

RECEIVED

APR 30 2013

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

APPELLANT CASE NO.: 2013-000403

KELLIE N. BURNETTE.....RESPONDENT,

v.

CITY OF GREENVILLE.....PETITIONERS.
AND HEWITT COLEMAN & ASSOCIATES

**RESPONDENT'S RETURN TO
PETITION FOR WRIT OF CERTIORARI**

Douglas A. Churdar, Esq.
SC Bar No.: 11971
Douglas A. Churdar, P.C.
712 East Washington Street
Greenville, SC 29601
Phone (864) 233-0203
Attorney for Respondent

Michael A. Farry, Esq.,
Bruce B. Campbell, Esq.
Horton, Drawdy, Ward,
Mullinax & Farry, PA
307 Pettigru Street
Greenville, SC 29601
Phone (864) 233-4351
Attorney for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED FOR REVIEW 1

I. Do Petitioners identify any “special and important reasons” for this Court to grant their petition? 1

II. Did the Court of Appeals improperly weigh evidence, or did it merely recognize there was not substantial evidence to support a finding that Claimant did not injure her lumbar spine in a work injury on June 16, 2007. 1

III. Did the Court of Appeals commit reversible error when it determined the Commission’s findings on Claimant’s credibility were irrelevant, or did it correctly recognize that Claimant cannot exaggerate two (2) MRIs’? 1

STATEMENT OF FACTS..... 1

STANDARD OF REVIEW 7

ARGUMENTS..... 8

I. Petitioners did not identify any “special and important reasons” for this Court to grant their petition. 8

II. The Court of Appeals did not improperly weigh evidence; rather, it merely recognized there was not substantial evidence to support a finding that Claimant did not injure her lumbar spine in a work accident on June 16, 2007...... 9

II. The Commissioner’s finding on Claimant’s credibility were irrelevant; Claimant cannot exaggerate two (2) MRIs...... 18

CONCLUSIONS 21

TABLE OF AUTHORITIES

Cases

Aakjer v. Spagne, 291 SC 165, 352 SE 2nd 503 (Ct. App. 1987)..... 20

Fishburne v. ATI Systems Intern., 384 S.C. 76, 84, 681 S.E. 2d 595, 599-600 (S.C. App. 2009)... 8

Hoxit v. Michelin Tire Corp., 304 SC 461, 405 S.E. 2d 407 (1991)..... 8

Jones v. Georgia-Pacific Corp., 355 S.C. 413, 417, 586 S.E. 2d 111, 113 (S.C. 2003)..... 8

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 437, 458 S.E. 2d 76, 80 (S.C. App. 1995) 8, 18

Thompson ex. rel. Harvey v. Cisson Const. Co., 377 S.C. 137, 151, 659 S.E. 2d 171, 178 (S.C. App. 2008)..... 8

Statutes

S. C. Code Ann. §1-23-380 8

QUESTIONS PRESENTED FOR REVIEW

- I. Do Petitioners identify any “special and important reasons” for this Court to grant their petition?
- II. Did the Court of Appeals improperly weigh evidence, or did it merely recognize there was not substantial evidence to support a finding that Claimant did not injure her lumbar spine in a work injury on June 16, 2007.
- III. Did the Court of Appeals commit reversible error when it determined the Commission’s findings on Claimant’s credibility were irrelevant, or did it correctly recognize that Claimant cannot exaggerate two (2) MRIs’?

STATEMENT OF FACTS

1. First Work Injury August 23, 2003

Respondent (hereinafter “Claimant”) is a police officer who has been medically retired. She had two (2) significant injuries while in the line of duty. On August 23, 2003, she was attempting to arrest a bad guy who was driving a stolen car. The bad guy t-boned Claimant’s squad car at a very high rate of speed, causing serious injury. (R. p. 318 – Photo of Squad Car from 8/23/03 injury.) Claimant filed a workers’ compensation claim, and it was determined that she sustained *17.5% disability to her back*. (R. pp. 314 and 316 – Decision and Order dated 1/11/06 in WCC File No. 0311607). It was further determined that she “has back pain on a daily basis in both the upper and lower portions..., “she must take pain medication...”, and “she cannot perform the duties of her position as well as she could before the accident.”...(R. p. 314) Notably absent from the order is any mention of radiculopathy-pain in the buttocks and legs. As will be discussed later, Claimant was treated for pain management until the time of a second work injury by Kevin Kopera, MD. As will also be discussed later, it is significant that Claimant’s low back pain from the first work injury was documented repeatedly by her treating

physicians as “just persistent, boring lumbar pain” and/or “chronic myofascial pain” that did not involve any radiculopathy.

