

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
JUDICIAL CONFERENCE DECISION AND ORDER

Shawn Wier v AGY Holding Corporation
SCWCC: 1510187
Commissioner: James

This matter was heard before the South Carolina Workers' Compensation Full Commission in Judicial Conference on a **Motion to Amend Caption of Appellate Decision**. The Commissioners considered the matter and ordered the matter handled in the following manner:

IT IS, THEREFORE, ORDERED the pending appeal of the Administrative Order of the Commission is hereby;
 Dismissed as Interlocutory. Set for Oral Argument.

IT IS, THEREFORE, ORDERED the pending motion be, and hereby is;
 Granted. Denied. Dismissed Preserved for hearing

BEFORE THE;
 Hearing Comm. Jurisdictional Comm. Full Commission.

IT IS, THEREFORE, ORDERED this matter be, and hereby is; remanded to take such action and enter an Order consistent with the Court's directive.

Remand to Panel as indicated below.
 Barden James Taylor
 Beck Campbell Wilkerson
 McCaskill

Remand for Order consistent with the Order of the Court.
 Remand to the Hearing Commissioner.
 Remand to the Jurisdictional Commissioner.
 Other: _____

Remand: Panel Oral Argument. En Banc Oral Argument.

AND IT IS SO ORDERED.



T. Scott Beck, Chair
For the Commission

Columbia, South Carolina

12/12 2016

CONCURRING:

Commissioner Susan S. Barden
Commissioner Melody James
Commissioner Aisha Taylor
Commissioner Avery Wilkerson
Commissioner Michael Campbell
Commissioner Gene McCaskill

NOT PARTICIPATING:

DISSENTING:

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THE UNDERSIGNED HAS THIS DATE SERVED THIS ORDER IN THE ABOVE ENTITLED ACTION UPON ALL PARTIES ELECTRONICALLY OR BY DEPOSITING A COPYHEREOF, POSTAGE PAID, IN THE UNITED STATES MAIL

This 12 day of December, 2016.

By: 
SCWCC Judicial Department

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

RECEIVED

DEC 28 2016

SC Court of Appeals

Shawn Wier,
Employee/Claimant,

vs.

AGY Holding Corporation,

Employer,

and

Great American Alliance Insurance Company,

Carrier/Defendants.

**AMENDED
DECISION AND ORDER**

WCC FILE NO: 1510187

Appellate Panel Review held in Columbia, South Carolina on

August 15, 2016

Appellate Panel Decision and Order filed on December 12, 2016

Appearances: Claimant represented by William L. Smith, II, Esquire
Defendants represented by E. Ros Huff, Jr., Esquire

STATEMENT OF THE CASE

This case came before the Single Commissioner pursuant to a Form 50 filed by the Claimant, Shawn Wier, and a Form 51 filed by Defendants. Claimant contended he suffered a compensable injury on June 5, 2015 when his left elbow struck the creel while doffing a frame. Claimant alleged entitlement to temporary total disability for the period of August 19, 2015 to the present and continuing. Claimant further alleged that he had not reached maximum medical improvement and was entitled to payment of past and future medical care.

Defendants denied that Claimant had sustained a compensable injury and denied any temporary total compensation or medical benefits.

The hearing was held before the Single Commissioner on February 1, 2016 in Columbia, South Carolina pursuant to timely and properly notice served on all parties. No objection was raised by either party regarding jurisdiction or venue.

On April 11, 2016, the Single Commissioner issued her Decision and Order, making the following Findings of Fact:

1. The parties have agreed to a temporary average weekly wage of \$728.26 and a compensation rate of \$485.53. This is subject to discovery and revision by subsequent order of the Commission.
2. The Claimant has met his burden of proof that he incurred an injury by accident to his left elbow that arose out of and was within the course and scope of his employment. This finding is based on the record as a whole, including the corroborating medical records of Aiken Regional Medical Center, Dr. Plymale, and the MRI findings as well as Claimant's testimony.

