

State of South Carolina
Workers' Compensation Commission

APPELLATE PANEL DECISION AND ORDER

COMMISSION PANEL: Commissioner Cynthia C. Dooley, Chair; Commissioner T. Scott Beck; Commissioner Melody L. James

SCWCC File No.: 1923480

Takara L. Stewart,
Claimant/Respondent,

v.

South Carolina CVS Pharmacy, L.L.C.,
Employer,

and

XL Insurance America Inc.,
Carrier,
Defendants/Appellants.

REVERSED

Hearing held via Zoom
on May 8, 2023

Per notice timely and properly served upon all Parties of Interest.

Appearances: Stephen J. Wukela, of Wukela Law Firm, appeared on behalf of
Claimant/Respondent.

Michelle D. Yarbrough, of Gallivan, White & Boyd, PA,
appeared on behalf of Defendants/Appellants.

Court Reporter: Amber Scarborough, 1230 Richland Street, Columbia, SC
29201, 803-252-3445, contact@creelreporting.com.

Filed: July 10, 2023

I. STATEMENT OF THE CASE

The parties were heard by Commissioner Aisha Taylor on June 3, 2021 in Hartsville, South Carolina. This is an appeal from the January 19, 2023 Order of Commissioner Taylor which found that Takara Stewart (“Claimant”) sustained a compensable physical-mental injury and a compensable mental-mental injury entitling her temporary total disability benefits and medical benefits.

This claim arises out of an incident which took place on December 26, 2019 when a CVS customer touched Claimant on her posterior while she was vacuuming the store floor. Video footage of the incident shows Claimant smiling immediately afterwards and then proceeding with vacuuming the floor. (Defendants’ Exhibit G). Claimant performed the remainder of her job duties that evening and closed the store. (Single Commissioner Hearing Tr. 76:17-77:6). She did not cry after the incident, nor did she speak about it with her supervisor or any of her coworkers that day. (Hearing Tr. 77:7-78:5).

Ten days later, on January 5, 2020, she first reported the incident to the police. (APA pp. 3-4). On February 20, 2020, Claimant presented to Dr. Andrea Atkins, an OBGYN, to discuss birth control. (Claimant’s APA, 4, p. 8). Dr. Atkins provided her with Nexplanon and diagnosed her with, among other things, anxiety. There is no reference to this work incident in the medical note.

On April 8, 2020 and February 24, 2021, Claimant filed a Form 50, Request for Hearing, alleging she suffered a *psyche* injury only as a result of a customer groping her posterior on December 26, 2019. She claimed she was in need of additional medical examination and treatment for her psyche and requested temporary total disability benefits over “[v]arious dates and times” since the accident. On May 8, 2020 and March 26, 2021, South Carolina CVS Pharmacy, LLC and XL Insurance America, Incorporated (“Defendants”) filed a Form 51, denying Claimant sustained an injury by accident arising out of and in the course of her employment and denying the nature and extent of the injury alleged. On May 18, 2021, Claimant filed a Form 58, Pre-Hearing Brief, in which she answered “psyche” to the question “Type of injury and body part(s).”

At the hearing on June 3, 2021, Claimant denied experiencing any pain or bruising after being touched by the customer. (Hearing Tr. 64:11-19). She also denied being physically hurt or injured from

the contact (Hearing Tr. 64:7-10), or ever reporting a physical injury to her physicians. (Hearing Tr. 63:23-24). She continued to work for CVS for months following the incident, and she did not call out of work or miss any time due to stress, anxiety, depression, trauma, or any psychological issues until March 14, 2020. (Hearing Tr. 63:4-14).

On March 13, 2020, she met with her supervisor, Robyn Hanna, and voiced fear over what might happen when the customer, who touched her and was just arrested, was released. (Hearing Tr. 27:12-17). She informed Ms. Hanna that she “had a past of being assaulted, or whatever” and that “it just kind of aggravated and, you know, stirred up a lot of, you know, anxiety.” (Hearing Tr. 27:20-23). Claimant alleged she was assaulted by an uncle when she was younger. (Hearing Tr. 24:7-10; 27:20-23). She admitted she never reported the molestation to any police or governmental agency, claiming her family told her not to say anything. (Hearing Tr. 72:25-73:3; 24:14-15). She also never received any medical treatment or professional counseling for the alleged molestation, and she never mentioned it to any of her medical providers until after December 26, 2019. (Hearing Tr. 73:14-25). There were also no witnesses present at the hearing to corroborate her prior molestation account or claims that she previously told family members of this alleged molestation. (Hearing Tr. 74:17-20).

Ms. Hanna advised Claimant, who wanted to take time off from work, to submit a leave request through Human Resources. (Single Commissioner Hearing Tr. 28:1-2). Ms. Hanna testified Claimant told her she was fearful of retaliation by her assailant. (Hearing Tr. 97:5-14). Claimant explained she stopped working for CVS the next day because she was scared of retaliation by the customer who had just been arrested and had a bond hearing. (Hearing Tr. 65:21-25). Claimant did not ask to be transferred to a different store to avoid the customer. (Hearing Tr. 82:18-21). She also acknowledged she did not have any medical documentation to support being out of work as of March 14, 2020. (Hearing Tr. 66:17-19).

