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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Opinion No. 5809 (Filed March 10, 2021)

Lamar Clark, Claimant,

Appellant,

v.

Philips Electronics, Employer, and Gallagher
Bassett Services, Carrier,

Respondents.

PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Philips Electronics and Gallagher Bassett Services (“Respondents” or “Defendants”) hereby petition for a rehearing of Opinion No. 5809 wherein this Honorable Court reversed and remanded the June 5, 2018 decision of the South Carolina Workers’ Compensation Commission (“Commission”).

The overarching theme of this Court’s opinion is that the Commission took an “absolutist” stance with regard to the Claimant’s lack of credibility. *Clark v. Philips Electronics*, Opinion No. 5809. This Court determined that the Commission failed to offer any explanation of how the Claimant’s credibility impacted the other evidence in the record, which is required per *Crane v. Raber’s Disc. Tire Rack. Id.*

Defendants do not disagree that *Crane* applies to this case since the Claimant's lack of credibility certainly played a part in the Commission's decision. *Crane v. Raber's Discount Tire Rack*, 429 S.C. 636 (2020). Put simply, the *Crane* court held that the Commission's Order was improper because it offered no explanations as to how Crane's lack of credibility justified ignoring the medical evidence showing a ruptured eardrum. Defendants submit that this Court has misconstrued the holding in *Crane* as to preclude any Commission decisions impacted by a Claimant's credibility; otherwise, the Commission's credibility findings and impact of same on other evidence would have been discussed within this Court's decision. Yet, notably missing from this Court's opinion is a single mention of any of the Commission's 9 Findings of Fact contained within the Order, in which the Commission did explain how the Claimant's lack of credibility rationally impacted other evidence in the record.

In further support of this Petition, Defendants contend that this Court overlooked or disregarded material facts or principles of law as follows:

1. This Court Overlooked and Misapprehended Material Facts in Evidence when Reversing the Commission's Assigned Impairment Rating and its Determination that Clark only Injured One Body Part:

The Court misapprehended the material facts in evidence by finding that "Drs. Holbrook and Storick ultimately concluded that Clark injured his back and at least one of his legs." *Clark v. Philips Electronics*, Opinion No. 5809. This conclusion is wholly inaccurate, as neither doctor stated that Clark injured his back and one of his legs. These medical opinions simply do not exist in the record. As such, this Court erred in holding that there is no substantial basis on the record permitting the panel to find Clark only injured one body part – as all of the evidence in the record supports this conclusion by the Commission.

As further evidence, even Judge Hewitt acknowledged that Drs. Storick and Holbrook never opined that Clark injured two body parts in this case.¹ In the Appellant’s Brief to this Court, Judge Hewitt did not argue that the Commission failed by not granting more weight to the treating physicians in this regard; rather, he argued: “we do not know whether the Commission bought Respondent’s argument that the neurological pain and numbness in Clark’s left leg did not count as another body part ‘affected’ such that Clark could pursue a claim under section 42-9-10.” (Brief of Appellant, p. 10).

Equally, if not more, concerning is this Court’s complete disregard of Clark’s refusal to participate in the discovery process; in fact, this Court’s decision rewards Clark for his complete refusal to be forthcoming about his prior injuries/conditions. It is undisputed that Clark attempted to frustrate the discovery process throughout the pendency of the claim in an effort to preclude Defendants from obtaining relevant medical records and documentation which directly contradict his allegations in support of his request for permanent and total disability.

This Court has determined that the Commission erred in finding that Clark’s non-disclosure of his 2006 injury made the medical opinions in this case suspect; specifically finding that the Commission had no basis to discount the opinion of Dr. Storick because Defendants failed to offer a contrary causation opinion in light of his pre-existing issues. This Court is wholly disregarding the fact that Defendants were blockaded from obtaining anything relevant to Clark’s prior medical

¹ The Honorable Blake Hewitt represented Clark during the entirety of the Appellate briefing in this case. Judge Hewitt’s Motion to be withdrawn as counsel was granted in October 2019, months after final briefs were filed by both parties.

history until after the hearing, at which time the only doctor deposition allowed was that of Dr. Storick.

