THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2018-001249

Sarah Folston, Claimant, ... Appellant,

v.

South Carolina Department of Disabilities and Special Needs, Employer, and
SC State Accident Fund, Carrier, ... Respondents.

BRIEF OF APPELLANT

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

SECONDARY SOURCES

ISSUES ON APPEAL

1. Whether the Single Commissioner erred as a matter of fact and law in failing to find Claimant permanently and totally disabled?

2. Whether the Single Commissioner erred as a matter of fact and law in giving any weight to Defendants' vocational expert when her opinion was based on speculation and did not meet the legal standards required for an expert opinion?

STATEMENT OF THE CASE

This hearing was set on Forms 21 and 22 following an unsuccessful mediation. The case involves admitted injuries to the right hip, right elbow, and back ("Upon further discovery and medical evaluation including a lumbar MRI, it was determined that Claimant had injured her back causing sciatic pain into her right leg.").

The issues to be decided were:

1. Extent of Permanent Disability. Claimant contends she is permanently and totally disabled under § 42-9-10. Defendants contend Claimant is partially disabled under § 42-9-30.

2. Post-MMI medical treatment. Claimant requires ongoing medication and pain management. Defendants stipulated that Claimant requires ongoing treatment from Dr. Hutcheson.

3. Lump sum award with James allocation.

4. Payment of assault leave (180 days per S.C. Code Ann. § 8-11-40 (2007).

The case was tried on February 15, 2017. The Single Commissioner issued a Decision and Order on October 6, 2017 with the following findings of fact:

1. Claimant is at MMI for her admitted work-related injuries as of November 12, 2015.

2. Based on a preponderance of the evidence, including video evidence of the Claimant and the Claimant's hearing testimony, I hereby find Claimant is entitled to an award of permanent partial disability.

3. I find that Claimant has sustained a permanent partial disability of twenty percent (20%) to the back.

4. Claimant is entitled to all causally-related future medical treatment for her back, as recommended by Dr. Hutcheson. At the hearing before the single Commissioner, Defendants stipulated to Claimant returning to Dr. Hutcheson for pain management treatment as set forth in Dr. LaMotta's November 20, 2016 medical report as part of her future medical care.

5. Claimant is entitled to a lump sum award.

6. Defendants are entitled to a credit for overpayment of temporary total disability from the date of the Form 21.

7. Claimant's request for assault leave pursuant to S.C. Code Ann. §8-11-40, is hereby denied as the commission lacks jurisdiction over this issue.

STATEMENT OF THE FACTS

This is an admitted injury by accident. Sarah Folston was employed with South Carolina Department of Disabilities and Special Needs (SCDSN). On March 22, 2011, Folston was attacked by a patient and knocked to the floor. She injured her right arm, right hip, and back.

DSN accepted her case and provided treatment through First Care until October 18, 2011. At that time, she underwent an MRI of the hip (not the back). Apparently based on the MRI, the doctor released her to regular duty on October 18, 2011 – despite ongoing complaints of continued pain radiating down her leg from her back and hip.

Folston continued to work. As her symptoms worsened, DSN began authorizing treatment through Doctors Express. She consistently complained of radiating back pain – and was diagnosed and treated for sciatica. She was treated from September 25, 2012 through February 11, 2013. DSN had refused to provide treatment since that date without explanation.

During this time, DSN provided light duty work within her restrictions. On November 26, 2012, DSN laid her off based on her being under restrictions for180 days.

On November 27, 2012, DSN began paying temporary total disability. Folston has remained disabled and out of work since that date.

On May 7, 2013, Folston was evaluated by Dr. Steven Poletti [R. p. 338]. Dr. Poletti diagnosed her with lumbar radiculopathy clinically. He opined she is not at MMI, and cannot be placed at MMI, or definitively diagnosed until she has a lumbar MRI.

Claimant filed a Form 50 seeking additional medical treatment. The parties entered into a Consent Order on January 3, 2014, providing for Dr. Ivan Lamotta to be the authorized treating physician [R. pp. 1 - 3].