3. Claimant's injury occurred during his shift on June 5, 2015. This injury was reported to his supervisor and he was referred to the hospital by his supervisor. The hospital records reflect the injury and indicate that Claimant had swelling in his left arm.
4. The Claimant was subsequently seen by an orthopedist, Dr. Mickey Plymale, on June 16, 2015. Dr. Plymale also documented swelling. Dr. Plymale placed the Claimant on light duty restrictions which were initially accommodated by the employer.
5. The employer terminated the Claimant on August 19, 2015 stating that they were unable to accommodate the medical restrictions of a probationary employee. This finding is based on testimony of the Claimant as well as Claimant's Exhibit One which was the Notice of Discharge form from AGY.
6. Dr. Plymale had recommended an MRI which was not obtained until September 21, 2015 after the Claimant went to the VA Hospital for treatment.
7. The MRI reflected a diffuse signal abnormality noticed at the extensor tendon attachment to the lateral epicondyles, likely representing tendinopathy or possible partial tear. Small joint effusion was also noted (APA Pg. 1).
8. After review of the MRI, Dr. Plymale states that the results show or confirm a diagnosis of lateral epicondylitis, and that he stood by his causation statement to a reasonable degree of medical certainty (Deposition of Dr. Plymale, Pg. 20).
9. The Defendants indicated that the Claimant's activities contained in a video of his family's pool trip to the YMCA, were not reflected truthfully in his deposition, and this affects his credibility and whether he incurred an injury, and whether he can receive temporary total payments. Although the Claimant did not reveal in his deposition that he picked up his children at the pool, he did reveal that he went to the pool with his family.

Even though it is not an issue, it is noted the Claimant was forthcoming in his pre-placement questionnaire about his pre-existing conditions. Also, as indicated, the Claimant's medical records are corroborative of his testimony. The testimony of the accident is credible, and the Claimant has a condition that has been objectively observed by two providers, and documented by MRI scanning.

10. The Claimant is entitled to payment of past medical treatment and the Defendants are to provide ongoing treatment with Dr. Plymale.
11. The Claimant was on light duty restrictions at the time of his termination. The Defendants' position is that the Claimant was not terminated, but instead, quit his employment. The Claimant's uncontroverted testimony is that he did not quit but was terminated. The Notice of Discharge documents, the facts of the discharge were that the employer was "unable to accommodate medical restrictions of a probationary employee" (Claimant's Exhibit 1).
12. Dr. Plymale indicates in his deposition that after review of his MRI results, that the restrictions would have continued until his symptoms were less (Deposition of Dr. Plymale, Pg. 21). Dr. Plymale reviewed photographs from the pool video and indicated he would not have necessarily restricted the Claimant from doing the activities depicted (Deposition of Dr. Plymale, Pg. 26).
13. The treating physician had issued restrictions for the Claimant. Although the Claimant exceeded his lifting restrictions and did not reveal that he had exceeded the restrictions, the physician put the restrictions in place. Although Dr. Plymale stated that he would not indicate that the Claimant could not work after viewing the photographs, he did not state he was changing the light duty work restrictions. As such, those work restrictions

remained in place. The Commission cannot substitute its judgment for that of a physician and change the medical restrictions.

14. The Claimant's inability to earn wages is tied to and related to his medical condition resulting from the injury. The Claimant is therefore entitled to temporary total disability from August 19, 2015, the date of his termination, through the present and continuing.

The Single Commissioner further made the following conclusions of law:

1. Pursuant to Section 42-1-160, the Claimant proved he sustained a compensable injury by accident arising out of and in the course of his employment.
2. Pursuant to Section 42-9-10, the Claimant is entitled to temporary total compensation from August 19, 2015 to the present and continuing.
3. Pursuant to Section 42-15-20, notice of the accident was given to the employer.
4. Pursuant to Section 42-15-60, the Claimant is entitled to payment of medical expenses from June 5, 2015 to the present and continuing. Dr. Plymale is designated as the authorized treating physician.

