

**APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1115949**

CLAYTON SIMS, EMPLOYEE,

APPELLANT,

-V-

A&D ENVIRONMENTAL SERVICES, INC., EMPLOYER,

CHUBB INDEMNITY INSURANCE COMPANY, CARRIER,

AND

FARA, THIRD PARTY ADMINISTRATOR,

RESPONDENTS.

Appellant Panel Review held in Columbia,
South Carolina, on February 8, 2012, per
notices timely and properly served upon all
parties of interest.

Appellant Panel Decision and Order filed
7/22, 2013

APPEARANCES:

Appellant represented by Joseph T. McElveen, Jr., Esquire of Sumter, South Carolina.

Respondents represented by Daniel B. Eller, Esquire of Greenville, South Carolina.

I. STATEMENT OF THE CASE

The Claimant, Clayton Shelton Sims, Jr., alleges that he injured his left shoulder and wrist while operating the hose of a vacuum truck on July 25, 2011. The claim was admitted in part and denied in part by the Defendants. Specifically, the Defendants admit that Claimant injured his left shoulder on the date of the accident, but deny that he sustained and injury to his left wrist. The Claimant alleges that there were only two issues before the Commission; (1) Compensability of the alleged left wrist injury, which would include whether Defendants should be responsible for Claimant's carpal tunnel surgery; and (2) Whether Claimant is entitled to any temporary total disability (TTD) benefits.

The Defendants deny that Claimant suffered a compensable work-related injury to his left wrist on July 25, 2011. The Defendants further assert that Claimant's left wrist injury was a preexisting condition that was not caused by or aggravated by the alleged accident. Defendant also claim that Claimant's claim is barred by Cooper v. McDevitt & Street Co., 260 S.C. 463, 196 S.E. 2d 833 (1973).

During the course of the hearing before the Single Commissioner, the parties requested that the hearing be adjourned after the lay testimony was received to allow the parties to conduct the deposition of Dr. David B. Fulton. (Tr. at p. 6). Following the conclusion of the hearing, the parties conducted the deposition of Dr. Fulton on March 14, 2012. The transcript of Dr. Fulton's deposition was submitted to the Single Commissioner and incorporated into the record of this proceeding.

After the Single Commissioner issued the Decision Notes requesting counsel for Defendants to draft a proposed Order, counsel for the Claimant requested that the Hearing

Commissioner Reconsider his findings and further requested that the hearing be "re-opened." Claimants' requests were denied on May 24, 2012.

The Single Commissioner denied Claimant's claim for his alleged injury to the left wrist on June 6, 2012. The Single Commissioner found as fact and concluded as law inter alia that Claimant's alleged left wrist injury was not causally related to the July 25, 2011 event in which he sustained a compensable injury to his left shoulder. The Decision & Order was served upon the parties via electronic mail on June 6, 2012. Claimant appealed the Decision & Order.

Oral arguments were presented before the Appellate Panel on February 19, 2013. All proffered testimony has been taken. The Appellate Panel has properly considered such, together with all the documentary evidence submitted by the parties along with their respective oral arguments. For the reasons set forth below, we **Affirm** the Decision & Order the Single Commissioner with amendments and make the Findings of Fact and Conclusions of Law as set forth below.

II. APA SUBMISSIONS

Pursuant to the South Carolina Workers' Compensation Act and the South Carolina Administrative Procedure Act, the following evidence was submitted into the record without objection:

- APA#1 Medical Records of Dr. David Fulton – Moore Orthopaedics, dated 11/28/11 – 8/31/11, consisting of 12 pages;
- APA#2 Medical Records of Occupational Health – Lexington Medical Center, dated 7/25/11 – 3/2/10, consisting of 63 pages;
- APA#3 Medical Records of Occupational Health Radiology Department – Lexington Medical Center, dated 7/25/11, consisting of 3 pages;
- APA#4 Medical Records of Moore Orthopaedics Physical Therapy, dated 8/31/11 – 8/5/11, consisting of 16 pages;