A. Second Work Injury June 16, 2007.

On June 16, 2007, Claimant was again attempting to arrest a bad guy. She was partially inside the bad guy’s vehicle while trying to wrestle her out. The bad guy drove off. Claimant was dragged forward while in a twisted or torqued position, thrown from the bad guy’s vehicle, and fell against a curb (R. p. 100, line 19 – p. 102, line 2). She felt “a shock go up both sides of [her] neck all the way up to [her] head.” (R. p. 101, lines 24-25). She “also felt a shock in [her] low back.” (R. p. 102, line 1). Claimant had the next day off but was unable to come into work the day after that.

B. Significant Delays/Refusals to Authorize Treatment

At the time of the second injury, Kevin Kopera, MD had been providing Claimant with pain management for her low back resulting from the first work injury, but he was closing his practice. On August 2, 2007, Employer/Carrier authorized Claimant to see John Satterthwaite, MD only “for evaluation and treatment of her lower back for pain management.” (R. p. 322). Claimant was unable to get an appointment with Dr. Satterthwaite’s practice until August 28, 2007 (R. p. 206). For the first time, she described her pain as “electrical/shooting”. Even after referring Claimant to Dr. Satterthwaite, Employer/Carrier refused for many months to authorize any treatment for Claimant’s neck and refused and still refuses to this day to authorize a referral to an orthopedic or neurosurgeon for a surgical evaluation of her low back.

As for the neck, in September 2007 Dr. Satterthwaite was still waiting on the “outcome of negotiations...before further evaluation of the neck” (R. p. 200). In a letter to Dr.

Satterthwaite dated October 12, 2007, Employer/Carrier acknowledged Claimant's neck pain and her contention that it was a result of the second work injury (R. p. 323). However, Employer/Carrier still refused to authorize any treatment for Claimant's neck. Employer/Carrier explicitly instructed Dr. Satterthwaite in a letter dated December 7, 2007: "We have not authorized any treatment for her neck, and we will not be covering treatment for her neck." (R. p. 324). In February 2008, Dr. Satterthwaite reported: "[U]ntil we receive written approval we cannot treat her neck..."(R. p. 186). This position continued until March 13, 2008 (R. p. 328). Thereafter, however, Employer/Carrier would only authorize pain management. Claimant sought a referral to a reputable orthopedic or neurosurgeon for a surgical evaluation, eventually having to file a Form 40 – the equivalent of a motion to compel – and obtaining an Order requiring the referral. On September 19, 2008 she was finally seen by David Mitchell, MD, an orthopedic who ordered an MRI of the cervical spine that revealed C5-6 disc protrusion (R. p. 223). She was then referred to Michael Bucci, MD, a neurosurgeon who performed a C5-6 fusion in October 2008 – 1 year and 4 months after the second work injury.

As for the low back, Claimant began for the first time to experience radiculopathy and was specifically diagnosed with lumbar radiculopathy. On December 13, 2007, Dr. Satterthwaite reported Claimant was "noting back pain with RLE paresthesia" and believed she needed a new MRI, which he ordered. (R. p. 193). The MRI showed "L5-S1 disc protrusion", and based on "L5-S1 disc protrusion with back and leg pain", Dr. Satterthwaite began administering epidural steroid injections to Claimant's lumbar spine area. (R. p. 188). Dr. Satterthwaite also attempted to refer Claimant to Steadman Hawkins – an orthopedic practice. (R. p. 185) Employer/Carrier would not authorize the referral. Claimant's counsel wrote Employer/Carrier's counsel three times requesting a referral (R. pp. 325-327). Claimant still has not received a referral for an

orthopedic or neurosurgeon to look at her low back, despite another request by Dr. Satterthwaite in his Physician's Statement as late as July 2009 (R. p. 150) and a request by Claimant in her Form 50 (R. p. 32).

C. Attempts to Work

Upon returning to work,¹ Claimant had difficulty performing her duties, which required her to wear approximately thirty (30) pounds of equipment (R. p. 98, lines 4-13) and run, jump, bend, stoop, get on the knees, lift adult humans and get in and out of a squad car (R. p. 97, line 9 – p. 98, line 3). In the months following this injury, she began missing work. (R. p. 102, lines 6-19) From June 2007 to April 2008, she went from full duty to light duty to being unable to work at all (R. p. 103, lines 7-10). After all, she was working with two injured and untreated discs (C5-6 and L5-S1).

Claimant loved being a police officer. Despite her untreated injured discs, she and Dr. Satterthwaite attempted to keep her working as a police officer. These efforts were addressed in treatment notes. Dr. Satterthwaite noted on October 18, 2007 that “she is a dedicated officer and wishes to continue working in law enforcement” and that “she doesn't want significant restrictions that would place her at a desk job or remove her from her job completely.” (R. p. 197) However, because of the difficulty Claimant was having on the street, she “applied for a teaching position, which would not require her to wear the vest and belt and allow her to change positions frequently from standing to sitting.” (R. p. 196) Only within this context did Dr.

