THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Unpublished Opinion No. 2018-UP-349
(S.C. Court of Appeals Filed August 1, 2018)

Verma Tedder, ... Petitioner,

vs.

Darlington County Community Action Agency, Employer,
and the State Accident Fund, Carrier, ... Respondents.

REPLY BRIEF OF PETITIONER

STEPHEN J. WUKELA
WUKELA LAW FIRM
ATTORNEY FOR PETITIONER
PO BOX 13057
FLORENCE SC 29504
843-669-5634

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The Appellant's vocational report was served on the Respondents as part of Appellant's Notice of Submissions on April 17, 2015, over four (4) months prior to the hearing. Workers' Compensation Regulation 67-612 titled "Admission of Expert Report as Evidence" provides for the admission of an expert's report if it was provided to the moving party more than ten (10) days before the scheduled hearing. See R.67-612(B)(2). The Commission excluded that report from evidence contrary to the law.

Respondents argue that R.67-612 is merely a prerequisite to admissibility and does not establish admissibility as a matter of right. (A. p. 467). They go on to note that R.67-612 indicates that parties do not waive any evidentiary objections to the introduction of a particular exhibit simply because the exhibit was included within the prerequisite time frame. (A. p. 468). They go on to argue that the Court of Appeals correctly ruled that the Regulation is "merely a prerequisite to an admission of an expert's report into evidence and does not take away the single commissioner's authority to exclude such a report for other reasons." (A. p. 468, citing A. pp. 481-482).

The Appellant does not disagree with this proposition of law. The problem, however, with Respondents' argument, and the Court of Appeals' finding, lies in the "other reasons" that formed the basis for the Commission's exclusion of an otherwise admissible report. Respondents made no evidentiary objections to the report. As the Respondents acknowledge, the report was excluded, not because it failed on evidentiary grounds; but, instead, as a sanction for the Appellant's failure to cooperate and waive her rights under S.C. Code §42-15-80. That is, "in order not to reward 'petitioner for bad behavior ...'" (A. p. 470).

The error lies in the fact that the "bad behavior" that the Commissioner sought to punish by exclusion of otherwise admissible evidence was the Appellant's further insistence upon the provisions of S.C. Code §42-15-80.

Defendants argue that the issue before this Court is whether the Appellant should have agreed to submit to an evaluation by Respondents' Vocational Expert. (A. p. 469). Respondents acknowledge, as the Commissioner did, that S.C. Code §42-15-80 does not require that the Appellant submit to the evaluation by Respondents' vocational expert. Ultimately, what the Respondents take issue with is S.C. Code §42-15-80 itself. The Respondents, like the Court of Appeals, believe that S.C. Code §42-15-80 should require the Appellant to submit to Respondents' vocational expert, and that the Appellant should have waived S.C. Code §42-15-80, lest its provisions cause a violation of due process.

As argued at length in the Appellant's brief, the Commission's elevation of their own view of "fair play" over the statutory provisions of S.C. Code §42-15-80 was in error.

Respondents go on to argue that the exclusion of the Claimant's vocational evaluation was harmless error and that the Claimant's vocational expert's opinion was not necessary to a determination of the Appellant's loss of earning capacity. In doing so, Respondents invite this Court to weigh the facts of this case. They argue that the Appellant had been released without restriction by her treating orthopaedic and that her own testimony suffered from a myriad of "credibility issues." (A. pp. 463-464).

The relevance of the opinion of a vocational expert on the issue of a Claimant's loss of earning capacity is self-evident. However, given the Respondents' argument on the facts, the Appellant must respond here to the Respondents' incorrect assertion that the Claimant was released without restriction and that her testimony suffered from "credibility issues".

In particular, on September 12, 2013, Dr. Robert Elvington, Appellant's authorized treating orthopaedist, found:

> She can return to work with no prolonged walking or standing, no climbing, stooping or crawling and no lifting or carrying greater than 10 pounds.
>
> We will address the patient's right knee symptoms at a later date. (A. p. 342).

Dr. Elvington went on to treat Claimant's right knee which was not a related condition; however, her restrictions never changed. (A. p. 358).

Appellant's restrictions were confirmed by a Functional Capacity Evaluation performed by Ms. Tracy Hill, P.T., on September 12, 2014. (A. pp. 372-374).

The Functional Capacity Evaluation, Appellant's APA No. 7, p. 124, (A. p. 374), found that the Claimant was limited to lifting 3 to 10 pounds at various heights on an occasional basis; carrying 11 pounds with 2 hands; carrying 7 pounds in the right hand and 7 pounds in the left hand. It further recommended that she avoid standing/walking for more than 35 minutes at any given time; and noted that she is unable to walk at a normal pace. (A. p. 372).

The Single Commissioner disregarded the Functional Capacity Evaluation as she found its findings "invalid". (A. pp. 20-21, Finding No. 20).