- APA#6 Medical Records of Moore Orthopaedic Physical Therapy, dated 8/31/11 – 8/12/11, consisting of 2 pages;
- APA#7 Medical Records of Lexington Medical Center Occupational Health, dated 3/2/10 – 9/22/09, consisting of 23 pages;
- APA#8 Medical Records of Lexington Orthopaedics, dated 12/7/09, consisting of 1 page, with additional records to be submitted upon receipt;
- APA#9 Medical Records of Palmetto Orthopaedic and Sports Medicine Center, dated 10/6/09 – 9/24/09, consisting of 5 pages, with additional records to be submitted upon receipt;
- APA#10 Medical Records of Dr. Robert S. Eagerton, Jr., to be submitted upon receipt;
- APA#11 Colonial Family Practice, to be submitted upon receipt
- APA#12 Deposition transcript of Dr. David B. Fulton, MD

EXHIBITS

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|-----------------------|----|--|
| Claimant's Exhibits: | #1 | DOT Driver's Application for Employment, 10/3/07; |
| | #2 | NuWay Industrial Services, Inc. Substance Abuse Prevention Process Employee Acknowledgement; |
| | #3 | Substance Abuse Consent Form; |
| | #4 | Occupational Health Medical Assessment Form; |
| | #5 | Industrial Accident Investigation Report |
| Defendants' Exhibits: | #1 | NuWay Industrial Services, Inc. Employee Emergency Information Sheet; |
| | #2 | Medical Examination Report for Commercial Driver Fitness Determination, 3/6/09; |
| | #3 | Medical Examination Report for Commercial Driver Fitness Determination, 3/8/10; |
| | #4 | NuWay Industrial Services, Inc. New Employee Checklist |

Background Facts

I. CLAYTON SHELTON SIMS, JR.

The Claimant testified that he has worked for the Defendant since 2007 and was working for them on the day of the accident, July 25, 2011. (Tr. at 8.) NuWay Environmental, who was later acquired by the Employer-Defendant originally hired Claimant. Id. The change in ownership also included a change in management. (Tr. at 9.) Claimant testified that when he began his employment at NuWay, he underwent a physical and filled out the "DOT Driver's Application for Employment." (Tr. at 23.) The form did not include any questions about his health or previous injuries. (Tr. at 24.) He did not fill out or sign the "Employment Agreement" or New Employee Checklist, but he did sign the NuWay Industrial Services, Inc., Substance Abuse Prevention Process, Employee Acknowledgment and the Substance Abuse Consent Form. (Tr. at 25-26.)

The Claimant testified that he injured his left shoulder and left wrist while operating a vacuum truck. (Tr. at 11.) While on his knees trying to suck material out of the bottom of the tank, the hose jerked away from him, causing him to experience pain in his neck, left shoulder, all the way to the tips of his fingers. Id. Claimant admitted that he failed to use a stinger which would normally be attached to the tube so that it wouldn't get stuck to the bottom of the tank. (Tr. at 35.) He reported the injury and his employer sent him to either Doctor's Care or Occupational Health. (Tr. at 11.) The Claimant's pain was on the left side of his body. (Tr. at 12.)

After his injury, Claimant returned to work on light duty. (Tr. at 16.) Claimant testified that he aggravated his left shoulder injury in November while on light duty. (Tr. at

17-18.) He started missing work on November 14, 2011, the day that he had surgery on his left wrist. Id.

The Claimant had previously suffered an arm injury in either 2001 or 2002. (Tr. at 31.) He had fallen and broken the bones just above his wrist. As treatment he underwent a carpal abutment. Id. Claimant testified that when he filled out the "NuWay Industrial Services, Inc., Employee Emergency Information Form" he did not include the injury or surgery because they occurred more than five years ago and the form only asked for surgeries within the last five years. (Tr. at 33.) However, Claimant admitted that if the medical records revealed that he had a surgery in 2002, then it would have been covered by the five (5) year period requested by the form. (Tr. at 38-39.)

