

STATE OF SOUTH CAROLINA
BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 2010374

RECEIVED
Nov 28 2022
SC Court of Appeals

LARRY RICHARDSON

EMPLOYEE /
CLAIMANT/APPELLANT,

vs.

KEMIRA WATER SOLUTIONS

EMPLOYER,

and

INSURANCE CO. OF THE STATE OF PA.

CARRIER,

DEFENDANTS/RESPONDENTS.

**APPELLATE PANEL
DECISION AND ORDER**

HEARING:

Appellate Panel review held via Zoom Conference – Columbia, South Carolina on June 20, 2022, per notices timely and properly served on all parties of interest.

APPEARANCES:

Ryan T. LeBlanc, Esquire, of Joye Law Firm, on behalf of the Employee/Claimant/Appellant.

James Lichty, Esquire, of McAngus, Goudelock & Courie, on behalf of the Employer-Carrier/Defendants/Respondents

STATEMENT OF THE CASE

The parties were heard by Commissioner Avery B. Wilkerson on December 16, 2021, in Saint George, South Carolina.

On March 1, 2022, Commissioner Wilkerson issued the following Findings of Fact:

FINDINGS OF FACT

1. The Defendants objection to Claimant's APA #1A, #2A, #3A, #2, and Exhibit B., is sustained and these expert reports excluded from evidence. This evidence was not provided to opposing counsel at least ten days prior to the hearing. Claimant did not establish good cause for failing to provide the documents in a timely manner. The undersigned also considered the prejudice that would result to the Defendants had the hearing been continued a second time. The Defendants' were entitled to a hearing prior to November 22, 2021, by operation of S.C. Code Ann. Sec. 42-9-260(C), but were denied a timely hearing due to the Claimant's first motion for a continuance, which was granted. To grant a second motion for a continuance, admit the untimely evidence, and require the Defendants to take the deposition of the Claimant's expert witnesses all while continuing to pay TTD benefits would lead to undue prejudice to the Defendants, especially should any credit due exceed the award of permanency.
2. The Claimant worked for the Employer approximately four years as a chemical operator. In this capacity he would prepare kettles for use in mixing and making chemical products. The job involves opening valves, moving hoses, hooking up, and walking up and down stairs. His job apparently also involved driving forklifts.
3. The Claimant was injured on August 4, 2020, when he planted his left leg while

exiting a forklift and suffered a twisting injury to his left knee. He felt a pop, fell to the ground, and felt an immediate burning sensation in his left knee. After taking a brief period to recover, he reported the injury to the Employer and requested medical attention.

4. The Claimant received medical attention at the direction of Dr. Murray, which included surgery. As he recalls, the surgery improved his symptoms which continued to improve until April 2021, when they started to worsen. In response, Dr. Murray provided the Claimant with injections in April 2021 and July 2021.
5. The Claimant started developing symptoms in his back in January 2021. He says he told Dr. Murray of his back symptoms several times in passing and assumed something was being done. Dr. Murray never ordered treatment for the back. The Claimant did not allege compensable injury to his back until his Form 58, submitted November 8, 2021.
6. The medical reports of Dr. Murray were received into evidence. Dr. Murray reviewed an MRI he interpreted to show degenerative tears of the medial meniscus and lateral subluxation of the patella. After three months of conservative treatment, Dr. Murray recommended surgery at the Claimant's appointment on November 3, 2020.
7. The Claimant's surgical note was not submitted as evidence. A document entitled *Roper St. Francis Healthcare Posting Slip: Orthopedics* indicates the Claimant's surgery was scheduled for December 16, 2020.
8. The Claimant's post-surgical treatment centered on physical therapy and medications. Due to ongoing complaints, Dr. Murray provided an injection to the left knee on April 20, 2021. The injection led to significant improvement and Dr. Murray placed

the Claimant at MMI on July 20, 2021, after providing a second injection.

9. Dr. Murray completed a Form 14B dated August 20, 2021. On this report he assigns the Claimant 2% impairment to his left knee using the *AMA Guides to the Evaluation of Permanent Impairment, 5th Edition*. He assigned the Claimant no permanent restrictions and recommended future medical treatment of injections and therapy.
10. The deposition testimony of Dr. Murray was received into evidence. Referencing a medical report from January 26, 2021, which was not submitted into evidence or attached as an exhibit to the deposition, Dr. Murray testified it appeared the Claimant did report some low back pain due to an altered gait following surgery.
11. Dr. Murray confirmed January 26, 2021, is the only report of back pain in his records. He confirmed he would've documented subsequent complaints and referred the Claimant to a specialist, if indicated. Dr. Murray stated it is fair to assume the condition of the Claimant's back had returned to baseline prior to July 20, 2021.
12. When asked to reconsider the Form 14B, Dr. Murray indicated he would not assign formal restrictions but that the Claimant can perform activities as tolerated. Dr. Murray also stated it is unlikely the Claimant will require a total knee replacement in the future but that he might need periodic X-rays.
13. The post-surgical reports of ATI Physical Therapy were received into evidence. While therapy focused on the left knee, complaints of back pain are scattered in the records, particularly with regard to an activity called "3 Way Hip Standing." ATI Therapy did not provide any modalities to the Claimant after April 23, 2021.
14. The Claimant no longer works for the Employer. According to a letter the Employer mailed the Claimant, the Claimant took medical leave starting August