In particular, the Single Commissioner interpreted the Functional Capacity Evaluation test results herself and disregarded the evaluator's conclusions as "invalid" based on her own interpretation the results of one element of the evaluation; a grip strength test of the Claimant's left hand which the report indicated:

> ... did not demonstrate a bell shaped curve which may be an indicator of submaximal effort and the coefficients of variation of the underlying data may be an indicator of varied effort since both

> the coefficients of variation at position 2 were not within the acceptable 15% limit.
> (A. p. 391).

The Single Commissioner relied on her own interpretation of that one test result to determine that the Functional Capacity Evaluation was "invalid" in its entirety. (A. pp. 5-23).

The Functional Capacity evaluator, Tracy Hill, P.T., never opined that her evaluation was invalid. In fact, to the contrary, Ms. Hill opined that: "The result of the Functional Capacity Evaluation performed on this date indicate that she can meet the demands of limited sedentary to limited light work." (A. p. 372). That expert opinion is uncontradicted in the record.

Moreover, the functional capacity evaluator specifically opined in her report that the Appellant's tests on left flexion and extension, left lateral and right lateral flexion, left straight leg raising and right straight leg raising, were valid. (A. p. 378). Further, the functional capacity evaluator performed tests for Waddell's signs which the expert found were all negative, i.e. not significant for "non-organic" pain. (A. p. 392). In addition, the evaluator noted that Claimant had "difficulty maintaining speed of the treadmill" on a treadmill test, (A. p. 394), recommended that "she avoid standing/walking for more than 35 minutes at a given time," and noted that "she is unable to walk at a normal pace". (A. p. 372).

In sum, the expert found that: "The results of the Functional Capacity Evaluation performed on this date indicate that she can meet the demands of limited sedentary to limited light work." (A. p. 372). The Commissioner disregarded this uncontradicted expert opinion, in favor of her own interpretation of the test as "invalid".

In the recent case of Burnette v. City of Greenville, 401 S.C. 413 (Ct. App. 2012), the Court of Appeals cautioned this Commissioner, and the Commission, against interpreting test results, and reminded the Commission that it was "permitted to disregard medical evidence only when

other competent evidence existed in the record." See Burnette at 427-428 (citing Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23 (Ct. App. 2011)).

In Burnette, the Court of Appeals reversed a decision by the instant Commissioner which found that a Claimant had not suffered a back injury based, in part, on the Commissioner's interpretation of MRI findings. The Court found:

> **Particularly disturbing is the finding that the 2008 MRI showed 'only' a 'minimal' protrusion with no nerve root displayed or impingement, and comparatively, no greater pathology of any significance, (if any), than the MRI of 2004 ... Because no evidence indicates this opinion originated from a medical provider, yet it appears in the Single Commissioner's Order, we are forced to conclude it is the medical opinion of the Single Commissioner, adopted by the Commission.**
> Burnette, 401 S.C. 417, 428. (emphasis added).

Here, as in Burnette, the medical opinion that the Functional Capacity Evaluation report is "invalid" is that of the Single Commissioner, rather than any medical provider. As in Burnette, the Single Commissioner ignored, (and, here, also excluded), uncontradicted expert opinions in favor of her own interpretation of test results.

Also, as in Burnette, the Single Commissioner heavily focused, instead, on what she viewed as credibility issues. See Burnette, at 426. In particular, the Commissioner found:

> Prior to the surgery to repair the torn meniscus in Claimant's left knee, Claimant's gait was 'mildly antalgic'. I give this record great weight, as Claimant ambulated laboriously into and of the hearing room with a cane that, contrary to Claimant's testimony, no doctor prescribed.
> (A. p. 19, Finding 10).

Thus, the Single Commissioner disregarded the authorized treating orthopaedic surgeon's opinions as to Claimant's restrictions, (A. p. 342), as well as the Functional Capacity Evaluation and its restrictions, and observations of the Claimant's difficulty walking. (A. pp. 372, 374).

Instead, she focused "great weight" on pre-surgery notes by the Claimant's occupational health physician, Dr. Richard T. Ferro, that indicated on April 12 and May 2, 2013, that the Claimant's gait was "mildly antalgic." (A. pp. 262, 264). Therefore, the Commissioner reasoned the Claimant was uncredible because she "ambulated laboriously" at the hearing.

In so doing, the Commissioner ignored the restrictions placed on the Claimant, post-surgery on the left knee, by Dr. Elvington. (A. pp. 342, 348). She ignored the Functional Capacity Evaluation which indicated Claimant was "unable to walk at a normal pace", and was "noted to have difficulty maintaining the speed of the treadmill," during testing. (A. pp. 374, 376).

