

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1008485

Rusty Lowery,

vs.

Pioneer Associates,

AND

Chartis Casualty Co.,

CLAIMANT
RESPONDENT/APPELLANT,

EMPLOYER,

CARRIER, DEFENDANTS
APPELLANTS/RESPONDENTS.

Appellate Panel Review held in Columbia, South Carolina,
on March 17, 2014 per notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed

June 16, 2014

APPEARANCES:

Rusty Lowery, Claimant of Boiling Springs, South Carolina
represented by Chadwick D. Pye and David A. Wilson.

Defendants represented by Katharine D. Phipps, Esquire of
Willson Jones Carter & Baxley, P.A. in Greenville, South
Carolina.

STATEMENT OF THE CASE

The parties were heard by Commissioner Andrea C. Roche, on May 22, 2013, in Spartanburg, South Carolina. On September 26, 2013, she issued a Decision and Order. The Single Commissioner's Decision and Order set forth the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT OF THE SINGLE COMMISSIONER

IT IS FOUND AS A FACT:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Rusty Lowery as Employee-Claimant and Pioneer Associates as Employer and Chartis Casualty Co as Carrier, Defendants.
2. The Claimant did not appear for the hearing and failed to testify on his own behalf. This finding is based on the observations of the undersigned.
3. Casey Collier is an agent for SLED. This finding is based on the testimony at the hearing.
4. Ms. Collier is qualified to testify as an expert in drug enforcement. This finding is based on the testimony at the hearing.
5. In March 2012, Claimant was arrested for selling illegal drugs to a confidential informant that worked for Ms. Collier. This finding is based on the testimony at the hearing.
6. Claimant has outstanding warrants for his arrest related to illegal drug charges. This finding is based on the testimony at the hearing.
7. Claimant has used methamphetamine after the date of accident in this matter. This finding is based on the deposition testimony of the Claimant, pages 44-47 and page 197 of the

deposition.

8. Claimant was also involved with illegal drugs, specifically methamphetamine, before the accident. This finding is based on the Claimant's deposition testimony and the exhibits of the Defendants' APA submissions.

9. Based on the medical records, I find the Claimant sustained an injury to his face, head, and neck in the admitted accident.

10. Based on the medical records, I find the Claimant did sustain a brain injury. This finding is based in part on the documented visual field loss as a result of the injury.

11. Claimant exaggerated his symptoms in his neuropsychological testing. This finding is based on the neuropsychological report from Dr. Williams.

12. Subsequent to the accident, Claimant entered into an agreement to work as a confidential informant with SLED, to set up a buy of methamphetamine with some drug dealers out of Atlanta, and, to this point, evade arrest for his pending warrants, all of which indicate a level of independent function and decision-making. This finding is based on the evidence and testimony.

13. Based on the totality of the evidence, I find the Claimant's brain injury is mild and not severe.

14. The Claimant has medium/light duty restrictions based on his cervical surgery. This finding is based on the medical records.

15. According to the credible testimony of the witness from the employer, the Claimant worked for many months after the accident, and performed his duties as usual. He appeared to be fine and was not having any problems.

16. According to the credible testimony of the witness from the employer, the employer

would have accommodated the Claimant's permanent restrictions.

17. According to Mr. Messer, the Claimant could have received anywhere from \$15-\$18 per hour for light/medium duty.

18. The Defendants submitted a vocational report that stated the Claimant could expect to earn from \$15,080-\$15,600 per year with his restrictions.

19. I find the Claimant has sustained permanent partial wage loss.

20. If the Claimant stayed with his employer, he could earn \$15 per hour, but if the employer lost that job for whatever reason, he may not be able to earn that amount. Therefore, I find the Claimant's after-injury average weekly wage to be \$450.

21. The difference between Claimant's pre-injury average weekly wage and post-injury average weekly wage is \$728.80.

22. Based on the medical records, I find the Claimant reached MMI on October 30, 2012.

23. As of March 19, 2013, when the Form 21 was filed, the Claimant's entitlement to temporary disability benefits ended.

24. The Defendants are entitled to a credit of temporary total disability benefits paid after March 19, 2013 against any permanent disability award. This credit will continue to accrue until permanent partial benefits begin. This finding is based on the evidence as a whole.