Defendants respectfully remind this Court that Clark spent months refusing to execute an SSA release for his file, so Defendants were unaware until a month before the hearing that the Claimant had previously applied for SSDI benefits, alleging inability to work due to a prior work-related back injury in Florida. (**R. 259**). Following receipt of his prior SSDI files, Defendants requested to re-depose Clark in order to obtain information about his prior workers' compensation claim and pre-existing injuries, since he had denied same in his deposition. (**R. 262**). Clark's counsel refused, so Defendants had to file a Motion to Compel. (**R. 262**). A conference call was held in regard to the Motion, at which time the Single Commissioner urged Clark's counsel to provide Defendants with the names of medical providers prior to the hearing. (**Id.**). Clark's counsel refused to comply, so Defendants were unaware of the names of any of his prior providers until the date of the hearing in this claim. (**Id.**). The Single Commissioner directed Clark to disclose this information on the stand and the record remained open for Defendants to subpoena the records and tender same into evidence. (**R. 130, 263**). Moreover, the only additional deposition of a physician that was allowed after the hearing was that of Dr. Storick, since Clark arrived at the hearing with a narrative dated that morning. (**R. 111, 254**).

In sum, Clark's refusal to cooperate in good-faith with the discovery process made it completely impossible for Defendants to obtain the contrary medical evidence which this Court has deemed necessary. As this opinion stands, Clark is being rewarded for his behavior.

This Court also reversed the Commission's award of 20% impairment to Clark's back, requesting that the Commission revisit how the 20% whole person rating does not translate to a

higher rating for his back alone. *Clark v. Philips Electronics*, Opinion No. 5809. This Court offered no legal basis warranting the Commission's "reconsideration" of the assigned rating, so this reversal is improper. The Commission found:

8. We find that the Claimant has sustained a 20% permanent impairment to his back, taking into account any affects to his legs. Both Drs. Holbrook and Storick have opined that the Claimant has sustained a medical impairment rating of 20%, and we assign greater weight to the opinions of these treating physicians. Ex. A, R.

Defendants don't dispute that there is objective evidence in the record showing injuries to Clark's low back – the question is what extent of those injuries can be attributed to his work-related injury with this employer. The Appellate Panel is permitted to consider the Claimant's credibility when it comes to the extent of an injury. *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 90 (2009). The 20% rating to Clark's back was within the evidence presented to the Commission, and it was proper for the Commission to weigh the conflicting impairment ratings and arrive at a rating which the Commission deemed warranted. As such, Defendants submit that the Commission's determination that Clark sustained an injury to only one body part which warranted a 20% impairment rating should stand for the reasons above.

2. This Court Misapplied the Controlling Law and Overlooked Material Facts in Evidence when Reversing the Commission's Determination that Clark Did Not Sustain a Loss of Earning Capacity:

According to this Court's decision, the Commission's determination that Clark suffered no loss of earning capacity "floats on air," because it is "unsupported by any visible explanation or evidence." *Clark v. Philips Electronics*, Opinion No. 5809. This is in error.

Again, somehow this Court has completely overlooked the paragraphs within the Commission's Order dealing with the evidence and findings directly related to Clark's claim for

loss of earning capacity. The Commission's decision was not pulled out of ether. Defendants agree that explanation is required when a Claimant's credibility impacts other evidence in the record, per *Crane*, which is exactly what the Commission did in this case. In particular, the Commission found:

4. We find the Claimant to be wholly lacking in credibility. We find that the Claimant's lack of credibility has undermined the medical opinions and treatment received in relation to his admitted workers' compensation claim, as the opinions and conclusions of his providers were based upon self-serving assertions of the Claimant. This finding is supported by the Deposition and Hearing testimony of the Claimant, his prior medical and Social Security records and the records from all physicians and vocational evaluators involved in this claim. The Claimant sustained a work injury in 2006 while working for Tile Depot, leaving him with residual low back pain and complaints of radiculopathy; however, when deposed in 2013, the Claimant denied ever working for Tile Depot, denied having any prior workers' compensation claims and denied any prior back injuries. Hrg. Tr. p. 46 – 47; Ex. C p. 626; Ex. S, p. 11, 21, 36. The Claimant maintained this denial of his prior workers' compensation claim at the Hearing, even when presented with his signature on Florida Workers' Compensation documents indicating otherwise. Hrg. Tr. p. 40, 48. The Claimant's 2006 work injury at Tile Depot was significant enough for him to apply for SSDI benefits in 2007 and 2009 as a result of same, wherein he indicated that his 2006 back injury prevented him from being able to work. Ex. N p. 2040, 1871. Just seven months before his date of accident with this Employer, the Claimant presented to Newberry Hospital, reporting back and left flank pain. Hrg Tr. p.127 – 128. Even so, the Claimant unequivocally admitted that he did not report any prior physical limitations to the IME physicians or vocational evaluators in relation to his work injury at Philips, even though he was asked about same. Hrg. Tr. p. 88 – 89; See medical records.

