

APPELLATE PANEL
of the
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

JOSEPH MICKLE, CLAIMANT-RESPONDENT

v.

BOYD BROTHERS TRANSPORTATION, INC., EMPLOYER,

and

LUMBERMANS UNDERWRITING ALLIANCE, CARRIER,

DEFENDANTS-APPELLANTS

WCC FILE NO. 1022202

Appearances:

Claimant Represented by Frank A. Barton, Esquire and the Mullis Law Firm, Columbia, South Carolina

Defendants, WTI Transport, Inc. and Boyd Brothers Transportation Inc., represented by Duke McCall, Esquire, Smith Moore Leatherwood, Greenville, South Carolina

STATEMENT OF THE CASE

The parties were heard by Commissioner T. Scott Beck on November 18, 2011, in Columbia, South Carolina. On March 14, 2012, Commissioner Beck issued his Order with the following specific Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

"Based upon the stipulations of the parties and the evidence presented, both in the form of submissions under the Administrative Procedures Act and the Hearing testimony, it is found as fact:

1. That the parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act as amended:

2. That Claimant is an employee of WTI Transport, Inc.;
3. That WTI Transport, Inc. is a wholly owned subsidiary of Boyd Brothers Transportation, Inc.;
4. That WTI Transport, Inc. did not regularly employ 4 or more employees in South Carolina;
5. That Defendants initially chose to pay benefits to Claimant in Alabama for the admitted claim; however, Claimant determined to pursue benefits in South Carolina where he resides;
6. That Boyd Brothers Transportation, Inc. has coverage in South Carolina;
7. That flatbed truck driving is an important, necessary, and essential part of the business and trade of Boyd Brothers Transportation, Inc.;
8. That employees of Boyd Brothers Transportation, Inc. regularly perform the identical work activity, flatbed truck driving, that Claimant performed in his work for Boyd's wholly owned subsidiary, WTI, Transport, Inc.;
9. That where the work activity Claimant engaged in for WTI, flatbed truck driving, was part of the general trade, business, or occupation of the owner, Boyd Brothers Transportation, Inc., the owner, is a statutory employer as contemplated in S.C. Code Section 42-1-400 (1985), and is, therefore, responsible for the payment of benefits to Claimant;
10. That Claimant's injury is to his back, with radiation affecting both legs;
11. That Claimant failed to meet his burden of proving a compensable psychological injury;
12. That the Functional Capacity Evaluation (FCE) places Claimant in the sedentary to light work capacity;
13. That Claimant's treating physicians limit Claimant to sedentary work capacity;

14. That Claimant is required to take significant prescription medications which prohibit him from driving a truck and which would also substantially limit his ability to perform any other form of work;

15. That the authorized treating physicians have restricted Claimant from driving trucks;

16. That Claimant's work history was almost exclusively in truck driving;

17. That Claimant is sixty-six (66) years of age with a high school education;

18. That the vocational assessment conducted by Robert Brabham concludes that Claimant is unable to perform any substantial gainful work activity;

19. That Claimant is unable to perform any substantial gainful work activity and, therefore, he is permanently and totally disabled;

20. That Claimant is entitled to and Defendants shall provide lifetime causally related medical care.

21. That the proceeds of the award will be allocated and disbursed under Utica Mohawk Mills v. Orr, 227 S. C. 226, 87 S.E. 2d 589 (1955), resulting in a weekly distribution to the Claimant of \$ 147.53 per week or a monthly entitlement of \$ 639.31 per month commencing upon execution of this Order and continuing for the rest of his life (See page 15 paragraph #8).

CONCLUSIONS OF LAW

Based on the evidence submitted in this case, the testimony given, the stipulations entered into and the foregoing Findings of Fact, this Commissioner makes the following Conclusions of Law:

1. Pursuant to §42-3-180 and §42-1-400, the South Carolina Workers' Compensation Commission has jurisdiction in this proceeding.