25. Because there is strong evidence of illegal drug use, including the claimant's own sworn testimony, I find a lump sum payment of permanent disability benefits to be contrary to the Claimant's interests.

26. Any attorney's fee or costs due to the Claimant's attorney may be paid in a lump sum. Defendants are entitled to deduct the number of weeks his fees and costs amount to off the

back end of the award and adjust the claimant's weekly benefits accordingly when the fee request is submitted and affirmed by the Commission.

27. Defendants are entitled to reduce Claimant's weekly benefit payment to recoup their overpayment of TTD pro rata over the 340-week award.

28. The Claimant is entitled to future pain management as recommended by Dr. Chittum that is causally-related to the admitted accident.

CONCLUSIONS OF LAW OF THE SINGLE COMMISSIONER

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.

2. Under § 42-1-160, Claimant sustained compensable injuries to the face, head, neck, and brain.

3. Under § 42-9-10 and 42-9-20, Defendants have paid any temporary benefits due.

4. Under § 42-15-60, Defendants have provided reasonable and adequate medical, surgical, hospital and other authorized treatment.

5. Under § 42-9-20, Claimant has sustained permanent partial wage loss, and two-thirds of the difference between the pre-injury average weekly wage and post-injury average weekly wage which is \$485.89.

6. Under § 42-9-210 and *Curriel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007), Claimant's entitlement to temporary total disability benefits ended as of March 19, 2013 and Defendants are entitled to a credit for temporary total disability paid subsequently against the permanency award as shown herein, which shall be taken in a pro rata

amount weekly.

7. The Claimant's attorney is entitled to be paid his fee in a lump sum. He is also entitled to his costs. Defendants are entitled to take a credit for his fee off the back end of the award and adjust the claimant's weekly benefits, if necessary, when the fee request is submitted and affirmed by the Commission.

8. Under § 42-15-60 the Claimant is entitled to future pain management per Dr. Chittum.

9. Under § 42-9-301, Claimant's request for lump sum benefits is denied.

ORDER/AWARD OF THE SINGLE COMMISSIONER

IT IS HEREBY ORDERED that as a result of Claimant's accidental injury occurring on July 9, 2010, Claimant has sustained permanent partial wage loss as set forth herein.

IT IS FURTHER ORDERED that Defendants are entitled to a credit for payment of temporary total disability benefits and attorney's fees and costs as set forth herein.

IT IS FURTHER ORDERED that Defendants shall pay weekly permanent partial disability benefits as set forth herein.

IT IS FURTHER ORDERED that Claimant is entitled to future medicals benefits under *Dodge* as set forth herein.

No hearing costs are assessed in this instance.

IT IS SO ORDERED.

Within the statutory period, the parties filed respective Applications for Review alleging the following assignments of error:

For the Claimant:

1. In stating that the hearing was on the Forms 50 and 51 only and not on the Defendant's Form 21. The hearing transcript reveals that this case went forward on all three forms.
2. In finding as a fact that the Claimant was arrested for selling illegal drugs to a confidential informant that worked for Ms. Collier, the error being that criminal charges are irrelevant to the workers' compensation claim. There was no evidence of any convictions relevant to the evidence only irrelevant drug charges that were improperly discussed at the hearing and admitted into evidence. The Claimant is presumed innocent of any "charges"; therefore, they cannot be used against him.
3. In finding as a fact that the Claimant has outstanding warrants for his arrest related to illegal drug charges, the error being that criminal CHARGES are irrelevant to the workers' compensation claim. There was no evidence of any convictions of Mr. Lowery.
4. In finding as a fact that the Claimant has used methamphetamine after the date of accident in this matter, the error being that criminal charges and unsubstantiated drug use is irrelevant to the workers' compensation claim unless he was intoxicated at the time of the accident and that is what caused his accident. There was no testimony or evidence introduced at the hearing that drug used occurred after the accident and no allegation that it caused the accident.
5. In finding as a fact that the Claimant was involved in illegal drugs, specifically methamphetamine, before the accident and after the accident, the error being pending criminal charges and alleged drug use is irrelevant to workers' compensation claim. There was no testimony or evidence introduced at the hearing on this issue.
6. In finding as a fact that the Claimant exaggerated his symptoms in his neuropsychological testing, the error being the preponderance of the evidence fails to support such a finding. The overwhelming evidence is contrary to this finding.
7. In finding as a fact that Claimant entered into an agreement to work as a confidential informant with SLED to set up a buy of methamphetamine with some drug dealers out of Atlanta, and to this point evade arrest for his pending warrants all of which indicate a level of independent function and decision making, the error being that criminal charges are irrelevant to the workers' compensation claim. There was no evidence introduced that Claimant set up a drug deal or that he is or has evaded arrest. The overwhelming evidence is contrary of this finding and the transcript reveals that the Commission even stated that Claimant's rebuttal witness was not needed to show financial and decision making ability based on the lack of evidence to the contrary.

