

STATE OF SOUTH CAROLINA) BEFORE THE SOUTH CAROLINA
) WORKERS' COMPENSATION COMMISSION
COUNTY OF YORK)

John Stevenson, Employee,)
)
) Claimant,) WCC FILE NO. 1212495
)
)

-vs-)
)

APPELLATE PANEL
DECISION AND ORDER

Marathon Abrasive, Inc.,)
Employer,)
)
) and)
)
) Practorian Insurance Company,)
)
) Defendants.)

RECEIVED
NOV 07 2013
SC Court of Appeals

APPELLATE PANEL

REVIEW:

COLUMIBA, SOUTH CAROLINA

DATE:

AUGUST 13, 2013

APPEARANCES:

**ANDREW W. CREECH OF ELROD POPE LAW
FIRM FOR CLAIMANT
DAVID BORNEMANN OF MCKAY, CAUTHEN,
SETTANA, & STUBBLEY, P.A.**

PURPOSE OF REVIEW:

**TO DETERMINE ALL ISSUES RAISED BY
FORM 30**

PROCEDURAL HISTORY

On September 17, 2012 Claimant filed a Form 50 Claim alleging that Claimant sustained a compensable injury to his left shoulder in the course and scope of his employment on May 22, 2012 by way of both a specific injury by accident and, alternatively, injury by repetitive trauma. On October 12, 2012 Defendants filed a Form 51 denying compensability of the injury.

A hearing was ultimately scheduled on March 11, 2013 before Commissioner Avery Wilkerson in Rock Hill, SC. Following the hearing Commissioner Wilkerson

entered the following findings of fact:

1. I find that Claimant has performed heavy work that is repetitive in nature over a period of 8 or 9 years. Claimant testified that for 8 to 9 years his job required him to load buckets of grain rock into a container, and then winch or wind the container up using a chain pull, using his arms to pull in an up and down motion. Even though, in approximately March 2011, Claimant began a different job, his testimony was that he still was required to lift heavy bags of grain. In addition, during that time period Claimant continued to rotate in performing the “hopper job”, though not as frequently as in the 8 years prior.
2. I find that Claimant sustained a compensable injury to his left shoulder due to the repetitive nature of his work. This finding is supported by the evidence as a whole, including both the testimony of the Claimant and the medical evidence. Specifically, on September 21, 2012, Claimant presented to Dr. Ashe complaining of left shoulder pain which “he believes... occurred from heavy lifting and pulling at his job.” (APA pg. 5). In further support, Dr. Ashe filled out a medical questionnaire opining, most probably and to a reasonable degree of medical certainty, that Claimant’s job duties, specifically the winding of the hopper of grain, were repetitive in nature and caused or aggravated Claimant’s left shoulder condition, contributing to his current level of pain. (APA pg. 11). Defendants failed to provide any evidence to the contrary and opted not to depose Dr. Ashe regarding his opinions on causation.
3. I find that Claimant meets the notice requirements set forth in Section 42-15-20. Despite somewhat conflicting testimony from Claimant and Tim Kennedy as to whether Claimant reported his injury on May 22, 2012, it is clear that notice was

provided pursuant to the statute by letter dated June 19, 2012 from Claimant's attorney, Andrew W. Creech, to Marathon Abrasive's attorney, Mark Cauthen of the McKay Firm. (See Claimant's Exhibit 1). Section 42-15-20 states in part that notice must be given "to the employer; his agent, or representative". The following facts are not disputed: 1) That as of June 19, 2012, the McKay Firm was provided notice that Mr. Stevenson injured his left shoulder performing his job duties at work, 2) That as of June 19, 2012, the McKay Firm was actively representing both Marathon Abrasive and Praetorian Insurance Company in a separate workers' compensation claim concerning an admitted injury Claimant suffered to his back on January 23, 2012, and 3) That McKay Firm is currently the representative or agent for Marathon Abrasive for this current claim for the left shoulder. Considering the above, there is a presumption that the McKay firm was and is the agent and/or representative of Marathon Abrasive when the notification letter dated June 19, 2012 was sent, satisfying the requirement set forth in 42-15-20.

4. I find that on September 21, 2012, Dr. Ashe placed Claimant on restricted duty. Those restrictions were never lifted by any doctor. Claimant has not worked since January 4, 2013 and is thus entitled to temporary total benefits from January 5, 2013 to present and continuing. The back payment of TTD shall be paid in a lump sum, with the check made payable to ANDREW CREECH AT THE ELROD POPE LAW FIRM and mailed to PO BOX 11091, Rock Hill, SC 29731. Claimant thereafter should be placed on a running award. Thus as of April 15, 2013, Defendants shall pay a lump sum amount of back TTD totaling \$4,200.00. (1/5/13 - 4/15/13 = 14 weeks) (14 weeks x \$300.00 = \$4,200.00).

