APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1116275

JOHN McDANIEL, EMPLOYEE, CLAIMANT/APPELLANT,

-v-

CAREER EMPLOYMENT PROFESSIONAL
D/B/A SNELLING STAFFING, EMPLOYER

And

UNITED WISCONSIN INSURANCE CO., CARRIER DEFENDANTS/RESPONDENT.

AFFIRM

Appellate Panel Review held in Columbia, South Carolina
on October 14, 2013, per notices timely and properly served
on all parties of interest.

Appellate Panel Decision and Order
Filed: 12-19, 2013

APPEARANCES:

Claimant/Appellant:
John McDaniel, appearing pro-se,
of Charleston, South Carolina

Defendants/Respondent:
Represented by Allison C. Nussbaum, Esquire
of McAngus, Goudelock, & Courie, LLC
of Mt. Pleasant, South Carolina

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STATEMENT OF THE CASE

Initially, a hearing was held before the Honorable Melody L. James on November 28, 2012, in Summerville, South Carolina. On January 4, 2013, Commissioner James issued the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The parties to the proceedings are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act. This finding is based upon the stipulations and admissions of the parties.
2. Claimant's applicable compensation rate is $358.62 based upon an average weekly wage of $537.91. The Claimant's twenty weeks of work is insufficient to base his average weekly wage, especially in light of his assignment and wages changing. However, there is no guarantee he would have continued with the assignment at Alside Revere (Testimony of Dan Cobb by way of Deposition). Employer provides temporary assignments with a goal of permanent placement. The third employee wages submitted do not provide for fifty-two weeks and they were all employed by Alside Revere. A fair and just method to calculate the wages of the Claimant is to take an average of the wages along with a three other employee wages provided. The Claimant--$492.85; Atkins--$506.88; Lampkin--$618.50; and Clark--$533.41.
3. On November 21, 2011 the Claimant suffered an injury by accident which arose out of and occurred during the course and scope of his employment to his left leg/foot and toes. The Claimant has received medical care and reached maximum medical improvement as of August 13, 2012.
4. The Claimant has a disability to the left leg of 34%.

5. The Defendants will receive a credit for all weekly benefits paid after the date of maximum medical improvement (August 13, 2012) pursuant to *Curiel v. Environmental Management Services, 376 S.C. 23, 655 S.E.2d 482 (2007).*

6. Claimant will be entitled to future medical care and treatment as indicated by Dr. Ohlson in his report of August 13, 2012, to include future surgery that will more likely than not be required on the maligned and anklylosis position of the fifth toe. Claimant will also require extra wide shoes. He will need Celebrex. He has been referred to Dr. Nancy Lembo for pain management and Defendants have authorized Dr. Tavel, whom the Claimant shall be allowed to continue to see.

CONCLUSIONS OF LAW

1. Pursuant to §42-1-130 and §42-1-140, at the time of the accident the Claimant and Defendant/Employer were covered parties under the provisions of the South Carolina Workers' Compensation Act.

2. Under §42-1-160, the Claimant suffered a compensable injury by accident arising out of and in the course and scope of his employment.

3. Pursuant to §42-1-40, the average weekly wage is defined. The Claimant is determined to have an average weekly wage of $537.91 and a compensation rate of $358.62.

4. Pursuant to §42-15-60 the Defendants are responsible for payment to medical providers of the medical expenses incurred by Claimant for treatment of his injury. The Claimant will be entitled to future medical care as directed and suggested by his authorized treating physician, Dr. Ohlson, to include pain management.