Dr. Lamotta treated Folston from October 24, 2013 until November 12, 2015 when Dr. LaMotta placed her at MMI. Dr. LaMotta assigned a 5% whole person impairment with permanent sedentary restrictions. He opined she would require "repeat orthopedic visits, repeat therapy, and repeat injections." [R. p. 159]. Notably, Dr. LaMotta stated in his October 16, 2015 report: "She may be considered for a minimally invasive decompression and fusion of L5-S1." [R. p. 156].

At Dr. Lamotta's referral, Folston also treated with Dr. Justin Hutcheson at the Center for Advanced Management of Pain from December 30, 2014 through July 15, 2015. Dr. Hutcheson considered a spinal cord stimulator as Folston received little relief from injections. He ultimately referred her back to Dr. LaMotta for potential surgery.

Folston underwent an FCE on February 17, 2016. She gave a consistent effort. The FCE showed she was restricted to "limited sedentary to limited light work." Her impairment rating was 13% whole person.

Folston was reevaluated by Dr. Poletti on March 7, 2016. Dr. Poletti opined:

> Currently with regards to her radiculopathy, she has significant signs of radiculopathy such as dermatomal distribution sensory loss and loss of relevant reflexes with a herniated disc at the level and on the side that would be expected from the objective clinical findings.

Dr. Poletti assigned a 13% whole person impairment rating for her back along with an additional 2% to the right lower extremity. He also noted should she undergo surgery (which he considered an option), her rating would be 28%. He recommended she continue in pain management with Dr. Hutcheson.

Regarding restrictions, Dr. Poletti agrees with Dr. LaMotta that Folston ". . . has a sedentary status. She should not be doing any kind of bending, twisting, pushing, pulling, heavy repetitive lifting, or lifting greater than 15-20 pounds." He noted "she has difficult rising from a sitting position." His opinion was "that she is potentially a candidate to pursue Social Security disability as she has a sedentary status and at this point is not capable of sitting for extended periods of time longer than 30 minutes." [R. p. 341]

Folston received a vocational evaluation from Glen Adams on February 26, 2016. Mr. Adams opined:

> A transferable skills analysis was conducted using OASYS to identify potential transferable occupations compatible with a "sedentary" work status. No relevant occupations were identified through this analysis. Ms. Folston's residual labor market is defined by any remaining jobs within the "Office & Administrative Support" industry designation. Based on a review of several thousand jobs within the previous 6 months, no suitable occupational goals remain for Ms. Folston given her age, education, work history and other factors outlined in this report. Jobs within this industry require a combination of work experience, education, and computer skills that Ms. Folston does not possess. Many of these jobs require knowledge and experience in the use of Microsoft Word, Excel and other Office programs, as well as other task specific programs such as QuickBooks. Therefore, no stable labor market remains for Ms. Folston working in a "sedentary" work capacity. She has incurred a total loss of access to the competitive labor market. Ms. Folston is classified as **totally vocationally disabled** as a result of injuries sustained on March 3, 2011 while working for the S.C. Department of Disabilities and Special Needs. [R. p. 372 (emphasis in original)].

STANDARD OF REVIEW

A court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634, 637 (Ct. App. 1999). Upon a proper appeal under the Worker's Compensation Act when only a question of law is involved, the facts having been concluded by the finding of the Commission, the appellate court as to review and correction of errors has plenary powers. Jolly v. Atlantic Greyhound Corp. 207 S.C. 1, 35 S.E.2d 42 (1945).

The evidence will ordinarily be regarded as sufficient where the circumstances shown tend to establish the ultimate facts in issue and provide a basis from which they reasonably may be inferred. An award cannot, however, be based upon mere possibilities, probabilities, surmises or conjectures. Broughton v. South Carolina Game and Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951). Findings must be made on competent evidence in the record. An incompetent expert opinion should not be admitted into the record or relied upon. Michau v. Georgetown County, 396 S.C. 589, 723 S.E.2d 805 (2012). A disability finding based on speculation should be reversed by the appellate courts. Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012).

