

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

**COMMISSION PANEL: THE HONORABLE SUSAN S. BARDEN, CHAIR; THE
HONORABLE MELODY JAMES; THE HONORABLE AVERY B. WILKERSON**

**SCWCC FILE NO.: 0901428
SCWCC FILE NO.: 0905998**

Katherine L. Haines,

Claimant/ 1st Appellants

v.

Dollar Tree Stores,

Employer, and

Arch Ins. Co.,

Carrier, Defendants/ 2nd Appellants.

Hearing held in Columbia,
South Carolina on February 19th, 2013
Per notice timely and properly served upon all Parties of Interest.

Appearances: Joseph T. McElveen for Claimant/ 1st Appellants
Brad B. Easterling for Defendants/ 2nd Appellants

Filed:

7-1-13

STATEMENT OF THE CASE

On October 22nd, 2012, the single Commissioner issued his Amended Decision and Order, which replaced the Decision and Order issued in this matter on October 10th, 2012, vacated the October 10th, 2012 Decision and Order, and rendered it null and void. The Decision and Order of October 22nd, 2012 is the only Order on appeal in this matter. The single Commissioner's Decision and Order of October 22nd, 2012 contained the following Findings of Fact and Conclusions of Law, and Order and Award based thereon:

FINDINGS OF FACT

1. The Claimant was an employee of the Employer on and prior to February 12, 2009, when she sustained an admitted injury to her back in the area of the neck. Although the injury was to the neck or cervical spine, the Claimant experiences radiculopathy or myeloradiculopathy, which means that the injury also has affected her arms and legs, right more than left in both cases. Form 14B of Dr. Redmond, Claimant's APA p. 507. The Claimant's range of motion issues and radiating pain are referenced throughout the medical evidence. Therefore, more than one body part has been affected by the work injury: the back, both arms, and both legs.
2. The Claimant similarly suffered another injury to her left shoulder and back (neck) on June 3, 2009, while working for the Employer. The Carrier herein was also the carrier at the time of this injury. The Defendants provided treatment for this injury. The treating physician, Dr. Burnworth, noted on June 25, 2009, that the shoulder pain was resolving and that the Claimant believed her main problem was her neck. Defendants' APA p. 291. Therefore, the June 3, 2009, accident caused no new injury.
3. The Claimant uses a cane that is prescribed by Dr. Redmond because of a tendency to fall. Claimant's APA p. 173. She underwent anterior cervical discectomy and interbody fusion at C4-5 and C5-6, with instrumentation and an

interbody implant. Claimant takes a host of prescription medications for her work related injury, including Soma, Relafen, Trazadone, Hydrocodone, Nucenta, Neurontin and Zoloft. Drs. Redmond and Johnson believe that long-term use of these medicines will be required, along with regular future care and treatment of the work related injury. Mr. Brown agrees with Drs. Redmond and Johnson that the prescribed medications will make it impossible for the Claimant to be employed. Dr. Johnson stated that the Claimant would be "a liability to herself, her coworkers and her employers if she takes her daily narcotics while trying to work"; and he says she will probably experience "significant absenteeism". Claimant's APA p. 35.

4. Throughout her treatment, the Claimant attempted to continue working for the Employer, mostly on light duty. She has exhibited a desire to get better and return to work. However, Dr. Redmond and Dr. Donald Johnson do not believe that she is able to return to work. Their conclusion is also the opinion of a vocational expert, Adger Brown, MA, CDMS, who reviewed all medical records and the functional capacity evaluation (FCE), conducted a face-to-face interview with the Claimant, and determined that the Claimant "is incapable of returning to any form of employment and should be considered permanently and totally disabled." Claimant's APA p. 181. The FCE in the record also shows great limitations in the Claimant's functional abilities. The Claimant gave consistent effort during the FCE. The physical therapist concluded that the Claimant "is best suited to the Less than Sedentary to Sedentary category of the Physical Demands Characteristics of work chart." This Commissioner adopts the functional limitations and restrictions shown in the FCE. As stated above, the vocational expert did not believe the Claimant can return to work. The Claimant is unable to return to her previous employment or any employment. The Defendants presented an Employability Analysis and Labor Market Survey completed by Jan Westmoreland, Med, CRC, of The Directions Group. Suffice it to say that the conclusions of Direction Group report as to the Claimant's ability to work are at odds with the overwhelming weight of the evidence. This report concludes that the Claimant can work at the sedentary to light work capacity level, whereas the most current medical evidence supports limited sedentary to sedentary. Mr.

Brown, the Claimant's vocational expert, points out the shortcomings of the Directions Group report, Claimant's APA p. 181, and this Commissioner adopts his observations as findings.