During the hearing, Claimant testified that he injured his left wrist while working in 2009. (Tr. at 26.) The injury he received back in 2009 was to the same wrist (left) that he alleges he injured on July 25, 2011. (Tr. at 28.) However, Claimant also admitted that during his deposition, he failed to mention the alleged 2009 injury to his left wrist, his treatment with Dr. McIntosh during 2009 or his treatment with Palmetto Orthopedics during 2009 (Tr. at 40-43.)

Claimant also testified during his deposition that he was not having any intermittent problems with his left arm or wrist (other than minor aches and pains) from the date of his last surgery through July 25, 2011. (Tr. at 43.) However, On March 2, 2010, he filled out an medical assessment form that appears on page 99 and 100 of the APA. (Tr. at 30.) The medical assessment form documented Claimant's report that he was having problems using his arms, hands, or fingers as well as cramping in his left hand. (Tr. at 43 and APA at p. 99-100). Claimant also reported on that form that he was experiencing numbness in his

hands as of March 2, 2010. (Tr. at 44.) He reported these same issues with his hand to Dr. McIntosh December 7, 2009, as seen on page 120 of the APA. Id. Claimant testified that he was experiencing similar problems in his left hand (cramping, numbness and tingling) on the day of the hearing. Id.

At the hearing, Claimant admitted that his testimony concerning intermittent problems with his left wrist between 2002 and 2011 was different than his prior deposition testimony on that issue when he was deposed on January 24, 2012. (Tr. at 47.) Claimant also admitted that during his deposition he did not report seeing Dr. McIntosh or any physician other than Dr. Tate at Palmetto Orthopedics. (Tr. at 47-48.) Finally, Claimant admitted that during his deposition, he denied having any problems with his left wrist other than a work injury he sustained with Coca-Cola in 2001. (Tr. at 49.)

II. MILCIADES DIONISIO HERRERA

Milciades Herrera testified that he is the corporate director for human resources and compliance at A&D Environmental Services, Inc. (Tr. at 64.) He started working for NuWay in January 1, 1999, kept his position when A&D took of in February of 2008 but was transferred to its corporate headquarters. Id. He was in human resources when the Claimant was hired. (Tr. at 65.) He identified the "NuWay Industrial Services, Inc., New Employee Checklist" as a normal document to be filled out as part of the application process. (Tr. at 67.) When examining the Employee Emergency Information Sheet, he testified that the medical history requested on the back of the form would normally be relied upon in the hiring process. (Tr. at 69.) The Claimant did not fill in the back portion of the form, and Mr. Herrera testified that he would not have hired the Claimant if he knew of Claimant's previous injury involving his left wrist. (Tr. at 69-70.)

III. DAVID B. FULTON, M.D.

During his deposition, David B. Fulton, M.D. testified that he received a Bachelor of Science in 1989 from University of Toledo, received a M.D. in 1993 from the University of Cincinnati, completed an orthopedic surgical training program at the University of Indiana in 1998, and finished a Hand and Upper Extremity Fellowship in Cincinnati, Ohio in July of 1999. (Dep. of Dr. Fulton at p. 4.) He has practiced at the Moore Orthopaedic Clinic in Columbia, South Carolina since August of 1999. Id. He is a board-certified orthopedic surgeon and has a Certificate of Added Qualifications for surgery of the hand. (Dep. of Dr. Fulton at pp. 4-5.) Dr. Fulton was tendered by the Defendants as an expert in hand surgery without any objection from Claimant's counsel. (Dep. of Dr. Fulton at p. 5.)

