THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File Nos. 1401997, 1422134
Appellate Case No. 2018-001274

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

v.

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

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Respondent believes this appeal presents a single issue:

> Whether the Workers' Compensation Commission abused its discretion when it declined to order Ray Logan to attend an additional functional capacity evaluation and a vocational evaluation before adjudicating his claim.

STATEMENT OF THE CASE

This appeal is about the Workers' Compensation Commission's discretion to manage a case. More to the point, it is about the commission's reasonable decision to deny a party's late request for evaluations that did not relate to that party's theory of the case or make sense.

Ray Logan worked at Winthrop University as the supervisor of a painting crew. (R.p.735). He hurt his back in December of 2014 when he was unloading a ladder from a van. (R.pp.750-751). He explained the ladder got caught on a 5-gallon bucket and that when he reached to move the bucket he felt excruciating pain. *Id.* He said he wrongly guessed the bucket would be empty. He later estimated it weighed 60 or 70 pounds. *Id.*

The core issue in the case was whether this injury aggravated a pre-existing problem with Mr. Logan's hip. An employer-provided doctor discovered a degenerative disease in Mr. Logan's hip while reviewing an MRI in May of 2015, five months after the injury.

Mr. Logan claimed the injury caused his hip to become symptomatic. (R.pp.153-155). He said he had no problems performing his job before the injury but had severe problems after the injury. *Id.* He supported his claim with an opinion from an orthopedist.

The employer and its insurance carrier—the Appellants—denied any relationship between Mr. Logan's injury and his hip. They claimed Mr. Logan had nothing more than a trivial and non-disabling back injury. (R.p.730, lines 13-23).

Appellants' theory of the case is important. They "admitted" the claim by acknowledging that an incident occurred in December of 2014 and they provided a limited amount of medical treatment when Mr. Logan asked to see a doctor the following May. In reality, however, the substance of Mr. Logan's claim was denied. Appellants emphasized that the doctor they provided to treat Mr. Logan in May of 2015 had interpreted Mr. Logan's MRI as not showing any evidence of an acute injury. This doctor quickly released Mr. Logan to full duty work and recommended Mr. Logan follow up on his own with an orthopedist.

The case for compensability was a battle of experts. Appellants relied heavily on the opinion of the doctor who had recommended Mr. Logan follow up on his own with an orthopedist. One of Mr. Logan's key witnesses turned out to be the orthopedist he saw on his own. This specialist repeatedly opined Mr. Logan's work-related injury had aggravated his hip as well as his back. (R.pp.330, 351, 450-451, 457-458).

The case was set to be tried in April of 2017. About a month before trial, Appellants asked the commission to compel Mr. Logan to submit to a functional capacity evaluation. (R.pp.126-127). The motion cited two statutes—sections 42-15-60 and -80—dealing with employer-provided medical treatment and employer-requested evaluations. (R.p.126).

Mr. Logan opposed the motion to compel, explaining an FCE was not medical, surgical, or hospital treatment, that an FCE was not performed by a qualified physician or surgeon, and that no physician had requested an additional FCE. (R.pp.136-137).

A single commissioner issued a brief order denying the motion to compel without explanation. (R.p.1).

The case was tried with a single commissioner in August of 2017. (R.p.724).

At the beginning of the hearing Appellants again sought an FCE and added the additional requests that they be allowed to re-convene the deposition of Mr. Logan's treating orthopedist, to cross-examine the orthopedist with the new FCE, and obtain a vocational evaluation. (R.p.728, line 25 - p.730, line 13). The single commissioner had previously issued an order closing the record to any further evidence beyond the evidence generated as a result of the motion to compel an FCE. (R.pp.3-4, ¶4). Even though Appellants had never mentioned a vocational evaluation before, Appellants argued their request for a vocational evaluation was consistent with this order because the reason they wanted the FCE was "to [] obtain a vocational evaluation." (R.p.730, lines 3-4). Appellants never explained how their request to re-convene the orthopedist's deposition would be allowable.

In January of 2018 the single commissioner issued an order finding Mr. Logan's December 2014 injury aggravated a pre-existing condition in his right hip and that this aggravation resulted in the need for medical treatment including hip replacement surgery. (R.p.58, ¶67). The order is lengthy. It has an extensive summary of the evidence and the hearing testimony. The order also includes 76 findings of fact.

The order explains the single commissioner chose to believe the opinion of Mr. Logan's treating orthopedist rather than the opposing opinions Appellants had offered supporting their argument. (R.pp.53-54, ¶¶39 & 42). The single commissioner denied Appellants' request for an FCE and vocational assessment, explaining Appellants were denying the injury had aggravated Mr. Logan's hip, that no physician had recommended a second FCE, and that the treating orthopedist had already reviewed and adopted the prior FCE during his deposition. (R.p.59, ¶76).

