APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 1512220

RICO DORSEY, EMPLOYEE .... CLAIMANT/APPELLANT

VS.

ALLWASTE SERVICES, INC., EMPLOYER

AND

BRIDGEFIELD CASUALTY INSURANCE, C/O SUMMIT HOLDING, INC.,

CARRIER.. DEFENDANTS/RESPONDENTS.

Appellate Panel Decision and Order

filed, June 14, 2017

APPEARANCES: CLAIMANT/APPELLANT represented by Creighton B. Coleman, Esquire, of Winnsboro, and Andrew N. Safran, Esquire, of Columbia, South Carolina; and

DEFENDANTS/RESPONDENTS represented by Nicolas L. Haigler, Esquire, of Columbia, South Carolina

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STATEMENT OF THE CASE

This is an appeal by Rico Dorsey (the Claimant) from the Decision and Order of Commissioner Aisha Taylor (the Hearing Commissioner), filed on October 4, 2016.

This claim was before the South Carolina Workers' Compensation Commission pursuant to the Form 21 filed by Allwaste Services, Inc. and Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc. (the Defendants) on February 25, 2016. The Hearing in this matter was originally scheduled for April 15, 2016, but was then postponed to May 9, 2016, and finally to July 22, 2016, due to counsel for the Claimant's assertion of a legislative conflict. The Hearing on July 22, 2016, was postponed by way of an Interim Order from the Hearing Commissioner to August, 3, 2016, over the Defendants' objection, due to a personal conflict of co-counsel for the Claimant, appointed the day prior to the Hearing. The Interim Order, filed on August 2, 2016, ordered the Defendants' objection to the Claimant's APA Submissions pursuant to Regulation 67-612 to be held in abeyance pending the Hearing on August 3, 2016, and that further documentary evidence under the APA would not be considered as part of the record.

It is the position of the Defendants that the Claimant reached maximum medical improvement (MMI) with regard to the admitted low back injury on February 4, 2016, and therefore, the Defendants are entitled to terminate temporary total disability benefits. The Defendants also requested a determination as to whether the Claimant sustained any permanent partial disability to his low back, requested a credit for any temporary total disability benefits paid to the Claimant after the date of MMI, and requested the undersigned make a determination as to the credibility of the Claimant.

Additionally, the Defendants raised numerous objections. First, the Defendants objected to the admission of the Claimant's APAs and the testimony of the identified witnesses, both as untimely under Regulation 67-612. The Defendants further objected to page 197 of the Claimant's APAs on the ground of authentication. Finally, the Defendants requested the right to decide, at the conclusion of the Hearing, whether to proceed with the depositions of Dr. Dennis and Dr. Forrest. The Claimant provided a counter

argument to each of these assertions and objections. After hearing all positions on these issues, the Hearing Commissioner overruled the objection of the Defendants as to the Claimant's APAs and allowed the evidence into the record. Moreover, the Hearing Commissioner asked that the Defendants state their position as to the aforementioned depositions before the close of the record.

Regarding the merits of the claim, the Claimant asserts he has not reached MMI for his low back injury and, moreover, requests a determination as to the compensability of the alleged injuries to the legs, neck and right elbow, for which he has also not reached MMI. The Claimant further contends he is entitled to continued temporary total disability benefits and causally-related medical treatment until such time as MMI is achieved.

By way of Decision and Order filed on October 4, 2016, the Hearing Commissioner made the following findings of fact:

1. All parties to the proceeding are subject to and bound by the terms of the South Carolina Workers' Compensation Act with Rico Dorsey as employee, Allwaste Services, Inc., as employer, and Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc., as carrier.

2. Prior to the hearing, the Defendants, the moving party in this case, requested the record be held open to depose the Claimant's experts, Drs. Dennis & Forrest. Additionally, the Claimant also requested the record be held open to depose Dr. Dennis & Dr. Forrest, their own experts. Both requests are denied and the record is closed as of August 3, 2016.

3. I find the medical questionnaire from Dr. Forrest, although not timely filed, is admitted into the record over the Defendants' objection. This finding is made pursuant to the undersigned's discretion under R. 67-612.

4. I find the Claimant sustained an admitted compensable injury to his lower back within the course and scope of his employment. This Finding is based upon the greater weight of the evidence in the record.

5. Based on the initial medical reports, I find the Claimant sustained a minor injury to his right arm as a result of his work accident. The Claimant complained of right arm pain for about 2 weeks after the initial injury after which there is no other medical evidence that supports a finding of a permanent injury to the Claimant's right arm. Additionally, The Claimant's deposition testimony is devoid of any complaints of continued right arm pain

associated with the injury. Based on the evidence as a whole, I find the Claimant's right arm injury has resolved with no permanency.

