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SC Court of Appeals

APPELLATE PANEL  
DECISION AND ORDER  
OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 1108515

SARAH FOLSTON, CLAIMANT/APPELLANT,

VERSUS

SOUTH CAROLINA DEPARTMENT OF DISABILITIES AND SPECIAL NEEDS  
AND SC STATE ACCIDENT FUND, DEFENDANTS/RESPONDENTS.

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Appellate Panel Review held in Columbia, South  
Carolina on January 22, 2018 per notices timely and  
properly served on all parties of interest.

Appellate Panel Decision and Order filed:

June 5, 2018

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APPEARANCES:

Claimant was represented by Stephen Samuels, of  
Samuels Law Firm, LLC, 1320 Richland Street,  
Columbia, SC 29201.

Defendants were represented by Erin Farthing,  
Esquire, of The South Carolina State Accident  
Fund, P.O. Box 102100, Columbia, South Carolina  
29221.

### **STATEMENT OF THE CASE**

This claim was initially heard before the Single Commissioner pursuant to Defendants' Form 21. Defendants filed their Form 21 on January 21, 2016 seeking to stop the payment of temporary total disability benefits, a determination of permanency and the amount of compensation due, and also a credit of overpayment of TTD to the date of MMI; if not the date of MMI to the date of the filing of the Form 21.

In response, Claimant filed a Form 22 admitting that Claimant was at MMI, but asserting that, as a result of this work-related accident, the Claimant was permanently and totally disabled. Further, Claimant denied in her Form 22 that Defendants were entitled to any credit for overpayments of TTD.

A hearing on Defendants' Form 21 was held before the Single Commissioner on February 15, 2017. On October 6, 2017, the Single Commissioner issued a decision and order, wherein he set forth the following findings of fact and conclusions of law:

### **FINDINGS OF FACT**

It is found by a preponderance of the substantial evidence as a fact:

1. All the parties of these proceedings are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, to date.
2. The South Carolina Workers' Compensation Commission has subject matter and personal jurisdiction over all the parties and matters before this Commissioner; all parties having received proper notice of the hearing held set for January 20, 2015.
3. Venue is proper set in Richland County, South Carolina.

4. Claimant sustained an admitted injury by accident to her right elbow, right hip, and back arising out of and in the course and scope of her employment on March 22, 2011.

5. Claimant underwent various evaluations and treatments for her admitted work-related injuries.

6. On November 12, 2015, in his medical notes, authorized treating physician Dr. Ivan E. LaMotta of Midlands Orthopaedics opined to a reasonable degree of medical certainty that Claimant had reached MMI, assigned a 5% medical impairment to the whole person, a 7% medical impairment to the lumbar spine and released the Claimant with work restrictions of sedentary duties. In addition, Dr. LaMotta recommended future medical care in the form of repeat orthopedic visits, repeat therapy and repeat injections. (Claimant's APAs pg. 113A)

7. On February 17, 2016, in an FCE and impairment rating evaluation for the Claimant, physical therapist Tracy Hill of Columbia Rehabilitation Clinic, Inc. assigned a 13% medical impairment to the whole person, a 17% medical impairment to the lumbar spine and opined Claimant qualifies for limited sedentary to limited light work. (Claimant's APAs pgs. 174-175)

8. On March 7, 2016, in an IME for the Claimant, Dr. Steven Poletti of the Southeaster Spine Institute opined to a reasonable degree of medical certainty that Claimant has a 13% medical impairment to the lumbar spine, which would be roughly 28% to the whole person should she undergo fusion surgery as recommended as an option per Dr. LaMotta in October 2015. However, Dr. Poletti further opined that he recommended Claimant continue with non-operative care with Dr. Hutcheson and agreed

with Dr. LaMotta that she has a sedentary status. Dr. Poletti also opined Claimant is potentially a candidate to pursue Social Security disability due to her sedentary status and at this point is not capable of sitting for extended periods of time longer than 30 minutes. (Claimant's APAs pg. 173)

9. On May 12, 2016, in a vocational assessment for the claimant, Glen K. Adams opined Claimant is totally vocationally disabled. (Claimant's APAs pg. 202)

10. On June 29, 2016, in an employability analysis and labor market survey for the Defendants, Jacqueline Kennedy-Merritt of The Directions Group opined to a reasonable degree of vocational certainty that there are appropriate positions that exist within the labor market that the Claimant can participate in. (Claimant's APAs pg. 219-220)

11. On November 20, 2016, at a follow-up appointment, Dr. LaMotta opined he would refer Claimant to Dr. Hutcheson for pain management and there were no contraindications for her to return to work with sedentary duty lifting restrictions (Defendants' APAs pg. 113 C)

12. On February 15, 2017, at the hearing before the single Commissioner, Claimant testified she may be capable of returning to work of some kind.

