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SC Court of Appeals

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 1311681

Anthony Shelley, Claimant, Appellant,

v.

Rock Tenn, Employer,

and

New Hampshire Insurance Company, Carrier, Defendants, Respondents.

Appellate Panel Review Hearing
held in Columbia, South Carolina,
on August 12, 2014, per notices
timely and properly served upon
all parties of interest.

Appellate Panel Decision and Order

filed, October 31, 2014

APPEARANCES: CLAIMANT/APPELLANT represented by Stephen J. Wukela, Esquire, and
DEFENDANTS/RESPONDENTS represented Grady L. Beard., Esquire.

STATEMENT OF THE CASE

This is an appeal by the claimant of the Decision and Order of Commissioner Avery B. Wilkerson, Jr. dated May 7, 2014, finding the claimant failed to meet his burden of proving he sustained a compensable injury by accident arising out of and in the course and scope of employment. Specifically, Commissioner Wilkerson determined the claimant took himself out of the course and scope of employment by violating an order from his direct supervisor, resulting in the injuries alleged. The defendants maintain the Commissioner correctly denied benefits based upon the greater weight of the evidence in the record and as a matter of law.

By way of background, there is no dispute that the claimant was injured on August 10, 2013, as a result of an altercation while on the defendant employer's premises. The parties disagree; however, whether the incident in question qualifies as a compensable injury by accident arising out of and in the course and scope of employment.

The claimant takes the position that while he was performing his job duties, specifically attempting to retrieve the Bill of Lading out of a vehicle; he was struck in the face by the driver of the vehicle with a mallet. The claimant fell to the ground and struck his head. The claimant alleges as a result of the altercation he sustained injuries to the left jaw, brain, and also psychological overlay. The claimant is seeking compensation for temporary total disability (TTD) from August 10, 2013, to August 27, 2013, and from September 3, 2013, to February 7, 2014. The claimant contends he has not reached maximum medical improvement (MMI) for his injuries and is entitled to additional medical care for his injuries until he is released at MMI.

The defendants, on the other hand, maintain the incident in question does not constitute a compensable injury by accident. The defendants take the position that the claimant and the driver of the vehicle had a heated exchange prior to the incident in question. Following this exchange and before any physical fight or altercation, the claimant was ordered by his direct supervisor, Mr. Jon Baxley, to get in his

truck and leave the site. The claimant; however, while backing out of the area as instructed unilaterally decided to disobey Mr. Baxley's direct instruction and instead returned to the truck of the other driver. The claimant then stepped up on the driver's side running board of the other truck; continued the argument with the driver; and attempted to physically enter the truck window which resulted in the fight and eventual injury. The defendants take the position that by disobeying a direct order from his supervisor to immediately leave the scene, the claimant took himself outside of the course and scope of his employment. Additionally, the defendants also contend the aggressor defense applies to the facts of the case and bars the claimant's receipt of benefits under the Act. In the alternative, if the claim was found compensable, the defendants take the position that the alleged psychological condition is not before the Commission as it was not properly pled; and that the claimant would not be entitled to TTD benefits as he was terminated for cause, such that his inability to work is not related to the injury in question but rather to his proper termination.

Prior to the call of the case, the defendants sought to submit the written statement of Albert McNeil into evidence as an exhibit as an exception to the hearsay rule. The defendants took the position that the statement qualified as a present sense impression pursuant to Rule 803(1), SCRE. The claimant contended the statement was hearsay and did not qualify as an exception to the hearsay rule. After listening to extensive arguments made by both parties on this issue, the Hearing Commissioner allowed the statement of Albert McNeil into evidence as defendants' Exhibit 1, as an exception to the hearsay rule over the objection of counsel for the claimant.

