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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1115485
Appellate Case No. 2018-001197

RECEIVED
MAY 13 2019
SC Court of Appeals

Lamar Clark, Appellant,

v.

Philips Electronics/Shakespeare, Employer,
and Gallagher Bassett Services, Carrier, Respondents.

REPLY BRIEF

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ARGUMENT

The Workers' Compensation Commission adopted a theory of the case that the claimant was not credible and found that this undermined testimony from medical doctors and other experts about the claimant's future ability to work. (R.p.58, ¶7).

Respectfully, credibility is not a sensible theory of this case, on this record. This case is driven by medical evidence. Lamar Clark had two herniated discs and two back surgeries after his injury in 2011. There is objective evidence documenting symptoms like decreased sensation, numbness, and pain radiating into his lower extremities. Multiple physicians have opined he needs either psychological treatment or a psychological evaluation. He has permanent restrictions imposed by physicians. See, e.g. (R.p.477) (restricting him to light duty). There is no evidence of *anything* this severe before 2011.

Respondents asked a single physician—only one—whether his opinion would change if he learned Mr. Clark had a prior back injury or had sought treatment for back problems before 2011. That doctor plainly said it would not affect his opinion. (R.pp.282-286). This was Dr. Storick, the authorized treating physician for pain management. The commission purported to credit Dr. Storick, (R.p.58, ¶5), but it apparently ignored this part of his opinion, without explanation.

Mr. Clark had experienced back problems before his 2011 injury. Plenty of people with heavy duty jobs have similar experiences. But there is no evidence he experienced anything like this. There is no getting around the evidence his injury affects multiple body parts. There is also no getting around the fact that the lack of any analysis on wage loss, the date of MMI, the 20% back rating, and the denial of future medical care make no sense.

A. Mr. Clark’s injury affects multiple body parts and the commission’s lack of analysis and explanation of its finding that he has not lost any of his earning capacity does not make sense.

The commission concluded as a matter of law that Mr. Clark “sustained an injury to one body part and has no loss of wage earning capacity.” (R.p.59, ¶4). The commission did not cite any particular evidence as supporting this or reference why it believed Mr. Clark—who has not worked since his 2013 surgery and who was declared disabled in 2014 (R.pp.402-408)—has not lost any earning capacity as a result of two herniated discs, two back surgeries, ongoing physical restrictions, and an ongoing pain management regimen.

Mr. Clark gave the commission a list of sixteen (16) different pieces of medical evidence documenting that his back injury affects his left leg. That list is attached as Appendix A at the end of this brief.

Oddly, the commission’s order openly acknowledges that the back injury affects Mr. Clark’s leg. The commission said its 20% impairment rating to the back accounted for “any affects” to the leg. (R.p.58, ¶8 & p.59, ¶6).

There is no evidence anything like this pre-existed Mr. Clark’s 2011 injury. Mr. Clark’s 2008 disability evaluation, for example, notes only intermittent pain in his back and left knee as well as limited numbness and tingling in his left leg. (R.p.620). Now, however, the medical reports note decreased sensation, decreased range of motion, an uneven walk, numbness in the left foot, and evidence of nerve root damage in the back corresponding to radiating symptoms in the left leg. See (Appendix A).

Mr. Clark also gave the commission a list of medical evidence documenting that his post-surgical pain and inability to work has affected his mental health. See (Appendix B).

The only evidence of depression before this injury is Mr. Clark's answer of "yes" to a question on his 2008 disability application asking whether he has been seen by anyone for emotional or mental problems that limit his ability to work. (R.p.602). Since his 2011 injury, however, multiple physicians have noted depression. (Appendix B). Yet, Mr. Clark has never even been granted a psychological evaluation.

This is important because an injured worker is allowed to offer evidence of decreased earning capacity if an injury affects multiple parts of the injured worker's body. *Brown v. Owen Steel Co.*, 316 S.C. 278, 280, 450 S.E.2d 57, 58 (Ct. App. 1994). Precedent recognizes that a back injury causing symptoms like pain, numbness, and weakness in an injured worker's extremity is an injury that affects more than one part of the body. *Dent v. E. Richland Cty. Pub. Serv. Dist.*, 423 S.C. 193, 202-203, 813 S.E.2d 886, 891 (Ct. App. 2018). Depression would count as well. See, e.g., *Bass v. Kenco Grp.*, 366 S.C. 450, 463, 622 S.E.2d 577, 584 (Ct. App. 2005) (shoulder injury resulted in multiple mental problems).