11, 2020. The employer held his job for six months but the Claimant did not return when his leave ended. His termination was effective February 17, 2021.

15. The Claimant testified his left knee felt well after the July 20, 2021 injection from Dr. Murray and he started looking for employment. He submitted his resume to several chemical plants and manufacturing facilities. He did not still think he could work as of the date of the hearing.

16. The Claimant states his left knee remains symptomatic as of the date of the hearing. He described his condition as deteriorating, unstable, and with constant pain. He has good days and bad days. On the bad days he has trouble with regular functions around the house. The Claimant would like further evaluation of his knee from Dr. Murray.

17. The Claimant states his back remains symptomatic as of the date of the hearing. He described his condition as similar to that of his left knee, with good days and bad days. The Claimant gets uncomfortable after prolonged sitting or walking. The Claimant would like further evaluation of his back.

18. With regard to the Claimant's left knee, Dr. Murray's opinion placing the Claimant at MMI is not refuted by any medical evidence. Neither are his opinions on the lack of formal permanent restrictions or intended future medical care. Although the Claimant testified to ongoing complaints of pain in his left knee, the greater weight of the evidence suggests the Claimant's left knee was doing well when Dr. Murray placed him at MMI. The final medical report indicates the Claimant was attempting to run and his testimony suggests he was looking for work. All of these factors are indicative of MMI. Based on the greater weight of the evidence, the Claimant reached MMI for his left

knee on July 20, 2021.

19. Because the Claimant has reached MMI, the Defendants are entitled to terminate payment of TTD benefits.
20. The Claimant sustained PPD benefits equivalent to 4% of the left leg. While Dr. Murray's impairment rating is only 2% to the left knee, the Claimant's testimony regarding continued symptoms on the date of hearing support a PPD award in excess of the impairment rating. The estimated award of compensation is 7.8 weeks.
21. The Claimant is entitled to future medical treatment consistent with the opinion of Dr. Murray. On his Form 14B, Dr. Murray indicated the Claimant will need therapy and injections in the future. At his deposition, Dr. Murray also indicated the Claimant will need X-rays. This is all the future medical treatment indicated by the evidence.
22. With regard to the Claimant's back, while there is no question he developed some degree of back pain following his surgery, it is hard to conclude it rose to the level of a compensable injury. Dr. Murray believes this was a secondary issue which developed due to an altered gait following surgery but that it is likely the condition resolved, based on the fact the Claimant did not report back pain to Dr. Murray after January 26, 2021. This is a reasonable conclusion to make given that the Claimant felt well enough to start searching for work once he was released from treatment. Moreover, the Claimant failed to pursue any kind of legal remedy for an evaluation of the back until submitting his Form 58 in advance of the November 16, 2021, stop pay hearing. And while back pain is mentioned by ATI Physical Therapy after January 26, 2021, it is almost always associated with the "3 Way Hip Standing" activity. Without further context provided by a medical expert, it is hard to conclude

any more from these reports than that the Claimant experienced back pain while performing that particular exercise. Moreover, nothing in the ATI Physical Therapy reports would contradict Dr. Murray's opinion that whatever post-surgical back symptoms the Claimant experienced had resolved by July 20, 2021, the date of MML. There was no medical evidence of causation submitted that would link his current complaints of back pain to his accident, despite the Claimant acquiring Dr. Murray's deposition testimony. Based on the greater weight of the evidence, the Claimant's allegations of a back injury are denied.

23. In reaching the above conclusions, the Undersigned specifically relied upon the deposition testimony of Dr. Murray. *See* Deposition of Dr. Murray, p. 20:10 - 21:16.

24. Although finding the Claimant reached MMI on July 20, 2021, the Defendants are only awarded a credit for TTD paid since the date the Form 21 was filed, or September 23, 2021. As of the date of hearing, the estimated value of credit was 15 weeks, with the final determination of credit to be determined after TTD benefits are terminated.