Dr. Fulton first saw the Claimant on August 31, 2011. (Dep. of Dr. Fulton at p. 6.) On his initial visit, the Claimant informed Dr. Fulton that he had injured himself on the job a month prior. (Dep. of Dr. Fulton at p. 6-7.) The Claimant reported to Dr. Fulton that the injury affected his left shoulder and wrist, producing a sharp pain in the wrist that developed into numbness in his left hand. (Dep. of Dr. Fulton at p. 7.) According to Dr. Fulton, Claimant related the onset of his problems with his left wrist to the date of his injury involving the hose, about one-month before he saw Dr. Fulton for the first time. (Dep. of Dr. Fulton at pp. 9-10.) When Dr. Fulton asked the Claimant about any previous or prior wrist problems, the Claimant denied having any prior problems with his left wrist and that "this was a first-time event." (Dep. of Dr. Fulton at pp. 10-11.) Based on Claimant's statements to him, Dr. Fulton formulated the initial opinion that the Claimant had carpal tunnel that was aggravated by the on-the-job injury of July 25, 2011. (Dep. of Dr. Fulton at p. 11.)

Dr. Fulton clarified his testimony concerning an "aggravation" by testifying that it is possible for carpal tunnel syndrome to manifest after a single trauma to the wrist. (Dep. of Dr. Fulton at p. 8). He described carpal tunnel as having an "insidious onset" of symptoms, the subtlety of which can make it difficult for a patient to pinpoint the date of their onset. (Dep. of Dr. Fulton at p. 8-9.) Dr. Fulton later testified that the Claimant's condition was technically was caused by a compressed median nerve at the wrist with a thickened transverse carpal ligament. (Dep. of Dr. Fulton at p. 23.) Such a condition can go unnoticed by a patient until an event or trauma aggravates the condition, producing its more noticeable symptoms. Id.

Dr. Fulton testified that as for treatment, he recommended that the Claimant wear a cock-up splint at night and that a nerve conduction study be obtained (Dep. of Dr. Fulton at p. 12.) The Claimant received the nerved conduction study from Dr. Alaric Van Dam on October 14, 2011. (Dep. of Dr. Fulton at p. 13.) Dr. Fulton ultimately performed surgery on the Claimant's wrist on November 14, 2011. (Dep. of Dr. Fulton at p. 16.) On November 28, 2011, on a follow-up visit, the Claimant reported that after the surgery he no longer had any numbness in his left hand. (Dep. of Dr. Fulton at p. 18.) Dr. Fulton has not seen the Claimant since this visit. (Dep. of Dr. Fulton at p. 19.)

In reference to Claimant's APA page 1A, the questionnaire submitted to Dr. Fulton by the Claimant's attorney, Dr. Fulton admitted that his opinion of the cause of the Claimant's carpal tunnel was formed without knowledge of the Claimant's previous injuries. (Dep. of Dr. Fulton at p. 22.) Dr. Fulton was then presented with various medical records that pre-dated Claimant's July 25, 2011 work injury. After reviewing the Claimant's medical records from Lexington Orthopaedics in 2009 along with Dr. McIntosh's notes

(Dep. of Dr. Fulton at Defendants' Ex. #3), Dr. Fulton admitted that the symptoms described in the medical records matched the symptoms of carpal tunnel syndrome. (Dep. of Dr. Fulton at pp. 27-28.) Additionally, upon reviewing the earlier 2009 medical reports from Palmetto Orthopaedics (Dep. of Dr. Fulton at Defendants' Ex. #4), Dr. Fulton agreed that they also demonstrated signs of carpal tunnel syndrome. (Dep. of Dr. Fulton at p. 29-30.) ~~He also identified these same symptoms when reviewing pages 99 and 100 of Defendants' APA.~~ (Dep. of Dr. Fulton at p. 31-32.) In light of this material, Dr. Fulton withdrew his opinion from the questionnaire, stating that the Claimant likely had carpal tunnel syndrome for at least two years. (Dep. of Dr. Fulton at pp. 32-33.)