5. I find that Claimant is not at Maximum Medical Improvement and Defendants shall authorize an evaluation and treatment with an orthopedist.

The single Commissioner also made the following Rulings of Law.

Accordingly, as provided in the South Carolina Code of Laws, 1976, Section 42-17-40, it is the determination of this Commissioner that:

1. Under Section 42-1-130, Claimant was a covered employee at the times in question.
2. Under Section 42-1-140, the Defendant employer was a covered employer under the Act.
3. Under Section 42-1-150, the Defendant had 4 or more employees engaged in employment.
4. Under Section 42-1-160, Claimant did sustain an injury by accident to his left shoulder, arising out of and in the course of his employment.
5. Under Section 42-1-172, Claimant proved by a preponderance of the evidence the causal relationship between Claimant's repetitive work duties and his left shoulder condition.
6. Under Section 42-15-20, Claimant provided proper notice to the employer, his agent, or his representative within the required 90-day time period.

Within the statutory period, Defendants filed an Application for Review in the case setting forth their reasons, copies of which were furnished to all interested parties. Briefs were submitted prior to oral arguments which were scheduled to be presented before the Appellate Panel on August 13, 2013.

In an Appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. Section 42-15-50 (1976, as amended), 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 reach its own Conclusions of Law consistent with or inconsistent with those of Hearing Commissioner.

Counsel for the Claimant and Defendants appeared at the scheduled hearing to present oral arguments on behalf of the parties. Having heard oral arguments on behalf of the parties, considered the briefs and viewed the record as a whole, the Appellate Panel **AFFIRMS with an AMENDMENT.** The following are found as fact:

FINDINGS OF FACT

1. I find that Claimant has performed heavy work that is repetitive in nature over a period of 8 or 9 years. Claimant testified that for 8 to 9 years his job required him to load buckets of grain rock into a container, and then winch or wind the container up using a chain pull, using his arms to pull in an up and down motion. Even though, in approximately March 2011, Claimant began a different job, his testimony was that he still was required to lift heavy bags of grain. In addition, during that time period Claimant continued to rotate in performing the “hopper job”, though not as frequently as in the 8 years prior.
2. I find that Claimant sustained a compensable injury to his left shoulder due to the repetitive nature of his work. This finding is supported by the evidence as a whole, including both the testimony of the Claimant and the medical evidence. Specifically, on September 21, 2012, Claimant presented to Dr. Ashe complaining of left shoulder pain which “he believes... occurred from heavy lifting and pulling at his job.” (APA pg. 5).

In further support, Dr. Ashe filled out a medical questionnaire opining, most probably and to a reasonable degree of medical certainty, that Claimant's job duties, specifically the winding of the hopper of grain, were repetitive in nature and caused or aggravated Claimant's left shoulder condition, contributing to his current level of pain. (APA pg. 11). Defendants failed to provide any evidence to the contrary and opted not to depose Dr. Ashe regarding his opinions on causation.

3. I find that Claimant meets the notice requirements set forth in Section 42-15-20. Despite somewhat conflicting testimony from Claimant and Tim Kennedy as to whether Claimant reported his injury on May 22, 2012, it is clear that notice was provided pursuant to the statute by letter dated June 19, 2012 from Claimant's attorney, Andrew W. Creech, to Marathon Abrasive's attorney, Mark Cauthen of the McKay Firm. (See Claimant's Exhibit 1). Section 42-15-20 states in part that notice must be given "to the employer, his agent, or representative". The following facts are not disputed: 1) That as of June 19, 2012, the McKay Firm was provided notice that Mr. Stevenson injured his left shoulder performing his job duties at work, 2) That as of June 19, 2012, the McKay Firm was actively representing both Marathon Abrasive and Praetorian Insurance Company in a separate workers' compensation claim concerning an admitted injury Claimant suffered to his back on January 23, 2012, and 3) That McKay Firm is currently the representative or agent for Marathon Abrasive for this current claim for the left shoulder. Considering the above, there is a presumption that the McKay firm was and is the agent and/or representative of Marathon Abrasive when

the notification letter dated June 19, 2012 was sent, satisfying the requirement set forth in 42-15-20.