6. The Claimant alleged an injury to his neck as a result of his work injury. The Claimant's contention that references to pain in the "upper R back" noted in the medical records are referring to his neck are unpersuasive. Correlating medical records from those same visits note that the Claimant was treated for his thoracic and lumbar spine only to the exclusion of the cervical spine. (See The Claimant's APA pp. 10-15). The Claimant also relies upon his IME referral examination from Dr. Forrest as well as the medical questionnaire as evidence in support of a compensable neck injury. In the Claimant's IME report, even Dr. Forrest notes, "It is not clear that the neck is playing a definite role here . . ." and basis his recommendation for a cervical MRI on The Claimant's reported symptomology. (The Claimant's APA pp. 166). Lastly, with regard to the Claimant's complaints of symptoms in his neck, the Claimant first alleged pain in his neck during his deposition on March 28, 2016, wherein he testified he told the doctors "from day one" his pain ran from "my neck all the way down my leg." (The Claimant's Depo. p. 63, ll. 8-10). He again reiterated this testimony at the hearing. I find the Claimant's contention that he complained of neck pain "since day one" is not supported by a preponderance of the evidence and his testimony in that regard cannot be relied upon. I find the Claimant's reported symptomology and chronology with regard to his neck pain cannot be relied upon and as such Dr. Forrest's medical opinion, which he himself admitted was only based on the Claimant's reported symptomology, is not afforded great weight in this instance. As such, the Claimant's request for benefits related to his neck is denied.

7. I find the Claimant is at maximum medical improvement for his work related injury to his lower back as of February 4, 2016. This finding is based on the preponderance of the reliable medical evidence as a whole including the medical opinion of Dr. Lamotta, who reviewed the Claimant's lumbar radiographs, MRI, and EMG study that showed "mild left L5 nerve irritation" and still placed The Claimant at maximum medical improvement. (The Defendants' APA pp. 65-68). Additionally, in the initial evaluation by Dr. Forrest on April 27, 2016, the issue of maximum medical improvement was not referenced and a follow-up letter dated May 5, 2016, from Dr. Forrest addressed the Claimant's work status but not his MMI status. The Claimant obtained a medical questionnaire from Dr. Forrest dated July of 2016; however, it is contradicted by a preponderance of the evidence in the record.

8. I find the Claimant has sustained 8% permanent partial disability to his back for his compensable low back injury. This finding is based on the preponderance of the evidence as a whole.

9. I find the Claimant is only entitled to future medical treatment in the form of epidural injections and corresponding follow-up office visits. Although not recommended by an authorized treating physician, the Claimant has been receiving injections on his own and testified they have been of benefit.

10. The Defendants are entitled to stop payment of temporary total disability benefits.

11. After the Claimant's award and the Defendants' credit are calculated with finality as a result of this Order, the Defendants may have a resulting net credit. This credit may be applied toward any future payments of permanency as ordered by this Commission or a higher court, if any; however, in no way shall this finding be construed to award the Defendants reimbursement directly from The Claimant.

12. No hearing costs are assessed.

In addition, the Hearing Commissioner made the following conclusions of law:

1. Pursuant to Section 42-1-130, the Claimant was a covered employee at the time in question.

2. Pursuant to Section 42-1-140, defendant-employer was a covered employer under the Act.

3. Pursuant to Section 42-1-160, the Claimant sustained compensable injuries to his low back and right arm, but did not sustain a compensable injury to his neck.

4. Pursuant to *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007), the Claimant reached maximum medical improvement with regard to his low back and right arm on February 4, 2016.

5. Pursuant to § 42-9-260, the Defendants are entitled to terminate temporary total disability benefits as the Claimant has reached maximum medical improvement.

6. Pursuant to *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007), the Defendants are entitled to a credit for all temporary total disability benefits paid after February 4, 2016; however, if the Defendants have a resulting net credit, said credit shall be applied to future permanency related payment, but shall not be construed to require reimbursement directly from the Claimant.

7. Pursuant to § 42-9-30, the Claimant did not sustain permanent partial disability to his right arm.

8. Pursuant to § 42-9-30, the Claimant sustained eight (8%) percent permanent partial disability to his back.

9. Pursuant to § 42-15-60, the Claimant is not entitled to further medical treatment for his right arm, but is entitled to future medical treatment for his back in the form of epidural injections and corresponding follow-up office visits.

Within the statutory period, counsel for the Claimant filed an Application for Review setting forth their reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Full Commission Appellate Panel (the Appellate Panel) on August 3, 2016. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the undersigned members of the Appellate Panel and has been under study and consideration. After careful review of all grounds raised, the evidence in the record, and oral arguments from both counsel, the Appellate Panel finds that, by unanimous vote, the Decision and Order of the Hearing Commissioner must be affirmed with amendments.

