

APPELLATE PANEL  
DECISION AND ORDER  
OF THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NO.: 1215536

Ron Blakley,  
Claimant/Respondent

vs.

S&S Firestone, Inc.,  
Employer,

and

United States Fire Insurance Company,  
Carrier,  
Defendants/Appellants.

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Appellate Panel Review held in Columbia, South Carolina on December 17, 2013, per  
Notices timely and properly served on all parties of interest.

Appellate Panel Decision and Order filed 1-30, 2014.

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Appearances: Claimant/Respondent represented by Lori S. Murray, Esquire, 1527  
Blanding Street, Columbia, South Carolina 29202.

Defendants/Appellants represented by William H. Shipley, Esquire, of  
Willson, Jones, Carter & Baxley, 4500 Fort Jackson Boulevard, Columbia,  
South Carolina 29209.

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## STATEMENT OF THE CASE

The parties were heard by Commissioner Aisha G. Taylor on July 12, 2013 in Columbia, South Carolina. As a result of said hearing, Commissioner Taylor issued a Decision and Order dated August 26, 2013 from which the Defendants appealed.

The Hearing Commissioner's Decision and Order set forth the following Findings of Fact:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Tim Nicholson as Employee-Claimant and S & S Firestone, Inc. as Employer and United States Fire Insurance Company as Carrier, Defendants.
2. I find the Claimant's back injury has affected the use of his right leg. This finding is supported by the greater weight of the evidence including the medical evidence which refers to radiating pain down into the right leg by multiple physicians and a diagnosis of radiculopathy by Dr. Poletti.
3. Claimant is a 48 year old, college educated male.
4. Claimant sustained an injury to his back on April 19, 2012 while in the course and scope of his employment with S&S Firestone, Inc.
5. Claimant treated conservatively with Carolina Occupational healthcare for approximately 5 months without any relief.
6. Claimant was eventually referred to Dr. Bethea who prescribed him pain medication and ultimately released him at maximum medical improvement to January 9, 2013 with a 7% impairment rating. Dr. Bethea did issue permanent work restrictions of no pushing, pulling, lifting or carrying of more than 25 pounds.
7. Claimant underwent an FCE on February 18, 2013 which qualified him for limited light to limited medium work. It was noted that Claimant should avoid standing and walking for over 45 minutes at a given time. Finally, the FCE noted Claimant could not tolerate occasional squatting or kneeling.
8. Claimant obtained an IME with Dr. Poletti of the Southeastern Spine Institute on February 19, 2013. Claimant was diagnosed with lumbar radiculopathy and was issued a 10% impairment rating. Dr. Poletti issued permanent work restrictions of no heavy bending, twisting, pushing, or pulling and no lifting greater than 20 pounds. (Claimant's APAs, p. 71).

9. On May 16, 2013, Claimant underwent a vocational assessment performed by Adams & Wilkinson. The vocational expert opined Claimant was unable to resume any of his former occupations due to his permanent work restrictions. Mr. Adams also opined Claimant's post-injury earning capacity was between \$8.00 and \$9.00 per hour (\$340.00 per week). (Claimant's APAs, pp. 73-88).

10. Claimant had a second vocational evaluation performed by Mr. Joel Leonard on June 26, 2013. Mr. Leonard opined that Claimant's work-related injury adversely impacted his ability to assess the open labor market. Mr. Leonard opined Claimant had a post-injury earning capacity of \$672.40 per week.

11. I give greater weight to the vocational evaluation from Adams & Wilkinson Associates because it takes into account the permanent work restrictions of the treating physician and because the evaluator sought out labor market research to help determine whether a market exists for Claimant's employment given his impairment and permanent restrictions.

12. I find Claimant is at maximum medical improvement as of January 9, 2013. I base this finding on the medical evidence including the MMI statement of Dr. Bethea. MMI is a factual determination left to the discretion of the Commission. See Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262 (Ct. App. 2006).

13. I find Claimant's work history is primarily that of a "working manager" wherein Claimant was routinely engaged in the physical aspects of each of his jobs. I base this finding on the testimony of the Claimant regarding his work history, which I find to be credible.

14. I find Claimant has sustained partial wage loss pursuant to 42-9-20. Claimant has an average weekly wage of \$681.01. Claimant's post-injury earning capacity is \$340.00 per week as outlined in Mr. Adams' vocational analysis. Accordingly, Claimant is entitled to \$227.35 for 340 weeks.

15. Defendants are entitled to a credit for overpayment for all temporary total disability benefits paid after January 9, 2013, the date of maximum medical improvement.

16. Claimant has not met his burden of proving a psychological injury as a result of his work-related injury. This allegation is not supported by the medical evidence. Specifically, Claimant's medical records from his family physician outline a myriad of causes of the Claimant's anxiety for which he sought treatment. Additionally, Claimant's psychological evaluation performed by Mark Williams, Ph.D. concluded there was no basis to support a conclusion that Claimant's work-related physical injury caused a psychiatric disorder. Therefore, Claimant's request for future medical treatment related to alleged anxiety is denied. (Claimant's APA pp. 37-42; Defendants' APA pp. 108-120).

