

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

Thomas Bradley Davis,

CLAIMANT,

vs.

Robert Bosch LLC,

Employer,

and

Zurich American Insurance Company,

Carrier

DEFENDANTS.

WCC FILE NO: 1022907

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SEP 15 2014
SC Court of Appeals

Appellate Panel Review held in Columbia, South Carolina on

June 9, 2014,

Appellate Panel Decision and Order filed on August 13, 2014

Appearances: Claimant represented by William L. Smith II.
Defendants represented by Amanda A. Mellard.

STATEMENT OF THE CASE

This case was originally heard by Commissioner T. Scott Beck on August 30, 2012 in Anderson, South Carolina. The case was tried with WCC File No. 0904601. Separate orders were issued by the Single Commissioner for the two cases. At the original hearing, Commissioner Beck found that claimant had sustained a specific disability to each upper extremity. That decision was appealed and the Appellate Panel affirmed in part, reversed in part, and remanded to the single commissioner in an order dated July 9, 2013. That order of the Appellate Panel found that claimant had proved entitlement to a wage loss award under Section §42-9-20 and remanded to the single commissioner for determination of wage loss. The Appellate Panel also allowed the submission of additional evidence on remand.

Commissioner Beck then heard the case on remand and issued an Order dated February 18, 2014. In that Order he found:

IT IS THEREFORE ORDRED that the defendants shall make the following payments:

1. Payment of \$457.25 per week for 340 weeks commencing May 17, 2011.

AND IT IS SO ORDERED.

Within the statutory period, counsel for the defendants filed a form 30 appeal in the case setting forth multiple reasons for appealing and furnished copies to all interested parties. All proffered testimony has been taken. Testimony, together with all of the documentary evidence has been delivered by oral argument to the individual members of the Appellate Panel and has since been under review and consideration.

By appeal, defendants respectfully submitted that:

1. Did the Full Commission err in finding as fact that claimant proved entitlement to an award under Section §42-9-20, meaning that he suffered wage loss and therefore, is entitled to an award under that statute for same, as the greater weight of the evidence does not support such a finding?
2. Did the Full Commission err in finding as a fact that claimant is not entitled to an award of permanent partial disability benefits pursuant to Section §42-9-30 for injuries sustained to the bilateral upper extremities but, instead, is entitled to an award under Section §42-9-20 for wage loss?
3. Did the Full Commission err in remanding this matter to the Hearing Commissioner for determination of wage loss pursuant to Section §42-9-20 when the greater weight of the evidence supports the Hearing Commissioner's initial finding that claimant did not sustain wage loss but, instead, is limited to an award under Section §42-9-30 for permanent partial disability benefits to the upper extremities?
4. Did the Full Commission err in ordering the parties may submit additional evidence at the remand hearing before the Single Commissioner where neither party requested to submit additional evidence and no motion was made to do so?
5. Did the Full Commission err in ordering that the parties may submit additional evidence at the remand hearing before the Single Commissioner where they are without authority to do so?
6. Did the Hearing Commissioner on remand err in finding as fact that claimant sustained a permanent loss of earning capacity where the greater weight of the evidence does not support same?
7. Did the Hearing Commissioner on remand err in finding that claimant's current earning capacity has been reduced to \$9.50 per hour when the greater weight of the evidence of the evidence does not support same?
8. Did the Hearing Commissioner on remand err in finding as fact that claimant is entitled to an award under Section §42-9-20 based on a pre-injury average weekly wage of \$1,065.84 and a residual earning capacity of \$380.00 per week, meaning that his earning capacity had diminished by \$685.84 per week?
9. Did the Hearing Commissioner err on remand that claimant is entitled to \$457.25 per week for 340 weeks commencing 2011?

In an Appellate Panel review, the Appellate Panel shall, pursuant to SC Code §42-17-50 (1985), review the award, weigh the evidence as presented at the initial hearing, and if good grounds be shown therefore, make its own findings of fact and reach its own

conclusions of law consistent with or inconsistent with those of the hearing Commissioner. The Commissioners considered the matter and hereby fully affirm the decision of the Single Commissioner.

DISCUSSION

The Appellate Panel issued a previous decision in this matter on July 9, 2013 finding that the claimant had sustained permanent wage loss under Section §42-9-20 and remanded to Commissioner Beck for determination of that wage loss. Further, the Appellate Panel ordered that each party could submit additional evidence. The decision of the Appellate Panel is a final decision of the Workers' Compensation Commission and under Section §1-23-380 of the Administrative Procedures Act is a final decision and can only be appealed to the Court of Appeals. We note that the defendants appealed the Appellate Panel's initial finding that claimant proved entitlement to a wage loss award as well as the Appellate Panel ruling allowing additional evidence on remand. However, those issues are not before this Panel since they are final decisions of this agency. Those issues, however, have been preserved for potential appeal to the Court of Appeals.

The only issue before this Appellate Panel is the issue of the extent of wage loss found by the Single Commissioner. In his Decision and Order, the Single Commissioner found that claimant had a pre-injury average weekly wage of \$1,065.84. He further found that claimant now has an earning capacity of \$380 per week. Thus claimant's earning capacity had been diminished by \$685.84 per week. The Single Commissioner found that claimant was entitled to two-thirds of that amount (\$457.25) for a period of 340 weeks commencing May 17, 2011. The issue before the Appellate Panel is the extent of wage loss found by the Single Commissioner.

