

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1405219

RECEIVED
JUL 01 2016
SC Court of Appeals

KEVIN WIKEL,

EMPLOYEE
CLAIMANT/RESPONDENT

vs.

PC METRO BOTTLING,

EMPLOYER,

AND

INDEMNITY INSURANCE CO. of NA,

CARRIER,
DEFENDANTS/RESPONDENTS

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

Appellate Panel Decision and Order filed
June 23rd, 2016

AFFIRMED IN FULL

APPEARANCES:

Claimant represented by William Thomas Bacon, IV,
Esquire of McDougall Law Firm,
Lady's Island, South Carolina.

Defendants represented by Andrew D. Smith,
Esquire of Goodman McGuffey Lindsey & Johnson,
LLP Charleston, South Carolina.

STATEMENT OF THE CASE

This matter came before the Hearing Commissioner on December 1, 2015, pursuant to SC WCC Forms 50 and 51. Claimant alleged he suffered compensable injuries by accident to the low back and left leg on May 9, 2014 while in the scope and course of employment with Employer when he lifted a case of drinks and felt pain in his low back with pain down the left leg. Claimant sought an Order of the Commission for compensability of his injuries; the Defendants responsibility to pay all causally-related medical treatment; Claimant's entitlement to temporary total disability benefits from April 2, 2015 through June 29, 2015; and a finding of permanent partial disability benefits in line with the 10% impairment rating to the back and 13% impairment rating to the left leg per Dr. Scott Strohmeyer.

The Defendants took the position Claimant failed to prove by a preponderance of the evidence a compensable injury by accident arising out of and in scope and course of his employment on May 9, 2014. Specifically, the Defendants relied on their perceived discrepancies between Claimant's report of injury on May 9, 2014 to his supervisor, the 1-800-JOB-HURT adjuster and his deposition testimony taken by defense counsel to defeat compensability. As such, the Defendants requested an Order of the Commission denying compensability of the claim and Claimant's entitlement to benefits under the Act.

By Order dated January 29, 2016, the Hearing Commissioner found Claimant suffered compensable injuries to the back and left leg on May 9, 2014. Pursuant to the finding of compensability, the Hearing Commissioner awarded causally-related medical treatment, temporary total disability benefits and permanent partial disability benefits. On February 10, 2016, the Defendants filed a Form 30, Request for Commission Review, challenging the Hearing Commissioner's Decision and Order.

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 careful consideration.

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50, review the award, weigh the evidence as presented at the hearing and, if good grounds be shown therefore, make its findings of facts and reach its own conclusions of law consistent or inconsistent with those of the Hearing Commissioner. *See Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 156 S.E.2d 318 (1967); *see also Lowe v. An-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

FINDINGS OF FACT

After a thorough review of the evidence, including the hearing testimony, and medical evidence, exhibits, and other documentary evidence submitted by the respective parties pursuant to the Administrative Procedures Act, the Commission File in this matter, and testimony submitted, WE, THE APPELLATE PANEL, AFFIRM THE FINDINGS OF FACTS OF THE SINGLE COMMISSIONER AS IF FULLY SET FORTH HEREIN AND FURTHER FIND AS FACT THAT:

1. Claimant plead an injury by accident to the back and left leg occurring on May 9, 2014 by Form 50, Hearing Request.
2. Testimony of the Claimant is that over a period of 13 days from April 24, 2014 to May 6, 2014 he worked continuously and began to experience pain in the low back. Then, after 2 days off work, during which he rested, he returned to work on May 9,

2014. That morning, while lifting a case of Aquafina, he suffered an injury to the low back and left leg and reported the same to his supervisors Eric and Landon.

