

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 1307602

Rec'd 4-20-16

Notice due 5-19

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SC Court of Appeals

VERMA TEDDER,

EMPLOYEE,
CLAIMANT/APPELLANT/RESPONDENTS

-v-

DARLINGTON COUNTY COMMUNITY ACTION AGENCY,

EMPLOYER,

AND

STATE ACCIDENT FUND,

CARRIER,
DEFENDANTS/RESPONDENTS/APPELLANT

Appellate Panel Review held in Columbia,
South Carolina on February 22, 2016 per
notices timely and properly served on all
parties of interest.

Appellate Panel Decision and Order filed

April 20, 2016.

APPEARANCES:

Claimant/Appellant/Respondent represented by Stephen J. Wukela
Esquire, of Florence, South Carolina

Defendants/Respondents/Appellant represented by G.
Murrell Smith, Jr., Esquire of Sumter,
South Carolina

STATEMENT OF THE CASE

The parties were heard by Commissioner Susan S. Bardon on August 20, 2015 in Hartsville, South Carolina. On November 23, 2015, the Hearing Commissioner issued the following Order:

IT IS HEREBY ORDERED that the Claimant suffered an injury to her spine, left knee, left arm and left hand by accident rising out and in the course and scope of her employment on March 29, 2013.

IT IS FURTHER ORDERED that the Claimant reached maximum medical improvement on August 26, 2014.

IT IS FURTHER ORDERED that the Claimant is entitled to and award of 10% permanent partial disability to the left knee pursuant to §42-9-30(16) and is, there entitled to 19.5 weeks of benefits.

IT IS FURTHER ORDERED that the Claimant is entitled to an award of 8% permanent partial disability to her spine pursuant to §42-9-30(21) and is, therefore entitled to 24 weeks of benefits.

IT IS FURTHER ORDERED that Claimant's request for future medical treatment for the back is denied.

IT IS FURTHER ORDERED that the Defendants are entitled to receive credit for temporary benefits paid to the Claimant from September 8, 2014 to present.

IT IS FURTHER ORDERED that the Defendants may stop temporary total benefits.

IT IS FINALLY ORDERED that the Claimant is not permanently and totally disabled pursuant to §42-9-10.

AND IT IS SO ORDERED.

Within the statutory period, Claimant filed an application for review in the case setting forth her reasons, copies of which were furnished to all interested parties prior to oral argument presented to the Appellate Panel on February 22, 2016.

All proffered testimony has been taken. Such, together with all documentary evidence has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

By appeal, Claimant respectfully submitted the following:

1. Did the Single Commissioner err as a matter of fact and conclusion of law in failing not find the Claimant was totally and permanently disabled pursuant to S.C. Code Ann. '42-9-10;
2. Did the Single Commissioner err as a matter of fact and conclusion of law in refusing to admit or consider the Claimant's APA No. 8, the report of Vocational Expert, J. Adger Brown, Jr.;
3. Did the Single Commissioner err as a matter of fact and conclusion of law in failing to find the Claimant suffered from permanent restrictions as a result of the accident;
4. Did the Single Commissioner err as a matter of fact and conclusion of law in finding that the Functional Capacity Evaluation performed by Columbia Rehabilitation Clinic was invalid and in failing to consider such evaluation;
5. Did the Single Commissioner err as a matter of fact and conclusion of law in finding the Claimant was not credible;
6. Did the Single Commissioner err as a matter of fact and conclusion of law in awarding the Defendants credit from the date the Form 21 was received by the Commission;

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. §42-17-50, 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 case was heard by Commissioner Barden in Hartsville, South Carolina. The Claimant was a teacher's aide for 16 years with the Darlington County Community Action Agency. She sustained an admitted injury on March 29, 2013 when, while supervising young children on the way to the playground, one of the children caused the Claimant to fall to the ground on her left side.

The Claimant was initially seen by McLeod Urgent Care (APA #1, P. 1-19), and underwent a course of physical therapy (APA #3, P. 29-38), and thereafter saw McLeod Occupational Health (APA #4, P. 58), from which she was referred to Pee Dee Orthopaedics. (APA #4, P. 73).

