

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

FILE NO. 0809635

DENISE THOMAS, CLAIMANT,

vs.

NVR, INC./RYAN HOMES,  
EMPLOYER,

AND

NEW HAMPSHIRE INSURANCE COMPANY,  
INSURER, (YORK RISK SERVICES GROUP, INC., SERVICING AGENT),  
DEFENDANTS.

Hearing: Held in Columbia, South Carolina on May 16, 2011.

Appearances: Claimant was represented by Kathryn Williams, Esquire, of  
Kathryn Williams, P.A., Greenville, South Carolina.

Defendants were represented by Andrew D. Kaplan, Esquire, of  
Rudisill, White & Kaplan, P.L.L.C., Charlotte, North Carolina.

Filed: \_\_\_\_\_

8-16-11

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**SC Court of Appeal:**

### STATEMENT OF THE CASE

On September 10, 2009, Commissioner Andrea C. Roche entered a Decision and Order finding as fact and concluding as a matter of law that, on June 30, 2008, claimant sustained an injury by accident causing an exacerbation of a pre-existing back and left lower extremity condition; that claimant's severe pre-existing psychological problems were not aggravated by the fall; although the psychological problems are aggravating the pain, the fall and the pain associated with it did not aggravate the psychological condition; that claimant has not reached maximum medical improvement and is entitled to causally related treatment for the low back and left leg; and that claimant has been temporarily totally disabled since July 1, 2008, and is entitled to temporary total disability compensation at the rate of \$640.19 per week to the present and continuing until further Order of the Commission. On February 25, 2010, the Full Commission affirmed Commissioner Roche's Decision and Order in its entirety.

On August 9, 2010, defendants filed a Form 21. This matter was heard by Commissioner T. Scott Beck on October 5, 2010. Commissioner Beck entered a Decision and Order on January 4, 2011, including the following:

### 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 § 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 the low back and radiculopathy in her left leg consistent with the recommendations of the authorized treating physicians.

19. Defendants are entitled to control 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.

Based on the foregoing Findings of Fact and pursuant to South Carolina Code § 42-17-40, the undersigned makes the following:

CONCLUSIONS 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 control future medical care. S.C. Code Ann. § 42-15-60.

Pursuant to the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby enters the following:

ORDER

IT IS, THEREFORE , ORDERED that the Findings of Fact and Conclusions of Law are

incorporated herein as if set forth verbatim, and that defendants are permitted to stop payment of temporary total disability compensation.

IT IS FURTHER ORDERED that defendants shall pay to claimant compensation for a 40% permanent partial disability to the back.

IT IS FURTHER ORDERED that defendants shall take credit against the aforementioned Award of permanent partial disability for all temporary total disability compensation paid to claimant since August 9, 2010.

IT IS FURTHER ORDERED that defendants shall provide 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 control future medical care.

Within the statutory period, claimant filed an application for review from Commissioner Beck's Decision and Order. On appeal, claimant raised the following issues:

1. The Hearing Commissioner erred in failing to find claimant is entitled to permanent total disability as a result of her injury by accident; the error being that the evidence overwhelmingly demonstrates that claimant is entitled to permanent total disability as a result of her injury by accident.
2. The Hearing Commissioner erred in failing to find claimant has sustained complete loss of earning capacity as a result of her injury by accident; the error being that the evidence overwhelmingly demonstrates that claimant has sustained complete loss of earning capacity as a result of her injury by accident and is thus entitled to permanent total disability.
3. The Hearing Commissioner erred in failing to find claimant is entitled to a determination of permanent disability based on loss of earning capacity; the error being that the Commission earlier determined claimant sustained injury to her back and left lower extremity, in addition to psychological problems that are aggravating her pain, those findings were not appealed and became the final law of the case, and thus, claimant's injury is not limited to a single scheduled member and she is entitled to a determination of permanent disability based on loss of earning capacity as a matter of law.
4. The Hearing Commissioner erred in failing to make any finding concerning claimant's

contention that he should consider her psychological condition under § 42-9-35; the error being that the evidence overwhelmingly demonstrates that based on the Commission's previous finding that claimant's preexisting psychological problems are aggravating her pain, which was not appealed and is now the final law of the case, claimant is entitled to consideration of such aggravation under § 42-9-35 and a finding that her injury is not limited to a single body part or member injury and that she is not limited to § 42-9-30 when considering the extent of her permanent disability.

5. The Hearing Commissioner erred in failing to find claimant has sustained permanent partial disability to her left lower extremity as a result of the injury by accident; the error being that the evidence overwhelmingly demonstrates that claimant has sustained permanent partial disability to her left lower extremity as a result of the injury by accident and is entitled to compensation for same.

6. The Hearing Commissioner erred in failing to make any finding on claimant's request for lump-sum payment of any award; the error being that the evidence overwhelmingly demonstrates that claimant is entitled to such lump-sum payment, that such lump-sum payment is in her best interest, and that the Commissioner should have reached this issue and made a finding that claimant is entitled to a lump-sum payment of her award.