7. We find that the evidence in the record does not support that the Claimant is permanently and totally disabled. We find that the Claimant's lack of truthfulness throughout the pendency of this matter to be an impediment to supporting the Single Commissioner's decision. In further support of this finding is the Claimant's admission that he did not report any prior physical limitations to the IME physicians or vocational evaluators in this claim. Hrg. Tr. p. 88 – 89; See medical and vocational reports. Moreover, at the Hearing, the Claimant disputed all of the medical records which evidenced improvement in his condition following his work injury at Philips. Hrg Tr. p. 69-71, 77, 85. Further, the Claimant reported to the vocational evaluators that he had only completed a 12th grade education, when in fact he had completed one year of college at Kaiser College, where the Claimant

majored in computer programming, and one year at the Georgia Military College. Hrg. Tr. p. 66.

It is undisputed that Clark lacks credibility, as he exhibited inconsistent and contradictory testimony and failed to report pre-existing issues to medical providers, just like in *Crane*. Yet, Clark went even further by extending his lack of candor to the experts performing vocational evaluations in this claim, by failing to disclose his educational history, prior employers and assertions made in his prior SSDI applications. As the Commissioners pointed out to Clark's counsel during the 2018 oral arguments, the vocational aspect of a case determines whether a Claimant is deemed permanently and totally disabled. (**R. 267 - 269**). Commissioner Barden further noted that vocational expert reports are built on the foundation of experience, education and skill set, and a vocational evaluator relies on supposedly truthful information. (**R. 267, 269**).

This Court disregarded material facts in the record by also finding that it had no way of knowing what the Commission used to arrive at the conclusion that Clark's earning capacity was intact. This is wholly inconsistent with the record, as Defendants tendered a vocational opinion from Jan Westmoreland showing several available accommodating positions which Clark could perform. (**R. 478-505**). Additionally, this Court disregarded the fact that Clark's vocational expert opinion was based on Clark reporting having no physical limitations previously². When this expert opinion is reconsidered by replacing his false history with the actual limitations Clark asserted in

² Dr. Brabham noted that Clark "appeared credible in his description of his limitations and remaining functional capacities," and found that "the information provided during this interview was highly consistent with information reported in other reports." (R. pp. 346 – 372). As such, Dr. Brabham concluded that "clearly it is the on the job injury in 2011, which began his medical problems which have been the primary basis for his inability to maintain gainful employment." (R. p. 350).

his prior SSDI applications, as the Commission did, the vocational opinion supporting his claim for PTD cannot stand.

The Commission, as factfinder, did not believe Clark or, by extension, his vocational expert witnesses who relied solely on Clark's false reporting. Further, given Clark's strong reliance on his own testimony of his inability to return to work, the Commission quite properly focused their observations on Clark's lack of credibility in weighing his testimony. As detailed above, the Commission considered the impact of the Clark's lack of credibility on Clark's testimony and the vocational opinion offered in support of his PTD claim, and the Commission properly explained its justification for discrediting this evidence in its Order. As such, Defendants submit that the Commission's determination that Clark sustained no loss of earning capacity should stand for the reasons above.

3. This Court Disregarded Material Facts in Evidence Supporting the Commission's Denial of Clark's Psychological Condition.

This Court reversed the Commission's determination that Clark's alleged psychological condition is unrelated to his work injury, holding that this determination was yet "another misuse of the credibility metric." *Clark v. Philips Electronics*, Opinion No. 5809. This is in error.

