

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO: 1103299

DAVID CUTLIP,

CLAIMANT/EMPLOYEE,

vs.

TRUE GROUP D/B/A JSE, LLC,

DEFENDANT/EMPLOYER,

and

ACCIDENT INSURANCE COMPANY, INC.

DEFENDANT/CARRIER.

Appellate Panel Review held in
Columbia, South Carolina on February 19, 2013

Appellate Panel Decision and Order
Filed 4/23, 2013.

APPEARANCES:

Claimant/Appellant represented by Robert D. Dodson, Esquire, of Columbia, South Carolina.

Defendants/Appellants represented by M. Stephen Stublely, Esquire, of Columbia, South Carolina.

RECEIVED

MAY 20 2013

SC Court of Appeals

STATEMENT OF THE CASE

This matter came before the Commission to determine the issues asserted in the parties' Forms 50 and 51. The Claimant asserted injury to the right shoulder, right arm, and right hand. He requested additional medical treatment, temporary total disability benefits dating back to June 1, 2011, and an entitlement to back-owed benefits as a result of receipt of prior payments at a lower compensation rate.

The Defendants admitted that Claimant sustained an injury to the right shoulder and right arm but disputed the alleged right hand injury. Defendants admitted Claimant's entitlement to the compensation related to the period of underpayment. Defendants denied an entitlement to any ongoing temporary total benefits due to Claimant's voluntary resignation and constructive refusal to afford his employer an opportunity to provide employment within his restrictions. Defendants additionally asserted that Claimant was previously non-compliant with medical treatment.

In reaching his Order, the single Commissioner found and ruled as follows:

FINDINGS OF FACT

1. Claimant injured his right shoulder, right arm, and right hand in a compensable injury by accident on April 6, 2011.
2. The Claimant is not at MMI with regard to the right shoulder, right arm, and right hand and is in need of additional medical treatment.
3. The Claimant is entitled to back TTD from June 28, 2012 and continuing in accordance with the Act.
4. As stipulated by the parties, Claimant has an AWW of \$761.46 yielding a CR of \$507.66.
5. For back TTD that was previously paid but was inadvertently underpaid to the Claimant, he is entitled to the difference in what he was paid in TTD and what he should have been paid at the correct compensation rate.

CONCLUSIONS OF LAW

1. The Claimant sustained a compensable injury by accident to his right shoulder, right arm, and right hand. S.C. Code Ann. §42-1-160.
2. The Claimant is not at MMI.
3. Dr. Earl B. McFadden, Jr. with Moore Orthopaedics is appointed as an authorized treating physician. S.C. Code Ann. §42-15-60.
4. No costs, attorney's fees, or fines are imposed. Reg. 67-614

Within the proscribed time period, the Defendants submitted a Form 30 Request for Commission Review challenging the single Commissioner's award of temporary total disability beginning June 28, 2012. The issues on appeal were limited to this issue and any arguments related to medical treatment or other issues contained in the Parties' Briefs are not properly before the Commission and, therefore, not addressed in this decision.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

In the appellate review, the Appellate Panel shall, pursuant to Section 42-17-50 (1985), review the award, weigh the evidence that was presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. Based upon a review of the foregoing, we hereby Affirm in Part and Reverse in Part the Decision and Order of the Single Commissioner and institute the following Order. ~~We Agree with the Defendant's argument and Reverse the single Commissioner's award as it relates to Claimant's entitlement to temporary total disability benefits.~~

FACTS OF THE CASE

Claimant is a 46 year old male with a bachelor's degree and a 16 year history of work as a telecommunications engineer. (Claimant's Depo at 6). During this time, he worked as a channel manager, manager/supervisor, salesman, sales manager, regional sales manager, and communications analyst. During his management experience, he has overseen nearly 100 agents at one time. (Claimant's Depo at 6-7). Claimant then spent approximately 4-5 years self-employed running a remodeling and real estate business. (Claimant's Depo at 9-10).

