

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

W.C.C. FILE NO: 0721273
SCSIF NO: 146208

McLEOD REGIONAL MEDICAL CENTER and
KEY RISK MANAGEMENT SERVICES,

Carrier/Employer/Respondent,

vs.

SOUTH CAROLINA SECOND INJURY FUND,

Appellant,

In re: SHAKETA JONES

**REVERSAL OF SINGLE
COMMISSIONER DECISION AND
ORDER**

Appellate Panel Review Hearing held in Columbia, South Carolina on August 13, 2013,
per notices timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed 10-22, 2013.

APPEARANCES:

Carrier/Employer/Appellants represented by
J. Brandon Hylton, Esquire of Florence, South Carolina.

Second Injury Fund/Respondent represented by
Latonya D. Edwards, Esquire of Dilligard Edwards, LLC of Columbia, South Carolina.

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SC Court of Appeals

STATEMENT OF THE CASE

The parties were heard by Single Commissioner Melody James on July 25, 2012 in Florence, South Carolina. As a result of the hearing, the Single Commissioner issued an Order filed on January 4, 2013, from which the Appellants take their appeal.

Within the statutory period, counsel for the Appellants filed an Application for Review, setting forth issues for review, copies of which were furnished to all parties prior to oral argument presented before the Appellate Panel on August 13, 2013.

Pursuant to South Carolina Code Annotated 42-17-50 (1976, as amended), we, the Appellant Panel, have reviewed the Award and weighed the evidence as presented at the initial hearing. We have also considered all of the issues raised in the Briefs of the Appellants and Respondents, as well as the arguments made before this Panel in oral arguments. In their Form 30, Request for Commission Review, the Appellants asserted fifteen (15) errors, as follows:

GROUND FOR REVIEW

1. Whether the Hearing Commissioner erred in Finding of Fact No. 4 that medical evidence in the record does not establish by preponderance of the evidence that the Claimant's prior left shoulder injury was a permanent condition or that the condition was such a seriousness to create a hindrance or obstacle to employment, when such a factual finding is against the greater weight and preponderance of the reliable and substantial evidence in the record?

2. Whether the Hearing Commissioner erred in Finding of Fact No. 5 when the Claimant's deposition testimony also supports a finding that her prior left shoulder injury is not permanent and serious enough to constitute a hindrance of constant employer, when such a factual finding is against the greater weight and preponderance of the reliable and substantial evidence in the record?

3. Whether the Hearing Commissioner erred in Finding of Fact No. 5 that the Claimant testified that the left shoulder was getting better and that her doctor planned to release her to full duty status, when such a factual finding is against the greater weight and preponderance of the reliable and substantial evidence in the record and is based on speculation?

4. Whether the Hearing Commissioner erred in Finding of Fact No. 6 that the carrier failed to meet its burden in establishing all necessary elements for partial reimbursement pursuant to South Carolina Code Annotated §42-9-40, when such a factual finding is against the greater weight and preponderance of the reliable and substantial evidence in the record?

5. Whether the Hearing Commissioner erred in Finding of Fact No. 6 that the carrier is not entitled to reimbursement from the South Carolina Second Injury Fund, when such a factual finding is against the greater weight and preponderance of the reliable and substantial evidence in the record?

6. Whether the Hearing Commissioner erred in failing to find that the Claimant suffered an injury to her left shoulder on August 1, 2007, and that such an injury was permanent and that the Claimant was never released from treatment, when failing to render such a factual finding is against the greater weight and preponderance of the reliable and substantial evidence in the record?

7. Whether the Hearing Commissioner erred in failing to issue a finding of fact that the Claimant's left shoulder injury on August 1, 2007, the injury was a hindrance or obstacle to her employment, when the failure to issue such a factual finding is against the greater weight and preponderance of the reliable and substantial evidence in the record?