The Claimant was initially seen at Pee Dee Orthopaedics by Dr. Robert Elvington, who diagnosed a medial meniscus tear of the left knee (APA #5, P. 83), and ultimately performed left knee arthroscopy and partial medial meniscus meniscectomy on September 4, 2013 (APA #5, P. 91).

The Claimant continued to follow up with Dr. Elvington following the surgery. During this time she continued to complain of a right knee injury which Dr. Elvington eventually opined via his Deposition of March 4, 2014, was not related to her admitted injury of August 29, 2013. (Defendants' APA #7).

Claimant continued the post-operative visits with Dr. Elvington and a course of physical therapy with Lowes Physical Therapy. (Claimant's APA #3). Dr. Elvington found that the Claimant was at maximum medical improvement on August 26, 2014. Dr. Elvington stated "from the range of motion documented by the physical therapist and that she is status post knee

arthroscopy and partial meniscus meniscectomy, patient would have a permanent physical impairment rating of 3% to the left knee.” Dr. Elvington did not place any restrictions on this August 26, 2014 addendum.

The Claimant maintains that a December 5, 2013 record signed by Dr. Elvington on the same date provided permanent work restrictions including but not limited to no prolonged walking, no climbing, no stooping or crawling and no lifting or carrying greater than 10 lbs. There is no mention of these restrictions in the August 26, 2014 Addendum which determined she was at maximum medical improvement.

The Claimant testified at the Hearing that she was not aware of any restrictions or instructions that she could not return to work after her August 26, 2014 visit with Dr. Elvington. (Trial Transcript Page 60, lines 1-8).

The Claimant was concomitantly seen at Pee Dee Orthopaedics in regards to her low back pain. Dr. W. S. Edwards, Jr. concluded on July 3, 2014 “patient was reassured there is no evidence of underlying compressive pathology or instability that would require surgical intervention. Use of good body mechanics and careful lifting techniques are emphasized. She is at maximum medical improvement and has a 5% impairment of her spine based on her industrial injury. No specific restrictions are necessary. She is discharged.” (APA #5, P. 111)

The Claimant’s attorney referred her for a Functional Capacity Evaluation that was performed on September 12, 2014 by Tracy Hill, PT of Columbia Rehabilitation Clinic, Inc. Importantly, it was noted by Tracy Hill “a five position hand grip test was performed and graph results did not resemble a bell-shaped curve indicating sub-maximum efforts. Coefficients of variation at position 2 of the right hand were above 15% indicating sub-maximal effort Wydell’s Evaluation of non organic signs was negative.” Also in reviewing the report, it was apparent

that the Claimant repeatedly self- limited throughout the testing. She was actually the one who was terminating the testing. (Claimant's APA #7).

The Claimant also had performed a Vocational Evaluation by J. Adger Brown on September 19, 2014. These results were excluded due to the Claimant's refusal to submit to an evaluation by the Defendants' vocational expert.

FINDINGS OF FACT

Based upon the documentary evidence, submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. Claimant injured her back, left knee, and left arm/hand in an admitted accident on March 29, 2013. *NOTE: BASED UPON DEFENDANTS' FORM 58 (listing the admitted body parts, including the "right arm and hand") AND THE DISCUSSION AT THE PRE-HEARING CONFERENCE, THE SINGLE COMMISSIONER OPENED THE RECORD WITH THE STATEMENT THAT CLAIMANT INJURED HER RIGHT ARM; no one corrected her. DURING HER REVIEW OF THE EVIDENCE AFTER THE HEARING, I noted (A) THE FIRST and subsequent MEDICAL RECORDS (e.g., Claimant's APA #1, pages 1-2, 7, and 9-10; Claimant's APA #3, page 33; Claimant's APA #4, page 60) STATE THAT IT WAS CLAIMANT'S LEFT ARM THAT WAS INJURED, AND (B) ATTORNEY SMITH AND CLAIMANT DISCUSSED THE LEFT ARM INJURY AT CLAIMANT'S DEPOSITION—SEE PAGE 52 of Claimant's Deposition. THEREFORE, THE TRANSCRIPT WILL CONTAIN AN ERROR IN THE SINGLE COMMISSIONER'S SUMMATION OF THE PARTIES' RESPECTIVE POSITIONS.*
2. Claimant's left arm/hand injury resolved (Claimant's APA #1, page 14; testimony of Claimant).
3. Claimant has an unrelated right knee meniscal tear, for which medical records state that she requires surgery as recommended by Dr. Elvington. As of the date of the hearing, there is no evidence that Claimant has undergone the right knee surgery to repair the tear (Deposition of Dr. Elvington, pages 19, 28-29, and 33-35).
4. Claimant is 54 years of age (testimony of Claimant).
5. Claimant is a high school graduate. She also has a 2-year associate's degree in early childhood education (testimony of Claimant; Claimant's Deposition, page 10; Defendants' APA, Exhibit A, page 35).