By way of Decision and Order dated May 7, 2014, Commissioner Wilkerson determined the claimant failed to meet his burden of proving he sustained a compensable injury by accident as alleged and issued the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. *Both the claimant and the defendant/employer are subject to the South Carolina Workers' Compensation Act, as the claimant was a covered employee and defendant/employer was a covered employer at the time in question.*
2. *The claimant is a 22 year employee of RockTenn. This Finding is based upon the claimant's testimony at the Hearing.*
3. *The claimant testified that he was told to leave premises by his direct supervisor, Jack Baxley, after his initial confrontation with the driver. The claimant did not to leave and decided to pull back up in his truck. This Finding is based upon the claimant's testimony at the Hearing.*
4. *According to the claimant's testimony, the claimant never said anything to the driver of the truck. The claimant got out of his truck and climbed up on the other driver's truck. The claimant alleged he saw a mallet in the driver's hand, and he put his right hand in the driver's side window to stop driver from hitting him with mallet. Visualizing this, the undersigned believes the incident could not have happened as the claimant described it. This Finding is based upon the claimant's Hearing testimony, as well as the Hearing testimony of Jack Baxley.*
5. *The claimant admitted Mr. Baxley was the boss on the site that day and that Mr. Baxley ordered him to leave. The claimant; however, felt he had to get paperwork signed by driver of vehicle. The claimant testified he has had OCD problems for many years. This Finding is based upon the claimant's testimony at the Hearing.*
6. *A review of the claimant's Hearing testimony reveals it is unclear to the undersigned as to how some of what happened occurred. The claimant seems to remember a lot early in testimony, but fails under cross-examination by counsel for the defense. This Finding is based upon the claimant's testimony at the Hearing.*
7. *Based on the Hearing testimony, the claimant has a bad temper when confronted. The claimant describes what happened exactly as the driver of other vehicle as it pertains to the confrontation while the driver was backing his truck into place. However, the descriptions provided by the driver and Mr. Baxley do not follow closely after this statement.*
8. *The undersigned finds that defendants' Exhibit #2, the written statement and testimony of John Baxley, an 18 year employee of RockTenn, to be very credible. Based upon my review of the testimony of the claimant and Mr. Baxley at the Hearing, greater weight is given to Mr. Baxley's testimony over that of the claimant. The undersigned finds Mr. Baxley to be more reliable with regard to the description of the accident of what happened on date of accident.*
9. *The undersigned uses his discretion and allows the statement given by truck driver, Albert McNeil, dated August 10, 2013, into evidence as an exception to the hearsay rule as a present sense impression. "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." 803(1), SCRE. (emphasis added)*
10. *Based on greater weight of evidence presented, the claimant took himself out of his employment when he was advised to leave the premises. The claimant admits to this in his*

testimony and same is also confirmed by his supervisor's testimony. In fact, Mr. Baxley confirmed that the incident would have never occurred if he had followed the order and left the premises. The claimant's case fails on that alone.

11. *Based upon the finding that the claimant was not within the course and scope of employment, the undersigned need not address the aggressor defense. However, the undersigned would find the claimant to be the aggressor due to his language, his act of yelling, his action of getting out of truck after he was advised to leave premises by the claimant's direct supervisor, Mr. Baxley, and putting his right hand into driver's window. This finding is based upon the greater weight of the evidence in the record, including but not limited to, the testimony of the claimant and Mr. Baxley.*
12. *Based upon the greater weight of the evidence in the record, the undersigned finds that the claim is denied. All body parts alleged, including psyche, are found not compensable.*
13. *The undersigned forwarded his Notes and Request for Proposed Order to the parties via email on March 6, 2014.*

CONCLUSIONS OF LAW

1. *Pursuant to § 42-1-130, the claimant was a covered employee at the time in question; and under § 42-1-140, the defendant employer was a covered employer.*
2. *Pursuant to § 42-1-160 the claimant failed to prove he sustained a compensable injury by accident arising out of and in the course and scope of employment. Disobeying a direct order of his supervisor took the claimant outside the course and scope of his employment.*
3. *Pursuant to § 42-9-10 or § 42-9-30, the claimant is not entitled to compensation for temporary total disability or permanent partial disability.*
4. *Pursuant to § 42-15-60, the defendants are not responsible for reimbursement of medical care to date. The claimant is not entitled to future medical care.*
5. *Pursuant to 803(1), SCRE, the statement of Albert McNeil is allowed into evidence as an exception to the hearsay rule.*