¹ The fact that Claimant struggled to work as a street cop for ten (10) months with two (2) untreated disc injuries, in addition to working for several years after her first injury while requiring ongoing pain management, argues against the Single Commissioner's finding that she is “someone who simply does not wish to work...” (R. p.12, paragraph 22).

Satterthwaite note that Claimant “is not interested in a desk job...”² (R. p. 196) Now that Claimant is medically retired, she “would rather be working. I enjoyed my job. I miss it...even the hard days were better than this.” (R. p. 105, line 24 – p. 106, line 1)

D. Claimant’s Medical Retirement

As noted previously, Claimant was eventually unable to work as a police officer. In March 2008, she applied for medical retirement. The SC Retirement System approved her application, and Claimant became medically retired on April 17, 2008 (R. pp. 230-231).

E. Claimant’s Impairment

Claimant’s *authorized treating physicians* assigned her the following impairments as a result of the second work injury:

a. Neck

- 28% whole person based on cervical fusion C5-6 per Michael Bucci, MD., neurosurgeon (R. p. 224)
- “25% impairment to the whole person, which corresponds to 72% impairment of the cervical spine” per John Satterthwaite, MD (R. p. 161)

b. Low Back

- “12% impairment to the whole person, which corresponds to a 16% impairment to the lumbar spine...” per John Satterthwaite, MD (R. p. 161)

² The Single Commissioner found these words – “not interested in a desk job”- are evidence that Claimant does not want to work. In full and proper context, these words simply reveal Claimant’s desire to remain a street cop. (R. p. 10, paragraph 14)

F. Claimant's Hobbies/Activities

Despite her impairments and restrictions, Claimant has attempted to remain active within her limitations. She enjoys gardening and yard work, though she has to take breaks. She "can't do certain things for...any period of time, especially repetitive motions." (R. p. 110, lines 9-10) She might be able to mow her lawn if she takes breaks, but she cannot rake or sweep. (R. p. 110, lines 16-17). She does "very limited" housework. To "remain active within her limitations", Dr. Satterthwaite "strongly encouraged" Claimant "to join a health club" and "do some exercising". (R. p. 159) Claimant followed Dr. Satterthwaite's recommendation, and as of her hearing had gone to the health club about ten (10) times over a two or three month period. (R. p. 126, lines 1-11). She exercises within her limitations. (R. p. 126, lines 18-20) (Q: "You do exercises and do things that you are able to do?" A: "That I am able to do. Yes.")

Claimant's parents have a boat, and she loved to be on the lake. (R. p. 110, lines 21-24) Though she didn't go out on the boat summer 2008, she went out twice during summer 2009. (R. p. 111, lines 1-3; p. 115, lines 21-22) Her parents live on the lake in Columbia and keep the boat there, and both times she went out on the lake, she was at her parents' house in Columbia (R. p. 116, lines 9-20). Accordingly, those two times neither she nor anyone else had to hook the boat up and tow it. (R. p. 116, lines 9-20) She can only go out when the water is calm, and she tries to stay close to coves. (R. p. 111, lines 6-8) One of the times she went out summer 2009, she "had to go back in" because "it was too choppy." (R. p. 111, lines 9-12)

G. The "Boat Cover Incident"

After reaching MMI per Dr. Bucci and receiving an impairment rating from him on the neck (R. p. 224) and after reaching MMI per Dr. Satterthwaite and receiving impairment ratings

from him on the neck and lumbar spine (R. pp. 158, 161) and after reaching MMI per Dr. David Tollison, a psychiatrist, and receiving restrictions from him (R. pp. 213-219), the “boat cover incident” occurred. On Saturday, July 18, 2009, Claimant towed her parents’ boat from Columbia to Greenville (R. p. 116, lines 1-8, 21). Her “dad’s friend hooked it up for [her].” (R. p. 116, line 4). While the boat was being towed, the boat cover blew off. Claimant’s friend lifted the boat cover and leaned it against the truck, and together they put it back on the boat. (R. p. 119, lines 1-17). Claimant never put the boat in the water. (R. p. 125, lines 7-9). On Tuesday, July 21, 2009, Claimant twisted her back while watering flowers. (R. p. 121, lines 2-5; p. 124, lines 19-21). On Thursday, July 23, 2009, Claimant was in severe pain and reported the pain to Dr. Satterthwaite’s nurse practitioner. The “boat cover incident” came up in conversation, because Claimant was talking about her desire to go boating and lamented the fact that her pain would prevent her from using the boat after she’d towed it from Columbia (R. p. 121, line 7 – p. 125, line 9) While not specifically stating Claimant’s pain was aggravated by the boat cover incident, the note mentions the incident. Claimant testified that, while it is true she aggravated her back pain, it was not the result of the “boat cover incident”, which she did not deny, but rather the “flower watering incident.” (R. p. 121, line 2 – p. 125, line 9) After the hearing, it became apparent the boat cover incident played a significant role in the Single Commissioner’s decision that Claimant is not credible and that the incident was an intervening cause of Claimant’s increased low back pain.

