

APPELLATE PANEL
DECISION AND ORDER OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 1108753

ELIZABETH SHARKEY,
Employee,
Claimant/Respondent,

vs.

WALMART,
Employer,

and

ILLINOIS NATIONAL INSURANCE CO.,
Carrier,
Defendants/Appellants.

APPELLATE PANEL'S
DECISION AND ORDER

APPELLATE HEARING:

Appellate Panel Review held in
Columbia, South Carolina on
October 16, 2017, per notices timely
and properly served on all parties
of interest.

APPEARANCES:

RECEIVED
JAN 23 2018
SC Court of Appeals

Defendant/Appellant represented by
Bob Horner, Esq.
Speed, Seta, Martin, Trivett, & Stubley,
LLC
Columbia, South Carolina

Claimant/Respondent represented by
Patrick L. Jennings, Esq.
Joye Law Firm, L.L.P.
North Charleston, South Carolina

APPELLATE PANEL DECISION
AND ORDER FILED:

December 20, 2017

STATEMENT OF THE CASE

~~The parties were heard by Commissioner Aisha Taylor on September 1, 2016, in Goose Creek, South Carolina. On July 21, 2017, Commissioner Taylor issued a Decision and Order with the following:~~

FINDINGS OF FACT

After due consideration of the claim and defenses, and after reviewing all of the evidence contained in the record, the following Findings of Fact as required under Section 42-17-40, South Carolina Code of Laws, 1976, as Amended, are set forth:

1. a. The medical opinions of Dr. Patel and Dr. Stovall both stated to a reasonable degree of medical certainty that Claimant suffered a change of condition for the worse since April of 2014 relating back to the original date of injury. Specifically, prior to April of 2014, Dr. Stovall did not consider Claimant to be a surgical candidate and as of the date of the hearing, Dr. Stovall had recommended Claimant for a fusion surgery to her L5-S1 in her lower back.
- b. Claimant's medication has increased since April 2014 to include additional prescriptions of Gabapentin, Lyrica and morphine, which had not previously been prescribed.
- c. Claimant's credible testimony regarding her increased pain, increased numbness, loss of sensation, and loss of motion. I find Defendants' arguments regarding the lack of objective radiographic evidence of a change of condition are not persuasive. See *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E. 2d 753 (Ct. App. 2016).
2. I find Claimant is entitled to additional medical treatment including, but not limited to, the surgery recommended by Dr. Stovall. All medical treatment shall be directed by the Defendants pursuant to Section 42-15-60 until Claimant is placed at maximum medical improvement.
3. I find Claimant was under permanent work restrictions when she was terminated from Wal-Mart and while there is some argument as to whether some of the absences, which led to her termination, were related

to her workers' compensation injury, I find there is insufficient evidence in the evidence to support

~~Defendants' Pollack defense as a means for not paying temporary total disability benefits. In fact, the~~

~~employer's witness testified, "Even if they go to the doctor and he puts them out for three days, it still would~~

have been an absence" that would count towards Claimant's termination. (Hr. Tr. p. 76, ll. 3-20). I find

Pollack does not apply in this case.

4. I find Claimant is entitled to payment of TTD from February 27, 2015 through the present and continuing until she is placed at maximum medical improvement or is otherwise returned to work and a Form 17 is signed and filed with the Commission.

5. I find Claimant is entitled to a lump-sum payment of any back-owed TTD.

6. I find Claimant's medical treatment is to resume at the direction of the defendants within 14 days of the date of this Order.

7. The Claimant is not at maximum medical improvement.

CONCLUSIONS OF LAW

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

1. Under Section 42-17-90, the Claimant has suffered a change of condition for the worse to her spine and affected lower extremities.

2. Under Section 42-17-90, the Claimant properly and timely filed for a change of condition.

3. Under Section 42-15-60, the Claimant is entitled to additional medical treatment including, but not limited to the surgery as recommended by Dr. Stovall.

4. Under Section 42-9-10, the Claimant is entitled to temporary, total disability benefits from February 27, 2015 through the present and continuing until such time as they may be properly terminated under the Act.

