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SC Court of Appeals

APPELLATE PANEL
DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 0917785

Paula Russell,

RESPONDENT
CLAIMANT,

vs.

Wal-Mart Stores, Inc.,

EMPLOYER,

and

American Home Assurance,

CARRIER,
DEFENDANTS/APPELLANTS

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

Appellate Panel Decision and Order filed

_____, 2014

APPEARANCES:

Respondent Paula Russell, Claimant, represented by Daniel
C. Vega, Esquire of Chappell, Smith & Arden in Columbia,
South Carolina.

Defendants/Appellants represented by Johnnie W. Baxley,
III, Esquire of Willson Jones Carter & Baxley, P.A. in Mt.
Pleasant, South Carolina.

STATEMENT OF THE CASE

The parties were heard by Commissioner Andrea C. Roche, on February 11, 2013, in Columbia, South Carolina. On August 5, 2013, Commissioner Roche issued the following Order:

In view of the record as a whole, the Single Commissioner's Findings of Fact and Findings of Law, it is ordered:

1. Defendants shall provide Claimant with medical care and attention for a change of condition for the worse.
2. Defendants shall provide temporary total disability benefits from December 1, 2011 through the present date and continuing.

AND IT IS SO ORDERED!

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. All parties appeared at oral arguments on December 16, 2013, and presented their case on appeal.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

By appeal, it is respectfully submitted that the Hearing Commissioner erred in the following:

It is respectfully submitted that the Hearing Commissioner erred in finding (Findings of Fact #1,2,4,5,6,7,8,9,10,12,16,17, and 18; Findings of Law # 1,2,3,4,5 and 6) that Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009 accident at work, error being that the preponderance of evidence in the record does not support such findings. Further error is that the evidence does not support a physical change of condition for the worse, especially since the back surgeon, Dr. Edwards,

testified that he could not identify any objective difference between any of claimant's MRIs, and thus, he could not state to a reasonable degree medical certainty that claimant has sustained a change of condition for the worse based upon the objective radiographic studies.

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. Section 42-17-50, review the award, weigh the evidence as presented at the initial hearing, and if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent or inconsistent with those of the Hearing Commissioner.

The Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law. *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (1992). In this case, the preponderance of evidence in the record supports a reversal of the Hearing Commissioner's award and finding that Claimant had sustained a compensable change of condition for the worse and was therefore entitled to additional benefits under the SC Workers' Compensation Act.

STATEMENT AND DISCUSSION OF EVIDENCE

Claimant contends she suffered a change of condition for the worse related to her November 3, 2009, back injury and requires additional medical treatment to include surgery with Dr. Edwards. Defendants contend Claimant has not suffered a change of condition for the worse and is not entitled to benefits because Claimant cannot carry her burden of proving a change of condition for the worse as required under the Act. The Defendants argue that the medical evidence and depositions of Dr. Edwards and Dr. Merritt do not support a physical change of condition for the worse, and Claimant's complaints supporting her claim for change of condition are all subjective in nature.

The law concerning change of condition claims in South Carolina is well established. Section. 42-17-90 provides, "the Commission may review an award and on that review make an

award . . . on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation.” In Gattis v. Murrells Inlet VFW #10420, 576 S.E.2d 191 (S.C. Ct. App. 2003) (citing Causby v. Rock Hill Printing & Finishing Co., 153 S.E.2d 697, 698 (S.C. 1967)), the court held a change in condition occurs when a claimant experiences a change in “physical condition” as a result of the original injury and occurring after the first award. To justify a modification of an award based on a change of condition, therefore, the claimant bears the burden of proving the actual change in condition and its causal connection to the original compensable accident. *Id.* (citing Krell v. S.C. State Hwy. Dept., 118 S.E.2d 322, 323 (S.C. 1061)). It is important to note that a change of condition refers to conditions different from those in existence when an award was originally made. *Id.* at 191 (citing Lewis v. Craven Reg'l Med. Ctr., 468 S.E.2d 269, 274 (N.C. Ct. App. 1996)). A continued or ongoing incapacity of the same character and kind and for the same injury is not a “change in condition.” *Id.*

Claimant has worked at Wal-Mart as an assistant store supervisor or shift manager since 2007. (Tr. at 30:4-5). After the original Hearing and Decision of the Commission for Claimant’s November 3, 2009, back claim, she alleges she experienced new and increased symptoms including radiating pain into her legs and is in need of additional medical treatment to include surgery by Dr. Edwards. (Tr. at 4:3-6).