2. Pursuant to §42-1-400, Claimant was a covered statutory employee under the Act and Boyd Brothers Transportation, Inc, is a statutory employer as contemplated in Section 42-1-400. and is, therefore, responsible for the payment of benefits to Claimant.

3. Pursuant to §42-15-60, Defendant Boyd Brothers Transportation, Inc. is responsible for payment of causally-related medical care from the date of accident and for providing lifetime medical care.

4. Pursuant to §42-15-60, Claimant has reached maximum medical improvement.

5. Pursuant to §42-9-10, Claimant is permanently and totally disabled as the result of the injuries to his back and legs.

6. Pursuant to §42-9-301, a lump sum payment is approved as being in the best interest of Claimant and not prejudicing Defendants.

7. That Defendants owe Claimant the balance of his 500 weeks, taking credit for the weeks of temporary total disability benefits paid.

8. It is ordered by the Commission that the proceeds of this Order of One Hundred and Eighty-Eight Thousand Five Hundred and Forty-Three and 38/100ths (\$ 188,543.38) Dollars shall be allocated as follows: Sixty-Two Thousand Eight Hundred and Forty-Seven and 79/100ths (\$ 62,847.79) Dollars as attorney fees [one third (1/3)]; at least Two Thousand Three Hundred Thirty-Three and 57/100ths (\$ 2,333.57) Dollars for litigation costs; resulting in a Net to the Claimant of One Hundred and Twenty-Three Thousand Three Hundred and Sixty-Two and 02/100ths (\$ 123,362.02) Dollars. This amount shall be allocated and paid to the Claimant under Section 42-9-10 and Section 42-9-20 of the 1976 Code of Laws of South Carolina as

interpreted by the Supreme Court decision of Utica Mohawk Mills v. Orr, 227 S. C. 226, 87 S.E. 2d 589 (1955); Sciarotta v. Bowen, 837 F.2d 135 (1988); Lemire v. Secretary of Health and Human Services, 682 F. Supp 102 (D.C.N.H.1988) and Hatch v. Heckler, 626 F. Supp. 1367 (N.D. California 1986). The Claimant's life expectancy under S. C. Code Section 19-1-150 is 16.08 years (a Sixty-Six year old male). **This therefore results in a weekly distribution to the Claimant of \$ 147.53** [\$ 123,362.02 divided by the life expectancy in weeks of 836.16 weeks (16.08 years times 52 weeks per year)] **or a monthly entitlement of \$ 639.31** [\$ 123,362.02 divided by the life expectancy in months of 192.96 months (16.08 years times 12 months per year)] **commencing upon the execution and approval of this Order and continuing for the rest of his life."**

DISCUSSION

Within the statutory period for review, counsel for Defendants filed an application for review setting forth their grounds for review, copies of which were furnished to all interested parties, prior to oral argument presented by the Appellate Panel on February 20, 2013. In their briefs, which were properly filed with Commission and properly served on all interested parties, and at oral arguments before the Appellate Panel on February 20, 2013, Defendants argued that the Hearing Commissioner erred (1) in finding that Boyd Brothers Transportation, Inc. was Claimant's statutory employer and that the Commission had jurisdiction over the claim; (2) in finding that Claimant was totally and permanently disabled and entitled to benefits and lifetime medical care; and (3) in including an erroneous calculation of the amount of the lump sum award.

In his Brief of Respondent which was properly filed with the Commission and properly served on all interested parties, and at oral arguments before the Appellate Panel on February 20, 2013, Claimant asserted that, as the result of a typographical error in the Hearing Commissioner's December 12, 2011 Order Directives, the Hearing Commissioner's Order incorrectly gave the employer credit for having paid 136 weeks of temporary total disability benefits despite the fact that it was undisputed that Claimant had been paid only 32 weeks of benefits at that time. Claimant took the position that the Appellate Panel should amend the Order so as to correct the mistaken credit and adjust the calculation of benefits due.