The Single Commissioner then ordered the Defendants to make the following payments:

1. Payment of temporary total compensation at the temporary rate of \$485.53 (this rate is subject to discovery and revision) from August 19, 2015 to the present and continuing.
2. Payment of all causally related medical expenses from June 5, 2015 to the present and continuing.

3. All other issues are held in abeyance.

Within the statutory period, the Defendants timely filed an Application for Review and Form 30 in the case setting forth their numerous grounds for review, copies of which were furnished to all interested parties. The appellant asserted the Single Commissioner erred:

1. Did the Hearing Commissioner err in finding as fact, concluding as a matter of law, and ordering that the Claimant sustained an injury by accident, the error being that this ruling is not supported by the evidence and the Claimant did not meet his burden of proof?
2. Did the Hearing Commissioner err in finding as fact, concluding as a matter of law, and ordering that the Claimant is entitled to medical treatment to be paid by the Defendants, the error being that this ruling is not supported by the evidence and the Claimant did not meet his burden of proof?
3. Did the Hearing Commissioner err in finding as fact, concluding as a matter of law, and ordering that the Claimant is entitled to temporary disability benefits, the error being that this ruling is not supported by the evidence, and the Claimant did not meet his burden of proof?
4. Did the Hearing Commissioner err in finding as fact, concluding as a matter of law, and ordering that Dr. Plymale coordinate treatment, the error being the Defendants have the right to direct medical treatment in this instance?

Briefs were submitted prior to oral arguments, which were presented before the Appellate Panel on August 15, 2015. All proper testimony has been taken. Such together with all documentary evidence has been delivered by oral argument to individual members of the Appellate Panel and has since been under study and consideration. In an appellate review, the

Appellate Panel shall, pursuant to SC Code Section 42-17-50 (1976 as amended), 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. Counsel for the Claimant and for the Defendants appeared at the scheduled hearing to present oral arguments on behalf of the parties. A review of the record in its entirety shows that the evidence supports the Single Commissioner's findings and rulings. The testimony of the Claimant as well as the medical records from Aiken Regional Medical Center, Dr. Mickey Plymale, and the deposition of Dr. Mickey Plymale establish that Claimant suffered an injury to his left elbow while doffing. The evidence also shows the Claimant worked light duty until he was terminated by Defendants and his work restrictions remained in effect. The evidence further established that Claimant had not reached maximum medical improvement and remained disabled.

Having heard oral arguments on behalf of the parties, considered the briefs, and viewed the Record as a whole, the Appellate Panel affirms the Hearing Commissioner's order in full and makes one amendment to Finding of Fact No. 9. Therefore, the following are made as:

FINDINGS OF FACT

1. The parties have agreed to a temporary average weekly wage of \$728.26 and a compensation rate of \$485.53. This is subject to discovery and revision by subsequent order of the Commission.
2. The Claimant has met his burden of proof that he incurred an injury by accident to his left elbow that arose out of and was within the course and scope of his employment. This finding is based on the record as a whole, including the corroborating medical records of

Aiken Regional Medical Center, Dr. Plymale, and the MRI findings as well as Claimant's testimony.

