

APPELLATE PANEL DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1012696

BEVERLY ROBINSON

EMPLOYEE,
CLAIMANT/APPELLANT

VS.

HOME DEPOT, INC.

EMPLOYER.

AND

LIBERTY MUTUAL INSURANCE CO.,

CARRIER,
DEFENDANTS/RESPONDENTS

Appellate Panel Review held in Columbia, South
Carolina, on March 18, 2013, per notices timely
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

5-29-13

APPEARANCES: Claimant/Appellant represented by Pamela A. Mullis, Esquire
and Frank Barton, Esquire, of Columbia, South Carolina.

Defendants/Respondents represented by George D. Gallagher,
Esquire of McAngus Goudelock & Courie, L.L.C of Columbia,
South Carolina.

FILED: _____

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SC Court of Appeals

STATEMENT OF THE CASE

Claimant sustained an admittedly compensable injury to her low back arising out of an in the course of her employment with The Home Depot on July 21, 2010 while lifting buckets of paint overhead. Defendants have provided authorized medical evaluation and treatment with Dr. Robert M. DeSilva and Dr. Steven B. Storick. Temporary total benefits have been paid from September 15, 2010 to date.

Defendants submit that Claimant has reached maximum medical improvement as of February 1, 2012 per the opinion of the authorized treating physician, Dr. Storick. Specifically, Dr. Storick states “[m]s. Robinson is at maximum medical improvement. She has had an extensive evaluation without any evidence of nerve root impingement to explain her perceived disability. She does have some early degenerative changes at L4-5 that can be the source of some component of her back and leg pain. Regardless, she has never improved with any of the treatments.” (APA p. 21). Defendants seek an Order from the Commission granting their request to terminate Claimant’s temporary total disability benefits, which the Commission’s file indicates have been running since September 15, 2010 to the present and continuing.

Defendants also seek entry of an appropriate award of permanent partial disability benefits for specific loss of use of the back based on the impairment rating from Dr. Storick. Dr. Storick further stated in his February 1, 2012 record: “[u]sing the *AMA Guides to the Evaluation of Permanent Impairment, 6th Ed.*, she has 5% whole person impairment to the lumbar spine based on her ongoing back and left leg pain as well as lumbar spondylosis/IDD. She can return to work at least light duty based on DOI criteria.” (APA p.21). Defendants further seek credit for all weekly benefits paid after February 2, 2012 against any permanent partial disability award. Finally, Defendants stipulate that Claimant may be entitled to ongoing medical care per

§42-15-60 in accordance with Dr. Storick's February 1, 2012 note, which states, in pertinent part, "[t]he patient is to cut back on her Lyrica to just at night since she is unable to tolerate the medication during the day. She can call me if she needs refills of the Lyrica provided she finds it beneficial. Ms. Robinson would need ongoing medical care if she continues with the medication as noted above and can be seen very four to six months."

Claimant initially contends that she has not reached maximum medical improvement and requires further medical evaluation and treatment that may affect a cure of her compensable lower back condition. As such, she opposes Defendants' stop payment application and requests continuing temporary total disability benefits. In the alternative, Claimant contends, if she is found to have reached maximum medical improvement, then a determination of the extent of her permanent disability is not appropriate. Although Defendants' Form 21 requests an entry of an appropriate permanent disability award, Claimant submits that a determination of permanency is improper unless she requests such a determination, which she is not seeking at this time. In the alternative, Claimant alleges she is permanently and totally disabled as a result of her compensable back injury, specifically, light duty work restrictions that prevent her from returning to the same or similar employment. Claimant finally contends that she is entitled to lifetime causally related medical treatment necessary to lessen the period or extent of her disability and/or maintain current level of functioning.

In reply to Claimant's position on permanent disability, Defendants submit the following: (a) Defendants properly raised the issue of Claimant's entitlement to permanent disability compensation per their Form 21; (b) the Commission is not bound to determine issues regarding extent of permanent disability only when the claimant requests such a determination and/or on the claimant's own terms; (c) Claimant is in no way prejudiced by Defendants' request for a

determination on the extent of her permanent disability because she submitted her evidence on that issue in the form of purported impairment ratings from her family physician, Dr. Green B. Neal, and a vocational report from her expert, Adgar Brown.

As for Claimant's claim for permanent and total disability, Defendants submit Claimant's compensable injury is confined to her lower back, which is a scheduled member under §42-9-30.

