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SC Court of Appeals

**DECISION AND ORDER  
BEFORE THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION  
APPELLATE PANEL**

WCC FILE 0904248

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WILLIE MOULTRIE,

Claimant/Appellant,

vs.

CHARLESTON COUNTY SCHOOL DISTRICT,

Employer/Self-Insured,  
Respondent.

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Appellate Panel Review  
Columbia, South Carolina  
February 18, 2014

Appellate Panel Decision & Order filed

on \_\_\_\_\_, 2014.

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**AFFIRMED IN FULL**

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Steven E. Goldberg of The Steinberg Law Firm, LLP, on behalf of Claimant/Appellant.

Leslie M. Whitten of Young Clement Rivers LLP, on behalf of Employer/Respondent.

This matter was heard before the Appellate Panel of the South Carolina Workers' Compensation Commission on an appeal filed by the Claimant. This matter was set for a hearing before the Jurisdictional Commissioner on August 19, 2013, based upon a Form 50 change of condition claim filed by the Claimant. The Claimant sustained an admitted injury to his lower back on March 26, 2009. The parties agreed that the Claimant reached Medical Maximum Improvement on February 15, 2010 and resolved his claim on a Form 16A for 14% to the back on January 12, 2011.

Subsequently, the Claimant filed a Form 50 hearing request on November 23, 2011, alleging he sustained injuries to his lower back, left leg and right leg. The Employer/Self-Insured timely filed a Form 51 on December 22, 2011, admitting the Claimant's lower back injury but denying that the Claimant had proven any physical change of condition since the last date of payment of compensation on January 14, 2011.

This matter was heard before the Single Commissioner on August 19, 2013, pursuant to notice timely and properly given to all parties of record. At the hearing, the Claimant alleged a change of condition and requested temporary total disability benefits and a finding that he was permanently and totally disabled. The Defendant denied that the Claimant had proven a change of condition and further denied that the Claimant would be entitled to any further indemnity benefits.

In his Order dated November 1, 2013, the Single Commissioner found that the Claimant had proven a physical change of condition for the worse. However, he found that the Claimant was not entitled to any temporary total benefits because he voluntarily retired. Finally, he found that the Claimant had suffered an additional 20% disability to his spine.

On November 12, 2013, the Claimant's attorney filed a Form 30 request for appeal, alleging that the Single Commissioner erred in not awarding past temporary total disability and in only awarding the Claimant a disability award of 20% of the back.

### **ORDER OF SINGLE COMMISSIONER**

The hearing in this matter was held on August 19, 2013. The Hearing Commissioner found as follows:

#### **FINDINGS OF FACT**

1. I find that the Claimant sustained an admitted injury by accident to his back while in the course and scope of his employment on March 26, 2009.
2. I find the Claimant has an average weekly wage of \$621.40 giving him a compensation rate of \$414.29.
3. I find that the Hearing held on August 19, 2013 was done in the proper venue with notices timely delivered to all parties of interest.
4. I find that instructions for the Order were sent to the parties on September 5, 2013.
5. It should also be noted that the parties requested and received a clarification of the notes on September 25, 2013.
6. I find that the Claimant previously reached Medical Maximum Improvement on March 26, 2010 and resolved his claim on a WCC Form 16A for 14% of the back on January 12, 2011.
7. I find that the Claimant timely filed his WCC Form 50 alleging a worsening of condition.
8. I find that the Claimant has, in fact, had a worsening of his condition. This finding is based on the MRI performed after the original date of Medical Maximum Improvement, the Doctor's written notes, and deposition testimony of the authorized treating physician.
9. I find that the Claimant did not reach Medical Maximum Improvement again until October 30, 2012 as stipulated by the parties.

10. I find that the Claimant is receiving Social Security retirement since February 2011.
11. I find that the Claimant voluntarily retired from his job on June 4, 2011.
12. I find that the report of James R. Myers, Vocational Expert on behalf of the Defendants, is not reliable as to job search after complete review of the deposition and report itself.
13. I find that the Claimant's vocational assessment of David R. Price would be a valid assessment of taking into consideration his inability to work combined with his educational background.
14. I find that the Claimant can not return to work with his previous employer and will be unable to find employment with his limited education and work due to lifting restrictions and weight limitations.
15. I find, however, since the Claimant retired voluntarily, he would not be entitled to back temporary total benefits.
16. I find that the Claimant's impairment rating increased from 6.7% to 8%.
17. I find that the Claimant is entitled to ongoing medical treatment so long as lessens his period of disability in accordance with Dr. Keffer's WCC Form 14b.
18. I find the Claimant has sustained an additional 20% impairment to his spine.

