

APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1512151

Donna Dozier,

vs.

Georgetown County School District,

AND

SC School Boards Insurance Trust,

APPELLANT
CLAIMANT,

EMPLOYER,

CARRIER,
DEFENDANTS/DEFENDANTS

Appellate Panel Review held in Columbia, South Carolina,
on November 14, 2017, per notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed

January 12, 2018

APPEARANCES:

Appellant Donna Dozier, Claimant represented by Neil D.
Wright of Myrtle Beach, South Carolina.

Defendants/Respondents represented by Timothy B. Killen,
Esquire of Willson Jones Carter & Baxley, P.A. in Mount
Pleasant, South Carolina.

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SC Court of Appeals

STATEMENT OF THE CASE

The parties were heard by Commissioner Gene McCaskill, on March 21, 2017, in Columbia, South Carolina. On August 16, 2017, he issued the following Order:

IT IS, THEREFORE, ORDERED, that the Claimant Donna Dozier has not yet reached maximum medical improvement.

IT IS FURTHER ORDERED, that the request of the Defendant Employer and the Defendant Carrier to stop payment of temporary total disability compensation to the Claimant Donna Dozier is hereby denied.

IT IS FURTHER ORDERED, that the request of the Defendant Employer and the Defendant Carrier for a credit for overpayment of temporary total compensation benefits paid to the Claimant Donna Dozier since October 31, 2016 is hereby denied.

IT IS FURTHER ORDERED, that the Claimant Donna Dozier shall receive any and all reasonable and customary causally related medical care and treatment for her left knee injury as Dr. Tupis shall provide or direct, including surgery to repair the meniscus tear in Claimant's left knee, until such time as Claimant achieves maximum medical improvement.

IT IS FURTHER ORDERED, that the Defendant Employer and the Defendant Carrier shall pay for any and all reasonable and customary causally related medical care and treatment for the Claimant's left knee injury as Dr. Tupis shall provide or direct, including surgery to repair the meniscus tear in Claimant's left knee, until such time as Claimant achieves maximum medical improvement.

IT IS FURTHER ORDERED, that the Defendant Employer and the Defendant Carrier shall pay temporary total disability compensation to the Claimant Donna Dozier at the compensation rate of \$133.85 per week until the Claimant reaches maximum medical improvement or by further Order of this Commission or by agreement of the Parties.

IT IS FURTHER ORDERED, that Claimant's alleged back and left hip injuries are hereby denied.

IT IS FURTHER ORDERED, that all other issues are held in abeyance at this time.

AND IT IS SO ORDERED.

The Claimant timely appealed the Single Commissioner's Order by filing a Form 30 on August 30, 2017. Claimant appealed the calculation of the Average Weekly Wage and Compensation Rate, as well as the related Findings, Conclusions, and Orders related thereto.

DISCUSSION

Employer is a school district. Claimant was an employee of the school. Claimant's annual salary for the 2014 – 2016 school year was \$11,522.00. Claimant's Exhibit 3. Claimant's annual salary for the 2015 – 2016 school year was \$11,857.00. Claimant's Exhibit 1. The annual contracts between employees of the school district and the school district require those employees to work One Hundred and Eighty-One (181) school days during the year. Claimant's Exhibit 2. Such was the case for Claimant. Id.

Claimant was injured on August 19, 2015. Defendants filed a Form 20 on or about September 16, 2016, at which time Temporary Total Disability (TTD) benefits began.

Claimant asserted that the Commissioner erred in his application of S.C. Code Ann. § 42-1-40. Specifically, Claimant asserted that, because Claimant didn't work when school was not in session, including weekends, she is entitled to an Average *Weekly* Wage (AWW) and Compensation Rate (CR) calculated on a *daily* basis, rather than a weekly basis ("Division of the Claimant's annual gross wage of \$11,522.00 . . . by the required 181 day work period . . . reveals that Claimant earned[] \$63.66 per day" Appellant's Brief, p. 7; "The accuracy of the Claimant's daily compensation rate of \$63.66" Appellant's Brief, p. 7 (emphasis added)).

The Single Commissioner correctly determined the Claimant's AWW and CR to be \$200.77 and \$133.85, respectively, as shown on the Form 20. Defendants filed the Form 20 on or about September 16, 2016, at which time they began a running award of TTD benefits. The Form 20 shows that the Claimant was paid wages of: (1) \$2,728.36 for the period ending June 30, 2015;

(2) \$2,373.67 for the period ending March 31, 2015; and (3) \$2,728.26 for the period ending December 31, 2014. These amount total \$7,830.19 earned during the three (3) quarters prior to the quarter in which the injury occurred. Form 20. This amount was then divided by Thirty-Nine (39) weeks, resulting in an AWW and CR of \$200.77 and \$133.85, respectively. Form 20. Claimant did not work during a fourth quarter prior to the quarter in which the injury occurred.