8. In finding as a fact that the Claimant's brain injury is mild and not severe, the error being the preponderance of the evidence fails to support such a finding. The overwhelming evidence contradicts this finding, including the defendant's own authorized treating physicians.

9. In finding as a fact that according to a credible witness, the Claimant worked for many months after the accident and performed his duties as usual; the error being the overwhelming evidence fails to support such a finding. The evidence showed that the witness was not credible and the Commissioner improperly excluded an email signed by the witness which directly contradicted his testimony.

10. In finding as a fact that Employer would have accommodated the Claimant's permanent restrictions, the error being the preponderance of the evidence fails to support such a finding. The Commissioner improperly refused to accept into evidence an e-mail signed by the Employer witness which directly contradicts this finding.

11. In finding as a fact that Claimant could have received anywhere from \$15-\$18 per hour for light/medium duty, the error being the preponderance of the evidence fails to support such a finding.

12. In finding as a fact that Claimant has sustained permanent partial wage loss, the error being the preponderance of the evidence fails to support such a finding.

13. In finding as a fact that Claimant reached MMI on October 30, 2013; the error being the preponderance of the evidence fails to support such a finding.

14. In finding as a fact that Employer is entitled to a credit of temporary total disability benefits paid after March 19, 2013; the error being the overwhelming evidence introduced is completely contradictory to such a finding and there was no credible evidence to support the finding.

15. In concluding that Claimant has sustained permanent partial wage loss and two-thirds of the difference between the pre-injury average weekly wage and post injury average weekly wage which is \$485.89, the error being the overwhelming evidence introduced is completely contradictory to such a finding and there was no credible evidence to support the finding.

16. In concluding that Claimant's entitlement to temporary total disability benefits ended as of March 19, 2013 and Employer is entitled to a credit for temporary total disability paid subsequently against the permanency award as shown herein, which shall be taken in pro rata amount weekly; the error being the overwhelming evidence introduced is completely contradictory to such a finding and there was no credible evidence to support the finding.

17. In concluding that Claimant's request for lump sum benefits is denied; the error being the overwhelming evidence introduced is completely contradictory to such a finding and there was no credible evidence to support the finding.

18. The Commissioner relies on the Claimant's deposition transcript in her findings; however, the Claimant's deposition was never turned over the Commissioner at the hearing and therefore not properly in evidence so the Commissioner cannot rely on anything in that transcript to make her ruling. Counsel for the Claimant specifically noted at the end of the hearing that the sealed transcript was not handed up; therefore, it is not relevant to the findings.

19. The Commissioner erred in allowing the Claimant's SLED report into evidence and allowing the SLED officer to testify to more than whether the Claimant made a profit as a drug dealer. The witness was to be limited to the issue of profit, however, over the officer testified way outside of that issue. On the issue of profit, the Claimant's rebuttal witness on the issue was not allowed as the Commissioner deemed her not relevant. The Claimant's witness was his elderly mother who lives next door to him and handles his finances. The SLED officer's testimony was highly prejudicial and irrelevant.