On April 15, 2020, through telemedicine, Claimant presented for her initial appointment with Dr. Ashley Hicks of MUSC Primary Care, her chosen primary care physician. (Claimant’s APA 5, p. 19). Claimant reported, among other things, a recent sexual assault and anxiety. However, on examination, she demonstrated a normal mood and affect with normal attention span and concentration. (Claimant’s APA

5, p. 20). Dr. Hicks diagnosed her with “anxiety state” and noted she had already been prescribed sertraline but had not started taking it. (Claimant’s APA 5, p. 21). The parties took Dr. Hicks’ deposition on March 22, 2021. During her deposition, Dr. Hicks testified she based Claimant’s anxiety diagnosis on her subjective complaints. (Dr. Ashley Hicks Dep. Tr. 28:8-10). She saw no objective findings of Claimant’s alleged psychological problems. (Hicks Dep. Tr. 27:24 – 28:2). Dr. Hicks did not assign any work restrictions or place Claimant out of work during this visit.

When Claimant returned to Dr. Hicks on May 18, 2020, she opined that Claimant was not compliant with her April 15, 2020 recommendations and also opined that there were no objective findings to support her subjective complaints. (Hicks Dep. Tr. 30:2-5; 33:8-10). Dr. Hicks placed Claimant out of work. Three days later, Claimant applied for unemployment benefits and certified she was ready, willing, and able to work. (Hearing Tr. 61:22-62:8). When asked about this certification, Dr. Hicks stated that she would support Claimant working as of May 21, 2020 if Claimant reported she felt she was able to work at that time. (Hicks Dep. Tr. 32:17-25). Following her May 2020 visit with Dr. Hicks, Claimant started treating with Dr. Aneta Hopkins, a Doctor of Education, with Wellness Counseling Services. She diagnosed Claimant with PTSD. (Claimant’s APA 6, p. 26).

Claimant failed to present for her follow-up appointment in June and July with Dr. Hicks due to transportation issues but confirmed Dr. Hicks never refused to see her via telemedicine during that time. (Single Commissioner Hearing Tr. 68:6-22). Dr. Hicks also agreed that transportation is not an issue for her virtual appointments. (Hicks Dep. Tr. 33:23-34:4). When Claimant ultimately presented for her August virtual appointment with Dr. Hicks, Dr. Hicks indicated Claimant’s anxiety had improved since she started seeing a counselor. (Defendants’ APA 12, p. 37). Dr. Hicks again noted that her anxiety diagnosis was based on Claimant’s subjective complaints and there were no objective signs of anxiety to support the diagnosis. (Hicks Dep. Tr. 36:3-13). Dr. Hicks did not give Claimant a mental status examination before diagnosing her with anxiety. Further, although her medical records recorded a new diagnosis of depression, she retracted that diagnosis during her deposition because she does not know where it came from, and she could not support that diagnosis based on her documentation. (Hicks Dep. Tr. 36:14 – 37:17). Dr. Hicks

prescribed sertraline, advised her to follow up in one month, and placed her out of work until her follow-up appointment. (Defendants' APA 12, p. 38). Claimant, however, did not return until October 5, 2020. (Defendants' APA 12, p. 40). That appointment was also virtual.

At that time, Claimant reported that she felt her anxiety and depression were poorly controlled, that she was not compliant with taking sertraline, and that the medication was making her drowsy. (Defendants' APA 12, p. 40). She also requested Dr. Hicks complete her FMLA paperwork. Dr. Hicks switched Claimant's prescription to Lexapro and advised her to call and cancel in advance rather than continue to no-show to her appointments. (Defendants' APA 12, p. 41). She further indicated she "will have to be honest about her lack of follow-up on her FMLA paperwork." She recommended Claimant follow up with her counselor, and, if unable to reach her, to switch counselors. In her deposition, Dr. Hicks again noted that Claimant was still non-compliant with her appointments despite them being virtual, there were no objective findings to support Claimant's anxiety diagnosis, and she was not willing to write her out of work due to non-compliance. (Hicks Depo. Tr. 38:9-20, 39:3-13).

When she returned to Dr. Hicks in November 2020, Claimant indicated she never picked up the Lexapro prescription and that she would instead prefer to continue without medications as she felt she was doing well with her coping mechanisms. Although Dr. Hicks asked Claimant to return in February 2021 for a follow up evaluation, Claimant never returned and never tried to make a follow up appointment. (Hicks Dep. Tr. 42:25 – 43:7).

Dr. Hicks confirmed Claimant continued to be non-compliant with her medication and follow-up visit treatment recommendations. (Hicks Dep. Tr. 41:9-23). In her deposition, Dr. Hicks confirmed that, during the course of treating Claimant, she only took Claimant out of work for one month on May 18, 2020 and one month on August 11, 2020. (Hicks Dep. Tr. 39:24 – 40:22)

Although post-traumatic stress disorder was not referenced or recorded in Dr. Hicks' medical records, when presented with a record from Claimant's counselor, Dr. Hicks agreed Claimant had a diagnosis of post-traumatic stress disorder. (Dr. Ashley Hicks' Dep. Tr. 16:22-25). Dr. Hicks stopped short of providing her opinion, to a reasonable degree of medical certainty, as to whether the incident Claimant

described at CVS would have aggravated a pre-existing condition and whether the complaints Claimant made when seeing Dr. Hicks were the result of the aggravation. (Dr. Ashley Hicks Dep. Tr. 17:1-21). She also testified she is a family medicine doctor and her only training in psychological diagnoses was during her residency. She could not recall the diagnostic criteria for a PTSD diagnosis during the deposition, she does not know how many criteria are required to qualify for a PTSD diagnosis, and she did not consult with the DSM before giving the PTSD diagnosis. (Hicks Depo. Tr. 5:25-6:2; 43:17-23; 44:3-8).

Regarding work restrictions, Dr. Hicks explained that, when she took Claimant out of work in May and August 2020, she did so for only a one-month period each time and that the period was meant to cover the time between her monthly follow-up appointments. (Hicks Depo. Tr. 40:10-12). She further explained she did not take her out of work in October 2020 because Claimant had been noncompliant with treatment. (Hicks Depo. Tr. 40:19-22). She also did not write her out of work in November 2020.