5. Dr. Boyd, a neurosurgeon, Dr. Johnson, an orthopedist, and Dr. Redmond, a physiatrist, all evaluated the Claimant and assessed a permanent impairment rating for the Claimant. Dr. Boyd assessed 26-28% whole person impairment based upon radiculopathy and loss of motion segment integrity. Dr. Johnson assesses 25% whole person impairment to the spine. Dr. Redmond concurred in Dr. Boyd's rating. So the Claimant has suffered significant impairment. The medical evidence makes it clear that the neck injury caused injury to the cervical spine resulting in radicular pain, injuring the back and affecting the arms and legs.
6. This Commissioner watched video discs provided by the Defendants. Nothing in the surveillance videos shows the Claimant functioning in a way that would change this Commissioner's decision on permanency.
7. The Defendants have provided and paid for medical care and treatment necessary to assist the Claimant in reaching a level of recovery that is now not likely to improve, with or without medical treatment. According to Dr. Redmond, maximum medical improvement was attained on August 30, 2011. Form 14B of Dr. Redmond, Claimant's APA p. 173A.
8. The Defendants have provided necessary medical care and treatment since the injury, although Dr. Johnson is of the opinion that the delay in treatment has probably lessened the chance of a complete recovery by the Claimant. The neck problem was obvious on the first MRI, he says, but nothing was done. The evidence indicates that the Defendants have paid for this care and treatment, including medical mileage. (The Defendants did not pay for Dr. Johnson's independent medical examination.)
9. The injury of the Claimant is a permanent injury, and as such will endure for the life of the Claimant, even though compensation for this injury by the Defendants will not exceed payment for 500 weeks.
10. The Claimant is capable of handling the financial implications of any award this Commissioner may make; and she wishes to receive any award payable in a lump sum. No objection has been raised by the Defendants to restating the award of

this Commissioner in terms of the Claimant's life expectancy or payment of the award in a lump sum.

RULINGS OF LAW

1. The Claimant, Employer and Carrier are subject to the South Carolina Workers' Compensation Act.
2. The Claimant, Katherine L. Haines, was an employee, S.C. Code Ann. §42-1-130, of the above-named Employer, Dollar Tree Stores, Inc., S.C. Code Ann. §42-1-140, on, prior, and subsequent to October 6, 2010. ARCH Insurance Company, Inc. is the carrier, S.C. Code Ann. §42-1-60.
3. The average weekly wage and compensation rate have been stipulated to be \$561.96 and \$374.66, respectively.
4. The Claimant suffered two accidental injuries in the scope and course of her employment, as stated in the above Findings of Fact. The first injury has resulted in permanent disability; the second injury aggravated the first, but caused no additional injury.
5. The Defendants are responsible for paying all bills and charges for causally related medical care and treatment which have been authorized through the date of this Order. This shall include mileage, as provided by law and Regulations, to and from authorized, related medical appointments, S.C. Code Ann. §42-15-60.
6. The Claimant is totally and permanently disabled under Section 42-9-30(21) of the Code of Laws of South Carolina (1976, as amended), in that she has experienced 50% permanent loss of use or disability to her back and in that the Defendants presented no testimony to rebut total and permanent disability. She has 25-28% whole person or back permanent impairment. Additionally, the FCE shows that she is experiencing significant loss of function. She walks with a cane. Although loss of earning capacity is assumed in cases of schedule disability, this Commissioner also notes that the Claimant cannot return to her previous employment and that she takes medications which make work unlikely, and even unsafe. All of these factors combine to support the finding of schedule disability.