Appellants filed a timely request for review of the single commissioner's decision. There, as here, they claimed the record was "under developed," "claimant friendly," and that they had been denied the opportunity to develop a record or put on an adequate defense. Appellants also added more to their request, just as they had done on the day of the trial. In addition to an FCE and a vocational evaluation, their panel brief asked for the commission to order an additional medical opinion. (R.p.817).

Mr. Logan explained he had already been through one FCE and that the evaluation had been requested by the treating orthopedist in order to help the orthopedist determine Mr. Logan's work restrictions. (R.p.849). Mr. Logan contended there was no evidence a second FCE was needed; no physician had asked for an additional evaluation. (R.p.852). Mr. Logan explained why the FCE was irrelevant to Appellants' argument. An FCE is a tool used by a physician to determine work restrictions. (R.p.854). It has nothing to do with whether Mr. Logan aggravated the pre-existing condition in his hip. *Id.*

An appellate panel of commissioners heard the case in March of 2018. (R.p.857).

In June of 2018, the panel fully affirmed the single commissioner's decision. The panel issued a lengthy order, just as the single commissioner had done. The panel explained it believed the single commissioner's order was correct and then repeated the single commissioner's findings and conclusions verbatim. (R.pp.95-110).

STANDARD OF REVIEW

The Administrative Procedures Act supplies the standard for this Court's review of the commission's decision. *Lark v. Bi-Lo*, 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981). Section 1-23-380 explains this Court may not substitute its judgment for the commission's

judgment as to the weight of the evidence but may reverse when the commission's decision is affected by an error of law, clearly erroneous, or arbitrary.

Precedent also says the commission has "wide discretion in managing a case," *Trotter v. Trane Coil Facility*, 393 S.C. 637, 650, 714 S.E.2d 289, 295 (2011), and that decisions concerning an injured worker's treatment or evaluation are usually reviewed for abuse of discretion. *Clark v. Aiken Cty. Gov't*, 366 S.C. 102, 114, 620 S.E.2d 99, 105 (Ct. App. 2005) (discussing the "treatment" statute; section 42-15-60); *Ward v. Dixie Shirt Co.*, 223 S.C. 448, 455, 76 S.E.2d 605, 608 (1953) (discussing the "evaluation" statute; section 42-15-80).

ARGUMENT

There are three reasons the commission did not abuse its discretion.

First, neither an FCE nor a vocational evaluation were relevant to Appellants' theory of the case. There was no dispute over whether Mr. Logan's hip condition was seriously disabling. The fight concerned whether Mr. Logan's hip had been aggravated.

Second, the circumstances of the request were difficult to understand. Appellants claimed they wanted to cross-examine the treating orthopedist with the additional FCE, yet they did not request the additional FCE until five months *after* the orthopedist had already been deposed. Appellants did not mention a vocational evaluation until the day of the hearing, *after* the record had been closed. These requests were late and did not make sense.

Finally, there is no plausible claim of a constitutional violation. Appellants availed themselves of the opportunity to present evidence supporting their case. Appellants' doctors did not request an FCE; apparently they felt they did not need one. Appellants had a full day in court and were afforded due process. This Court should affirm.

A. The commission did not abuse its discretion because neither an FCE nor a vocational evaluation were relevant to Appellants' theory of the case.

There was no real dispute Mr. Logan's hip condition left him seriously disabled. He was 55 years old by the time of trial, had undergone a total hip replacement, and was found disabled by the Social Security Administration. (R.p.70, ¶3; p.75, ¶37; & p.80, ¶60).

Appellants' core theory of the case was that Mr. Logan's hip problem had no relationship to his work-related accident. They called this case an "admitted" case because they acknowledged an on-the-job incident and authorized initial treatment with a doctor, but their position was that Mr. Logan suffered a minor back injury that resulted in no permanent disability and no need for future medical treatment. (R.p.730, lines 13-23).

Appellants believed three experts supported their position. Dr. Charlton McNair evaluated Mr. Logan in May of 2015 and opined Mr. Logan's hip was not related to his injury, that Mr. Logan had not suffered any permanent injury, and he released Mr. Logan to full duty work. (R.p.533). Dr. Ryan Wetzel evaluated Mr. Logan in December of 2015 and offered a similar (though not identical) opinion; he opined Mr. Logan did not "seem" to need permanent work restrictions and expressed no opinion on Mr. Logan's hip. (R.p.720). Finally, Dr. James Bethea opined Mr. Logan's hip problems were not related to his work-related accident. (R.pp.722-723). Dr. Bethea did not examine Mr. Logan or speak with him. He based his opinion solely on his review of the medical records. *Id.*

Mr. Logan responded to these arguments by pointing to his history and to the opinion of his treating orthopedist. Mr. Logan had a long history of coming back from minor injuries. (R.pp.453-455) (summarizing this history). This injury proved to be different. *Id.*

Mr. Logan sought treatment on his own for several months. *Id.* When that did not work, his employer sent him to Dr. McNair. *Id.* As noted above, Dr. McNair found no evidence of any permanent injury and suggested Mr. Logan follow up with an orthopedist. *Id.* The orthopedist performed a hip replacement and opined Mr. Logan's December of 2014 injury aggravated the pre-existing arthritis in Mr. Logan's back and hip. (R.pp.459-461).