Dr. Fulton admitted that his prior opinion was based upon the medical history as the Claimant told him and that if he had knowledge of these medical records he would have determined that the carpal tunnel syndrome's symptoms started before the Claimant's alleged injury of July 25, 2011. *Id.* Instead, Dr. Fulton is now of the opinion that the carpal tunnel syndrome was a preexisting condition, unrelated to the injury in July of 2011. (Dep. of Dr. Fulton at p. 33-34.) Also, considering the identical nature of the Claimants symptoms to his previous complaints, Dr. Fulton determined that the incident did not likely exacerbate or aggravate the preexisting condition. (Dep. of Dr. Fulton at p. 34.) Finally, Dr. Fulton testified that Claimant's carpal tunnel surgery was not causally related to the July 25, 2011 event. (Dep. of Dr. Fulton at pp. 38-39)

The Single Commissioner's Findings of Fact and Conclusions of Law were as follows:

III. FINDINGS OF FACT

The following are found as facts:

1. *The Claimant's claim for the July 25, 2011 accident is not barred by Cooper v. McDevitt & Street Co., 260 S.C. 463 (1973). There is no evidence that the Claimant made misrepresentations on an application for employment;*
2. *The "Employee Emergency Information Sheet" is not an application; it is what it says it is; there were no instructions as to how to complete the form or penalties for an incomplete form;*
3. *Though there may be an interesting argument as to how case law might be impacted by the Americans with Disabilities Act, the courts have not yet ~~addressed this question and it is not necessary to consider the question in this~~ finding of fact;*
4. *It is the opinion of Dr. David B. Fulton that Claimant's left wrist injury was "a pre-existing condition and it was not related to that event [the July 25, 2011 event]." (Dep. of Dr. Fulton at pp. 33-34). As such, I find that the Claimant's claim for a left wrist injury arising out of the July 25, 2011 accident is not compensable under the Act. Such Finding is based upon finding the deposition of Dr. David B. Fulton and the medical records;*
5. *The injury to the Claimant's left shoulder is compensable. The Claimant is entitled to medical care and treatment which would tend to lessen the degree of disability; Such Finding is based upon stipulation of the parties.*
6. *Dr. David B. Fulton is the authorized treating physician for the Claimant's compensable left shoulder injury.*
7. *Claimant was cleared to return to work without restriction by the authorized treating physician on September 21, 2011; Such Finding is based upon the medical evidence.*
8. *Any claims by Claimant for TTD and/or TPD apply solely to the shoulder;*
9. *As to Claimant's claim for TTD and/or TPD, no payroll records have been provided to allow for arguments or to make a determination as to what benefits, if any, are due to the Claimant; therefore these issues are held in abeyance.*

IV. CONCLUSIONS OF LAW

Under the foregoing Finding of Fact and the Code of Laws of South Carolina, as amended, it is concluded that:

1. *Under S.C. Code Ann. §42-1-160, the Claimant, Clayton Shelton Sims, Jr., sustained a compensable injury by accident on July 25, 2011 which is limited to*

an injury to his left shoulder. Claimant's claim that he sustained an injury to his left wrist as a result of this accident is specifically denied;

2. *Under S.C. Code Ann. §42-15-60, the Claimant, Clayton Shelton Sims, Jr., is entitled to additional medical treatment for the left shoulder injury which will tend to lessen the period of disability, as recommended by the authorized treating physician until Claimant reaches Maximum Medical Improvement or further Order of the Commission;*

After considering all of the evidence contained within the record, we FULLY AFFIRM the Single Commissioner's Findings of Fact and Conclusions of Law WITH AMENDMENTS and therefore make the following Findings of Fact, Conclusions of Law, and Award:

V. FINDINGS OF FACT

The following are found as facts:

