THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

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SC Court of Appeals

Appellate Case No. 2018-001274

Ray K. Logan, Employee,...Respondent,

vs.

Winthrop University, Employer, and
South Carolina State Accident Fund, Carrier,..Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENTS

I. The Commission abused its discretion in arbitrarily denying Appellants a functional capacity evaluation and vocational assessment—both of which became patently relevant to Appellants' defense after the Respondent not only decided to allege permanent and total disability, but also after he obtained both such evaluations from his own hand-picked providers.

Respondent hypocritically argues that Appellants' request for a functional capacity evaluation and vocational assessment was somehow irrelevant to Appellants' position, when the Respondent—not the Appellants—is the party directly responsible for making both evaluations not only relevant to, but at the center of, this case. Despite Respondent's unfounded contention, the Record overwhelmingly shows that both were relevant to Appellants' defense and the decision to deny Appellants' request for the same was impermissibly based on "surmise, conjecture or speculation." Shealy v. Aiken Co., 341 S.C. 448, 455, 535 S.E.2d 438, 443 (2000); Clade v. Champion Labs, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998). Accordingly, the Commission's decision should be overturned as unsupported by substantial evidence. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 267 (Ct. App. 2006) (citing cases); Lark v. Bi-Lo, Inc., 276 S.C. 130, 135-136, 276 S.E.2d 304, 306 (1981).

Indeed, Appellants never contested that the Respondent sustained an admitted lumbar spine strain on February 26, 2014, and again on December 1, 2014, and—to be sure—Appellants subsequently provided proper and adequate medical care for both injuries. (R. pp. 465-72, 474-81). Appellants continued to provide medical treatment to Respondent until his release by his treating physician, Dr. Charlton Scott McNair, on May 13, 2015. (R. p. 533).

Not until *nearly a year and a half after Respondent was released from care*, did he allege that his unrelated, coincidentally discovered right hip condition was related to his work-related accident and had caused him to become permanently and totally disabled as a result. (R. pp.

113-18, 151-55). Only after Respondent made such allegations did functional capacity evaluations and vocational assessments become relevant to this case. Before then, this was merely an admitted one body part claim.

Prior to that point in time, Respondent's functional capacity was not in question whatsoever. This is plainly evidenced by the fact that he never needed to be removed from work for his admitted minor back injury and was only removed from work following his unrelated right hip procedure months after he was released from care for his work-related back injury. (R. pp. 293-96, 474-543). Moreover, no functional capacity evaluation was even recommended until Respondent began treating on his own for his unrelated hip condition with his self-selected orthopedist. (R. pp. 293-96, 461). Interestingly, even Respondent's own functional capacity evaluation obtained shortly thereafter still indicated that he is capable of at least light work. (R. p. 552). The Respondent then obtained his own vocational assessment on August 31, 2016, which inexplicably concluded that he was permanently and totally disabled. (R. p. 575).

Clearly, the above actions by Respondent—not by Appellants—made both functional capacity evaluations and vocational assessments not just relevant to, but at the center of, this case, and therefore, patently relevant to the Appellants' defense thereof. However, Respondent attempts to mislead this Court by conflating the issues of compensability and extent of disability in hopes of convincing this Court, without any legitimate basis, that an Appellant-obtained functional capacity evaluation and vocational assessment would be irrelevant. (Resp't's Br. 7). Notably, the newly associated counsel for Respondent has admitted to this Court on numerous occasions that he does not practice workers' compensation law. This is made apparent by his obvious inability to understand, much less explain, compensability as a technical term in workers' compensation cases.

Compensability of the back in this case has never been at issue because Appellants admitted the back injury from the outset. (R. pp. 119-22, 474-81). The extent of disability with regard to the back was in dispute, and evidence supporting that the disability was slight included the 7 percent impairment rating to the back assigned by not only Dr. Wetzel, but also Dr. Lehman—the Respondent's self-selected physician. (R. pp. 293-96, 461, 720-21).

