

FULL COMMISSION APPELLATE PANEL

AMENDED DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO.0908371

TIMOTHY HANNAH,)
)
 EMPLOYEE)
 CLAIMANT/APPELLANT,)
)
 MJV, INC/BUTLER TRUCKING,)
)
 EMPLOYER,)
)
 PALMETTO TIMBER S. I. FUND)
 C/O WALKER, HUNTER &)
 ASSOCIATES, INC.)
)
 CARRIER,)
 DEFENDANTS/RESPONDENTS.)
)

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 SC Court of Appeals

Full Commission Appellate Panel Review held in
 Columbia, South Carolina, on November 17, 2015
 per notices timely and properly served upon all
 parties of interest.

Full Commission Appellate Panel Decision and
 Order filed July 6, 2016

APPEARANCES: W. E. Jenkinson, III, Esquire of Kingstree, South Carolina
 representing the Claimant/Appellant.

Defendants/Respondents represented by R. Mark Davis,
 Esquire, of Charleston, South Carolina

STATEMENT OF THE CASE

The parties were heard by Commissioner Gene McCaskill on September 25, 2014 in Conway, South Carolina. On July 2, 2015 the Hearing Commissioner issued the following Order:

1. Claimant did not suffer an injury by accident to his low back arising out of and occurring in the course of his employment;
2. Claimant is at maximum medical improvement for his cervical spine and left arm/elbow; Claimant is not entitled to any disability or wage loss under § 42-9-10, 42-9-20, 42-9-30, for his cervical spine and/or left arm/elbow;
3. Defendants are not responsible for payment of past, present, or future medical bills for treatment rendered by Dr. James Brennan;
4. Defendants are not responsible for and Claimant is not entitled to future medical treatment for his cervical spine, left arm, or low back.

Within the statutory period, counsel for Claimant filed an Application for Review in the case setting forth questions for appeal, copies of which were furnished to all interested parties prior to oral argument presented before the Full Commission Appellate Panel on November 17, 2015.

All proper testimony has been taken, together with all documentary evidence, and oral arguments have been delivered by to the individual members of the Full Commission Appellate Panel and the case has since been under study and consideration.

By Appeal. Claimant respectfully submitted the following questions asserting that the Hearing Commissioner erred in the following:

1. Did the Hearing Commissioner err in Finding of Fact No. 4 which in part states, "Using the 6th addition of the AMA Guides there should be no impairment to his cervical spine.

To make this determination I did use the Cervical Spine Regional Grid. His functional history is two grade above the clinical studies and physical examination, so it is considered unreliable. I did use the physical examination and clinical studies to calculate his final impairment, which as noted above, is zero.”; the error being that Dr. Bethea is the treating physician for the Claimant’s elbow and not his cervical spine; Dr. Bethea did not see the Claimant’s MRI which would have been conclusive of injury to the Claimant’s cervical spine nor did he rely upon the findings and conclusions of Dr. Triana, the authorized doctor for the cervical spine injury?

2. Did the Hearing Commissioner err in Finding of Fact No. 5 which states, “Dr. Bethea signed a Form 14B on February 10, 2010, which reads, “Based on the AMA Guidelines, the claimant has sustained a 0% medical impairment to cervical spine injured body part(s) and a 0% medical impairment to left elbow other affected body part(s).”; the error being that the evidence as well as well the testimony of the authorized treating physician for the cervical spine found on the date and for months thereafter the Claimant could not return to work and was in need of a surgical procedure for his cervical spine?
3. Did the Hearing Commissioner err in Finding of Fact No. 6 which states, “per the Form 14B Physician’s Statement, the Claimant is able to return to work without restriction”; the error being that the evidence as well as well the testimony of the authorized treating physician for the cervical spine found on the same date and for months thereafter the Claimant could not return to work and was in need of a surgical procedure for his cervical spine?
4. Did the Hearing Commissioner err in Finding of Fact No. 7 which states, “Per the Form 14B, the Claimant will not need future medical care related to his or her work related

injury or illness on a reasonable degree of medical certainty (more likely than not)”; the error being that the authorized treating physician for the cervical spine, Dr. Triana, found at the same time that the Claimant needed a surgical procedure for the cervical spine as documented by MRIs and other diagnostic testing which had not been seen by Dr. Bethea?