See Therrell v. Jerry's Inc., 370 S.C. 22, 633 S.E. 2d 893 (S.C. 2006) (holding that situs of

claimant's injury controls nature and scope of claimant's entitlement to permanent disability compensation). Although Claimant alleges injury to her legs, she has not shown "disabling effects" from her legs contributing to her overall disability; therefore, she is limited to scheduled disability compensation for specific loss of use of the back under §42-9-30. See Wigfall v. Tideland Utilities, 354 S.C. 100, 580 S.E. 2d 100 (S.C. 2003) (holding that claimant is limited to scheduled disability compensation for loss of use of a single scheduled member unless she can prove disabling effects to another scheduled or unscheduled body part). Finally, Defendants submit that the preponderance of the evidence does not support a finding of permanent and total disability, given the paucity of objective findings; Dr. Storick's fairly mild impairment rating of only 5%, and light duty work restrictions.

A hearing in this matter was convened before Commissioner Gene McCaskill on April 18, 2012 in Columbia, South Carolina. By Order dated September 4, 2012. Commissioner McCaskill found, *inter alia*, the following: (a) Claimant reached maximum medical improvement as of February 1, 2012; (b) the preponderance of the evidence in the record establishes that Claimant did not sustain direct injury or disabling effect to her legs as a result of her work accident; therefore, Claimant's compensable injury is confined to the back; (c) Claimant failed to establish by preponderance of the evidence that she sustained permanent and

total disability under §42-9-10 and/or §42-9-30; (d) Claimant has sustained 15% specific loss of use of the back; (e) Defendants are granted credit for all benefits paid beyond the date of maximum medical improvement against the permanent partial disability award; and (f) Claimant was entitled to ongoing and future medical modalities necessary to lessen the period/extent of disability and maintain maximum medical improvement under the direction of Dr. Steven Storick.

Thereafter, Claimant timely appealed to the Full Commission. Although Claimant's Form 30 alleges 43 exceptions, the grounds for Claimant's appeal can essentially be characterized as follows: (1) whether the hearing Commissioner erred in finding Claimant was limited to recovery for a single scheduled member pursuant to §42-9-30; (2) whether the hearing Commissioner erred by failing to distinguish between impairment and disability by not awarding Claimant permanent and total disability under §42-9-10 for total loss of earning capacity, or §42-9-30 based on greater than 50% loss of use of the back; and (3) finding that Claimant reached maximum medical improvement and failing to order further medical evaluation and treatment. Oral arguments on these issues were heard before the undersigned Appellate Panel on March 18, 2013.

EVIDENCE OF THE CASE

Claimant's Testimony:

Claimant was the only witness to testify at the hearing. She confirmed her essential biographical information, including age, education level, prior vocational history. She described her compensable work accident with Home Depot and course of her subsequent medical treatment. Finally, she testified regarding her current symptoms and complaints of disability and

dysfunction, including severe constant back pain and dysfunction with her legs. She appeared for the hearing using a cane to ambulate.

Medical Evidence:

After failing some initial non-specialized conservative treatment, Claimant was referred for orthopaedic evaluation with Dr. Robert DaSilva of Midlands Orthopaedic on September 9, 2010. Dr. DaSilva noted that Claimant presented with a “normal gait with no assistive devices.”

He noted positive straight raise on the right and diffuse tenderness over the lower lumbar spine on the right side. He ordered an MRI to rule out herniated disc and released her to return to work at light duty only. (APA pp.1-2). Claimant underwent an MRI scan on September 22, 2010. The scan showed “mild degenerative disc changes at L4-5 and T11-12 without disc herniation or spinal stenosis.” (APA p.4). Dr. DaSilva saw Claimant in follow-up and recommended physical therapy, continued light duty work status, and prescription medications.

Claimant presented to Dr. DaSilva for follow-up in November 2010 complaining of severe radiating lower back pain. Dr. DaSilva ordered a bone scan and EMG and nerve conduction studies of the lower extremities with Dr. Daniel Westerkam. Dr. Westerkam's conclusion is “[t]his is a normal study. There is no electrodiagnostic evidence of lumbar radiculopathy, peripheral neuropathy, myopathy, or lower extremity peripheral nerve entrapment at this time. The patient appears to have some SI joint dysfunction that is probably irritating the sciatic nerve but not causing any significant nerve injury or damage.” (APA p.13). Claimant underwent the bone scan in December 2010. The bone scan impression is as follows: “[n]o abnormalities within the lumbar spine or posterior pelvis.” (APA p.15).

Claimant followed up with Dr. DaSilva on December 30, 2010. Dr. DaSilva's assessment at that point is “[b]ack pain etiology unclear. No structural abnormalities.” Dr.