STANDARD OF REVIEW

The Court of Appeals should have reversed or modified the Commission’s decision if it was affected by an error of law or was clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. *Fishburne v. ATI Systems Intern.*, 384 S.C. 76, 84, 681

S.E. 2d 595, 599-600 (S.C. App. 2009) (citing S. C. Code Ann. §1-23-380). “Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action.” *Thompson ex. rel. Harvey v. Cisson Const. Co.*, 377 S.C. 137, 151, 659 S.E. 2d 171, 178 (S.C. App. 2008); and *Jones v. Georgia-Pacific Corp.*, 355 S.C. 413, 417, 586 S.E. 2d 111, 113 (S.C. 2003). “When the evidence is susceptible of but one reasonable inference, the question becomes a matter of law.” *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 437, 458 S.E. 2d 76, 80 (S.C. App. 1995). Applying these principles to this case and particularly to the first argument, where there is a conflict in medical evidence, the findings of fact of the Commission are conclusive. *Id.* at 435, 79, citing *Hoxit v. Michelin Tire Corp.*, 304 SC 461, 405 S.E. 2d 407 (1991). However, when the only medical evidence before the Commission demonstrates that an injury occurred as a result of an accident, the existence of the injury and causation become matters of law. *Mullinax*, 318 S.C. at 443, 458 S.E. 2d at 83.

ARGUMENTS

I. Petitioners did not identify any “special and important reasons” for this Court to grant their petition.

There is nothing unique about this case, other than the fact that the Court of Appeals found it “particularly disturbing” that the Single Commissioner disregarded explicit opinions of treating physicians and included her own medical opinion in the initial Order. Otherwise, the Court of Appeals merely determined there was not substantial evidence to support a finding that Claimant did not injure her lumbar spine in a work accident on June 16, 2007.

II. The Court of Appeals did not improperly weigh evidence; rather, it merely recognized there was not substantial evidence to support a finding that Claimant did not injure her lumbar spine in a work accident on June 16, 2007.

The Single Commissioner, whose findings were adopted by the Commission, failed to compare Claimant's symptoms after her August 23, 2003 work injury with the injury in issue; undertook her own comparison of Claimant's May 11, 2004 MRI with her January 7, 2007 MRI that she is not qualified to undertake and that is inconsistent with the opinions of all treating physicians and the disability examiner for the SC Retirement System; and appears to have ignored the explicit opinion of Claimant's treating physician, Dr. Satterthwaite, on the issue of injury to Claimant's low back, arriving at her interpretation of his treatment notes that is inconsistent with his own interpretation.

A. Comparison of Claimant's Symptoms

1. After August 23, 2003 Injury – “Just persistent boring lumbar pain” and “normal” MRI.

After Claimant's August 23, 2003 work injury, she was treated by Wes Merriwether, MD. With regard to her condition, he reported the following:

- “Low back pain...No radicular complaints.” (R. p. 302, 9/10/03 note).
- “...has just had persistent back pain...She does not notice any radicular pain...**just persistent boring lumbar pain.**” (R. p. 298, 5/05/04 note)

After treating Claimant for many months, Dr. Merriwether referred Claimant to Kevin Kopera, MD for pain management. With regard to her symptoms, Dr. Kopera reported the following:

- “She denies symptoms in either lower extremity, including denying any weakness or numbness...MRI imaging was obtained of the lumbar spine on 5/11/2004...I would consider it normal.” (R. p. 141, 6/21/04 note)

Dr. Kopera continued to treat Claimant over the next two years before closing his practice, and his reports reflect that Claimant’s symptoms were essentially unchanged. Dr. Kopera continued to report Claimant’s condition as “chronic low back pain” and “myofascial pain.”

- 6/21/2004

“...continuous low back pain...She denies symptoms in either lower extremity, including denying any weakness or numbness.” (R. p. 141, 6/21/2004 note by Kevin Kopera, MD)

- 8/19/2004

“Ms. Burnette continues to focus on low back pain and is not describing any radicular symptoms.” (R. p. 140, 8/19/2004 note by Kevin Kopera, MD)

- 12/28/2004

“Her strength and sensation are grossly intact in the lower extremities with no obvious neurological deficits.” (R. p. 139, 12/28/2004 note by Kevin Kopera, MD)

- 3/28/2005

“...chronic low back pain most consistent with myofascial pain.” (R. p. 138, 3/28/2005 note by Kevin Kopera, MD)

- 6/28/2005

“...continued myofascial pain in the lumbar area...” (R. p. 137, 6/28/2005 note by Kevin Kopera, MD)

