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SC Court of Appeals

APPELLATE PANEL
DECISION AND ORDER

OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 1106006

THEODORE L. MORPHY., CLAIMANT/APPELLANT,

VERSUS

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS AND SC STATE
ACCIDENT FUND, DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in Columbia, South
Carolina on November 18, 2014 per notices timely and
properly served on all parties of interest.

Appellate Panel Decision and Order filed:

February 4th, 2015

APPEARANCES:

Claimant was represented by Joseph R. Dasta,
Esquire, of McWhirter, Bellinger & Associates,
1807 Hampton St., Columbia, SC 29201.

Defendants were represented by Page P. Snyder,
Esquire, of The South Carolina State Accident
Fund, P.O. Box 102100, Columbia, South Carolina
29221-5000.

STATEMENT OF THE CASE

This claim went before the Single Commissioner pursuant to the Form 50 filed by Claimant, Theodore Morphy, on July 19, 2014. This was an admitted claim in which Claimant injured his lower back on May 24, 2011 while he fell from the back of an eighteen wheeler while he was distributing supplies. Claimant alleged he was permanently and totally disabled pursuant to S.C. Code §42-9-10 for his admitted low back injury. Defendants denied that Claimant sustained permanent and total disability and argued that the claim should be limited to the lumbar spine only. Claimant further alleged that Defendants improperly stopped his temporary total disability benefits when Claimant retired on June 30, 2012 and claimed that he was entitled to temporary total disability benefits for the period of July 1, 2012 through May 29, 2013, the date Claimant signed a Form 17. Defendants contend that temporary total disability benefits were not due and a penalty would be improper.

The claim was heard by the Single Commissioner on April 7, 2014 in Columbia, South Carolina. On July 8, 2014, the Single Commissioner issued her Order and Decision, making the following findings of fact, repeated herein verbatim:

FINDINGS OF FACT

1. The Claimant has suffered an admitted injury to his low back which occurred on May 24, 2011.
2. The back injury has affected both of the Claimant's legs and thus the Claimant is not limited to recovery under SC Code Section 42-9-30.
3. Based on the medical records, the Claimant's testimony, and my observation of the Claimant, the Claimant has failed to prove that he is permanently and totally disabled. The greater weight is given to the

opinion of Dr. Hutcheson who has treated the Claimant for a long period of time. Dr. Hutcheson assigned a 12% whole person impairment rating and restricted the Claimant to light to medium duty work. The Claimant has received only conservative medical treatment. His MRI was significant only for degenerative changes and was labeled "benign" by Dr. Hutcheson. I also considered the restrictions and impairment rating offered by Dr. Johnson, the independent medical evaluation doctor, and the results of the Functional Capacity Evaluation procured by the Claimant at Columbia Rehabilitation Clinic.

4. Based on the medical records, the Claimant's testimony, the vocational experts' evidence, and my observation of the Claimant, I find that the Claimant has suffered wage loss pursuant to Workers' Compensation Code Section 42-9-20. I find the Claimant's residual earning capacity to be \$575.00 a week. Vocational experts in the record were relying on limited light to limited sedentary duty in their determinations. I give greater weight to the restrictions assigned by Dr. Hutcheson. Nevertheless, I did not determine the Claimant's earning capacity to be in the upper range as offered by the defendants' vocational expert because of the Claimant's ongoing complaints of pain. Therefore, the Claimant's award for wage loss is \$78,675.40.
5. The Claimant is entitled to further medical care as recommended by Dr. Hutcheson, to include but not limited to, pain management and the spinal cord stimulator.
6. The defendants are responsible for payment of all past causally related and authorized medical care and bills.
7. The Claimant's average weekly wage is \$922.08 with a compensation rate of \$614.75.
8. The maximum medical improvement date is February 19, 2014.
9. The defendants improperly stopped the temporary total disability benefits as of July 1, 2012, after the Claimant retired on June 30, 2012. No temporary total disability benefits were paid to the Claimant from July 1, 2012 through May 30, 2013, the date on which the Form 17 was signed. The Claimant is entitled to temporary total disability benefits from July 1, 2012 through May 30, 2013, with interest.
10. The defendants are also penalized 25% for improperly stopping the temporary total disability benefits.
11. The Claimant is entitled to Utica Mohawk/James language as follows:

This Commissioner hereby approves the allocation of the \$78,675.40 award as follows: **\$29,698.15** as attorneys fees and costs; and, **\$48,977.25** in compromised settlement of disputed future disability compensation benefits at the rate of **\$34.37** per week, commencing on the date of this agreement for a period of **1,425** weeks thereafter, pursuant to Section 42-9-10 of the 1976 Code of Laws of South Carolina, as amended, as interpreted by the South Carolina Supreme Court in the case of James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010); *Utica Mohawk*."

The hearing Commissioner made Conclusions of Law as follows:

CONCLUSIONS OF LAW

1. The Claimant suffered an admitted injury to his back which occurred on May 24, 2011. See Code Section 42-1-160.
2. The Claimant's average weekly wage is \$922.08 with a compensation rate of \$614.75. See Code Section 42-1-40.
3. The Claimant reached maximum medical improvement on February 19, 2014.
4. The defendants are responsible for payment of all past causally related and authorized medical care and bills. See Code Section 42-15-60.
5. The back injury has affected both of the Claimant's legs.
6. Based on the medical records, the Claimant's testimony, and my observation of the Claimant, the Claimant has failed to prove that he is permanently and totally disabled. See Code Section 42-9-10.
7. The Claimant has suffered wage loss with a residual earning capacity of \$575.00 per week. This resulted from the combined effects of his low back injury and its effect on both of his legs. See Code Section 42-9-20.
8. The Claimant's wage loss award is \$78,675.40. See Code Section 42-9-20.
9. The Claimant is entitled to future medical care as recommended by Dr. Hutcheson, to include but not limited to, pain management in the form of lifetime medications, injections, physical therapy, imaging, a spinal cord stimulator, and further surgery evaluation and management of a spinal cord stimulator if implanted. See Code Section 42-15-60.

10. The defendants improperly stopped the Claimant's temporary total disability benefits as of July 1, 2012. The Claimant is entitled to temporary total disability benefits covering July 1, 2012 through May 30, 2013, the date on which the Claimant signed the Form 17. The defendants will pay the legal rate of interest on the temporary total disability benefits owed as well as a 25% penalty on the temporary total disability benefits withheld in violation of the law. The temporary total disability check including the interest and the 25% penalty will be sent directly to the Claimant's attorney. See Code Sections 42-9-260 and 34-31-20 (b). Also see Workers' Compensation Regulations 67-506 and 67-510.
11. The Claimant is entitled to payment of his wage loss award lump sum. See Code Section 42-9-301 and Workers' Compensation Regulation 67-1605.
12. The Claimant is entitled to Utica Mohawk/James language as outlined above, in Findings of Fact number 11.

Within the statutory period, both parties filed Applications for Review in the case setting forth their exceptions, copies of which were furnished to all interested parties.

Claimant stated the following grounds for review:

1. Whether the Hearing Commissioner erred as a matter of law in Findings of Fact #3 in finding that the Claimant failed to prove that he is permanently and totally disabled when such a finding is not supported by the greater weight of the evidence on the record?
2. Whether the Hearing Commissioner erred as a matter of law in Findings of Fact #3 that the greater weight is given to the opinion of Dr. Hutcheson when such a finding is not supported by the greater weight of the evidence on the record?
3. Whether the Hearing Commissioner erred as a matter of law in Findings of Fact #4 in finding that the Claimant has suffered only wage loss pursuant to WC Code Section 42-9-20 when such a finding is not supported by the greater weight of the evidence on the record?
4. Whether the Hearing Commissioner erred as a matter of law in Findings of Fact #4 in finding that the Claimant's residual earning capacity to be as high as \$575.00 a week when such a finding is not supported by the greater weight of the evidence on the record?
5. Whether the Hearing Commissioner erred as a matter of law in Findings of Fact #4 in finding that the greater weight is given to the restrictions

assigned by Dr. Hutcheson when such a finding is not supported by the greater weight of the evidence on the record?