DaSilva advised Claimant to “[f]ollow-up as needed” and “[n]o medical treatment indicated.” (APA p.17).

Claimant’s attorney referred her for an independent medical evaluation with Dr. Don Johnson at Southeastern Spine Institute. Dr. Johnson’s physical examination notes that Claimant presents with a “slightly antalgic” gait on the left side. Dr. Johnson further states “[i] would suggest that she be allowed to have a series of at least two to three injections as well as lumbar core stabilization exercise program. I think there is a significantly high likelihood that she could avoid surgical intervention.” (APA p.19).

Thereafter, Claimant was referred by the Defendants for authorized treatment with Dr. Steven Storick of Carolina Spine Center. Claimant initially saw Dr. Storick in May 2011 complaining of left-sided back and leg pain. Dr. Storick’s impression is chronic low back pain and left leg pain, left lumbosacral radiculitis, and L4-5 degenerative disc disease. He notes that “[t]here is no evidence of direct nerve root impingement by disc protrusion or stenosis. Her nerve studies are normal.” (APA p.23). Dr. Storick recommended a course of epidural steroid injections. Claimant saw Dr. Storick for a follow-up visit in September 2011, where he notes “[s]he has had two epidural steroid injections without much improvement.” He further states: “[t]he majority of Ms. Robinson’s symptoms seem to be more radicular in origin although she really has not responded to typical treatments for this problem. She does have some subtle symptoms of sacroiliitis and given the minimal findings on MRI it would be reasonable to inject that joint.” (APA p.31).

In October 2011, Dr. Storick again notes the two epidural steroid injections have not been helpful and recent left sacroiliac joint injection was not helpful either. (APA p.33). Dr. Storick notes: “[m]s. Robinson has exhausted conservative treatments... Given the negative results of

the prior MRI and nerve studies, as well as her ongoing persistent back and left leg pain, a lumbar myelogram/CT scan is warranted to help us determine if there is any evidence of nerve root impingement.” (APA p.33). Claimant underwent a lumbar myelogram/CT scan, which confirms the MRI results of some degenerative changes at L4-5 and L5-S1. The myelogram also reveals a mild broad-based disc bulge at L4-5 that Dr. Storick says is “not severe.” (APA p.36). Dr. Storick recommended a selective nerve block to the left at L4-5, which Dr. Storick notes on February 1, 2012 “[s]aw no improvement.”

Ultimately, Dr. Storick released Claimant at maximum medical improvement as of February 1, 2012 noting that she has some early degenerative changes at L4-5 that can be the source of some component of her back and leg pain, but that she has never improved with any treatments. Dr. Storick released Claimant with a 5% whole person impairment to the lumbar spine based on ongoing back pain and left leg pain as well as lumbar spondylosis/degenerative disc disease. He notes that she has permanent work restrictions of no lifting or carrying or pushing/pulling greater than 20 pounds. (APA p.37-38).

Deposition Testimony of Dr. Storick:

Claimant’s attorney deposed Dr. Storick on April 10, 2012. Dr. Storick confirmed that Claimant should be restricted from medium to heavy manual labor. He also confirmed that she was taking Lyrica for neuropathic pain. Dr. Storick noted that Claimant could be seen every three to four months for refills and adjustment of the Lyrica. Dr. Storick stated that Claimant will need some type of neuropathic pain medication for symptomatic relief of her pain for the indefinite future. Claimant’s attorney specifically questioned Dr. Storick regarding Claimant’s use of a cane. Dr. Storick testified: “[i] would take issue with the use of a cane. I do not think that under the circumstances and all the tests we have provided that have been negative that I

would not encourage her to use a cane and I think that is more of a crutch on her part. While she may feel numbness, there is no evidence of any substantial nerve damage that would require, or evidence of anything that would require the use of a cane.” (Storick Dep. p.8, ll 19-25, p.9, ll 1-2). Dr. Storick further confirmed that numbness in the leg would not be a medical justification for use of a can. (Storick Dep. p.9, ll 23-25).

Under cross-examination, defense counsel posed the following question to Dr. Storick:

Question: Is it fair to say, Doctor, that the amount of subjective pain and subjective disability that Ms. Robinson is complaining of is atypical or out of proportion to the objective pathology, especially considering the treatment that has been specifically targeted to that pathology has not been successful?

