BEFORE THE APPELLATE PANEL

OF THE SOUTH CAROLINA

WORKERS' COMPENSATION COMMISSION

SCWCC FILE NO.: 1022089

Brenda Oswald, Employee, vs. Oswald Law Firm, Employer, and NorGuard Insurance Company, Carrier, Defendants.	)	DECISION & ORDER

HEARING: November 19, 2011 at the S.C. Workers' Compensation Commission, 1333 Main St., Columbia, SC.

APPEARANCES: The Claimant, Brenda Oswald, was represented by Frank A. Barton, Esquire, Post Office Box 3972 West Columbia, SC 29171.

Defendants The Oswald Law Firm, Employer, and NorGuard Insurance, Carrier, were represented by Peter P. Leventis, IV, Esquire and Mark D. Cauthen, Esquire of McKay, Cauthen, Settana & Stubley, P.A. of Columbia, South Carolina

PURPOSE OF HEARING: To determine if the single Commissioner erred as a matter of fact and/or law for the reasons set forth in the Form 30 appeal filed by the Claimant Brenda Osawld.

OPINION: Commissioner Gene McCaskill, Appellate Panel Chair
Commissioner Susan S. Barden
Commissioner Melody L. James

FILED: _____, 2014.

BACKGROUND AND PROCEDURAL POSTURE

This matter comes before the Appellate Panel of the Commission upon a Form 30 appeal filed on behalf of the Claimant, Brenda Oswald, who is represented by attorney Frank A. Barton of Lexington, SC. The Defendants, The Oswald Law Firm, Employer, and NorGuard Insurance, Carrier, are represented by attorney Peter P. Leventis, IV of Columbia, SC. The parties and their attorneys appeared before the Appellate Panel on November 19, 2013 after appellate briefs were filed by the parties, and oral argument was conducted. This was a denied claim for benefits by the Employer/Carrier. This case was originally heard before Commissioner Andrea C. Roche on March 21, 2013.

Commissioner Roche issued an Order on July 9, 2013 denying benefits, and finding that the case was not compensable. Commissioner Roche's Order made the following "Findings of Facts" and "Conclusions of Law" in her July 9, 2014 Order as follows:

FINDINGS OF FACT (BY THE SINGEL COMMISSIONER)

1. That all parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.

2. That Claimant, Brenda Oswald, was an employee of the Oswald Law Firm on the date in question of September 27, 2010.

3. That the Oswald Law Firm Employer was insured for this date of accident, for purposes of workers' compensation, through NorGuard Insurance.

4. That venue for the hearing is proper and agreed upon by the parties in Lexington, South Carolina.

5. That notice of the hearing was timely and properly served upon all parties of interest.

6. That notice of the accident was given to the employer in a timely fashion.

7. That a claim for benefits was filed with the South Carolina Workers' Compensation Commission within two years of the date of the alleged accident.

8. That the Claimant's average weekly wage for this accident is $692.30, and her corresponding compensation rate would be $461.53.

9. That Claimant's sworn testimony at the hearing was not credible due in part to the reasons stated above, and outlined conflicting evidence from her testimony; as well as evidence in the record; the undersigned's own observations of the witness, and specifically in light of the fact that her testimony as to the facts of the accident (such as where she was coming from at the time of the accident) were in direct conflict with a disinterested non-party to the workers' compensation claim, Mr. Franklin Riggins. (See Generally, the Deposition Testimony of Franklin Riggins *vis a vis* the sworn deposition and trial testimony of Mrs. Brenda Oswald) (Hearing Trans. at p. 29; Riggins Trans. at p. 18 lines 19-25; and p. 19, line 23 – p. 20, line 11).

Namely, that Mrs. Oswald testified both in her deposition, and at trial that she was in the midst of going from an accountant's office to a bank at the time of the accident, yet Mr. Riggins, who lives approximately 0.2 miles from the Claimant, stated that he followed Mrs. Oswald out of the neighborhood that morning, and immediately preceding the motor vehicle accident in which he was the other involved driver.

10. I do not believe the Claimant's version events as to where she was traveling to and from, and her alleged purpose for such travels at the time of the accident which gave rise to her injuries. (See Also, Defendants' APA's at p 102, a July 26, 2011 report for treatment of the Sept. 27, 2010 date of accident checking "no" as to whether or not this "the patient's pain or condition arise as the result of a work related injury or accident.").

11. The Claimant has the burden of providing by the greater weight of the evidence that the claim is compensable and falls within the Act. No exhibits from the Claimant were provided in the record as to the alleged transaction(s) which took place on September 27, 2010 at Burkett or SCB&T which would corroborate her version of the events or her alleged actions on that date related to her employment activities at either location. The Claimant has not met her burden of proof under the Act in proving by the greater weight of the evidence that her travel was work related and arose out of or in the course of her employment with the Oswald Law Firm.

