

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

W.C.C. FILE NO: 1210790

Azael Rodriguez

EMPLOYEE,
CLAIMANT/RESPONDENT/APPELLANT

VS.

PACK IQ, LLC

EMPLOYER,

AND

Liberty Mutual Insurance Company

CARRIER,
DEFENDANTS/APPELLANTS/RESPONDENTS,

Appellate Panel Review held in Columbia, South
Carolina, on June 9, 2014 per notices timely
and properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

August 25th, 2014

APPEARANCES: Claimant/Respondent/Appellant represented by Stephen Garcia
Defendants/Appellants/Respondents represented by Alaina M. Beach

RECEIVED

SEP 22 2014

SC Court of Appeals

STATEMENT OF THE CASE

The parties were heard by Commissioner Gene McCaskill on November 6, 2013 in Anderson, South Carolina. On February 21, 2014, he issued the following Order:

FINDINGS OF FACT

Based upon the testimony, the workers' compensation file, and the medical evidence submitted, the undersigned Commissioner makes the following findings of fact.

1. Claimant suffered an injury to the back by accident arising out of and within the course and scope of his employment on June 27, 2012. This finding is based on the evidence in its entirety.
2. Defendants have provided medical care and treatment for his back injury. This finding is based on the evidence in its entirety.
3. Claimant also alleges injuries to both the right and left lower extremities. This finding is based on the medical records, Claimant's testimony, and the record as a whole.
4. Ultimately, the authorized treating physicians are Dr. Sung J. Han and Dr. Michael Bucci. This finding is based on the evidence in its entirety.
5. Dr. Han wrote a script on February 19, 2013, requesting an impairment rating from Dr. Carol W. Burnette, who is an associate of Dr. Han's at Piedmont Comprehensive Pain Management Group, LLC. This finding is based on Defendants' APA pp. 39-41.
6. Dr. Burnette conducted an "Impairment Evaluation" on April 19, 2013. This finding is based on Claimant's APA pp. 84-86.

7. Dr. Burnette reviewed the medical records of Dr. Han as well as Dr. Bucci, Rich Hamel, PT, Advanced Physical Therapy, ProAxis Physical Therapy, Tracy Hall, PT, and Anderson Radiology. This finding is based on Claimant's APA pp. 84-86.
8. Dr. Burnette wrote in the assessment section of the evaluation, "Based on his history, exam and using the 6th edition AMA Guides to the Evaluation of Permanent Impairment, he appears to best fit Lumbar Class I disc herniation category with non-verifiable radicular symptoms. The default whole person impairment rating would be 7%, but this value is shifted up to 9% after consideration of functional history and physical exam grade modifiers (each a value of '2'). Since the lumbar spine represents 75% of whole person function, the resulting lumbar spine impairment is 12%, calculated by dividing the whole person impairment (9%) by 0.75." This finding is based on Defendants' APA p. 47.
9. Dr. Han's assessment on June 3, 2013, as recorded in his medical note from that day:
 1. Mild lumbar stenosis with back pain, status post repeat epidural injection with no benefit.
 2. Physical therapy has been of no benefit.
 3. Work-related injury, litigation pending, work injury on June 22, 2012. (The list date of accident is actually 6/27/12.)
 4. Has seen Dr. Bucci, follow up with him on a p.r.n. basis.
 5. Is at MMI, status FCE and impairment rating.This finding is based on Defendants' APA p. 48.
10. On June 3, 2013, Dr. Burnette completes a Form 14B. That form indicates that Claimant is still at MMI as of 2/19/13. Additionally, she lists restrictions which also appear in Dr. Han's note of the same day. No lifting greater than 40 pounds occasionally. No pushing or pulling greater than 55 pounds occasionally. This finding is based on Defendants' APA p. 44.