Answer: I believe the use of the cane, the limping, I have no answer for why has that degree of a problem. Based on the tests, including the nerve study, the myelogram and MRI, I would not discount that she could have back pain and some referral to the leg. But I believe the degree of disability is excessive of what the diagnostic tests of shown.

(Storick Dep. p.18, ll 7-22). (emphasis added)

FINDINGS OF FACT

After considering able arguments from counsel for the parties, and based on a review of the medical and other documentary evidence submitted by the parties through their APAs, deposition testimony from the authorized treating physicians, and lay testimony presented at the hearing, the Appellate Panel hereby makes the following Findings of Fact and Conclusions of Law:

1. The preponderance of the evidence in the record, including, but not limited, the medical records and deposition testimony from Dr. Storick, establish that

Claimant has reached maximum medical improvement for her compensable lower back injury as of February 1, 2012. No further medical evaluation, treatment, or diagnostic testing will "affect a cure" of Claimant's compensable lower back condition within the meaning of §42-15-60.

2. Because Claimant has reached maximum medical improvement, Defendants are entitled to terminate Claimant's temporary total disability benefits, and consideration of an award of permanent disability benefits is appropriate and ripe for adjudication.
3. The preponderance of the evidence in the record, specifically, medical evidence from Dr. Storick, EMG and nerve conduction studies, and other diagnostic studies/tests, confirm that Claimant has not sustained direct injury or disabling effects on either leg as a result of her compensable lower back injury. Dr. Storick testified in his deposition that there was no medical justification for Claimant's use of a cane to ambulate, given her mild objective findings. Moreover, Dr. Storick did not impose any specific restrictions on Claimant's work status or other activities relative to her leg or legs. Claimant's work restrictions consist of no lifting/carrying or pushing/pulling greater than 20 pounds, which he indicated in his deposition testimony was a prophylactic restriction necessary to prevent further injury to Claimant's back.
4. Because Claimant's compensable injury is confined to her lower back, she may recover compensation for permanent partial disability benefits for specific loss of use of the back per §42-9-30. See Wigfall v. Tideland Utilities, 354 S.C. 100, 580 S.E. 2d 100 (S.C. 2003) (holding that a workers' compensation claimant with

one scheduled injury was limited to recovery under the scheduled disability statutes and the scheduled disability coupled with loss of earning capacity does not enable claimant to pursue permanent and total disability); *See also Therrell v. Jerry's Inc.*, 370 S.C. 22, 633 S.E.2d 893 (S.C. 2006) (situs of the injury determines the nature and scope of permanent disability compensation).

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5. The preponderance of the evidence presented in this case does not establish that Claimant has sustained a total loss of earning capacity entitling her to an award of permanent and total disability under §42-9-10. This finding is based in part on the following: (a) Dr. Storick imposed permanent prophylactic restrictions of no lifting/carrying or pulling/pushing greater than 20 pounds, which qualifies Claimant for light duty employment; (b) Dr. Storick testified there is no medical justification for Claimant's use of a cane; and (c) Although Claimant's vocational expert, Adgar Brown, opined that Claimant was permanently and totally disabled secondary to her compensable back injury, his opinions are based largely upon less than sedentary work restrictions imposed by Claimant's family physician, Dr. Green B. Neal, who is not a specialist in spinal injuries.
6. Based on the evidence as a whole, including, but not limited to, Claimant's testimony regarding her subjective complaints of pain and disability/dysfunction, deposition testimony from Dr. Storick, as well as impairment ratings, work restrictions, and other commentary contained in the medical records from all providers whose reports were submitted into evidence, the undersigned Commissioner finds that Claimant has sustained a 15% specific loss of use of her back as a result of her compensable lower back injury.

7. Since Claimant reached maximum medical improvement as of February 1, 2012, Defendants are entitled to credit for all weekly benefits paid since that date to the present and continuing against the aforementioned 15% permanent disability award.
8. Based on deposition testimony from Dr. Storick and other medical evidence presented, Claimant is entitled to ongoing medications, evaluations, and other medical treatment necessary to lessen the period/extent of her disability and/or to maintain her current level of maximum medical improvement functioning under the direction of Dr. Steven Storick.

