

**DECISION AND ORDER
OF
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

W.C.C. FILE NO. 0726308

**Shannon Cook, Employee
v.
Spartanburg Steel, Employer**

HEARING: Held in Greenville, SC
September 27, 2013

APPEARANCES: Employee was represented by:

Ryan S. Montgomery, Esquire
Ryan Montgomery Attorney at Law, LLC
108 Mills Avenue
Greenville, South Carolina 29605

Employer/Carrier was represented by:
Brad B. Easterling, Esquire
Turner Padgett Graham & Laney
200 East Broad Street
Greenville, South Carolina 29601

PURPOSE OF THE HEARING: To determine only the issues on the
Form 50 Change of Condition Request
And/or Additional Medical Pursuant to
Commission Order

DECISION AND ORDER: The Honorable Susan Barden

DATE OF DECISION: November 25, 2014

I. APA SUBMISSIONS/EXHIBITS

Employee:

| | | | |
|----|--|------------------------|----------------------|
| 1. | Carolinas Center for Advanced Management of Pain | 7/13/2011 – 9/13/13 | 1 – 128, 128A |
| 2. | Carolina Health Professionals, LLC | 2/16/2012 | 129 – 132 |
| 3. | Orthopedic Specialties of Spartanburg | 8/15/2012 – 6/12/2013 | 133 – 146 |
| 4. | Piedmont Imaging | 9/13/2012 | 147 – 148 |
| 5. | Southeastern Neurosurgical & Spine | 12/14/2012 – 9/11/2013 | 149 – 155, 155A-E |
| 6. | Greenville Radiology | 7/25/2013 | 156 – 159 |
| 7. | Decision and Order | 6/8/2011 | 160 – 175 |
| 8. | Prior Form 50 | 5/9/2012 | 176 – 181 |

Employer:

EXHIBIT#

1. Young v. Tide Craft, Inc. 270 S.C. 453; 242 S.E.2d 671 (1978)
2. Allen v. Benson Outdoor Advertising Co., 236 S.C. 22; 112 S.E.2d 722 (1960);
3. Deposition of Claimant
4. Deposition of Dr. Phillips;
5. Deposition of Dr. Kanos (withdrawn at hearing);
6. Surveillance Video

II. Stipulations

1. The South Carolina Workers' Compensation Commission has jurisdiction over this matter;
1. Hearing Venue is properly set in Greenville County per party stipulation as the parties hereto previously agreed to move this hearing from Spartanburg to Greenville County;
2. The date of injury is September 17, 2007;
3. Claimant's average weekly wage is \$846.64 yielding a compensation rate of \$564.46;
4. Defendants had previously sought an Order granting a continuance of the hearing in order to take the deposition of Dr. Charles Kanos. At the hearing, this request was withdrawn by the defendants and the parties elected to proceed under the current APA submissions.

and legal arguments.

5. Both parties are subject to the provisions of the South Carolina Workers' Compensation Act.

III. STATEMENT OF CASE

A. Employee's Position

It was the position of the employee that he had sustained a change of condition for the worse to include a need for surgery. Procedurally, this matter was originally handled by attorney Tom Gagne of Greenville, South Carolina. The underlying matter went to hearing on June 8, 2011 at which time permanency and the need for future medical was addressed. Commissioner Williams awarded Claimant 25% permanent partial disability to the spine, which award was paid on June 27, 2011. On May 9, 2012, less than one year later, counsel for the claimant, Tom Gagne, filed a Form 50 (notice of claim only) alleging a change of condition for the worse and attached a medical report from Dr. Tony Rana indicating the claimant had sustained a change of condition for the worse. Between that filing and May 17, 2013, the claimant terminated his legal representation with Tom Gagne and retained, attorney Ryan Montgomery of Greenville, South Carolina. On May 17, 2013, Mr. Montgomery filed a supplemental Form 50 requested a hearing to address the change of condition for the worse previously filed by Tom Gagne.