1. The Claimant's claim for the July 25, 2011 accident is not barred by Cooper v. McDevitt & Street Co., 260 S.C. 463 (1973). There is no evidence that the Claimant made misrepresentations on an application for employment;
2. The "Employee Emergency Information Sheet" is not an application; it is what it says it is; there were no instructions as to how to complete the form or penalties for an incomplete form;
3. Though there may be an interesting argument as to how case law might be impacted by the Americans with Disabilities Act, the courts have not yet addressed this question and it is not necessary to consider the question in this finding of fact;
4. It is the opinion of Dr. David B. Fulton that Claimant's left wrist injury was "a pre-existing condition and it was not related to that event [the July 25, 2011 event]." (Dep. of Dr. Fulton at pp. 33-34). As such, we find that the Claimant's claim for a left wrist injury arising out of the July 25, 2011 accident is not compensable under the Act. Such Finding is based upon finding the deposition of Dr. David B. Fulton and the medical records;
5. The injury to the Claimant's left shoulder is compensable. The Claimant is entitled to medical care and treatment which would tend to lessen the degree of disability; Such Finding is based upon stipulation of the parties.
6. Dr. David B. Fulton is the authorized treating physician for the Claimant's compensable left shoulder injury.

7. Claimant was cleared to return to work without restriction by the authorized treating physician on September 21, 2011; Such Finding is based upon the medical evidence.
8. Any claims by Claimant for TTD and/or TPD apply solely to the shoulder;
9. As to Claimant's claim for TTD and/or TPD, no payroll records have been provided to allow for arguments or to make a determination as to what benefits, if any, are due to the Claimant; therefore these issues are held in abeyance.

CONCLUSIONS OF LAW

Under the foregoing Finding of Fact and the Code of Laws of South Carolina, as amended, it is concluded that:

1. Under S.C. Code Ann. §42-1-160, the Claimant, Clayton Shelton Sims, Jr., sustained a compensable injury by accident on July 25, 2011 which is limited to an injury to his left shoulder. Claimant's claim that he sustained an injury to his left wrist as a result of this accident is specifically denied;
2. Under S.C. Code Ann. §42-15-60, the Claimant, Clayton Shelton Sims, Jr., is entitled to additional medical treatment for the left shoulder injury which will tend to lessen the period of disability, as recommended by the authorized treating physician until Claimant reaches Maximum Medical Improvement or further Order of the Commission;

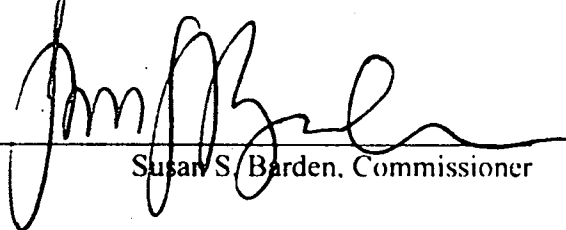
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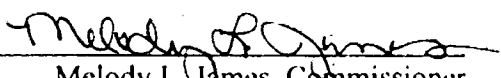
IT IS, THEREFORE, ORDERED that Claimant's claim for a left wrist injury is hereby DENIED. All other issues are held in abeyance.

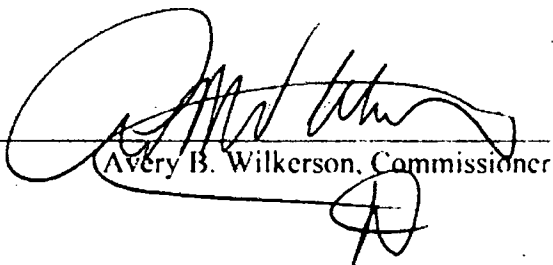
No hearing costs are assessed in this instance.

IN FULL AFFIRMATION OF THE SINGLE COMMISSIONERS' DECISION & ORDER WITH AMENDMENTS, IT IS SO ORDERED

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION


Susan S. Barden, Commissioner


Melody L. James, Commissioner


Avery B. Wilkerson, Commissioner

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 22, 2013