ORDER

~~Based on the above Findings of Fact and Conclusions of Law, it is hereby,~~

~~**ORDERED, ADJUDGED, AND DECREED, that the Claimant, Elizabeth Sharkey, has**~~

sustained a change of condition for the worse to her spine as a result of her work accident injury of April 23, 2011; and it is further

ORDERED, ADJUDGED, AND DECREED, that the Claimant, Elizabeth Sharkey, is entitled to temporary, total disability benefits from February 27, 2015 through the present and continuing; and it is further

ORDERED, ADJUDGED, AND DECREED, that the Claimant, Elizabeth Sharkey, is entitled to additional medical treatment, including but not limited to the surgery as recommended by Dr. Stovall, and this is the responsibility of the Defendants/Employer.

No hearing costs are assessed in this matter.

AND IT IS SO ORDERED!

Within the statutory period, the Defendant/Respondent filed a Form 30 Application for Review in this case setting forth their grounds for appeal, copies of which were furnished to all interested parties prior to oral argument presented before the Appellate Panel on October 16, 2017. All proper testimony has been taken. Together with all the documentary evidence and transcript of the hearing, appellate briefs were delivered to the individual members of the South Carolina Workers' Compensation Appellate Panel. The case has since been under study and consideration.

By appeal, Defendants/Appellants submit that the Hearing Commissioner committed the following errors in denying and dismissing their claims:

1. That the Hearing Commissioner erred in finding as an issue of fact, and/or concluding as a matter of law that Claimant has suffered a change of condition for the worse when she relied exclusively on the subjective

complaints of the Claimant without the presence of any objective radiographic evidence of an alleged change in the record (Findings of Fact #1, #2, #6) (Conclusions of Law #1, #3)

2. That the Hearing Commissioner erred in finding as an Issue of fact, and/or concluding as a matter of law, that the Claimant's subjective complaints were sufficient to establish a change of condition under the Act, as the Claimant's subjective complaints at the time of the Hearing were the same as her subjective complaints at the time of her permanency hearing, or that any difference between her complaints was not sufficient factually or legally to arise to a change of condition as contemplated by the Act. (Findings of Fact #1, #2, #6) (Conclusions of Law #1, #3)

3. That the Hearing Commissioner erred in finding as an issue of fact, and/or concluding as a matter of law when she found the medical opinion of Dr. Stovall supported the Claimant's position that she had suffered a change of condition for the worse because Dr. Stovall's testimony fails to meet the standard set forth by the SC Workers' Compensation Act to establish that Claimant suffered a change of condition, as he based his conclusion on the fact that Claimant has failed conservative therapy and suffers from chronic pain, which began in 2011 (Finding of Fact #1, #2, #6) (Conclusions of Law #1, #3)

4. That the Hearing Commissioner erred That the Hearing Commissioner erred in finding as an issue of fact, and/or concluding as a matter of law in finding that Dr. Stovall's opinion regarding Claimant's alleged change of condition was legally inadequate to constitute a change of condition, as Dr. Stovall's opinions regarding her change of condition resulting in the need for surgery were the same conditions that existed prior to her prior permanency hearing, that there were no facts that altered Dr. Stovall's opinions that were not in existence prior to her permanency hearing, and that the issue was legally one of future medical care that should have been identified on the Form 14B rather than addressed via a change of condition. (Findings of Fact #1, #2, #6) (Conclusions of Law #1, #3)

5. That the Hearing Commissioner erred in finding as an issue of fact and/or concluding as a matter of law that Dr. Patel stated to a reasonable degree of medical certainty that Claimant suffered a change of condition

for the worse since April 2014, and erred as a matter of law in finding the medical opinion of Dr. Patel supports the Claimant's position that she had suffered a change of condition for the worse, as he simply stated his opinions

regarding whether Claimant needed an MRI and nothing more, which does not meet the standard set forth by the

Act for finding a change of condition (and, in fact, that MRI showed no physical change of condition). (Finding of Fact #1) (Conclusions of Law #1, #3)

6. That the Hearing Commissioner erred in finding as an issue of fact, and/or concluding as a matter of law that the Claimant suffered a change of condition under the Act when the evidence revealed the only exacerbation of her symptoms was because of Claimant's failure to abide by her treatment as prescribed and only occurred when Claimant failed to abide by said treatment. (Finding of Fact #1) (Conclusions of Law #1, #3)

