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SC Court of Appeals

**DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION
FULL COMMISSION**

W.C.C. FILE NO.: 1717327

Santos M. Argueta, Employee Claimant/Appellant

vs.

Anderson County School District and
South Carolina School Board Self-Insurance Trust Fund, Carrier Defendants/Respondents

HEARING:

Held Remotely via Zoom
on January 24, 2022.

APPEARANCES:

Claimant/Appellant represented by:
Stephen N. Garcia
Garcia Law, LLC
604 Pettigru Street
Greenville, SC 29601

Defendants/Respondents represented by:
J. South Lewis, II
Willson, Jones, Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607

PURPOSE OF HEARING:

To determine issues raised on Claimant's
Form 30

COMMISSION PANEL:

Commissioner Aisha Taylor (Chair)
Commissioner Melody L. James
Commissioner Avery B. Wilkerson, Jr.

FILED:

May 26 _____, 2022

STATEMENT OF CASE

This claim arises out of an admitted accident that occurred on October 2, 2017. Defendants accepted the low back only and provided medical treatment with various physicians over the course of the claim, including Drs. Han, Van Pelt, and Gao. A hearing was held before Commissioner Barden on October 22, 2020 regarding extent of permanent partial disability (PPD) and Claimant's request for additional medical treatment. A Decision and Order was issued on December 22, 2020, awarding 2% PPD to the back, credit for overpayment of TTD benefits (back to June 10, 2020), and no entitlement to future medical treatment. Claimant filed an appeal with the Appellate Panel on January 4, 2021. During the pendency of the appeal, Claimant filed a Motion to Introduce New Evidence. The Motion was denied. After denial of said Motion, Claimant withdrew his Appeal on March 2, 2021. This change of condition claim was filed with SCWCC on May 18, 2021.

The hearing to determine whether Claimant had suffered a change of condition was held on August 11, 2021 before the undersigned and the parties outlined their respective positions. It was Claimant's position that he had sustained a change of condition and Claimant relied on subjective testing as well as the opinion of Dr. Glenn Scott who had originally evaluated Claimant on July 23, 2020 and then again on May 4, 2021. Specifically, Claimant asserted that the results of an EMG/NCV performed on December 3, 2020 as well as the opinion of Dr. Glenn Scott formed the basis of the change of condition. Claimant primarily relied on *Mungo v. Rental Uniform Service of Florence, Inc.*, 678 S.E.2d 825, 383 S.C. 270 (Ct. App. 2009) in support of his position. Claimant further requested TTD benefits be awarded, at least back to the date of Claimant's most recent evaluation with Dr. Scott, May 4, 2021.

Defendants asserted that Claimant had not sustained a change in his condition, but rather, that Claimant had simply underwent a test (EMG/NCV) recommended by his IME physician before the original hearing, but one that he did not have at that time. Defendants further contended that the EMG/NCV results did not indicate that the Claimant's condition changed since the original hearing and date of MMI.

Specifically, Defendants pointed to Dr. Scott's deposition testimony that the result of the EMIG/NCV were as he expected them to be at the time he evaluated Claimant initially on July 23, 2020.

STIPULATIONS

The Claimant's Counsel and Counsel for the Defendants stipulated at the Single Commissioner Hearing to the following issues:

1. The purpose of the hearing was to determine the issues as set forth in the Forms 50/51—alleging a change of condition—and any other issues which may timely come before the Commission;
2. That the Claimant's accident occurred on October 2, 2017;
3. The Claimant's average weekly wage was \$965.14 with a corresponding compensation rate of \$643.46;
4. Notices were timely and properly served upon all parties of interest;
5. Venue, set in Ninety-Six, was proper as agreed by all parties;
6. That the South Carolina Workers' Compensation Commission had jurisdiction over the parties and issues involved.