7. The Claimant is also totally and permanently disabled under Section 42-9-10, in that she suffered injury to five body parts (back and bilateral arms and legs) and her incapacity to work is total, as discussed above. See S.C. Code Ann. §42-1-120. This conclusion is supported by the totality of the evidence: the FCE, the opinion of the vocational expert, Mr. Brown, the opinions of Drs. Redmond and Johnson, and the testimony of the Claimant.
8. The medical evidence establishes that the Claimant will require continuing medical care and treatment that is related to the work injury and authorized. S.C. Code Ann., §§42-9-10 and 42-15-60 and *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (S.C. App. 1999). Dr. Redmond filled out a Form 14B which certifies that future medical treatment will be required. Dr. Johnson confirmed the need for continuing medical care and treatment in his reports also.
9. The award of total and permanent disability should be paid to the Claimant in a lump sum, except that weekly payments should continue through October 7, 2012. According to documents filed by the Defendants the Claimant has been paid 115.8572 weeks of either temporary total or temporary partial disability compensation. The commuted value of total and permanent disability, calculated by using the "Net Present Value Table—5% per annum", revised on January 17, 2012, is \$120,378.74. The Claimant argues that Section 42-9-301, which governs lump sum payments, provides that the lump sum "shall be fixed by the Commission, but in no case to be less than ninety percent of, nor to exceed, the commutable value of the future installments commuted so as not to exceed six percent nor to be less than two percent". The Claimant argues that the commutable value of total and permanent disability is \$143,922.94 and that ninety percent of the commutable value is \$129,530.65. Therefore, the Claimant says that the lump sum to be paid is \$129,530.65. This Commissioner does not agree and concludes that the commuted value of \$120,378.74 shall be paid. This amount will also be restated in terms of the Claimant's life expectancy pursuant to §19-1-150 of the Code of Laws of South Carolina (1976, as amended), since the Claimant has suffered total and permanent disability. *James v. Anne's Inc.*, 386 S.C. 326, 688 S.E.2d 562 (2010). The attorney for the Claimant is also entitled to

a fee and reimbursement of costs for prosecuting this action on the behalf of the Claimant; and such fee and costs shall be paid in a lump sum.

ORDER AND AWARD

NOW, THEREFORE, IT IS ORDERED:

1. That the Defendants shall be responsible for payment of all medical care and treatment related to the work injury, including medical mileage, which has been or subsequently is authorized.
2. That the Defendants shall further continue to provide related, authorized medical care and treatment as stated more fully in the text of this Order.
3. That the Defendants shall continue paying the amount of weekly temporary total disability compensation (TTD) through October 7, 2012.
4. That the Defendants shall pay to the Claimant the balance of 500 weeks of compensation in a lump sum, a total of \$120,378.74, representing the Claimant's total entitlement for compensation or indemnity under the South Carolina Worker's Compensation Act.
5. The lump sum award of \$120,378.74 shall be allocated as follows: a) \$40,126.25 as attorney fees pursuant to a written contract between the Claimant/Employee and attorney; b) \$3,614.71 for costs and litigation expenses pursuant to the same contract; and c) \$76,637.78 in full settlement of future compensation under the South Carolina Workers' Compensation Act at the rate of \$45.08 per week commencing on the date this Order is approved by the South Carolina Workers' Compensation Commission and continuing thereafter for a period of 1699.88 weeks. See Utica-Mohawk v. Orr, 227 S.C. 226, 87 S.E.2d 589 (1955); see also James v. Anne's Inc., 386 S.C. 326, 688 S.E.2d 562 (2010); see also Sciarotta v. Bowen, 837 F.2d 135 (3d Cir., 1988, POMS §52001.55(c)(4).).
6. The Order issued in this matter on October 10, 2012, is hereby vacated in its totality and rendered null and void, with reference to this Order being necessary to understand the ruling of this Commissioner.

AND IT IS SO ORDERED!

ISSUES ON APPEAL

Claimant properly filed a Form 30 Request for Commission Review setting forth the following assignments of error:

1. In failing to follow the requirements of Section 42-9-301 of the Code of Laws of South Carolina (1976, as amended), "Lump-sum payments", the error being that the Claimant should have been awarded the lump sum value of total and permanent disability in an amount no less than ninety percent (90%) of the uncommuted value of future installments of compensation.
2. In the alternative, in using the five (5%) percent "Net Present Value Table" to calculate the lump sum value of total and permanent disability, the error being that the use of said table is unfair and inequitable to the Claimant in that the discount rate used exceeds greatly the rate of interest that can be earned by the Claimant on the lump sum award during the discounted weeks. A ten-year maturity Treasury bond yields less than two (2%) percent, and the fifty-two week high is just over two (2%) percent.

Defendants properly filed a Form 30 Request for Commission Review setting forth the following assignments of error:

1. The Hearing Commissioner erred in adopting the functional limitations and restrictions shown in the FCE when the reliable probative and substantial evidence of the case does not support such a finding.
2. The Hearing Commissioner erred in finding as a fact that claimant is unable to return to her previous employment or any employment when the reliable probative and substantial evidence of the case does not support such a finding.
3. The Hearing Commissioner erred in finding as a fact that the conclusions of The Directions Group (Defendants' vocational expert) are at odds with the overwhelming weight of the evidence when the reliable probative and substantial evidence of the case does not support such a finding.