12. I find that this claim for benefits is not compensable under the Act and excluded as the claim is barred under the "going and coming" rule exclusion, and no applicable exception to this exclusion would apply. Even assuming the Claimant's version of events is partially accurate (and the undersigned does not in finding the witness not credible (See Findings of Fact No. 9-10 above)), the Claimant would have been driving from her home – as opposed to another bank as testified to – to a place of employment, a bank.

First, the bank in question was actually on her way to the Oswald Law Firm from her house. Again, this is even assuming *arguendo* that the Claimant was legitimately headed to work and/or the bank, in the first instance. Under the dual purpose doctrine, the personal trip (to into work at the law firm) would have still taken place, even if the alleged "special errand" or "work trip," that is a trip

by the bank had not been part of the journey. However, I find the "special errand" or "work trip," by the bank (again assuming the Claimant was necessarily telling the truth about this trip at all) would not have taken place at this time 'but for' the trip from home into the office itself for her regular work day.

Therefore, as the trip to the Oswald Law Firm, from home, during regular work hours would be barred under the "going and coming" exclusion, so to would the purported trip by the bank (on the way to, or back to) the office under this set of circumstances pursuant to the "dual purpose," doctrine. Hence, the entire journey would be during a non-covered trip, again even assuming the Claimant's assertions as to her travels and responsibilities to be partially accurate.

13. Based on Findings of Fact Numbered "9," "10," "11," and "12," above, the undersigned finds this claim for benefits is not compensable as stated, and as further outlined hereinabove and below. Therefore, it is not necessary to reach the other defenses raised by the Employer/Carrier and I make no specific findings as to: *laches*; Claimant's receipt of ongoing payment in wages for the 30 months following the accident; whether or not there is medical evidence in the record to support an aggravation of the Claimant's pre-existing neck injury; nor the Claimant's entitlement to prior or future medical treatment – specifically in the 25 months prior to her Form 50 filing for this hearing.

CONCLUSIONS OF LAW (BY THE SINGLE COMMISSIONER)

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

1. Under § 42-3-20 and § 42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.

2. Under § 42-1-130, Claimant, Brenda Oswald was a covered employee of the Oswald Law Firm on September 27, 2010 due to her employment as an office manager for the firm.

3. Under § 42-1-140, the Oswald Law Firm is a covered employer under the meaning of the Act.

4. Under § 42-1-150, there was an employer/employee relationship between the parties on the date of accident.

5. Under § 42-17-20, venue in Columbia, South Carolina was proper and agreed upon by the parties.

6. Under § 1-23-320 (b) and Regulation 67-607, notice of the hearing was timely and properly served upon all of the parties of interest.

7. Under § 42-15-20, the Claimant gave timely notice of her accident to her employer.

8. Under § 42-15-40, the claim for benefits was filed under the Workers' Compensation Act within two years with the South Carolina Workers' Compensation Commission.

9. Under § 42-1-40, Claimant's average weekly wage was $692.30, and her compensation rate is $461.53.

10. Under § 42-1-160, has not met her burden of proof in showing that she sustained a compensable injury arising out of or in the course and scope of her employment with the Oswald Law Firm.

11. Under §42-15-60, and pursuant to Findings of Fact numbered "10-12" and Conclusions of Law Numbered "10" and "12," no medical benefits are due as this claim for benefits is found by the undersigned to fall outside of the Workers' Compensation Act, and therefore not compensable.

12. In the first instance, the undersigned has found the Claimant not to be credible as noted above, and consequently finds the entire trip to be outside the course and scope of employment, as I do not believe her testimony in relation to where she was traveling to and from and why, or that it was work related travel.

13. Even assuming, *arguendo*, that the part of the Claimant's testimony regarding her travels was accurate, namely that she was on her way to the office and going by the bank to make deposits, this case would still be barred under the "going and coming rule," exclusion and not fall under any applicable exclusion thereto. (See Generally, S.C. Code Ann. §42-1-160, and *Sola v. Sunny Slope Farms*, 244 S.C. 6, 14; 135 S.E. 2d 321, 326 (1964)). (See testimony of Franklin Riggins at Trans. at p. 18 lines 19-25; and p. 19, line 23 – p. 20, line 11).