### CONCLUSIONS OF LAW

Based upon the findings of fact set forth above, the undersigned Commissioner makes the following conclusions of law as required by S.C. Code Anno., § 42-17-40:

1. The Claimant must establish facts that entitle him to an award by the preponderance of the evidence. Walsh v. U.S. Rubber Co., 120 S.E.2d 685 (S.C. 1961); Herndon v. Morgan Mills, Inc., 143 S.E.2d 376 (S.C. 1965). The Claimant has met his burden of proving his claim by the preponderance of the evidence.

2. Under S.C. Code Anno., § 42-1-130, the Claimant was an employee, and under S.C. Code Anno., § 42-1-130, the Defendant Employer was an employer covered under the Act at the time of the Claimant's injuries.

3. Under S.C. Code Anno., § 42-1-160, it is admitted and the Claimant established by the preponderance of the evidence that he sustained a compensable injury by accident to his lower back arising out of and in the course of his employment with the Employer on March 26, 2009.

4. Under S.C. Code Anno., § 42-15-20, the Claimant gave timely and proper notice of his injury to the Employer.

5. Under S.C. Code Anno., § 42-15-40, the Claimant timely filed his claim within two (2) years of his admitted accident.

6. Under S.C. Code Anno., § 42-15-60 the Claimant received medical care and treatment reasonably required to lessen his disability.

7. Under S.C. Code Anno., § 42-1-40, 42-1-50, and 42-9-10 the Claimant has a compensation rate of \$414.29.

8. Under S.C. Code Anno., § 42-15-60 (B) the claimant timely filed his claim for a worsening of condition and that the Claimant has met his burden of proof showing he has had a physical worsening of his condition.

9. Under S.C. Code Anno., § 42-9-30 the Claimant has sustained a disability to his spine.

### **ORDER**

Based on the foregoing findings of fact and conclusions of law it is hereby:

**ORDERED** that the Claimant sustained an injury by accident to his back on March 26, 2006; it is further

**ORDERED** that the Claimant sustained a physical worsening of his condition within a year of his resolving the initial claim on Form 16A; it is further

**ORDERED** that the Claimant did not reach Medical Maximum Improvement until October 30, 2012; it is further

**ORDERED** that the Defendants shall be responsible for all medical treatment by the authorized treating physicians; it is further

**ORDERED** the Claimant is not entitled to past Temporary Total benefits because he retired from his job; it is further

**ORDERED** that the Claimant has sustained a 20% disability to his spine and that the Defendants would therefore owe the Claimant the amount of \$24,857.40, it is further

**ORDERED** that the Claimant is entitled to ongoing medical treatment as recommended by Dr. Keffer in his signed 14B so long as such treatment continues to lessen the period of his disability

**AND IT IS SO ORDERED.**

No hearing costs are assessed.

### **APPEAL TO APPELLATE PANEL**

In his appeal to the Appellant Panel, the Claimant respectfully submits the following:

1. The Hearing Commissioner erred in failing to award past temporary total benefits. The err being the only evidence in the record shows the Claimant was unable to perform the duties of his job and was not at Medical Maximum Improvement during the time period that temporary benefits should have been paid.
2. The Hearing Commissioner erred in not awarding back temporary total benefits. The err being that the Commission's findings were contradictory to such an award in so much that the Commissioner found the Claimant was unable to work and unable to return to his previous job.
3. The Hearing Commissioner erred in finding that since the Claimant retired voluntarily he would not be entitled to back temporary total benefits. The err being that no case law or statutory law supports such a finding.
4. The Hearing Commissioner erred in stating the Claimant had only sustained a 20% disability to his spine. The err being that the only evidence in the record was that the Claimant had sustained a 50% or more loss of use of his back.
5. The Hearing Commissioner erred in not awarding the Claimant total and permanent disability. The err being that the evidence in the record supported that the Claimant has sustained a 50% loss of use of his back and therefore would be deemed totally and permanently disabled under the Workers' Compensation Act.
6. The Hearing Commissioner erred in only awarding a 20% permanent disability. The err being that such a finding was contradictory to other findings by the Commission which stated the Claimant was unable to return to work his previous employer and will be unable to find new employment with his limited education.

