

**APPELLATE PANEL
DECISION AND ORDER
OF
THE SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION**

WCC FILE NO: 1611132

MICHAEL A. REPSHAS, EMPLOYEE,

CLAIMANT/RESPONDENT,

VS.

BB&T CORPORATION, INC., EMPLOYER,

and

HARTFORD ACCIDENT & INDEMINTY COMPANY, CARRIER,

DEFENDANTS/APPELLANTS.

RECEIVED
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SC Court of Appeals

Appellate Panel Review held in Columbia, South Carolina on April 16, 2018, per notices timely and properly served on all parties of interest.

Appellate Panel Decision and Order filed
June 27, 2018.

Appearances:

Claimant/Respondent represented by Jeremy A. Dantin, of Harrison, of HARRISON WHITE, P.C.

Defendants/Appellants represented by Jared M. Pretulak, of GALLIVAN, WHITE & BOYD, P.C.

STATEMENT OF THE CASE

The parties were heard by Commissioner Avery B. Wilkerson, Jr., on October 4, 2017, in Greenville, South Carolina. On January 7, 2018, Commissioner Wilkerson issued the following Order:

Defendants shall pay medical, hospital, surgical, doctors and nurses bills incurred as a direct result of Claimant's injury by accident suffered on July 11, 2016, and shall continue to be responsible for related medical care, including, but not limited to, back surgery.

All other issues were held in abeyance. As part of that Order, Commissioner Wilkerson made the following findings of fact:

1. The parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended to date, with BB&T Corporation as Employer, and Hartford Accident & Indemnity Company as Employer's carrier; and Claimant was an Employee of the Employer on July 11, 2016.
2. Claimant's compensation rate is \$583.89.
3. It is without dispute that Claimant has a history of pre-existing back problems dating back to 2010.
4. In 2010, Dr. Rollins recommended to Claimant that he undergo a 3-level fusion, but Dr. McCorkle recommended conservative treatment in a second opinion. Claimant elected the conservative course of treatment recommended by Dr. McCorkle, which included injections and physical therapy.
5. Claimant did not treat with any back specialists after seeing Dr. McCorkle in 2010 until he saw Dr. Mitchell on July 29, 2016.
6. Claimant did continue to treat occasionally for back and left leg problems from 2010 through July 2016 with his family doctor, and Claimant testified that he continued to have back and left leg pain during this period.
7. On July 11, 2016, Claimant reported to his Unit Leader, David Lanihan, that he possibly injured himself moving a desk at work earlier that same day, as noted in the Form 12-A completed by Lanihan and per Claimant's hearing testimony. The undersigned finds this constitutes timely notice to Employer.
8. Defendants' witness, Tonya Holmes, confirmed Claimant was one of the BB&T employees who assisted in moving the desk at work on July 11, 2016, and further testified she had never known Claimant to be dishonest. Holmes was not present

during the lifting of the desk (and thus did not see any of this activity) – as such, there was nothing she could add regarding the actual lifting and/or repositioning of the desk.

9. The testimony from Tonya Holmes that Claimant could have declined to assist with moving the desk does not preclude a finding of compensability. Claimant performed this activity at work, with other co-workers, at the request of a superior, and for the benefit of Employer (specifically, for the benefit of his Department Manager, whose desk was actually moved in her office and at her request).
10. Defendants sent Claimant to Dr. Kaysi on July 12, 2016, the day after he assisted in lifting a desk at work. Dr. Kaysi noted Claimant injured his back lifting a heavy object at work the day before.
11. While claimant was involved in a motor vehicle accident on July 23, 2016, it does not appear this accident likely changed his back and left leg condition in any significant way. I base this finding on Claimant's hearing testimony regarding this motor vehicle accident, the fact that Claimant had already been referred by Dr. Hess to Dr. Mitchell at the time of his accident, as well as Dr. Mitchell's opinion that this accident was unlikely to have exacerbated or changed his condition from his work accident of July 11, 2016.
12. Dr. Mitchell opined Claimant most likely aggravated/exacerbated his pre-existing back condition in lifting the desk at work on July 11, 2016, which also most probably caused the new injury (extruded disc fragment pressing on L2 nerve root) he noted on the MRI.
13. Both Dr. Boyd and Dr. Kanos opined that they did not believe Claimant's low back and left lower extremity problems were caused or aggravated by any accident at work on July 11, 2016.
14. I give greater weight to the opinion offered by Dr. Mitchell in this instance. Dr. Mitchell actually treated (and continues to treat) Claimant, whereas Dr. Boyd and Dr. Kanos were paid to provide opinions by Defendants without ever seeing him a single time. Further, it is unclear what actual documents Dr. Boyd and Dr. Kanos reviewed and/or whether they were provided complete copies of the pertinent records in this instance, which is particularly important given that their opinions purport to be based solely upon such records.
15. The undersigned finds Claimant suffered a compensable injury to his back and left leg on June 11, 2016, arising out of and in the course of his employment with the aforesaid Employer.
16. The care and treatment Claimant has received to date relating to his back and left leg problems has been necessary and appropriate. The undersigned finds that Defendants are responsible for related past medical expenses.
17. Claimant is entitled to continuing medical care as recommended by Dr. Mitchell, including, but not limited to, surgery.

18. Defendants are entitled to select a back specialist to provide continuing medical care to Claimant for his back and left leg. However, should Defendants decide to switch Claimant's care from Dr. Mitchell, Defendants may not select Dr. Boyd or Dr. Kanos (or any other doctor in their respective practices) to provide such treatment.