On May 25, 2021, Claimant presented for an IME with Dr. Jon Snipes, a psychiatrist, who was the only medical doctor seen by Claimant specially trained in diagnosing post-traumatic stress disorder. (Defendants' APA 13, p. 46). In his accompanying report, Dr. Snipes described Claimant's demeanor as "hostile" and noted it was difficult to assess Claimant's specific symptoms due to her poor cooperation and her being clearly unhappy with the interview. (Defendants' APA 13, pp. 47; 51). He provided that, at one point, "it seemed that she actually hung up and then rejoined the meeting." (Defendants' APA 13, p. 50). He also indicated she was not able to elaborate on many specific symptoms, answered most questions with somewhat vague answers, answered a lot of other questions with "I don't know", and refused to answer others. (Defendants' APA 13, p. 47).

Still, she reported a depressed mood, a sense of being easily overwhelmed, low frustration tolerance, that her mind races at times, and that she often becomes frustrated. She told him her symptoms of anxiety and stress started immediately after the accident despite being able to continue working for three months after. (Defendants' APA 13, p. 47). When asked what she felt she needed for treatment, she responded "I wasn't given any kind of restitution, compensation." (Defendants' APA 13, p. 51). When Dr. Snipes tried to clarify that he was asking about psychiatric care and what kind of treatment she felt that she

needed going forward, Claimant stated, "I'm trying to get the funds so I can pay for my classes!" When he reframed the question a third time and asked more about treatment and how to help her recover, she responded "at this point, there has to be some restitution." (Defendants' APA 13, p. 51). When asked directly about the need for medication, she reported that she does not need medication. (Defendants' APA 13, p. 51).

Dr. Snipes did not see any evidence of any psychiatric illness related to Claimant's workplace incident at that point. (Defendants' APA 13, p. 52). He explained she would not meet the criteria for post-traumatic stress disorder as she was not showing any continued symptoms of avoidance, alterations in arousal or reactivity, and did not endorse any continued intrusion symptoms. He also indicated in his report that Claimant was still able to vacuum without experiencing distressing thoughts. (Defendants' APA 13, p. 50). He felt she was showing signs of depression that did not appear to be related to her workplace incident but rather related to her life stressors following becoming homeless. He indicated it is "very clear" from her comments that the major stressor contributing to these symptoms is her financial strain and homelessness. He noted she does not feel she needs any psychiatric treatment related to her previous incident but felt optimistic about therapy she recently started with Brenda Graham. He further provided "she is very clearly capable of returning to work, and she herself agrees with this assessment and is taking steps to find employment now." All of his opinions were given to a reasonable degree of psychiatric certainty. (Defendants' APA 13, p. 52).

Claimant testified that, after she stopped working for defendant employer, she did not "really have any . . . working income coming in." (Single Commissioner Hearing Tr. 28:16-25). However, the record provides that, even prior to this incident and her subsequent unemployment, Claimant had a history of financial problems. She testified she had been involved in a bankruptcy suit in Savannah in 2010 as well as in a number of eviction-related matters spanning from 2009-2017. (Hearing Tr. 43:2-5; 43:23-46:19). Nevertheless, when presented with her renter's application for the Florence apartment she was residing in at the time of this incident, she acknowledged she indicated on the application that she had never been evicted. (Hearing Tr. 48:7-12). She also acknowledged she was late on rent "a lot of times" and that her

landlord for that apartment also filed evictions against her. (Hearing Tr. 49:12-18). Five of those evictions were before the incident that gave rise to this claim. (Hearing Tr. 49:10-51:15).

Additionally, before this work incident, Claimant, a divorced mother, indicated she was having a “rough time” and that it was “not easy” having to work, attend school, raise a child, and pay her expenses. (Single Commissioner Hearing Tr. 52:21-53:7). She provided her landlord notice of her intent to vacate on December 19, 2019, a week before the incident. (Hearing Tr. 54:14-22). The reason she provided on the notice was “income changed.” (Defendants’ Exhibit E, p. 83). She testified on direct examination that she moved out of the apartment at the end of June/early July 2020 allegedly due to an inability to pay her rent. (Hearing Tr. 29:6-22). However, when confronted with documentation during cross-examination, Claimant admitted that she moved because was given a notice to vacate for violating the lease agreement because she had a pet. (Hearing Tr. 55:1-17).

After moving out of the apartment, she moved in with her aunt. (Single Commissioner Hearing Tr. 56:18-20). She denied living anywhere other than at a hotel for a few nights and her aunt’s place from the time she left her apartment in Florence until the date of the hearing. (Hearing Tr. 58:19-23). Although she testified on cross-examination that she slept in her car when she could not afford a hotel (Hearing Tr. 57:11-13), she later changed her testimony and admitted that that she never lived out of her car. (Hearing Tr. 57:17-24). This testimony is contrary to what she told Dr. Hicks who testified in her own deposition that Claimant told her that she and her daughter were both living out of her car. (Hicks Dep. p. 34:22-25). This testimony is also contrary to her report to Dr. Snipes that she was homeless and displaced. (Defendants’ APA 13, p. 51).

The parties presented for oral argument before the Appellate Panel on May 8, 2023. Michelle D. Yarbrough appeared on behalf of Defendants/Appellants and Stephen J. Wukela appeared on behalf of Claimant/Respondent. On February 2, 2022, Defendants filed a motion to admit additional and newly discovered evidence into the record. The hearing on that motion was heard by the Appellate Panel.