8. Whether the Hearing Commissioner erred in Conclusion of Law No. 3 that the Carrier failed to prove that the Claimant's left shoulder injury was permanent and serious enough to be a hindrance and obstacle to employment, when such a legal conclusion is against the greater weight and preponderance of the reliable and substantial evidence in the record and is based upon erroneous factual findings?

9. Whether the Hearing Commissioner erred in Conclusion of Law No. 4 that the Carrier failed to meet its burden of proof that the Claimant's prior left shoulder injury created a substantially greater liability for medical costs and permanent disability, when the failure to render such a legal conclusion is against the greater weight and preponderance of the reliable and substantial evidence in the record and is based upon erroneous factual findings?

10. Whether the Hearing Commissioner erred in Conclusion of Law No. 5 that the Carrier did not meet all of its burden for reimbursement pursuant to South Carolina Code Annotated §42-9-400 and is not entitled to reimbursement from the South Carolina Second Injury Fund and that their claim is denied, when such a conclusion of law is against the greater weight and preponderance of the reliable and substantial evidence in the record and is based upon erroneous factual findings?

11. Whether the Hearing Commissioner erred in failing to render a Conclusion of Law that the Claimant's prior shoulder injury was permanent and serious enough to be a hindrance or obstacle to employment when the failure to render such a legal conclusion against the greater weight and preponderance of the reliable and substantial evidence in the record and is based upon erroneous factual findings?

12. Whether the Hearing Commissioner erred in failing to render a Conclusion of Law that the carrier met its burden of proof that the Claimant's left shoulder injury created a substantially greater liability for medical costs and permanent disability, thus meeting the requirements of South Carolina Code Annotated §42-9-400, when the failure to render such a legal conclusion against the greater weight and preponderance of the reliable and substantial evidence in the record and is based upon erroneous factual findings?

13. Whether the Hearing Commissioner erred in failing to render a Conclusion of Law that the carrier met all the requirements for reimbursement pursuant to South Carolina Code Annotated §42-9-400 and is entitled to reimbursement from the South Carolina Second Injury Fund, when the failure to render such a legal conclusion against the greater weight and preponderance of the reliable and substantial evidence in the record and is based upon erroneous factual findings?

14. Whether the Hearing Commissioner erred in ordering that the carrier's claim for reimbursement pursuant to South Carolina Code Annotated §42-9-400 is denied and dismissed with prejudice, when such an order is against the greater weight and preponderance of the reliable and substantial evidence in the record and is based upon erroneous factual findings and legal conclusions?

15. Whether the hearing Commissioner erred in failing to order that the carrier's claim for reimbursement pursuant to South Carolina Code Annotated §42-9-400 is granted and thus is entitled to reimbursement from the South Carolina Second Injury Fund, when the failure to render such an order is against the greater weight and preponderance of the reliable and substantial evidence in the record and is based upon erroneous factual findings?

As noted above, both the Appellants and Respondents have submitted their Briefs, which have been considered by Members of the Appellate Panel. After careful review in the instant case, the Appellate Panel of the South Carolina Workers' Compensation Commission has determined that the Single Commissioner's Findings of Fact are incorrect as stated. Further, the Appellate Panel determined that the Single Commissioner's Conclusions of Laws are also incorrect as stated. As a result, the Appellate Panel issues the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

After carefully reviewing the entire file, including the APA Submissions and the Commission's file in this case, and after an extensive pretrial conference, we make the following Findings of Fact:

1. Claimant sustained an admitted compensable injury to her left shoulder as a result of an accident occurring on August 1, 2007.

2. The Claimant sustained a subsequent admitted compensable injury to her left shoulder on November 17, 2007.

3. The greater weight of the evidence supports the finding that the Claimant had a pre-existing upper extremity injury. This is clearly delineated in the medical reports, including, but not limited to, the reports of McLeod Occupational Health and Pee Dee Orthopaedic Associates.

4. Based on the medical reports of McLeod Occupational Health, the Claimant was on light duty restrictions, a 35 pound material handling limit, at the time of the subsequent accident on November 17, 2007.