14. As noted, such trip did not fall under any exception to the "going and coming" exclusion of compensability. The bank in question is on the Claimant's way from her house to the Oswald Law Firm. (See Defendants' Trial Exhibit No. 19). In conjunction with Finding of Fact numbered "12" above, this journey would not have been a "work related" trip under the "dual purpose" exception to the "going and coming" exclusion from the Act. (See *DiMaria v. MultiMedia Inc.*, 308 S.C. 387, 417 S.E.2d 324 (1992)).

15. Pursuant to the foregoing analysis of the case, and the above Findings of Fact and Conclusions of Law, in that the undersigned has found this case to not be compensable, there is no need to reach or determine the other affirmative legal and factual defenses raised by the Employer/Carrier associated with this claim for benefits. (Also see, Finding of Fact No. 13 above).

ISSUES ON APPEAL

Within the applicable time for appeal, Appellant Brenda Oswald, filed a Form 30 appeal on three separate grounds of exception for appellate judicial review by this Panel as follows:

1. Whether the Commissioner erred in finding that the Claimant was not on the job at the time of the accident in question on September 27, 2010?
2. Whether the Commissioner erred in concluding the going and coming rule applied in determining that the Claimant was not working at the time of her accident?
3. Whether the Commissioner erred in disregarding testimony of the Defendant employer which stated that the Claimant was on the job at the time of her accident?

(See Generally the Form 30 of Brenda Oswald filed on July 22, 2013).

No other issues were raised on appeal, and the Defendants did not cross appeal on any ground or grounds.

STATEMENT OF THE CASE

The Claimant's/Appellant's position is that on or about September 27, 2010, she was in a motor vehicle accident in which she injured her back, neck and both shoulders. The Claimant/Appellant asserted that this accident, in which her vehicle was rear-ended by another motorist, took place under circumstances which arose out of and in the course of her employment as an office manager for the Oswald Law Firm. The Claimant alleged before the single Commissioner that at the time of the accident she was in the midst of traveling between her firm's accountant's office, and the firm's bank, in order to make withdraws/deposits for the Oswald Law Firm, pursuant to her employment duties.

The Claimant/Appellate requested any and all available benefits under the Act, including but not limited to temporary total disability (TTD) benefits from the date of the accident in September 27, 2010 and ongoing, until she attains maximum medical improvement (MMI). She also requested reimbursement or coverage of any all medical treatment from the date of accident to present, as well as continuing medical benefits under the Act. The Claimant did not seek a determination of permanent disability at the time of the original hearing, as her position was that she had not yet attained MMI. In response to one of the Defendants' arguments that such travel

at the time of accident was not in the course and scope of her work, the Claimant argued that even if her trip were not from one place of employment to another (e.g. between the accountant's office and the bank), and if she were traveling from home to the bank, such a trip would not be outside of her scope of employment under the "going and coming" rule exclusion, but rather would be compensable under the "dual purpose" exception to the "going and coming" exclusion.

The Defendants/Respondents, for their part, have continuously denied any and all benefits in this case on several grounds and asserted numerous affirmative defenses. Essentially, the Respondents argued before the single Commissioner that the Claimant did not carry her burden of proof in proving an injury by accident arising out of an in the course and scope of her employment. Moreover, that the travel engaged in by Mrs. Oswald at the time of the accident would have been subject to the going and coming rule exclusion to compensability. The Defendants/Respondents further asserted that there was direct evidence in the record, via sworn testimony of a disinterested third party, that contradicted the Claimant's version of events and her alleged travel that day in the first instance.

Respondent Employer/Carrier also contended that even if the Claimant's injuries were otherwise compensable, that she cannot prove by medical evidence under S.C. Code Ann. §42-9-35 that she has suffered an aggravation of a pre-existing injury to her cervical spine and shoulders from this alleged injury. Employer/Carrier argued before the single Commissioner that the equitable doctrine of *laches*, for failure to timely prosecute her claim for benefits within a reasonable amount of time, would further stand to bar ongoing benefits. Specifically as to TTD benefits, the Defendants/Respondents also argued and provided evidence that the Claimant/Appellant still came into work at the Oswald Law Firm and/or as a real estate agent with Oswald Realty, and still performed job duties and functions for the Oswald Law Firm.

Further on that point, Defendants/Respondents pointed to at the Single Commission hearing that the Claimant has continued receiving ongoing salary benefits and wages from the

Oswald Law Firm for over 30 months by the date of the single Commissioner's hearing, and therefore would not be entitled to back due TTD benefits even if the claim was otherwise compensable. Lastly, Respondents argued that even if the claim was otherwise compensable above and beyond the other defenses raised, the Appellant Oswald failed to even request a hearing for more than a year (and even that hearing request was later withdrawn multiple times) and never fully prosecuted the claim until over 2 ½ years after the accident. The Employer/Carrier asserted that medical treatment during those 2 ½ years was not emergent medical care; nor did the Claimant have the right to direct her own medical treatment at that time. Therefore, according to Defendants/Respondents, such treatment from the date of accident until the date of the most recent hearing request in December of 2012 would not be reimbursable or covered under the Act, even if the claim was otherwise compensable, under the requirements of S.C. Code Ann. §42-15-60.