5. Did the Hearing Commissioner err in Finding of Fact No. 16 which states, “S.C. Code Ann. §42-15-60 gives the employer the authority to select the treating physician”: the error being that this statute in no way precludes the Claimant from asserting a permanent impairment and a resulting rating as well as compensation?
6. Did the Hearing Commissioner err in Finding of Fact No. 19 which states “When the Claimant chose to proceed on his own, he took himself out from under the Workers’ Compensation Act”; the error being that the Claimant still had a right to assert he had a permanent injury and resulting impairment for which he was entitled to compensation under the Workers’ Compensation Act?
7. Did the Hearing Commissioner err in Finding of Fact No. 22 in finding that the Claimant had reached maximum medical improvement from his neck injury based upon the statement of Dr. Bethea; the error being Dr. Bethea was the treating physician for the elbow and not the cervical spine; the authorized physician for the cervical spine was Dr. Triana who as of late April (three months later) 2011 found that based upon CT scans and his care and treatment the Claimant was in need of future medical care and treatment including surgery and continued to keep him out of work?
8. Did the Hearing Commissioner err in Finding of Fact No. 23 which states, “Based on a review of the evidence as a whole, the Claimant is at MMI for his cervical spine and left

- arm/elbow as of 02/10/10 (sic 2011), the date Dr. Bethea completed the Form 14B"; the error being that there was no credible evidence and testimony that the Claimant had reached MMI based on the documentation and testimony of the treating physician Dr. Triana who continued treatment to the cervical spine?
9. Did the Hearing Commissioner err in Finding of Fact No. 26 which states, "Claimant did not suffer any permanent partial disability of the back (cervical spine) as a result of this workers' compensation claim"; the error being that the evidence presented, particularly, that of the treating physician for the cervical spine, Dr. Triana, and the CT scans demonstrated the need for surgery and permanent partial disability of the cervical spine?
 10. Did the Hearing Commissioner err in Finding of Fact No. 28 which states, "Claimant is not entitled to TTD benefits"; the error being that the Claimant was entitled to TTD benefits after the surgical procedure performed by Dr. Brennan on May 2013 for a period of three months based upon the evidence presented?
 11. Did the Hearing Commissioner err in Finding of Fact No. 30 which states, 'Claimant is not entitled to future medical treatment under Dodge or any other statute, regulation, or case governing the provision of medical benefits under S.C. Workers' Compensation Act"; the error being if the commission finds Claimant is entitled to an impairment rating for his cervical spine compensation resulting, Claimant would be entitled to the insertion of Utica-Mohawk language in any final order?
 12. Did the Hearing Commissioner err in ordering "Claimant is at MMI for his cervical spine..."; the error being that the evidence presenting, particularly that of Dr. Triana, his authorized treating physician for the cervical spine, and Dr. Brennan establish the

Claimant was not at MMI for the cervical spine until three months following the surgery performed by Dr. Brennan in 2013?

13. Did the Hearing Commissioner err in ordering "Claimant is not entitled to any disability or wage loss under §42-9-10, 42-9-20, 42-9-30, for his cervical spine...": the error being that the evidence undisputedly shows the Claimant does have a permanent impairment and subsequently right to compensation under the provisions of the Workers' Compensation Act?

In Appellate review, the Full Commission Appellate 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. This scope of review of the Full Commission is not limited. The Commission can, like the Single Commissioner, consider all of the evidence and reach its own Findings of Fact and Conclusions of Law. Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 64, 156 S.E.2d 318, 321 (1967).

It is well-established that the Full Commission is the ultimate fact finder in Workers' Compensation cases and is not necessarily bound by the Single Commissioner's Findings of Fact. Id. 58, 64. The Full Commission is empowered to make its own Findings of Fact and to reach its own Conclusions of Law consistent or inconsistent with those of the Single Commissioner. Id. The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission. Id.

After careful review of the instant case, the Commission, by unanimous vote, has determined to **Affirm in part Reverse in part** the Hearing Commissioner's Decision and Order as set forth below.

FULL COMMISSION APPELLATE PANEL REASONING

The Claimant/Appellant presented the Full Commission Appellate Panel with multiple grounds for review asserting the Hearing Commissioner erred in numerous Findings of Fact and Conclusions of Law. After a careful review of the evidence, we have determined that we reverse in part the Single Commissioner's Decision and Order, particularly Findings of Fact number 19 which states "When the Claimant chose to proceed on his own, he took himself out from under the Workers' Compensation Act" and number 21 "Proceeding on his own, the Claimant abandoned his recourse under the Workers' Compensation Act".

The Single Commissioner found the Defendants provided treatment for the Claimant's neck before he reached maximum medical improvement prior to February 2, 2010, the date of the Form 14B completed by Dr. Bethea. The Single Commissioner held that if the Claimant wished to pursue additional treatment for the neck, that pursuit would have to have been under the provisions of the Act for the Defendants to be held financially responsible. Since the Claimant sought treatment on his own, without advising his attorney or requesting treatment from the Defendants, the Single Commissioner found that the Claimant abandoned his recourse under the Act. Based on this holding the Single Commissioner concluded that the Claimant was not entitled to any disability for his cervical spine. Defendants are not responsible for the payment of past, present or future medical bills for treatment rendered by Dr. James Brennan, and Defendants are not responsible for any future medical treatment.