S.C. Code Ann. § 42-1-40 reads as follows:

"Average weekly wages" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of the injury "Average weekly wage" must be calculated by taking the total wages paid for the last four quarters immediately preceding the quarter in which the injury occurred as reported on the Department of Employment and Workforce's Employer Contribution Reports divided by fifty-two or by the actual number of weeks for which wages were paid, whichever is less. When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained.

...

When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

In her Brief, Claimant cites the 1950 case of Breeland v. Colleton County, et al., 216 S.C. 147, 57 S.E.2d 63 (1950), as "binding precedent". Appellant's Brief, p. 9. However, in her argument, Claimant fails to note that Defendants herein and the Single Commissioner calculated the AWW and CR in the identical manner (using 39 as the divisor) the Court in Breeland.

In Breeland, Claimant was paid on a monthly basis for nine (9) months. The Industrial Commission calculated Claimant's AWW and CR using thirty-six (36) weeks as the divisor, purportedly because Claimant wouldn't work during Christmas and holidays (though this reasoning was not elucidated in the Commission's Orders). The Supreme Court overruled this calculation, as the Commission failed to show exceptional reasons for excluding those three (3)

weeks. Breeland v. Colleton County, et al., 216 S.C. 147, 57 S.E.2d 63 (1950). Supreme Court divided the wages earned by 39 weeks, as did Defendants herein.

~~The Single Commissioner found that Claimant worked fewer than fifty-two (52) weeks~~ prior to the August 19, 2015, work injury. Order, p. 17. In his Order, the total wages earned (\$7,830.19) were divided by the number of weeks those wages were earned (39). Accordingly, the Single Commissioner's Order should be affirmed.

Additionally, Defendants argue that Claimant's contentions that her AWW and CR should be based on her total annual salary divided by the number of work days in her contract creates a preposterous result. To wit, Claimant demands an AWW of \$318.30, based on her annual salary divided by thirty (30) weeks. Claimant arrive at the thirty (30) week divisor, apparently, because the Claimant came to work with Employer during the prior school year, and her contract for that year required only 150 work days. Claimant then divides 150 days by five (5) (rather than seven (7) days, or a week). The Court in Breeland specifically wrote that this very mechanism of calculation of AWW is error: "Saturdays and Sundays could as well have been deducted from the work period as the Christmas vacation, and the average wage thereby artificially increased." Breeland v. Colleton County, et al., 216 S.C. 147, 150, 57 S.E.2d 63, 64 (1950) (emphasis added).

It is important to note that, if used, Claimant's calculations would approximate an annual salary of \$16,551.60. This is nearly thirty percent (30%) higher than her salary at the time of the accident. Manifestly, such a calculation would not be fair to all parties, as the Code requires.

Because an average daily wage is not appropriate under any circumstances and would not be fair or just to any Employer (not just school districts), because the Single Commissioner calculated the AWW and CR based on the number of weeks wages were earned, and because the Claimant's calculations do not approximate the wages that would have been earned but for the injury, and for the reasons as set for the above, the Order of the Single Commissioner is hereby

affirmed.

FINDINGS OF FACT

~~Based upon the documentary evidence submitted by the respective parties, pursuant to the~~
Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. Based upon the stipulation of the parties, we find that on August 19, 2015 the Claimant Donna Dozier was an employee of the Defendant Employer, Georgetown County School District.

2. Based upon the stipulation of the parties, we find that on August 19, 2015 the Claimant and the Defendant Georgetown County School District were subject to the provisions of the South Carolina Workers' Compensation Act.

3. Based upon the stipulation of the parties, we find that on August 19, 2015 the Claimant Donna Dozier suffered a compensable work-related accidental injury to her right knee arising out of and within the course and scope of her employment with the Defendant Employer Georgetown County School District.

4. Based upon the evidence in the record, we find that timely notice of the Claimant's work-related injury was given to the Defendant Employer Georgetown County School District.

5. Based upon the evidence in the record, we find that the Defendant Employer and Defendant Carrier have provided medical care and treatment for the work-related accidental injury to the Claimant's right knee, including arthroscopic surgery to the Claimant's right knee for repair of a tear of the medial meniscus.

6. Based upon the evidence in the record, we find that the Claimant has asserted that both of her knees were injured when she fell on August 19, 2015. We further find that the initial injury to the Claimant's right knee appeared to be significantly greater than the injury to the Claimant's left knee and that the Claimant received medical treatment provided by the Defendant

Employer and the Defendant Carrier only for her right knee injury while the condition of the Claimant's left knee injury worsened over time.