Claimant reported to Dr. James O. Merritt on September 16, 2011, months after the April 13, 2011, original Hearing and June 8, 2011, Decision and Order of the Commission. Dr. Merritt testified in his deposition that Claimant was having new complaints of pain down her legs. (Dr. Merritt Deposition, page 7, lines 9-10). He also testified, however, that he had some notes in his file showing Claimant complained of pain going into her leg before she initially saw him in 2010. (Dr. Merritt Deposition, page 13, line 21— page 14, line 1). At the visit in September 2011,

however, he ordered an MRI to compare to her prior August 2011 MRI, and both MRIs showed a disc protrusion at L5-S1. (Dr. Merritt Deposition, page 7, line 24----page 8, lines 4-11). Although Dr. Merritt didn't have the films from the MRIs to compare, he didn't think there was a major change between the two. (Dr. Merritt Deposition, page 8, lines 18-21). In fact, he testified he was not sure if he ever saw the actual films, but upon reviewing the MRI reports, there was nothing he felt was "extremely remarkable." (Dr. Merritt Deposition, page 8, lines 13-14; 21-24). Without looking at the films, Dr. Merritt could not say for sure whether there was an obvious objective change or not. (Dr. Merritt Deposition, page 17, lines 11-13). Dr. Merritt also conceded that Dr. Edwards as a spine surgeon would be "more of an expert on spine MRIs" than he would be, and that Dr. Edwards' opinion that there was no change in the MRIs from 2010 to 2011 was probably correct. (Dr. Merritt Deposition, page 18, lines 3-19).

Dr. Merritt sent Claimant for further evaluation with spine surgeon Dr. William S. Edwards who did review the actual MRI studies at issue in this case. (Dr. Edwards Deposition, page 5, lines 16-17; page 16, lines 22-25). He concluded there was pathology at the L5-S1 disc on both studies; they looked substantially the same to him; and there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 6, lines 5-7; page 7, lines 8-10; page 17, lines 1-3). Further, Claimant's radiographical condition was not worsening; instead, any worsening was predominantly subjective. (Dr. Edwards Deposition, page 12, lines 24-25; page 13, lines 5-6). In fact, Dr. Edwards explained that Claimant's disc protrusion at L5-S1 has been contacting the nerve root throughout the course of her claim causing irritation in the nerve root; she doesn't have any weakness in her muscles that are innervated by that particular nerve; and, her reflexes remain the same (Dr. Edwards Deposition, page 16, lines 17-21; page 17, lines 9-12). Dr. Edwards also opined that Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because Claimant was

pregnant. (Dr. Edwards Deposition, page 20, line 19—page 21, line 2).

After a lengthy review of the evidence, including the medical records, deposition testimony of both doctors, and the Claimant's testimony at the hearing, we find that Claimant did not meet her burden of proving that she sustained a physical worsening of her condition subsequent to the original hearing on this claim per 42-17-90, and that she is, therefore, not entitled to any additional benefits under the South Carolina Workers' Compensation Act.

In the case at hand, Claimant has not presented any objective testimony other than self-serving subjective complaints to demonstrate her condition is any "different" from her condition at the time the original Decision and Order was filed in June 2011. However, even the Claimant's lay testimony about her past and ongoing complaints does not carry the burden of proving a worsening of condition after the original award. Specifically, Claimant's treating provider Dr. Merritt testified that Claimant had some complaints of pain going into her right leg before she saw him at her first visit. (Dr. Merritt Deposition, page 13, line 21—page 14, line 1). Likewise, Claimant testified at the hearing that she was indeed having some aches in her right leg when she first started treatment with Dr. Merritt and conceded she had some right leg symptoms when she treated with Dr. Wentz for injections in 2010, all of which occurred prior to the original hearing. (Tr. at 18:21-25; 20:2-23). Nevertheless, she testified that she believed the pain in her right leg was new and different than before, although she could not remember exactly when she "started receiving them" and whether those issues started before or after the original hearing. (Tr. at 9: 11-21).