- 10/11/2005

“...myofascial pain...primarily lumbar region.” (R. p. 135, 10/11/2005 note by Kevin Kopera, MD)

- 1/12/2006

“She denies any symptoms in either upper or lower extremities.” (R. p. 288, 1/12/2006 note by Kevin Kopera, MD)

- 5/31/2006

“Chronic thoracic and lumbar pain most consistent with myofascial pain.” (R. p. 291, 5/31/2006 note by Kevin Kopera, MD)

- 6/29/2006

“Myofascial pain...most prominent in the thoracic and lumbar region.” (R. p. 292, 6/29/2006 note by Kevin Kopera, MD)

“...her prior (5/11/2004) **MRI** of the lumbar spine was **essentially normal**...” (R. p. 292, 6/29/2006 note by Kevin Kopera, MD)

Claimant’s testimony at the hearing was consistent with the symptoms she reported to Drs. Merriwether and Kopera after her first work injury but before the second work injury.

Q. Did you ever have pain in your buttocks and in your legs as a result of the first accident?

A. No. I had – the pain then was in the immediate area. It didn’t radiate like it does now.

Q. Did you make any claim for radiculopathy or pain radiating down into your legs as a result of that (8/23/03) accident?

A. No.

(R. p. 96, lines 1-9).

...

Q. Try to differentiate for the Commissioner what's different about your back now than it was after the August 23, 2003 injury?

A. ...I had low back pain and some in the middle, the thoracic area. Now it's in my entire back and neck. It starts from the neck and goes down to my low back, the buttocks area. The pain also at times, it does radiate down a nerve of my leg.

(R. p. 103, line 18 – p. 104, line 3).

2. After The Second Work Injury - Radiculopathy.

After the second work injury and as noted above, Claimant began having radicular pain into the buttocks and legs. (R. p. 96, lines 2-5; p. 103, line 17- p. 104, line 17). Because Dr. Kopera had closed his practice, Employer/Carrier eventually authorized her to be treated by Dr. Satterthwaite. Dr. Satterthwaite has stated: "Ms. Burnette had been in an accident on June 16, 2007 and complained of increased lower back pain and radiculopathy symptoms." (R. p. 150) From the point he began seeing her, Dr. Satterthwaite reported Claimant's condition to include radiculopathy – pain in the buttocks and legs.

- 8/28/2007

"Description of Pain:...Electrical/Shooting..." (R. p. 206, 8/28/07, note by Justin Hutcheson, MD)

- 12/13/2007

"RLE (right lower extremity) laterally above knee, medially below knee..." (R. p. 193, 12/13/2007 note by John Satterthwaite, MD)

"Noting back pain with RLE (right lower extremity) parasthesis – needs new lumbar MRI – ordered." (R. p. 193, 12/13/2007 note by John Satterthwaite, MD)

- 1/07/2008 MRI

- 1/10/2008

“LUMBAR RADICULOPATHY... reviewed lumbar MRI – HNP (herniated nucleus pulposis) L5-S1 discussed ESI (epidural steroid injection) L5-S1...” (R. p. 190, 1/10/2008 note by John Satterthwaite, MD)

- 1/30/2008

“L5-S1 disc protrusion with back and leg pain.” (R. p. 188, 1/30/2008 note by John Satterthwaite, MD)

- 2/20/2008

“LUMBAR RADICULOPATHY.” (R. p. 187, 2/20/2008 note by John Satterthwaite, MD)

- 3/13/2008

“LUMBAR RADICULOPATHY as unchanged...ESI (epidural steroid injection) has worn off – did help with back and leg pain – will schedule for another one L5-S1. Reviewed MRI – does have HNP (herniated nucleus pulposis) L5-S1. Would like to see surgeon. Will refer to Steadman Hawkins for evaluation.” (R. p. 185, 3/13/2008 note by John Satterthwaite, MD)

- 3/26/2008

“L5-S1 disc protrusion with radiculopathy.” (R. p. 183, 3/26/08 note by John Satterthwaite, MD)

- 4/10/2008

“LUMBAR RADICULOPATHY” (R. p. 182, 4/10/2008 note by John Satterthwaite, MD)

- 4/14/2008

“A new MRI of the lumbar spine ordered 12/2007 shows a disk herniation at L5-S1...Her limitations preclude her returning to this job and disability is recommended as of 3/13/2008.” (R. p. 231, 4/14/2008 note by Michael Sheehan, disability examiner with SC Retirement Center)

- 5/19/2008

“L5-S1 disc protrusion with radiculopathy...return of back pain...repeat ESI (epidural steroid injection)” (R. p. 180, 5/19/08 note by John Satterthwaite, MD)

- 6/16/2008

“LUMBAR RADICULOPATHY.” (R. p. 179, 6/16/2008 note by John Satterthwaite, MD)