17. Claimant has not met his burden of proving a urological injury as a result of his work-related injury. This allegation is not supported by the medical evidence. Specifically, Claimant's medical records from his family physician outline a list of potential causes for his erectile dysfunction, but do not causally relate it to his work-related injury. (Claimant's APAs pp. 37-42).

18. Claimant did not allege permanent and total disability compensation pursuant to S.C. Code Ann. § 42-9-10.

The Hearing Commissioner's Decision and Order also set forth the following  
Conclusions of Law:

1. Pursuant to S.C. Code Ann. §§ 42-1-130 and 42-1-140, Claimant was a covered employee at the time in question Defendant/Employer was a covered employer under the Act.

2. Pursuant to S.C. Code Ann. § 42-1-160, Claimant did sustain an injury to his low back by accident arising out of and in the course of his employment on April 19, 2012.

3. Pursuant to S.C. Code Ann. § 42-1-160, Claimant failed to meet his burden of proving urological or psychological injuries by accident arising out of and in the course of his employment on April 19, 2012.

4. Pursuant to S.C. Code Ann. § 42-1-40, Claimant's average weekly wage is \$681.01.

5. Pursuant to S.C. Code Ann. § 42-15-60, Claimant was entitled to medical, surgical, hospital and other authorized treatment until January 9, 2013, the date on which Claimant reached maximum medical improvement, but not thereafter, there being no evidence that any additional medical treatment would tend to lessen the period of its disability.

6. Pursuant to S.C. Code Ann. §§ 42-1-160 and 42-9-10, Claimant was entitled to a period of temporary total disability until January 9, 2013, the date at which Claimant reached maximum medical improvement. Defendants are entitled to a credit for overpayment of temporary benefits from January 9, 2013.

7. Pursuant to S.C. Code Ann. § 42-9-20, Claimant has sustained partial wage loss with a post-injury earning capacity of \$340.00 per week.

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Within the statutory period, counsel for the Defendants filed an Application for Review  
in the case setting forth the following assignments of error:

1. Did the Hearing Commissioner err in Finding of Fact No. 2, that the Claimant's back injury has affected the use of his right leg, when such a finding is against the greater weight of the evidence in the record?
2. Did the Hearing Commissioner err in Finding of Fact No. 11, that the vocational evaluation from Adams & Wilkinson Associates deserves greater weight, when such a finding is against the greater weight of the evidence in the record?
3. Did the Hearing Commissioner err in Finding of Fact No. 13, that Claimant's work history is primarily that of a "working manager" wherein Claimant was routinely engaged in the physical aspects of each of his jobs, when such a finding is against the greater weight of the evidence in the record?
4. Did the Hearing Commissioner err in Finding of Fact No. 14, that Claimant has sustained partial wage loss pursuant to § 42-9-20, when such a finding is against the greater weight of the evidence in the record?
5. Did the Hearing Commissioner err in Finding of Fact No. 14, that Claimant has a post-injury earning capacity of \$340.00 per week, when such a finding is against the greater weight of the evidence in the record?
6. Did the Hearing Commissioner err in Finding of Fact No. 14, that Claimant is entitled to \$227.35 for 340 weeks, when such a finding is against the greater weight of the evidence in the record?
7. Did the Hearing Commissioner err in Conclusion of Law No. 7, that Claimant has sustained partial wage loss, when such a finding is against the greater weight of the evidence in the record and is based upon erroneous legal conclusions?
8. Did the Hearing Commissioner err in Conclusion of Law No. 7, that Claimant has a post-injury earning capacity of \$340.00 per week, when such a finding is against the greater weight of the evidence in the record and is based upon erroneous legal conclusions?
9. Did the Hearing Commissioner err in Ordering that Claimant has sustained partial wage loss pursuant to S.C. Code § 42-9-20, when such an order is against the greater weight of the evidence in the record and is based on erroneous legal conclusions?
10. Did the Hearing Commissioner err in Ordering that Claimant is entitled to weekly compensation equal to \$227.35 for 340 weeks when such an order is against the greater weight of the evidence in the record and is based on erroneous legal conclusions?

Copies of the above assignments of error were furnished to all interested parties prior to oral argument presented before the Appellate Panel on December 17, 2013.

Pursuant to S.C. Code Ann. § 42-17-50 (1985), the Appellate Panel reviewed the Hearing Commissioner's Decision and Order and weighed the evidence in the record as presented at the initial hearing. The Panel also considered all issues raised in the briefs of the Appellants and Respondent. The Panel makes the following Findings of Fact and Conclusions of Law:

### **FINDINGS OF FACT**

IT IS FOUND AS A FACT:

1. The Hearing Commissioner erred in finding that the Claimant sustained partial wage loss pursuant to Section 42-9-20. Given that this is an injury to the back, and only the back, the record does not support an award pursuant to Section 42-9-20 and compensation is limited to Section 42-9-30. In this case, the Claimant failed to meet his burden to show that another scheduled member was *impaired* or injured as a result of his accident. No such finding was made. As such, his recovery is limited to Section 42-9-30. Given the Court's decision in Colonna v. Marlboro Park Hospital, 404 S.C. 537 (Ct. App. 2013), the Hearing Commissioner would have needed to make a finding of impairment to another scheduled member. She made no such finding.