II. SINGLE COMMISSIONER FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. I find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Takara L. Stewart being the Claimant, and SC CVS Pharmacy, LLC. being the Employer and XL Ins. America, Inc., the Carrier.

This finding is based upon stipulation of the parties at the commencement of the hearing.

2. I find that pursuant to §42-1-40 the Claimant's average weekly wage is Two Hundred Fifty-Eight and 45/100 (\$258.45) Dollars a week resulting in a compensation rate of One Hundred Seventy-Two and 31/100 (\$172.31) Dollars.

This finding is based upon the stipulation of the parties.

3. I find that pursuant to §42-1-160 the Claimant sustained physical-mental injury by accident on December 26, 2019 as a direct and proximate result of a physical and sexually based assault.

I find based on evidence of the record that on December 26, 2019, while closing out the CVS store where she was employed, the Claimant was groped on her buttocks by a customer. This finding is supported by the Claimant's report to her supervisor, Robyn Lynn Hanna, Store Manager.

Ms. Hanna testified that the Claimant reported being touched on the rear to her that she referred the Claimant to report it the ethics line. (See, Tr. p. 87, l. 17 - p. 88, l. 14);(See also Tr. p. 92, l. 22 - p. 93, l. 21). The report to the ethics portal describes the same description of the accident. (APA #1, p. 1). Ms. Hanna described the Claimant's demeanor during this conversation, which she described as normal. She testified that the Claimant was not that upset, frantic, or crying. (Tr. p. 88).

The Claimant also gave the same description to the police department. (See, APA #2, p. 3).

The event was also captured on surveillance video. After viewing the surveillance video and providing it to the police department, the store manager testified that she was able to identify the assailant

as a customer that frequently visited the store by the name of Beth Rollinson. (Transcript p.94, 1.20- p.95, 1.22).

The store manager, Ms. Hanna further testified at trial that subsequent to the incident, Ms. Stewart came to see her in March of 2020, and seemed genuinely upset. (Tr. p. 97, 1.5 -1.11). Ms. Hanna testified that, in that meeting, Ms. Stewart relayed to her that she was having anxiety attacks and that she was fearful of retaliation by the assailant or someone in her family. (See, Tr. p. 97, 1. 12-1.18).

Ms. Hanna also testified that, at that March 2020 meeting, the Claimant also revealed that she had suffered a sexual assault in the past. (Tr. p. 97, 1.19-1.21).

Ms. Hanna testified that she consoled the Claimant and told her that her only option was to take medical leave. (Tr. p. 98, 1. 7).

Ms. Hanna testified that the Claimant had told her that she had spoken to a counselor, (Tr. p. 99, 1. 12-13), and that Hanna was aware that the Claimant subsequently requested a leave of absence from CVS. (Tr. p. 99, 1. 18-p. 100, 1. 6).

The Defense disputes the severity and the significance of the injury: Ms. Hanna testified, "Being touched on the rear, I mean, it's just not that big of a deal to me." (Tr. p. 88, 1.4-1.5)

Nevertheless, the Act does not require a physical injury to be permanent in order to meet the burden proving a physical-mental injury. I find that a sexual assault is a physical and an unwanted touching, which constitutes a physical injury within the meaning of the Act. See, e.g., Landford vs. Clinton Cotton Mills, 204 S.C. 423 (1944) (finding willful assault constitutes injury by accident).

Therefore, regardless of the severity of the injury to the Claimant's physical body, or whether it was permanent, I find that the unwanted touching by the customer constitutes physical assault and an injury by accident within meaning of the Workers' Compensation Act.

I also find that this physical assault resulted in a psychological injury as a direct and proximate result.

After reporting the incident to CVS, the Claimant initially underwent counseling with the CVS Employee Assistance Program through Ms. Linda Davis. The text exchanges between Ms. Davis and the Claimant, found that APA #3, indicate that Ms. Davis was not a very reliable caregiver and cancelled appointments on the Claimant, repeatedly.

In the meantime, the record reflects that the Claimant saw her OBGYN, Dr. Andrea Atkins, on February 20, 2020, and was diagnosed with anxiety.

Ultimately, on April 15, 2020, the Claimant saw her family doctor, Dr. Andrea Hicks, to whom she reported anxiety and recent sexual assault affecting her work. Dr. Hicks was deposed and testified as follows:

Q: Do you have a reason [sic] to reasonable degree of medical certainty as to whether this incident that she has described in the CVS would have aggravated a pre-existing condition?

A: Yes; of course.

Attorney: Object to the form, but you can answer.

A: Yes

Q: Okay. And do you have any opinions to a reasonable degree of medical certainty as to whether the complaints that she made to you when she saw you were the result of that aggravation?

A: Yes

(APA #11 Depo p. 17)

Therefore, based on this evidence, I find that the unwanted touching or groping that the Claimant was subjected to by a customer on December 26, 2019, constitutes a physical injury by accident that, in turn, aggravated the preexisting psychological condition of PTSD which the Claimant suffered as a result of sexual assault when she was a child. Thus, the Claimant sustained a physical-mental injury by accident on December 26, 2019, within the meaning of S.C. Code 42-1-160 of the South Carolina Workers' Compensation Act.

4. Notwithstanding the finding of a physical-mental injury, above; I also find that, on December 26, 2019, the Claimant sustained a compensable mental-mental injury within the meaning of S.C. Code 42-1-160.

It is well established in the Workers' Compensation law that, in order to recover Workers' Compensation benefits for a mental injury unaccompanied by a physical injury, the Claimant must prove both: 1. that the Claimant was exposed to unusual and extraordinary conditions in her employment; and, 2. that those unusual and extraordinary conditions were the proximate cause of the mental injury. (See, *Doe v. South Carolina Department of Special Needs*, 364 S.C. 411 (Ct. App. 2005).

