

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

W.C.C. FILE NO: 0810152

PATRICIA FORE

EMPLOYEE,
CLAIMANT/APPELLANT

VS.

GRIFFCO OF WAMPEE, INC.

EMPLOYER,

AND

AIG DOMESTIC CLAIMS,

CARRIER,
DEFENDANTS/RESPONDENTS

Appellate Panel Review held in Columbia, South
Carolina, on April 16, 2013, per notices timely
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

7-15-13

APPEARANCES: Claimant/Appellant represented by Latonya Dilligard Edwards,
Esquire/SCSIF, of Dilligard Edwards, LLC of Columbia, South
Carolina.

Defendants/Respondents represented by James H. Lichty,
Esquire of McAngus Goudelock & Courie, LLC of Columbia,
South Carolina.

STATEMENT OF CASE

This matter was heard before Commissioner Andrea Roche on April 26, 2012, in Myrtle Beach, South Carolina. On December 19, 2012, she issued the following Order:

That Defendants are not barred from seeking reimbursement from the SIF,

That SIF shall reimburse the Defendants for all compensation benefits payable subsequent to those payable for the first seventy-eight weeks following the injury,

That SIF shall not reimburse the Defendants for medical payments at this time,

That the question of whether future medical payments are reimbursable by the SIF is premature and to be determined as future medical payments are provided.

By Form 30, Appellate submitted the following exceptions to the Single Commissioner's Findings of Fact and Conclusions of Law:

1. Did the Hearing Commissioner err in finding as a fact (Finding of Fact No. 4) that Carrier placed the Fund on notice of a potential claim before payment of the first seventy-eight (78) weeks of compensation, when such finding is against the greater weight of the reliable, probative, and substantial evidence in the record?
2. Did the Hearing Commissioner err in finding as a fact (Finding of Fact No. 12) that if the Claimant needs revision surgery, the diabetes will have played a role in that, the error being an award of reimbursement cannot be based on speculation?
3. Did the Hearing Commissioner err in finding as a fact (Finding of Fact No. 13) that should Carrier provide the Claimant's revision surgery, a new hearing may be necessary to determine whether that cost is reimbursable by the Fund, the error being that any subsequent reimbursement hearing violates the statutory reimbursement scheme?
4. Did the Hearing Commissioner err in finding as a fact (Finding of Fact No. 15) that Claimant's prior permanent physical impairment resulted in compensation that is substantially greater and is caused by aggravation of the pre-existing impairment that would have resulted from the subsequent injury alone, when such finding is against the preponderance of the reliable, probative, and substantial evidence in the record?
5. Did the Hearing Commissioner err in concluding (Conclusion of Law No. 7) that S.C. Code Ann. Sec. 42-7-320 pertains to whether the Fund can accept a claim after December 31, 2011 and does not prohibit the Commission from awarding reimbursement of a claim after December 31, 2011, when such conclusion is against the greater weight of the reliable, probative and substantial evidence in the record?

6. Did the Hearing Commissioner err in failing to find that the medical evidence in the record rebutted the presumption that Claimant's pre-existing diabetes was permanent and a hindrance per S.C. Code Sec. 42-9-400?

STANDARD OF REVIEW

In 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 therefor, make its own Findings of Fact and Conclusions of Law. The final determination of witness credibility and the weight to be accorded evidence in workers' compensation cases is reserved to the Full Commission. Etheridge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (S.C.App 2002). After careful review in the instant case, the Commission affirms, with amendment, the Single Commissioner's Order of December 19, 2012, and issues the following Findings of Fact and Conclusions of Law and Final Order as the final determinations of the Commission.

FINDINGS OF FACT

Based upon the testimony and exhibits submitted, the Appellate Panel of the South Carolina Workers' Compensation Commission makes the following findings of fact:

Notice

1. That Defendants placed the Commission and the SIF on notice of a potential claim, in writing, on October 2, 2009.
2. That an Order of the Commission dated October 13, 2009, determined the Claimant suffered a compensable injury to her back on February 24, 2008, and ordered the Defendants to provide compensation.

3. That a Form 40 filed by the Claimant's attorney suggests the Defendants had not paid any compensation to the Claimant as of November 17, 2009.
4. That Defendants placed the SIF on notice of a potential claim before payment of the first seventy-eight weeks of compensation.

Substantially Greater Compensation or Medical Payments due to Aggravation

5. That Claimant had diabetes prior to her injury.
6. That the Employer had knowledge of the Claimant's diabetes prior to her injury.
7. That Claimant's pre-existing diabetes is a permanent physical impairment.
8. That Claimant's prior permanent physical impairment has not resulted in medical payments that are substantially greater and caused by aggravation of the pre-existing impairment that that which would have resulted from the subsequent injury alone.
9. That the SIF is not obligated to provide reimbursement for medical payments at this time.
10. That Claimant's diabetes contributed to the non-union of her two-level fusion.
11. That Claimant is a candidate for revision surgery due to non-union of her two-level lumbar fusion but is not interested in surgery.
12. That if the Claimant needs revision surgery, the diabetes will have played a role in that, but that is just speculation at this point.
13. That should the Defendants provide the Claimant revision surgery, a new hearing may be necessary to determine whether that cost is reimbursable by the SIF.
14. That the Claimant suffered 40% partial permanent disability to her back as a result of her injury, as determined by the Appellate Panel Decision and Order dated August 27, 2012. This award is currently under appeal to the South Carolina Court of Appeals and could change.