Claimant began working for Employer as a durability test technician On January 3, 2011. (APA 6 at 31-32). Claimant sustained an admitted injury by accident to the right arm on April 6, 2011 while moving doors. (APA 4 at 22, 25). Claimant presented to Spring Valley Family Practice on April 7, 2011 complaining of pain in the right biceps. After a physical examination, Claimant was diagnosed with a right biceps tear. (APA 4 at 25). He was placed on modified duty and referred for an orthopaedic consultation. (APA 4 at 22).

Claimant next presented to Dr. Michael S. Green of Midlands Orthopaedic on April 14, 2011 where he underwent a right distal biceps tendon reattachment. (APA 1 at 1-2). At his follow up appointment on May 27, 2011, Claimant complained of difficulty regaining range of motion and noted new complaints of right shoulder pain. (APA 1 at 4). Claimant was given right arm lifting restrictions of 5-10 pounds for two weeks, with instructions to increase five pounds every two weeks. (APA 1 at 4).

Employer contacted Claimant on June 7, 2011 to ask him about a possible return to work. Employer noted that they had believed he would be coming back on a few previous occasions and had intentions of moving him from Durability Testing to a position in Performance Testing. (APA 6 at 31). Claimant confirmed at the Hearing that a light duty job was offered to him. (Tr.

At 10). Claimant testified that he believed that the job would entail basically standing around and monitoring a laboratory, but he did not attempt the job because he believed he could not stand for more than 15-20 minutes without aggravating his shoulder. (Tr. at 10).

Claimant informed his Employer that he was resigning effective immediately because he was worried about possibly reinjuring himself and noted that he did not feel like a good fit in the company's work environment. (APA 6 at 31). Claimant noted to Employer that "he's looking for a 'suit-and-tie' job that more closely matches himself and what he wants." (APA 6 at 31). On the date Claimant resigned (June 7, 2011), Employer distributed an email to its employees indicating the same.

Claimant confirmed at the Hearing that he had numerous conversations with Employer where he asked for a little more time before coming back to work and that they accommodated his request to delay a return every time. (Tr. at 12-13). Claimant's testimony shows that he unilaterally resigned his position without ever even attempting light duty work, despite his Employer's continued willingness to work with him to accommodate his light duty restrictions. (Tr. at 12, 13). At the conclusion of Claimant's hearing testimony, the single Commissioner asked him if he ever tried the light duty offered by Employer and Claimant confirmed that he did not. (Tr. at 16).

Teresa Rhodes, owner and managing partner of Employer, testified regarding Claimant's offers to return to work. Ms. Rhodes testified that she personally talked to Claimant once she received return to work information and Claimant informed her that he was going to look for other means of employment and was not interested in returning. (Tr. at 17). Ms. Rhodes confirmed that light duty was available and offered to the Claimant within his restrictions. (Tr. at 17). She also confirmed that seating was available and would have been provided to Claimant

upon request. (Tr. at 18). Unfortunately, rather than ask his Employer for a chair, Claimant chose to decline light duty work and resigned his employment. Ms. Rhodes testified that light duty still would be available for Claimant if he had not chosen to resign. (Tr. at 18, 20).

At the time he left Employer, Claimant's restrictions included full time work with up to 45-50 pounds lifting, but he testified that he declined to even try to perform the job offered to him, which admittedly involved no lifting. (APA 1 at 8; Tr. at 9-10). Claimant agreed that no medical professional ever restricted him from prolonged standing. (Tr. at 14).

Since leaving Employer, Claimant testified that he had sent off 300-400 resumes primarily for communications analyst and telecommunications engineer-type jobs. (Claimant's Depo at 29). Claimant has also applied for numerous jobs as a shift supervisor or store manager but has not sought any work through personnel services. (Claimant's Depo at 31). Claimant confirmed he remained on light duty restrictions. (Claimant's Depo at 30). When asked why he had not returned to work since his resignation, Claimant indicated it was due to the economy and the industry had shrunk by half of the workforce. (Claimant's Depo at 30-31).