Given, as I find above, that the assault, the act of unwanted touching by customer, resulted in physical injury, and, in turn, resulted in the aggravation of the Claimant's psychological condition, the requirement of demonstrating "unusual and extraordinary work conditions," does not apply.

However, even if the Claimant has not sustained a physical injury, I specifically, and alternatively, find that the physical and sexually based assault suffered by the Claimant was extraordinary and unusual in comparison to the normal working conditions of employment at CVS.

5. I find that the accident of December 26, 2019 aggravated the Claimant's pre-existing psychological condition.

Ms. Stewart testified, that, as a child, she was sexually assaulted by her mother's older brother. (Tr. p. 24, l. 7- 1.20). Supervisor, Ms. Robyn Hanna, testified that in March of 2020, after the accident, the Claimant met with Hanna and seemed genuinely upset. Ms. Hanna testified that, at that meeting, the Claimant related to her that she had been having anxiety attacks and that she was fearful of retaliation by her assailant, or someone in the assailant's family. Ms. Hanna testified that, at that point, the Claimant revealed to her that the Claimant had been sexually assaulted in the past. (Tr. p. 97, 1.8-1.28).

Dr. Hicks, the Claimant's treating physician was deposed and testified as follows:

Q: Do you have a reason [sic] to reasonable degree of medical certainty as to whether this incident that she has described in the CVS would have aggravated a pre-existing condition?

A: Yes; of course.

Attorney: Object to the form, but you can answer.

A: Yes

Q: Okay. And do you have any opinions to a reasonable degree of medical certainty as to whether the complaints that she made to you when she saw you were the result of that aggravation?

A: Yes

(APA #11 Depo p. 17)

6. I find that, pursuant to §42-15-20, the Employer received notice of the accident on December 26, 2019, within ninety (90) days of the accident.

This finding is based on upon the Employer's Form 51 admission.

7. I find that pursuant to S.C. Code §42-15-60 the Defendants are responsible for additional treatment to be rendered to Claimant, including treatment rendered by Dr. Ashley Hicks, and any counselor she recommends from the date of this Order, and continuing for such additional time as will tend to lessen the period of disability.

The Claimant's treating physician, Dr. Hicks, testified that the treatment that she and Dr. Hopkins had provided to the Claimant was necessary as a result of this accident. (See, Dep. Dr. Hicks, p.18, 1.2-1.6). Dr. Hicks' recommendation was that the Claimant attend future visits with Dr. Hicks. (Dep. Dr. Hicks, p.18, 1.7-1.9).

Dr. Hicks testified, however, that the Claimant had not been compliant with that recommendation, and had failed to consistently attended appointments with Dr. Hicks.

Dr. Hicks acknowledged that she understood from the Claimant that the Claimant had difficulty obtaining transportation and that issues with the Claimant's social situation played a large role in her non-compliance. (Dep. Dr. Hicks, p. 18, 1. 7-1.23). However, Dr. Hicks agreed that transportation would not be

an issue if the Claimant attended her appointments virtually which she had done previously. (Dep. Dr. Hicks, pp. 33-34). Dr. Hicks testified that she previously recommended that the Claimant undergo counseling, and that the question as to whether the Claimant should continue counseling depended on the Claimant's current condition. Dr. Hicks explained that, therefore, she needed to meet with the Claimant to evaluate her to make further recommendations. (See, Dep. Dr. Hicks, p.19, 1.9-p.20, 1.6).

At trial, Claimant's Counsel indicated that the Claimant was not seeking a finding that the Employer and Carrier were responsible for past medical treatment. Rather, the Claimant's counsel indicated that the Claimant sought only future treatment at the hands of Dr. Hicks and any counseling Dr. Hicks recommended.

Specifically at trial, the Claimant's counsel noted, "the more difficult question in this case, your Honor, is the remedy. Of course, we contend that she is entitled to continued medical treatment at the hands of Dr. Hicks and psychological, psychiatric treatment on the referral by Dr. Hicks. That treatment has been spotty at best, and in no-in part due to Ms. Stewart and her inconsistent visits with Dr. Hicks. I would contend, your Honor, that that is part and parcel of the injury itself as well. However, I think Ms. Stewart understands that if she is to get better, she needs to have treatment, she needs to take medication, and that if the Commission finds this case compensable, that will be a requirement of her continued eligibility for benefits by statute". (Tr., p. 9, 1.7-1.21).

I, therefore, find that the Employer is required to provide the Claimant evaluation and treatment at the hands of Dr. Hicks and any providers, including counselors, to whom Dr. Hicks refers the Claimant, for causally related treatment.

The Commission further notes, as the Claimant's counsel concedes, that if the Claimant is not compliant with medical treatment going forward, the Employer and Carrier will certainly have the right, pursuant to the Act, to seek the suspension of benefits during any period of unreasonable refusal of treatment.

8. I find that Claimant was totally disabled and entitled to benefits at the weekly rate of \$172.31 pursuant to §42-9-10 for the 24.5714 week period of May 18, 2020, through November 5, 2020; totaling \$4,224.01.

The record reflects the Claimant was placed out of work by Dr. Hicks during the period of May 18, 2020 through November 5, 2020.

Dr. Hicks testified that she was not prepared to endorse medical leave beyond November 5, 2020, because, at that point, the Claimant was not compliant with medications and treatment. At trial, the Claimant sought only temporary total disability benefits for the period of May 18, 2020 through November 5, 2020.