FINDINGS OF FACT

After careful review of the evidence and arguments presented by the parties, WE FIND AS A FACT THAT:

1. All parties to the proceeding are subject to and bound by the terms of the South Carolina Workers' Compensation Act with Rico Dorsey as employee, Allwaste Services, Inc., as employer, and Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc., as carrier.

2. We find the Form 21 was filed on February 25, 2016. On March 8, 2016, the matter was set for a hearing on April 15, 2016. Due to conflicts reflected in the record, the matter was reset three times, and was eventually heard on August 3, 2016.

3. Prior to the hearing, the Defendants timely amended and filed their written Pre-hearing Brief pursuant to Regulation 67-611 on July 6, 2016, to add notice of the witness testimony of the Claimant's experts, Dr. Forrest and Dr. Dennis, by deposition. The Claimant's written Pre-hearing Brief was not amended and filed; the Claimant made an oral request at the August 3, 2016 hearing to leave the record open for testimony of Dr. Forrest and Dr. Dennis by deposition. The Defendants indicated that their desire to proceed with the depositions was contingent on whether the Claimant's oral request was to be granted. The request to leave the record open is denied and the record is closed as of August 3, 2016. We find Regulation 67-611 is applicable. Pursuant to Regulation 67-611(B), each attorney representing a party at a hearing shall file and serve a Form 58 at least ten days before the hearing with the Hearing Commissioner's office identified on the hearing notice. Additionally, pursuant to that section, a party is under a duty to promptly supplement a response with respect to any question directly addressed on Form 58 and amend a response if the party obtains information upon the basis

of which the party knows the response was incorrect when made, or the party knows the response thought correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

4. We find the medical questionnaire from Dr. Forrest, although not timely filed, is admitted into the record over the Defendants' objection. This finding is made pursuant to the undersigned's discretion under Regulation 67-612. We find Regulation 67-612 is applicable to reports of experts, and is not applicable to deposition testimony in lieu of live testimony. Pursuant to Regulation 67-612, the moving party must provide any written expert's reports to the opposing party at least fifteen days before the scheduled hearing. Further, the non-moving party must provide to the moving party any report not provided by the moving party at least ten days before the scheduled hearing. However, the Regulation "shall not be construed to limit the discretionary authority of a Hearing Commissioner to accept reports, depositions or other evidence at the conclusion of the scheduled hearing." *See* Regulation 67-612(E).

5. We find the Claimant sustained an admitted compensable injury to his lower back within the course and scope of his employment. This Finding is based upon the greater weight of the evidence in the record.

6. Based on the initial medical reports, we find the Claimant sustained a minor injury to his right arm as a result of his work accident. The Claimant complained of right arm pain for about two weeks after the initial injury after which there is no other medical evidence that supports a finding of a permanent injury to the Claimant's right arm. Additionally, the Claimant's deposition testimony is devoid of any complaints of continued right arm pain associated with the injury. Based on the evidence as a whole, we find the Claimant's right arm injury has resolved with no permanency.

7. The Claimant alleged an injury to his neck as a result of his work injury. The Claimant's contention that references to pain in the "upper R back" noted in the medical records are referring to his neck are unpersuasive. Correlating medical records from those same visits note that the Claimant was treated for his thoracic and lumbar spine only to the exclusion of the cervical spine. (*See* the Claimant's APA pp. 10-15). The Claimant also relies upon his IME referral examination from Dr. Forrest as well as the medical questionnaire as evidence in support of a compensable neck injury. In the Claimant's IME report, even Dr. Forrest notes, "It is not clear that the neck is playing a definite role here . . . " and basis his recommendation for a cervical MRI on The Claimant's reported symptomology. (The Claimant's APA pp. 166). Lastly, with regard to the Claimant's complaints of symptoms in his neck, the Claimant first alleged pain in his neck during his deposition on March 28, 2016, wherein he testified he told the doctors "from day one" his pain ran from "my neck all the way down my leg." (The Claimant's Depo. p. 63, ll. 8-10). He again reiterated this testimony at the hearing. We find the Claimant's contention that he complained of neck pain "since day one" is not supported by a preponderance of the evidence and his testimony in that regard cannot be relied upon. We find the Claimant's reported

symptomology and chronology with regard to his neck pain cannot be relied upon and as such Dr. Forrest's medical opinion, which he himself admitted was only based on the Claimant's reported symptomology, is not afforded great weight in this instance. As such, the Claimant's request for benefits related to his neck is denied.

8. We find the Claimant is at maximum medical improvement for his work related injury to his lower back as of February 4, 2016. This finding is based on the preponderance of the reliable medical evidence as a whole including the medical opinion of Dr. Lamotta, who reviewed the Claimant's lumbar radiographs, MRI, and EMG study that showed "mild left L5 nerve irritation" and still placed the Claimant at maximum medical improvement. (The Defendants' APA pp. 65-68). Additionally, in the initial evaluation by Dr. Forrest on April 27, 2016, the issue of maximum medical improvement was not referenced and a follow-up letter dated May 5, 2016, from Dr. Forrest addressed the Claimant's work status but not his MMI status. The Claimant obtained a medical questionnaire from Dr. Forrest dated July of 2016; however, it is contradicted by a preponderance of the evidence in the record.