From a medical perspective and once the claimant alleged a change of condition for the worse as of May 9, 2012, the defendants referred the claimant to Dr. Marco Rodriguez who opined that the claimant needed a lumbar fusion. The defendants then referred the claimant to Dr. Charles Kanos who opined that the claimant was in need of a CT myelogram to definitely determine whether or not the Claimant was in need of surgery. Dr. Kanos recommended against the lumbar fusion as recommended by Dr. Rodriguez. At this point the medical treatment from

defendants was discontinued except for the medical treatment with Dr. Phillip LaTourette, the claimant's authorized pain management physician. Claimant on his own obtained the CT myelogram and a return visit to Dr. Charles Kanos. At that appointment, it was the medical opinion of Dr. Kanos that the claimant needed surgery and that his condition had worsened. The claimant took the position on the date of the hearing that Drs. Latourette, Kanos, Rodriguez, and Rana had all opined that the claimant has sustained a change of condition for the worse.

Realizing that the defendants would argue that the case was a legal issue based upon the Form 50 Claim only and the case of the Allen v. Benson Outdoor Advertising, 236 S.C. 22 (1960), claimant responded to the case of Allen v. Benson but arguing the distinction in that case and the case at bar. In the Allen case, the issue was whether the case must be heard within the twelve month period. Allen timely filed an application but it was not heard within one year. That case did not address anything associated with filing the application for a claim only in order to toll the statutory one year requirement as required in §42-17-90. The Allen Court goes onto cite and incorporate additional jurisdictional opinions noting that "the filing of a claim for further compensation within the statutory period and partial but not complete development thereof with such period, with loss of jurisdiction by the Commissioner would be an absurd result which the legislature certainly did not have in mind... a claim if filed within the statutory period applicable to the nature of the claim filed." The Allen court held and only held that the application for review was made within one year and so they had jurisdiction to hear the claim. It did not go beyond that and extrapolating sentences out of context does not change that.

In addition, when claimant filed the Form 50 hearing request, the medical report of Dr. Tony Rana had already been filed in support of the change of condition.

B. Employer's Position

The employer argues claimant has not sustained a change of condition for the worse. However, the defendants' primary position(s) are that the Commission need not reach that decision as it lacks jurisdiction to hear the case based upon the following three arguments:

First, the defendants argue that the claimant's claim is barred by S.C. Code 42-17-90. The last sentence under 42-17-90 reads: "...the review [on a claim for change of condition] **must not** be made after twelve months from the date of the last payment of compensation pursuant to an award provided by this title." (emphasis added). Defendants submitted the case of Allen v. Benson Outdoor Advertising, 236 S.C. 22 (1960), which defendants contend requires that a Request for Hearing be filed within one year from the date of the last payment of compensation. Defendants argue this requires the filing of a Form 50, Request for Hearing, and not simply a Form 50 – Notice of Claim Only. On May 9, 2012, the claimant's prior counsel, Tom Gagne, only filed a Form 50 – Notice of Claim alleging a change of condition but did not request a hearing. Based on Allen, defendants contend the claimant is barred from proceeding under a change of condition argument and the undersigned Commissioner does not have jurisdiction over the claim.

Second, the defendants argue that, even if the Form 50 - Notice of Claim only did toll the statute of limitations, the claimant still cannot proceed with his change of condition request as the claimant's prior counsel relied upon (submitted with the May 9, 2012 Form 50 – Notice of Claim only) a medical report from Dr. Tony Rana, which defendants contend is nebulous in nature and gives no factual basis upon which the opinion is based. For this argument, defendants rely on the case of Young v. Tide Craft, 270 S.C. 453, 242 S.E.2d 671 (1978), which holds that expert opinion is inadmissible if its factual foundation is nebulous. In Dr. Rana's February 16,