~~7. Based upon the pleading of the Claimant, we find that the Claimant has also~~
asserted that she has suffered an injury to her left lower back arising out of her fall on August 19, 2015.

8. Based upon the testimony of the Claimant, we find that the Claimant has also asserted that she suffers pain in her left hip arising out of her fall on August 19, 2015.

9. Based upon the pleading of the Defendant Employer and the Defendant Carrier and the arguments offered by their legal counsel at the hearing, we find that the Defendant Employer and the Defendant Carrier only admit that the Claimant suffered a compensable work-related accidental injury to her right knee arising out of her fall on August 19, 2015. We further find that the Defendant Employer and the Defendant Carrier contend that the Claimant reached maximum medical improvement with respect to her right knee injury on October 31, 2016, that the Claimant's authorized treating physician, Dr. Todd M. Tupis, has assigned a 2% permanent medical impairment as a result of the injury to the Claimant's right leg, and that this case is ripe for a determination of permanency.

10. Based upon our review of the entire transcript of the deposition testimony of Dr. Todd M. Tupis, which was taken on March 15, 2017, we find that Dr. Tupis was questioned extensively about injury to the Claimant's left knee. We further find that Dr. Tupis has determined that the Claimant has suffered a meniscus tear in her left knee. We further find that Dr. Tupis has expressed his medical opinion, which he holds to a reasonable degree of medical certainty, that the meniscus tear in the Claimant's left knee was caused by Claimant's overcompensating alteration of her gait which transferred her weight to her left leg to relieve pressure on her surgically repaired right knee.

11. Based upon the evidence in the record, we find that while Dr. Tupis was not the Claimant's original authorized treating physician, he is steadfastly consistent in his opinion concerning the cause of the meniscus tear in the Claimant's left knee and capably defended his opinion concerning the cause of the meniscus tear in the Claimant's left knee against challenges that his opinion was based upon subjective complaints of the Claimant rather than objective evidence by pointing out that the Claimant's subjective complaints were consistent with the objective evidence in the medical record.

12. Based upon the evidence in the record, we find that Dr. Tupis' testimony is unwavering and convincing concerning the cause of the meniscus tear in the Claimant's left knee.

13. Based upon my review of all of the medical and lay evidence in the record, we are persuaded and we hereby find that the meniscus tear in the Claimant's left knee and the Claimant's symptoms and complaints of injury to her left knee are causally related to her work-related accident on August 19, 2015.

14. Based upon the evidence in the record, we find that the Claimant has not reached maximum medical improvement.

15. Based upon the evidence in the record, we find that the Claimant is entitled to receive and the Defendant Employer and the Defendant Carrier are obligated to provide all reasonable and customary causally related medical care and treatment for the Claimant's left knee injury until such time as Claimant reaches maximum medical improvement.

16. Based upon the evidence in the record, we find that the Claimant should continue to receive causally related medical care and treatment from Dr. Tupis, who shall continue to serve as the Claimant's authorized treating physician. We further find that the Claimant is entitled to receive any and all reasonable and customary causally related medical care and treatment as Dr.

Tupis shall provide or direct until such time as Claimant reaches maximum medical improvement, including surgery to repair the meniscus tear in Claimant's left knee.

~~17. Although Claimant alleges an injury to the back, there is insufficient evidence in~~
the record to support a finding of a causally related injury to the back. Although the Claimant alleges an injury to the hip, there is even less evidence to support a finding of a causally related injury to the hip. Further, Claimant failed to plead the hip as an affected/injured body part; therefore, the alleged hip injury is not properly before us.

18. The Hearing Commissioner observed the Claimant's demeanor on the witness stand during her testimony. The Claimant never shifted, grimaced, or provided any other indication that she was in pain as she sat during the hearing.

19. The Claimant did not ask to stand during the hearing until counsel for the Defendant Employer and the Defendant Carrier brought it to her attention that she had not asked to stand. That exchange and Claimant's request to stand occurred at 3:46 P.M., an hour and eight minutes after the hearing began at 2:38 P.M.

20. The Claimant's lay testimony concerning her alleged back injury was that she feels like if she "gets her knees straight" her back will improve.

21. Based upon the medical evidence and the lay testimony in the record, and based upon the Hearing Commissioner's observation of the demeanor of the Claimant during her testimony, we find that there is insufficient evidence to support a finding that the Claimant suffered a compensable injury to her back or to her left hip. Accordingly, we further find that the Claimant has failed to carry, by a preponderance of the evidence, her burden of proof as to the compensability of the alleged injury to her back and her left hip.

