IN THE SUPREME COURT OF MISSISSIPPI

NO. 2019-CT-00012-SCT

SHAUN SEALS

v.

PEARL RIVER RESORT AND CASINO AND PEARL RIVER RESORT

ON WRIT OF CERTIORARI

DATE OF JUDGMENT:	12/06/2018
TRIAL COURT ATTORNEYS:	BENJAMIN SETH THOMPSON DARRYL MOSES GIBBS ROGEN K. CHHABRA AMY K. TAYLOR
ATTORNEYS FOR APPELLANT:	BENJAMIN SETH THOMPSON JOSEPH R. FRANKS
ATTORNEY FOR APPELLEES:	AMY K. TAYLOR
NATURE OF THE CASE:	CIVIL - WORKERS' COMPENSATION
DISPOSITION:	THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED IN PART AND REVERSED IN PART. THE DECISION OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION IS REINSTATED AND AFFIRMED - 09/03/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

RANDOLPH, CHIEF JUSTICE, FOR THE COURT:

¶1. We accepted this case on certiorari from the Court of Appeals. ***Seals v. Pearl River Resort***, No. 2019-WC-00012-COA, 2019 WL 6711386 (Miss. Ct. App. 2019). The Court of Appeals decision was split with five judges joining the majority in full, one joining in part and in the result, and four concurring in part and dissenting in part. Both the majority and the

opinion concurring in part and dissenting in part affirmed the Workers' Compensation Commission's decision as to the date of Seals's maximum medical improvement. We agree and adopt the well-reasoned analysis of the opinion concerning maximum medical improvement. We are, however, constrained to reverse the Court of Appeals' majority regarding loss of wage-earning capacity. Sufficient evidence supported the Commission's decision that Seals had not suffered loss of wage-earning capacity. We reinstate the Commission's decision *in toto*.

FACTS AND PROCEDURAL HISTORY

¶2. The facts of this case were well summarized by the Court of Appeals. We add only the following: Donna Brolick, Pearl River Resort's director of employment compliance, was called as a witness at the hearing before the administrative judge (AJ). Brolick testified that she was previously vice president of human resources at Pearl River Resort at the time Seals's position was phased out and he was let go in January of 2013. Brolick further testified that in 2012 the resort changed its management. Multiple upper-level positions were eliminated or consolidated. Seals's position as director of transportation was one of several positions that were eliminated.

¶3. On appeal from the AJ, the Commission reversed the AJ's order. The Commission found that Seals had reached maximum medical improvement on November 13, 2015, in accord with Dr. Bruce Hirshman's opinion. The Commission also found that Seals failed to prove any permanent disability or loss of wage-earning capacity for two reasons. First, it

found that both Dr. Hirshman and Dr. Bruce Senter released Seals to return to work without restriction. Second, the Commission found that Seals was let go for unrelated economic reasons, noting his receipt of severance pay and other benefits as well as the testimony and evidence adduced by the Resort.

¶4. Seals appealed the decision of the Commission, and the case was assigned to the Court of Appeals. The court held that the Commission was correct in its assessment of the date of maximum medical improvement but that the Commission erred by finding Seals failed to prove any loss of wage-earning capacity. The Court of Appeals reversed and remanded the decision of the Commission and directed the Commission to calculate Seals's loss of wage-earning capacity and to award corresponding compensation. The Resort petitioned this Court for a writ of certiorari, which was granted.

STANDARD OF REVIEW

¶5. "In workers' compensation cases, 'this Court reviews the decision of the Commission, not that of the [AJ], the circuit court, or the Court of Appeals.'" ***Jones v. Miss. Baptist Health Sys., Inc.***, 294 So. 3d 76, 80 (Miss. 2020) (internal quotation marks omitted) (quoting ***Sheffield v. S.J. Louis Constr. Inc.***, 285 So. 3d 614, 618 (Miss. 2019)). The Commission's decision will be affirmed unless it "lacks the support of substantial evidence, is arbitrary or capricious, is beyond the Commission's scope or its power, or violates constitutional or statutory rights." ***Sheffield***, 285 So. 3d at 618 (citing ***Short v. Wilson Meat House LLC***, 36 So. 3d 1247, 1250 (Miss. 2010)). For a decision to be supported by substantial evidence, the

underlying evidence must provide "a substantial basis of fact from which the fact in issue can be reasonably inferred." ***Id.*** (internal quotation mark omitted) (quoting ***Wilson Meat House LLC***, 36 So. 3d at 1251). Therefore, if a decision is supported by substantial evidence, it will almost necessarily not be arbitrary or capricious. ***Id.***[1]

ANALYSIS

¶6. The Commission made two findings: (1) that Seals had reached maximum medical improvement and (2) that Seals had suffered no loss of wage-earning capacity due to a work-related accident. Both were supported by substantial evidence.