**Based on sworn testimony and a preponderance of the evidence, I hereby find:**

1. Claimant is at MMI for her admitted work-related injuries as of November 12, 2015.
2. Based on a preponderance of the evidence, including video evidence of the Claimant and the Claimant's hearing testimony, I hereby find Claimant is entitled to an award of permanent partial disability.

3. I find that Claimant has sustained a permanent partial disability of twenty percent (20%) to the back.

4. Claimant is entitled to all causally-related future medical treatment for her back, as recommended by Dr. Hutcheson. At the hearing before the single Commissioner, Defendants stipulated to Claimant returning to Dr. Hutcheson for pain management treatment as set forth in Dr. LaMotta's November 20, 2016 medical report as part of her future medical care.

5. Claimant is entitled to a lump sum award.

6. Defendants are entitled to a credit for overpayment of temporary total disability from the date of the Form 21.

7. Claimant's request for assault leave pursuant to S.C. Code Ann. §8-11-40, is hereby denied as the commission lacks jurisdiction over this issue.

#### CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Workers' Compensation Act, the undersigned Commissioner makes the following Conclusions of Law:

1. Pursuant to S.C. Code Ann. § 42-1-130, the Claimant was a covered employee at the time in question.

2. Pursuant to § 42-1-140, Defendant Employer, was a covered employer under the Act.

3. S.C. Code Ann. § 42-1-160 governs injuries and includes injuries by accident arising out and in the course and scope of employment.

4. Pursuant to § 42-1-160, the Claimant sustained a compensable injury by accident arising out of and in the course and scope of her employment with Defendant on

March 22, 2011 to her right elbow, right hip and back.

5. Claimant is entitled to causally related future medical care with Dr. Hutcheson as referred by Dr. LaMotta in his November 20, 2016 medical report as it will tend to lessen her disability pursuant to *Dodge v. Bruccoli Clark Laymen, Inc.*, 334 S.C. 574 (S.C. Ct App. 1999) and S.C. Code Ann. §42-9-60.

6. Pursuant to § 42-1-40 the Claimant's average weekly wage is \$380.66, with a resulting compensation rate of \$253.79.

Within the statutory period, Claimant filed an Application for Review in the case setting forth her exceptions, copies of which were furnished to all interested parties. Claimant stated the following grounds for review:

1. Whether the Single Commissioner erred as a matter of fact and law in finding that the Commission had no jurisdiction to order payment of assault leave?
2. Whether the Single Commissioner erred as a matter of fact and law in failing to find Claimant permanently and totally disabled?
3. Whether the Single Commissioner erred as a matter of fact and law in giving any weight to Defendants' vocational expert when her opinion was based on speculation and did not meet the legal standards required for an expert opinion?
4. Whether the Single Commissioner erred as a matter of fact and law in not applying the correct test for permanent and total disability?
5. Whether the Single Commissioner erred as a matter of fact and law in making an award to the back only under Section 42-9-30?
6. Whether the Single Commissioner erred as a matter of fact and law in admitting Defendants' untimely FCE into evidence?
7. Whether the Single Commissioner erred as a matter of fact and law in giving any weight to Defendants' untimely FCE whether neither vocational expert relied on the FCE in reaching an opinion?

Oral arguments were delivered by the parties on January 22, 2018. All proffered testimony has been taken. Such, together with all documentary evidence and legal briefs, has been delivered to the individual members of the Full Commission and has since been under study and consideration.

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1976, as amended), review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefor, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

Stephen Samuels for the Claimant and Erin Farthing for the Defendants appeared at the scheduled hearing to present oral arguments on behalf of the parties. Having heard oral arguments on behalf of the parties, considered their briefs and viewed the records as a whole, the Appellate Panel hereby **AFFIRMS WITH AMENDMENTS** the Decision and Order of the Single Commissioner and enters the following Findings of Act, Rulings or Law and Order as its own:

### **APPELLATE PANEL FINDINGS OF FACT**

#### **FINDINGS OF FACT**

It is found by a preponderance of the substantial evidence as a fact:

1. All the parties of these proceedings are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, to date.
2. The South Carolina Workers' Compensation Commission has subject matter and personal jurisdiction over all the parties and matters before this Commissioner; all parties having received proper notice of the hearing held set for

January 20, 2015.

3. Venue is proper set in Richland County, South Carolina.

4. Claimant sustained an admitted injury by accident to her right elbow, right hip, and back arising out of and in the course and scope of her employment on March 22, 2011.