The claimant timely appealed the Decision and Order to the Full Commission via Form 30 filed May 19, 2014, raising the following grounds for appeal:

1. *The Single Commissioner erred as a matter of fact and conclusion of law in failing to find that the claimant suffered an injury by accident out of and in the course and scope of his employment.*
2. *The Single Commissioner erred as a matter of fact and conclusion of law in finding that "disobeying a direct order and instruction of his supervisor took the claimant outside the course and scope of his employment."*

3. *The Single Commissioner erred as a matter of fact and conclusion of law in failing to find that the claimant was struck in the face-by a mallet by Albert McNeil.*
4. *The Single Commissioner erred as a matter of fact and conclusion of law in finding that the claimant was barred from recovering workers' compensation benefits on the grounds that he was an aggressor of the incident in question.*
5. *The Single Commissioner erred as a matter of fact and conclusion of law in admitting the statement given by truck driver, Albert McNeil, along with other recitations of Mr. McNeil's hearsay statements during the course of testimony.*
6. *The Single Commissioner erred as a matter of fact and conclusion of law in finding that the claimant's case fails based on the testimony of Mr. Baxley that the incident would have never occurred if the claimant had followed the order and simply left the premises.*
7. *The Single Commissioner erred as a matter of fact and conclusion of law in failing to find that the claimant is entitled to compensation pursuant to § 42-9-10 and § 42-9-30 and medical pursuant to § 42-15-60.*

To the contrary, the defendants respectfully requested the Full Commission to affirm the Order of Commissioner Wilkerson in its entirety as same was based upon the greater weight of evidence in the record and was in compliance with the applicable law.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the undersigned members of the Full Commission and has since been under study and consideration. In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. § 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 Single Commissioner. After careful review in the instant case of all grounds raised by claimant in the appeal, oral arguments, and the briefs presented by both parties, the Commission, by unanimous vote, has determined that the Hearing Commissioner's Findings of Fact and Conclusions of Law are **AFFIRMED WITH AMENDMENTS**. Specifically, the undersigned Full Commission Appellate Panel only requested the correction of several typographical errors contained within the body of the Order. Accordingly, the Findings of Fact and Conclusions of Law of the Hearing

Commissioner shall become, and hereby are, the law of the case and, therefore, the Order is sustained in its entirety with the above noted amendments.

FINDINGS OF FACT

After careful review of the evidence in the record; the oral arguments presented by the parties at the Full Commission Hearing, and in their respective briefs; the Appellate Panel Finds as Fact that:

1. Both the claimant and the defendant/employer are subject to the jurisdiction of the South Carolina Workers' Compensation Act, as the claimant was a covered employee and defendant/employer was a covered employer at the time in question.
2. The claimant is a 22 year employee of RockTenn. This Finding is based upon the claimant's testimony at the Hearing.
3. The claimant testified that he was told to leave the premises by his direct supervisor, Jack Baxley, after his initial confrontation with the driver. The claimant did not leave and decided to pull back up in his truck. This Finding is based upon the claimant's testimony at the Hearing.
4. According to the claimant's testimony, the claimant never said anything to the driver of the truck. The claimant got out of his truck and climbed up on the other driver's truck. The claimant alleged he saw a mallet in the driver's hand, and he put his right hand in the driver's side window to stop the driver from hitting him with the mallet. The Hearing Commissioner stated that visualizing this, he did not believe the incident could have happened as the claimant described it, and we agree. This Finding is based upon the claimant's Hearing testimony, as well as the Hearing testimony of Jack Baxley.
5. The claimant admitted Mr. Baxley was the boss on the site that day and that Mr. Baxley ordered him to leave. The claimant, however, felt he had to get paperwork signed by driver of vehicle. The claimant testified he has had OCD problems for many years. This Finding is based upon the claimant's testimony at the Hearing.
6. A review of the claimant's Hearing testimony reveals it is unclear to the Appellate Panel as to how some of what happened occurred. The claimant seems to remember a lot early in testimony, but fails under cross-examination by counsel for the defense. This Finding is based upon the claimant's testimony at the Hearing.
7. Based on the Hearing testimony, the claimant has a bad temper when confronted. The claimant describes what happened exactly as Mr. Baxley as it pertains to the confrontation while the driver was backing his truck into place. However, the descriptions provided by the driver and Mr. Baxley do not follow closely after this statement.
8. The Appellate Panel finds that defendants' Exhibit #2, the written statement, and testimony of John Baxley, an 18 year employee of RockTenn, to be very credible. Based upon the Appellate Panel's review of the testimony of the claimant and Mr. Baxley at the Hearing, we