¶7. We agree with the Court of Appeals that the Commission's finding on maximum medical improvement was supported by substantial evidence. The Commission relied on the evaluations of six doctors. Five said that Seals was not a candidate for surgery. The last physician to regularly treat Seals, Dr. Hirshman, treated Seals through a course of anesthesiology/pain management and opined that there was nothing further he could do to help Seals. He set the date for maximum medical improvement as November 13, 2015. The Commission noted that on that date, Dr. Hirshman had reported significant improvement with continuing residual low-back pain at the end of a day of manual labor. Dr. Hirshman noted that this residual pain could be controlled by continuing to follow a home-exercise plan.

¶8. Since Seals's accident, multiple physicians agreed that Seals was not a candidate for

[1] There are no allegations that the Commission violated Seals's statutory or constitutional rights or exceeded its power, so we limit our review to whether substantial evidence support the Commission's decision.

surgery and that his pain was best managed through other means. Dr. Hirshman opined that Seals had reached maximum medical improvement through physical therapy and other anesthesiological pain-management techniques. As the Court of Appeals found, multiple medical evaluations and opinions amply support the Commission's finding that Seals had reached maximum medical improvement.

¶9. Next, the Commission found that Seals had suffered no loss to his wage-earning capacity as a result of the accident of April 12, 2012, instead finding that Seals's loss of employment was for unrelated economic reasons. The Commission relied on opinions by Drs. Hirshman and Senter that Seals was fit to work with no restrictions. These opinions contrast with an opinion offered by Dr. Katz, who saw Seals one time at the request of Seals's attorney and who never treated Seals. The Commission is permitted to weigh and judge evidence as the ultimate fact-finder. ***Jones***, 294 So. 3d at 80 (quoting ***Logan v. Klaussner Furniture Corp.***, 238 So. 3d 1134, 1138 (Miss. 2018)). The Commission was well within its authority when it accepted the opinions of Drs. Hirshman and Senter over Dr. Katz's opinion. Evidence and testimony was uncontested that the Resort underwent a change in management and that Seals's position was eliminated. Seals remained employed in the same position for nine months after the accident.

¶10. These findings defeat his claim for loss of wage-earning capacity. *See* ***Ga. Pac. Corp. v. Taplin***, 586 So. 2d 823, 828 (Miss. 1991). The medical evaluations and opinions coupled with the evidence related to the Resort's operations provide substantial evidence to support

the Commission's decision.

CONCLUSION

¶11. Because substantial evidence existed in the record to support the decision of the Commission, we affirm in part and reverse in part the judgment of the Court of Appeals, and we reinstate and affirm the decision of the Commission.

¶12. **THE JUDGMENT OF THE COURT OF APPEALS IS AFFIRMED IN PART AND REVERSED IN PART. THE DECISION OF THE MISSISSIPPI WORKERS' COMPENSATION COMMISSION IS REINSTATED AND AFFIRMED.**

COLEMAN, MAXWELL, BEAM, CHAMBERLIN, ISHEE AND GRIFFIS, JJ., CONCUR. KITCHENS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J.

KITCHENS, PRESIDING JUSTICE, DISSENTING:

¶13. I respectfully dissent. I would hold that the Workers' Compensation Commission lacked the support of substantial evidence in finding that Shawn Seals presented insufficient medical evidence of disability. I would affirm the decision of the Court of Appeals that reversed the Commission's decision and remanded the case to the Commission for a calculation of loss of wage earning capacity and benefits.

¶14. No dispute exists that Shawn Seals sustained a work-related back injury when, as the Court of Appeals put it, "[t]he car he was in was rear-ended so violently the windows exploded." ***Seals v. Pearl River Resort***, No. 2019-WC-00012-COA, 2019 WL 6711386, at *1 (Miss. Ct. App. 2019). Seals consulted several physicians about his back injury. Dr. Bruce Senter, who recommended physical therapy but not surgery, assessed him with a 5 percent

impairment to the body as a whole and released him with no restrictions. In contrast, Dr. Michael Molleston advised that he undergo surgery. Dr. Greg Wood, who examined Seals at the request of the employer, and Dr. Orhan Ilercel, who performed an independent medical evaluation, disagreed with Dr. Molleston's opinion on surgery. Dr. Wood opined that surgery would condemn Seals to a course of multiple procedures in a vain attempt to resolve his pain. Dr. Ilercel's recommendations included an evaluation by a physiatrist. In accordance with the medical recommendations for a nonsurgical approach, Seals undertook a course of physical therapy and pain management. His pain management specialist, Dr. Bruce Hirshman, administered physical therapy, performed nerve blocks, and performed a neurotomy and a rhizotomy.[2] On November 13, 2015, Dr. Hirshman released Seals to return to work with no restrictions from an anesthesiology pain management perspective but noted the likely future need for another rhizotomy.