2012 report, which claimant relies upon to support his claim for change of condition, relative to claimant's lumbar spine, Dr. Rana assigned the exact same medical impairment rating as his did in his earlier July 14, 2010 report. In his February 16, 2012 report, Dr. Rana, as he also did in his July 14, 2010 report, opines claimant remains at MMI for the injuries received as result of his September 17, 2007 work accident. Defendants submit that, inherently, there can be no change of condition if claimant's MMI status is unchanged subsequent to the last payment of compensation. The only difference noted in Dr. Rana's two IME reports is found in his February 16, 2012 report where he references claimant's thoracic disc herniation at the T8/T9 level. However, nowhere in his February 16, 2012 report does Dr. Rana causally relate claimant's thoracic condition to his September 17, 2007 work injury.

Finally, defendants argue that claimant's claim should be barred by South Carolina Workers' Compensation Regulation 67-602(C), which requires the moving party to attach to the hearing request form a medical report(s) indicating a change in claimant's condition. In this claim, there was no medical report attached to the May 17, 2013 Form 50 nor to the August 9, 2013 Form 50, the only two Forms 50 requesting a hearing.

IV. EVIDENCE OF CASE

A. From the Defendants

Defendants submitted the deposition transcript of Dr. LaTourette. The defendants submitted surveillance video which was admitted into evidence without objection.

B. From the Claimant

The claimant by way of previous counsel submitted a Form 50 Change of Condition Application (Claim Only) on and in number 11a of the application states "Claimant comes for a change of condition". See APA 8, pp. 176-177. Pursuant to §42-17-90, the previous counsel

included a medical report from Tony Rana, M.D., dated February 16, 2012. See APA 8, pp. 178-180. Dr. Rana notes that the claimant “returns for evaluation of a worsening of condition.” Id. at 178. Dr. Rana went on to provide a basis for his opinion in that he identifies “treatment since his prior evaluation has included psychological counseling by Dr. Tollison and transforaminal epidural steroid injections by Dr. LaTourette” Id.

Following the application for a change of condition, Dr. Latourette referred Mr. Cook on August 15, 2012 for an evaluation with Dr. Marco Rodriguez at Orthopaedic Specialties which was authorized by the defendants. See Clmt. APA 3. Dr. Rodriguez opined that the claimant “shows a positive straight leg raise on the left side.” Id. at 136. Dr. Rodriguez recommended and prescribed a MRI conducted at Piedmont Imaging on September 13, 2012. Clmt. APA 4, p. 14. Presumably, Dr. Rodriguez reviewed the MRI film studies and added to his report indicating the MRI showed “L5-S1 recurrent herniation compression the L5 and S1 nerve roots on the left side”. Id. “It is truly a recurrent herniation”. Id. Dr. Rodriguez further opined that the claimant should be scheduled for surgery to include a lumbar fusion.” Dr. Rodriguez also opined that the recurrent herniation was causally related to his work injury of 9/17/07 and that Mr. Cook had sustained a change of condition for the worse. Id. at 146.

The employer/carrier referred Mr. Cook for another medical opinion. This time he was sent to Charles Kanos, M.D. of SouthEastern Neurosurgical. According to the Kanos report of December 14, 2012 “new patient is seen at the neurosurgical consultation at the request of WC for evaluation of low back pain.” Clmt. APA 5, p. 149. Kanos noted he had positive straight leg raise on the left. Kanos saw the claimant again on February 27, 2013 on a “WC follow up on low back pain”. Id. at 152. Claimant was noted to have post-surgical changes on L5-S1 and noted that the most appropriate treatment plan would be a Lumbar CT myelogram with emphasis

on film myelography looking for fill defects which if there was a defect then a decompression surgery would help. Id. at pp. 152-153.

Claimant terminated his relationship with previous counsel and hired Ryan Montgomery on May 16, 2013 (See record as a whole and claimant's testimony). Current counsel amended the previously filed Form 50 Claim only and filed an application for change of condition by way of a Form 50 requesting a hearing on May 17, 2013 and subsequently filed another Form 50 on August 9, 2013 (See Commission file).