7. The Hearing Commissioner erred in failing to make any finding on claimant's request for a lifetime allocation of her award; the error being that the evidence overwhelmingly demonstrates that claimant is entitled to such lifetime allocation and that the Commissioner should have reached this issue and made a finding that claimant is entitled to a lifetime allocation of her award.

8. The Hearing Commissioner erred in finding that the injury to the left leg is in the form of radiculopathy; the error being that to the extent the Commissioner intended this finding to indicate that claimant sustained something less than compensable injury to her left lower extremity and that claimant's injury as a result of this injury by accident is limited to her back under § 42-9-30, the Commission previously found that claimant sustained such compensable injury to her left lower extremity in the form of aggravation of her preexisting condition and thus, claimant's injury is not limited to a single scheduled member and she is entitled to a determination of permanent disability based on loss of earning capacity as a matter of law.

9. The Hearing Commissioner erred in finding claimant's preexisting psychological problems were not aggravated by the compensable accident, however claimant's psychological problems are aggravating her pain (Commissioner Roche's Decision and Order dated September 10, 2009, affirmed by appellate panel on February 25, 1010); the error being that to the extent the Commissioner intended this finding to indicate that claimant's psychological problems play no role in her current injury by accident and that and that claimant's injury as a result of this injury by accident is limited to her back under § 42-9-30, the Commission previously found that claimant's psychological problems aggravate her pain from the injury by accident, such finding

clearly references § 42-9-35 entitling claimant to a finding that her injury is not limited to a single member under § 42-9-30 and a determination of permanent disability based on loss of earning capacity.

10. The Hearing Commissioner erred in finding that § 42-9-35(A)(2) is not cited in Commissioner's Roche's Decision and order dated September 10, 2009, as a ruling of law, but is asserted by claimant at this proceeding; the error being that this finding is not sufficient for review as the Commissioner merely cites the issue and fails to actually make any finding on the issue before him.

11. The Hearing Commissioner erred in finding that § 42-9-35(A)(2) is not cited in Commissioner's Roche's Decision and order dated September 10, 2009, as a ruling of law, but is asserted by claimant at this proceeding; the error being that to the extent the Commissioner intended this finding to indicate that claimant's psychological problems play no role in her current injury by accident and that and that claimant's injury as a result of this injury by accident is limited to her back under § 42-9-30, the Commission previously found that claimant's psychological problems aggravate her pain from the injury by accident, such finding clearly references § 42-9-35 entitling claimant to a finding that her injury is not limited to a single member under § 42-9-30 and a determination of permanent disability based on loss of earning capacity.

12. The Hearing Commissioner erred in finding 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; the error being that this finding is directly contrary to the Commission's earlier finding that claimant has sustained compensable aggravation of her low back and left lower extremity condition as a result of her injury by accident and such findings were not appealed and are now the law of this case.

13. The Hearing Commissioner erred in finding that 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; the error being that there is no evidence to support this finding but that the evidence on the record overwhelmingly demonstrates that Dr. Scott opined claimant has a 7% whole person impairment which he apportioned to 3% preexisting and 4% as affects of the injury itself.

14. The Hearing Commissioner erred in finding Dr. Bruce noted the absence of any findings of lumbar radiculopathy during his evaluation on July 10, 2010; the error being that there is no evidence to support this finding as the evidence actually overwhelmingly demonstrates that Dr. Bruce merely stated that claimant does not describe a true radicular pain below her knee at this point and no definite radiculopathy findings but also clearly found that claimant continues experience injury and an adverse effect on her left lower extremity as a result of the injury by accident and the injury to her back in left lower extremity pain, a significant limp on her left lower extremity, and left lower extremity atrophy secondary to disuse due to pain in her left lower extremity originating from the low back.

15. The Hearing Commissioner erred in finding Dr. Bruce noted the absence of any findings of lumbar radiculopathy during his evaluation on July 10, 2010; the error being that this finding is in directly contrary to the Commissioner's Finding of Fact #18 in which he awards claimant continued medical treatment for radiculopathy in her left leg consistent with the recommendations of the authorized treating physicians.

16. The Hearing Commissioner erred in finding Dr. Bruce noted the absence of any findings of lumbar radiculopathy during his evaluation on July 10, 2010; the error being that this finding is directly contrary to the Commission's earlier finding that claimant has sustained compensable aggravation of her low back and left lower extremity condition as a result of her injury by accident and such findings were not appealed and are now the law of this case.

17. The Hearing Commissioner erred in finding 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; the error being that there is no evidence to support this finding as the evidence overwhelmingly demonstrates that in addition to opining that "considering the psychological factors alone, it is my vocational opinion that Ms. Thomas is not employable in any capacity" and that "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," Mr. Adams also recognized that Dr. Scott limited claimant to sedentary work as a result of her physical injuries alone and completed a pain questionnaire opining that claimant's pain would prevent her from performing daily work and would cause distraction or even total abandonment of a task and he opined that "physically she is limited to sedentary level of functioning" and is not employable at a sedentary level.