6. Claimant's prior employment includes work as a cook, work in a textile mill, work on an assembly line, and work as a dining room aide in a nursing home (testimony of Claimant; Claimant's Deposition, pages 12-15; Defendants' APA, Exhibit A, pages 16-17).
7. Claimant's job with Employer is described as teacher's aide/assistant teacher/associate teacher for 3-year olds, a job Claimant held for approximately 16 years. Although the length of Claimant's job tenure is impressive and weighs in her favor, it is not dispositive (testimony of Claimant; Claimant's Deposition, page 22; Claimant's APA #3, pages 32 and 37; Claimant's APA #4, page 59; Claimant's APA #5, pages 79 and 83).
8. Claimant has a prior workers' compensation claim involving her right knee, for which an impairment rating was assigned and for which Claimant received a settlement. Claimant also has a prior personal injury lawsuit involving her back for which she also received a settlement (Claimant's Deposition, pages 15-21, 31, 46-49, and 53).
9. Because of the left knee injury in issue, Claimant underwent arthroscopic knee surgery—a partial medical meniscectomy (Deposition of Dr. Elvington, pages 8-9; Claimant's APA #2, pages 21 and 23-24; Claimant's APA #5, pages 91, 95, and 113).
10. Prior to the surgery to repair the torn meniscus in Claimant's left knee, Claimant's gait was "mildly antalgic." We give this record great weight, as the Single Commissioner observed the Claimant ambulate laboriously into and of the hearing room with a cane that, contrary to Claimant's testimony, no doctor prescribed. There is no prescription for a cane contained in the medical records; nor do the narrative records document a recommendation for a cane; the records only speak to Claimant's presentation with a cane at medical appointments (*e.g.*, Claimant's APA #1, pages 7, 13, and 15; *See also* Claimant's APA #5, pages 87, 97, and 105).
11. As to the spine, the authorized treating orthopedist found that Claimant's back (a) pain is "not well localized to any anatomic site," and (b) had no spasm during clinical exam. Claimant has 5/5 motor strength in her lower extremities. We give great weight to this evidence (Claimant's APA #5, page 105).
12. The authorized treating orthopedist interprets Claimant's MRI of the spine as showing (a) no stenosis or other abnormality, (b) "no serious pathology," (c) no compressive pathology; (d) no need for surgical intervention or invasive treatment; and (e) no need for restrictions. I give this evidence great weight. Dr. Edwards diagnosed a lumbar sprain/strain, and noted, at least at one visit, that Claimant's gait was "**normal.**" By contrast, the Single Commissioner observed the Claimant laboriously ambulated in and out of the hearing room with a cane (Claimant's APA #5, pages 110-111).
13. For her spine, Claimant was treated conservatively (not even an injection). In fact, Claimant saw the treating orthopedist only 4 times before being released at maximum medical improvement (medical evidence in its entirety).
14. Claimant worked within restrictions up until the date of her knee surgery. Claimant

completed a form prior to the knee surgery in which she stated that she did not need any accommodations or job modifications (Claimant's Deposition, pages 25-26; Claimant's APA #3, page 32; Claimant's APA #4, page 58).