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 have since been under study and consideration. In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. Section 42-17-50 (1989), review the award, weigh the evidence as 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.

After considering all of the evidence in the record and the arguments presented, the Appellate Panel, by unanimous vote, affirms the Order of the Hearing Commissioner in full. Accordingly, the following Findings of Fact and Conclusions of Law shall become, and hereby are, the law of the case:

FINDINGS OF FACT

Based upon the stipulations of the parties and the evidence presented, both in the form of submissions under the Administrative Procedures Act and the Hearing testimony, it is found as fact:

1. That the parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act as amended;
2. That Claimant is an employee of WTI Transport, Inc.;
3. That WTI Transport, Inc. is a wholly owned subsidiary of Boyd Brothers Transportation, Inc.;
4. That WTI Transport, Inc. did not regularly employ 4 or more employees in South Carolina;
5. That Defendants initially chose to pay benefits to Claimant in Alabama for the admitted claim; however, Claimant determined to pursue benefits in South Carolina where he resides;
6. That Boyd Brothers Transportation, Inc. has coverage in South Carolina;
7. That flatbed truck driving is an important, necessary, and essential part of the business and trade of Boyd Brothers Transportation, Inc.;
8. That employees of Boyd Brothers Transportation, Inc. regularly perform the identical work activity, flatbed truck driving, that Claimant performed in his work for Boyd's wholly owned subsidiary, WTI, Transport, Inc.;
9. That where the work activity Claimant engaged in for WTI, flatbed truck driving, was part of the general trade, business, or occupation of the owner, Boyd Brothers' Transportation, Inc., the owner, is a statutory employer as contemplated in S.C. Code Section 42-1-400 (1985), and is, therefore, responsible for the payment of benefits to Claimant.

10. That Claimant's injury is to his back, with radiation affecting both legs;
11. That Claimant failed to meet his burden of proving a compensable psychological injury;
12. That the Functional Capacity Evaluation (FCE) places Claimant in the sedentary to light work capacity;
13. That Claimant's treating physicians limit Claimant to sedentary work capacity;
14. That Claimant is required to take significant prescription medications which prohibit him from driving a truck and which would also substantially limit his ability to perform any other form of work;
15. That the authorized treating physicians have restricted Claimant from driving trucks;
16. That Claimant's work history was almost exclusively in truck driving;
17. That Claimant is sixty-six (66) years of age with a high school education;
18. That the vocational assessment conducted by Robert Brabham concludes that Claimant is unable to perform any substantial gainful work activity;
19. That Claimant is unable to perform any substantial gainful work activity and, therefore, he is permanently and totally disabled;
20. That Claimant is entitled to and Defendants shall provide lifetime causally related medical care.
21. That the proceeds of the award will be allocated and disbursed under Utica Mohawk Mills v. Orr, 227 S. C. 226, 87 S.E. 2d 589 (1955), resulting in a weekly distribution to the Claimant of \$ 147.53 per week or a monthly entitlement of \$ 639.31 per month commencing upon execution of this Order and continuing for the rest of his life.

CONCLUSIONS OF LAW

Based on the evidence submitted in this case, the testimony given, the stipulations entered into and the foregoing Findings of Fact, the Commission makes the following Conclusions of Law:

1. Pursuant to §42-3-180 and §42-1-400, the South Carolina Workers' Compensation Commission has jurisdiction in this proceeding.
2. Pursuant to §42-1-400, Claimant was a covered statutory employee under the Act and Boyd Brothers Transportation, Inc, is a statutory employer as contemplated in Section 42-1-400, and is, therefore, responsible for the payment of benefits to Claimant.
3. Pursuant to §42-15-60, Defendant Boyd Brothers Transportation, Inc. is responsible for payment of causally-related medical care from the date of accident and for providing lifetime medical care.
4. Pursuant to §42-15-60, Claimant has reached maximum medical improvement.
5. Pursuant to §42-9-10, Claimant is permanently and totally disabled as the result of the injuries to his back and legs.
6. Pursuant to §42-9-301, a lump sum payment is approved as being in the best interest of Claimant and not prejudicing Defendants.
7. That Defendants owe Claimant the balance of his 500 weeks, taking credit for the weeks of temporary total disability benefits paid.