11. As to the Claimant's assertion of injuries to both the right and left lower extremities, a review of the record as a whole simply does not support that conclusion. While there are occasional references to his legs in the records, there is the conclusion of Dr. Burnette cited above. Additionally, while she does list the legs as an affected body part on the 14B, she assigns as to percentage of medical impairment to the other body parts—"N/A"—not applicable. This finding is based on the medical records and the evidence in its entirety.
12. This is a §42-9-30 case because the disability is confined to the single scheduled member, the back. As to the assertion that this is a wage loss case, §42-9-20 requires that there be two scheduled members for a case to be a wage loss case. No one disputes that Claimant had dual employment and as a result of this injury left his other employment. While fairness might seem to indicate otherwise, the law is quite clear on this point. Wage loss recovery is not permitted under the scenario present in this case.
13. There are also two vocational evaluations as part of this record. Both have been given weight.
14. Claimant reached maximum medical improvement on February 19, 2013. This finding is based on Defendants' APA p 44 and the record as a whole.
15. When the record is viewed as a whole, Claimant, as a result of this work-related accident, has suffered a 22% disability to the back.
16. Claimant is also entitled to future medical care and treatment that might tend to lessen his disability as outlined in the 14B executed by Dr. Burnette on June 3, 2013.

17. Defendants are entitled to a credit for the overpayment of TTD from May 9, 2013, the date of service on the Form 21.
18. The Form 18 filed December 19, 2013 indicates that the Claimant has been paid at a rate less than \$452.52 weekly. He is entitled to the difference between what he has been paid and \$452.52 rate for the period from August 20, 2012 and February 19, 2013. Any credit for overpayment of TTD is awarded only after this adjustment has been made.
19. There was an interpreter in this case—Jamie Lara. The interpreter executed the Affidavit for Translators/Interpreters, which was notarized.

CONCLUSIONS OF LAW

Accordingly, as provided in §42-17-40 and pursuant to other applicable law, it is the determination of this Commissioner:

1. That pursuant to S.C. Code Ann. §42-15-60 and other applicable law, Claimant has reached maximum medical improvement as of February 19, 2013;
2. That pursuant to S.C. Code Ann. §42-9-30 (21) and other applicable law, Claimant has sustained a 22% permanent partial disability to his back secondary to his compensable work accident on June 27, 2012.
3. That pursuant to S.C. Code Ann. §42-15-60 and other applicable law, Claimant is entitled to future medical care and treatment that might tend to lessen his disability as outlined in the 14B executed by Dr. Burnette on June 3, 2013.
4. That pursuant to S.C. Code Ann. §42-9-260 and Regulation 67-506, Defendants are entitled to a credit for the overpayment of TTD from May 9, 2013, the date of service on the Form 21.

ORDER

IT IS HEREBY ORDERED that Defendants shall pay Claimant 66 weeks of compensation at the stipulated compensation rate of \$452.52, representing 22% permanent partial disability to the back.

IT IS FURTHER ORDERED that Defendants shall pay Claimant the difference between what he has been paid weekly in TTD and \$452.52 for the period from August 20, 2012 and February 19, 2013.

IT IS FURTHER ORDERED that Defendants are entitled to a credit for the overpayment of TTD from May 9, 2013.

AND IT IS SO ORDERED.

Within the statutory period, counsel for Defendants and counsel for Claimant each filed Applications for Review in the case setting forth Defendants' and Claimant's reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Appellate Panel on June 9, 2014. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission and has since been under study and consideration.

By appeal, Defendants respectfully submit the following:

1. Did the Hearing Commissioner err in finding, "Dr. Burnette wrote in the assessment section of the evaluation, 'Based on his history, exam and using the 6th Edition of the AMA Guides to the Evaluation of Permanent Impairment, he appears to best fit lumbar Class I Disc Herniation Category with non-verifiable radicular symptoms. The default whole person impairment rating would be 7%, but this value is shifted up to 9% after consideration of functional history and physical exam grade modifiers (each a value of

"2"). Since the lumbar spine represents 75% of whole person function, the resulting lumbar spine impairment is 12%, calculated by dividing the whole person impairment (9%) by .75. This finding is based on Defendants' APA p. 47," where the greater weight of the evidence does not support such a finding?