APA SUBMISSIONS

Under the Administrative Procedures Act, the following records were submitted into evidence at the time of the hearing:

By Claimant:

1. MD360	10/04/17- 10/04/17	1-5
2. CTR FOR OCCUPATIONAL HEALTH	10/19/17 -11/06/17	6-23
3. ADVANCED PT	10/19/17 -05/16/19	24-65
4. POA	12/11/17 -09/09/19	66-72
5. PCPMG	02/14/18 -07/14/21	73-102
6. ANMED OCCUP. MEDICINE (IME)	06/10/20 -06/10/20	103-115
7. DR. GLENN SCOTT	07/23/20 -05/04/21	116-125

By Defendants:

8. EMERGENCY MD	06/26/19	126
9. ELITE PT (FCE)	03/04/20	127-136
10. PIEDMONT COMPREHENSIVE PAIN MGMNT. (DR. HAN)	07/14/21	137

Exhibits:

The parties jointly submitted the deposition of Glenn Scott, MD (08/04/21).

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. *Claimant sustained an admitted injury to the low back, for which Defendants provided treatment, both with a spine specialist (Dr. Van Pelt) and a pain management specialist (Dr. Han).*
2. *Claimant went to Dr. Glenn Scott for an IME, arranged by his attorney, on July 23, 2020. Dr. Scott recommended Claimant undergo nerve testing (EMG/NCV) at that time. Claimant did not have this test prior to the hearing before Commissioner Barden on October 22, 2020.*
3. *Claimant was found to be at MMI as of June 10, 2020 by Decision & Order of Commissioner Barden dated December 22, 2020. He was awarded 2% permanent partial disability (PPD) to the back, with Defendants being awarded a "credit" for all TTD paid past June 10, 2020 (which resulted in an overpayment due back to Defendants). No further medical treatment was ordered.*
4. *Claimant went on his own on December 3, 2020 for an NCV/EMG of the bilateral lower extremities. (See CI's APA # 7.)*
5. *Claimant filed an appeal (Form 30) of Commissioner Barden's Decision & Order with the SCWCC Appellate Panel on January 4, 2021.*
6. *Claimant filed a Motion to Introduce New Evidence on January 5, 2021, attempting to have the NCV/EMG admitted into evidence. This Motion was denied by SCWCC on February 23, 2021.*
7. *After denial of the Motion, on March 2, 2021, Claimant withdrew his pending appeal. Thereafter, he filed this change of condition application.*
8. *A change of condition "occurs when the claimant experiences a change in physical condition as a result of [his] original injury, occurring after the first award." Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 109 (Ct. App. 2003).*
9. *Claimant testified at hearing that his present symptoms, including pain down his right leg, are the same symptoms he'd had since the underlying injury. (Hrg. Tr., p. 20.)*

10. Claimant participates in his family's church cleaning business, including going to the churches and being on his feet to assist his wife. (Hrg. Tr., pp. 18-20.)
11. Dr. Scott testified that the NCV/EMG findings from December 3, 2020 were as he would have expected them to be, had Claimant had the test when it was initially recommended (in July 2020). In other words, the December 3, 2020 testing simply confirmed what he believed Claimant's condition to be when he saw Claimant in July 2020.
12. Claimant not going for additional testing until after receiving an unfavorable hearing award/decision does not amount to a compensable change of condition.
13. Based on the evidence, and specifically the testimony of Claimant and Dr. Scott, I cannot find that Claimant sustained a "change in physical condition" as a result of the original injury.

CONCLUSIONS OF LAW

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.
2. Under § 42-17-90, Claimant did not sustain a change of condition.
3. Under §§ 42-15-60, Claimant is entitled to no further medical treatment.

ORDER/AWARD

IT IS HEREBY ORDERED that Claimant did not sustain a compensable change of condition, remains at MMI, and is entitled to no further medical treatment or benefits pursuant to the Act.

No hearing costs are assessed in this instance.

IT IS SO ORDERED.