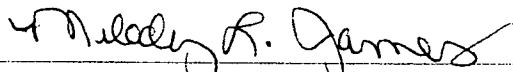
8. It is ordered by the Commission that the proceeds of this Order of One Hundred and Eighty-Eight Thousand Five Hundred and Forty-Three and 38/100ths (\$ 188,543.38) Dollars shall be allocated as follows: Sixty-Two Thousand Eight Hundred and Forty-Seven and 79/100ths (\$ 62,847.79) Dollars as attorney fees [one third (1/3)]; at least Two Thousand Three Hundred Thirty-Three and 57/100ths (\$ 2,333.57) Dollars for litigation costs; resulting in a Net to the Claimant of One Hundred and Twenty-Three Thousand Three Hundred and Sixty-Two and 02/100ths (\$ 123,362.02) Dollars. This amount shall be allocated and paid to the Claimant under Section 42-9-10 and Section 42-9-20 of the 1976 Code of Laws of South Carolina as interpreted by the Supreme Court decision of Utica Mohawk Mills v. Orr, 227 S. C. 226, 87 S.E. 2d 589 (1955); Sciarotta v. Bowen, 837 F.2d 135 (1988); Lemire v. Secretary of Health and Human Services, 682 F. Supp 102 (D.C.N.H.1988) and Hatch v. Heckler, 626 F. Supp. 1367 (N.D. California 1986). The Claimant's life expectancy under S. C. Code Section 19-1-150 is 16.08 years (a Sixty-Six year old male). **This therefore results in a weekly distribution to the Claimant of \$ 147.53** [\$ 123,362.02 divided by the life expectancy in weeks of 836.16 weeks (16.08 years times 52 weeks per year)] **or a monthly entitlement of \$ 639.31** [\$ 123,362.02 divided by the life expectancy in months of 192.96 months (16.08 years times 12 months per year)] **commencing upon the execution and approval of this Order and continuing for the rest of his life.**

ORDER

IT IS HEREBY ORDERED that the Order of the Hearing Commissioner filed in the above-captioned matter on March 14, 2012, is hereby **AFFIRMED IN FULL**.

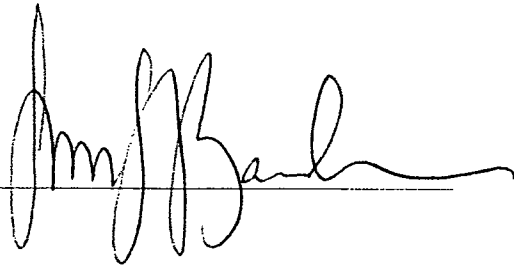
AND IT IS SO ORDERED.

South Carolina Workers' Compensation Commission

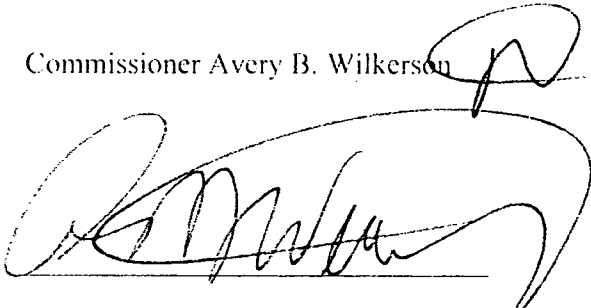
By: 
Commissioner Melody L. James
South Carolina Workers' Compensation Commission

**FULL AFFIRMATION
CONCUR:**

Commissioner Susan S. Barden, Chair



Commissioner Avery B. Wilkerson



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JUN 03 2013
SC Court of Appeals

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 May 14, 2013