

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

**COMMISSION PANEL: THE HONORABLE AISHA TAYLOR, CHAIR; THE
HONORABLE GENE MCCASKILL; THE HONORABLE SUSAN S. BARDEN**

SCWCC FILE NO.: 1307169

Scott M. Colstrom,

Employee/Claimant,

v.

SBC Internet Services, Inc.,

Employer, and

Old Republic Insurance Company,

Carrier/Defendants.

Hearing held in Columbia, SC
South Carolina on October 19, 2015

Per notice timely and properly served upon all Parties of Interest.

Appearances: Alton L. Martin, Esquire, for Claimant

Matthew O. Riddle, Esquire, for Defendants

Filed:

March 24, 2016

RECEIVED
APR 22 2016
SC Court of Appeals

STATEMENT OF THE CASE

The instant proceeding was initiated by Claimant's Form 50 Request for Hearing dated December 15, 2014. This is an admitted right knee claim. Claimant has undergone two authorized surgeries to his right knee. He alleged that he developed problems with his left leg and left hip as a result of his altered gait following surgery. Claimant also alleged causally related depression and chronic stress reaction that has aggravated his diabetes and hypertension ("HTN"). Claimant is not at maximum medical improvement ("MMI") for his admitted right knee injury. Claimant is seeking additional treatment for his left hip, left leg, depression, diabetes, and HTN. Additionally, Claimant contends his Average Weekly Wage and Compensation Rate are inaccurate and he is owed temporary total disability ("TTD") at the corrected rate.

Defendant/Employer timely filed a responsive pleading on a Form 51 dated January 22, 2015. Defendants admitted Claimant's right knee was not at MMI at the time of filing, but argued Claimant's other alleged injuries were not causally related and the Average Weekly Wage and Compensation Rate as set forth in the Form 20 were accurate. Defendants also denied that Claimant was entitled to additional medical care or TTD.

A hearing on the merits was held on March 19, 2015. The single Commissioner's Decision and Order filed on May 20, 2015 contained the following findings of fact and conclusions of law:

FINDINGS OF FACT

- 1. Jurisdiction and Venue are proper based upon the location of the accident and stipulation of the parties.*
- 2. Defendants received notice of the accident on June 14, 2013 by stipulation.*
- 3. Claimant has been out of work and paid TTD benefits at the rate of \$564.00 per week for 92 weeks, as of March 20, 2015 based on Claimant's testimony.*
- 4. Claimant had an excellent work record and received 5-star Evaluations for every quarter during the year preceding the accident. His supervisor regularly placed him in charge when he went out of town and Claimant was regularly asked to*

work overtime because of his quality of work. This finding is based on Claimant's testimony.

5. *Claimant initially suffered an injury to his right knee only on June 14, 2013, based on Claimant's testimony, stipulation of the parties, and APA #'s 1,2,3,4.*
6. *The Form 20 provided by Defendants was not valid as it failed to accurately reflect Claimant's pay increase that occurred prior to the accident, based on Claimant's testimony and Claimant's Exhibits 1 and 2.*
7. *Claimant worked 1989.25 regular hours and 440.25 overtime hours in the 52 weeks preceding the accident under the AT&T Union contract governing his employment as a wire technician, based on Claimant's testimony and Claimant's Exhibit 2.*
8. *Claimant's employment was governed by a written union contract that specified the exact amount and time of Claimant's wages and raises, these were not Merit raises, Claimant had already received two raises in accordance with the Union Contract; the third and final raise was scheduled, based on Claimant's testimony and Claimant's Exhibits 1 and 2.*
9. *Claimant's final scheduled hourly rate increase in accordance with the Union Contract was \$20.23 per hour, with overtime paid at \$30.05 per hour, based on Claimant's testimony and Claimant's Exhibit 1.*
10. *Use of the statutory methods for calculation of Average Weekly Wage provided in SC Code § 42-1-40 would be unfair to the employee and employer, as the specific amount of Claimant's wages had been bargained for and agreed upon pursuant to the Union Contract, based on Claimant's testimony and Claimant's Exhibits 1 and 2.*
11. *The use of the hourly rate of \$20.03 provided by the union contract plus overtime, in combination with Claimant's hours for the 52 weeks preceding the accident provide a fair and accurate approximation of Claimant's earning were it not for the injury, based on Claimant's testimony and Claimant's Exhibits 1 and 2.*
12. *The Union Contract governing Claimant's wages and scheduled raises, and Claimant's 5-Star job performance, both represent exceptional reasons why the statutory methods for calculating Average Weekly Wage would be unfair to the Claimant, and therefore calculation of Average Weekly Wage by an alternative*