Therefore, I find that the Claimant is entitled to temporary total disability benefits for the dates Dr. Hicks had written her out of work of May 18, 2020 through November 5, 2020.

The Claimant's future entitlement to temporary total disability benefits is not before this Commission. Such will be determined, if necessary, by future proceedings before this Commission.

As with medical treatment, the Claimant's entitlement to future disability benefits will, no doubt, be based on her future psychological condition and the extent to which she is compliant with the care recommended by Dr. Hicks and any counselor recommended by Dr. Hicks.

CONCLUSIONS OF LAW

1. Under §42-1-130, the Claimant was a covered Employee at the time in question; and under §42-1-140, the Defendant-Employer was a covered Employer under the Act.
2. Under §42-1-160, the Claimant did sustain a physical-mental injury by accident arising out of and in the course of her employment.
3. Under §42-1-160 the Claimant did sustain a mental-mental injury by accident arising out of and in the course of employment.
4. Under §42-15-20, the Claimant gave proper notice of the accident to the Employer.

5. Under §42-15-60, the Employer is required to furnish future adequate and proper care, at the hands of Dr. Andrea Hicks and any counselor to whom Dr. Hicks refers the Claimant.

6. Under §42-9-10 the Claimant is entitled to temporary total benefits for the 24.5714 week period of May 18, 2020 through November 5, 2020 of the weekly rate at \$172.31; totaling \$4,224.01.

III. ISSUES ON APPEAL

In a workers' compensation case, the Appellate Panel is the ultimate fact finder. *DeBruhl v. Kershaw Cnty. Sheriff's Dep't.*, 303 S.C. 20, 24, 397 S.E.2d 782, 785 (Ct. App. 1990). "When reviewing the evidence and award of the hearing commissioner, the [Appellate Panel] may make its own findings of fact and reach its own conclusions of law either consistent or inconsistent with those of the hearing commissioner." *Lowe v. Am-Can Transp. Servs., Inc.*, 283 S.C. 534, 537, 324 S.E.2d 87, 89 (Ct. App. 1984). The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. *DeBruhl*, 303 S.C. at 24, 397 S.E.2d at 785.

1. Defendants'/Appellants' Arguments

Defendants/Appellants set forth forty-two issues on appeal. They are as follows:

- (1) Did the hearing commissioner err as a matter of law in ruling on a physical-mental injury as a physical injury was not raised in the Form 50, Request for Hearing?
- (2) Was the hearing commissioner's ruling on a physical-mental injury when a physical injury was not raised in the Form 50, Request for Hearing, arbitrary capricious, characterized by an abuse of discretion, or clearly an unwarranted exercise of discretion?
- (3) Was the hearing commissioner's ruling on a physical-mental injury when a physical injury was not raised in the Form 50, Request for Hearing, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?
- (4) Did the hearing commissioner err as a matter of law in finding that, pursuant to section 42-1-160, Claimant sustained a physical-mental injury by accident on December 26, 2019 as a direct and proximate result of a physical and sexually based assault?
- (5) Was the hearing commissioner's finding that, pursuant to section 42-1-160, Claimant sustained a physical-mental injury by accident on December 26, 2019 a direct and proximate result of a physical and sexually based assault, arbitrary, capricious, characterized by an abuse of discretion, or clearly an unwarranted exercise of discretion?

- (6) Was the hearing commissioner's finding that, pursuant to section 42-1-160, Claimant sustained a physical-mental injury by accident on December 26, 2019 as a direct and proximate result of a physical and sexually based assault clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?
- (7) Did the hearing commissioner err as a matter of law in finding that an unwanted touching constitutes a physical injury within the meaning of the South Carolina Workers' Compensation Act?
- (8) Was the hearing commissioner's finding that an unwanted touching constitutes a physical injury within the meaning of the South Carolina workers compensation act, arbitrary, capricious, characterized by an abuse of discretion, or clearly an unwarranted exercise of discretion?
- (9) Was the hearing commissioner's finding that an unwarranted touching constitutes a physical injury within the meaning of the South Carolina Workers' Compensation Act clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?
- (10) Did the hearing commissioner err as a matter of law in finding that Claimant had pre-existing post-traumatic stress disorder?
- (11) Was the hearing commissioner's finding that Claimant had pre-existing post-traumatic stress disorder, arbitrary, capricious, characterized by an abuse of discretion or clearly an unwarranted exercise of discretion?
- (12) Was the hearing commissioner's finding that Claimant had pre-existing post-traumatic stress disorder, clearly erroneous in view of the reliable, probative and substantial evidence on the whole record?
- (13) Did the hearing commissioner err as a matter of law finding that the unwanted touching aggravated Claimant's pre-existing psychological condition?
- (14) Was the hearing commissioner's finding that the unwanted touching aggravated Claimant's pre-existing psychological condition, arbitrary, capricious characterized by an abuse of discretion, or clearly and unwarranted exercise of discretion?
- (15) Was the hearing commissioner's finding that the unwanted touching aggravated Claimant's pre-existing psychological condition, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?
- (16) Did the hearing commissioner err as a matter of law finding that the physical assault resulted in a psychological injury as a direct and proximate result?
- (17) Was the hearing commissioner's finding that the physical assault resulted in a psychological injury as a direct and proximate result, arbitrary, capricious, characterized by an abuse of discretion, or clearly an unwarranted exercise of discretion?
- (18) Was the hearing commissioner's finding that the physical assault resulted in a psychological injury as a direct and proximate result, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?