3. Claimant testified regarding his prior employment working as a manager for Golden Coral and Dollar General.
4. Claimant's deposition was taken by defense counsel on September 5, 2014 and October 26, 2015. In response to the deposition questions of defense counsel, Claimant seemed confused as to what really happened. However, Claimant was clear about the fact that he developed low back pain over a 13 day period from April to May 2014 and then after 2 days off, he experienced increased pain in the incident of lifting a case of product (Aquafina) the morning of May 9, 2014.
5. Claimant was denied medical treatment by the Defendants following formal denial of the claim. As such, Claimant had all causally-related medical treatment, including MRI, injections and the April 2, 2014 surgery and post-surgical therapy paid for by his group health carrier.
6. A credibility finding was requested by the Defendants. Based on the Hearing Commissioner's observations of Claimant during his testimony on direct and cross-examination, we find Claimant's credibility to be neutral at worst, but somewhat confused. We do not think Claimant is lying about his work injury, his reporting of the work injury or his medical treatment.
7. Defendants presented the testimony of Landon Papay, unit sales manager of the Employer and supervisor of the Claimant. Mr. Papay was asked on direct examination by counsel for Defendants about Claimant's injury and reporting:

Q. Okay. Did you ever hear about a work related accident on May 9th, 2014, by Mr. Wikel?

could
report

A. If I remember correctly, he either called myself or Eric Smith, his direct supervisor, and stated that his back - - he could not - - he no longer work that day; his back was hurting him too - - at that point in time too much where he could not work. He - - I believe, it was either Eric - - either Eric Smith or myself that told him at that point in time to call the 1-800-JOB-HURT number, for him to it and then to go see the doctor.

Q. Okay. And do you know where he was on May 9th, 2014?

what

A. I - - I'd have to look at the sheets and see exactly what day and - - what store he was at.

Q. Do you recall how or - - he told you he injured himself?

A. I believe he said he was lifting a case of product.

Q. Okay. Did he say on that day or any particular day or - -

yes.

A. He said it was on that - - on that day - - that it was that morning,

Q. - - lifting something that morning?

A. Uh-huh.

Q. You just have to answer verbally yes or no.

A. Yes. Sorry.

(Hr. Tr. p. 66, l.5 - p. 67, l.6).

The testimony of Mr. Papay is compelling and clearly notes an injury by accident with a causation statement reported to him by Claimant on May 9, 2014. We gave great weight to this testimony of an Employer witness presented by counsel for the defense.

8. Mr. Papay also testified Claimant mentioned a slipped disc he had prior to the May 9, 2014 injury, but this was never confirmed by any medical record, medical opinion or

other reliable means. Mr. Papay further testified he had inquired about Claimant's ability to fully perform all his job duties and was assured he was able to do so.

9. Based on the greater weight of testimony and medical evidence in the record, we find this case compensable as an injury by accident to the low back and left leg on May 9, 2014. The record, when considered as a whole, supports Claimant's May 9, 2014 injury by accident.

- a. Testimony of Claimant and Landon Papay is consistent and credible to support the May 9, 2014 injury by accident.
- b. APA p. 13 – Dr.'s Care note dated May 9, 2014. Low back pain x1 week after long shifts at work lifting and bending.
- c. APA p. 27 – Dr.'s Care Physician's statement – Claimant diagnosed with low back and radicular pain, which is work related. Disability date May 9, 2014.
- d. APA p. 31 – MRI at Belfair Clinical Summary dated May 22, 2014 – LBP w/ pain leg x2 wks lifting injury at work.
- e. APA p. 38 – June 6, 2014 office note of Dr. Strohmeyer – Claimant does a lot of lifting. There was no one incident.
 - i. (This is report is consistent with Claimant's deposition testimony and hearing testimony regarding the low back pain starting over a period of 2 weeks followed by the May 9, 2014 event.)
- f. APA p. 50 – February 23, 2015 office note of Dr. Strohmeyer – Claimant had a recurrence of his pain. There was no new trauma. It looks like he has a recurrence.

g. APA p. 69 – June 9, 2014 note of Dr. Batson – Claimant has lower pain radiates down the left leg. Began 5 weeks ago, occurred prolonged lifting, loading and driving while performing his job.

i. (This report is consistent with Claimant's deposition testimony and hearing testimony regarding the low back pain starting over a period of 2 weeks followed by the May 9, 2014 event.)