On June 25, 2013, Dr. Kanos opined that the claimant's need for the CT Myelogram was medically necessary and causally related to his workers' compensation injury and that the claimant had sustained a change of condition for the worse. Clmt APA 5, p. 155. Despite the opinion from their own doctor, Dr. Kanos, the carrier failed to provide this CT Myelogram and the claimant underwent that examination on his own the results of which are located at Clmt. APA 6 and incorporated herein by reference.

The claimant then returned to the workers' compensation carrier-selected physician, Dr. Kanos, but this time at his own expense. Clmt. APA, p. 155e. In that appointment, Dr. Kanos opined that the claimant was in need of a L5-S1 decompression and a left L4-5 foraminotomy Clmt APA, p. 155c-d. In addition, Dr. Kanos completed another questionnaire indicating that Mr. Cook had sustained a change of condition for the worse as he needs additional medical treatment. See Clmt APA, p. 155a.

In addition to these authorized physicians (Dr. Rodriguez and Dr. Kanos), the claimant also treated with Dr. Phillip LaTourette, the authorized treating physician for Mr. Cook's pain management. After reviewing the reports from Rodriguez and Kanos, Dr. LaTourette concurred that Mr. Cook had sustained a change of condition for the worse. Clmt. APA, p. 128a.

The defendants submitted a surveillance video received without objection wherein the claimant works under the hood of a vehicle for approximately 1 hour and moves a commercial car jack in the video. The video was taken approximately 9-10 months prior to the hearing. See Defendants' APA and the Hr. Tr. testimony of the claimant generally.

On cross examination, claimant testified that he was offered a light duty position by the employer before the hearing with Commissioner Wilkerson June 8, 2011 but to date he has not contacted the employer with respect to that light duty position. See Hr. Tr. generally.

V. FINDINGS OF FACT

1. In an admitted accident on September 17, 2007, Claimant injured his back (resulting in bilateral radiculopathy) and sustained admitted psychological overlay. He alleges that (a) he has sustained a change of condition for the worse; or alternatively, (b) Defendants should be required to provide the surgery recommended for Claimant as a *Dodge*/future medical.
2. Claimant is 33 years of age (medical evidence establishing Claimant's date of birth as 4/26/80).
3. Prior to the hearing with Commissioner Wilkerson, Claimant (a) underwent two lumbar surgeries for a "large" herniated disc; and (b) failed a spinal cord stimulator trial (Claimant's APA #1, pages 3, 7, 11, and 19).
4. Commissioner Wilkerson awarded Claimant permanency benefits to the spine (25%) on June 8, 2011. I base this finding on the Commission's file (See also Claimant's APA #7).
5. Defendants paid the permanency award on June 27, 2011.
6. Claimant's counsel (Mr. Gagne) timely filed a Form 50 on May 9, 2012, alleging a change of condition for the worse. Attached to the Form 50 was an opinion from Dr. Rana that Claimant has sustained a change of condition for the worse (Claimant's APA #8).
7. On May 17, 2013, Claimant's current counsel (Mr. Montgomery) filed a Form 50 requesting a hearing on the change of condition for the worse (Claimant's APA #9).
8. Pursuant to Section 42-17-90 and a sequential review of the treatment records dated after the hearing before Commissioner Wilkerson, I find that Claimant's lumbar spine condition has significantly worsened: after the permanency award was paid, Claimant's

back and leg pain increased, and a cane was prescribed for “antalgic gait and leg weakness.” Claimant’s medications were no longer relieving his pain, and were therefore changed/increased. Treatment records note that (a) morphine was having “very little effect,” (b) Claimant’s Waddell’s signs were consistently “0/5,” and, most importantly, (c) Claimant has “*severe [post-surgical] scar tissue formation.*” Claimant has also undergone multiple injections since the date of the permanency award, and he requested another surgical consult/opinion in December 2011. As all these records are from authorized providers, Defendants had notice of Claimant’s worsening condition as well as notice of his request for another surgical opinion (e.g., Claimant’s APA #1, pages 5-6, 8, 10, 13, 21, 26, 33, 36, 38-39, 45, 48, 50, 53, 57, 59, 75, 80, 85, 97, 102, 108, 110, 114, and 116; *See also* Claimant’s APA #3, page 143).