- (19) Did the hearing commissioner err as a matter of law in failing to find that Claimant did not establish by expert opinion or testimony stated to a reasonable degree of medical certainty that the incident on December 26, 2019 aggravated a pre-existing psychological condition as required by section 42-9-35?
- (20) Was the hearing commissioner's failure to find Claimant did not establish by expert opinion or testimony stated to a reasonable degree of medical certainty that the incident on December 26, 2019 aggravated a pre-existing psychological condition as required by section 42-9-35, arbitrary, capricious, characterized by an abuse of discretion, or clearly an unwarranted exercise of discretion?
- (21) Was the hearing commissioner's failure to find that Claimant did not establish by expert opinion or testimony stated to a reasonable degree of medical certainty that the incident on December 26, 2019 aggravated a pre-existing psychological condition as required by section 42-9-35, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?
- (22) Did the hearing commissioner err as a matter of law in failing to find that the only medical evidence stated to a reasonable degree of medical certainty, came from Psychiatrist Dr. Jon Snipes who opined that Claimant did not have PTSD but that she was showing signs of depression, unrelated to the December 26, 2019 incident?
- (23) Was the hearing commissioner's failure to find that the only medical evidence stated to a reasonable degree of medical certainty, came from Psychiatrist Dr. Jon Snipes who opined that Claimant did not have PTSD but that she was showing signs of depression unrelated to the December 26, 2019 incident, arbitrary, capricious, characterized by an abuse of discretion, or clearly an unwarranted exercise of discretion?
- (24) Was the hearing commissioner's failure to find that the only medical evidence, stated to a reasonable degree of medical certainty, came from Psychiatrist Dr. Jon Snipes who opined that Claimant did not have PTSD but that she was showing signs of depression, unrelated to the December 26, 2019 incident, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?
- (25) Did the hearing commissioner err as a matter of law in finding that, under section 42-1-160, Claimant sustained a compensable mental-mental injury by accident on December 26, 2019?
- (26) Was the hearing commissioner's finding that, under section 42-1-160, Claimant sustained a compensable mental-mental injury by accident on December 26, 2019, arbitrary, capricious, characterized by an abuse of discretion, or clearly an unwarranted exercise of discretion?
- (27) Was the hearing commissioner's finding that, under section 42-1-160, Claimant sustained a compensable mental-mental injury by accident on December 26, 2019, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?
- (28) Did the hearing commissioner err as a matter of law in finding that, under section 42-15-60, Defendants are responsible for additional treatment to be rendered to Claimant, including treatment rendered by Dr. Ashley Hicks, and any counselor she recommends from the date of the Order and continuing for such additional time as will tend to lessen the period of disability?

- (29) Was the hearing commissioner's finding that, under section 42-15-60, Defendants are responsible for additional treatment to be rendered to Claimant, including treatment rendered by Dr. Ashley Hicks, and any counselor she recommends from the date of the Order and continuing for such additional time as will tend to lessen the period of disability, arbitrary, capricious, characterized by an abuse of discretion, or clearly an unwarranted exercise of discretion?
- (30) Was the hearing commissioner's finding that, under section 42-15-60, Defendants are responsible for additional treatment to be rendered to Claimant, including treatment rendered by Dr. Ashley Hicks, and any counselor she recommends from the date of the Order and continuing for such additional time as will tend to lessen the period of disability, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?
- (31) Did the hearing commissioner err as a matter of law in failing to find that Defendants are entitled to direct medical treatment under section 42-15-60?
- (32) Was the hearing commissioner's failure to find that Defendants are entitled to direct medical treatment under section 42-15-60, arbitrary, capricious, characterized by an abuse of discretion, or clearly an unwarranted exercise of discretion?
- (33) Was the hearing commissioner's failure to find that Defendants are entitled to direct medical treatment under section 42-15-60, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?
- (34) Did the hearing commissioner err as a matter of law in failing to find medical treatment awarded, if compensable, is limited to just causally-related medical treatment and not all medical treatment provided by Dr. Hicks, a general practitioner, and counselors who she recommends?
- (35) Was the hearing commissioner's failure to find medical treatment awarded, if compensable, is limited to just causally related medical treatment and not all medical treatment provided by Dr. Hicks, a general practitioner, and counselors who she recommends, arbitrary, capricious, characterized by an abuse of discretion, or clearly an unwarranted exercise of discretion?
- (36) Was the hearing commissioner's failure to find medical treatment awarded, if compensable, is limited to just causally related medical treatment and not all medical treatment provided by Dr. Hicks, a general practitioner, and counselors who she recommends, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?
- (37) Did the hearing commissioner err as a matter of law in finding that, under section 42-9-10, Claimant is entitled to temporary total disability benefits for the 24.5714 week period of May 18, 2020 through November 5, 2020?
- (38) Was the hearing commissioner's finding that, under section 42-9-10, Claimant is entitled to temporary total disability benefits for the 24.5714 week period of May 18, 2020 through November 5, 2020, arbitrary capricious, characterized by an abuse of discretion, or clearly an unwarranted exercise of discretion?
- (39) Was the hearing commissioner's finding that, under section 42-9-10, Claimant is entitled to temporary total disability benefits for the 24.5714 week period of May 18, 2020 through

November 5, 2020, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?

- (40) Did the hearing commissioner err as a matter of law in failing to find that Claimant was earning \$4,500.00 per month during the time she was claiming temporary total disability benefit for the 24.5714 week period of May 18, 2020 through November 5, 2020?
- (41) Was the hearing commissioner's failure to find that Claimant was earning \$4,500.00 per month during the time she was claiming temporary total disability benefits for the 24.5714 week period of May 18, 2020 through November 5, 2020, arbitrary, capricious, characterized by an abuse of discretion, or clearly an unwarranted exercise of discretion?
- (42) Was the hearing commissioner's failure to find that Claimant was earning \$4,500.00 per month during the time she was claiming temporary total disability benefits for the 24.5714 week period of May 18, 2020 through November 5, 2020, clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record?