Commissioner Wilkerson issued the following Conclusions of Law:

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the Undersigned enters the following Conclusions of Law:

1. S.C. REG. 67-612(8) requires a non-moving party to provide expert reports to opposing counsel at least ten days prior to the hearing. Claimant's APA #IA, #2A, #3A, #2, and Exhibit B. were not provided to the Defendants in a timely manner and are appropriately excluded as evidence, as no good cause was provided for the lack

- of timeliness.
2. S.C. CODE ANN. SEC. 42-9-30 governs awards for partial permanent disability. The Claimant is awarded 4% PPD to the left leg, which has a value of 7.8 weeks.
 3. S.C. CODE ANN. SEC. 42-15-60 governs entitlement to medical treatment. This section also requires the Commission to determine whether Claimant is entitled to further medical treatment or modalities. Under the terms of this Order, the Claimant reached MMI and is entitled to further medical treatment or modalities consisting of injections, therapy, and X-rays, consistent with the opinion of Dr. Murray.
 4. S.C. CODE ANN. SEC. 42-1-160 defines what constitutes an injury by accident. There is no dispute over the admitted injury to the left knee. The Claimant's allegations of injury to the back are denied. The greater weight of the evidence shows the alleged back injury is a secondary complaint arising after surgery and resolving before MMI. No treatment was recommended for the back and no restrictions were provided. It did not hinder the Claimant from seeking employment after he was placed at MMI. "Nothing in the Act suggests our legislature intended to compensate an employee for aches, pains, or other conditions that do not interfere with his ability to do his job, even if those conditions are work-related." King v. Int'l Knife, 395 S.C. 437, 718 S.E.2d 227 (S.C. App. 2011).
 5. S.C. CODE ANN. SEC. 42-9-210 address the Defendants' credit for payment made when not due and payable. "TTD benefits are available from the date of injury through the date of MMI and post-MMI benefits may be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member." Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (S.C. App. 1999). Although this Order places the Claimant at MMI on July 20,

2021, credit is only granted back to the date the Form 21 was filed, which is September 23,2021.

Commissioner Wilkerson issued the following Order:

ORDER

Based on the above Findings of Fact and Conclusions of Law, the Undersigned hereby determines that the defendants may terminate TTD benefits effective immediately and is entitled to credit for all payments since September 23, 2021. The Claimant is entitled to 4% PPD to the left leg and future medical treatment consisting of injections, therapy, and X-rays. The Claimant's allegations of injury to the back are denied.

AND IT IS SO ORDERED!

Within the statutory period, the Appellant filed a Form 30 request for Commission review on March 9, 2022, setting forth the grounds of appeal, copies of which were furnished to all interested parties prior to oral arguments presented before the Appellate Panel on June 20, 2022. Such, together with all documentary evidence, has been delivered by oral argument to individual members of the Appellate Panel and has since been under study and consideration.

On appeal, the Appellant respectfully submitted the following:

1. Whether the Single Commissioner erred, as a matter of law, that certain documents the Claimant sought to introduce into evidence would be exclude from the record.
2. Whether the Single Commissioner erred, as a matter of fact and law, that the Claimant did not sustain a compensable injury to his low back.
3. Whether the Single Commissioner erred, as a matter of fact, a determination that the Claimant is at MMI.
4. Whether the Single Commissioner erred, as a matter of fact, when he assigned a 4% permanent partial disability award to the left lower extremity.

5. Whether the Single Commissioner erred, as a matter of fact and law, whether the Defendants are entitled to any credit for overpayment of TTD benefits.

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. § 42-1 7-50 (1985), review the award and 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 Single Commissioner.

Based upon a review of the foregoing, and after due consideration of the evidence in the record and the parties' respective arguments, the Appellate Panel has affirmed the Single Commissioner's decision to exclude the Claimant's APA #1A, #2A, #3A, #2, and Exhibit B. The Appellate Panel has determined to reverse the Single Commissioner's findings that the appellant did not sustain a compensable injury to his low back. The reasons for this are as follows:

APPELLATE PANEL FINDINGS OF FACT

1. The Defendants objection to Claimant's APA #1A, #2A, #3A, #2, and Exhibit B., is sustained and these expert reports excluded from evidence. This evidence was not provided to opposing counsel at least ten days prior to the hearing. Claimant did not establish good cause for failing to provide the documents in a timely manner. The undersigned also considered the prejudice that would result to the Defendants had the hearing been continued a second time. The Defendants' were entitled to a hearing prior to November 22, 2021, by operation of S.C. Code Ann. Sec. 42-9-260(C), but were denied a timely hearing due to the Claimant's first motion for a continuance, which was granted. To grant a second motion for a continuance, admit the untimely evidence, and require the Defendants to take the deposition of the Claimant's expert witnesses all while continuing to pay TTD benefits would lead to undue prejudice to the Defendants, especially should

any credit due exceed the award of permanency.