5. Claimant received continuous treatment for her shoulder after the August 7, 2012 accident up until her subsequent accident on November 17, 2007.

6. The Claimant was never released to full duty before her subsequent injury on November 17, 2007.

7. In the Claimant's last medical treatment before her subsequent injury on November 17, 2007, the Claimant informed Dr. Johnson that she still had soreness around her shoulder and also noted numbness in her hand on an intermittent basis.

8. The Claimant had increased disability after the November 17, 2007 accident, as she noted acute or increased problems with sitting, standing, walking, along with difficulty of lifting more than five pounds (*see* Deposition Testimony of Claimant).

9. After the November 17, 2007 accident, the Claimant was assigned a 40% whole person impairment for the left upper extremity (Form 14B, completed by Dr. Naso). On the form 14B, Dr. Naso also noted the Claimant would need future medical treatment, including pain management, physical therapy and possible cervical surgical intervention.

10. After the subsequent accident on November 17, 2007, the Claimant underwent additional MRI's, a laminectomy and a spinal cord stimulator, among other medical treatment.

11. The Claimant most probably would not have needed the above-mentioned treatment but for the November 2007 accident (Deposition Testimony of Claimant).

12. Based upon the medical reports submitted, the deposition testimony of the Claimant and deposition testimony of Octavia Williams-Blake of the Employer, we find that the Claimant's prior injury to her arm occurring on August 7, 2007 was permanent; she was never placed at MMI or released from care prior to sustaining a subsequent injury to her upper extremity on November 17, 2007.

13. Based upon the medical reports submitted, the deposition testimony of the Claimant and the deposition testimony of Octavia Williams-Blake, we find the Claimant's prior permanent physical impairment combined with her injury of November 17, 2007, while employed with McLeod Health, causing the Claimant disability that was substantially greater than that which would have resulted from the November 17, 2007 injury alone.

14. Based upon the medical reports submitted, the deposition testimony of the Claimant and the deposition testimony of Octavia Williams-Blake, we find that the

Employer/Carrier/Appellants established Claimant's November 17, 2007 work injury combined with and/or aggravated her permanent pre-existing upper extremity condition to cause a substantially greater liability for medical payments than that which had resulted from the August 7, 2007 injury alone.

15. We find that, based upon the medical records submitted, the deposition testimony of the Claimant and the deposition testimony of Octavia Williams-Blake, that the Claimant's pre-existing upper extremity conditions is to be considered a permanent condition in that her November 17, 2007 injury did most probably aggravate combined with her pre-existing upper extremity condition to cause substantially greater lost time from work, substantially greater permanent disability and substantially greater medical costs than that which would have occurred from the November 17, 2007 injury, alone.

16. We find that, based on the testimony of the Claimant, testimony of Octavia Williams-Blake of the Employer, and the fact that the Claimant was on light duty at the time of her subsequent injury occurring on November 17, 2007, the Claimant's pre-existing upper extremity condition is to be considered a hindrance or obstacle to obtaining employment or re-employment.

17. Pursuant to *South Carolina Code of Laws, Annotated §42-9-400* and based upon the APA submissions related to the pre-existing upper extremity injury, the Respondents/Employer/Carrier have carried their burden, have proved they are entitled to full statutory reimbursement from the South Carolina Second Injury Fund for both compensation, medical costs as it pertains to the injuries that the Claimant sustained on November 17, 2007, while employed with McLeod Health, including, but not limited to, injuries to the Claimant's upper extremity.

18. Pursuant to the *South Carolina Code of Laws, Annotated §42-9-400*, the Respondents/Employer/Carrier are entitled to full statutory reimbursement from the South Carolina Second Injury Fund for all compensation and medical costs pertaining to injuries sustained by the Claimant on November 17, 2007, including, but not limited to, injuries to the Claimant's upper extremity.