Claimant returned to Dr. Green on July 6, 2011 where it was noted that Claimant had regained full range of motion and improved his strength. (APA 1 at 5). He continued to complain of some shoulder pain and pain in the lateral aspect of the right elbow. (APA 1 at 5). Claimant returned to Dr. Green on August 22, 2011 complaining of continued right shoulder pain. Claimant noted that he is "very active" and "has to carry and lift heavy objects and he is very active in daily life as well as work activities." (APA 1 at 8). Dr. Green and Claimant determined to treat the shoulder conservatively. (APA 1 at 8). As of August 22, 2011, Dr. Green had placed Claimant on full time work with 40-50 pound lifting restrictions below the chest and up to 15 pounds above chest level. (APA 1 at 8). An MRI of the right shoulder on August 26,

2011 showed no evidence of rotator cuff tear, mild degenerative arthritis of the AC joint, and findings suggestive of a "small type III SLAP tear." (APA 1 at 11).

On October 14, 2011, Claimant's original attorney sent him to Dr. Timothy G. Allen at Lowcountry Hand Center where he complained for the first time of an injury to the right hand related to the accident. (APA 2 at 13-17). Additionally, Claimant reported that his biceps complaints were resolved, but he continued to have some right shoulder pain and issues related to lateral epicondylitis (tennis elbow). (APA 2 at 13). Claimant reported to Dr. Allen that he resigned from work due to pain. (APA 2 at 13). Dr. Allen recommended additional treatment for a post-traumatic ganglion, post-traumatic carpal tunnel syndrome, and right elbow lateral epicondylitis. (APA 2 at 14).

On November 11, 2011; the Carrier sent Claimant's prior attorney correspondence regarding Claimant's a "no call-no show" for a scheduled appointment in October 2011. (APA 5 at 28). Carrier requested that Claimant set up a new appointment with Dr. Green convenient to his schedule and noted that she would authorize the follow up. (APA 5 at 28).

After August, 2011, Claimant did not contact the carrier or request authorized medical treatment until an evaluation with Dr. Earl McFadden of Moore Orthopaedics on June 28, 2012. Dr. McFadden found full range of motion of the right shoulder with good strength, but slight tenderness over the AC joint and marked impingement findings. He noted mildly painful lateral epicondylitis and tenderness at the MCP joint of the right thumb but with full range of motion and good stability. (APA 3 at 18). He noted that the distal biceps repair was doing extremely well and recommended only conservative care for Claimant's other complaints. (APA 3 at 18). Currently, Claimant states that he cannot even push or pull a shopping cart, despite Dr. McFadden's report that he could pull up to 50 pounds. (APA 3 at 18; Tr. at 11-12).

There was no medical evidence submitted at the Hearing showing that any provider has removed Claimant from light duty and placed him completely out of work.

DISCUSSION

I. THE GREATER WEIGHT AND PREPONDERANCE OF THE EVIDENCE SHOWS THAT CLAIMANT IS NOT ENTITLED TO AN AWARD FOR TEMPORARY TOTAL DISABILITY BENEFITS BEGINNING JUNE 28, 2012 AND CONTINUING

The single Commissioner awarded temporary total disability benefits (TTD) to Claimant beginning June 28, 2012, which coincides with Dr. McFadden's appointment and the end of an extended period of time without treatment. However, resuming benefits based on medical treatment ignores the primary reason why Claimant should not be entitled to TTD while on light duty restrictions. The primary reason Claimant is not entitled to TTD is because he resigned his employment and, thus, refused his contemporaneous offer of light duty and any future offer of light duty the Employer could have made.