method using Claimant's hours for the 52 weeks preceding the accident, in combination with his scheduled hourly rate of \$20.03, and \$30.05 for overtime, most nearly approximate the amount which he would be earning if not for the injury based on Claimant's testimony and Claimant's Exhibits 1 and 2.

13. *Claimant's average weekly wage is \$1,020.66 (1989.25 regular hours at \$20.03 per hour and 440.25 overtime hours at \$30.05 per hour = \$53,074.19 annually), with a compensation rate of \$680.47, based on Claimant's testimony, his wage records submitted as Claimant's Exhibit 2 and the selected pages of his Union Contract submitted as Claimant's Exhibit 1.*
14. *Defendants owe temporary benefits from the present and continuing at the rate of \$680.47 until further agreement or Order, based on Claimant's testimony and Claimant's Exhibits 1 and 2.*
15. *Defendants underpaid Claimant \$116.47 per week for all the weeks previously paid, beginning June 14, 2013 to the present, based on Claimant's testimony and Claimant's Exhibit 1 and 2.*
16. *Dr. Kissenberth and Dr. Folk are the authorized treating orthopaedic surgeons for the Claimant, based on Claimant's testimony, APA #2,8, and 10; stipulations of the parties.*
17. *Claimant was not represented by counsel until October 22, 2014; this was after he had undergone two authorized surgeries; after he sought treatment on his own for depression; after multiple references were noted by the authorized physical therapist to antalgic gait and problems with his left leg and left hip; after his job was terminated; and after his health insurance was cancelled. This finding is based on Claimant's testimony and APA #2, 4, 5, and 6.*
18. *Claimant's Form 50 filed on December 15, 2014 indicated Claimant needed additional treatment for his left hip, left leg, psyche, endocrine system and cardiovascular system, based on the Form 50 in the Commission's file and Claimant's testimony.*
19. *On December 18, 2014, Dr. Kissenberth completed a Medical Questionnaire opining Claimant's left hip problems were aggravated and recommending a psychological evaluation. (APA 2, pg. 55). This was provided to Defendants on February 12, 2015, per Defendants Exhibit A, APA pgs. 393-396.*

20. *Over the course of his claim, Claimant has aggravated problems with his left hip and developed left leg problems as a result of his antalgic gait following surgeries and is entitled to immediate treatment, based on Dr. Kissenberth's questionnaire (APA 2, pg. 55), Claimant's testimony, and extensive references to his antalgic gait, left hip, and left leg problems in physical therapy. (Left hip – APA 5, pgs. 77, 189, 198, 203, 206, 209, 210, 212, 213, 223, 226, 227, 228, 229, 231, 235, 237, 242, 243, 277, 284, 291, 307; Left leg – APA 5, pgs. 103, 104, 147, 150, 153, 156, 159, 169, 173, 176, 179, 185, 188, 191, 195, 204, 207, 210, 223, 229, 232, 235, 238, 244, 245, 268, 27; Antalgic gait, left hip and leg – Dr. Kissenberth, PT, APA 5 pgs. 68, 70, 83, 127, 129, 165, 194, 196, 200, 203, 206, 209, 212, 215, 222 [knee brace, right left 2/28/14], 224, 226, 228, 230; ambulation APA 5, pgs. 231, 234, 237, 239, 241, 243, 250, 252, 276, 287, 290, 292, 293, 296, 300, [3]06, 308, 310, 325, 327, 330, 333, 336, 342.*
21. *Defendants did not rebut Dr. Kissenberth's opinions provided in this Medical Questionnaire, and Dr. Kissenberth is Defendant's authorized surgeon, based on APA 2, pg. 55), and Claimant's testimony.*
22. *Claimant's attorney requested Defendants identify its authorized psychologist. Claimant's attorney advised Defendants of an IME with psychiatrist, Dr. Mullen on February 12, 2015, in a letter faxed on the same day as the appointment. (Defendants Exhibit A, APA pgs. 393-396) and provided Defendants with a copy of the IME report recommending treatment (APA 7).*
23. *Claimant has developed causally-related depression as a result of this work injury, based on Dr. Kissenberth's questionnaire (APA 2, pg. 55), Dr. Mullen's report, APA 7, APA 6, and Claimant's testimony.*
24. *Despite the Claimant's Form 50 seeking treatment for psyche, Dr. Kissenberth's medical questionnaire recommending a psychological evaluation, Claimant's letter requesting Defendants identify an authorized psychologist, and Claimant's psychiatric IME with Dr. Mullen ; Defendants refused to identify a psychologist; failed to conduct any psychological evaluation of their own; failed to rebut the recommendation of their treating surgeon, failed to rebut the IME opinion of Dr. Mullen, and failed to provide the treatment recommended by the IME, based on Claimant's testimony, APA 2, pg. 55; APA 7; and APA 6; and Defendants Exhibit*