5. Pursuant to §42-9-10 the Claimant is entitled to compensation for a period of temporary total disability benefits.
6. Pursuant to §42-9-30, the Claimant is entitled to compensation for a specific permanent partial disability of 34% to the leg.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, Commissioner James issued the following Order:

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that the Claimant has a compensable injury of November 21, 2011 to his left leg and reached maximum medical improvement on August 13, 2012; and

IT IS FURTHER ORDERED that the Claimant has an average weekly wage of $537.91 and a compensation rate of $358.62 and Defendants shall pay the Claimant for the underpayment of benefits and shall pay for a permanent loss of use and disability to the leg of 34% (66.3 weeks) in a lump sum after deducting a credit for the weekly benefits paid after August 13, 2012; and

IT IS FURTHER ORDERED the Defendants shall provide future medical care with Dr. Ohlson and Dr. Tavel as the authorized treating physicians with that medical care to include the medicals that have been set out by Dr. Ohlson in his medical records and his report of August 13, 2012; and

IT IS SO ORDERED!

Within the statutory period, prior Counsel for the Claimant, Thomas White, filed WCC Form No. 30, Request for Commission Review, setting forth six grounds for review as follows:

1. The Hearing Commissioner erred in Finding of Fact #2 and Conclusion of Law #3 in finding the Claimant had a compensation rate of $358.62 based upon an average weekly wage of $537.91; the error being the Single Commissioner should have found the Claimant was entitled to an average weekly wage and compensation rate in an amount not less than $627.75 with a compensation rate of $418.91.

2. The Hearing Commissioner erred in Finding as a Fact and Finding of Fact #2 that a fair and just method was to calculate the wages of the Claimant was to take an average of his wages along with the three other employee wages provided; the error being that it was not fair and just to the Claimant as it did not reflect the earnings of the injured employee and the error being that the amount that should have been used should be the actual earnings of the employee with the ultimate objective of reflecting fairly the Claimant's probable future earning loss.

3. The Hearing Commissioner erred in Finding as a Fact and Finding of Fact #2 that the wages of the Claimant, Atkins, Lampkin, and Clark were, respectively, $492.85, $506.88, $618.50, and $533.41; the error being the wages of the Claimant were based on an incorrectly calculated Form 20 that does not accurately reflect the wages of the Claimant and the wages of the other three individuals included partial weeks and were not correctly calculated under the Definition of Average Weekly Wage.

4. The Hearing Commissioner erred in Finding of Fact #4 and Ruling of Law #6 in finding the Claimant has a disability to the Left Leg of 34%; the error being that the Single Commissioner should have found that the Claimant's loss of use and disability greatly exceeded this amount based upon the residual vocational impact to the Claimant and how disabling the injury actually is.

5. The Hearing Commissioner erred in Finding as a Fact and a Ruling as a Matter of Law in Finding of Fact #5 that the Defendants should receive a credit for all weekly benefits paid after the date of maximum medical improvement and Ruling of Law #5; the error being the Single Commissioner should have found the Defendants were not entitled to a credit as the Claimant had not been able to return to work and no work had been offered although the Claimant was ready and available to attempt to try to come back to work with his employer if they offered work within his restrictions and Claimant had been actively seeking other employment.

6. The Hearing Commissioner erred in failing to find as a fact and ruling as a matter of law that the Defendants should be subject to fines and penalties for the late payments of temporary total disability benefits because those payments were made 14 days after they were due and Defendants failed to make timely payment on multiple occasions.

Additionally, on March 8, 2013, prior Counsel for the Claimant filed a Motion to Admit Additional and Newly Discovered Evidence to include pay records from Jerrod Lampkin, the Claimant's replacement at Alside Revere. By Judicial Conference Decision and Order dated April 15, 2013, the Claimant's Motion to Admit Additional Evidence, dated March 8, 2013 was granted.

The testimony in the record, together with documentary evidence (including the additional pay records of Jerrod Lampkin, admitted through Judicial Conference Order dated April 15, 2013), has been provided to the members of the Appellate Panel, and has been under careful study, review, and consideration. In addition, Briefs and oral arguments were received from both parties.

Upon Request for Review, the Appellate Panel shall review the Order and Award, weigh the evidence presented at the initial Hearing, and if good cause be shown, make its own Findings of Fact and reach its own Conclusions of Law pursuant to S.C. Code Ann. § 42-17-50. After careful review of the evidence presented and after considering the arguments presented by the parties, the Appellate Panel, by unanimous vote, affirmed the Hearing Commissioner's Order of January 4, 2013. In reaching this Decision, the Appellate Panel did not consider any documents outside the record because the Claimant's Amended Form 30 was not timely served; therefore, any records submitted with the Amended Form 30 were not considered by the Panel.