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. § 42-17-50 (1983), weigh the evidence as presented at the initial hearing, and if grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. Based upon a review of the foregoing, and by way of a full affirmation of the Findings and Conclusions of the Hearing Commissioner, we enter the following Findings of Fact and Conclusions of Law:

#### **FINDINGS OF FACT**

1. We find that the Claimant sustained an admitted injury by accident to his back while in the course and scope of his employment on March 26, 2009.
2. We find the Claimant has an average weekly wage of \$621.40 giving him a compensation rate of \$414.29.
3. We find that the Hearing held on August 19, 2013 was done in the proper venue with notices timely delivered to all parties of interest.
4. We find that instructions for the Order were sent to the parties on September 5, 2013.
5. It should also be noted that the parties requested and received a clarification of the notes on September 25, 2013.
6. We find that the Claimant previously reached Medical Maximum Improvement on March 26, 2010 and resolved his claim on a WCC Form 16A for 14% of the back on January 12, 2011.

7. We find that the Claimant timely filed his WCC Form 50 alleging a worsening of condition.

8. We find that the Claimant has, in fact, had a worsening of his condition. This finding is based on the MRI performed after the original date of Medical Maximum Improvement, the Doctor's written notes, and deposition testimony of the authorized treating physician.

9. We find that the Claimant did not reach Medical Maximum Improvement again until October 30, 2012 as stipulated by the parties.

10. We find that the Claimant is receiving Social Security retirement since February 2011.

11. We find that the Claimant voluntarily retired from his job on June 4, 2011.

12. We find that the report of James R. Myers, Vocational Expert on behalf of the Defendants, is not reliable as to job search after complete review of the deposition and report itself.

13. We find that the Claimant's vocational assessment of David R. Price would be a valid assessment of taking into consideration his inability to work combined with his educational background.

14. We find that the Claimant cannot return to work with his previous employer and will be unable to find employment with his limited education and work due to lifting restrictions and weight limitations.

15. We find, however, that since the Claimant retired voluntarily, he would not be entitled to back temporary total benefits.

16. We find that the Claimant's impairment rating increased from 6.7% to 8%.

17. We find that the Claimant is entitled to ongoing medical treatment so long as lessens his period of disability in accordance with Dr. Keffer's WCC Form 14b.

18. We find the Claimant has sustained an additional 20% impairment to his spine.

### CONCLUSIONS OF LAW

The following sections of the South Carolina Code of Laws give the appropriate definitions and provisions of the South Carolina Workers' Compensation Act as applicable to this case:

1. The Claimant must establish facts that entitle him to an award by the preponderance of the evidence. Walsh v. U.S. Rubber Co., 120 S.E.2d 685 (S.C. 1961); Herndon v. Morgan Mills, Inc., 143 S.E.2d 376 (S.C. 1965). The Claimant has met his burden of proving his claim by the preponderance of the evidence.

2. Under S.C. Code Anno., § 42-1-130, the Claimant was an employee, and under S.C. Code Anno., § 42-1-130, the Defendant Employer was an employer covered under the Act at the time of the Claimant's injuries.

3. Under S.C. Code Anno., § 42-1-160, it is admitted and the Claimant established by the preponderance of the evidence that he sustained a compensable injury by accident to his lower back arising out of and in the course of his employment with the Employer on March 26, 2009.

4. Under S.C. Code Anno., § 42-15-20, the Claimant gave timely and proper notice of his injury to the Employer.

5. Under S.C. Code Anno., § 42-15-40, the Claimant timely filed his claim within two (2) years of his admitted accident.

6. Under S.C. Code Anno., § 42-15-60 the Claimant received medical care and treatment reasonably required to lessen his disability.

7. Under S.C. Code Anno., § 42-1-40, 42-1-50, and 42-9-10 the Claimant has a compensation rate of \$414.29.

8. Under S.C. Cod Anno., 42-15-60 (B) the claimant timely filed his claim for a worsening of condition and that the Claimant has met his burden of proof showing he has had a physical worsening of his condition.