Only compensability of the hip is contested, as should be expected given that: (1) by his own testimony, the Respondent relayed no hip complaints following either one of his two incidents; (2) the intake forms document that the Respondent presented to Dr. McNair complaining only of low back pain following the initial accident; and (3) the Respondent presented to Dr. McNair after the second incident again complaining of only low back pain without relaying a single hip complaint. (R. pp. 474-81; 516-24; 754, lines 7-9; 755, lines 9-11; 756, lines 7-24). Moreover, the Respondent's discovery that he even had a hip condition was by complete coincidence: x-rays ordered for his admitted minor back injury revealed *incidental* findings of joint space narrowing and subchondral cyst formation of the hip. (R. p. 515). Only after this fortuitous finding did Dr. McNair suggest a follow-up appointment with an orthopedist to address the unrelated hip issue. (R. p. 533).

But, as counsel for Respondent fails to explain, only if the hip condition is found to be compensable does the extent of disability as a result of the compensable hip injury become an issue to be decided by the Commission. And, only if the hip is found to be compensable *in addition to* the compensable back injury does this claim become a two body part claim *where it is even possible* to argue that the extent of disability is so great as to be considered permanent and total under § 42-9-10. This is a separate and distinct determination to be made by the Commission in accordance with the Workers' Compensation Act. Despite Respondent's reliance

on a Social Security Administration finding, this determination also has nothing to do with the SSA—a completely different governmental agency—or any determination made by the SSA, which is bound by different laws, regulations, and requirements. (Resp't's Br. 7).

Because Respondent alleged he sustained injuries to more than one body part and those injuries were allegedly so extensive as to render him permanently and totally disabled, the Respondent made functional capacity evaluations and vocational assessments patently relevant to this case. This is true for both his claim and the Appellants' defense thereof. Therefore, the Commission's arbitrary denial of the Appellants' request for a functional capacity evaluation and vocational assessment clearly constituted an abuse of discretion.

II. The Commission's decision denying Appellants a functional capacity evaluation and vocational assessment was arbitrary, capricious, and an abuse of discretion. That is the standard. Respondent's complaint that "other things . . . do not make sense" is juvenile and without legal support.

Respondent criticizes the Appellants for scheduling their functional capacity evaluation for February 15, 2017, which Respondent then refused to attend. (Resp't's Br. 8). However, counsel for the Appellants is unaware of any rule or regulation imposing specific deadlines for defense-scheduled functional capacity evaluations. And, even if such a deadline did exist, that deadline would have been met here given that the hearing was set in this matter for April 25, 2017—more than two months after the scheduled appointment. (R. pp. 123-24).

In fact, pursuant to Regulation 67-612, the Appellants needed only to obtain and submit to opposing counsel any expert reports upon which Appellants intended to rely 10 days prior to the hearing. S.C. Code Ann. Reg. 67-612(B)(2). Accordingly, Appellants scheduled the functional capacity evaluation well in advance of this timely notice deadline.. The fact that Respondent finds this "difficult to understand" is neither the Appellants' nor the Court's

problem, especially given that no rules or regulations have been violated here, combined with Respondent's refusal to attend the functional capacity evaluation.

Moreover, Respondent twists Appellants' statements made during the single commissioner hearing. (Resp't's Br. 8). During the hearing, Appellants' counsel specifically stated that Appellants have the right to obtain a functional capacity evaluation, and, depending upon the outcome of the same, the option to then cross-examine Dr. Lehman (Respondent's self-selected orthopedist who treated the unrelated right hip condition) regarding that report *or* to produce other evidence that may become necessary as a result. (R. p. 729, lines 12-16). This is clearly not the same as hinging the right to obtain a functional capacity evaluation directly onto the right to cross-examine Dr. Lehman on the FCE report, as Respondent would have this Court believe. (Resp't's Br. 8). Of course, had Respondent attended the functional capacity evaluation in February there would be no issue to decide. The truth is Respondent's refusal to attend the functional capacity evaluation is largely responsible for this entire appeal.

Respondent further misguides the Court as to the parameters surrounding depositions under the South Carolina Rules of Civil Procedure, which this Court undoubtedly knows well. Pursuant to Rule 30(a)(2), the deposition of any witness may be taken more than once upon "agreement of the parties through their counsel or by order of the court." Rule 30(a)(2), SCRCP. Thus, even if the Appellants' right to obtain a functional capacity evaluation was tied to their right to right to cross-examine Dr. Lehman on the same, which it is not, the right to depose Dr. Lehman never exhausted as Respondent apparently believes.