A review of the record shows at the time of the original hearing, claimant received two vocational evaluations related to the injuries that are the subject of this claim. Both vocational evaluators determined that claimant suffered wage loss as a result of his work related injuries. Joel D. Leonard, the vocational expert hired by the employer, determined that claimant "likely had significant wage loss..." Deposition of Joel Leonard, pp 25-25. Mr. Leonard also asserted that it would be reasonable to conclude that claimant sustained a permanent loss of wage earning capacity if was no longer employed by Bosch. Deposition of Joel Leonard, p 34. The defendants hired Joel Leonard to perform a vocational evaluation and paid him \$1,000 for his services. Deposition of Joel Leonard, p. 6. After performing the evaluation, Mr. Leonard arrived at the opinion that there was significant wage loss, informed the defendants and was not asked to go further in generating a report. Deposition of Joel Leonard, pp 24-25, 34. Leonard went on to testify that claimant could currently earn as little as \$340 per week up to \$480 per week. Deposition of Joel Leonard, pp 37-41.

Also, at the original hearing, the report of Dr. Robert Brabham was entered as evidence. Dr. Brabham concluded that claimant was unable to engage in full time gainful, competitive employment as a result of his medical conditions resulting from his on the job injuries. APA, p. 13. Thus, at the original hearing both vocational experts were of the opinion that claimant had sustained permanent wage loss.

Claimant was treated by Dr. Timothy Dew. Dr. Dew noted on December 2, 2010 that claimant may need to look for a new profession since he has over-use injuries in both arms. APA, p. 45. On May 2, 2011, Dr. Dew opined that claimant had suffered a 9% impairment to the left upper extremity and an 11% impairment to the right upper

extremity. APA, p. 48. Dr. Dew also noted that claimant was subject to the following restrictions: "No repetitive gripping more than 40lbs, no repetitive pinching more than 10lbs bilaterally." APA, p. 48. Dr. Dew also opined again that "claimant may need to get a different job where he is not performing repetitive pinching." APA, p. 48.

At the remand hearing before Commissioner Beck, additional vocational reports were admitted. Dr. Brabham issued an updated report considering only the work restrictions of Dr. Dew from the on the job injury. Based on those restrictions claimant could earn only in the \$8.00 to \$10.00 per hour range (\$360 to \$400 per week). APA, p. 5. Defendants also obtained a new vocational evaluation. Defendants hired George Page who performed a vocational evaluation. Mr. Page also found wage loss. Page opined that claimant would have to start in an entry level position but may have opportunity for advancement over time in which his wage loss would not be as great. He concluded that claimant would start at the \$8.50 to \$11.00 per hour range (\$340 to \$440 per week post injury average weekly wage.)

Pursuant to SC Code Annotated §42-17-50 (1995), the Appellate Panel reviewed the award and weighed the evidence in the record as presented. The Panel also considered all issues raised in the briefs and oral arguments. The Panel makes the following as:

FINDINGS OF FACT

1. This matter is on remand from the Appellate Panel to determine wage loss under Section §42-9-20.
2. Claimant sustained injuries to two body parts and has shown that he has sustained permanent wage loss.

3. Dr. Timothy Dew placed permanent work restrictions on claimant following claimant's April 19, 2010 accident.
4. When considering those work restrictions all three vocational experts that evaluated claimant determined that he had sustained a permanent loss of wage earning capacity.
5. We find that based upon the evidence submitted by the parties that claimant's earning capacity has been reduced to \$9.50 per hour.
6. Claimant is therefore entitled to an award under Section §42-9-20 based on the following:

Claimant's pre-injury average weekly wage was \$1,065.84. Claimant now has a residual earning capacity of \$380 per week. Therefore, claimant's earning capacity has diminished by \$685.84 per week. Claimant is entitled to two-thirds of that amount (\$457.25) for a period of 340 weeks commencing May 17, 2011.

CONCLUSIONS OF LAW

1. Pursuant to Section §42-9-20, claimant has sustained a permanent loss of wage earning capacity resulting in a residual earning capacity of \$380 per week. As such, claimant is entitled to \$457.24 per week for 340 weeks commencing May 17, 2011.

After careful review in this case, the Appellate Panel of the South Carolina Workers' Compensation Commission has determined the Order of the Hearing Commissioner is hereby **AFFIRMED IN FULL**. The findings of fact and conclusions of law found in the hearing Commissioner's decision and order as specified above are hereby **AFFIRMED IN FULL**,

ORDER

It is hereby ordered that the Order of the Single Commissioner from which this appeal has been taken is hereby **AFFIRMED IN FULL**. It is further ordered that

claimant has sustained a permanent loss of wage earning capacity and is entitled to \$457.25 per week for a period of 340 weeks commencing May 17, 2011.

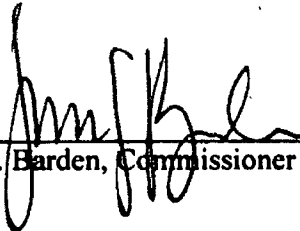
AND IT IS SO ORDERED!

S.C. WORKERS' COMPENSATION COMMISSION

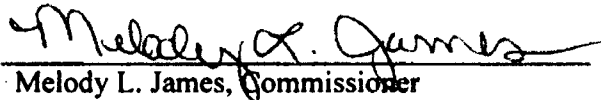


Aisha Taylor, Commissioner
For the Appellate Panel

CONCUR:



Susan S. Barden, Commissioner



Melody L. 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 August 13, 2014