agree with the Hearing Commissioner and greater weight is given to Mr. Baxley's testimony over that of the claimant. The Appellate Panel finds Mr. Baxley to be more reliable with regard to the description of the accident of what happened on the date of accident.

9. The Appellate Panel agrees with the Hearing Commissioner's decision to allow the statement given by truck driver, Albert McNeil, dated August 10, 2013, into evidence as an exception to the hearsay rule as a present sense impression. "A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or **immediately thereafter.**" 803(1), SCRE. (emphasis added)
10. Based on the greater weight of evidence presented, the claimant took himself out of his employment when he was advised to leave the premises. The claimant admits to this in his testimony and same is also confirmed by his supervisor's testimony. In fact, Mr. Baxley confirmed that the incident would have never occurred if claimant had followed the order and left the premises. The claimant's case fails on that alone.
11. Based upon the finding that the claimant was not within the course and scope of employment, the Appellate Panel need not address the aggressor defense. However, the Appellate Panel would find the claimant to be the aggressor due to his language, his act of yelling, his action of getting out of truck after he was advised to leave premises by the claimant's direct supervisor, Mr. Baxley, and putting his right hand into the driver's window. This finding is based upon the greater weight of the evidence in the record, including but not limited to, the testimony of the claimant and Mr. Baxley.
12. Based upon the greater weight of the evidence in the record, the Appellate Panel finds that the claim is denied. All body parts alleged, including psyche, are found not compensable.
13. The Appellate Panel confirms the Hearing Commissioner forwarded his Notes and Request for Proposed Order to the parties via email on March 6, 2014. Moreover, the Appellate Panel forwarded their Notes and Request for Proposed Order to the parties via e-mail dated August 29, 2014.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and as provided by the Code of Laws of South Carolina, § 42-17-40, it is the determination of the Full Commission Appellate Panel that:

1. Pursuant to § 42-1-130, the claimant was a covered employee at the time in question; and under § 42-1-140, the defendant employer was a covered employer.
2. Pursuant to § 42-1-160 the claimant failed to prove he sustained a compensable injury by accident arising out of and in the course and scope of employment. Disobeying a direct order of his supervisor took the claimant outside the course and scope of his employment.
3. Pursuant to § 42-9-10 or § 42-9-30, the claimant is not entitled to compensation for temporary total disability or permanent partial disability.

4. Pursuant to § 42-15-60, the defendants are not responsible for reimbursement of medical care to date. The claimant is not entitled to future medical care.
5. Pursuant to 803(1), SCRE, the statement of Albert McNeil is allowed into evidence as an exception to the hearsay rule.

ORDER

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Decision and Order of Commissioner Avery B. Wilkerson, Jr. dated May 7, 2014, is **AFFIRMED WITH AMENDMENTS**. The greater weight of the evidence in the record supports the claimant failed to meet his burden of proving he sustained a compensable work-related injury by accident as alleged. The claimant took himself out of the course and scope of employment by violating an order from his direct supervisor, resulting in the injuries alleged. As such, the claimant is not entitled to any benefits under the Act.


AFFIRMED WITH AMENDMENTS.

SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

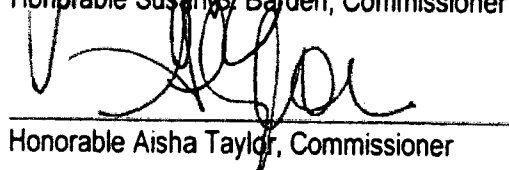


Honorable T. Scott Beck, Commissioner
for the Appellate Panel

CONCUR:



Honorable Susan S. Barden, Commissioner



Honorable Aisha Taylor, 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 Eugenia Hollmon on October 31, 2014