4. The Hearing Commissioner erred in finding as a fact Claimant's vocational expert points out the shortcomings of the Directions Group Report and erred in adopting his findings when the reliable probative and substantial evidence of the case does not support such a finding.
5. The Hearing Commissioner erred in finding as a fact that the injury to the cervical spine results in radicular pain, affecting the arms and legs, when the reliable probative and substantial evidence of the case does not support such a finding.
6. The Hearing Commissioner erred in finding as a fact that nothing in the surveillance videos shows the Claimant functioning in a way that would change the Commissioner's decision on permanency when the reliable probative and substantial evidence of the case does not support such a finding.
7. The Hearing Commissioner erred in finding as a fact Claimant is capable of handling the financial implications of any award the Commissioner may make when the reliable probative and substantial evidence of the case does not support such a finding.
8. The Hearing Commissioner erred in concluding as a matter of law that Claimant is permanently and totally disabled under § 42-9-30(21) in that she has experienced 50% loss of use or disability to her back and that the defendants presented no testimony to rebut total and permanent disability when the reliable probative and substantial evidence of the case does not support such a conclusion.
9. The Hearing Commissioner erred in concluding as a matter of law that Claimant permanently and totally disabled under § 42-9-10 in that she suffered injury to five body parts (back and bilateral arms and legs) and her incapacity to work is total, when the reliable probative and substantial evidence of the case does not support such a conclusion.
10. The Hearing Commissioner erred in concluding as a matter of law that Claimant is in need of additional medical treatment which would tend to lessen her disability when the reliable probative and substantial evidence of the case does not support such a conclusion.
11. The Hearing Commissioner erred in ordering Defendants to pay Claimant the balance of 500 weeks of compensation in a lump sum when the reliable, probative

and substantial evidence of the case does not support an award of permanent and total disability.

FINDINGS OF THE APPELLATE PANEL

Following a Hearing before the above-mentioned appellate panel of the Workers' Compensation Commission, the Commission adopts in full the Findings of Fact and Rulings of Law of the single Commissioner contained above as the Findings of Fact and Rulings of Law of the Commission. The Commission declines to make any new findings, changes, or amendments to the Decision and Order of the single Commissioner dated October 22nd, 2012.

ORDER

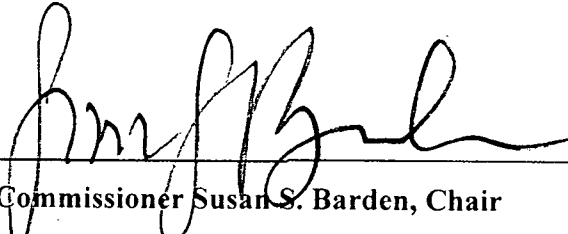
IT IS THEREFORE ORDERED

1. That the Defendants shall be responsible for payment of all medical care and treatment related to the work injury, including medical mileage, which has been or subsequently is authorized.
2. That the Defendants shall further continue to provide related, authorized medical care and treatment as stated more fully in the text of this Order.
3. That the Defendants shall continue paying the amount of weekly temporary total disability compensation (TTD) through October 7, 2012.
4. That the Defendants shall pay to the Claimant the balance of 500 weeks of compensation in a lump sum, a total of \$120,378.74, representing the Claimant's total entitlement for compensation or indemnity under the South Carolina Worker's Compensation Act.
5. The lump sum award of \$120,378.74 shall be allocated as follows upon approval by the Commission of a Form 61: a) \$40,126.25 as attorney fees pursuant to a written contract between the Claimant/Employee and attorney; b) \$3,614.71 for costs and litigation expenses pursuant to the same contract; and c) \$76,637.78 in full settlement of

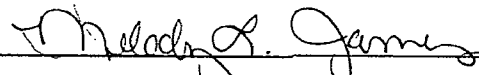
future compensation under the South Carolina Workers' Compensation Act at the rate of \$45.08 per week commencing on the date this Order is approved by the South Carolina Workers' Compensation Commission and continuing thereafter for a period of 1699.88 weeks. *See Utica-Mohawk v. Orr*, 227 S.C. 226, 87 S.E.2d 589 (1955); *see also James v. Anne's Inc.*, 386 S.C. 326, 688 S.E.2d 562 (2010); *see also Sciarotta v. Bowen*, 837 F.2d 135 (3d Cir., 1988, POMS §52001.55(c)(4).).

6. The Order issued in this matter on October 10, 2012, is vacated in its totality and rendered null and void, with reference to this Order being necessary to understand the ruling of the single Commissioner.


AND SO IT IS ORDERED!



Commissioner Susan S. Barden, Chair



Commissioner Melody James



Commissioner Avery B. Wilkerson

Columbia, South Carolina

7-1-13

RECEIVED

AUG 02 2013

SC Court of Appeals

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 July 1, 2013