The commission may have based the lack of a wage loss on the vocational evaluation offered by the Respondents. That vocational expert opined Mr. Clark was employable assuming he could work part time or full time. (R.p.504). But the commission did not say whether it was crediting this evaluation or any other piece of evidence. The basis for the finding of no reduction in earning capacity is completely left to guesswork.

It is perfectly fair to say that the lack of a full work history and a medical history might undermine the persuasiveness of a medical or vocational evaluation. Here, however, there is no dispute about certain material facts. Mr. Clark worked a heavy duty job at Shakespeare for seven months before he got injured. (R.p.40, ¶9). He worked for six more

months *after* he got injured. *Id.* He only stopped working when it came time for his first surgery. (R.pp.132-136). He has not worked since. *Id.* It is difficult, if not impossible, to understand the argument that someone with this experience and a history of heavy duty jobs has not lost any earning capacity. He is not as able-bodied as he was before.

B. The commission’s date of MMI makes no sense and is directly contrary to the testimony of a doctor on whom the commission purported to reply.

The commission found the date of maximum medical improvement was July 23, 2014. (R.p.58, ¶6). This was the date Dr. Holbrook, the authorized back surgeon, gave on a doctor’s questionnaire. (R.p.477).

The problem is that this date was over a year before Dr. Storick, the authorized doctor for pain management, placed Mr. Clark at MMI for that part of his injury. (R.p.324). When Dr. Holbrook released Mr. Clark he referred Mr. Clark to Dr. Storick. (R.p.320). Dr. Storick then saw Mr. Clark multiple times between August of 2014 and July of 2015 before finding, in July, that Mr. Clark had reached maximum medical improvement from a pain management prospective. (R.p.324). Dr. Storick stood by that date in his deposition. (R.p.290).

The date of MMI affects a claimant’s entitlement to temporary disability compensation. Any temporary compensation paid after MMI is usually counted as a “credit” towards the payment of a permanent disability award. See *Hendricks v. Pickens Cty.*, 335 S.C. 405, 414, 517 S.E.2d 698, 703 (Ct. App. 1999) (citing S.C. Code Ann. § 42-9-210).

Using an MMI date from July of 2014 rather than August of 2015 meant that more than 52 weeks of compensation for temporary disability would be improperly counted as pre-payment of Mr. Clark’s permanent disability award. This was a way to “hammer” Mr. Clark

financially. When combined with the low back rating and the refusal to consider any other body parts, the backed-up MMI date left Mr. Clark with an “award” saying *he* owed *his employer* money even though he had a back injury requiring two surgeries and has been out of work for a substantial length of time. (R.p.60).

And again, as mentioned in Mr. Clark’s lead brief, this finding was incredibly odd because nobody argued for this date. The single commissioner found the date of MMI was May 25, 2016. (R.p.45, ¶9). Respondents argued on appeal the proper date was Dr. Storick’s date in August of 2015. (R.pp.86-87). The commission picked a date nearly a year before the date Respondents proposed. Respectfully, this makes no sense.

C. The commission’s 20% back rating is directly contradicted by the record.

The commission found Mr. Clark had a 20% impairment to his back and said it was basing this on the opinions of Dr. Holbrook and Dr. Storick. (R.p.58, ¶8).

Dr. Holbrook gave Mr. Clark a 20% impairment rating to his “whole person.” (R.p.477). Mr. Clark could not locate any impairment ratings from Dr. Storick. The only impairment rating Respondents listed on their pre-hearing brief was Dr. Holbrook’s 20% rating. (R.p.63, ¶11). That filing mistakenly characterized Dr. Holbrook’s rating as to the lumbar spine, just as the commission did. *Id.* Dr. Holbrook plainly gave a “whole person” rating. (R.p.477).

As noted in Mr. Clark’s lead appellate brief, precedent has observed “whole person” impairment ratings are lower than back ratings. *Lawson v. Hanson Brick Am.*, 393 S.C. 87, 89, 710 S.E.2d 711, 712 (Ct. App. 2011) (noting a twenty-five percent whole-person rating

translates to a thirty-three percent lumbar impairment). There is no support for the finding that Mr. Clark's disability is properly characterized as a 20% disability to the back.