3. Claimant's injury occurred during his shift on June 5, 2015. This injury was reported to his supervisor and he was referred to the hospital by his supervisor. The hospital records reflect the injury and indicate that Claimant had swelling in his left arm.
4. The Claimant was subsequently seen by an orthopedist, Dr. Mickey Plymale, on June 16, 2015. Dr. Plymale also documented swelling. Dr. Plymale placed the Claimant on light duty restrictions which were initially accommodated by the employer.
5. The employer terminated the Claimant on August 19, 2015 stating that they were unable to accommodate the medical restrictions of a probationary employee. This finding is based on testimony of the Claimant as well as Claimant's Exhibit One which was the Notice of Discharge form from AGY.
6. Dr. Plymale had recommended an MRI which was not obtained until September 21, 2015 after the Claimant went to the VA Hospital for treatment.
7. The MRI reflected a diffuse signal abnormality noticed at the extensor tendon attachment to the lateral epicondyles, likely representing tendinopathy or possible partial tear. Small joint effusion was also noted (APA Pg. 1).
8. After review of the MRI, Dr. Plymale states that the results show or confirm a diagnosis of lateral epicondylitis, and that he stood by his causation statement to a reasonable degree of medical certainty (Deposition of Dr. Plymale, Pg. 20).
9. The Defendants indicated that the Claimant's activities contained in a video of his family's pool trip to YMCA, were not reflected truthfully in his deposition, and this affects his credibility and whether he incurred an injury, and whether he can receive

temporary total payments. Although the Claimant did not reveal in his deposition that he picked up his children at the pool, he did reveal that he went to the pool with his family. Even though it is not an issue, it is noted the Claimant was forthcoming in his pre-placement questionnaire about his pre-existing conditions. Also, as indicated, the Claimant's medical records are corroborative of his testimony. The testimony of the accident is credible, and the Claimant has a condition that has been objectively observed by two providers, and documented by MRI scanning. Notwithstanding any inconsistency, after review of all the evidence, we believe Claimant more than we doubt him.

10. The Claimant is entitled to payment of past medical treatment and the Defendants are to provide ongoing treatment with Dr. Plymale.
11. The Claimant was on light duty restrictions at the time of his termination. The Defendants' position is that the Claimant was not terminated, but instead, quit his employment. The Claimant's uncontroverted testimony is that he did not quit but was terminated. The Notice of Discharge documents, the facts of the discharge were that the employer was "unable to accommodate medical restrictions of a probationary employee" (Claimant's Exhibit 1).
12. Dr. Plymale indicates in his deposition that after review of his MRI results, that the restrictions would have continued until his symptoms were less (Deposition of Dr. Plymale, Pg. 21). Dr. Plymale reviewed photographs from the pool video and indicated he would not have necessarily restricted the Claimant from doing the activities depicted (Deposition of Dr. Plymale, Pg. 26).

13. The treating physician had issued restrictions for the Claimant. Although the Claimant exceeded his lifting restrictions and did not reveal that he had exceeded the restrictions, the physician put the restrictions in place. Although Dr. Plymale stated that he would not indicate that the Claimant could not work after viewing the photographs, he did not state he was changing the light duty work restrictions. As such, those work restrictions remained in place. The Commission cannot substitute its judgment for that of a physician and change the medical restrictions.
14. The Claimant's inability to earn wages is tied to and related to his medical condition resulting from the injury. The Claimant is therefore entitled to temporary total disability from August 19, 2015, the date of his termination, through the present and continuing.

CONCLUSIONS OF LAW

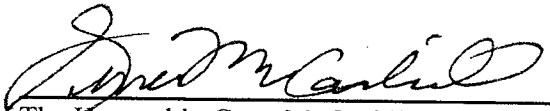
1. Pursuant to Section 42-1-160, the Claimant proved he sustained a compensable injury by accident arising out of and in the course of his employment.
2. Pursuant to Section 42-9-10, the Claimant is entitled to temporary total compensation from August 19, 2015 to the present and continuing.
3. Pursuant to Section 42-15-20, notice of the accident was given to the employer.
4. Pursuant to Section 42-15-60, the Claimant is entitled to payment of medical expenses from June 5, 2015 to the present and continuing. Dr. Plymale is designated as the authorized treating physician.