CONCLUSIONS OF LAW

Pursuant to S.C. Code Ann. 42-17-40, and based upon the Findings of Fact, we make the following conclusions of law:

1. Pursuant to S.C. Code Ann. § 42-9-400, the Claimant, Shaketa Jones, sustained a serious injury to her shoulder on November 17, 2007 while in the employ of McLeod Health.
2. Pursuant to S.C. Code Ann. § 42-9-400, the Respondents/Employer/Carrier satisfied the knowledge requirement as the Employer was aware of the claim of pre-existing upper extremity injury/condition.
3. Pursuant to S.C. Code Ann. § 42-9-400, Claimant's pre-existing upper extremity injury condition is permanent in nature.
4. Pursuant to S.C. Code Ann. § 42-9-400, the Claimant's pre-existing back injury/condition is a hindrance and/or obstacle to employment and/or re-employment.
5. Pursuant to S.C. Code Ann. § 42-9-400, the Claimant's November 17, 2007 injury combined with her and/or aggravated her pre-existing upper extremity injury/condition.

6. Pursuant to S.C. Code Ann. § 42-9-400, as a result of this combination and/or aggravation, Claimant experienced substantially greater lost time from work, greater permanent disability, substantially greater medical costs than that which would have resulted from the August 7, 2007 injury, alone.
7. Pursuant to S.C. Code Ann. § 42-9-400, and based on the APA submissions, Petitioners have carried their burden and have proven they are entitled to full statutory reimbursement from the South Carolina Second Injury Fund, as it pertains to injuries sustained on November 17, 2007, while employed with McLeod Health, including, but not limited to, injuries to the Claimant's upper extremity.
8. Pursuant to S.C. Code Ann. § 42-9-400, the Respondents/Employer/Carrier are entitled to full statutory reimbursement from the South Carolina Second Injury Fund for all compensation and medical costs pertaining to the injuries Claimant sustained on November 17, 2007 while employed with McLeod Health, including, but not limited to, injuries to the Claimant's upper extremity.

ORDER

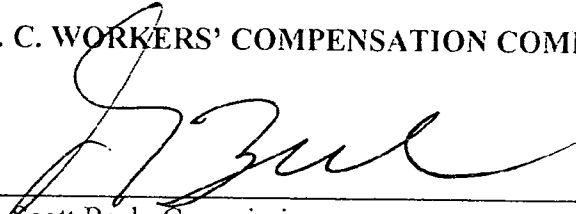
Based upon the Findings of Fact and Conclusions of law,

IT IS ORDERED that the Findings of Fact and Conclusions of Law are incorporated herein verbatim.

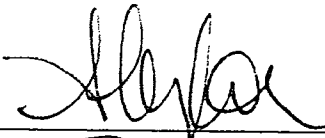
IT IS FURTHER ORDERED South Carolina Second Injury Fund shall reimburse Respondents/Employer/Carrier, pursuant to the *South Carolina Code of Laws, Annotated 42-9-400* for all compensation and medical costs pertaining to all the injuries the Claimant sustained as a result of the November 17, 2007 accident while employed with McLeod Health, including, but not limited to, injuries to the Claimant's upper extremity.

IT IS SO ORDERED.

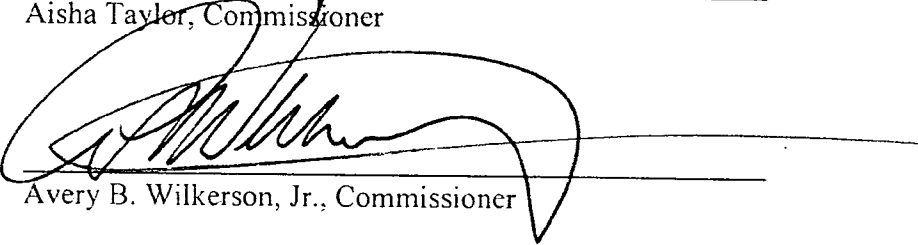
S. C. WORKERS' COMPENSATION COMMISSION



T. Scott Beck, Commissioner



Aisha Taylor, Commissioner



Avery B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Valerie Deller on October 22, 2013