¶15. At the recommendation of Dr. Ilercel, Seals saw a physiatrist, Dr. Howard Katz, on November 7, 2015, for an independent medical evaluation. Dr. Katz performed a physical evaluation specifically geared to discerning the extent of Seals's functional limitations, if any. Dr. Katz determined that Seals's back injury limited him to light duty or sedentary work and that he could perform some medium level activities. Dr. Katz found that he was "limited to exerting approximately 30 pounds of force occasionally in order to lift, carry, push or pull. He can exert up to 10 pounds of force frequently in order to lift, carry[,] push or pull. He can

[2] Dr. Katz described those procedures as "ha[ving] some nerves burned in his back."

exert a negligible amount of force constantly in order to lift, carry[,] push or pull." Dr. Katz assigned an impairment rating of 2 percent to the body as a whole, which he described as "significant impairment that affects his functional capacity." Vocational rehabilitation expert Bruce Brawner, relying on the restrictions imposed by Dr. Katz, performed a vocational evaluation and found that Seals had lost access to 30 percent of the jobs in the competitive labor market for which he otherwise was qualified.

¶16. The Commission found that Seals had sustained no loss of wage earning capacity, relying on the opinions of Dr. Senter and Dr. Hirshman, both of whom had found that Seals could return to work without restrictions. The Commission found that those physicians' opinions were more probative than the opinion of Dr. Katz because they had treated Seals and because Seals had seen Dr. Katz only once for his evaluation. The majority resolves this case with an easy application of the well-established rule that this Court will affirm the Commission when the expert medical testimony is in conflict. ***Raytheon Aerospace Support Servs. v. Miller***, 861 So. 2d 330, 336 (Miss. 2003). Because the physicians disagreed, the argument goes, we must affirm the Commission.

¶17. I would find that a more nuanced approach is appropriate given the marked differences in the relative strengths of the medical evidence. This Court affirms the Commission's finding that Seals reached maximum medical improvement (MMI) on November 13, 2015. But Dr. Senter did not examine Seals anywhere near the date that he reached MMI. When Seals reached MMI, he had not seen Dr. Senter for more than three

years. After seeing Dr. Senter for the last time on August 20, 2012, Seals consulted with several physicians and underwent multiple treatments including physical therapy, injections, a neurotomy, and a rhizotomy. It cannot be said that Dr. Senter's opinion was particularly probative of Seals's physical condition and limitations considering that he last saw Seals more than three years before he reached MMI and considering Seals's numerous treatments in the interim.

¶18. Nor was Dr. Hirshman's opinion especially probative of Seals's work restrictions. Dr. Hirshman's treatment of Seals was limited to pain management. His opinion was that Seals had no restrictions *from an anesthesiology pain management perspective*. Conversely, Dr. Katz was a specialist in physical medicine whose purpose in seeing Seals was not to treat him but specifically to evaluate his physical capabilities. In the context of medical malpractice litigation, this Court has taken a dim view of medical testimony rendered outside the physician's discipline. In ***Bailey Lumber & Supply Co. v. Robinson***, 98 So. 3d 986, 994 (Miss. 2012), this Court found an internal medicine and pulmonary specialist who had treated hundreds of hip patients over a thirty-year career unqualified to testify about what had caused his patient's need for a hip replacement. The Court found that the testimony was outside the internal medicine doctor's discipline and that the patient's orthopaedic surgeons had provided the only sound medical testimony on causation. ***Id.*** at 996. Although the Mississippi Rules of Evidence do not apply to proceedings before the Commission as they do in a medical malpractice trial, common sense dictates that medical testimony from outside a physician's

practice area must carry less weight than that of a physician who specializes in the pertinent area of medicine. Here, Dr. Hirshman was a pain management specialist who expressly limited his opinion on Seals's restrictions to his anesthesiology pain management perspective. But Dr. Katz specialized in physical medicine and arrived at his opinion after specifically evaluating Seals's physical presentation from a whole body perspective. It cannot be said reasonably that Dr. Katz's opinion carried less weight than Dr. Hirshman's opinion, limited as it was to the area of anesthesiology pain management.

¶19. Because Dr. Senter evaluated Seals for the last time long before Seals reached MMI, because Dr. Hirshman's opinion was limited to the area of anesthesiology pain management, and because Dr. Katz specifically was charged with evaluating Seals's physical capabilities, I would find that the Commission's decision to reject Dr. Katz's opinion was unsupported by substantial evidence. The Commission lacked the support of substantial evidence in determining that Seals had suffered no medical impairment. As found by the Court of Appeals, the Commission erred by rejecting the medical impairment evidence of Dr. Katz and by ignoring the vocational impairment evidence provided by Bruce Brawner. Therefore, I would affirm the decision of the Court of Appeals that reversed the decision of the Commission and remanded this case to the Commission to calculate Seals's loss of wage earning capacity and benefits.

KING, P.J., JOINS THIS OPINION.