9. Three authorized physicians state that Claimant has sustained a change of condition for the worse, and that Claimant needs further surgery. There is no competing questionnaire or evidence to the contrary (medical evidence in its entirety, including but not limited to Claimant’s APA #1, pages 128-128A; Claimant’s APA #3, pages 136, 143, and 146; Claimant’s APA #5, pages 155, 155A, and 155D).
10. The questionnaires referenced *supra* are clearly supported by the treatment records in evidence, and I therefore accord the questionnaires great weight (medical evidence in its entirety).
11. At the hearing, Claimant appeared to be in genuine discomfort, a presentation which did not appear to be feigned or contrived. I considered the fact that Dr. Kanos found some “exaggerated response” during his exam of Claimant, but given the fact that there is objective pathology after both an MRI and a CT myelogram (such that three physicians, including Dr. Kanos, recommend surgery), I find that Claimant may be merely appealing for help. Moreover, Claimant has not exaggerated his condition to authorized treating physicians; in fact, the opposite is true. To treating physicians, Claimant volunteered the fact that he went out to dinner and a movie with his son, and that he is “trying to do some walking and he is praised.” If Claimant were being untruthful about his condition, it would have been far more expedient for him to claim he cannot go anywhere or do anything (Claimant’s APA #1, pages 122 and 126; observations of the undersigned; medical evidence in its entirety; Commission file containing pleadings and Orders).
12. Surgery was not a future medical ordered by Commissioner Wilkerson. Although there is no dispute that Claimant now needs surgery, I am unable to order surgery as a future medical under Commissioner Wilkerson’s Order (*See* ORDER language, page 16 of Commissioner Wilkerson’s Order, which limits future medicals to those listed on the Form 14B).
13. Claimant has not reached maximum medical improvement, a finding I base on the opinions of three authorized physicians (e.g., Claimant’s APA #1, page 128A).
14. Claimant shall receive reimbursement for his \$25 filing fee, such that he is not charged or responsible for the cost of his Motion to Compel (Claimant’s APA #10).
15. Claimant shall receive reimbursement for the CT Myelogram and visits with Dr. Kanos:

Dr. Kanos (Defendants' IME) requested a CT Myelogram prior to rendering a surgical opinion. Once Dr. Kanos reviewed the results of the CT Myelogram, he agreed that Claimant needs surgery, although Dr. Kanos does not recommend fusion surgery (Claimant's APA #5, pages 155, 155A, and 156; Claimant's APA #6, pages 156-157).

16. Dr. Kanos is hereby named the treating surgeon. He is very familiar with Claimant's spinal condition, and his surgical approach in Claimant's case is more conservative than that recommended by other physicians in this case.
17. Permanency is premature.
18. I find that the opinion from Dr. Rana is not inadmissible. Dr. Rana's physical examination mentions the lumbar spine no fewer than 5 times, and he opines that Claimant sustained a change of condition to the spine. Whether or not Dr. Rana found Claimant to be at maximum medical improvement is not dispositive any more than is a statement by a physician to a reasonable degree of medical certainty that a claimant has sustained a repetitive trauma injury. Otherwise, the Commission's involvement would be unnecessary. Dr. Rana does opine that Claimant has an "additional" problem of thoracic spine involvement; whether or not the Commission or any other physician agrees with that statement is a merits issue for adjudication. The undersigned is unwilling to "punish" Claimant for any deficiencies with regard to Dr. Rana's record/opinion, **when the authorized treatment records clearly support an opinion of a worsened condition** (Claimant's APA #2).
19. I considered Defendants' video surveillance, but it does nothing to persuade the undersigned to deviate or retreat from this decision.
20. Claimant's average weekly wage is \$846.64, yielding a compensation rate of \$564.46. I base this finding on the Order of Commissioner Wilkerson.
21. Any issue relating to TTD and permanency is held in abeyance, as the only issue before the undersigned was whether the claimant has sustained a change of condition for the worse.
22. Based upon the medical records as a whole to include Dr. Kanos' medical notes, I find that the claimant is entitled to additional medical treatment through Dr. Kanos, including but not limited to the recommended surgery, as it is causally related to the underlying injury, medically necessary and will tend to lessen the period of disability;