To put it another way, the fact Claimant forfeited TTD benefits by voluntarily removing himself from the labor market, does not impose a later duty on the Employer to secure a new labor opportunity when he eventually decides that he would like to try light duty work. The Claimant unilaterally decided to resign his employment after declining multiple offers of light duty employment within his work restrictions, and as such, should not be entitled to any temporary total disability benefits. When an employee quits a job, the Employer has no duty to secure them future employment. Likewise, when a Claimant quits a job, the Employer should not be obligated to reintroduce them to the labor market over a year later when the Claimant decides that he made a mistake and would like to try light duty.

Under § 42-9-260, an employee refusing limited duty employment within her doctor's restrictions is not eligible for temporary total disability benefits during the period of refusal. See

Smith v. South Carolina Dept. of Mental Health, 329 S.C. 485, 494 S.E.2d 630 (Ct. App. 1997)

(Employer need not offer or procure suitable employment for workers' compensation claimant before stopping compensation benefits; all statute provides is that if employer offers claimant position consistent with claimant's physical capacity, claimant is not entitled to benefits for period during which he refuses employment).

The WCC has regularly held that employees who quit rather than accept a work assignment within their restrictions are not entitled to workers' comp benefits. The Commission has repeatedly held that the text of Section 42-9-190 is good enough. For example:

- o O'Connell v. Goodwill (Full Commission Review September 2008) – The Commission found that “Following the Claimant's accident, the Employer provided light duty work for her to perform within restrictions assigned by her treating physicians. On August 23, 2006, Claimant voluntarily resigned from this employment despite the fact appropriate light duty was offered.” Although Claimant was found not to have reached MMI, TTD benefits were denied due to the voluntary resignation.
- o Clark v. Madison Industries (Full Commission Review January 2007) – The Commission found that “After working a short period, Claimant voluntarily resigned his position on October 13, 2003. Claimant's work duties constituted suitable employment which Claimant refused.” Although Claimant was found not to have reached MMI, TTD benefits were denied due to the voluntary resignation.
- o Mumford v. Triad Hospitals (Single Commissioner August 2004) – The Commission found “Under Section 42-1-120 and Section 42-9-10, the Claimant is not entitled to temporary total disability compensation.” “Claimant voluntarily resigned from her employment on October 15, 2003, and has not produced medical evidence supporting her contention that she has been unable to perform the essential functions of her job since she last worked. Consequently the Defendants are not responsible for temporary total disability benefits.”

When the Claimant declined light duty work within his restrictions and resigned from his employer he took a calculated risk that he would be able to find a job he felt better suited his interests. Claimant's testimony corroborates the Employer's testimony in that his offer of light duty employment would essentially require him to monitor a laboratory and would require no lifting or other physical activity beyond his restrictions. The Employer held light duty

employment for the Claimant on multiple occasions and Claimant declined to return to work. Despite the initial delays the Employer tried to work with Claimant to keep him on the job; however, Claimant chose to resign in order to pursue other job interests. It is important to note that Employer did everything they could to accommodate a return to work and did not pressure or otherwise coerce the Claimant into quitting his job. By voluntarily removing himself from the labor market, Claimant forfeited his rights to ongoing TTD. He made his refusal to work permanent which precludes any future temporary total disability benefits or temporary partial benefits for any period where Claimant is not written completely out of work by the authorized physician. Once an employee formally tenders his resignation, an Employer cannot be expected to continue holding a claimant's job open on the off chance they cannot find a new one and decide they want to return. Claimant made his own decision to quit during a tough economy and is now trying to hold his Employer responsible for his own poor decisions.