The Single Commissioner also ignored the records of Lowe's Physical Therapy which contain, between May 13, 2013 and June 20, 2014, (A. pp. 281-306), numerous references to Claimant's difficulty with left lower extremity range of motion, stability and ambulation. See, e.g., **05/13/13 note** (A. p. 283), ("L knee worse than right → light duty ... cautious when moving knee ... Knee slightly swollen; when standing Pt shifts weight onto R LE."); **09/23/13 note** (A. pp. 293-294), ("Hesitant to put weight on (L) LE ... Pt presents $\bar{c}$ ↑ p!, ↓ ROM and ↓ stability s/p meniscal repair"); **10/10/13 note** (A. p. 297), ("Strength hasn't been tested Eval 2° to ↑ c/o pain, pt still ambim $\bar{c}$ SPC [single point cane]"), **10/23/13 note** (A. p. 298), ("NMR [neuromuscular re-education] to improve gait"); **04/25/14 note** (A. p. 299), ("→ numbness/tingling L>R all the time on (L) intermittent (R) ... motivated ... Majority of Motion coming from thoracic and hips").

In fact, on May 7, 2014, the therapist at Lowe's Physical Therapy indicated "L knee buckled on steps - almost fell ↓ steps". (A. p. 305).

In spite of this evidence, the Commissioner put "great weight" on a note, pre-surgery, in May of 2013 that indicated the Claimant was "mildly antalgic" as proof that the Claimant's altered gait at the hearing was, in fact, artifice.

Similarly, the Single Commissioner also placed weight on a medical history form which the Claimant completed on May 21, 2013, prior to surgery and prior to seeing McLeod Occupational Health for the first occasion. (A. pp. 19-20, Finding No. 14). On that form, the Claimant responded "no" to a question asking "Do you need any accommodations, job modification and or structural changes to your work are due to a health-related condition?" (A. p. 307). The Commission relied on this response to demonstrate that the Claimant did not, in fact, require work restrictions as she alleged at trial. (A. pp. 19-20, Finding No. 14).

The Single Commissioner failed to note that after that intake form was completed, on the visit of the same date, the occupational health doctor limited the Claimant to lifting 25 pounds or less, no bending, no climbing, and referred her for MRIs and continued physical therapy. (A. p. 310). Nor did the Commissioner consider that the results of those MRIs ultimately resulted in Dr. Elvington recommending and performing surgery on the Claimant's left knee and his setting restrictions which the Employer admitted they could not accommodate.

The Single Commissioner went on to find that the Claimant was not credible because she testified at the hearing that she did not have right knee problems prior to the accident. (A. p. 20, Finding No. 19; A. p. 166, lines 22-23).

This testimony, in the Commissioner's view, was indicative of an attempt to mislead the Commission because she viewed it as contradictory to the Claimant's deposition testimony. At deposition the Claimant testified at length about prior injury to her right knee and the resulting Workers' Compensation claim. (A. pp. 52, line 16 - p. 58, line 6). During that deposition, the Claimant also testified:

Q. Were you still having problems with your right knee before you were injured in this accident?
A. No.
Q. Had your right knee completely healed?

A. Yes.
(A. p. 57, lines 11-16).

Moreover, the fact that the Claimant currently has right knee problems was not in dispute, and the causation of that right knee condition was not in issue.

Thus, even though Claimant's current right knee problems are well-established through the Claimant's testimony at trial, at deposition, and in the medical records; even though the causation of Claimant's right knee problems were not in issue, and even though Claimant testified at length at deposition about a prior right knee injury and Workers' Compensation claim with problems that resolved before the instant accident, the Commissioner found that the Claimant's failure to mention the prior, resolved, and irrelevant right knee claim, (to which she had previously testified at deposition), was damning to the Claimant's credibility, and, moreover, formed a basis for the Commissioner to ignore the undisputed evidence contained in the Vocational Report and Functional Capacity Evaluation establishing the Claimant's restrictions.

Nevertheless, the Single Commissioner still found that the Claimant had a ten (10%) percent impairment to her left lower extremity, (which was over three (3) times the three (3%) percent rating set by her authorized treating surgeon), as well as eight (8%) percent to the spine (which was over one and a half (1½) times the rating from her authorized treating surgeon).

In sum, here, as in Burnette, Claimant presented uncontradicted expert opinions. Here, in spite of the specific admonitions this Commissioner received from the Court of Appeals in Burnette, this Commissioner again either excluded, deemed "invalid", or simply ignored the uncontradicted evidence in favor of her own interpretations of test results, and her zeal for credibility determinations, contrary to the law and the substantial evidence in the record.

For the foregoing reasons, the Court of Appeals should be reversed.

Respectfully submitted,

WUKELA LAW FIRM

May 2, 2019

BY: 
STEPHEN J. WUKELA
ATTORNEY FOR APPELLANT
SC BAR NO. 68351
PO BOX 13057
FLORENCE SC 29504
843-669-5634

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PROOF OF SERVICE

I certify that I have served the Reply Brief of [redacted]on Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on May 24, 2019, addressed to their attorney of record, G. Murrell Smith, Jr., PO Box 580, Sumter SC 29151-0580.

WUKELA LAW FIRM

BY: _____
STEPHEN J. WUKELA
ATTORNEY FOR PETITIONER
SC BAR NO. 68351
PO BOX 13057
FLORENCE SC 29504
843-669-5634