

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

FILE NO.: 0809635

Denise A. Thomas, Employee-Claimant,

Appellant,

vs.

NVR Building Products/Ryan Homes, Employer, and
New Hampshire Insurance Co., Carrier-Defendants,

Respondents.

Appellate Panel Review Held in Columbia,
South Carolina on March 20, 2012, per notice timely
and properly served upon all parties of interest.

Appearances: Kathryn Williams, Esq. of Kathryn Williams, P.A. of Greenville,
South Carolina for-claimant

Andrew D. Kaplan, Esq. of Rudisill, White & Kaplan, P.L.L.C. of
Charlotte, NC for defendants.

Purpose: Appellate Panel Review of issues set forth on claimant's Form 30
Request for Commission Review

Filed:

7/26/12

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SC Court of Appeals

STATEMENT OF CASE

By previous Order of Commissioner Andrea C. Roche, claimant was determined to have sustained compensable injury by accident on June 30, 2008 causing compensable aggravation of a preexisting low back condition. The Commissioner further found that the low back injury was causing an adverse effect on her left lower extremity and that her preexisting psychological condition, while not compensable, is aggravating her pain. The Commissioner awarded temporary compensation benefits and continued medical treatment for the low back and left lower extremity condition. Commissioner Roche's Order was affirmed without change by the Commission's Appellate Panel on February 25, 2010.

The claim returned to the Commission on October 5, 2010 on defendants' Form 21. Defendants contended claimant had reached maximum medical improvement on May 25, 2010 and that they are entitled to stop payment of temporary compensation benefits and a determination of permanent partial disability based on the back condition alone, as they alleged claimant was no longer suffering any related symptoms in her left lower extremity and that her psychological condition had no bearing on the claim. Defendants further contended claimant is not entitled to a lump-sum payment or a lifetime allocation of any award. They sought credit for alleged overpayment of compensation back to the date of maximum medical improvement.

Claimant admitted that she has reached maximum medical improvement and contended that she is entitled to permanent total disability compensation based on her back and left leg conditions and also her psychological condition under § 42-9-35, given the fact that the Commission has previously determined that the psychological condition

is aggravating her pain. In the alternative, if the Commissioner should for some reason determine claimant is not permanently and totally disabled, claimant contends she is entitled to a substantial permanent partial disability award for her back and left lower extremity and continuing medical treatment under Dodge v. Bruccoli, Clark, Layman, Inc., 334 S.C. 574, 514 S.E.2d 593 (Ct. App. 1999). Further, claimant contended defendants should not be allowed credit for any temporary compensation benefits paid prior to the filing of the Form 21.

By Order dated January 4, 2011, Commissioner T. Scott Beck determined claimant is entitled to 40% permanent partial disability compensation for loss of use of her back and stated that "[t]his award takes into account claimant's radiculopathy in her left leg . . . and increased pain resulting from her preexisting (noncompensable) psychological condition." The Commissioner awarded further maintenance medical care and stated that "[d]efendants are entitled to control future medical care." He awarded defendants credit for temporary benefits paid since August 9, 2010, the date of the Form 21.

Claimant appealed to the Full Commission Panel, and by Order dated August 16, 2011, the Appellate Panel amended the Hearing Commissioner's Order to award the lifetime allocation language and to use the word "direct" rather than "control" concerning continuing medical treatment. The Panel also remanded the claim to the Commissioner "to address the S.C. Code § 42-9-20 argument."

By Order dated November 10, 2011, the Hearing Commissioner stated that he was perplexed in that claimant "did not plead S.C. Code § 42-9-20 in her Form 58" and did not lay out that position at the call of the case. He refused to alter his award stating again

that his award of 40% to the back under § 42-9-30 accounts for claimant's radiculopathy and is consistent with the alternative position claimant took at the hearing. The Commissioner further stated that the Panel, as the "ultimate finders of facts," "certainly had the authority to award a wage loss (S.C. Code § 42-9-20) in this matter."

The claim now returns to the Full Commission following the remand and claimant's further appeal from the Commissioner's Orders. Within the statutory period, claimant filed an Application for Review in the case, a copy of which was furnished to all parties prior to briefing and oral argument before the Appellate Panel. By appeal, claimant respectfully submitted that the Commissioner erred as follows:

1. The Hearing Commissioner erred to the extent he found the issue of wage loss under § 42-9-20 was not before him.
2. The Hearing Commissioner erred in failing to find claimant is entitled to an award based on her substantial wage loss as a result of her injury by accident.
3. The Hearing Commissioner erred in failing to find claimant has sustained far greater than 40% permanent partial disability to her spine and in failing to make any award for permanent partial disability to her left lower extremity.
4. The Hearing Commissioner erred in failing to address or make any findings concerning claimant's request for a lump-sum payment of her award.

All testimony and documentary evidence was delivered to the individual members of the Appellate Panel for their study and consideration, along with the briefs filed by the parties.

DECISION

Under S.C. Code Ann. § 42-17-50, an Appellate Panel is empowered to review the appealed award, weigh the evidence as presented at the initial hearing, and, if good grounds are shown therefore, make its own factual findings and legal conclusions consistent with or inconsistent with the Hearing Commissioner.

Based upon its review of all the evidence on the record in this case and the previous Orders of the Commission, and specifically the August 16, 2011 Order of the Appellate Panel, the Panel hereby finds that the single Commissioner's analysis on remand was done procedurally but the merits of an award under S.C. Code Ann. § 42-9-20 were not addressed as per the Panel's remand Order. Therefore, this Panel hereby again remands this claim to the next jurisdictional Commissioner for an analysis of the merits of an award of wage loss under § 42-9-20 and appropriate findings.