It is difficult to understand how an FCE or a vocational evaluation would relate to the dispute over whose theory of compensability was more believable. An assessment of Mr. Logan's physical abilities or vocational capacity has nothing to do with whether the orthopedist's opinion and Mr. Logan's precipitous decline since this incident are more persuasive than the contrary viewpoints Appellants offered. The commission made this exact point, explaining the hip was a "denied" body part, meaning it made no sense for Appellants to evaluate the extent of Mr. Logan's disability given their position that the primary driver of his disability—his hip—was not related to his workplace injury. (R.p.108, ¶76).

This reasoning is sensible and has ample factual support in the record. Appellants therefore cannot demonstrate the commission abused its discretion. An abuse of discretion occurs when factual findings lack any evidentiary support or when the decision is controlled by an error of law. *Thompson v. S.C. Steel Erectors*, 369 S.C. 606, 612, 632 S.E.2d 874, 878 (Ct. App. 2006). This is not that. It was within the commission's discretion to deny the evaluations based on its reasoning that they were not relevant to Appellants' defense.

B. Other things show the requests were late and do not make sense.

In addition to the relevance problem outlined above, other circumstances of Appellants' requests for an FCE and a vocational evaluation are difficult to understand.

In June of 2016 the treating orthopedist suggested an FCE as a way of better gauging Mr. Logan's physical restrictions. (R.p.459, ¶4). His deposition occurred in September of 2016. (R.p.607). The orthopedist referenced the FCE during his deposition and deferred to its assessment of Mr. Logan's physical abilities. (R.pp.639-640).

Appellants attempted to set their own FCE in February of 2017—five months after the orthopedist's deposition. (R.pp.130-131). Yet, at the trial with the single commissioner, they said they thought they had the right to cross-examine the orthopedist with the additional FCE once it occurred. (R.p.729, lines 12-16).

Appellants never described how this would have been permissible. The Administrative Procedures Act explains depositions in administrative cases are subject to the same rules as apply in civil actions. S.C. Code Ann. § 1-23-320(D) (Supp. 2018). The rules of civil procedure say the deposition of a witness may ordinarily be taken only one time. Rule 30(a)(2), SCRCP. The time to cross-examine the orthopedist had come and gone.

As for the vocational evaluation, Appellants did not mention this until the day of the hearing. This request was hard to understand in light of the fact that the single commissioner had already issued an order closing the record to all further evidence except evidence generated as a result of the motion to compel an FCE. (R.pp.3-4). Appellants' explanation that they intended to use the FCE "as part of" getting a vocational evaluation is hard to reconcile with the fact that they never scheduled a vocational evaluation. It is also hard to reconcile with the fact that their motion to compel did not mention a vocational evaluation.

The commission has a lot of latitude to leave the record "open." That is the colloquial way of describing the process of temporarily adjourning a hearing in order to

admit evidence that is not available on the hearing date. The procedure is outlined in Regulation 67-613C, which explains a party may move at a hearing for adjournment to procure additional evidence or if a witness fails to appear. This is a discretionary decision, and precedent explains "[e]very reasonable presumption in favor of a proper exercise of the trial court's discretion will be made." *Trotter*, 393 S.C. at 650, 714 S.E.2d at 295.

The commission's denial of Appellants' request for these evaluations is bolstered by the fact that the requests themselves do not make sense. If Appellants wanted to cross-examine the orthopedist with an FCE they should have requested one in time for his deposition. If they wanted a vocational evaluation they would have scheduled one and they would have mentioned it in their motion to compel. Appellants did none of this. The commission had the discretion to conclude that the treating orthopedist had already reviewed an FCE during his deposition. (R.p.108, ¶76). It also had the discretion to close the record.

C. There is no plausible claim of a due process or equal protection violation. Appellants real complaint is that they lost.

Due process is flexible but its fundamental components generally include notice of the issues to be decided in a case, an opportunity to be heard, and the right to cross-examine witnesses. *Tall Tower v. S.C. Procurement Review Panel*, 294 S.C. 225, 232-233, 363 S.E.2d 683, 686-687 (1987). A party must show substantial prejudice to establish a due process claim. *Id.* at 233, 363 S.E.2d at 687.