FINDINGS OF FACT BY THE APPELLATE PANEL

1. That all parties are bound by and subject to the terms and provisions of the South Carolina Workers' Compensation Act.

2. That Claimant, Brenda Oswald, was an employee of the Oswald Law Firm on the date in question of September 27, 2010.

3. That the Oswald Law Firm Employer was insured for this date of accident, for purposes of workers' compensation, through NorGuard Insurance.

4. That venue for the hearing is proper and agreed upon by the parties in Lexington, South Carolina.

5. That notice of the hearing was timely and properly served upon all parties of interest.

6. That notice of the accident was given to the employer in a timely fashion.

7. That a claim for benefits was originally filed with the South Carolina Workers' Compensation Commission within two years of the date of the alleged accident.

8. That the Claimant's average weekly wage for this accident is $692.30, and her corresponding compensation rate is $461.53.

9. That Claimant's sworn testimony at the hearing was not credible due in part to the outlined conflicting evidence from her trial testimony, as well as evidence in the record; and specifically in light of the fact that her testimony as to the facts of the accident (such as where she was coming from at the time of the accident) was in direct conflict with a disinterested non-party to the workers' compensation claim, Mr. Franklin Riggins. (See Generally, the Deposition Testimony of Franklin Riggins *vis a vis* the sworn deposition and trial testimony of Mrs. Brenda Oswald) (Hearing Trans. at p. 29; Riggins Trans. at p. 18 lines 19-25; and p. 19, line 23 – p. 20, line 11).

Namely, that Mrs. Oswald testified both in her deposition and at the hearing that she was in the midst of going from an accountant's office to a bank at the time of the accident; however, Mr. Riggins, who lives approximately 0.2 miles from the Claimant, stated that he followed Mrs. Oswald out of the neighborhood that morning, and immediately preceding the motor vehicle accident in which he was the other involved driver.

10. We do not believe the Claimant's version events as to where she was traveling to and from, and her alleged purpose for such travels at the time of the accident which gave rise to her injuries. (See also, Defendants' APA at p. 102, a July 26, 2011 report for treatment of the Sept. 27, 2010 date of accident, in which "no" was checked as to whether or not "the patient's pain or condition arise as the result of a work related injury or accident.").

11. The Claimant has the burden of providing by the greater weight of the evidence that the claim is compensable and falls within the Act. No exhibits from the Claimant were provided in the record as to the alleged transaction(s) which took place on September 27, 2010 at

Burkett or SCB&T, which would corroborate her version of the events or her alleged actions on that date related to her employment activities at either location. We find the Claimant has not met her burden of proof under the Act in proving by the greater weight of the evidence that her travel was work related and arose out of or in the course of her employment with the Oswald Law Firm.

12. We further find that this claim for benefits is not compensable under the Act as the claim is barred under the "going and coming" rule exclusion, and no applicable exception to this exclusion would apply. Even assuming the Claimant's version of events is partially accurate (these undersigned Commissioners do not so find; See Findings of Fact No. 9-10 above), the Claimant would have been driving from her home – as opposed to another bank as she testified to – to a place of employment, a bank.

First, the bank in question was actually on the Claimant's way to the Oswald Law Firm from her house. Again, this is even assuming *arguendo* that the Claimant was legitimately headed to work and/or the bank, in the first instance. Under the dual purpose doctrine, the personal trip (to into work at the law firm) would have still taken place, even if the alleged "special errand" or "work trip" (i.e. trip by the bank) had not been part of the journey. However, we find the "special errand" or "work trip" by the bank (again assuming the Claimant was necessarily telling the truth about this trip at all) would not have taken place at this time "but for" the trip from home into the office itself for her regular work day.

Therefore, as the trip to the Oswald Law Firm from the Claimant's home during regular work hours would be barred under the "going and coming" exclusion, so would the purported trip by the bank (on the way to, or back to) the office under this set of circumstances pursuant to the "dual purpose" doctrine. Hence, the entire journey would be during a non-covered trip, again even assuming the Claimant's assertions as to her travels and responsibilities to be partially accurate.