The objective medical testimony and medical testing certainly does not support Claimant's assertion that she sustained a worsening of her physical condition after the original award. While a new MRI was ordered by Claimant's treating provider due to her new complaints of pain, Dr. Merritt testified during his deposition that he could not recall whether he actually reviewed the original films in this case. (Dr. Merritt Deposition, page 8, lines 13-24). Dr. Edwards did review

and compare the MRI studies from 2010 and 2011; he concluded: (1) there was pathology at the L5-S1 disc on both studies; (2) the MRIs looked substantially the same to him; and, (3) there was no objective or significant radiographical difference to be noted in the scans. (Dr. Edwards Deposition, page 5, lines 16-17; page 6, lines 5-7; page 7, lines 8-10; page 16, lines 22-25; page 17, lines 1-3). Dr. Edwards also opined Claimant's disc protrusion at L5-S1 has been contacting the nerve root and causing irritation throughout the course of her claim; she has not developed any weakness in her muscles innervated by that particular nerve; and, her reflexes have remained the same. (Dr. Edwards Deposition, page 16, lines 17-21; page 17, lines 9-12). Dr. Merritt deferred to Dr. Edwards as being more of an expert regarding the interpretation of the MRI scans, and he agreed with Dr. Edwards' opinion that there was no change in the MRI scan before and after the first hearing. We give greater weight to the opinion of Dr. Edwards on these issues because he is a spine surgeon and because Dr. Merritt himself identified Dr. Edwards as more of an expert of these issues and deferred to his judgment. The preponderance of the evidence shows Claimant's physical symptomology did not change and her objective testing also did not change after the original Decision and Order from the Commission filed in June 2011.

Finally, Claimant alleges she developed new symptoms after the original Decision and Order in this case which resulted in Dr. Edwards recommending spine surgery. (Tr. at 12:4-23). Upon further review of the evidence in this case, however, it is clear that Dr. Edwards opined Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. (Dr. Edwards Deposition, page 20, line 19—page 21, line 2). In sum, Claimant's radiographic condition has not worsened; any alleged worsening in this case is solely based on Claimant's subjective complaints; and Dr. Edwards admits there is nothing he could look at that doesn't have a subjective component to it to show Claimant's condition is worse. (Dr. Edwards Deposition, page 12, lines 24-25; page

13. lines 5-6; page 18, lines 5-8). The evidence in this matter simply does not meet the preponderance of the evidence standard as required by the Act and case law to establish a worsening of Claimant's physical condition occurring after the original award.

For these reasons, we find that the hearing Commissioner erred in finding Claimant sustained a change of condition for the worse under S.C. Code Ann. Sec. 42-17-90 as a result of her original November 3, 2009, accident at work because the preponderance of evidence in the record does not support such findings.

FINDINGS OF FACT

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. The South Carolina Workers' Compensation Commission has exclusive jurisdiction over this matter.
2. The Claimant worked for Wal-Mart Stores, Inc. and suffered an injury to her back arising out of and in the course and scope of her employment on November 3, 2009.
3. This claim was originally adjudicated at a hearing before Commissioner Avery Wilkerson on April 13, 2011. An Order was issued on June 8, 2011, and the Claimant was awarded 7% permanent partial disability to the back and ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.
4. Subsequent to the original award, the Claimant filed an application for a change of condition per 42-17-90.
5. Defendants mistakenly filed a Form 15 on this claim, and that issue was adjudicated by

Order of Commissioner Melody James dated September 18, 2012. That Order specifically held all claims of change of condition by Claimant and all defenses by Defendants in abeyance for future determination.

6. We have reviewed the submitted evidence, including the medical records, the Claimant's testimony, the testimony of the various doctors, and the prior Orders.

7. We give limited weight to the testimony of the Claimant as it is conclusory and self-serving. However, when considering all of the evidence as a whole, we find Claimant's lay testimony about her past and ongoing complaints does not carry the burden of proving a worsening of condition after the original award. Claimant was unable to establish that she had any new complaints at this time that were not present at the time of the original award, she was unable to establish when she thought her condition worsened, and she was unable to establish that her need for surgery was new or occurred after the original award. The lay testimony simply did not carry the burden of proving a compensable change of condition claim.

8. We give more weight to the medical records, the diagnostic tests, and the testimony of the medical experts in this case. Among the medical experts, we give the greatest weight to Dr. Edwards' testimony and opinion because he is a spine surgeon and because Dr. Merritt himself identified Dr. Edwards as more of an expert of these issues and deferred to his judgment.

9. The medical records, diagnostic tests, and medical opinions do not support a physical change of condition for the worse. The preponderance of the evidence indicates that there was no objective difference between the Claimant's MRI scan after the original award and the MRI scan before the original award.