VI. CONCLUSIONS OF LAW

Pursuant to S.C. Code Ann. and based upon the above findings of fact, the APA submissions from all parties, I make the following Conclusions of Law:

1. Pursuant to §42-17-90, the evidence as a whole and the above findings of facts, the claimant has sustained a change of condition for worse;
2. Pursuant to §42-17-90, the evidence as a whole and the above findings of facts, claimant's previous counsel timely filed an application for a change of condition;
3. All applicable time limits in S.C. Code Ann., §42-17-90 were tolled, or satisfied, when claimant filed his Form 50 on or about May 9, 2012;
4. Pursuant to §42-17-90, the evidence as a whole, the above findings of fact and the case of Young v. Tide Craft, Inc. Dr. Rana's opinion was based enough on fact to create an issue as to the merits to be adjudicated at this hearing and does not preclude the claimant from now pursuing a change of condition request;
5. Pursuant to the South Carolina case of Allen v. Benson Outdoor Advertising Co. 236 S.C. 22; 112 S.E2d 722 (1960) this case at bar is not precluded from being brought for a change of condition. The undersigned Commissioner notes the language within the Allen case which allows for "the filing of a claim for further compensation within the statutory period" is enough and that loss of jurisdiction by the commission would be an *absurd* result which legislature certainly did not have in mind. Id. at 30;
6. Pursuant to §42-15-60, the claimant is entitled to additional medical treatment with Dr. Charles Kanos as this treatment is medically necessary, casually related and will tend to lessen the period of disability;
7. Pursuant to §42-15-60, all medical treatment with Dr. Kanos was causally related, medically necessary and would tend to lessen the period of disability. Claimant is entitled to reimbursement of any and all expenses and co-pays associated with this treatment;

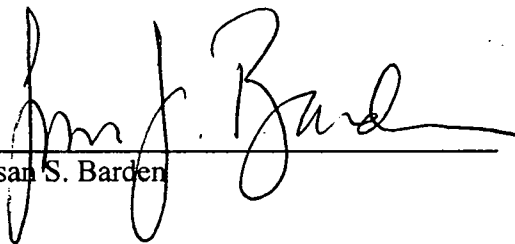
8. Pursuant to Title 42 of the South Carolina Code Annotated, et. seq., all issues not addressed herein are hereby held in abeyance, including but not limited to additional permanency.

VII. ORDER

IT IS, THEREFORE, ORDERED that the Findings of Fact and Conclusions of Law are incorporated herein verbatim and this Order is based upon the above cited Findings of Fact and Conclusions of Law. It is further Ordered:

1. The defendants shall reimburse the claimant his \$25.00 fee associated with the Motion to Compel and previously ordered by Order of the Commission;
2. The defendants shall reimburse the claimant for any and all expenses associated with the medical treatment as directed by or provided by Dr. Charles Kanos;
3. The defendants shall provide ongoing medical care through Dr. Charles Kanos;
and
4. All other issues not addressed herein are hereby held in abeyance pending a final order of the Commission.

AND IT IS SO ORDERED.



Susan S. Barden

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).

November 25, 2013

By: Kristi Love, Administrative Assistant to Commissioner Barden