The single Commissioner included a line in his Order stating, "On cross examination, the employer's representative acknowledged she did not know what all the restrictions and limitations were." (Order at 5). The Commissioner erred in making this assessment. When asked on cross-examination what Claimant's restrictions were, the employer representative stated, "His restrictions were not being able to lift a certain amount and then the issue of lifting over his head or up to his waist." (Tr. at 19). She went on to state that she believed the lifting restrictions were 20 pounds and that she received the restrictions sometime in June 2011. (Tr. At 19). While it appears she may have confused the restrictions given by Dr. McFadden in June 2012 (20 pounds lifting), the employer representative was correct that Claimant had lifting restrictions and restrictions against lifting over a certain height at the time he resigned. In fact, Dr. Green's restrictions show they were even higher than recalled by the employer representative

(40-50 pounds lifting). (APA 1 at 8). Furthermore, the employer representative's recollection of specific restrictions does not matter in this case because it is uncontested that the job offer involved no lifting and that the job offer did not violate any restrictions in place at the time of Claimant's resignation. In the Claimant's own words, "The light duty they discussed was just basically standing around the laboratory monitoring things, looking at the computer basically... and they had offered me a chance to stand around and basically fill the time." (Tr. at 10). The Claimant's own description of the light duty job offer proves that it did not violate any of his work restrictions. The Claimant's testimony indicates that he resigned because there was not a chair in the laboratory; however, 1) there is no evidence that he ever requested a chair, 2) there was no evidence of any restrictions against standing (including from Claimant's own IME), and 3) the Employer's testimony confirmed that a chair could have been easily accommodated if the Claimant would have made this request known.

The Claimant now states that he had to resign because 1) there was no chair at the station he would be placed in for light duty and 2) he could not stand for more than a few minutes before his shoulder began hurting. Even if this was true (which is not supported in the medical records), rather than simply ask for a chair to use while on light duty (which the Employer confirmed would have been no problem), Claimant decided to resign. The Commission fails to see a reason why Claimant was justified in refusing to try a no lifting, light duty job within his restrictions with available seating, when he has admittedly applied to 300-400 other positions. It is unlikely that the jobs Claimant subsequently applied for are any lighter than sitting in a chair and monitoring a lab.

Furthermore, if the Claimant's physical condition was legitimately a factor keeping him from returning to light duty work, it does not make sense that Claimant would go months without

requesting any re-evaluation of his restrictions. In fact, despite obtaining an independent medical examination, Claimant did not have his doctor address restrictions in his medical note or a subsequent medical questionnaire.

In fact, the Claimant testified that the reason for his continuing unemployment was due to the economy, not due to his disability. At no time since he quit, have his restrictions been lower than the work he chose to leave. Prior to leaving his job, Dr. Green had placed Claimant on modified duty and was gradually increasing his lifting restrictions. By the time of the last appointment he attended on August 22, 2011, Claimant was able to work full time with lifting restrictions of 45-50 pounds up to chest level and up to 15 pounds above the chest. (APA 1 at 8). Claimant's Attorney referred him to Dr. Allen in October 2011 who gave no opinion on current work restrictions. (APA 2 at 14). Claimant did not present for any further treatment until he agreed to appear for an appointment with Dr. McFadden on June 28, 2012. As of that date, Dr. McFadden opined that Claimant was capable of light duty with lifting up to 20 pounds, pulling up to 50 pounds, and no overhead work. (APA 3 at 18).

The Claimant's primary obstacle in finding alternate employment is the economy. In fact, Claimant has a college degree and an impressive history of managerial-type experience which does not constrain him to any heavy physical labor. He quit an available job within his restrictions to try to find alternate employment. It would be unreasonable to now hold that the Employer is responsible for temporary total disability benefits because the Claimant decided he wanted to take his chances on finding a job elsewhere.

A ruling obligating an Employer to pay for TTD after a Claimant on light duty declined light duty work by quitting would take away any incentive of an employee to return to work in the first place. Therefore, we find that the greater weight and preponderance of the evidence

rejects the single Commissioner's findings and conclusions as stated in the discussion above. Based on a review of the file, the evidence presented in the parties' briefs and oral argument, the Appellate Panel Affirms in Part and Reverses in Part the Single Commissioner's Order dated October 16, 2012 and the following are made as:

FINDINGS OF FACT

Based upon the oral arguments, APA Submissions, and record on appeal, the Appellate Panel makes the following findings of fact:

1. Claimant injured his right shoulder, right arm, and right hand in a compensable injury by accident on April 6, 2011.
2. The Claimant is not at MMI with regard to the right shoulder, right arm, and right hand and is in need of additional medical treatment.
3. Claimant was receiving regular and active treatment at the time of his resignation and the work offered was within his restrictions.
4. Claimant's own description of the job offer showed it involved just standing around and monitoring a computer (Tr. at 10).
5. Claimant resigned June 7, 2011 without ever trying the light duty job offer and telling his employer he wanted to look for a suit-and-tie job (APA 6 at 31).
6. At the time of his resignation, Claimant's work restrictions were full time work with 45-50 pounds of lifting. (APA 1 at 8).
7. By his own estimation, Claimant applied for 300-400 other jobs after resigning (Depo at 29) and blamed the economy for his failure to find work (Depo at 30-31).
8. Claimant is not entitled to temporary total disability benefits where he voluntarily resigned his employment on June 7, 2011 and declined multiple offers of employment within his work restrictions.
9. By voluntarily removing himself from the labor market, Claimant made his refusal to work permanent which precludes any future temporary total disability benefits or temporary partial benefits.
10. As stipulated by the parties, Claimant has an AWW of \$761.46 yielding a CR of \$507.66.

11. For back TTD that was previously paid but was inadvertently underpaid to the Claimant, he is entitled to the difference in what he was paid in TTD and what he should have been paid at the correct compensation rate.

CONCLUSIONS OF LAW

Under the South Carolina Workers' Compensation Act and other applicable law, it is the determination and conclusion of the Appellate Panel that:

1. The Claimant sustained a compensable injury by accident to his right shoulder, right arm, and right hand. S.C. Code Ann. §42-1-160.
2. Pursuant to §42-1-120, §42-9-10, §42-9-190, and §42-9-260, Claimant is not entitled to temporary total disability benefits for periods on light duty since the date of his voluntary resignation and continuing.
3. The Claimant is not at MMI.
4. Dr. Earl B. McFadden, Jr. with Moore Orthopaedics is appointed as an authorized treating physician. S.C. Code Ann. §42-15-60.
5. No costs, attorney's fees, or fines are imposed. Reg. 67-614

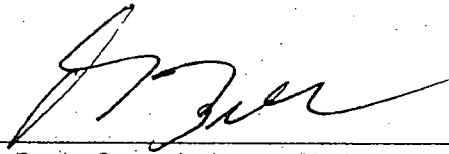
ORDER

IT IS THEREFORE ORDERED that, Claimant sustained a compensable injury by accident to his right shoulder, right arm, and right hand.

IT IS FURTHER ORDERED that the single Commissioner's Order granting TTD from June 28, 2012 and continuing is Reversed. Claimant is not entitled to temporary total disability benefits where he voluntarily resigned his employment and declined multiple offers of employment within his work restrictions.

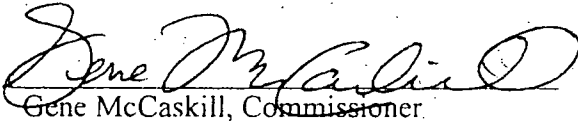
IT IS FURTHER ORDERED that Claimant is entitled to further medical care and treatment with Dr. Earl B. McFadden with Moore Orthopaedics.

IT IS FURTHER ORDERED that Claimant is entitled to any difference for underpayment of previously paid temporary total disability benefits prior to his voluntary resignation and refusal of employment offers within his restrictions.

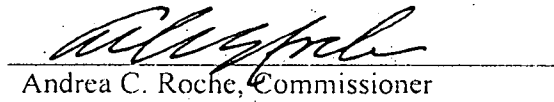


T. Scott Beck, Commissioner; Chair
For the Appellate Panel

CONCUR:



Gene McCaskill, Commissioner



Andrea C. Roche, Commissioner

Dated: 4/23/13

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

By Valerie Deller on April 23, 2013