18. The Hearing Commissioner erred in finding 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; the error being that the Commission previously found that claimant's psychological problems aggravate her pain from the injury by accident, such finding clearly references § 42-9-35 entitling claimant to a finding that her injury is not limited to a single member under § 42-9-30 and a determination of permanent disability based on loss of earning capacity, and as such Mr. Adams report considering both psychological and physical factors is overwhelming evidence that claimant has sustained complete loss of earning capacity as a result of her injury by accident and is entitled to permanent total disability.

19. The Hearing Commissioner erred in failing to find that Dr. Scott opined in his June 8, 2010 Clinical Assessment of Pain that claimant's pain would prevent her from performing daily work and would cause distraction or even total abandonment of a task and that such supports claimant's contention that she has sustained complete loss of earning capacity and is entitled to permanent total disability; the error being that the evidence overwhelmingly demonstrates that Dr. Scott opined in his June 8, 2010 Clinical Assessment of Pain that claimant's pain would prevent her from performing daily work and would cause distraction or even total abandonment of a task and that such supports claimant's contention that she has sustained complete loss of earning capacity and is entitled to permanent total disability.

20. The Hearing Commissioner erred in finding and ruling claimant is awarded 40% permanent partial disability to the spine and that 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 preexisting (non-compensable) psychological condition; the error being that there is no evidence to support this finding but the evidence rather overwhelmingly demonstrates that claimant has sustained complete loss of earning capacity as a result of her injury by accident entitling her to permanent total disability or in the alternative demonstrates that claimant has sustained far greater permanent partial disability to her back and even 50% or more loss of use of the back under § 42-9-30(21) entitling her to total and permanent disability compensated under § 42-9-10(B).

21. The Hearing Commissioner erred in finding and ruling claimant is awarded 40% permanent partial disability to the spine and that 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 preexisting (non-compensable) psychological condition; the error being that this finding is contradictory in that the fact that claimant's injury involves her back, her left lower extremity, and increased pain resulting from her preexisting psychological condition under § 42-9-35, claimant is not limited to the scheduled member section as a matter of law and is entitled to a determination of permanent disability based on loss of earning capacity.

22. The Hearing Commissioner erred in finding and ruling claimant is awarded 40% permanent partial disability to the spine and that 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 preexisting (non-compensable) psychological condition; the error being that in describing claimant's psychological condition as non-compensable the Commissioner fails to consider § 42-9-35 and its directive that such aggravation along with claimant's other compensable injuries entitles claimant to a determination of permanent disability based on loss of earning capacity.

23. The Hearing Commissioner erred in finding and ruling defendants are entitled to control future medical care; the error being that such is a misstatement of the law and in fact defendants are merely entitled to choose a physician to provide continued medical care to claimant and are not entitled to "control" such medical care.

24. The Hearing Commissioner erred in finding and ruling defendants are to receive credit for temporary total disability compensation paid since August 9, 2010, the date of filing of the Form 21; the error being that there is no evidence to support this finding but that the evidence in fact overwhelmingly demonstrates that claimant is entitled to permanent total disability benefits making such credit moot.

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. § 42-17-50, review the

award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own findings of fact and reach its own conclusions of law consistent with or inconsistent with those of the Hearing Commissioner.

Based upon a review of the foregoing, Commissioner Andrea C. Roche and Commissioner Derrick L. Williams have determined that the matter should be remanded to the Hearing Commissioner to address the S.C. Code § 42-9-20 argument.

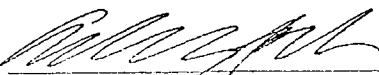
The Panel amends the Hearing Commissioner's Decision and Order to award the allocation of the award pursuant to James v. Anne's, Inc., 701 S.E.2d 730 (S.C. 2010), and to amend the Hearing Commissioner's Finding of Fact 19 to use the word "direct" instead of "control".


ORDER

IT IS, THEREFORE , ORDERED that this matter is remanded to the Hearing Commissioner to address the S.C. Code § 42-9-20 argument.

IT IS FURTHER ORDERED that the Hearing Commissioner's Decision and Order is amended to award the allocation of the award pursuant to James v. Anne's, Inc., 701 S.E.2d 730 (S.C. 2010), and the Hearing Commissioner's Finding of Fact 19 is amended to use the word "direct" instead of "control".

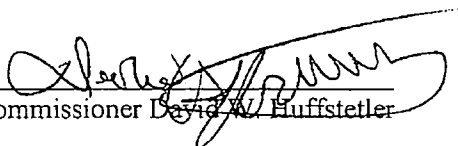
IT IS SO ORDERED.

  
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Commissioner Andrea C. Roche

  
\_\_\_\_\_  
Commissioner Derrick L. Williams

Commissioner David W. Huffstetler votes to affirm the findings and conclusions of the Hearing Commissioner:

"The Hearing Commissioner had the option of making a wage loss award with more than one body part involved, however; he also had the option of an award under 42-9-30. I find no error in his using either option. He is not compelled to make an award of wage loss."

  
Commissioner David W. Huffstetler

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 hereof, postage paid, in the United State mail addressed to the attorney or attorneys for said parties.

This 16 day of August, 2011  
By Valecia S. DeBer

Administrative Assistant to the Commissioner