ORDER

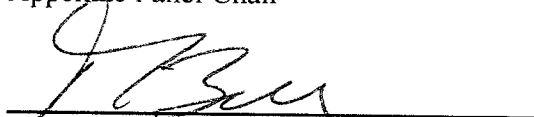
IT IS THEREFORE ORDERED that the Decision and Order of the Single Commissioner filed on April 11, 2016 is hereby affirmed by the Appellate Panel with the amendment of Finding of Fact No. 9. We order Defendant to make the following payments:

1. Payment of temporary total compensation at the temporary rate of \$485.53 (this rate is subject to discovery and revision) from August 19, 2015 to the present and continuing.
2. Payment of all causally related medical expenses from June 5, 2015 to the present and continuing.
3. All other issues are held in abeyance.

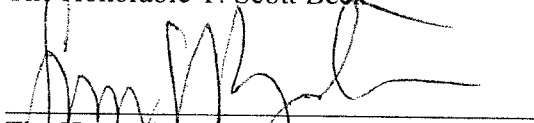
AND IT IS SO ORDERED.



The Honorable Gene McCaskill
Appellate Panel Chair



The Honorable T. Scott Beck



The Honorable Susan Barden

RECEIVED

DEC 28 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 Eugenia Hollmon on December 12, 2016

The South Carolina Court of Appeals

Shawn Wier, Employee, Claimant, Respondent,

v.

AGY Holding Corporation, Employer, and Crawford &
Company, Carrier, Appellants.

Appellate Case No. 2016-002297

Trial Court Case No. 1510187

RECEIVED

DEC 28 2016

SC Court of Appeals

ORDER

The time for serving and filing the amended order from the Workers'
Compensation Commission is hereby extended until January 11, 2017.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

FILED

12-6-16

cc:

E. Ros Huff, Jr., Esquire

William L. Smith, II, Esquire

The South Carolina Court of Appeals

Shawn Wier, Employee, Claimant, Respondent,

v.

AGY Holding Corporation, Employer, and Crawford &
Company, Carrier, Appellants.

Appellate Case No. 2016-002297

Trial Court Case No. 1510187

RECEIVED

DEC 28 2016

SC Court of Appeals

ORDER

The time for serving and filing the appellants' initial brief and designation of matter is hereby extended until January 13, 2017.

FOR THE COURT

BY *V. Claire Allen, Deputy*
CLERK

Columbia, South Carolina

FILED

12-14-16

cc:

E. Ros Huff, Jr., Esquire

William L. Smith, II, Esquire



E. Ros Huff, Jr.
roshuff@huffandhapeshis.com

HUFF & HAPESHIS^{LLC}
ATTORNEYS AT LAW

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RECEIVED

December 27, 2016

DEC 28 2016

SC Court of Appeals

Jenny Kitchings
Clerk of Court
SC Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

Re: Shawn Wier, Employee, Claimant, Respondent, v. AGY Holding Corporation, Employer
and Crawford & Company, Carrier, Appellants
Appellate Case No. 216-002297

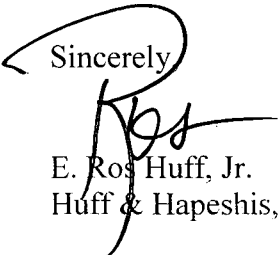
Dear Honorable Kitchings:

I have enclosed the Order from the South Carolina Workers' Compensation Commission granting the Motion to Amend Caption of the Appellate Decision signed by Commissioner James. Also, enclosed is an Amended Decision and Order approved with the corrected insurance carrier Great American Alliance Insurance Company. Please correct the caption in your system to read as the following:

Shawn Wier, Employee, Claimant, Respondent, v. AGY Holding Corporation, Employer
and Great American Alliance Insurance Company, Carrier, Appellants

Our appellants' initial brief and designation of matter is due on January 13, 2017. By copy of this letter to William L. Smith, II, I am informing him of the same.

Sincerely


E. Ros Huff, Jr.
Huff & Hapeshis, LLC

ERHjr/caw
Enclosure
cc: William L. Smith, II, Esquire
5500.0819