2. Did the Hearing Commissioner err in finding, "This is a Section 42-9-30 case because the disability is confined to the single scheduled member, the back. As to the assertion that this is a wage loss case, Section 42-9-20 requires that there be two scheduled members for a case to be a wage loss case. No one disputes that Claimant had dual employment and, as a result of this injury, left his other employment. While fairness might seem to indicate otherwise, the law is quite clear on this point. Wage loss recovery is not permitted under the scenario present in this case," where the greater weight of the evidence does not support such a finding?
3. Did the Hearing Commissioner err in finding, "When the record is viewed as a whole, Claimant, as a result of this work-related accident, has suffered a 22% disability to the back," where the greater weight of the evidence does not support such a finding or conclusion of law?
4. Did the Hearing Commissioner err in finding, "Claimant is entitled to future medical care and treatment that may tend to lessen his disability as outlined on the Form 14B executed by Dr. Burnette on June 3, 2013," where the greater weight of the evidence does not support such a finding or conclusion of law?
5. Did the Hearing Commissioner err in finding that Defendants are entitled to a credit for overpayment of temporary total disability from May 9, 2013, the date of service on the Form 21, where the greater weight of the evidence does not support such a finding or

conclusion of law?

6. Did the Hearing Commissioner err in finding, “the Form 18 filed December 19, 2013 indicates that Claimant has been paid at a rate less than \$452.52 weekly. He is entitled to the difference between what he has been paid and the \$452.52 rate for the period from August 20, 2012 and February 19, 2013. Any credit for overpayment of TTD is awarded only after this adjustment has been made,” where the greater weight of the evidence does not support such a finding or conclusion of law?

By appeal, Claimant respectfully submits the following:

It is respectfully submitted that the Single Commissioner erred:

1. In finding as fact, Finding of Fact No. 11, which reads: “As to the Claimant’s assertion of injuries to both the right and left lower extremities, a review of the record as a whole simply does not support that conclusion. While there are occasional references to his legs in the records, there is the conclusion of Dr. Burnette cited above. Additionally, while she does list the legs as an affected body part on the 14B, she assigns as to percentage of medical impairment to other body parts—“N/A”—not applicable. This finding is based on the medical records and the evidence in its entirety.”
2. In finding as fact, Finding of Fact No. 12, which reads: “This is a §42-9-30 case because the disability is confined to the single scheduled member, the back. As to the assertion that this is a wage loss case, §42-9-20 requires that there be two scheduled members for a case to be a wage loss case. No one disputes that Claimant had dual employment and as a result of this injury left his other employment. While fairness might seem to indicate otherwise, the law is quite clear on this point. Wage loss recovery is not permitted under the scenario present in this case.”

3. In finding as fact, Finding of Fact No. 15, which reads: “When the record is viewed as a whole, Claimant, as a result of this work-related accident, has suffered a 22% disability to the back.”
4. In concluding as a matter of law, in Conclusion of Law No. 2, which reads: “That pursuant to S.C. Code Ann. §42-9-30 (21) and other applicable law, Claimant has sustained a 22% permanent partial disability to his back secondary to his compensable work accident on June 27, 2012.”

In an Appellate review, the Panel shall, pursuant to S.C. Code Ann. §42-17-50 (2007), 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. After careful review in the instant case, the Panel, by majority vote, has determined all of the Hearing Commissioner’s Findings of Fact and Conclusions of Law are correct as stated. Accordingly, they shall become, and hereby are, the law of the case, and therefore, the Order is sustained in its entirety. The Panel, by majority vote, finds the following:

FINDINGS OF FACT

Based upon the testimony, the workers’ compensation file, and the medical evidence submitted, the Appellate Panel makes the following Findings of Fact:

1. Claimant suffered an injury to the back by accident arising out of and within the course and scope of his employment on June 27, 2012. This finding is based on the evidence in its entirety.
2. Defendants have provided medical care and treatment for his back injury. This finding is based on the evidence in its entirety.