20. The Commissioner erred in ignoring the overwhelming evidence in this case that the Claimant does have permanent and severe physical brain damage as stated by the authorized treating physicians and evidenced by the objective testing done by the physicians specifically trained in this diagnosis.

For the Defendants:

1. Whether the Commissioner erred in Finding of Fact Number 9 to the extent the Finding of Fact could be construed that the Claimant had permanent injury/disability to any body part other than the neck that would support an award of permanent partial wage loss, because such finding is not supported by the preponderance of the evidence and an error of law.

2. Whether the Commissioner erred in Finding of Fact Number 10 finding Claimant sustained a brain injury, as such finding is not supported by the preponderance of the evidence and an error of law.

3. Whether the Commissioner erred in Finding of Fact Number 19 in finding that Claimant sustained permanent and partial wage loss, such finding not being supported by the preponderance of the evidence and an error of law.

4. Whether the Commissioner erred in Finding of Fact Number 20 in her assessment of the after-injury average weekly wage to be \$450.00, such that the finding is not supported by the preponderance of the evidence and an error of law.

5. Whether the Commissioner erred in failing to find Claimant's post-injury average weekly wage at \$15.00 per hour/\$600 per week at a minimum, with such a finding being supported by the testimony of Mr. Messer.

6. Whether the Commissioner erred in Finding of Fact Number 21 in her finding that the difference between the pre and post-injury average weekly wage is \$728.80, with such finding not supported by the preponderance of the evidence and an error of law.

7. Whether the Commissioner erred in failing to find that Claimant sustained a single-member injury only with permanent partial disability benefits due under the schedule in Section 42-9-30 only and precluding any recovery from permanent partial wage loss as shown by the preponderance of the evidence.

8. Whether the Commissioner erred in Conclusion of Law Number 2 to the extent that such conclusion could be construed to find permanent injury/disability to any body part other than the neck, with such conclusion unsupported by the preponderance of the evidence and an error of law.

9. Whether the Commissioner erred in ordering payment of weekly permanent partial disability benefits per South Carolina Code Ann. 42-9-20, such order not being supported by the preponderance of the evidence and an error of law.

Copies of the respective parties' alleged assignments of error were furnished to all interested parties prior to oral argument presented before the Appellate Panel on March 17, 2014.

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

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:

IT IS FOUND AS A FACT:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Rusty Lowery as Employee-Claimant and Pioneer Associates as Employer and Chartis Casualty Co as Carrier. Defendants.

2. The Claimant did not appear for the hearing and failed to testify on his own behalf. This finding is based on the observations of the undersigned.

3. Casey Collier is an agent for SLED. This finding is based on the testimony at the hearing.
4. Ms. Collier is qualified to testify as an expert in drug enforcement. This finding is based on the testimony at the hearing.
5. In March 2012, Claimant was arrested for selling illegal drugs to a confidential informant that worked for Ms. Collier. This finding is based on the testimony at the hearing.
6. Claimant has outstanding warrants for his arrest related to illegal drug charges. This finding is based on the testimony at the hearing.
7. Claimant has used methamphetamine after the date of accident in this matter. This finding is based on the record as a whole.
8. Claimant was also involved with illegal drugs, specifically methamphetamine, before the accident. This finding is based on the record as a whole.
9. Based on the medical records, we find the Claimant sustained an injury to his face, head, and neck in the admitted accident.
10. Based on the medical records, we find the Claimant did sustain a brain injury. This finding is based in part on the documented visual field loss as a result of the injury.
11. Claimant exaggerated his symptoms in his neuropsychological testing. This finding is based on the neuropsychological report from Dr. Williams.
12. Subsequent to the accident, Claimant entered into an agreement to work as a confidential informant with SLED, to set up a buy of methamphetamine with some drug dealers out of Atlanta, and, to this point, evade arrest for his pending warrants, all of which indicate a level of independent function and decision-making. This finding is based on the evidence and testimony.

13. Based on the totality of the evidence, we find the Claimant's brain injury is mild and not severe.

14. The Claimant has medium/light duty restrictions based on his cervical surgery. This finding is based on the medical records.