A, APA p 393 – 396. As such, Defendants have given up their right to direct medical care related to Claimant's causally-related psyche issues and Dr. Mullen shall be the authorized treating psychiatrist. Treatment should be provided immediately.

25. *The Claimant has not reached MMI and is in need of a third surgery to his right knee, and treatment for his left knee, left hip, and psyche, based on APA 2,5,7 and 10, and Claimant's testimony.*
26. *Claimant has a follow-up appointment scheduled with Dr. Mullen for May 5, 2015 based on Claimant's testimony.*
27. *Claimant did not have high blood pressure and diabetes prior to his work accident, based on the testimony of Claimant.*
28. *Claimant's high blood pressure and diabetes were not aggravated by the accident based on the greater weight of the evidence.*
29. *Claimant is entitled to all unpaid reimbursable mileage incurred to date, based on Claimant's testimony.*
30. *Claimant loved his job and planned to continue working for Defendant/Employer. Because of increased work, he could have worked more overtime the year following the accident, but for his injury. This finding is based on Claimant's testimony.*
31. *Claimant's testimony was very credible regarding his job performance, development of medical problems, and Union wages. Particularly considering his supervisor, Pete Just, attended the hearing as the Employer Representative and provided no rebuttal testimony. This finding is based on Claimant's testimony, APA 1-8, 10, Defendants APA Exhibit A, APA pgs. 393-396, and Claimant's Exhibits 1 and 2.*
32. *The FCE obtained by Defendants on September 9, 2014 was of little value as the authorized surgeon did not place Claimant at MMI and wrote him out of work pending another surgery shortly thereafter, based on Claimant's testimony and APA 2, 5, 8, 9 and 10.*

CONCLUSIONS OF LAW

Accordingly, pursuant to South Carolina Code § 42-17-40 and § 1-23-30, it is the determination of this Commission:

1. Pursuant to South Carolina Code § 42-15-10 and § 42-17-20, the South Carolina Workers' Compensation Commission has jurisdiction and venue is appropriate.
2. Pursuant to South Carolina Code § 42-1-130, Claimant was a covered employee at the time in question and under § 42-1-140, the Defendant was a covered employee under the Act.
3. Pursuant to South Carolina Code § 1-23-320 and South Carolina Code Reg. 67-607, the parties received proper notice of the hearing and the issues to be addressed.
4. Pursuant to South Carolina Code § 42-15-20 and by Stipulation, Claimant gave notice of an accident to the employer, its agent or representative within ninety (90) days after the accident.
5. Pursuant to South Carolina Code § 42-1-160, and Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114 (Ct. App. [1995]), Claimant suffered an injury by accident arising out and in the course of employment to his right leg which subsequently resulted in causally related injuries to his left leg, left hip, and psyche.
6. Pursuant to South Carolina Code § 42-1-40, and Reg. 67-1603 exceptional reasons exist for deviating from the statutory method of computing Average Weekly Wage; and computing Average Weekly Wage using another method based on Claimant's scheduled hourly rate of \$20.03 specified in the Union Contract, with overtime paid at \$30.05 per hour, in combination with his 1989.25 regular hours and 440.25 overtime hours for the preceding year the accident, $[(\$20.03 \times 1989.25) + (30.05 \times 440.25) = \$53,074.19]$ divided by 52 weeks is not unfair to the Claimant of Defendant/Employer and does most nearly approximate the amount which Claimant would be earning were it not for the injury. As such, Claimant's Average Weekly Wage is \$1,020.66 with a corresponding Compensation Rate of \$680.47.