10. In reaching our decision on compensability and credibility, we considered the November 8, 2008 record from Beaufort Memorial Hospital found at APA pp. 169-172.

11. In reaching our decision on compensability and credibility, we considered the Videotape submitted as an exhibit by Defendants dated May 2, 2014.

12. In reaching our decision on compensability and credibility, we considered the 1-800-JOB-HURT recording the parties stipulated was taken on May 9, 2014.

13. In reaching our decision on compensability and credibility, we considered the defense-prepared statement/questionnaire completed by Dr. Scott Strohmeyer found at APA p. 199 in which he states he does not know how [Claimant] hurt his back and left lower extremity.

14. In the Form 14B dated September 29, 2015, Dr. Scott Strohmeyer opined Claimant reached Maximum Medical Improvement on June 29, 2015. We base our finding of MMI on Dr. Strohmeyer's opinion as stated in the Form 14B. (APA p. 68).

15. In the Form 14B dated September 29, 2015, Dr. Scott Strohmeyer opined Claimant has an impairment rating of 10% to the back and 13% to the left lower extremity

pursuant to the AMA Guidelines. We base our finding of Claimant's disability on Dr. Strohmeyer's opinion as stated in the Form 14B. (APA p. 68).

16. Claimant was written out of work by Dr. Strohmeyer from the date of surgery, April 2, 2015, through June 29, 2015. We find Claimant is entitled to TTD benefits while out of work per Dr. Strohmeyer. (APA pp. 65 and 68).
17. As the Claimant's injuries are compensable, the Defendants are responsible for all causally-related medical treatment from May 9, 2014 through June 29, 2015.
18. Claimant was released to return to work without restriction by Dr. Strohmeyer. This is confirmed by the June 29, 2015 return to work note and Form 14B. (APA pp. 65 and 68).
19. We find Claimant is entitled to future medical treatment consisting of physical therapy per the Form 14B dated June 29, 2015. (APA p. 68).
20. Order instructions were sent to all parties of interest on December 15, 2015.

CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Law, WE, THE APPELLATE PANEL, AFFIRM THE CONCLUSIONS OF LAW OF THE SINGLE COMMISSIONER AS IF FULLY SET FORTH HEREIN AND FURTHER CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. § 42-1-40 governs the average weekly wage and compensation rate.
2. § 42-1-120 governs disability.
3. § 42-1-160 governs injuries and includes injuries by accident arising out of and in the course and scope of employment.

4. § 42-9-30(16) governs disability to the leg.
5. § 42-9-30(21) governs disability to the back.
6. § 42-15-20 governs notice of injury.
7. § 42-15-60 governs Claimant's entitlement to medical treatment.
8. § 42-17-40 governs the conduct of hearings and rendering of awards.

ORDER

WE, THE APPELLATE PANEL, AFFIRM THE ORDER OF THE SINGLE COMMISSIONER AS IF FULLY SET FORTH HEREIN AND FURTHER ORDER THAT:

IT IS HEREBY ORDERED Commissioner Wilkerson's Decision and Order dated January 29, 2016, is affirmed and shall remain in effect.

IT IS HEREBY ORDERED that the Defendants shall pay causally-related medical expenses incurred as a result of the Claimant's compensable May 9, 2014 injury to the back and left leg.

IT IS FURTHER ORDERED that the Defendants shall pay the Claimant 12.7143 weeks of temporary total disability benefits in the amount of \$7,268.38.

IT IS FURTHER ORDERED that the Defendants shall pay the Claimant 30 weeks of permanent partial disability benefits representing 10% to the back or \$17,150.10.

IT IS FURTHER ORDERED that the Defendants shall pay the Claimant 25.35 weeks of permanent partial disability benefits representing 13% to the leg or \$14,491.83.

IT IS FURTHER ORDERED that the Claimant is entitled to additional medical treatment in the form of physical therapy.

AND IT IS SO ORDERED.

Signature page follows


Gene McCaskill, Commissioner


Aisha Taylor, Commissioner


T. Scott Beck, Commissioner

RECEIVED

JUL 01 2016

SC Court of Appeals

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 June 23, 2016