15. According to the credible testimony of the witness from the employer, the Claimant worked for many months after the accident, and performed his duties as usual. He appeared to be fine and was not having any problems.

16. According to the credible testimony of the witness from the employer, the employer would have accommodated the Claimant's permanent restrictions.

17. According to Mr. Messer, the Claimant could have received anywhere from \$15-\$18 per hour for light/medium duty.

18. The Defendants submitted a vocational report that stated the Claimant could expect to earn from \$15,080-\$15,600 per year with his restrictions.

19. We find the Claimant has sustained permanent partial wage loss.

20. If the Claimant stayed with his employer, he could earn \$15 per hour, but if the employer lost that job for whatever reason, he may not be able to earn that amount. Therefore, we find the Claimant's after-injury average weekly wage to be \$450.

21. The difference between Claimant's pre-injury average weekly wage and post-injury average weekly wage is \$728.80.

22. Based on the medical records, we find the Claimant reached MMI on October 30, 2012.

23. As of March 19, 2013, when the Form 21 was filed, the Claimant's entitlement to temporary disability benefits ended.

24. The Defendants are entitled to a credit of temporary total disability benefits paid after March 19, 2013 against any permanent disability award. This credit will continue to accrue until permanent partial benefits begin. This finding is based on the evidence as a whole.

25. Because there is strong evidence of illegal drug use, we find a lump sum payment of permanent disability benefits to be contrary to the Claimant's interests.

26. Any attorney's fee or costs due to the Claimant's attorney may be paid in a lump sum. Defendants are entitled to deduct the number of weeks his fees and costs amount to off the back end of the award and adjust the claimant's weekly benefits accordingly when the fee request is submitted and affirmed by the Commission.

27. Defendants are entitled to reduce Claimant's weekly benefit payment to recoup their overpayment of TTD pro rata over the 340-week award.

28. The Claimant is entitled to future pain management as recommended by Dr. Chittum that is causally-related to the admitted accident.

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. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.
2. Under § 42-1-160, Claimant sustained compensable injuries to the face, head, neck, and brain.
3. Under § 42-9-10 and 42-9-20, Defendants have paid any temporary benefits due.
4. Under § 42-15-60, Defendants have provided reasonable and adequate medical, surgical, hospital and other authorized treatment.

5. Under § 42-9-20, Claimant has sustained permanent partial wage loss, and two-thirds of the difference between the pre-injury average weekly wage and post-injury average weekly wage which is \$485.89.

6. Under § 42-9-210 and *Curriel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007), Claimant's entitlement to temporary total disability benefits ended as of March 19, 2013 and Defendants are entitled to a credit for temporary total disability paid subsequently against the permanency award as shown herein, which shall be taken in a pro rata amount weekly.

7. The Claimant's attorney is entitled to be paid his fee in a lump sum. He is also entitled to his costs. Defendants are entitled to take a credit for his fee off the back end of the award and adjust the claimant's weekly benefits, if necessary, when the fee request is submitted and affirmed by the Commission.

8. Under § 42-15-60 the Claimant is entitled to future pain management per Dr. Chittum.

9. Under § 42-9-301, Claimant's request for lump sum benefits is denied.

ORDER

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

IT IS HEREBY ORDERED that the Single Commissioner's decision is Fully Affirmed with the correction and deletion of any reference to claimant's deposition.

IT IS FURTHER ORDERED that as a result of the claimant's accidental injury occurring on July 9, 2010, Claimant has sustained permanent partial wage loss as set forth herein.

IT IS FURTHER ORDERED that Defendants are entitled to a credit for payment of temporary total disability benefits and attorney's fees and costs as set forth herein.

IT IS FURTHER ORDERED that Defendants shall pay weekly permanent partial disability benefits as set forth herein.

IT IS FURTHER ORDERED that Claimant is entitled to future medicals benefits under *Dodge* as set forth herein.

No hearing costs are assessed in this instance.

IT IS SO ORDERED.

FULL AFFIRMATION:


SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Aisha Taylor, Commissioner

CONCUR:



Scott Beck, Commissioner

Melody James, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on June 16, 2014