15. Claimant reached maximum medical improvement on August 26, 2014 (Claimant's APA #5, pages 111 and 113).
16. The authorized treating physicians assigned a 3% impairment rating for the knee, and a 5% whole person impairment rating for the spine. Impairment ratings are never in and of themselves dispositive, but in this case we find them compelling and more persuasive than Claimant's testimony (Claimant's APA #5, pages 111 and 113).
17. Claimant is under no restrictions for her back (Claimant's APA #5, page 111).
18. As to the restrictions for the knee, I considered the nature of the surgery (an **arthroscopic partial meniscectomy**) and the fact that Dr. Elvington wrote in September 12, 2013, that Claimant "will slowly *resume normal activities*" regarding her left knee. As of December 5, 2013, Claimant had an unrelated right knee meniscal tear awaiting surgery, so the restrictions still pending as of December 5, 2013, are not persuasive as to the left knee. Further, even Claimant admitted at her deposition that **bilateral knee pain in part keeps her from working**. It may be Claimant's unrelated right knee that results in her use of a cane, but we do not find the cane was prescribed for Claimant's post-surgical left knee or mild back condition (Claimant's APA #5, pages 92-93, 96-97, 99-100, and 113; Claimant's Deposition, page 51; Deposition of Dr. Elvington, pages 13-14).
19. Claimant did not make a good witness on her own behalf, a finding I base on my observations of her demeanor and on the delivery of her testimony. We further note:
 - (a) that at the hearing before the undersigned--perhaps because Claimant originally pled a right knee injury--Claimant denied any prior right knee problems (hearing transcript, pg. 32, lines 22-23); by contrast, at her deposition, Claimant (i) described a prior workers' compensation right knee injury, (ii) named the attorney who represented her in the right knee workers' compensation case, (iii) admitted receiving a right knee impairment rating, and (iv) admitted that she received settlement for her right knee workers' compensation injury;
 - (b) Claimant's testimony that her knee pain runs up to her low back was not believable; and
 - (c) Claimant completed and/or signed a form in which she denied any prior workers' compensation claims or impairment ratings.

(testimony of Claimant; observations of the Single Commissioner; Claimant's Deposition, pages 15-20 and 53; *See also* Defendants' APA #2, page 2, referring to a prior right knee x-ray; Claimant's APA #4, page 59).

20. Claimant obtained her own FCE from Tracy Hill, the conclusion of which is not persuasive, and which is in fact invalid: even Hill notes that (a) Claimant's handgrip testing did not result in a bell-shaped curve (which is particularly compelling since this is a knee and back case), indicating **sub-maximal effort**; and (b) Claimant repeatedly self-limited throughout/actually terminated testing (Claimant's APA #7 in its entirety).
21. The Single Commissioner did not consider Claimant's vocational report (Claimant's #8), as Claimant refused to submit to Defendants' vocational evaluation. She fully considered the time lag before Defendants requested a vocational evaluation, but given Claimant's myriad credibility issues, the Single Commissioner is not inclined to reward Claimant's unwillingness to submit to a vocational evaluation for Defendants. Claimant's APA #8 was proffered, but not considered by the Single Commissioner.
22. Defendants may stop payment of temporary benefits.
23. The Claimant alleges that the Defendant should be barred by the Doctrine of Laches from receiving a credit to the date the Form 21 was filed. The Hearing was initially scheduled on October 29, 2014. This matter had to be rescheduled since the parties had not mediated pursuant to Resolution 67-1802(A). Mediation was conducted on February 23, 2015. A Hearing was rescheduled for May 5, 2015. The Defendant's attorney had conflicts with subsequent rescheduling until the Hearing of August 20, 2015. All of the requests to reschedule the Hearing by the Defendant were consented to by the Claimant.
24. Defendants to receive credit from date the Form 21 was received by the Commission-- September 8, 2014.
25. PPD to knee pursuant to Section 42-9-30(16): 10%. This award is based upon a 3% impairment rating, and the nature of the surgery (an arthroscopic partial meniscectomy).
26. PPD to spine pursuant to Section 42-9-30(21) for Claimant's non-surgical lumbar strain/sprain: 8%
27. This is not a believable Claimant.
28. As to future medicals, Dr. Edwards did not recommend any, and therefore no future medicals are ordered for the back. For the knee, Claimant takes prescription strength Ibuprofen and Aleve (testimony of Claimant).
29. Claimant's average weekly wage is \$325.19, yielding a compensation rate of \$216.80 (stipulation of the parties).