It is hard to follow the argument that the commission's decision to close the record violated Appellants' constitutional rights. Appellants presented the opinions of three doctors. They argued that those opinions showed Mr. Logan's injury did not affect his hip

and that he had no permanent disability. Appellants cross-examined Mr. Logan. He was the only live witness at the trial. Appellants questioned the orthopedist during his deposition. Accepting Appellants' argument would mean that the commission has no discretion to deny a party's request that they be allowed to get a piece of evidence opposing every piece of evidence presented by the other side. The commission would lack this discretion even when the requests are late and when the explanations do not make sense, as was the case here.

Appellants support their argument by citing this Court's unpublished decision in *Tedder v. Darlington County Community Action Agency:* No. 2018-UP-349 (S.C. Ct. App. filed Aug. 1, 2018). This citation is improper under Rule 268(d)(2), SCACR.

In fairness, there is *some* uncertainty about the commission's ability to *order* an injured worker to submit to an FCE or a vocational evaluation. The "treatment" statute refers to "medical," "surgical," "hospital," and "other treatment or evaluation." S.C. Code Ann. § 42-15-60(A) (2015). The "evaluation" statute requires the injured worker to submit to evaluations "by a qualified physician or surgeon" as requested by the employer or the commission. S.C. Code Ann. § 42-15-80(A) (2015).. FCEs and vocational evaluations are not any of these. An FCE is often performed by a physical therapist, as it was here. (R.p.551). Vocational evaluations are usually performed by certified rehabilitation counselors. (R.p.580). None of this is "treatment" and none of it is done by a physician.

Sometimes a physician requests an FCE as part of evaluating a patient's work restrictions. That occurred here: the treating orthopedist recommended an FCE in June of 2016 to help him gauge Mr. Logan's physical limitations. (R.p.459, ¶4). Other physicians may not feel they need an FCE. None of the physicians Appellants offered as witnesses

requested one. As this brief has already noted, those physicians apparently did not need an FCE before opining Mr. Logan did not have any permanent work restrictions.

In the run-of-the-mill case there is nothing for an injured worker to gain by refusing to submit to an FCE or a vocational evaluation arranged by the employer or carrier. Refusing gives the impression that the injured worker has something to hide. It also risks the very thing that occurred in *Tedder*. There, the single commissioner decided to exclude the injured worker's FCE after telling the injured worker the FCE would be excluded unless the worker attended the employer-requested FCE. It is easy to explain that ruling as a proper exercise of discretion. The commission is tasked with weighing the evidence. The ruling in *Tedder* reflects the commission's decision to assign no weight to the injured worker's FCE because the injured worker appeared to be ducking an additional examination.

This case is not that. Here, Appellants offered a nonsensical explanation for an additional FCE, claiming they needed it in order to cross-examine an expert who had already been deposed. Then, they requested a vocational evaluation after the record had been closed. Appellants had other avenues available. They could have requested an independent medical evaluation—an evaluation plainly within the scope of section 42-1-80—and they could have asked the IME doctor whether an FCE would be advisable. They could have sent one of their existing experts a questionnaire with the same inquiry in an effort to put "their" FCE in the same posture as the FCE the orthopedist requested. None of this was done. The commission does not violate the constitution every time it gives a party an adverse ruling on evidence.

This Court's decision in *Aaron v. Viro Group* summarizes several cases confirming the commission's role as having the ultimate authority to decide who will be the injured

worker's treating physician and to decide whether an injured worker must submit to an evaluation or treatment. 344 S.C. 321, 543 S.E.2d 574 (Ct. App. 2001). Sometimes the commission concludes the claimant ought to submit to a requested evaluation. E.g., *Wardlaw v. J.G. Ridgeway Construction Co.*, 212 S.C. 116, 46 S.E.2d 662 (1948) (commission concluded the claimant's fear of a procedure was not good grounds for refusing to undergo the procedure). Other times the commission reaches the opposite conclusion. E.g., *Ward v. Dixie Shirt Co.*, 223 S.C. 448, 76 S.E.2d 605 (1953) (commission declined to order an additional test after a test had already been performed by a specialist at the request of the primary treating physician the employer had chosen). Each of these cases recognize that this sort of decision is committed to the commission's discretion. The commission does not violate the constitution when it exercises its discretion and finds, as the commission did here, that there is no need for a further evaluation.

CONCLUSION

For the foregoing reasons this Court should affirm.

Respectfully submitted,

February 1, 2019

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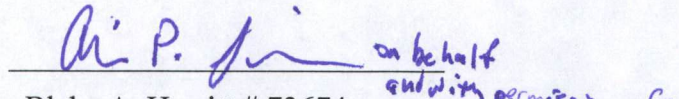

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Respondent* complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

Respectfully submitted,

February 1, 2019

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