7. That the Hearing Commissioner erred in finding as an Issue of fact, and/or concluding as a matter of law that the Claimant suffered a change of condition under the Act when the treatment sought by the Claimant was surgical intervention and all objective evidence relating to the surgery in the case revealed no change in Claimant's condition, said objective conditions existing prior to her alleged change of condition, and her treating physician Dr. Stovall had stated multiple times that Claimant was not a surgical candidate. (Findings of Fact #1, #2, #6) (Conclusions of Law #1, #3)

8. That the Hearing Commissioner erred in finding as an issue of fact, and/or concluding as a matter of law, that the Claimant is entitled to TID because Claimant had previously reached MMI and been awarded PPD at the time of her termination, and, thus would not be entitled to TID under the Act, as TTD is not available to a Claimant who has reached MMI and not available to a Claimant who may successfully argue a change of condition more than a year after her termination. (Finding of Fact #3, #4, #5) (Conclusion of Law #4)

9. That the Hearing Commissioner erred in finding as an issue of fact, and/or concluding as a matter of law, that the Claimant is entitled to TTD because Claimant has not been written out of work by an authorized treating physician. (Finding of Fact #3, #4, #5) (Conclusion of Law #4)

10. That the Hearing Commissioner erred in finding as an issue of fact, and/or concluding as a matter of law, that the Claimant is entitled to TID because Claimant is currently eligible to work in accordance with her permanent light duty restrictions which were established at the time she was awarded PPD and also because her light duty restrictions written at the time of her prior permanency hearing and subsequent award have not changed. (Finding of Fact #3, #4, #5) (Conclusion of Law #4)

11. That even if TID were not legally barred in this case, the Hearing Commissioner erred as a matter of law in concluding that Pollack v. Southern Wine does not apply to this case, as Defendants/ Appellants have presented sufficient evidence to satisfy the rule set forth in Pollack, thus proving that Claimant is not currently working because she was terminated for cause on February 27, 2015, and but for Claimant's termination, she would still be working the same position previously made available to her by the Defendant/ Appellant/Employer that was in compliance with her permanent work restrictions. (Findings of Fact #3, #4, #5) (Conclusion of Law#4)

12. That the Hearing Commissioner erred as a matter of fact and in concluding as matter of law that Claimant is entitled to ongoing TID from February 27, 2015, as Claimant is not currently written out of work by a physician, that her light duty restrictions written at the time of her prior permanency hearing and subsequent award have not changed, and she is prohibited from receiving temporary benefits pursuant to the rule set forth by Pollack v. Southern Wine. (Findings of Fact #3, #4, #5) (Conclusion of Law #4)

13. That the Hearing Commissioner erred as a matter of fact and/or concluding as a matter of that Claimant is entitled to payment of back-due TTD benefits beginning February 27, 2015 (termination date), as Claimant did not file her claim for a change of condition until February 12, 2016 and there was no ongoing workers' compensation action at the time Claimant was terminated because her prior claim had been adjudicated on the merits, she was at MMI, and had been awarded permanency with permanent restrictions (which have never been altered since that time). (Findings of Fact #3, #4, #5) (Conclusion of Law #4)

14. That even if Claimant were legally entitled to TID under the Act, the same of which is denied, the Hearing Commissioner erred as a matter of fact and/or concluding that Pollack v. Southern Wine does not apply to

this case, as at the time of her termination, Claimant was awarded permanency and therefore TID cannot be made retroactive to her termination, that the evidence established that Claimant was terminated in accordance with the

~~Defendant's policies on termination, and the fact that the Hearing Commission disagreed with the Defendant's~~

termination policies does not provide a basis for concluding that the Claimant was terminated for any other reason than cause. (Findings of Fact #3, #4, #5) (Conclusion of Law #4)

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1985), 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.

