

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

WCC FILE NO. 1503413

James Thorpe,)
)
Employee/Claimant/Respondent,)
)
v.)
)
Town of Bowman,)
)
Employer,)
)
and)
)
State Accident Fund,)
)
Carrier,)
)
Defendant(s)/Appellants.)
_____)

REVERSED

RECEIVED

JUN 23 2017

SC Court of Appeals

Appellate Panel Review held in Columbia, South Carolina, on February 21, 2017, per notices timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed on: May 23, 2017

APPEARANCES:

Claimant/Respondent represented by
R. Michael Johnson, Jr., Esquire

Defendant(s)/Appellant(s) represented by
Clarke W. McCants, Esquire

STATEMENT OF THE CASE

The parties were heard by Commissioner Melody L. James on February 3, 2016, in St. Matthews, South Carolina. As a result of the Hearing, the single Commissioner issued an Order

dated November 21, 2016, from which the Claimant, as Appellant, sought review pursuant to S.C. Code Ann. § 42-17-50 (as amended). Within the statutory period, counsel for the Claimant filed an Application for Review in the case setting forth assignments of error, copies of which were furnished to all interested parties prior to oral argument presented before the Appellant Panel on January 21, 2017, as set forth below:

1. Did the Hearing Commissioner err as a matter of fact and law in Finding of Fact 4 in which the Commissioner found that the dog, Racks, was the sole personal property of the Claimant, where the record and law of this State do not support such a finding?
2. Did the Hearing Commissioner err as a matter of fact and law in Finding of Fact 5 in which the Commissioner found that the dog, Racks, was the property of the Claimant and that there was not a meeting of the minds between the Claimant and the Chief of Police such that the dog could be the property of the Town, where the record and law of this State do not support such a finding?
3. Did the Hearing Commissioner err as a matter of fact and law in Finding of Fact 6 in which the Commissioner found that the dog Racks, was the personal property of the Claimant and that the Town was not responsible for the 24-hour care of the dog, where the record and law of this State do not support such a finding?
4. Did the Hearing Commissioner err as a matter of fact and law in Finding of Fact 8 in which the Commissioner found that the Claimant and the Chief of Police had a lack of understanding or interpretation of the conversation following Racks testing for drug detection, where the record and law of this State do not support such a finding?
5. Did the Hearing Commissioner err as a matter of fact and law in Finding of Fact 9 in which the Commissioner found that the Chief of Police instructed the Claimant that Racks could not be used as a K-9 due to his apprehension training, where the record and law of this State do not support such a finding?
6. Did the Hearing Commissioner err as a matter of fact and law in Finding of Fact 13 in which the Commissioner found that from a review of the testimony it is clear how the mis-communication occurred, where the record and law of this State do not support such a finding?
7. Did the Hearing Commissioner err as a matter of fact and law in Finding of Fact 19 in which the Commissioner found that the Claimant was not on duty at the time of the incident, where the record and law of this State do not support such a finding?

8. Did the Hearing Commissioner err as a matter of fact and law in Finding of Fact 24 in which the Commissioner found that the Claimant's injury was not within the course and scope of his employment, where the record and law of this State do not support such a finding?
9. Did the Hearing Commissioner err as a matter of fact and law in Finding of Fact 25 in which the Commissioner found that the Claimant's injury/accident did not arise out of and in the course of his employment, where the record and law of this State do not support such a finding?
10. Did the Hearing Commissioner err as a matter of fact and law in Conclusion of Law 6 in which the Commissioner found that the Claimant did not sustain injury by accident arising out of and in the course of his employment, where the record and law of this State do not support such a finding?
11. Did the Hearing Commissioner err as a matter of fact and law in Conclusion of Law 7 in which the Commissioner found that the Claimant was not entitled to receive compensation and benefits under the Workers' Compensation Act, where the record and law of this State do not support such a finding?

All testimony and documentary evidence has been taken and delivered to the individual members of the Appellate Panel for their study and consideration. In addition, the parties have briefed and orally argued their positions before the Panel.

In an Appellate Panel review under S.C. Code Ann. § 42-17-50, the Commission's Appellate Panel shall review the award, weigh the evidence presented at the initial hearing, and, if good ground be shown therefore, make its own findings and conclusions consistent with or inconsistent with those of the Hearing Commissioner.

After careful review of the record in this case, the Commission, by unanimous vote, has determined that the Hearing Commissioner's Findings of Fact and Rulings of Law are hereby reversed. The Hearing Commissioner's Order is reversed in its entirety, and the Commission's Appellate Panel's Findings of Fact and Rulings of Law, as adopted below, are hereby the law of this case.