22. Based upon the evidence in the record, we find that the Claimant worked less than fifty-two (52) weeks as a food service employee for the Defendant Employer prior to her injury on

August 19, 2015. We further find and conclude that S.C. Code Ann. § 42-1-40, which governs the calculation of an employee's average weekly wage, requires that when an employee has worked less than fifty-two (52) weeks prior to injury the computation of average weekly wage must be fair and just to all parties. We further find, upon consideration of all evidence concerning the Claimant's average weekly wage, that the calculation of the Claimant's average weekly wage by the Defendant Employer and the Defendant Carrier which calculated the Claimant's average weekly wage at \$200.77 as reflected on the Form 20 filed by the Defendant Carrier most correctly reflects the directives of the Act concerning calculation of average weekly wage. Accordingly, based upon the evidence in the record, we further find that the Claimant's compensation rate is \$133.85 as reflected on the Form 20 filed by the Defendant Carrier.

23. We further find that all other issues should be held in abeyance at this time.

CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. Pursuant to S.C. Code Ann. § 42-1-130, the Claimant, Donna Dozier, was a covered employee of the Defendant Employer Georgetown County School District at the time of her work-related injury on August 19, 2015.

2. Pursuant to S.C. Code Ann. § 42-1-140, the Defendant Employer Georgetown County School District was the Claimant's employer at the time of the Claimant's work-related injury on August 19, 2015.

3. Pursuant to S.C. Code Ann. § 42-1-160, the Claimant sustained compensable injuries to her right knee and her left knee by accident arising out of and within the course and scope of her employment with the Defendant Employer Georgetown County School District on August 19, 2015.

4. S.C. Code Ann. § 42-1-40 which governs the calculation of an employee's average weekly wage provides that when the employment, prior to injury, extended over a period of less than ~~fifty-two weeks the method of dividing the earnings during that period by the number of weeks and~~ parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained.

5. Pursuant to S.C. Code Ann. § 42-9-10, the Claimant is entitled to compensation for her period of temporary total disability which shall continue until the Claimant reaches maximum medical improvement at a compensation rate of \$133.85 per week.

6. Pursuant to SC Code Ann. § 42-15-60 the Defendant Employer and the Defendant Carrier are responsible for payment of the cost of all additional medical care and treatment that Todd M. Tupis, M.D., determines to be reasonable and customary for the treatment of the Claimant's left knee injuries that are causally related to the accident of August 19, 2015.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,
IT IS, THEREFORE, ORDERED that the Claimant Donna Dozier has not yet reached maximum medical improvement.

IT IS FURTHER ORDERED that the request of the Defendant Employer and the Defendant Carrier to stop payment of temporary total disability compensation to the Claimant Donna Dozier is hereby denied.

IT IS FURTHER ORDERED that the request of the Defendant Employer and the Defendant Carrier for a credit for overpayment of temporary total compensation benefits paid to the Claimant Donna Dozier since October 31, 2016 is hereby denied.

IT IS FURTHER ORDERED that the Claimant Donna Dozier shall receive any and all reasonable and customary causally related medical care and treatment for her left knee injury as

Dr. Tupis shall provide or direct, including surgery to repair the meniscus tear in Claimant's left knee, until such time as Claimant achieves maximum medical improvement.

~~IT IS FURTHER ORDERED~~ that the Defendant Employer and the Defendant Carrier shall pay for any and all reasonable and customary causally related medical care and treatment for the Claimant's left knee injury as Dr. Tupis shall provide or direct, including surgery to repair the meniscus tear in Claimant's left knee, until such time as Claimant achieves maximum medical improvement.

IT IS FURTHER ORDERED that the Defendant Employer and the Defendant Carrier shall pay temporary total disability compensation to the Claimant Donna Dozier at the compensation rate of \$133.85 per week until the Claimant reaches maximum medical improvement or by further Order of this Commission or by agreement of the Parties.


IT IS FURTHER ORDERED that Claimant's alleged back and left hip injuries are hereby denied.

IT IS FURTHER ORDERED that all other issues are held in abeyance at this time.

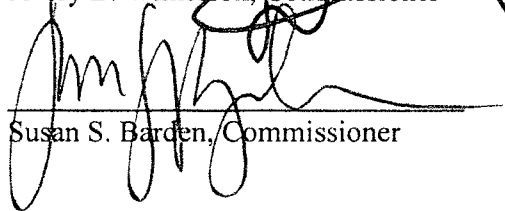
AND IT IS SO ORDERED!

FULL AFFIRMATION

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION


R. Michael Campbell, II, Commissioner


Avery B. Wilkerson, Commissioner


Susan S. Barden, 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 January 12, 2018