Finally, Respondent takes issue with the fact that Appellants never actually scheduled a vocational evaluation appointment, while completely ignoring the fact that he conveniently refused to attend the functional capacity evaluation appointment—an appointment which he

would have no reason to fear attending if he was actually permanently and totally disabled as he alleges. (Resp't's Br. 8). But, if Respondent would not even appear for his first scheduled appointment, it stands to reason that scheduling a vocational evaluation shortly thereafter would prove a fruitless endeavor and cause Appellants to incur fees associated thereto without receiving anything in return. The act of scheduling a vocational evaluation appointment is certainly not required by any legal authority to maintain the right to the same.

Furthermore, vocational evaluations are normally obtained after a functional capacity evaluation, so the vocational expert can consider the functional capacity evaluation report in his or her analysis. Thus, the vocational evaluation not only falls within the scope of Appellants' specific statements during the hearing regarding the right to produce other evidence according to the functional capacity evaluation results, but also should have been easily anticipated by Respondent's only counsel at the time (who does have experience in the workers' compensation system). (R. p. 729, lines 12-16). This is only more obvious considering that the Respondent had already obtained his own vocational evaluation after obtaining his own functional capacity evaluation—in that very order. (R. pp. 552, 575). Simply put, the Respondent hypocritically criticizes the Appellants for pursuing the exact same course of actions in which he already engaged during the months prior.

III. The Commission's denial also constituted a structural defect that violated the Appellants' constitutional guarantee to due process and equal protection of the laws, both of which violations each require that the entire Decision and Order be vacated.

Respondent hastily dismisses patent violations of Appellants' constitutional guarantees to due process and equal protection, either of which—alone—provide an independent ground for reversing and remanding this case for a hearing *de novo*. As our Supreme Court has made plain, despite Respondent's turning of a blind eye to the same, "at minimum certain elements must be present" for procedural due process to exist. In re Dickey, 395 S.C. 336, 359-60, 718 S.E.2d 739, 751 (2001) (citing In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003). "These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses." Id.; see also S.C. Const., art. I, §§ 3, 22.

Importantly, contrary to Respondent's assertion, this "right to introduce evidence" is not easily satisfied so long as a party has had an opportunity to introduce at least some evidence. (Resp't's Br. 10). Instead, an "[o]pportunity must be afforded all parties to respond and present evidence and argument on *all issues* involved." S.C. Code Ann. § 1–23–320(E) (emphasis added). Here, Appellants did not have the "opportunity to be heard" or the opportunity to "introduce evidence" with respect to either a functional capacity evaluation or a vocational assessment in violation of these explicit constitutional requirements. S.C. Const., art. I, §§ 3, 22.

As explained above, Respondent—not Appellants—made both functional capacity evaluations and vocational assessments not just relevant to, but at the center of, this case when he placed his functional capacity into contention by alleging that his unrelated, coincidentally discovered right hip condition was related to his work-related accident and had caused him to become permanently and totally disabled as a result *nearly a year and a half after he was*

released from care. (R. pp. 113-18, 151-55). Respondent then went out and obtained his own functional capacity evaluation and his own vocational assessment. (R. pp. 552, 575).

After Respondent caused this significant shift in this case and gave rise to additional issues, Appellants attempted "to respond and present evidence" on these new points by scheduling their own functional capacity evaluation. S.C. Code Ann. § 1–23–320(E). However, Respondent refused to attend the appointment and prevented Appellants from obtaining any evidence on these issues. (R. pp. 125-32). When Appellants sought relief and filed a Motion to Compel Attendance to this appointment, but were denied the same, the Appellants' right "to respond and present evidence" on these issues was unequivocally violated by the Commission. S.C. Code Ann. § 1–23–320(E).

This decision by the Commission had no "reasonable basis for the limitation or differentiation," Moseley v. Welch, 218 S.C. 242, 249-50, 62 S.E.2d 313, 317 (1950), and constituted "an arbitrary exercise of the powers of government," Johnson, Lytle & Co. v. Spartan Mills, 68 S.C. 339, 339, 47 S.E. 695, 698 (1904), in direct contravention of not only the Appellants' constitutional guarantee to due process, but also to equal protection of the laws. See also S.C. CONST., art. I, § 3 ("[N]or shall any person be denied the equal protection of the laws.").