7. *The parties submitted numerous cases on the issue of Average Weekly Wage. Forrest v. A.S Price; Roberts v. McNair; Booth v. Midland Trane; and Brown v. Peoplease Corp. do not apply; Elliott v. SCDOT is most nearly applicable, but not directly on point.*
8. *Pursuant to South Carolina Code, § 42-15-60, Claimant has not reached MMI, for his causally related right leg injury, psyche injury, aggravated left hip, and left leg problems and shall be provided authorized treatment by Dr. Kissenberth, Dr. Folk, and Dr. Mullen.*
9. *Pursuant to South Carolina Code, § 42-1-40 and § 42-9-200, Claimant is entitled to \$116.47 per week for underpayment of TTD between June 14, 2013 and the present, and payment of TTD at the corrected rate of \$680.47 per week thereafter; and continuing until agreement of the parties or order of the Commission.*
10. *Per S.C. Code § 1-23-308, Claimant's testimony was very credible.*
11. *Per S.C. Code § 42-9-35, Claimant's left leg was aggravated, but his high blood pressure and diabetes were not aggravated by the accident.*
12. *Per S.C. Reg. 67-1601, Claimant is entitled to all reimbursable unpaid mileage incurred to date.*

ORDER AND AWARD

Defendants owe Claimant \$116.47 per week for underpayment of TTD from June 14, 2013 to the present; payment of TTD at the corrected rate of \$680.47 thereafter; treatment for Claimant's right leg, left hip, and left leg with Dr. Kissenberth and Dr. Folk; and, authorized psychiatric treatment by Dr. Mullen for Claimant's psyche injury. Payment of TTD shall continue until further order or agreement of the parties. Defendants shall pay Claimant all unpaid reimbursable mileage incurred to date. All other issues are held in abeyance.

ISSUES ON APPEAL

Defendants filed a Form 30 Request for Commission Review on June 1, 2015. Defendants requested the Commission review the single Commissioner's Decision and Order to address 12 questions of fact or conclusions of law regarding the Commissioner's findings as grounds for appeal. The Form 30 with attachments is contained in the Commission's file. Claimant also filed a Form 30 which was administratively dismissed for untimeliness. Claimant's subsequent Motion to withdraw the administrative dismissal was also dismissed.

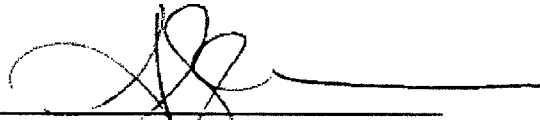
FINDINGS OF THE FULL COMMISSION


This matter was heard before the South Carolina Workers' Compensation Full Commission Appellate Panel during the last term of Review. The Commissioners considered the matter and **Vacated and Remanded** the matter to the next jurisdictional Commissioner, but not the original hearing Commissioner for a hearing de novo.

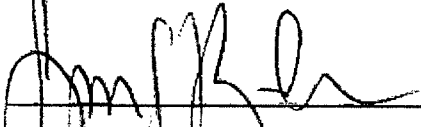
ORDER

IT IS THEREFORE ORDERED that this matter is **Vacated and Remanded** to the next jurisdictional Commissioner for a hearing de novo.

AND SO IT IS ORDERED!



Commissioner **Aisha Taylor, Chair**

Commissioner **Gene McCaskill**

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 Eugenia Hollmon on March 24, 2016