9. Under S.C. Code Anno., 42-9-30 the Claimant has sustained a disability to his spine.

### **ORDER**

Based on the foregoing findings of fact and conclusions of law it is hereby:

**ORDERED** that the Claimant sustained an injury by accident to his back on March 26, 2006; it is further

**ORDERED** that the Claimant sustained a physical worsening of his condition within a year of his resolving the initial claim on Form 16A; it is further

**ORDERED** that the Claimant did not reach Medical Maximum Improvement until October 30, 2012; it is further

**ORDERED** that the Defendants shall be responsible for all medical treatment by the authorized treating physicians; it is further

**ORDERED** the Claimant is not entitled to past Temporary Total benefits because he retired from his job; it is further

**ORDERED** that the Claimant has sustained a 20% disability to his spine and that the Defendants would therefore owe the Claimant the amount of \$24,857.40, it is further

**ORDERED** that the Claimant is entitled to ongoing medical treatment as recommended by Dr. Keffer in his signed 14B so long as such treatment continues to lessen the period of his disability;

No hearing costs are assessed.

**AND IT IS SO ORDERED.**

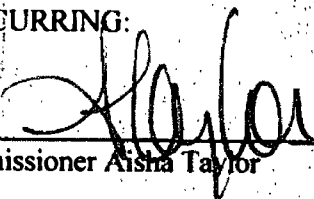
SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION

By:



Commissioner Gene McCaskill

CONCURRING:

  
\_\_\_\_\_  
Commissioner Aisha Taylor

**DISSENT**

In reviewing the evidence in this case, including the deposition testimony, transcript testimony, the Findings of Fact, and arguments of counsel, it is clear that the Claimant should have been found to have sustained a 50% loss of more use to his back

and should have been found totally and permanently disabled under the Workers' Compensation Act.

The Claimant has a sixth (6<sup>th</sup>) grade education, has severe lifting restrictions, and was not able to return to the job that he had held for over twenty (20) years. He has substantial lifting and weight restrictions, which, by the Defendants' own admission, forced him to leave the facility where he worked alone to another facility where he needed help from his co-workers. The uncontroverted testimony was the Claimant, while at the new facility, only used a walkie-talkie and never engaged in physical activity. Furthermore, the Claimant "retired" at the suggestion of his supervisors, so, in essence he was asked to leave.

While the Claimant's impairment rating appears to be relatively low, the Claimant has severe restrictions which should be given great weight. Just because the Claimant did not have to go through a surgical procedure which would have increased his impairment rating does not mean the Claimant can return to work.

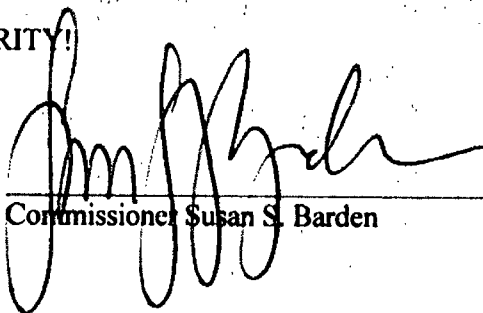
It is the job of the Commission to assess Claimant's disability and to give a rating with the restrictions placed upon him to include all factors including the Claimant's age, work history, educational background, and if there would be any jobs in the market that the Claimant could sustain employability. As the Single Commissioner found, there were no other jobs available to the Claimant. This finding was upheld, and thus can only lead to an assumption of total disability. Therefore, the 20% rating appears to be indirect conflict with the evidence and Findings of Fact as stated by the Single Commissioner and upheld in the majority decision.

Evidence of whether or not the Claimant had the ability to find employment in the market place would be contained within the vocational reports. Not only did the Single Commissioner find that the Defendants' vocational report was "not reliable," is clear in reviewing the deposition that Defendants' vocational expert that his opinions were flawed, without context, and did not actually list available jobs in the area that the Claimant would be able to sustain.

Seeing that all the evidence and the subsequent findings lead to the conclusion that the Claimant is totally and permanently disabled; and being no evidence supporting he would be able to return to the workforce in any capacity, I would disagree with the conclusions of law and the assessment of disability put forth by the majority.

It appears clear that the claimant had sustained a fifty (50%) loss of use of the back and that the Claimant is totally and permanently disabled under the act. Thus

**I SO DISSENT WITH THE MAJORITY!**



Commissioner 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).

***By Kim Falls on June 24, 2014***