9. We find the Claimant has sustained 8% permanent partial disability to his back for his compensable low back injury. This finding is based on the preponderance of the evidence as a whole.

10. We find the Claimant is only entitled to future medical treatment in the form of epidural injections and corresponding follow-up office visits. Although not recommended by an authorized treating physician, the Claimant has been receiving injections on his own and testified they have been of benefit.

11. The Defendants are entitled to stop payment of temporary total disability benefits.

12. We find the Defendants timely filed their Form 21 Request for Hearing—within three weeks of the authorized treating physician's MMI statement. As such, the Defendants are entitled to a credit for overpayment of TTD dated back to February 4, 2016—the date of maximum medical improvement.

13. After the Claimant's award and the Defendants' credit are calculated with finality as a result of this Order, the Defendants may have a resulting net credit. This credit may be applied toward any future payments of permanency as ordered by this Commission or a higher court, if any; however, in no way shall this finding be construed to award the Defendants reimbursement directly from the Claimant.

14. No hearing costs are assessed.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and as provided by the Code of Laws of South Carolina, § 42-17-40, it is the determination of the Appellate Panel that:

1. Pursuant to Section 42-1-130, the Claimant was a covered employee at the time in question.

2. Pursuant to Section 42-1-140, defendant-employer was a covered employer under the Act.

3. Pursuant to Section 42-1-160, the Claimant sustained compensable injuries to his low back and right arm, but did not sustain a compensable injury to his neck.

4. Pursuant to *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007), the Claimant reached maximum medical improvement with regard to his low back and right arm on February 4, 2016.

5. Pursuant to § 42-9-260, the Defendants are entitled to terminate temporary total disability benefits as the Claimant has reached maximum medical improvement.

6. Pursuant to *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007), the Defendants are entitled to a credit for all temporary total disability benefits paid after February 4, 2016; however, if the Defendants have a resulting net credit, said credit shall be applied to future permanency related payment, but shall not be construed to require reimbursement directly from the Claimant.

7. Pursuant to § 42-9-30, the Claimant did not sustain permanent partial disability to his right arm..

8. Pursuant to § 42-9-30, the Claimant sustained eight (8%) percent permanent partial disability to his back.

9. Pursuant to § 42-15-60, the Claimant is not entitled to further medical treatment for his right arm, but is entitled to future medical treatment for his back in the form of epidural injections and corresponding follow-up office visits.

ORDER

IT IS, THEREFORE, ORDERED, that the Decision and Order of the Hearing Commissioner filed in the above-captioned matter on October 4, 2016, is hereby AFFIRMED with amendments as modified.

IT IS FURTHER ORDERED that the Claimant has reached maximum medical improvement with regard to his right arm and low back as of February 4, 2016.

IT IS FURTHER ORDERED that the Defendants are entitled to terminate temporary total disability benefits and, moreover, are entitled to a credit for all temporary total disability paid to the Claimant after February 4, 2016. However, if the result of the credit is a net to the Defendants, the credit shall be applied

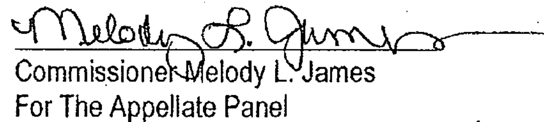
for future permanency related payment, but shall not be applied as to require reimbursement directly from The Claimant.

IT IS FURTHER ORDERED that the Claimant did not sustain permanent partial disability to his right arm, but is entitled to eight (8%) percent in permanent partial disability to the back, or 24 weeks, or $8,807.76 in benefits.

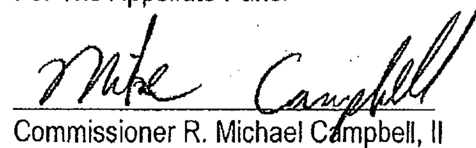
IT IS FURTHER ORDERED that the Claimant is not entitled to future medical treatment under the Act for his right arm, but is entitled to future medical treatment for his back in the form of epidural injections and corresponding follow-up office visits.

AND IT IS SO ORDERED.

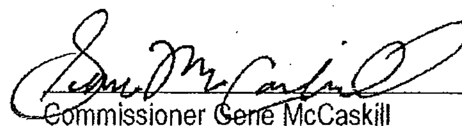
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION



Commissioner Melody L. James
For The Appellate Panel



Commissioner R. Michael Campbell, II



Commissioner Gene McCaskill

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 June 14, 2017