Based upon a review of the Records and Briefs, the Panel, **FULLY AFFIRMS** the Decision and Order of the Hearing Commissioner dated July 21, 2017. Accordingly, Findings of Fact and Conclusions of Law set forth below shall become and hereby are the law of the case:

FINDINGS OF FACT

After due consideration of the claim and defenses, and after reviewing all of the evidence contained in the record, the following Findings of Fact as required under Section 42-17-40, South Carolina Code of Laws, 1976, as Amended, are set forth:

1. a. The medical opinions of Dr. Patel and Dr. Stovall both stated to a reasonable degree of medical certainty that Claimant suffered a change of condition for the worse since April of 2014 relating back to the original date of injury. Specifically, prior to April of 2014, Dr. Stovall did not consider Claimant to be a surgical candidate and as of the date of the hearing, Dr. Stovall had recommended Claimant for a fusion surgery to her L5-S1 in her lower back.

b. Claimant's medication has increased since April 2014 to include additional prescriptions of Gabapentin, Lyrica and morphine, which had not previously been prescribed.

c. Claimant's credible testimony regarding her increased pain, increased numbness, loss of sensation, and loss of motion. We find Defendants' arguments regarding the lack of objective radiographic evidence of a change of condition are not persuasive. See *Russell v. Wal-Mart Stores, Inc.*, 415 S.C. 395, 782 S.E. 2d 753 (Ct. App. 2016).

2. We find Claimant is entitled to additional medical treatment including, but not limited to, the surgery recommended by Dr. Stovall. All medical treatment shall be directed by the Defendants pursuant to Section 42-15-60 until Claimant is placed at maximum medical improvement.

3. We find Claimant was under permanent work restrictions when she was terminated from Wal-Mart and while there is some argument as to whether some of the absences, which led to her termination, were related to her workers' compensation injury, we find there is insufficient evidence in the evidence to support Defendants' Pollack defense as a means for not paying temporary total disability benefits. In fact, the employer's witness testified, "Even if they go to the doctor and he puts them out for three days, it still would have been an absence" that would count towards Claimant's termination. (Hr. Tr. p. 76, ll. 3-20). We find Pollack does not apply in this case.

4. We find Claimant is entitled to payment of TTD from February 27, 2015 through the present and continuing until she is placed at maximum medical improvement or is otherwise returned to work and a Form 17 is signed and filed with the Commission.

5. We find Claimant is entitled to a lump-sum payment of any back-owed TTD.

6. We find Claimant's medical treatment is to resume at the direction of the defendants within 14 days of the date of this Order.

7. The Claimant is not at maximum medical improvement.

CONCLUSIONS OF LAW

~~Accordingly, as provided in Section 42-17-40, South Carolina Code of Laws, 1976, as amended, it is the determination of the undersigned Commissioner as follows:~~

1. Under Section 42-17-90, the Claimant has suffered a change of condition for the worse to her spine and affected lower extremities.
2. Under Section 42-17-90, the Claimant properly and timely filed for a change of condition.
3. Under Section 42-15-60, the Claimant is entitled to additional medical treatment including, but not limited to the surgery as recommended by Dr. Stovall.
4. Under Section 42-9-10, the Claimant is entitled to temporary, total disability benefits from February 27, 2015 through the present and continuing until such time as they may be properly terminated under the Act.

ORDER

Based on the above Findings of Fact and Conclusions of Law, it is hereby,

ORDERED, ADJUDGED, AND DECREED, that the Claimant, Elizabeth Sharkey, has sustained a change of condition for the worse to her spine as a result of her work accident injury of April 23, 2011; and it is further

ORDERED, ADJUDGED, AND DECREED, that the Claimant, Elizabeth Sharkey, is entitled to temporary, total disability benefits from February 27, 2015 through the present and continuing; and it is further

ORDERED, ADJUDGED, AND DECREED, that the Claimant, Elizabeth Sharkey, is entitled to additional medical treatment, including but not limited to the surgery as recommended by Dr. Stovall, and this is the responsibility of the Defendants/Employer.

No hearing costs are assessed in this matter.

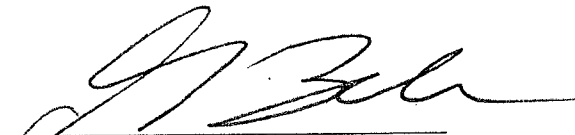
AND IT IS SO ORDERED!

South Carolina Workers'
Compensation Commission



Melody L. James, Chairman
On Behalf of the Appellate Panel

WE CONCUR:


Gene McCaskill, Commissioner
T. Scott Beck, 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 on December 20, 2017