After considering all the evidence contained in the record, we REVERSE the Single Commissioner's Findings of Fact, Conclusions of Law, and Order and therefore make the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. Claimant sustained an admitted injury to the low back, for which Defendants provided treatment, both with a spine specialist (Dr. Van Pelt) and a pain management specialist (Dr. Han).
2. Claimant underwent an Independent Medical Evaluation by Dr. Glenn Scott, arranged by his attorney, on July 23, 2020. Dr. Scott recommended Claimant undergo nerve testing (EMG/NCV) at that time. Claimant did not have this test prior to the hearing before Commissioner Barden on October 22, 2020.
3. Claimant was found to be at MMI as of June 10, 2020 by Decision & Order of Commissioner Barden dated December 22, 2020. He was awarded 2% permanent partial disability (PPD) to the back, with Defendants being awarded a "credit" for all TTD paid past June 10, 2020 (which resulted in an overpayment due back to Defendants). No further medical treatment was ordered.
4. Claimant went on his own on December 3, 2020 for an NCV/EMG of the bilateral lower extremities. (See CI's APA # 7.)
5. Claimant filed an appeal (Form 30) of Commissioner Barden's Decision & Order with the SCWCC Appellate Panel on January 4, 2021.
6. Claimant filed a Motion to Introduce New Evidence on January 5, 2021, attempting to have the NCV/EMG admitted into evidence. This Motion was denied by SCWCC on February 23, 2021.
7. After denial of the Motion, on March 2, 2021, Claimant withdrew his pending appeal. Thereafter,

he filed this change of condition application.

8. When the original order is limited to a determination of the claimant's condition as of a specific date, it is appropriate for the Appellate Panel to then consider any subsequent events or diagnoses made after that date when making a determination about an alleged changed of condition. *Mungo v. Retail Uniform Services of Florence*, 678 S.E.2d 825 at 831, 383 S.C. 270 at 279 (Ct. App. 2009)(Rehearing denied, Cert. Denied)(Citing *Gattis v. Murrells Inlet VFW No. 10-420*, 353 S.C. 100 at 109, 576 S.E.2d 191 at 196 (Ct. App. 2003).
9. The review of an award at a change of condition hearing is concerned with the date as of which a claimant's condition was determined. *Id.*
10. In the instant matter, the Claimant's award at the permanency hearing held on October 22, 2020 was based on the determination by Dr. Gao that the Claimant had achieved maximum medical improvement on June 10, 2020.
11. Although Claimant had *some* complaints of radicular pain prior to June 10, 2020, Claimant had not been diagnosed with radicular pain or symptoms, and in fact, quite the opposite was true—the various authorized, treating physicians opined that no objective evidence existed to confirm Claimant's subjective complaints of radicular symptoms.
12. The first time the Claimant was diagnosed with nerve root impingement and/or injury was on December 3, 2020, the date of the nerve conduction study, and the first time the Claimant was diagnosed with radiculopathy was on May 4, 2021 by Dr. Glenn Scott. (APA pp. 120 through 125.)
13. In fact, Dr. Han *ruled out* radiculopathy in his note dated June 26, 2019. (APA p. 94.)
14. Where subsequent, objective testing confirms a diagnosis of bilateral radiculopathy when only a diagnosis of lumbar strain, chronic low back pain, and lumbar spondylosis existed prior to June 10, 2020, it stands to reason that the Claimant has suffered a clear change of condition since

June 10, 2020, the date upon which Claimant's award at the permanency hearing was based. (APA pp. 86, 88, 89, 91, 92, 94, 107, 110.)

15. Further, the unrefuted opinion of Dr. Glenn Scott in his note dated May 23, 2021 reads: (1) that the Claimant had suffered an interval change in his condition for the worse, (2) that such opinion was based not only on the NCV/EMG dated December 3, 2020 but also based upon the clinical examination as well as the Claimant's subjective Complaints, and (3) that the Claimant had also suffered an increased impairment to his back *since the July 2020 examination performed by him*. (APA pp. 124 through 125.)