It is uncontested that the Claimant suffered an injury to his cervical spine in a work related accident. The Claimant had an initial hearing related only to his low back pain which he prevailed before the Single Commissioner and was reversed by the Full Commission in 2011. Subsequently, Claimant signed a Form 17 in the fall of 2011. Thereafter he continued to have

problems with his neck hurting and sought medical care and treatment using his wife's insurance. His family practitioner referred him to Dr. Brennan, a neurosurgeon in Florence, who ordered a new MRI which revealed significant disc bulge at C6-7 and as a result Dr. Brennan operated on the Claimant's neck, performing a fusion. Dr. Brennan continued to treat the Claimant through the end of 2012 and released him with an impairment rating of 28% of the cervical spine.

Defendant has raised the defense of res judicata and collateral estoppel. We find that these defenses do not apply because the subject matter is not the same as in the prior litigation which was adjudicated based upon the lumbar spine not the cervical spine. Likewise the defendant raised the Doctrine of Laches which we do not find applies because the Claimant was not negligent and unreasonable in his explanation of the length of time under the circumstances of his claim. Further, there is no finding of material prejudice as required by the Doctrine of Laches.

Of particular concern is the finding of the Single Commissioner that when the Claimant chose to proceed on his own he took himself out from under the Workers' Compensation Act and abandoned his recourse under the Act. This finding relied upon §42-15-60 as precluding the Claimant from receiving unauthorized medical benefits.

Nowhere does §42-15-60 preclude a Claimant from independently obtaining a rating from a non-treating physician and receiving an unauthorized evaluation from said physician. Claimant and employee often each secure ratings for presentation to the Commission and the employer does not pay for the rating secured by the Claimant in this situation. Further, Claimant requested that the employer be liable for the cost of care with Dr. Brennan and additional temporary total payments during the recovery. The denial of this request does not require and should not lead to the denial of the award of permanency based on the findings of Dr. Brennan.

The evidence is uncontroverted that the treatment rendered by Dr. Brennan is the treatment which is being recommended by Dr. Triana when he was the authorized treating physician. Brennan found a 28% impairment to the cervical spine which according to his opinion, to a reasonable degree of medical certainty is a result of the injury sustained by the Claimant in the accident of July 14, 2009.

AMENDMENTS TO ORIGINAL ORDER AND DECISION OF THE FULL

COMMISSION:

The Appellate Panel of the Full Commission issued a Decision and Order in this case on February 23, 2016.

On February 29, 2016 the Defendants filed a "Motion for Reconsideration." The Defendants requested that the Commission reconsider Defendants' credit for overpayment of Temporary Total Disability benefits from the period of February 10, 2010 through August 16, 2011. The Defendants also requested that the Commission reconsider the findings and conclusion that Claimant suffered 28% permanent partial disability to the cervical spine, and amend the Appellate Panel Order dated February 23, 2016 to reflect those changes. The Defendants further requested that the Commission amend the Order to reflect that the Act provides for disability awards for the "back" and not specific segments of the spine, e.g., "cervical spine."

The Claimant in response filed a reply on March 11, 2016 asserting that the Temporary Total Disability payments were properly paid because the Claimant was entitled to payment under the Order of the single Commissioner through the hearing of the Full Commission on July 25, 2011. The Claimant further asserts that he suffered an unquestioned injury to the cervical spine in the roll-over accident of his 18-wheeler vehicle, which was well documented from the time of his injury, that the injury in fact did occur and a fusion resulted which in turn caused a

28% impairment to his cervical spine.

The Defendants' Motion for Reconsideration is granted in part and denied in part. The request for credit for overpayment is denied. The Defendants' request that the Commission reconsider the permanent partial disability award is denied. The Defendants' request for the award of permanent partial disability to be termed as an award to the back as provided by the Act is granted.

This Order amends the Findings of Fact and Conclusions of Law to reflect the disposition of the Motion for Reconsideration as follows:

FINDINGS OF FACT:

1. Claimant suffered permanent injury to his cervical spine and using the 6th Edition of the AMA Guidelines, Claimant suffered a 28% impairment to his back.
2. S.C. Code Ann. §42-15-60 in no way precludes the Claimant from asserting a permanent impairment and resulting rating as well as compensation.
3. When the Claimant chose to proceed on his own he did not take himself out from under the Workers' Compensation Act and the Claimant had a right to assert he had a permanent injury and resulting impairment for which he was entitled to compensation under the Workers' Compensation Act.
4. The Claimant did suffer permanent partial disability of the back as a result of the injuries sustained in this work related accident.
5. The Claimant has reached MMI for the injuries sustained in this work related accident.
6. The Defendants are not entitled to a credit for Temporary Total Disability benefits paid to the Claimant during the period of February 10, 2010 through August 16, 2011.