FINDINGS OF FACT

1. The parties to the proceedings are subject to and bound by the terms and provisions of the

South Carolina Workers' Compensation Act, as amended to date, with the Town of Bowman as the Employer; State Accident Fund, as the insurance carrier; and the Claimant as the employee of the employer on February 27, 2015.

2. The Claimant, James Thorpe, did sustain bodily injury on February 27, 2015, to his left hand while employed by the Town of Bowman and such injury arose out of and in the course of his employment.

3. The Claimant gave notice to the Defendants pursuant to the Act.

4. The average weekly wage is \$692.36, with a resulting compensation rate of \$461.60.

5. The Claimant is entitled to medical care to the left hand, as it will tend to lessen his period of disability. Defendants shall pay all outstanding medical to date that is causally related to the accident, including but not limited to the medical bills of the Regional Medical Center in Orangeburg and Dr. David Ajibade.

6. The Claimant is 38 years old, lives in Springfield, South Carolina and grew up in Orangeburg where he went to high school at Orangeburg-Wilkerson before receiving a G.E.D. in 1995.

7. The Claimant has been in law enforcement since 2005 when he began working for the Orangeburg County Sheriff's office before beginning work in Bowman as an officer in September/October of 2014.

8. Although the testimony in this case is conflicting, the Appellate Panel finds that both witnesses testified in a credible manner. It appears that there was a mis-communication or a misinterpretation of the conversation between the Claimant and Chief Pendarvis as to the use of Racks.

9. The Town of Bowman employed two officers at the time of the incident involved in this

case, namely the Claimant and Chief Pendarvis.

10. The Claimant and Chief Pendarvis did discuss that the Claimant wanted to use a K-9 as part of his work with the Town of Bowman. Chief Pendarvis used his three dogs in conjunction with his work for the Town as K-9 units.

11. The Claimant was given Racks, the K-9 unit, by a former co-employee in the Orangeburg Sheriff's office on Wednesday, February 25, 2015, two days before the accident. The Claimant did not pay for Racks and he was told that Racks was certified in narcotics, tracking, article location and attack.

12. The Claimant called Chief Pendarvis and asked if he could use Racks as a K-9. The Chief brought the Claimant a kennel to transport Racks and to keep him in at night.

13. Chief Pendarvis supplied the Claimant with dog food from the Town's K-9 room, which has K-9 equipment and donated dog food within it.

14. The Claimant was unaware of any written policy at the time he acquired Racks and before the time of the incident involved here.

15. The policy does state that the K-9 unit shall attend weekly maintenance training, and that the canines must complete at least four hours of training per week. How or where this is to be accomplished is not set forth in the policy.

16. The policy also states that the "Police K-9 will be considered a member of the Bowman Police Department." It also states that the "handler will be responsible for the health and welfare of the assigned canine, both on and off duty."

17. The Claimant's recollection of the conversations with the Chief is that he could keep Racks, but was not allowed to use the command Racks had learned to prompt him to attack or apprehend someone.

18. The Claimant's recollection of the conversations is consistent with the written policy of the Town which states, "At no time should a Police Canine be ordered to apprehend (bite)."

19. The Claimant and Chief Pendarvis worked out Racks for approximately an hour on Thursday, February 26, 2015, the day before the accident, and afterwards the Claimant's understanding was that he could use Racks as a K-9.

20. Both Racks and the Claimant stayed at work, at the police station, from 11:42 am until 10:01 pm the day before the accident.

21. As it was the Claimant understands that the Town would be using the dog, the Claimant proceeded, at the Chief's suggestion, to take out the back seat of another police vehicle – a K-9 unit patrol car - so that it could accommodate the kennel that had been given to him earlier by Chief Pendarvis.

22. At no time on February 26, 2015, the day before the accident, did Chief Pendarvis order the Claimant to take Racks away from the station. At no time after the accident was the Claimant ever reprimanded for not taking Racks away from the station.

23. Any misunderstandings or mis-communications between the Claimant and Chief Pendarvis does not prejudice the Claimant in this case. The Claimant proceeded in his employment such that Racks was part of the K-9 unit. An activity can arise out of and be within the course and scope of employment where a Claimant justifiably believes that the activity is permissible or required. In this case the Claimant justifiably believed that Racks was his K-9 unit and that it was his responsibility to care for and train Racks.

24. The incident forming the basis for this case occurred within a day of the conversation between the Claimant and Chief Pendarvis.

25. Chief Pendarvis did not discover that there was any misunderstanding or mis-

communication until after the incident.