- 7/17/2008

“L5-S1 disc protrusion with radiculopathy...increasing back and leg pain...returns for repeat ESI (epidural steroid injection)” (R. p. 177, 7/17/2008 note by John Satterthwaite, MD)

- 8/15/2008

“LUMBAR RADICULOPATHY as unchanged” (R. p. 176, 8/15/2008 note by John Satterthwaite, MD)

- 9/04/2008

“Pain primarily in the back and hips. Minimal leg pain...DISPLACEMENT – LUMBAR DISC W/O MYELOPATHY” (R. p. 173, 9/04/2008 note by John Satterthwaite, MD)

“LUMBAR RADICULOPATHY” (R. p. 174, 9/04/2008 note by John Satterthwaite, MD)

- 9/15/2008

“Lumbar HNP (herniated nucleus pulposis)...Increasing back and leg pain.” (R. p. 172, 9/15/2008 note by John Satterthwaite, MD)

- 9/26/2008

“She has an injured disk at L5-S1...” (R. p. 222, 9/26/2008 note by David Mitchell, MD)

- Etcetera with no treatment of L5-S1

- “...Our office ordered a new MRI on 12/13/2007, and the MRI was completed on 1/07/2008. The new MRI showed some central disk protrusion at L5-S1. On 3/13/2008, our office was indicated a referral to Steadman Hawkins for evaluation. To my knowledge, that evaluation has never taken place.”

“I have diagnosed Ms. Burnette with L5-S1 disk protrusion with radiculopathy down into the upper buttocks and legs. I have treated her with a variety of medications and epidural steroid injections. I still believe she should be seen by an orthopaedic surgeon or neurosurgeon to determine whether she is a surgical candidate. It is my opinion to a reasonable degree of medical certainty that her

injury on 6/16/2007 exacerbated a prior lumbar spine injury or caused new injury.” (R. pp. 150-152, 8/17/2009 note by John Satterthwaite, MD)

Claimant has never received a referral to an orthopaedic or a neurosurgeon as referenced in Dr. Satterthwaite’s note of March 13, 2008 (R. p. 185) or his Physician’s Statement of August 17, 2009 (R. p. 150). She continues to this day to have radicular pain in the buttocks and legs.

B. Claimant’s May 11, 2004 MRI Compared to January 7, 2008 MRI

The Single Commissioner actually undertook her own comparison of Claimant’s May 11, 2004 MRI with her January 7, 2008 MRI and relied upon her opinion regarding the results. She found that the January 7, 2008 MRI “shows...no greater pathology of any significance (if any) than the MRI of 2004.” (R. 21, paragraph 18d). Aside from the obvious problem with her qualifications to make and rely upon such a comparison, her opinion is inconsistent with that of the authorized treating physicians and a disability examiner for the SC Retirement System.

1. May 11, 2004 MRI – “Normal”

After Claimant’s August 23, 2003 work injury, she underwent an MRI on May 11, 2004 because of continued low back pain. On May 14, 2004, Dr. Merriwether indicated “The MRI looks pretty good...” (R. p. 295). When Dr. Kopera first saw the MRI on June 21, 2004, he reported: “MRI imaging was obtained of the lumbar spine on 5/11/04...I would consider it to be normal.” (R. p. 141). By June 29, 2006, he declined to offer Claimant injections because she had no disc injury. He stated “...her prior MRI (5/11/04) of the lumbar spine was essentially normal...” (R. p. 292).

2. January 7, 2008 MRI – “L5-S1 Disc Protrusion”, “An Injured Disc at L5-S1” and “Disc Herniation at L5-S1”

After the second work injury, Dr. Satterthwaite ordered an MRI that occurred on January 7, 2008. He and another treating physician and the disability examiner have opined that the second MRI shows a disc herniation at L5-S1. Dr Satterthwaite reported the results: “L5-S1 disc protrusion” (R. p. 188). In a Physician’s Statement, he stated:

“We received an old MRI dated May 11, 2004 showing minimal disc bulge at L4-5 and L5-S1 without stenosis. Ms. Burnette had been in an accident on June 16, 2007 and complained of increased lower back pain and radiculopathy symptoms. Accordingly, our office ordered a new MRI on December 13, 2007 and the MRI was completed on January 7, 2008. The new MRI showed some central disc protrusion at L5-S1.” (R. p. 150)

When Claimant was forced to file a Form 40 to obtain an Order requiring referral to an orthopaedic for her neck, she saw Dr. Mitchell. In addition to ordering and reviewing an MRI for Claimant’s neck, he reviewed the January 7, 2008 MRI. He reported that Claimant “has an injured disc at L5-S1”. (R. p. 222).