This Court has disregarded and discounted material facts in the record that contradict Clark's allegations of a work-related psychological injury, in order to arrive at this Court's conclusion that the medical evidence relied on by Clark is "objective" and "uncontradicted." Moreover, this Court points to Clark's complaints of chronic pain, sleeplessness and senses of hopelessness as proof of this objective medical evidence, although they are all unquestionably subjective in nature. The Commission properly placed less weight on Clark's subjective alleged

psychological complaints due to his complete lack of candor with regard to nearly every material issue in this case. Further, in compliance with *Crane*, the Commission properly provided an explanation of how Clark's lack of credibility impacted the other evidence in the record related to his psych allegations, as follows:

3. We find that the Claimant's alleged psychological issues are not supported by the greater weight of the evidence and thus are not causally related to the accident of July 20, 2011. The greater weight of the evidence supports that the Claimant had pre-existing psychological issues which were not relayed to any of his treating physicians. This finding is based on the 2008 and 2009 SSDI documents wherein Claimant alleged that he was suffering from mental or emotional issues at that time which limited his ability to work. Ex. C. Moreover, the Claimant indicated on these documents that he had been seen by a provider for emotional or mental problems in the past. *Id.* The Claimant maintained his denial of any prior psychological issues at the hearing, and his medical records are void of any mention to his treating physicians of his prior psychological issues and/or treatment. Hrg. Tr. p. 54- 55; See medical records.

It was Clark's burden to prove that his alleged psychological condition is a result of the work incident. Clark requested the Commission disregard any evidence related to conditions and limitations impacting his ability to work before this incident (which Clark personally attested to in his prior SSDI files!), while at the same time asking the Commission to believe his testimony about alleged psychological issues resulting from the work injury. Without a doubt, Clark's credibility played a role in the Commission's analysis of this issue, and it was proper for the Commission to grant more weight to the evidence that it found more reliable.

The Commission is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established. *Ballenger v. S. Worsted Corp.*, 209 S.C. 463; 467, 40 S.E.2d 681, 682-83 (1946). Thus, while medical testimony is entitled to great respect, the fact finder may disregard it if other competent evidence is presented. *Id.* Indeed, "medical testimony should not be held conclusive irrespective of other evidence." *Id.* at 467, 40

S.E.2d at 682-83. As such, Defendants submit that the Commission's determination that Clark's alleged psychological issues are unrelated to his work injury should stand for the reasons above.

4. This Court Misconstrued and Misapplied the Controlling Law with Regard to Sufficiency of Findings of Fact and Conclusions of Law on the Issue of MMI.

This Court vacated the Commission's MMI determination, relying on *Canteen v. McLeod* for the proposition that the Commission did not explain how it resolved the clashing MMI evidence. *Clark v. Philips Electronics*, Opinion No. 5809. This is in error.

Defendants first submit that this Court has made a misstatement of law, as *Canteen* doesn't stand for the proposition that the Commission is required to explain its resolution of conflicting evidence within its findings or conclusions. Rather, the *Canteen* court held that the Commission's findings must be sufficient enough to ascertain whether they are supported by evidence and law was correctly applied, which the Commission did here. There is no requirement that the Commission reiterate every piece of conflicting evidence within the Findings of Fact or Conclusions of Law. Rather, South Carolina Code Ann § 1-23-350 requires that findings of fact be accompanied by a concise and explicit statement of the underlying facts supporting the findings, just as the Commission did here in Finding of Fact #6:

6. We find that the Claimant has reached MMI as of July 23, 2014. This finding is based on the 14B completed by Dr. Thomas Holbrook, wherein he placed the Claimant at MMI as of July 23, 2014 and indicated that the Claimant would be evaluated by Dr. Storick to optimize his medicines and for consideration of a spinal cord stimulator. Ex. A.

The ability to draw inconsistent conclusions from the evidence does not prevent the Appellate Panel's Findings of Fact from being supported by substantial evidence. *Tiller v. National Health Care Ctr. of Sumter*, 334 S.C. 333, 338 (1999). The Defendants contend that the

Commission's determination that Clark reached MMI on July 23, 2014 should stand for the reasons above.

CONCLUSION:

For all of the reasons above, Defendants respectfully request that this Court reconsider its Opinion and uphold the Commission's July 5, 2018 Order.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that I served counsel for the Appellant with a copy of Defendants' Petition for Rehearing on March 25, 2021, by mailing and emailing copies of same to the following addresses:

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PAYNE LAW GROUP

March 25, 2021

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SC Court of Appeals

VIA US MAIL

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate St.
Columbia, SC 29201

Re: Lamar Clark v. Philips Electronics/Shakespeare and Gallagher Bassett Services
COA Case No.: 2018-001197

Dear Ms. Kitchings:

Enclosed please find the filing fee for Respondents/Defendants' Petitions for Rehearing which was filed today in this claim. We are serving counsel of record with this letter via email only.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Brooke A. Payne

Encl: \$50 Filing fee
cc: William B. Salley (*via email*)