D. There is no logical explanation of the commission's decision that Mr. Clark is not entitled to any future medical care. There could be no such decision based on this record.

The commission offered no explanation for its findings that Mr. Clark was not entitled to any future medical care. (R.pp.59-60).

Again, Mr. Clark's pain management doctor, Dr. Storick, said in his deposition that Mr. Clark would need pain management visits twice per year, ongoing medicine, and that "most people in [Mr. Clark's] situation usually have lifetime medicals." (R.p.287, lines 2-7 & p.292, lines 13-16). On the eve of trial in 2016, Dr. Storick referred Mr. Clark for a pre-operative interview and assessment for a test run with a spinal cord simulator. (Supp.R.p.20). Other doctors explained Mr. Clark would need ongoing medication. (R.pp.341, 381, & 459). It is not possible to pretend this evidence does not exist.

The commission made much out of what it perceived as Mr. Clark's failure to be forthright. This bought the line Respondents were selling; Respondents' argument to the commission was an invitation to speculate about whether Mr. Clark had been a candidate for surgery back when he filed for disability in 2009. (R.p.278, lines 8-12). The theory apparently was that all of these problems might have been pre-existing.

There is just no evidence to support that. There is no evidence Mr. Clark did not suffer a serious back injury. There is no evidence it did not affect other parts of his body. There is no basis for concluding it has not affected his ability to earn wages. People with a

history of heavy duty jobs do not come back from a serious injury that caused permanent impairments and have no reduction in earnings. The idea that they do is a fantasy.

Respondents could have asked to leave the record open if they felt as though they did not get ample discovery in a timely fashion. They could have asked to send questionnaires to the authorized treating providers to see whether the opinions of those providers would change. They did not do any of this.

The impairments here are similar to those in *Linen v. Ruscon Construction Co.*, 286 S.C. 67, 69, 332 S.E.2d 211, 212 (1985), but a determination of permanent and total disability is beyond the scope of this appeal. This Court cannot make the decision in the first instance. The Court should reverse and remand for a decision based on evidence instead of speculation and containing detailed findings that are capable of meaningful judicial review.

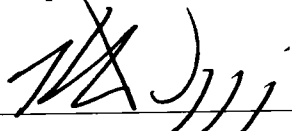
CONCLUSION

For the foregoing reasons this Court should reverse.

May 10, 2019

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Appendix A

Back and Left Leg - Lamar Clark

- **Claimant's APA 4, R.p.317:** *EMG - 1/25/12* - "Electrodiagnostic findings and clinical assessment are consistent with lumbar radiculopathy primarily affecting the left L5 nerve root."
- **Claimant's APA 5, R.p.319:** *Dr. Storick - 2/11/13* - Neurologic: Sensation is slightly decreased to light touch along the left great toe. Describes a fairly accurate left L5 radiculopathy.
- **Claimant's APA 1, R.pp.311-312:** *Dr. Holbrook - 5/22/13* - Work related back injury affects leg; back and left leg pain most probably result from his performance of his job activities and/or work-related aggravation of a pre-existing condition.
- **Claimant's APA 11, R.p.342:** *Progressive Physical Therapy - 11/21/13* - low back pain with left hip and lower extremity radicular complaints.
- **Claimant's APA 6, R.p.327:** *Dr. Westerkam - 7/21/14* - Neurologically, sensation is decreased over the left great toe. Reflexes at the left hamstring is absent. He does have slightly antalgic gait with slight limp. Impression: He continues to have numbness and tingling in the left foot with weakness and persistent low back pain.
- **Claimant's APA 1, R.p.315:** *Dr. Holbrook - 7/23/14* - low back pain radiating down left posterior thigh; tenderness to palpation over the lower lumbar paraspinous...still has strength about 4/5 in left ankle.
- **Claimant's APA 10, R.p.335:** *Dr. Hutcheson - 7/23/14* - Decreased range of motion in all directions, flexion 30 degrees and extension 10 degrees - L3-S1; Decreased sensation to light touch at medial left big toe.
- **Claimant's APA 5, R.pp.320-321:** *Dr. Storick - 8/20/14* - "The pain is mostly confined to the left back in a continuous fashion down his left leg to the back of the thigh and, to a lesser degree, the lower leg. There is persistent numbness in the left foot and great toe consistent with an L5 dermatome."
- **Claimant's APA 15, R.pp.373-375:** *Dr. Holt - 8/21/14* - "Straight leg raise...positive...on the left; Squatting and toe walk were downgraded to 4 of 5. DTR could not be elicited at the left knee...Sensory exam noted loss in the...left medial foot and its great toe."
- **Claimant's APA 5, R.p.323:** *Dr. Storick - 8/27/14* - Assessment: Chronic back and leg pain.
- **Claimant's APA 10, R.pp.337-339:** *Dr. Hutcheson - 12/4/15* - Neurologic: weakness, numbness; Patrick's Test: Positive, right and left, Straight Leg Raise: Positive, Radiculopathy: Left. Comments: "post-laminectomy pain syndrome with back and bilateral leg pain (Left > Right)."