When Claimant applied for medical retirement, her records were reviewed by a disability examiner. In determining that she should be medically retired, the disability examiner reviewed the January 7, 2008 MRI. He reported: “A new MRI of the lumbar spine ordered 12/7 shows a disc herniation at L5-S1 “ (R. pp. 230-231).

3. Explicit Opinion of Treating Physician

The Single Commissioner also appears to have ignored the explicit opinion of Claimant’s treating physician, Dr. Satterthwaite, on the issue of injury to Claimant’s low back. He states:

“I have diagnosed Ms. Burnette with L5-S1 disc protrusion with radiculopathy down into the upper buttocks and legs...It is my opinion to a reasonable degree of medical certainty that her injury of June 16, 2007 exacerbated a prior lumbar spine injury or caused new injury.” (R. p. 150)

In finding to the contrary, the Single Commissioner misinterpreted two of Dr. Satterthwaite’s treatment notes in a manner inconsistent with his own explicit opinion.³ To support the conclusion that Claimant had radiculopathy before the second work injury, the Single Commissioner misinterpreted language in a July 1, 2009 note that says Claimant “has ongoing back and left leg pain from her previous injury...” (R. p. 159). Of course, as of July 2009, both back injuries were “previous.” But after comparing Claimant’s medical records following the August 23, 2003 injury with those following the second work injury, Claimant’s testimony, and Dr. Satterthwaite’s explicit opinion, the only reasonable interpretation of the above is that Dr. Satterthwaite was referring to radiculopathy following the second work injury. The Single Commissioner also misinterpreted language in a December 13, 2007 note by running the end of one line (which significantly does not extend to the right hand margin) into the beginning of the line below it to conclude that at the time of the May 2004 MRI Claimant was having right lower extremity paresthesia. The note, appearing exactly as below, states:

“reviewed and discussed last lumbar MRI was 5/2004 and had disc bulges at L4-L5 and L5-S1 at that time noting back pain with RLE paresthesia – needs new lumbar MRI – ordered.” (R. p. 152 and 195)

In the Order, the Single Commissioner wrote “at that time [referring to a May 2004 MRI] noting RLE parasthesia.” (R. p. 21, paragraph 18b) The words in brackets are the Single

³ These treatment notes suffer from a lack of punctuation and capitalization, but they are more reliably interpreted by their author than by the Commission.

Commissioner's. The interpretation that the "RLE parasthesia" was noted at the time of the May 11, 2004 MRI is not Dr. Satterthwaite's interpretation – it is the Single Commissioner's *misinterpretation*. It is significant that Dr. Satterthwaite attached this *same* note to his Physician's Statement as support for his opinion that Claimant injured L5-S1 in this accident and that the radiculopathy resulted from this accident (R. pp. 150-152). The first paragraph of his Physician's Statement puts this entirely in context. Combined with Dr. Satterthwaite's explicit opinion, the only reasonable interpretation of the note above (and clearly Dr. Satterthwaite's interpretation, the lack of punctuation and capitalization notwithstanding) is that Claimant had disc bulges "at that time", i.e. the May 11, 2004 MRI, but that she was currently, i.e. as of December 13, 2007, "noting back pain with RLE paresthesia." That is why Dr. Satterthwaite believed she "needs new lumbar MRI", and that is why he proceeded to order one after this injury.

Here, as in *Mullinax*, the only medical evidence before the Single Commissioner demonstrated that an injury occurred as a result of the second work injury, namely injury at L5-S1. Accordingly, the Court of Appeals determined properly as a matter of law that Claimant sustained injury to her low back and is entitled to treatment. See *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E. 2d at 83.

II. The Commissioner's finding on Claimant's credibility were irrelevant; Claimant cannot exaggerate two (2) MRIs.

Claimant is a police officer who has been seriously injured in two work related accidents. The evidence is overwhelming that she suffered a disc injury at C5-6 and L5-S1, and it is undisputed that she suffers from depression and anxiety. Claimant worked for several years while in pain management following her August 23, 2003 injury, and she attempted to work for ten (10) months while being denied treatment for two injured discs (C5-6 and L5-S1). Claimant

testified consistent with her injuries, impairment ratings, and restrictions, as well as the opinions of her treating physicians with respect to her injuries, impairments, and restrictions. **Not one treating physician has so much as hinted that Claimant is malingering or that her complaints are inconsistent with her injuries.** She has not attempted to portray herself as suffering from “complete physical helplessness.” She volunteered information about her activities on direct examination. She didn’t try to hide them.

Accordingly, her credibility should not be questioned, particularly when the centerpiece of the credibility issue is an irrelevant and immaterial incident, i.e. the “boat cover incident”. This Court can review the hearing transcript R. pp. 115-125 – ten (10) pages dedicated to the “boat cover incident”- and recognize that there was confusion on the part of Employer/Carrier’s counsel as to the details of the incident he was questioning Claimant about. That and the nature of cross examination is what accounts for the extended and confusing exchange. The facts regarding the “boat cover incident” are outlined on page 10 of this brief. If this panel reads that section first, they will completely understand why it took ten pages of transcript to attempt to unwind this issue.