5. Claimant underwent various evaluations and treatments for her admitted work-related injuries.

6. On May 5, 2014, Claimant had an EMG/NCS on May 5, 2014. It was a normal study with no evidence of peripheral nerve impingement, peripheral polyneuropathy, or radiculopathy on needle exam of the tested right lower extremity. Dr. Troyer further opined, "the axonopathy seen in the foot FDI may be more due to local trauma with obesity and swelling." This is a diagnostic test to which we accord great weight. We give this objective study greater weight than her subjective complaints upon which her impairment rating was assigned. (p. 115 of the APA)

7. On November 12, 2015, in his medical notes, authorized treating physician Dr. Ivan E. LaMotta of Midlands Orthopaedics opined to a reasonable degree of medical certainty that Claimant had reached MMI, assigned a 5% medical impairment to the whole person, a 7% medical impairment to the lumbar spine and released the Claimant with work restrictions of sedentary duties. In addition, Dr. LaMotta recommended future medical care in the form of repeat orthopedic visits, repeat therapy and repeat injections. (Claimant's APAs pg. 113A)

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11. On June 29, 2016, in an employability analysis and labor market survey for the Defendants, Jacqueline Kennedy-Merritt of The Directions Group opined to a reasonable degree of vocational certainty that there are appropriate positions that exist within the labor market that the Claimant can participate in. (Claimant's APAs pg. 219-220)

12. We give great weight to video of Claimant from her son's Facebook page dated May 10, 2015, which is inconsistent with Claimant's subjective statement to providers (upon which, in part, her vocational expert bases his conclusion). We find the

video compelling. We, therefore, give greater weight to Defendants' vocational report, but note that neither expert viewed the video.

13. On November 20, 2016, at a follow-up appointment, Dr. LaMotta opined he would refer Claimant to Dr. Hutcheson for pain management and there were no contraindications for her to return to work with sedentary duty lifting restrictions (Defendants' APAs pg. 113 C)

14. On February 15, 2017, at the hearing before the single Commissioner, Claimant testified she may be capable of returning to work of some kind.

**Based on sworn testimony and a preponderance of the evidence, we hereby find:**

1. Claimant is at MMI for her admitted work-related injuries as of November 12, 2015.

2. Based on a preponderance of the evidence, including video evidence of the Claimant and the Claimant's hearing testimony, we hereby find Claimant is entitled to an award of permanent partial disability.

3. We find that Claimant has sustained a permanent partial disability of twenty percent (20%) to the back.

4. Claimant is entitled to all causally-related future medical treatment for her back, as recommended by Dr. Hutcheson. At the hearing before the single Commissioner, Defendants stipulated to Claimant returning to Dr. Hutcheson for pain management treatment as set forth in Dr. LaMotta's November 20, 2016 medical report as part of her future medical care.

5. Claimant is entitled to a lump sum award.

6. Defendants are entitled to a credit for overpayment of temporary total

disability from the date of the Form 21.

7. Claimant's request for assault leave pursuant to S.C. Code Ann. §8-11-40, is hereby denied as the commission lacks jurisdiction over this issue.

### CONCLUSIONS OF LAW

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2. Pursuant to § 42-1-140, Defendant Employer, was a covered employer under the Act.

3. S.C. Code Ann. § 42-1-160 governs injuries and includes injuries by accident arising out and in the course and scope of employment.

4. Pursuant to § 42-1-160, the Claimant sustained a compensable injury by accident arising out of and in the course and scope of her employment with Defendant on March 22, 2011 to her right elbow, right hip and back.

5. Claimant is entitled to causally related future medical care with Dr. Hutcheson as referred by Dr. LaMotta in his November 20, 2016 medical report as it will tend to lessen her disability pursuant to *Dodge v. Bruccoli Clark Laymen, Inc.*, 334 S.C. 574 (S.C. Ct App. 1999) and S.C. Code Ann. §42-9-60.

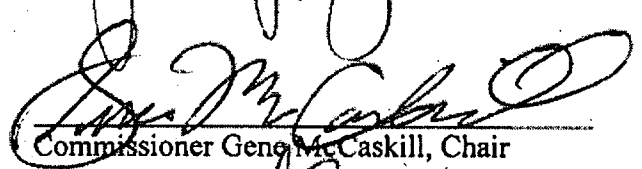
6. Pursuant to § 42-1-40 the Claimant's average weekly wage is \$380.66, with a resulting compensation rate of \$253.79.

### ORDER

IT IS, THEREFORE, ORDERED the Order of the hearing Commissioner is  
AFFIRMED WITH AMENDMENTS.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION

  
\_\_\_\_\_  
Commissioner Susan S. Barden  
\_\_\_\_\_  
Commissioner Gene McCaskill, Chair  
\_\_\_\_\_  
Commissioner Aisha Taylor

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 Valerie Deller on June 5, 2018***