RULINGS OF LAW

In view of those Findings of Fact and as provided in the South Carolina Code of Laws, **WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS A**

MATTER OF LAW;

1. Under §42-1-130, the Claimant was a covered employee at the time in question.
2. Under §42-1-140, the Defendant was a covered employer under the Act.
3. Under §42-1-160, Claimant's average weekly wage is \$325.19 with a resulting compensation rate of \$216.80.
4. §42-9-210 is applicable when determining when a Carrier is entitled to credit for overpayment of temporary disability benefits.
5. Claimant's request to reconsider the Order excluding the Claimant's Vocational Report dated August 7, 2015 is hereby denied. Claimant's unwillingness to submit to a Vocational Evaluation for the Defendant causes the undersigned not to consider the Vocational Report contained in Claimant's APA #8.
6. The Claimant suffered a 10% permanent partial disability to her knee pursuant to §42-9-30(16).
7. The Claimant suffered an 8% permanent partial disability to her spine pursuant to §42-9-30(21).
8. Defendants may terminate temporary total benefits and shall receive credit for the overpayment from the date the Form 21 was received by the Commission, September 8, 2014 pursuant to §42-9-210.
9. The Claimant has not met the burden of proof to establish that the Defendant's request for overpayment should be barred by the Doctrine of Laches.
10. Pursuant to S.C. Code Ann. §42-1-120 the Claimant is not permanently and totally disabled.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law;

IT IS HEREBY ORDERED that the Claimant suffered an injury to her spine, left knee, left arm and left hand by accident rising out and in the course and scope of her employment on March 29, 2013.

IT IS FURTHER ORDERED that the Claimant reached maximum medical improvement on August 26, 2014.

IT IS FURTHER ORDERED that the Claimant is entitled to and award of 10% permanent partial disability to the left knee pursuant to §42-9-30(16) and is, there entitled to 19.5 weeks of benefits.

IT IS FURTHER ORDERED that the Claimant is entitled to an award of 8% permanent partial disability to her spine pursuant to §42-9-30(21) and is, therefore entitled to 24 weeks of benefits.

IT IS FURTHER ORDERED that Claimant's request for future medical treatment for the back is denied.

IT IS FURTHER ORDERED that the Defendants are entitled to receive credit for temporary benefits paid to the Claimant from September 8, 2014 to present.

IT IS FURTHER ORDERED that the Claimant failed to meet the burden of proof that the Defendant is barred from receiving overpayment of TTD by the Doctrine of Laches.

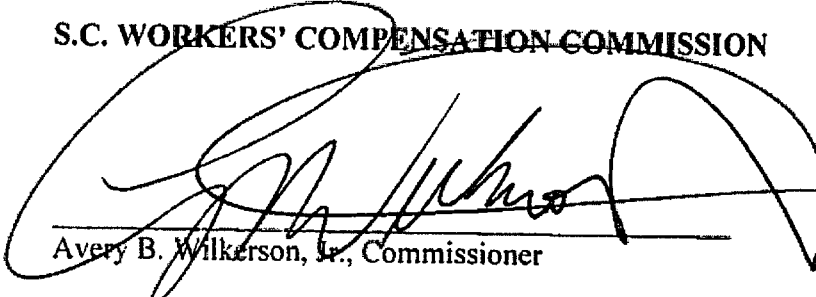
IT IS FURTHER ORDERED that the Defendants may stop temporary total benefits.

IT IS FINALLY ORDERED that the Claimant is not permanently and totally disabled pursuant to §42-9-10.

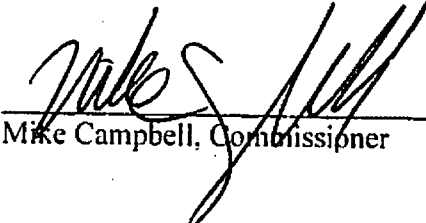
AND IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION

MAJORITY AFFIRMATION:



Avery B. Wilkerson, Jr., Commissioner



Mike Campbell, Commissioner

I RESPECTFULLY VOTE TO VACATE:



Melody 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 Eugenia Hollmon on April 20, 2016