CONCLUSIONS OF LAW:

1. Claimant has sustained a 28% permanent partial disability to the back based upon a fusion of C6-7 and the Claimant's testimony.
2. S.C. Code Ann. §42-15-60 which gives the employer the authority to select the treating physician does not preclude the Claimant from asserting a permanent impairment and resulting rating as well as compensation.
3. When the Claimant chose to proceed on his own he did not take himself out from under the Workers' Compensation Act. The Claimant still had a right to assert he had a permanent injury and resulting impairment for which he was entitled to compensation under the Workers' Compensation Act.
4. The Claimant did suffer a permanent partial disability of the back as a result of his Workers' Compensation claim and the evidence presented, particularly that of the treating physician of the cervical spine, Dr. Triana, and the CT scans, demonstrated the need for surgery and permanent partial disability of the back.
5. Based upon a disability to the back of 28%, the Claimant is entitled to 84 weeks of compensation at the rate of \$381.32 per week for a total of \$32,030.88, said payments to be made in a lump sum to be calculated in accordance with Regulation 67-1605.
6. The Claimant has reached MMI for the injuries sustained in this work related accident.
7. This lump sum is made for payment which shall continue for the balance of the life of the Claimant and thus, through payment in a lump sum shall be reached by the payment of attorney fees in the amount of \$10,570.19 and costs in the amount of \$7,627.44.
8. The Claimant's attorney in his Form 61 has waived the costs leaving the attorney fees at \$10,570.19 and the Claimant will receive \$21,460.69.

9. The lump sum is compensation for permanent impairment that will affect the Claimant for the rest of his life.

10. The Claimant's remaining life expectancy from August 31, 2011. (the date of the Form 17) the date of the last payment of salary benefits. is 348 months. Therefore, even though paid in a lump sum, the Claimant's benefits shall be considered to be \$61.66 per month for 348 months.

IT IS SO ORDERED!

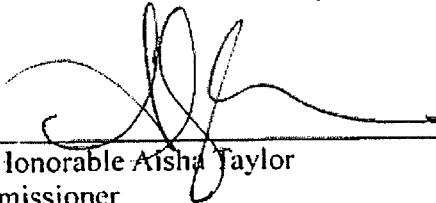


The Honorable Melody L. James, Chair
Commissioner
South Carolina Workers' Compensation Commission

WE CONCUR:



The Honorable T. Scott Beck
Commissioner
South Carolina Workers' Compensation Commission



The Honorable Aisha Taylor
Commissioner
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 Eugenia Hollmon on July 6, 2016

ORDER
OF
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

SCWCC FILE NO.: 0908371

Timothy Hannah,

Claimant,

v.

MJV/Butler Trucking, Inc. and Palmetto Timber S.I.,

Employer/Defendant.

ORDER TO ADDRESS
DEFENDANTS' MOTION FOR RECONSIDERATION

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AUG 08 2016
SC Court of Appeals

On February 29, 2016 the Defendants filed a "Motion for Reconsideration." The Defendants requested that the Commission reconsider Defendants' credit for overpayment of Temporary Total Disability benefits from the period of February 10, 2010 through August 16, 2011. The Defendants also requested that the Commission reconsider the findings and conclusion that Claimant suffered 28% permanent partial disability to the cervical spine. The Defendants additionally requested that the Commission's Order would reflect that the Act provides for disability awards for the "back" and not specific segments of the spine, e.g., "cervical spine." The Defendants further requested that the Commission amend the Appellate Panel Order dated February 23, 2016 to reflect the requested changes.

The Claimant in response filed a reply on March 11, 2016 which contends that the Temporary Total Disability payments were properly paid because the Claimant was entitled to payment under the Order of the single Commissioner through the hearing of the Full Commission on July 25, 2011. The Claimant further asserts that he suffered an unquestioned injury to the cervical spine in the roll-over accident of his 18-wheeler vehicle, which was well documented from the time of his injury, that the injury in fact did occur, and a fusion resulted which in turn caused a 28% impairment to his cervical spine.

The Defendants' request for Motion for Reconsideration is granted in part and denied in part. The request for credit for overpayment is denied. The Defendants' request that the Commission reconsider the permanent partial disability award is denied. The Defendants' request for the award of permanent partial disability to be termed as an award to the back as provided by the Act is granted.

The Commission will issue an Amended Order to reflect the disposition of the Motion for Reconsideration.

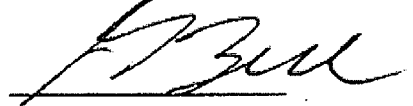
IT IS THEREFORE ORDERED that:

1. The Defendants' Motion for Reconsideration is granted in part and denied in part.
2. The Commission will issue an Amended Order to reflect the disposition of the Motion for Reconsideration.

AND SO IT IS ORDERED!



Melody L. James, Commissioner, Chair



T. Scott Beck, Commissioner



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 July 6, 2016