CONCLUSIONS OF LAW

1. Maximum medical improvement is a term used to indicate a person has reached such a plateau that in the physician's opinion there is no further medical care or treatment that will lessen the degree of impairment. O'Banner v. Westinghouse Electrical Corp., 319 S.C. 24, 459 S.E. 2d 324 (Ct. App. 1995).
2. In the instance case, Claimant reached maximum medical improvement as of February 1, 2012, and therefore Defendants are entitled to terminate Claimant's temporary total disability benefits in accordance with WCC R.67-506(B).
3. Pursuant to S. C. Code Ann. §42-9-30 and other applicable law, Claimant has sustained a 15% permanent partial specific loss of use of the back as a result of her compensable work accident.
4. Pursuant to Wigfall and Therrell, *supra*, Claimant's compensable injury is confined to her lower back and she is therefore limited to scheduled disability compensation for loss of use of the back under §42-9-30. *See also*: Colonna v.

Marlboro Park Hospital, Shearhouse Advance Sheets, Opinion #5117 (Ct. Appl 2013) (“[w]e find that that more thoroughly reading of Singleton [internal citations omitted] and subsequent cases demonstrates that a claimant must prove not only that another body part was *affected* by the insertion of the treatment device, but that another body part was *impaired* or *injured* per §42-9-10 to apply.”) (emphasis added). Because Claimant has not proven by the

preponderance of the evidence that she sustained direct injury or disabling effect to any other body parts, she cannot to pursue an award for permanent and total disability under §42-9-10 or an award of permanent partial disability based on loss of or diminution of earning capacity under §42-9-20.

5. Pursuant to S. C. Code Ann. §42-9-10, Claimant has failed to prove that she is permanently and totally disabled as a result of her back injury. See Coleman v. Quality Concrete Products, 245 S.C. 625, 142 S.E. 2d 43 (1965) (holding the burden is on the employee to prove he or she is totally disabled, specifically, that he or she is unable to perform the services other than those that are so limited in quality, dependability, or quantity that a reasonably stable labor market for them does not exist.) See also Watson v. Xtra Mile Driving, Inc., Opinion No. 5013 (Court of Appeals affirmed the Commission’s denial of claimant’s claim for permanent and total disability benefits where claimant’s vocational expert, Adger Brown, opined that claimant was permanently and totally disabled *citing* Shealy v. Aiken County, 341 S.C. 448, 535 S.E. 2d 438 (holding that the Commission is specifically reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence).

6. Pursuant to S. C. Code Ann. §42-9-210 Defendants are entitled to credit for all compensation benefits paid beyond the date of maximum medical improvement. *See Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E. 2d 482 (S.C. 2007) (workers' compensation benefits accrue along a time continuum. *See also Curiel* ('temporary total disability benefits are available from the date of injury through the date of maximum medical improvement and post-maximum medical improvement benefits may then be awarded as either permanent total or partial disability or as percentage of impairment to the scheduled member).
7. Pursuant to S. C. Code Ann. §42-15-60 and *Dodge v. Brucoli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E. 2d. 593 (Ct. App. 1999) Claimant is entitled to causally related, reasonable, and medically necessary medical care necessary to lessen the period/extent of her disability and/or maintain current level of functioning/maximum medical improvement status under the direction of Dr. Steven Storick.

ORDER

For all the aforementioned reasons, **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that Commissioner McCaskill's Order dated September 4, 2012 is hereby **AFFIRMED** in its entirety and that all of the Findings of Fact and Conclusions of Law are true and correct based on preponderance of the evidence standard.

IT IF FURTHER ADJUDGED AND DECREED that Defendants shall pay Claimant permanent partial disability compensation to Claimant for 45 weeks commencing on February 2, 2012, which represents a 15% permanent partial specific loss of the back in accordance with

§42-9-30. The net difference between the aforementioned permanent disability award less benefits paid to the present after February 2, 2012, shall be tendered to Claimant in a lump sum.

IT IS FINALLY ORDERED, ADJUDGED, AND DECREED that Defendants shall authorize and be financially responsible for causally related, reasonable, and medically necessary treatment tending to lessen Claimant's period or extent of disability and/or maintain current level of function/maximum medical improvement status under the direction of Dr. Steven Storick,

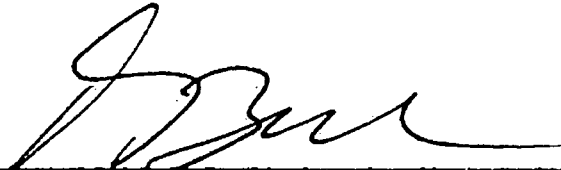
subject to all provisions and limitations under §42-15-60.

AND IT IS SO ORDERED.

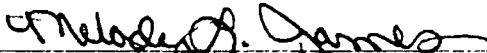


Commissioner Andrea C. Roche
For the Appellate Panel

WE CONCUR:



Commissioner T. Scott Beck



Commissioner Melody James

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 29, 2013