ARGUMENT

1. The competent evidence shows Claimant is Permanently and Totally Disabled under § 42-9-10.

The Commission never addressed the issues raised on permanent and total disability under § 42-9-10. The award of 20% partial disability to the back was made under § 42-9-30.

As an award under § 42-9-10 would be larger than the single member award made by the Single Commissioner and Appellate Panel, the Court should reverse and apply the codes section which would result in the greatest possible disability award. S.C. Code Ann. § 42-9-10 (2007) (setting out requirements for general disability).

The Commission is required to apply whichever statute provides the greatest benefits for the Claimant. The policy behind the general disability portion of the act provides the claimant with the opportunity to establish a disability greater than the presumptive disability provided for under the scheduled member section. See Brown v. Owen Steel Co., 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct.App.1994). This concept is practically identical to North Carolina's *Doctrine of Munificent Remedy*. It would defeat the purposes of the Act to deny a Claimant the opportunity to establish a greater disability than he would receive under the scheduled member statute.

Under the Doctrine, "where two remedies are created side by side in a statute, the Claimant should have the benefit of the more favorable." Gupton v. Builders Transport, 357 S.E.2d 674 (N.C. 1987), quoting 2 A. Larson, *The Law of Workmen's Compensation* Sec. 58.25 (1987). In other words, where a claimant has established entitlement to a greater award under § 42-9-10 or 42-9-20 than he would receive under a scheduled member award, the Commission is required to make the most favorable award. See McLean v. Eaton Corp., 481 S.E.2d 289 (N.C. App. 1997)(error for Commission to award partial permanent disability under scheduled injury statute without assessing whether or not the lost income statute would provide a more munificent remedy).

If interpreted under the Brown framework, Folston would be entitled to an award for total disability under § 42-9-10. The Single Commissioner erred by failing to consider an award under § 42-9-10.

Per the previous Consent Order, Folston has suffered injuries to her right hip, right elbow, and back. The Consent Order also provides "Upon further discovery and medical evaluation including a lumbar MRI, it was determined that Claimant had injured her back causing sciatic pain into her right leg."[R. p. 1]. Both Dr. LaMotta and Dr. Poletti diagnosed Folston with L5 radiculopathy [R. pp. 129, 340]. She therefore satisfies the two-body part rule. Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012)(affirming Court of Appeals holding that radiculopathy into a leg satisfies the two body part rule).

The two orthopaedic surgeons who evaluated Folston, Dr. LaMotta and Dr. Poletti, placed her on sedentary restrictions [R. p. 130, 341]. An FCE by Columbia Rehabilitation Clinic put her capacity at limited sedentary to limited light (meaning she cannot actually function at the full range of sedentary duties).[1] [R. pp. 343 - 363]

There were two vocational evaluations done. Glenn Adams tested Folston's reading, writing, spelling and arithmetic skills. She reads at a 4th grade level and performs arithmetic at a 5th grade level. She cannot use a computer and has no transferable skills from her prior employment as a resident aide, kitchen helper and massage therapist. Adams concluded:

> Therefore, no stable labor market remains for Ms. Folston working in a "sedentary" work capacity. She has incurred a total loss of access to the competitive labor market. Ms. Folston is classified as **totally vocationally disabled** as a result of injuries sustained on March 3, 2011 while working for the S.C. Department of Disabilities and Special Needs. [R. p. 372 (emphasis in original)].

---

[1] Defendants obtained a second FCE from CORA. Neither of the vocational experts considered or relied on the second FCE.

Respondents obtained a vocational evaluation from Jacqueline Kennedy-Merritt. Kennedy-Merritt is employed by The Directions Group. The Directions Group is a company providing cost savings to workers' compensation insurance companies through utilization reviews, nurse case managers, and vocational experts. Kennedy-Merritt testified that (1) of the 60-90 vocational reports she has written in workers' compensation cases in her career, there is only "one report that I've written in regards to the individual not being able to maintain or sustain competitive employment;" (2) 100% of her workers' comp vocational evaluations in the past year were for the employer; and (3) she only found seven potential jobs that Folston could perform [R. pp. 406 - 434].