2. When reviewing the medical evidence in this case, the Claimant does mention pain radiating into his right leg. There is no impairment rating for the right leg. Neither the radiologist, Dr. William Savoca, nor the authorized treating physician, Dr. James F. Bethea, make a finding as to radiculopathy of the right leg. Dr. Savoca's report on the MRI (09/27/12) states in part, "There is a small central protrusion at L5-S1, but again, without significant impression on the thecal sac or existing nerve root." Dr. Bethea, on the Form 14B, lists the injured body part as the "lower back." He lists the body parts affected as the "lower back." It should be noted that Dr. Steven Poletti, who

was the claimant's independent medical evaluator, opines that there is radiculopathy. However, his opinion does not carry the same weight as the authorized treating physician and the radiologist.

3. We affirm that the Claimant is at maximum medical improvement on January 9, 2013, as found by the single Hearing Commissioner.

4. We concur that the Claimant has failed to meet his burden as to a psychological injury or urological injury.

5. We also concur with the single Hearing Commissioner as to the Defendants' entitlement to a credit for overpayment of temporary total disability benefits.

6. As to a determination of permanent partial disability pursuant to Section 42-9-30, the Claimant has a 7% impairment rating to the whole person from the authorized treating physician. He also has lifting restrictions of "not more than medium-duty work with occasional lifting of 40 pounds and frequent lifting to 20 pounds. He may need to change position from time to time." When considered with his education and work history, the Claimant has a 14% permanent partial disability to the back.

#### **CONCLUSIONS OF LAW**

Accordingly, as provided in § 42-17-50, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Pursuant to S.C. Code Ann. §§ 42-1-130 and 42-1-140, Claimant was a covered employee at the time in question Defendant/Employer was a covered employer under the Act.

2. Pursuant to S.C. Code Ann. § 42-1-160, Claimant did sustain an injury to his low back by accident arising out of and in the course of his employment on April 19, 2012.

3. Pursuant to S.C. Code Ann. § 42-1-160, Claimant failed to meet his burden of proving right leg, urological, or psychological injuries by accident arising out of and in the

course of his employment on April 19, 2012.

4. Pursuant to S.C. Code Ann. § 42-1-40, Claimant's average weekly wage is \$681.01.

5. Pursuant to S.C. Code Ann. § 42-15-60, Claimant was entitled to medical, surgical, hospital and other authorized treatment until January 9, 2013, the date on which Claimant reached maximum medical improvement, but not thereafter, there being no evidence that any additional medical treatment would tend to lessen the period of its disability.

6. Pursuant to S.C. Code Ann. §§ 42-1-160 and 42-9-10, Claimant was entitled to a period of temporary total disability until January 9, 2013, the date at which Claimant reached maximum medical improvement. Defendants are entitled to a credit for overpayment of temporary benefits from January 9, 2013.

7. Pursuant to S.C. Code Ann. § 42-9-30, Claimant has sustained permanent partial disability of 14% to his back.

After careful review in the present case, the Appellate Panel of the South Carolina Workers' Compensation Commission has determined the Order of the Hearing Commissioner is hereby AFFIRMED IN PART, REVERSED IN PART, and AMENDED as set forth above.

#### **ORDER**

**IT IS HEREBY ORDERED** that the Order of the Hearing Commissioner from which this appeal has been taken is hereby AFFIRMED IN PART, REVERSED IN PART, and AMENDED to find the Claimant suffered an injury to the back only, compensation is limited to benefits under Section 42-9-30, and the Claimant has sustained a 14% permanent partial disability of the back pursuant to Section 42-9-30.

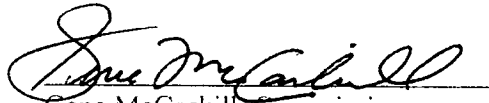
IT IS AFFIRMED that the Claimant did not meet his burden of proof as to a psychological or urological injury.

IT IS AFFIRMED that the Claimant reached maximum medical improvement on January 9, 2013.

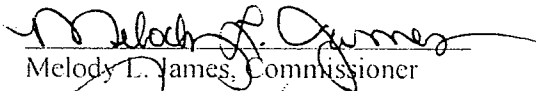
IT IS AFFIRMED that Defendants are entitled to credit for overpayment of temporary disability benefits made after January 9, 2013.

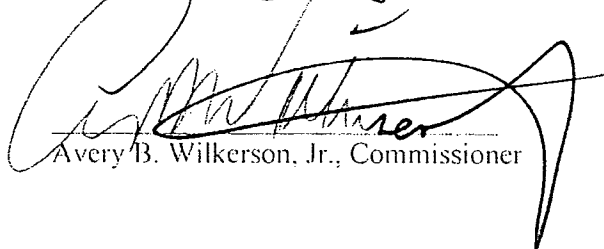
IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION

  
Gene McCaskill, Commissioner  
For the Appellate Panel

Concur:

  
Melody L. James, 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 Eugenia Hollmon on January 30, 2014**