2. The Single Commissioner's finding that the Claimant did not sustain an injury to his low back is Reversed.
3. The substantial evidence rule of the Administrative Procedures Act (APA) governs the standard of review in a Workers' Compensation decision. SC Code 1976, § 1-23-380(A)(6)(e). Medical evidence, means expert opinion or testimony, stated to a reasonable degree of medical certainty and is offered by a qualified, licensed medical physician. SC Code 1976 § 42-1-160(g), 42-9-35, 41-1-172.
4. Dr. Murray stated, under oath, that it is his opinion, to a reasonable degree of medical certainty, that more likely than not, the problems with Mr. Richardson's low back is secondary to his left knee injury. (EXH AA, p. 44).
5. There is no other medical evidence that challenges and/or contradicts Dr. Murray's medical opinion.
6. Defendants argue that since Dr. Murray "assumed" that the Claimant's low back pain had resolved, then the low back is not compensable under the Act. (EXH AA, p.54)
7. To begin, a medical decision must not be based on surmise, conjecture, or speculation. Crisp v. SouthCo., 401 S.C. 627, 641, 738 S.E.2d 835 (2013); Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1949).
8. Dr. Murray's testified that he "assumed" that the Claimant's low back is no longer bothering him. Consequently, his opinion is based upon that which the Court has deemed improper to rely upon.

9. Furthermore, to conflate the compensability of a body part with whether or not that body part is impaired or not, disabled or not, or needing further medical or not, is not supported by the South Carolina Workers' Compensation Act.
10. There is clear and uncorroborated evidence that the Claimant sustained an injury to his low back as a result of his work accident on August 4, 2020.
11. The Claimant has testified that his low back is still bothering him and that he would like to get an evaluation of his low back. (Hrg. Trs. p. 41-42).
12. Dr. Murray also opined that referring the Claimant to an orthopaedic specialist would be appropriate if he still has issues with his low back, given that physical therapy had already been conducted. (EXH AA, p. 45A).
13. The Claimant is entitled to an orthopaedic evaluation to his low back pursuant to SCWC § 42-17-30.
14. The Defendants will control the selection of the orthopaedic specialist who evaluates and treats the Claimant's low back.
15. Consequently, the Claimant is not at MMI.
16. Since the Claimant is not at MMI, coupled with the fact that he has been assigned work restrictions, (Dr. Murray opined that he would support limitations of no repetitive bending, stooping, and squatting and no climbing ladders. EXH AA, p.49) and that the Employer cannot accommodate his work restrictions since they let him go (Hrg. Trs. p. 35, 44) (EXH B. p. 62), TTD benefits are to be reinstated.
17. Since TTD benefits had been terminated prior to this Order, the Defendants are to pay the Claimant back-owed TTD benefits, in a lump sum, from the time they were terminated to present date.

18. The PPD award the Single Commissioner awarded the Claimant is rescinded since it is premature to determine permanency when the Claimant is not at MMI for his August 4, 2020 work accident.

APPELLATE PANEL CONCLUSIONS OF LAW

1. The Claimant's request to submit APA #1A, #2A, #3A, #2, and Exhibit B is denied
2. Under Section 42-1-160, the Claimant has sustained a compensable injury to his low back
3. Under Section 42-17-30, the Claimant is entitled to an orthopaedic evaluation, under the control of the Defendants, to his low back
4. The Claimant is not at MMI
5. The Claimant is entitled to TTD benefits from the date that the Defendants terminated his benefits to present and continuing.
6. The 4% permanent, partial disability award to the left lower extremity is hereby vacated.

APPELLATE PANEL ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Appellant has sustained a compensable injury to his low back; and it is hereby

ORDERED, ADJUDGED, AND DECREED that the Appellant is entitled to an evaluation of his low back with an orthopaedic specialist, to be provided by the Defendants/Respondents based on the above Findings of Fact and Conclusions of Law; and it is hereby

ORDERED, ADJUDGED, AND DECREED that the Appellant is not at maximum medical improvement ("MMI"); and it is hereby

ORDERED, ADJUDGED, AND DECREED that the Claimant is entitled to TTD benefits from the time the Defendants/Respondents terminated his benefits to present and continuing; and it is hereby

ORDERED, ADJUDGED, AND DECREED that the Single Commissioner's permanency award is hereby vacated, and permanency is premature at this time.

AND IT IS SO ORDERED!

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION PANEL




Melody L. James, Commissioner/Chair

WE CONCUR:



Aisha Taylor, Commissioner



R. Michael Campbell, II, Commissioner

Order Served via email:

<p>James H. Lichty McAngus Goudelock & Courie jlichty@mgclaw.com</p>	<p>Ryan T. LeBlanc Joye Law Firm rleblanc@joyelawfirm.com</p>
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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 October 28, 2022