15. That the Claimant's prior permanent physical impairment resulted in compensation that is substantially greater and is caused by aggravation of the pre-existing impairment that that which would have resulted from the subsequent injury alone.

16. That the SIF is obligated to provide reimbursement for all compensation benefit payments payable subsequent to those payable for the first seventy-eight weeks following the injury.

Application of S.C. CODE ANN SEC. 42-7-320

17. That Defendants timely submitted a Form 58 and APA Submissions to the Commission on February 21, 2012.

18. That the SIF indicated it would object to any APA Submissions not submitted prior to June 30, 2011, yet failed to raise any objections at the hearing, suggesting it does not deny the evidence contained in the Defendants' APA submissions was submitted to the SIF prior to June 30, 2011.

19. That the SIF did not present an argument to suggest the evidence contained in the Defendants' APA Submissions was not submitted to the SIF prior to June 30, 2011.

Amendments to Order of Single Commissioner

20. That the single Commissioner's is hereby amended so that the date of accident referenced on page three and on page five shall read February 24, 2008.

CONCLUSIONS OF LAW

It is concluded under the South Carolina Worker's Compensation Act in Section 42-1-10 S.C. Code of Laws, et. seq., that:

1. S.C. CODE ANN. SEC. 42-9-400 governs reimbursement from Second Injury Fund where disability is substantially greater or caused by aggravation of pre-existing employment.

2. S.C. CODE ANN. SEC. 42-9-400(a) establishes the SIF must reimburse an employer or carrier when a Claimant with a permanent physical impairment suffers a subsequent injury leading to substantially greater compensation or medical payments than would have resulted from the injury alone due to the aggravation of the permanent physical impairment. Since the evidence shows compensation payments are substantially greater due to the prior permanent physical impairment, the SIF shall reimburse the carrier for all compensation payments made to date. The evidence does not establish substantially greater medical payments however, and the SIF is not obligated to reimburse the Defendants for medical payments.
3. S.C. CODE ANN. SEC. 42-9-400(a)(1) establishes the SIF is only responsible for reimbursing compensation benefits payments subsequent to those payable for the first seventy-eight weeks following the injury.
4. S.C. CODE ANN. SEC. 42-9-400(d)(2) establishes a presumption that diabetes is permanent and constitutes a hindrance or obstacle to employment, provided the employer establishes prior knowledge of the permanent impairment. Since the employer established knowledge of the Claimant's diabetes, the condition is permanent and constitutes a hindrance or obstacle to employment.
5. S.C. CODE ANN. SEC. 42-9-400(f) establishes the employer or carrier must notify the Commission and the SIF of a possible claim no later than after the payment of seventy-eight weeks of compensation. Since the Defendants provided notice of a potential claim to both before it provided any compensation to the Claimant, the Defendants provided timely notice of its claim for reimbursement.
6. S.C. CODE ANN. SEC. 42-7-320 establishes a schedule for the termination of the SIF.

7. S.C. CODE ANN. SEC. 42-7-320 establishes the SIF shall not accept a claim for reimbursement after December 31, 2011. This statute pertains to whether the SIF can accept a claim after December 31, 2011 and does not prohibit the Commission from awarding reimbursement of a claim after December 31, 2011.
8. S.C. CODE ANN. SEC. 42-7-320(2) establishes a bar to reimbursement in the event an employer or carrier does not submit all required information for consideration of accepting a claim to the SIF by June 30, 2011. This is an affirmative defense as it relates to the SIF. The SIF did not present any evidence to establish the Defendants failed to submit required information to the SIF prior to June 30, 2011. Moreover, the evidence suggests the SIF agrees the Defendants submitted all required information to the SIF prior to June 30, 2011. Accordingly, the Defendants are not barred from seeking reimbursement by operation of SEC. 42-7-320(2).

ORDER

Based on the above Findings of Fact and Conclusions of Law, the undersigned hereby affirms the decision of the single Commissioner in full and Orders,

That Defendants are not barred from seeking reimbursement from the SIF,

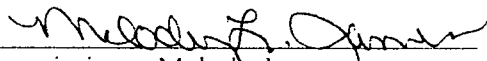
That SIF shall reimburse the Defendants for all compensation benefits payable subsequent to those payable for the first seventy-eight weeks following the injury,

That SIF shall not reimburse the Defendants for medical payments at this time,

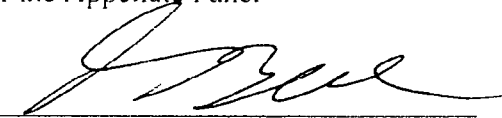
That the question of whether future medical payments are reimbursable by the SIF is premature and to be determined as future medical payments are provided,

That the single Commissioner's is hereby amended so that the date of accident referenced on page three and on page five shall read February 24, 2008.

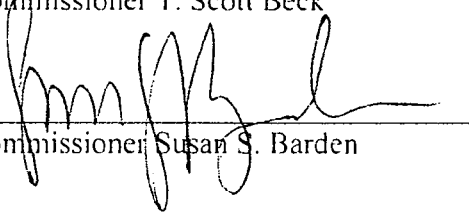
AND IT IS SO ORDERED!



Commissioner Melody James
For the Appellate Panel



Commissioner T. Scott Beck



Commissioner Susan S. Barden

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 15, 2013