The Panel reiterates the Commissioner's Findings of Fact and Conclusions of Law, as stated, but preserves the issues on appeal pending remand to the jurisdictional Commissioner for additional findings, as above:

FINDINGS OF FACT

1. The parties are subject to and bound by the provisions of the South Carolina Workers' Compensation Act, as amended.
2. An employer-employee relationship existed between claimant and defendant-employer on June 30, 2008.
3. Claimant's average weekly wage and compensation rate are \$960.23 and \$640.19 respectively.

4. Claimant is fifty-eight (58) years old.
5. Claimant has a Master's Degree in Counseling, although she last used her degree thirty-five (35) years ago.
6. Claimant suffered a compensable injury to her back and left leg (exacerbation) on June 30, 2008. (Commissioner Roche's Decision and Order dated September 10, 2009)
7. The injury to the left leg is in the form of radiculopathy.
8. Claimant's pre-existing psychological problems were not aggravated by the compensable accident. However, claimant's psychological problems are aggravating claimant's pain. (Commissioner Roche's Decision and Order dated September 10, 2009, affirmed by appellate panel on February 25, 2010.)
9. S.C. Code Ann. § 42-9-35(A)(2) is not cited in Commissioner Roche's Decision and Order dated September 10, 2009, as a ruling of law, but is asserted by claimant at this proceeding.
10. Dr. Gerald Rollins opined on May 13, 2009 that there is no objective evidence to indicate claimant is worse than she was prior to the date of injury, June 30, 2008.
11. On April 7, 2010 and April 27, 2010, authorized treating physician Dr. Glenn Scott noted improvement in claimant's condition with physical therapy.
12. On May 25, 2010, Dr. Scott assessed maximum medical improvement, assigned a 4% impairment rating to claimant's back, and placed claimant in a sedentary level.

13. Dr. George Bruce assigned a 13% whole person rating attributable to claimant's cervical spine (which converts to a 16% permanent partial impairment to the cervical spine), and a 17% whole person rating attributable to the lumbar spine (which converts to a 19% permanent partial impairment to the lumbar spine), although only the low back was found compensable. (Finding of Fact 9, Commissioner Roche's Decision and Order dated September 10, 2009.).

14. Dr. Bruce noted the absence of any findings of lumbar radiculopathy during his evaluation on July 10, 2010.

15. Claimant's vocational report by Randy Adams opines that claimant is permanently and totally disabled, but relies heavily on claimant's psychological condition to arrive at that conclusion. Mr. Adams opined "[c]onsidering the psychological factors alone, it is my vocational opinion that Ms. Thomas is not employable in any capacity. Her psychological issues would prohibit her from performing any of her past relevant work or from utilizing any of her skills that she developed in her work history. Physically she is limited to a sedentary level of functioning. She does not have any transferable skills due to her psychological limitations."

16. Dr. Scott completed a Clinical Assessment of Pain on June 8, 2010.

17. Claimant is awarded 40% permanent partial disability to the spine. This award takes into account claimant's radiculopathy in her left leg (Commissioner Roche's Decision and Order dated September 10, 2009) and increased pain resulting from her pre-existing (non-compensable) psychological condition..

18. Claimant is entitled to future medical care for her low back and radiculopathy in her left leg consistent with the recommendations of the authorized treating physicians.

19. Defendants are entitled to direct future medical care.

20. Defendants are entitled to terminate temporary total disability compensation. Defendants are to receive credit for temporary total disability compensation paid since August 9, 2010, the date of filing of the Form 21.

RULINGS OF LAW

1. The foregoing Findings of Fact as set forth above are construed to be Conclusions of Law, if applicable.

2. The parties are subject to and bound by the provisions of the South Carolina Workers' Compensation Act, as amended. S.C. Code Ann. § 42-1-130 and 42-1-140.

3. Claimant sustained an injury by accident to her back and left leg (radiculopathy) arising out of and in the course and scope of her employment with defendant-employer. S.C. Code Ann. § 42-1-160.

4. Claimant sustained a 40% permanent partial disability to the back. S.C. Code Ann. § 42-9-30.

5. Defendants are entitled to credit for temporary total disability compensation paid since the date of filing of the Form 21 on August 9, 2010. S.C. Code Ann. § 42-9-210.

6. Claimant is entitled to causally-related future medical care for the low back and radiculopathy in her left leg consistent with the recommendations of the authorized treating physicians; defendants direct future medical care. S.C. Code Ann. § 42-15-60.

ORDER

IT IS, THEREFORE, ORDERED that this claim is remanded to the next jurisdictional Commissioner for an analysis of the merits of an award of wage loss under § 42-9-20 and appropriate findings. All other issues on appeal are preserved pending remand to the jurisdictional Commissioner for additional findings.

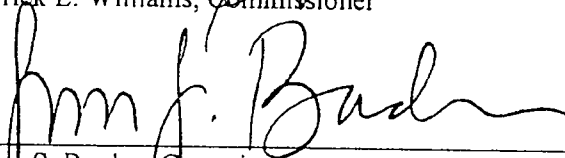
AND IT IS SO ORDERED.

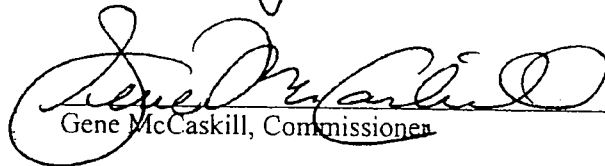
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S.C. WORKERS' COMPENSATION COMMISSION


Derrick L. Williams, Commissioner

CONCUR:


Susan S. Barden, Commissioner


Gene McCaskill, Commissioner

Date: 7/26/12

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy heretofore, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 26 day of July, 2012
By Valerie D. Deller

Administrative Assistant to the Commissioner

Kathryn Williams
Andrew D Kaplan