- **Claimant's APA 10, R.p.340:** *Dr. Hutcheson* - 12/4/15 - "Whole person impairment rating...include[s] within that impairment rating a portion of impairment to his affected left leg due to lumbar radiculopathy." "loss of L4/5-5/S1 reflex demonstrate neurologic deficit affecting leg."
- **Claimant's APA 16, R.pp.378-379:** *Dr. Gabr* - 12/4/15 - Sensation: Nerve Roots: Sensation to touch and pressure...intact over the lumbo-sacral nerve roots bilaterally except for patchy deficit on the left S1 distribution. Deep tendon reflexes are symmetrical except diminished left Achilles compared to the right. Documented chronic radiculopathy following lumbar surgery at clinically appropriate level L4-5 and L5-S1.
- **Claimant's APA 16, R.p.380:** *Dr. Gabr* - 12/4/15 - "Whole person impairment rating...include[s] within that impairment rating a portion of impairment to his affected left leg due to lumbar radiculopathy." "Based on MRI findings and operative reports from Dr. Holbrook, there are evidence of granulomas and chronic nerve damage of root L5, positive to be symptomatic in addition to objective clinical findings corresponding to left L5 radiculopathy."
- **Claimant's APA 16, R.p.381:** *Dr. Gabr* - 12/4/15 - 14B: Body parts injured: low back, Body parts affected: left leg and nervous system.
- **Claimant's APA 10, R.p.341:** *Dr. Hutcheson* - 12/15/15 - 14B: Body Parts Affected: back, left hip, left leg, left foot, nervous system, psychological.

Appendix B

Psychological - Lamar Clark

- **Claimant's APA 6, R.p.325:** *Dr. Westerkam - 5/9/13* - "He used to be an avid basketball and football player as well as coach. He states that he can do neither activities at this time because of persistent pain. Patient states that this has caused some depression."
- **Claimant's APA 12, R.pp.344-345:** *Dr. Lind - 5/16/13* - BDI = 33 severe levels of depression; BAI = 23 Moderate levels of anxiety; "emotional symptoms are more likely than not...caused by his 20 July 2011 physical work-related injuries"; Not at MMI; Needs additional psychological treatment.
- **Claimant's APA 13, R.p.358:** *Dr. Brabham - 5/21/13* - BDI = 45 severe levels of depression; he should be considered for treatment for his severe level of depression related to his on-the- job injuries.
- **Claimant's APA 6, R.p.327:** *Dr. Westerkam - 7/23/14* - "The patient has not received treatment for the psychological issues that have resulted from his pain...I would recommend to lessen his period of disability that he receive 6 cognitive behavioral trainings sessions and start on an antidepressant, such as Cymbalta.
- **Claimant's APA 15, R.p.444:** *Dr. Holt - 8/21/14* - Impressions: Depression and Anxiety, mild to moderate, not yet treated but recommended; "He was obviously depressed but remained pleasant."
- **Claimant's APA 5, R.p.323:** *Dr. Storick - 7/23/15* - "he will occasionally use a Flexeril in the evening for sleep and back pain."
- **Claimant's APA 10, R.p.338:** *Dr. Hutcheson - 12/4/15* - Psychiatric: depression
- **Claimant's APA 16, R.p.377:** *Dr. Gabr - 12/4/15* - "Mood and affect can be described as depressed with poor eye contact."
- **Claimant's APA 10, R.p.341:** *Dr. Hutcheson - 12/15/15* - 14B: "psyche care per Dr. Lind"
- **Claimant's APA 13, R.p.369:** *Dr. Brabham - 12/18/15* - "still experiencing severe levels of depression"