When Claimant attempted to submit additional records (Motions to Admit - R. pp. 37-50; pp. 54-61) that completely support her claim that the “flower watering incident” caused aggravation to her back in July 2009, namely Dr. Tollison’s note dated August 4, 2009, Employer/Carrier’s counsel opposed consideration of those records. (Return to Motions to Admit - R. pp. 51-53; pp. 63-65) (Orders Denying – R. pp. 15-17) But even without those records, it is a stretch to conclude that Dr. Satterthwaite’s record does any more than imply the “boat cover incident” caused aggravation to Claimant’s back rather than the “flower watering incident.” Further, it is a stretch to conclude Claimant is not credible because of the confusion. She openly

stated three (3) different times that she went out on her parents' boat twice in the summer of 2009. She had nothing to hide.

The "boat cover issue" has become the reddest of red herrings. It formed the basis for harsh credibility findings by the Single Commissioner. Petitioners have attempted to shade all factual findings with these credibility findings. The problem is that the most significant findings relating to Claimant's low back are based upon objective symptoms that are supported by two (2) MRIs. Assuming for the sake of argument that Claimant is a bald faced liar, she cannot exaggerate two (2) MRIs.

To the extent that it constituted impeachment, it should not have, because it involved collateral matter. The general rule is that it is improper to allow impeachment on collateral matter. *Aakjer v. Spagne*, 291 SC 165, 352 SE 2nd 503 (Ct. App. 1987). The "boat cover incident" was collateral and thus irrelevant for the following reasons. No treating physician took it into account in rendering opinions on impairment or restrictions. Whatever the cause of the aggravation, the point is that it occurred after Claimant's injury and after all treating physicians had rendered their opinions on impairment. There is no evidence that Claimant or the treating physicians relied upon that incident to contend she is impaired and restricted and unable to work. For the same reasons, the low back aggravation incident, regardless of the cause, cannot be an "unrelated, intervening" incident that caused Claimant's condition. (The Single Commissioner found that "if Claimant aggravated her low back condition in the accident in issue, the aggravation was temporary, and her condition returned to baseline or is the result of ... the unrelated, intervening boat cover incident." (R. p. 22, paragraph 19) Here again, Claimant and Dr. Satterthwaite based Claimant's impairments and restrictions on radiculopathy, which prompted an MRI showing an injured disc at L5-S1, all of which preceded the "boat cover

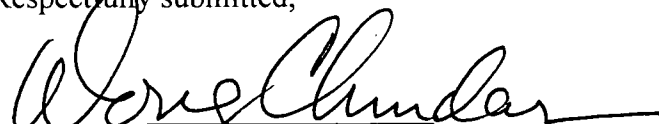
incident.” (R. pp. 150-152) It is clear that the injury to Claimant’s low back was not a “temporary” aggravation. The only temporary aggravation occurred in July 2009. Regardless of the cause, by definition the temporary aggravation that occurred in July of 2009 cannot have been “intervening”.

CONCLUSIONS

Based on the foregoing, Claimant asks that the Supreme Court deny the Petition for Writ of Certiorari.

Date: 4/25/13

Respectfully submitted,



Douglas A. Churdar, Esq.
SC Bar No. 11971
Douglas A. Churdar, P.C.
712 East Washington Street
Greenville, SC 29601
Phone (864) 233-0203
Attorney for Respondent

RECEIVED

APR 30 2013

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE SC COURT OF APPEALS AND
GREENVILLE COUNTY COURT OF COMMON PLEAS

CASE NO: 2013-000403

KELLIE N. BURNETTE.....RESPONDENT,

v.

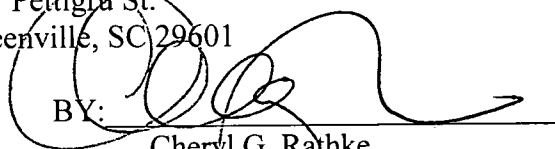
CITY OF GREENVILLE.....PETITIONERS.
AND HEWITT COLEMAN & ASSOCIATES

CERTIFICATE OF SERVICE

I, the undersigned legal assistant to Douglas A. Churdar, Attorney for the Respondent, hereby certify that on April 26, 2013, Respondent served Respondent's Return to Petition for Writ of Certiorari upon the Petitioners by depositing the same in the United States mail, first-class postage prepaid, to the following addressee:

Michael A. Farry, Esq.
Horton, Drawdy, Ward
Mullinax & Farry, PA
307 Pettigru St.
Greenville, SC 29601

BY:



Cheryl G. Rathke
Paralegal to Douglas A. Churdar
712 East Washington Street
Greenville, SC 29601