Folston called all seven potential employers and testified none were interested in hiring her. Kennedy-Merritt testified she did not speak to any actual employers regarding whether they would hire Folston nor did she provide actual job descriptions. On further questioning about the seven specific jobs, Kennedy-Merritt admitted: (1) two of the jobs were not in the local area (Easley and Orangeburg); (2) one listing was with a job assistance agency (not an actual employer); (3) the job at Republic Parking was part-time (and per the DOT classification, outside of Folston's restrictions); (4) the appointment setter job was part-time (and required HVAC knowledge and extensive walking outside Folston's ability); (5) the job monitoring student athletes' class attendance was part-time and required extensive walking; and (6) the mortgage processor job was a trainee position – for which Kennedy-Merritt failed to list the job requirements or qualifications. In short, none of these jobs were viable options for Folston, who is an older individual with no transferable skills whose reading skills are in the bottom 3% of the population [R. pp. 406 - 434].

The test for permanent and total disability is whether the employee is unable to perform services other than those that are "so limited in quality, dependability, or quantity that a reasonable stable market for them does not exist." See, e.g Wynn v. Peoples Natural Gas Co., 238 S.C. 1, 118

S.E.2d 812 (1961). In answering this question, the Commission can rely on expert vocational testimony – provided the vocational expert's opinion is founded on the physical limitations established by the doctors. See Stephenson v. Rice Servs., Inc., 323 S.C. 113, 116, 473 S.E.2d 699, 700 (1996)(The ability to perform limited tasks for which no stable job market exists does not prevent an employee from proving total disability). Cf. Young v. Tide Craft, 270 S.C. 453, 468, 242 S.E.2d 671, 678 (1978) ("It is, of course, elementary that the factual or underlying basis for the expert's opinion be set out, otherwise the opinion lacks probative value.").

In this case, there are differing vocational opinions. Glen Adams opined to a reasonable degree of vocational certainty that ". . . Folston is classified as **totally vocationally disabled.**" [R. p. 372]. His opinion meets the legal standard to be a probative expert opinion. Conversely, Kennedy-Merritt's opinion is fundamentally flawed because she based her opinion on *possibilities* rather than *probabilities.* See Windham v. City of Florence, 221 S.C. 350, 70 S.E.2d 553 (1952)(it is not sufficient for an expert to say "possibly" or "might have" as experts have to go further and testify at least that the result in question must be stated "most probably."). Kennedy-Merritt testified:

> . . . my vocational opinion says that with the limitations that are provided, *these are possible jobs* that she can do . . . But on the other hand, she would need help going to these types of jobs. That's why I'm saying she can't just walk out the door and go get them. I believe, based on my vocational knowledge, education, experience, that with some help these jobs, *she could possibly do these jobs.*

[R. p. 425, pg. 78 line 16 - R. p. 425, pg. 79 line 5].

As Kennedy-Merritt's opinion is not competent evidence, it is unreliable and cannot be given any weight as to the question of disability. Cf. Michau v. Georgetown County, 396 S.C. 589, 594, 723 S.E.2d 805, 807 (2012)(excluding expert opinion because expert's failure to state opinion to a reasonable degree of medical certainty rendered the opinion incompetent). As Adams' opinion stands alone, Folston should be found permanently and totally disabled.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed. The Court should hold Claimant is permanently and totally disabled, entitling her to the balance of 500 weeks and lifetime medical treatment. In the alternative, the case should be remanded for the Appellate Panel to exclude Ms. Kennedy-Merritt's report from the record and make new factual findings based on the competent evidence in the record.

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29250
(803) 779-4000
stephen@samuelslawfirm.net

Attorney for Appellant

Columbia, South Carolina
April 2, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2018-001249

Sarah Folston, Claimant, ... Appellant,

v.

South Carolina Department of Disabilities and Special Needs, Employer, and
SC State Accident Fund, Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this final Brief of Appellant complies with Rule 211(b), SCACR.

Respectfully Submitted

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000

Attorney for Appellant

April 2, 2019
Columbia, South Carolina