6. Whether the Hearing Commissioner erred as a matter of law in Findings of Fact #4 in finding that the Claimant's award for wage loss is only \$78,675.40 when such a finding is not supported by the greater weight of the evidence on the record?
7. Whether the Hearing Commissioner erred as a matter of law in Conclusions of Law #6 in ruling that the Claimant has failed to prove that he is permanently and totally disabled when such a ruling is not supported by the Act, caselaw, and the greater weight of the evidence on the record?
8. Whether the Hearing Commissioner erred as a matter of law in Conclusions of Law #7 in ruling that the Claimant has suffered only wage loss with a residual earning capacity as high as \$575.00 a week when such a ruling is not supported by the Act, caselaw, and the greater weight of the evidence on the record?
9. Whether the Hearing Commissioner erred as a matter of law in Conclusions of Law #8 in ruling that the Claimant's wage loss award is only \$78,675.40 when such a ruling is not supported by the Act, caselaw, and the greater weight of the evidence on the record?

Defendants stated the following grounds for review:

1. Did the hearing commissioner err as a matter of law in finding that the Defendants improperly stopped temporary total benefits?
2. Did the hearing commissioner err as a matter of fact that the Defendants improperly stopped temporary total benefits?
3. Did the hearing commissioner err as a matter of law in assessing a penalty for the termination of temporary total benefits?
4. Did the hearing commissioner err as a matter of fact in assessing a penalty for the termination of temporary total benefits?

Oral arguments were delivered by the parties on November 18, 2014. All proffered testimony has been taken. Such, together with all documentary evidence and legal briefs, has been delivered to the individual 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 (1976, as amended), review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefor, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

Joseph M. Dasta for the Claimant and Page P. Snyder for the Defendants appeared at the scheduled hearing to present oral arguments on behalf of the parties. Having heard oral arguments on behalf of the parties, considered their briefs and viewed the records as a whole, the Appellate Panel hereby affirms in part and reverses in part the Order of the Single Commissioner. The Appellate Panel reverses Findings of Fact numbers 9 and 10. Claimant is not entitled to temporary total disability benefits for the period of July 1, 2012 through May 30, 2013 because Claimant took himself out of work via retirement and acknowledged that benefits were not due. Further, temporary total benefits were never started; Claimant used sick and annual leave during the period he was written out of work, so Defendants did not improperly stop benefits when Claimant retired. Since, benefits were not due; Defendants did not improperly stop temporary total disability benefits and are not ordered to pay a 25% penalty. Consequently, Conclusion of Law number 10 is also reversed. The remainder of the Order of the Single Commissioner is affirmed, including the lump sum payment of the S.C. Code §42-9-20 award.

ORDER

IT IS, THEREFORE, ORDERED the Order of the hearing Commissioner is AFFIRMED IN PART AND REVERSED IN PART.

IT IS ORDERED that Finding of Fact number nine is REVERSED. Claimant is not entitled to temporary total disability benefits for the period of July 1, 2012 through May 30, 2013.

IT IS ORDERED that Finding of Fact number ten is REVERSED. Defendants did not improperly stop temporary total disability benefits.

IT IS ORDERED that Conclusion of Law number ten is REVERSED. Claimant is not entitled to temporary total disability for the period of July 1, 2012 through May 30, 2013. Defendants do not have to pay for benefits during this period and are not assessed a 25% penalty.

IT IS ORDERED that the remainder of the Order and Decision is AFFIRMED.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

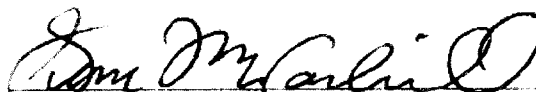
CERTIFICATE OF SERVICE

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 February 4, 2015



T. Scott Beck, Chair



Gene McCaskill, Commissioner



Melody L. James, Commissioner