EVIDENCE SUMMARY

At the original hearing on November 28, 2012, the Claimant sought benefits under the South Carolina Workers' Compensation Act based upon an accident at work on November 21, 2011. The Claimant alleged that he injured his left foot/left leg and left toes on that date and agreed he was at maximum medical improvement per the opinion of his treating physician, Dr.

Ohlson on August 13, 2012. At the hearing, the Claimant argued his disability greatly exceeded the rating to his left lower extremity issued by Dr. Ohlson.

Further, the Claimant argued that the average weekly wage and compensation rate reflected on the Form 20 were incorrect. The Claimant alleged he worked for Snelling Staffing for less than one year; therefore, his average weekly wage does not reflect the earnings he was making at the time of his injury. In particular, the Claimant argued his average weekly wage and compensation rate should be based on Jerrod Lampkin's earnings, his replacement at Alside Revere. Claimant requested payment of the alleged underpayment for past due checks and his award in a lump sum based on the alleged compensation rate.

Also, at the hearing, Claimant requested future medical care as recommended by Dr. Ohlson, his authorized treating physician. The Claimant requested Defendants be denied any type of temporary total disability credit even though the Claimant agreed with maximum medical improvement being reached on August 13, 2012. Claimant argued the credit should be reduced or negated based on his continued attempts to find work.

At the hearing, Defendants agreed Claimant sustained an admitted injury to his left foot and he is at maximum medical improvement per Dr. Ohlson's August 13, 2012 opinion. Defendants argued Claimant's compensation rate on the Form 20 is correct with an average weekly wage of $492.85, resulting in a compensation rate of $328.58. Defendants requested the award be based on the average weekly wage and compensation rate reflected on the Form 20. Furthermore, Defendants alleged the loss of use and disability to the Claimant's left lower extremity should be consistent with the 34% rating assigned by Dr. Ohlson, the authorized treating physician.

Following the pre-hearing conference, the Claimant testified on his own behalf. He testified he is 30-years old with a birthdate of March 5, 1982. Claimant graduated from high school in 2000 and has no other degrees or diplomas. At the time of the hearing, Claimant testified he was enrolled at Trident Technical College in his third semester in civil engineering studies. Additionally, Claimant maintains a commercial driver's license that he received in 2006.

Prior to working for Snelling Staffing, Claimant worked in a sports store, performed construction work, worked as an auditor, served as a caddy on Kiawah Island, and sold cars.

When the Claimant was originally hired for Snelling Staffing, he was earning $11.50 per hour. His first assignment was at Ben Arnold where he worked as a route delivery driver and routinely lifted 40-50 pounds. When his assignment at Ben Arnold ended as a result of his school schedule, he was placed at Alside Revere where he was moving 75-100 boxes in a warehouse.

Claimant testified he had a previous Workers' Compensation injury when he cut his finger at work but received no benefits other than medical care. Claimant denied any additional Workers' Compensation claims. Claimant admitted to a motor vehicle accident in 2005 wherein he followed up with a chiropractor thereafter. Claimant settled his case for approximately $5,000.00. Also, Claimant admitted to a motorcycle accident in 2001 but denied any broken bones. Claimant specifically denied any prior injuries to his left leg/left foot and any physical inhibitions in his ability to perform his work duties.

Before the Claimant received his second assignment at Alside Revere, he was out of work for approximately six weeks. His assignment at Ben Arnold ended as a result of conflicts with his school schedule. When he began working at Alside Revere, he received $13.00 per hour

and alleged he would receive nine hours per day and upwards of 45 hours or more per week. Claimant began his employment at Alside Revere on November 11, 2011 and worked nine hours that day. The following week, he worked 45.5 hours and earned a total of $627.25.