The Commission did not provide a satisfactory reason for its differentiation between Appellants and Respondent, nor did it apply the law "equally to all persons." Moseley, 218 S.C. at 249-50, 62 S.E.2d at 317. Instead, the Commission openly allowed the Respondent to obtain multiple additional reports favorable to his case and then conveniently refuse to attend any appointments arranged by Appellants, appointments which could have led to evidence contrary to the case he already built and negating the need for this appeal.

At best, Respondent's behavior was suspect. At worst, his actions were a reversed-engineered means of creating a claimant-driven evidentiary record that would have otherwise wholly failed to support his allegations. Ostensibly, the Respondent would have no reason to fear appearing for an evaluation on his functional capacity if he was actually permanently and totally disabled as he alleged. Indeed, Respondent admits that "[r]efusing gives the impression that the injured worker has something to hide." (Resp't's Br. 11). Yet, nowhere in his Brief does he so much as attempt to explain why his refusal is an anomaly and does not give the very same impression to this Court.

Instead, Respondent attempts to redirect the Court's attention to what he believes constitute "other avenues" available to Appellants. (Resp't's Br. 11). Respondent submits that an independent medical evaluation or expert questionnaire are satisfactory "other avenues" available to Appellants in lieu of a functional capacity evaluation or vocational evaluation. (Resp't's Br. 11). But, Respondent entirely fails to acknowledge that these are radically different options in terms of discovery. (Resp't's Br. 11). He also fails to note that in an adversarial court system, the attorneys for Respondent do not have the privilege of determining what evidence Appellants can present or what strategy they can choose to use.

Moreover, neither an independent medical evaluation nor expert questionnaire would allow Appellants to respond to directly to his functional capacity evaluation or his vocational assessment. (Resp't's Br. 11). Both evaluations obtained by Respondent, but denied to the Appellants, specifically go to the Respondent's allegation of permanent and total disability and assess the Respondent's physical capabilities and vocational skills far beyond that typically assessed during an independent medical evaluation. This should be obvious as the intent and

purpose of an independent medical evaluation is different than that of either a functional capacity evaluation or a vocational assessment.

Therefore, Appellants respectfully request that this Court reverse and remand the case for a hearing *de novo* following the Appellants' functional capacity evaluation and vocational assessment to ensure that Appellants are afforded due process and that the laws applicable to the Commission "operate on all alike." Johnson, Lytle & Co., 68 S.C. at 339, 47 S.E. at 698. Even if the aforementioned abuse of discretion committed by the Commission were not sufficient reason alone to reverse, the Appellants urge this Court to reverse and remand this case, at very minimum, because of the violation of basic constitutional guarantees which antedate the Commission's existence and control its authority.

CONCLUSION

For the foregoing reasons, the Appellants respectfully request that this Court reverse and remand the case for a hearing *de novo*.

The Commission abused its discretion when it arbitrarily denied Appellants a functional capacity evaluation and vocational assessment. But, both evaluations became patently relevant to Appellants' defense after the Respondent not only decided to allege permanent and total disability, but also after he obtained both such evaluations from his own hand-picked providers.

The Commission's decision denying Appellants a functional capacity evaluation and vocational assessment was arbitrary, capricious, and an abuse of discretion. Moreover, the decision resulted in an evidentiary record that was piecemealed and claimant-driven. Respondent's complaint that "other things . . . do not make sense" is juvenile and without legal support.

Finally, the Commission's denial of Appellants' request for a functional capacity evaluation and vocational assessment after Respondent had already obtained the same constitutes a patent violation of Appellants' constitutional guarantee to due process and equal protection of the laws, both of which provide additional, independent grounds reversing and remanding this case for a hearing *de novo*.

Any of the above reasons—alone—constitutes separate and sufficient grounds for reversing and remanding this case.

Respectfully submitted,

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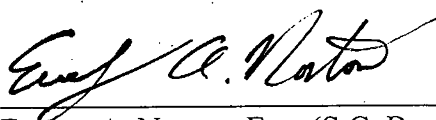

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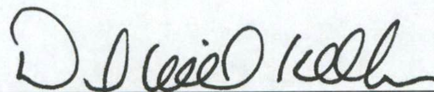
CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of Appellants complies with Rule 211(b), SCACR.

February 4, 2019



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