The Form 30 is contained within the Commission file.

IV. DECISION OF THE APPELLATE PANEL

FINDINGS OF FACT

After the hearing and giving careful consideration to the documentary evidence, medical records, the testimony of the witnesses, and arguments of counsel, the Appellate Panel makes the following findings of fact:

- 1. The parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Takara L. Stewart being Claimant, and SC CVS Pharmacy, LLC being the Employer and XL Ins. America, Inc., the Carrier.**

This finding is based upon the stipulation of the parties.

- 2. Claimant did not suffer a physical injury within the meaning of South Carolina Code section 42-1-160.**

This finding is supported by Claimant's own denial of being physically hurt or injured from the contact (Single Commissioner Hearing Tr. 64:7-10), or ever reporting a physical injury to her physicians. (Hearing Tr. 63:23-24). This finding is also supported by Claimant's physician confirming that Claimant did not report a physical injury and the physician did not diagnose her with a physical injury as a result of the incident. (Hicks Dep. Tr. p. 46:23-47:14).

3. Claimant did not suffer a physical-mental injury within the meaning of South Carolina Code section 42-1-160.

Because Claimant is unable to establish a physical injury from the incident in question, Claimant is also unable to support a claim for a physical injury causing a mental injury. Accordingly, we reverse the single commissioner's finding that the incident caused a physical-mental injury.

4. Claimant did not establish the requirements of section 42-9-35 of the South Carolina Code to prove an aggravation of her pre-existing psychological condition.

Section 42-9-35 provides that a claimant shall establish by a preponderance of the evidence, including medical evidence, that: (1) the alleged injury aggravated the pre-existing condition or permanent physical impairment; or (2) the preexisting condition or the permanent physical impairment aggravated the subsequent injury. S.C. Code Ann. 42-9-35(A). This statute defines "medical evidence" as "expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider." S.C. Code Ann. 42-9-35(C).

There is no evidence in the record showing Claimant was diagnosed with PTSD or any other mental health conditions prior to this accident. There is also no evidence indicating she received mental health treatment of any kind before this accident. Further, even if there was evidence of a preexisting mental health condition, Claimant did not present sufficient medical evidence establishing an aggravation between the alleged injury and alleged pre-existing condition. Claimant's primary care physician, Dr. Hicks, did not render her opinion regarding an aggravation of a preexisting condition to a reasonable degree of medical certainty as required under section 42-9-35. In contrast, Dr. Snipes, a psychiatrist, opined to a reasonable degree of psychiatric certainty that Claimant had no psychiatric illness related to the workplace incident. Accordingly, we reverse the single commissioner's finding that Claimant suffered an aggravation of a preexisting mental health condition.

5. Claimant has failed to establish a mental-mental injury under section 42-1-160 of South Carolina Code.

When a mental injury is not accompanied by a physical injury, the employee must establish, by a preponderance of the evidence: (1) the employment conditions causing the mental injury were extraordinary

and unusual in comparison to the normal conditions of the particular employment; and (2) the medical causation between the stress, mental injury, or mental illness, and the stressful employment conditions by medical evidence. S.C. Code section 42-1-160. Like section 42-9-35, the statute defines "medical evidence" as an "expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider." As noted in Finding of Fact number 4, we find Claimant failed to submit sufficient medical evidence to establish her burden of proof under 42-1-160 for a mental-mental injury. Therefore, we reverse the single commissioner's decision finding Claimant established a mental-mental injury.

6. Claimant is not entitled to future medical treatment.

In light of our finding Claimant failed to establish a compensable injury under the Act, we find Claimant is not entitled to any medical treatment in connection with this claimed work incident. Moreover, no physician has stated, to a reasonable degree of medical certainty as required under section 42-15-60, that future medical treatment is needed as a result of the claimed incident. As such, we reverse the single commissioner's decision awarding Claimant future medical treatment.

7. Claimant is not entitled to temporary compensation benefits.

Because Claimant has failed to establish a compensable injury under the Act, we find she is not entitled to temporary compensation benefits for any period of time due to this work incident. Accordingly, we reverse the single commissioner's decision awarding Claimant temporary total disability benefits.

8. Defendants' Motion to Submit Newly Discovered Evidence is denied as moot.

Given the aforementioned findings, we deny Defendants' Motion to Submit Newly Discovered Evidence as moot.

CONCLUSIONS OF LAW

Accordingly, it is the determination of the Full Commission:

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 §42-1-160, Claimant did not sustain a physical-mental injury by accident arising out of and in the course of her employment.

3. Under §42-9-35, Claimant did not meet the requirements of establishing an aggravation of pre-existing condition.

4. Under §42-1-160, Claimant did not sustain a mental-mental injury by accident arising out of and in the course of her employment.

5. Under §42-15-60, Claimant is not entitled to medical treatment.

6. Under §42-9-10, Claimant is not entitled to temporary total benefits.

ORDER


The order of the single commissioner is fully reversed and the Motion to Submit Newly Discovered Evidence is denied as moot.

AND SO IT IS ORDERED.


_____ (date)
Columbia, SC



Cynthia C. Dooley, Commissioner, Chair



J. T. Scott Beck, Commissioner



Melody L. James, Commissioner

Order Served via email:

| | |
|--|--|
| Michelle D. Yarbrough Gallivan White & Boyd myarbrough@gwblawfirm.com | Stephen J. Wukela Wukela Law Firm stephen@wukelalaw.com |
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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 July 10, 2023