13. Based on Findings of Fact No. 9, 10, 11, and 12, the undersigned Commissioners find this claim is not compensable, as further outlined hereinabove and below. Therefore, it is not necessary to reach the other defenses raised by the Employer/Carrier, and we make no specific findings as to: *laches*; Claimant's receipt of ongoing payment in wages for the 30 months following the accident; whether or not there is medical evidence in the record to support an aggravation of the Claimant's pre-existing neck injury; nor the Claimant's entitlement to prior or future medical treatment – specifically in the 25 months prior to her Form 50 filing for this hearing.

CONCLUSIONS OF LAW BY THE APPELATE PANEL

Accordingly, as provided in the South Carolina Code of Law, 1976, as amended, § 42-17-50, it is the determination of this Appellate Panel of the Commission that:

1. Under § 42-3-20, § 42-3-180, and §42-17-50, this appellate panel has jurisdiction over the parties to hear the issues in dispute.

2. Under § 42-1-130, Claimant, Brenda Oswald was a covered employee of the Oswald Law Firm on September 27, 2010 due to her employment as an office manager for the firm.

3. Under § 42-1-140, the Oswald Law Firm is a covered employer under the meaning of the Act.

4. Under § 42-1-150, there was an employer/employee relationship between the parties on the date of accident.

5. Under § 42-17-20, venue in this matter was proper before the single Commissioner.

6. Under § 1-23-320 (b) and Regulation 67-607, notice of the hearing was timely and properly served upon all of the parties of interest.

7. Under § 42-15-20, the Claimant gave timely notice of her accident to her employer.

8. Under § 42-15-40, the claim for benefits was filed under the Workers' Compensation Act within two years with the South Carolina Workers' Compensation Commission.

9. Under § 42-1-40, Claimant's average weekly wage was $692.30, and her compensation rate is $461.53.

10. Under § 42-1-160, has not met her burden of proof in showing that she sustained a compensable injury arising out of or in the course and scope of her employment with the Oswald Law Firm.

11. Under §42-15-60, and pursuant to Findings of Fact No. 10-12 and Conclusions of Law No. 10 and 12, no medical benefits are due as this claim for benefits is found by the undersigned to fall outside of the Workers' Compensation Act, and therefore not compensable.

12. In the first instance, the undersigned Commissioners find the Claimant not to be credible as noted above, and consequently finds the entire trip was outside the course and scope of employment, as we do not believe her testimony in relation to where she was traveling to and from and why, nor that it was work related travel.

13. Even assuming, *arguendo*, that the part of the Claimant's testimony regarding her travels was accurate, namely that she was on her way to the office and going by the bank to make deposits, this case would still be barred under the "going and coming rule," exclusion and not fall under any applicable exclusion thereto. (See Generally, S.C. Code Ann. §42-1-160, and *Sola v Sunny Slope Farms*, 244 S.C. 6, 14; 135 S.E. 2d 321, 326 (1964)). (See testimony of Franklin Riggins at Trans. at p. 18 lines 19-25; and p. 19, line 23 – p. 20, line 11).

14. As noted, such trip did not fall under any exception to the "going and coming" exclusion of compensability. The bank in question is on the Claimant's way from her house to

the Oswald Law Firm. (See Defendants' Trial Exhibit No. 19). In conjunction with Finding of Fact No. 12 above, this journey would not have been a "work related" trip under the "dual purpose" exception to the "going and coming" exclusion from the Act. (See *DiMaria v. MultiMedia Inc.*, 308 S.C. 387, 417 S.E.2d 324 (1992)).

15. Pursuant to the foregoing analysis of the case, and the above Findings of Fact and Conclusions of Law, in that the undersigned Commissioners have found this case to not be compensable, there is no need to reach or determine the other affirmative legal and factual defenses raised by the Employer/Carrier associated with this claim for benefits. (See also Finding of Fact No. 13 above).

ORDER

The Appellate Panel of the Commission has reviewed the evidence available in the record, including the Order of the single Commissioner, the briefs filed by the parties, as well as the oral arguments and remarks made by the parties before the Panel, in addition to the pre-hearing filings, and Commission record, to include but not limited to the transcripts, APA expert medical reports and trial exhibits of the parties.

As outlined above, we find that the Claimant was not in the course and scope of her employment at the time of the accident, and further hold that the single Commissioner's Order is affirmed in full, and the findings and conclusions are adopted, verbatim, as the findings and conclusion of this appellate panel, and as outlined herein above. The request for benefits under the Act is therefore denied as this was not a compensable accident under the meaning of the Act pursuant to S.C. Code Ann. §42-1-160.

AFFIRMED.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner,
Appellate Panel Chairman

Gene McCaskill, Commissioner

Melody L. James, Commissioner

Columbia, SC May 6th, 2014

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 Kim Falls on May 6, 2014