4. Furthermore, even if notice was not proper, the above facts constitutes reasonable excuse to believe that notice was properly given with no prejudice to the employer, thus satisfying requirements provided in Section 42-15-20(B)&(C). Claimant thought notice had been given pursuant to Claimant's counsel's letter dated June 19, 2012. In our view, this constitutes reasonable excuse. *See also* Lizee v. South Carolina Dept. of Mental Health (S.C. App. 2005) with regard to prejudice stating "It is not the workers compensation claimant's burden to show the absence of prejudice by lack of timely notice to the employer of a claim, but it is the employer's burden to prove the presence of prejudice."
5. I find that on September 21, 2012, Dr. Ashe placed Claimant on restricted duty. Those restrictions were never lifted by any doctor. Claimant has not worked since January 4, 2013 and is thus entitled to temporary total benefits from January 5, 2013 to present and continuing. The back payment of TTD shall be paid in a lump sum, with the check made payable to ANDREW CREECH AT THE ELROD POPE LAW FIRM and mailed to PO BOX 11091, Rock Hill, SC 29731. Claimant thereafter should be placed on a running award. Thus as of April 15, 2013, Defendants shall pay a lump sum amount of back TTD totaling \$4,200.00. (1/5/13 - 4/15/13 = 14 weeks) (14 weeks x \$300.00 = \$4,200.00).
6. I find that Claimant is not at Maximum Medical Improvement and Defendants shall authorize an evaluation and treatment with an orthopedist.

RULINGS OF LAW

Accordingly, as provided in the South Carolina Code of Laws, 1976, Section 42-17-40, it is the determination of this Commissioner that:

1. Under Section 42-1-130, Claimant was a covered employee at the times in question.
2. Under Section 42-1-140, the Defendant employer was a covered employer under the Act.
3. Under Section 42-1-150, the Defendant had 4 or more employees engaged in employment.
4. Under Section 42-1-160, Claimant did sustain an injury by accident to his left shoulder, arising out of and in the course of his employment.
5. Under Section 42-1-172, Claimant proved by a preponderance of the evidence the causal relationship between Claimant's repetitive work duties and his left shoulder condition.
6. Under Section 42-15-20, Claimant provided proper notice to the employer, his agent, or his representative within the required 90-day time period, and even if proper notice wasn't given reasonable excuse existed, with no prejudice to the employer pursuant to Section 42-15-20 (B)&(C), as Claimant thought notice had been given pursuant to Claimant's counsel's letter dated June 19, 2012.

ORDER

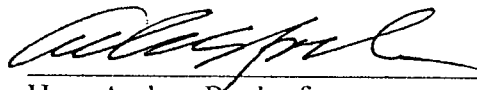
It is therefore ordered:

The Decision and Order of the single Commissioner filed in the above matter on April 13, 2013 is hereby **AFFIRMED WITH AMENDMENT** by the Appellate Panel of the South Carolina Workers Compensation Commission.

1. Defendants shall pay temporary total benefits from January 5, 2013 to present and continuing. The back payment of TTD shall be paid in a lump sum, with the check made payable to ANDREW CREECH AT THE ELROD POPE LAW FIRM and mailed to PO BOX 11091, Rock Hill, SC 29731. Claimant thereafter should be placed on a running award. Thus as of September 15, 2013, Defendants shall pay a lump sum amount of back TTD totaling \$4,200.00. (1/5/13 - 9/15/13 = 36.2 weeks) (36.2 weeks x \$300.00 = \$10,860.00).

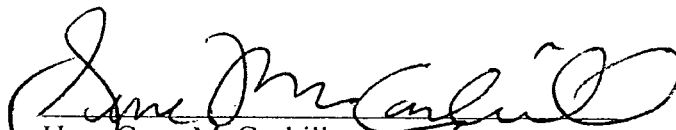
2. Defendants shall authorize an evaluation and treatment with an orthopedist and pay for all past and future causally-related medical treatment.

AND IT IS SO ORDERED.



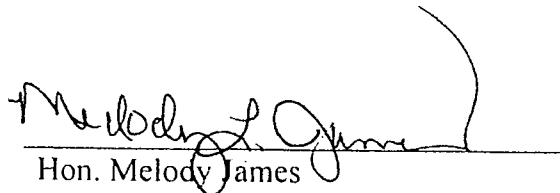
Hon. Andrea Roche for
The Appellate Panel

CONCUR:



Hon. Gene McCaskill

I concur in the results, but would reverse the finding of Notice to an employer, authorized agent, or representative. Notice was not provided to an authorized agent pursuant to Reg. 42-15-20. However, there is a reasonable excuse for the notice beyond ninety (90) days.


Hon. Melody James

Columbia, South Carolina

Date 10-8-13

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 October 8, 2013