26. Chief Pendarvis did not give clear and explicit instructions for the Claimant not to use Racks.

27. Chief Pendarvis did not give clear and explicit instructions to the Claimant that Racks was not considered a K-9 unit.

28. The Claimant had an expectation that Racks was his K-9 unit, for use in his role as a deputy for the Town of Bowman.

29. On the date of the accident, the Claimant took Racks in to his fenced back yard to train him per the instructions of Chief Pendarvis.

30. The Claimant would have Racks retrieve objects and then reward him by throwing a rubber hose for Racks to retrieve.

31. While training Racks, the Claimant went to his squad car to retrieve the bag of dog food given to him by the Chief from the back seat. The Claimant accidentally left the back gate ajar, allowing Racks to escape his backyard and run on to the porch of the Claimant's neighbor, an elderly woman.

32. Racks entered the neighbor's screened in porch through a swinging door and became trapped within the screened porch once the door closed.

33. The Claimant believed it was his responsibility to retrieve Racks and entered the porch to do so.

34. The Claimant described Racks as running into the screens and being disoriented. The Claimant ordered Racks to stop and when the dog did not, he grabbed his collar to retrieve him. Racks bit the Claimant on the left hand when he grabbed the collar. The Claimant was forced to choke Racks with his right hand until the dog passed out; releasing the Claimant's left hand.

35. Due to the bite, the Claimant sought medical care at the Regional Medical Center in Orangeburg, South Carolina and with Dr. David Ajibade.

36. The Claimant was diagnosed as having multiple wounds to the left hand and a proximal phalanx fracture of the fourth digit at the Regional Medical Center.

CONCLUSIONS OF LAW

Accordingly, as provided in South Carolina Code of Laws, (1976 as amended), Section 42-17-40, it is the determination of this Commissioner:

1. Under §42-1-160, the Claimant did sustain injury by accident, arising out of and in the course of his employment.
2. Under §42-15-20, the Claimant gave notice of the accident to the Employer.
3. Under §42-15-60, the Claimant is entitled to additional medical care, which will tend to lessen the period of disability.

ORDER AND AWARD

THEREFORE, it is ordered that the Defendants shall make the following payments:

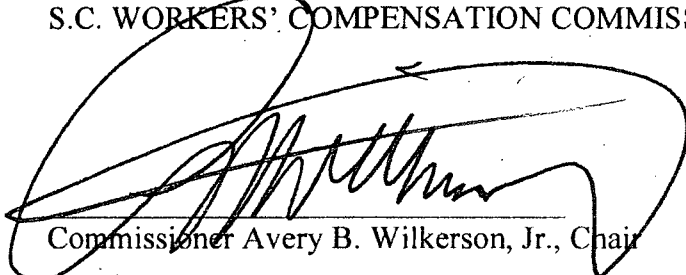
1. Charges for the Claimant's causally related medical care for his left hand with a specialist of the Defendants choosing until further Order of this Commission. Further, the Defendants shall pay for all causally related medical care to date, including but not limited to the Regional Medical Center and Dr. David Ajibade.

DECISION AND ORDER OF THE COMMISSION ON APPEAL

IT IS THEREFORE ORDERED that the Decision and Order of the Hearing Commissioner is hereby reversed by the Appellate Panel of the Commission with Findings of Fact and Law added.

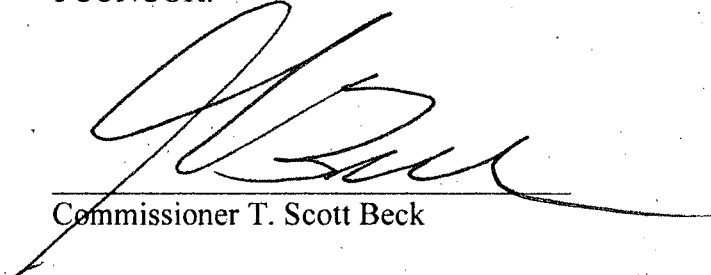
AND IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION

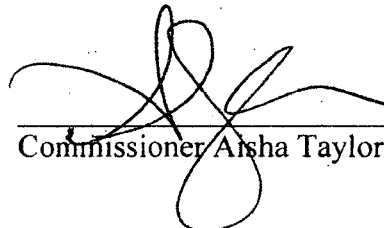


Commissioner Avery B. Wilkerson, Jr., Chair

I CONCUR:



Commissioner T. Scott Beck



Commissioner Aisha Taylor

RECEIVED

JUN 23 2017

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 May 23, 2017