10. We are cognizant of the fact that testimony from both doctors and statements out of medical reports can be cherry-picked to support either position on this change of condition dispute. However, when reviewing the evidence as a whole and giving weight to the various pieces of

evidence, it is our view that the preponderance of the evidence does not establish that Claimant has sustained a change of condition for the worse. We find that the preponderance of the evidence does not prove a worsening of Claimant's physical condition as a result of the original injury and occurring after the first award.

11. Both Dr. Merritt and Dr. Edwards ultimately testified that was no objective or significant radiographical difference to be noted in the MRI scans done before and after the original award.

12. Dr. Edwards opined Claimant could have been a candidate for discectomy back in 2010 for her November 2009 accident, but it was probably not considered at that time because she was pregnant. The preponderance of the evidence does not support Claimant's contention that her need for surgery is new or developed after the original award.

13. The preponderance of the evidence shows that Claimant's radiographic condition has not worsened.

14. As a result of our finding that Claimant has not proven a compensable change of condition per 42-17-90, Claimant is ineligible for any further benefits under the South Carolina Workers' Compensation Act, including but not limited to temporary compensation (42-9-10), additional permanent disability (42-9-10, 42-9-20, and 42-9-30), and additional medical treatment (42-15-60).

15. Notwithstanding #14 above, per the previous Order of this Commission dated June 8, 2011, Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

CONCLUSIONS OF LAW

In view of those 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 S.C. Code Ann. section 42-17-90, Claimant failed to prove by a

preponderance of the evidence that Claimant suffered a change of condition for the worse.

2. Pursuant to section 42-15-60, Claimant is not entitled to additional medical care.
3. Pursuant to 67-603(D), Defendant's failure to answer Claimant's hearing request resulted in a forfeiture of the Defendant's right to assert a statute of limitation defense.
4. As a result of our finding that Claimant has not proven a compensable change of condition per 42-17-90, Claimant is ineligible for any further benefits under the South Carolina Workers' Compensation Act, including but not limited to temporary compensation (42-9-10), additional permanent disability (42-9-10, 42-9-20, and 42-9-30), and additional medical treatment (42-15-60).
5. Notwithstanding #14 above, per the previous Order of this Commission dated June 8, 2011, Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS, THEREFORE, ORDERED that the Claimant failed to prove by a preponderance of the evidence in the record that Claimant has sustained a change of condition for the worse. We find that the preponderance of the evidence does not prove a worsening of Claimant's physical condition as a result of the original injury and occurring after the first award.

IT IS FURTHER ORDERED that as a result of our finding that Claimant has not proven a compensable change of condition per 42-17-90, Claimant is ineligible for any further benefits under the South Carolina Workers' Compensation Act, including but not limited to temporary compensation (42-9-10), additional permanent disability (42-9-10, 42-9-20, and 42-9-30), and additional medical treatment (42-15-60).

IT IS FURTHER ORDERED that notwithstanding #14 above, per the previous Order

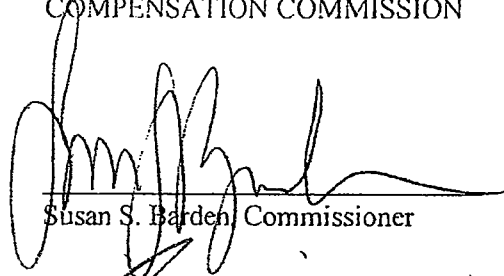
of this Commission dated June 8, 2011. Claimant is entitled to ongoing anti-inflammatory medication as per the Form 14B completed by Dr. Merritt on March 29, 2011, as long as such medication is causally related to her work accident and tends to lessen her period of disability as per the authorized treating physician.

IT IS FURTHER ORDERED that Claimant application for additional benefits under the South Carolina Workers' Compensation Act for a worsening of condition per 42-17-90 is hereby denied and dismissed with prejudice.

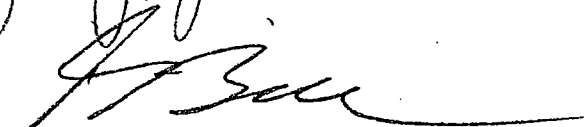
AND IT IS SO ORDERED.

**FULL REVERSAL
UNANIMOUS DECISION**

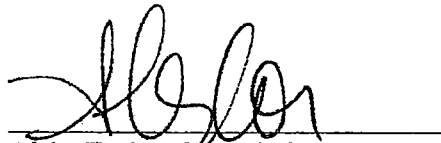
**SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION**



Susan S. Barden, Commissioner



T. Scott Beck, Commissioner, concurring



Aisha Taylor, Commissioner, concurring

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