Prior to the hearing, the deposition of the Claimant's supervisor, Dan Cobb was taken in lieu of live testimony. Mr. Cobb testified that the Claimant was brought on for full time work through Snelling Staffing, and he would be paid for at least 40 hours per week. Mr. Cobb testified there was a mandatory waiting period before Claimant would be hired as a permanent employee of Alside Revere. Following Claimant's accident, another employee was hired to replace him and receives overtime pay. Mr. Cobb testified he would not be able to hire the Claimant permanently until three months passed.

Claimant was involved in an admitted accident on November 21, 2011 wherein he injured his left foot when it was run over by a forklift. He was seen in the Emergency Room at Roper Hospital and diagnosed with multiple fractures. Thereafter, he was referred to Dr. Ohlson who provided treatment from November 28, 2011 through August 13, 2012. During his treatment with Dr. Ohlson, the Claimant experienced multiple problems with wound healing and was ultimately referred to a wound facility.

In addition, Claimant received evaluations by Dr. Gudas and Dr. Brilliant for independent medical evaluations. Additionally, Claimant was referred for pain management and Defendants authorized treatment with Dr. Tavel. At the time of the hearing, the Claimant was under Dr. Tavel's care for pain management.

Claimant testified his foot was chronically swollen secondary to the injury and an alleged malunited fracture. Claimant explained he had orthotics and was in need of custom shoes. Claimant states he is unable to fit his left foot into a normal shoe because his left foot is four

sizes wider than the right and an oversized toe box is needed. Claimant described pain in his foot and leg which runs down his knee. Claimant stated his ability to be on his feet is very limited. Furthermore, Claimant said his pain level is constant and his base level is a 3 to 4 out of 10. He experiences symptoms including foot tingling, numbness and burning. If the Claimant is required to be on his feet for any period of time, his pain level elevates. After approximately 10 to 15 minutes, he experiences an elevation in his pain level. After about 45 minutes, his pain level spikes to a 6 or 7 out of 10. Claimant continues to use medication to include Celebrex, Gralise, Tylenol and a topical cream. Also, Claimant testified that he ices his foot regularly.

Claimant testified his standing limitation was 15 to 20 minutes, walking was 30 minutes and stated he walks with a noticeable limp. Out of an eight hour day, Claimant estimates he could probably stand or walk for up to two hours if he were able to intermittently change positions to standing and walking. Claimant cannot run, climb, squat, jump, and has a very difficult time with any sort of inclines. Also, Claimant has problems with balance and states he has fallen several times.

Claimant submitted earnings from several additional workers in his pre-hearing brief and asked the Hearing Commissioner to consider these wages.

FINDINGS OF FACT

After careful review of the evidence presented in the instant case and after considering the arguments presented by the parties, the Appellate Panel of the South Carolina Workers' Compensation Commission, unanimously affirms the Hearing Commissioner's January 4, 2013 Decision and Order. We find substantial evidence in the record supports the Hearing Commissioner's Findings of Fact and adopt the following Findings of Fact as our own:

1. The parties to the proceedings are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act. This finding is based upon the stipulations and admissions of the parties.
2. Claimant's applicable compensation rate is $358.62 based upon an average weekly wage of $537.91. The Claimant's twenty weeks of work is insufficient to base his average weekly wage, especially in light of his assignment and wages changing. However, there is no guarantee he would have continued with the assignment at Alside Revere (Testimony of Dan Cobb by way of Deposition). Employer provides temporary assignments with a goal of permanent placement. The third employee wages submitted do not provide for fifty-two weeks and they were all employed by Alside Revere. A fair and just method to calculate the wages of the Claimant is to take an average of the wages along with a three other employee wages provided. The Claimant--$492.85; Atkins--$506.88; Lampkin--$618.50; and Clark--$533.41.
3. On November 21, 2011 the Claimant suffered an injury by accident which arose out of and occurred during the course and scope of his employment to his left leg/foot and toes. The Claimant has received medical care and reached maximum medical improvement as of August 13, 2012.
4. The Claimant has a disability to the left leg of 34%.
5. The Defendants will receive a credit for all weekly benefits paid after the date of maximum medical improvement (August 13, 2012) pursuant to *Curiel v. Environmental Management Services, 376 S.C. 23, 655 S.E.2d 482 (2007).*
6. Claimant will be entitled to future medical care and treatment as indicated by Dr. Ohlson in his report of August 13, 2012, to include future surgery that will more