16. Serving as an independent basis for the finding that the Claimant has sustained a change of condition separate and apart from the NCV/EMG, Dr. Glenn Scott also opined that the Claimant had suffered a change of condition within the few months between July 2020 and May of 2021 and that such opinion was not based solely on the NCV/EMG findings dated December 3, 2020, but also based on the clinical examination and the Claimant's subjective complaints. (APA pp. 124 through 125.)

17. Consistent with his opinion that the Claimant has sustained a change of condition, Dr. Glenn Scott also restricted the Claimant's work activities to "Sedentary Duty" dating back to May 4, 2021. (Deposition Transcript of Dr. Glenn Scott, p. 36, line 23 through p. 37, line 2.)

18. There is a causal relationship between the Claimant's current condition of bilateral radiculopathy to the lower extremities and the work injury occurring on or about October 2, 2017. (Deposition Transcript of Dr. Glenn Scott, p. 33, line 23 through p. 34, line 4.)

19. When considering the record as a whole, we find that the Claimant has suffered a change of condition.

CONCLUSIONS OF LAW

Accordingly, as provided under the South Carolina Code of Laws, § 42-17-40, and § 1-23-320, it is the determination of the Full Commission that:

1. Pursuant to S.C. Code § 42-3-180, the Commission has jurisdiction over the parties to hear the issues in dispute.
2. Pursuant to S.C. Code § 42-17-90, Claimant has established by a preponderance of evidence that he has sustained a change of condition since June 10, 2020 to his spine, left lower extremity, and right lower extremity.
3. Pursuant to S.C. Code §§ 42-17-90 and 42-15-60, Claimant has established by a preponderance of evidence that he is entitled to additional medical treatment at the expense and direction of the Defendants.
4. Pursuant to S.C. Code §§ 42-17-90 and 42-9-10, Claimant has established by a preponderance of evidence that he is entitled temporary total disability backpay from May 4, 2021 to present and a continuing award of temporary total disability benefits therewith until the benefits are terminated by agreement of the parties or by order of the Commission.

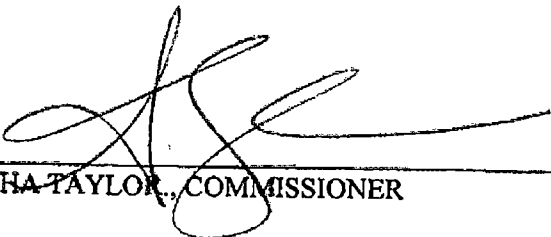
ORDER

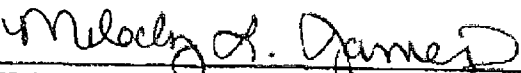
NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Claimant has established by the greater weight of the evidence (1) that he has sustained a change of condition, (2) that he is entitled to an award of temporary total disability backpay from May 4, 2021 to present, (3) that he is entitled to a continuing award of temporary total disability benefits at the stipulated compensation rate of \$643.46 until the benefits are terminated by agreement of the parties or by order of the Commission, and (4) that he is entitled to continuing medical treatment/benefits to the spine, left lower extremity, and right lower extremity.

IT IS FURTHER ORDERED that all other issues not addressed by this Order shall be held in abeyance.

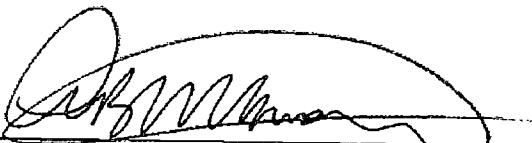
IN REVERSAL OF THE SINGLE COMMISSIONER'S DECISION & ORDER, IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION


AISHA TAYLOR, COMMISSIONER


MELODY L. JAMES, COMMISSIONER

Dissenting


AVERY WILKERSON, COMMISSIONER
B JR.

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on May 26, 2022

Order Served via E-Mail:

<p>J. South Lewis, II Wilson, Jones, Carter, & Baxley jslewis@wjcbllaw.com</p>	<p>Stephen Garcia Garcia Law Firm, LLC stephen@scgarcialaw.com</p>
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