3. Claimant also alleges injuries to both the right and left lower extremities. This finding is based on the medical records, Claimant's testimony, and the record as a whole.
4. Ultimately, the authorized treating physicians are Dr. Sung J. Han and Dr. Michael Bucci. This finding is based on the evidence in its entirety.
5. Dr. Han wrote a script on February 19, 2013, requesting an impairment rating from Dr. Carol W. Burnette, who is an associate of Dr. Han's at Piedmont Comprehensive Pain Management Group, LLC. This finding is based on Defendants' APA pp. 39-41.
6. Dr. Burnette conducted an "Impairment Evaluation" on April 19, 2013. This finding is based on Claimant's APA pp. 84-86.
7. Dr. Burnette reviewed the medical records of Dr. Han as well as Dr. Bucci, Rich Hamel, PT, Advanced Physical Therapy, ProAxis Physical Therapy, Tracy Hall, PT, and Anderson Radiology. This finding is based on Claimant's APA pp. 84-86.
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clear on this point. Wage loss recovery is not permitted under the scenario present in this case.

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15. When the record is viewed as a whole, Claimant, as a result of this work-related accident, has suffered a 22% disability to the back.
16. Claimant is also entitled to future medical care and treatment that might tend to lessen his disability as outlined in the 14B executed by Dr. Burnette on June 3, 2013.
17. Defendants are entitled to a credit for the overpayment of TTD from May 9, 2013, the date of service on the Form 21.
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CONCLUSIONS OF LAW

Accordingly, as provided in §42-17-40 and pursuant to other applicable law, it is the determination of the Appellate Panel:

1. That pursuant to S.C. Code Ann. §42-15-60 and other applicable law, Claimant has reached maximum medical improvement as of February 19, 2013;
2. That pursuant to S.C. Code Ann. §42-9-30 (21) and other applicable law, Claimant has sustained a 22% permanent partial disability to his back secondary to his compensable work accident on June 27, 2012.
3. That pursuant to S.C. Code Ann. §42-15-60 and other applicable law, Claimant is entitled to future medical care and treatment that might tend to lessen his disability as outlined in the 14B executed by Dr. Burnette on June 3, 2013.
4. That pursuant to S.C. Code Ann. §42-9-260 and Regulation 67-506, Defendants are entitled to a credit for the overpayment of TTD from May 9, 2013, the date of service on the Form 21.

ORDER

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IT IS FURTHER ORDERED that Defendants shall pay Claimant the difference between what he has been paid weekly in TTD and \$452.52 for the period from August 20, 2012 and February 19, 2013.

IT IS FURTHER ORDERED that Defendants are entitled to a credit for the overpayment of TTD from May 9, 2013.

AND IT IS SO ORDERED.

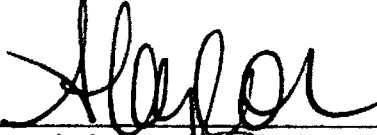
ORDER

IT IS, THEREFORE, ORDERED that the Order of the Single Commissioner filed in

the above-captioned matter on February 21, 2014 is hereby affirmed by the Panel, and the same shall constitute the Decision and Order of the Appellate Panel.


AND IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION

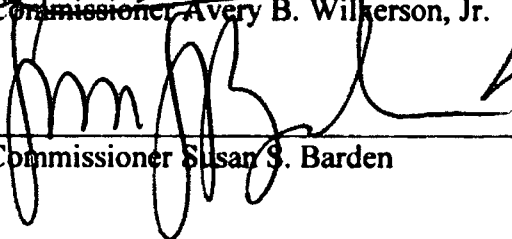


Commissioner Aisha Taylor
For the Appellate Panel

WE CONCUR:



Commissioner Avery B. Wilkerson, Jr.



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 August 25, 2014