likely than not be required on the maligned and anklylosis position of the fifth toe. Claimant will also require extra wide shoes. He will need Celebrex. He has been referred to Dr. Nancy Lembo for pain management and Defendants have authorized Dr. Tavel, whom the Claimant shall be allowed to continue to see.

CONCLUSIONS OF LAW

In view of these Findings of Fact, and as provided in the South Carolina Code of Laws, **WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:**

1. Pursuant to §42-1-130 and §42-1-140, at the time of the accident the Claimant and Defendant/Employer were covered parties under the provisions of the South Carolina Workers' Compensation Act.
2. Under §42-1-160, the Claimant suffered a compensable injury by accident arising out of and in the course and scope of his employment.
3. Pursuant to §42-1-40, the average weekly wage is defined. The Claimant is determined to have an average weekly wage of $537.91 and a compensation rate of $358.62.
4. Pursuant to §42-15-60 the Defendants are responsible for payment to medical providers of the medical expenses incurred by Claimant for treatment of his injury. The Claimant will be entitled to future medical care as directed and suggested by his authorized treating physician, Dr. Ohlson, to include pain management.
5. Pursuant to §42-9-10 the Claimant is entitled to compensation for a period of temporary total disability benefits.

6. Pursuant to §42-9-30, the Claimant is entitled to compensation for a specific permanent partial disability of 34% to the leg.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, we unanimously adopt the Hearing Commissioner's Order as follows,

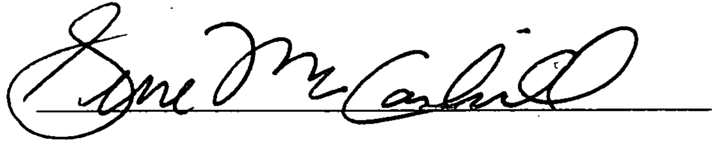
IT IS THEREFORE, HEREBY ORDERED that the Claimant had a compensable injury of November 21, 2011 to his left leg and reached maximum medical improvement on August 13, 2012 and

IT IS FURTHER ORDERED that the Claimant has an average weekly wage of $537.91 and a compensation rate of $358.62 and Defendants shall pay the Claimant for the underpayment of benefits and shall pay for a permanent loss of use and disability to the left leg of 34 percent (66.3 weeks) in a lump sum after deducting a credit for the weekly benefits paid after August 13, 2012; and

IT IS FURTHER ORDERED the Defendants shall provide future medical care with Dr. Ohlson and Dr. Tavel as the authorized treating physicians with that medical care to include the medicals that have been set out by Dr. Ohlson in his medical records and his report of August 13, 2012; and

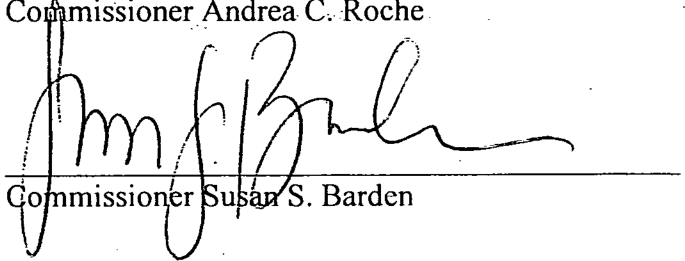
IT IS SO ORDERED.

FULL AFFIRMATION



Commissioner Gene McCaskill

Commissioner Andrea C. Roche



Commissioner Susan S. Barden

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United State mail addressed to the attorney or attorneys for said parties.

This 19 day of December, 2013

By Valerie D. Detter

John McDaniel

Allison L. Nussbaum