Within the statutory period, counsel for Defendants/Appellants ("Defendants") filed an Application for Review, copies of which were furnished to all interested parties prior to oral argument presented before the Appellate Panel on April 16, 2018. All testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission and has since been under study and consideration.

By appeal, Defendants respectfully submitted the following:

1. Did the hearing Commissioner err as a matter of fact and law in finding as fact that it is without dispute that Claimant has a history of pre-existing back problems dating back to 2010, the error including, but not being limited to, the fact such finding significantly discounts the severity of the Claimant's medical diagnosis, symptoms experienced and treatment received all which predated the claimant's alleged work accident? (Finding of Fact No.3)
2. Did the hearing Commissioner err as a matter of fact and law in finding as fact that Claimant did not treat with any back specialist after seeing Dr. McCorkle in 2010 until he saw Dr. Mitchell on July 29, 2016, the error including, but not being limited to, the fact such finding is inaccurate and significantly discounts the severity of the Claimant's medical diagnosis, symptoms experienced and treatment received all which predated the claimant's alleged work accident? (Finding of Fact No.5)
3. Did the hearing Commissioner err as a matter of fact and law in finding as fact Claimant continued to treat occasionally for back and left leg problem from 2010 through July 2016 with his family doctor, and Claimant testified that he continued to have back and left leg pain during this period, the error including, but not being limited to, the fact such finding does not accurately reflect Claimant's deposition testimony? (Finding of Fact No.6)
4. Did the hearing Commissioner err as a matter of fact and law in finding as fact on July 11, 2016, Claimant reported to his Unit Leader, David Lanihan, that he possibly injured himself moving a desk at work earlier that same day, as noted in the Form 12-A completed by Lanihan and per Claimant's hearing testimony and the Commissioner finds this constitutes timely notice to

Employer, the error including, but not being limited to, the fact such finding does not accurately reflect Claimant's deposition testimony? (Finding of Fact No.7)

5. Did the hearing Commissioner err as a matter of fact and law in finding as fact Defendants' witness, Tonya Holmes, confirmed Claimant was one of the BB&T employees who assisted in moving the desk at work on July 11, 2016, and further testified she had never known Claimant to be dishonest and Holmes was not present during the lifting of the desk (and thus did not see any of this activity) - as such, there was nothing she could add regarding the actual lifting and/or repositioning of the desk, the error including, but not being limited to, the fact such finding does not accurately reflect witness's testimony? (Finding of Fact No.8)
6. Did the hearing Commissioner err as a matter of fact and law in finding as fact the testimony from Tonya Holmes that Claimant could have declined to assist with moving the desk does not preclude a finding of compensability and Claimant performed this activity at work, with other co-workers, at the request of a superior, and for the benefit of Employer (specifically, for the benefit of his Department Manager, whose desk was actually moved in her office and at her request) the error including, but not being limited to, the fact such finding does not accurately reflect witness's testimony? (Finding of Fact No.9)
7. Did the hearing Commissioner err as a matter of fact and law in finding as fact Defendants sent Claimant to Dr. Kaysi on July 12, 2016, the day after he assisted in lifting a desk at work and Dr. Kaysi noted Claimant injured his back lifting a heavy object at work the day before the error including, but not being limited to, the fact such interpretation and reliance on said medical record is not reflective of the testimony, medical evidence, and record as a whole? (Finding of Fact No. 10)
8. Did the hearing Commissioner err as a matter of fact and law in finding as fact while claimant was involved in a motor vehicle accident on July 23, 2016, it does not appear this accident likely changed his back and left leg condition in any significant way which was based on Claimant's hearing testimony regarding the motor vehicle accident, the fact that Claimant had already been referred by Dr. Hess to Dr. Mitchell at the time of his accident, and Dr. Mitchell's opinion that this accident was unlikely to have exacerbated or changed his condition from his work accident of July 11, 2016, the error including, but not being limited to, the fact such interpretation and reliance on claimant's testimony and said medical records is not reflective of the testimony, medical evidence and record as a whole? (Finding of Fact No. 11)
9. Did the hearing Commissioner err as a matter of fact and law in finding as fact Dr. Mitchell opined Claimant most likely aggravated/exacerbated his pre-existing back condition in lifting the desk at work on July 11, 2016, which

also most probably caused the new injury (extruded disc fragment pressing on L2 nerve root) he noted on the MRI, the error including, but not being limited to, the fact such interpretation and reliance on said medical opinion is not reflective of the testimony, medical evidence and record as a whole? (Finding of Fact No. 12)

10. Did the hearing Commissioner err as a matter of fact and law in failing to give greater weight to the findings of both Dr. Boyd and Dr. Kanos who had access to more information than Dr. Mitchell and who opined that they did not believe Claimant's low back and left lower extremity problems were caused or aggravated by an accident allegedly occurring at work on July 11, 2016, the error including, but not being limited to, the fact such failure to adequately review and rely on said experts resulted in a decision which is not reflective of the testimony, medical evidence and record as a whole? (Finding of Fact No. 13)
11. Did the hearing Commissioner err as a matter of fact and law in finding as fact he gave greater weight to the opinion offered by Dr. Mitchell in this instance as Dr. Mitchell actually treated (and continues to treat) Claimant, whereas Dr. Boyd and Dr. Kanos were paid to provide opinions by Defendants without ever seeing him a single time and further, it is unclear what actual documents Dr. Boyd and Dr. Kanos reviewed and/or whether they were provided complete copies of the pertinent records in this instance, which is particularly important given that their opinions purport to be based solely upon such records, the error including, but not being limited to, the fact such overreliance on Dr. Mitchell's opinion and discounting of Dr. Boyd and Dr. Kanos's is inconsistent with the testimony, medical evidence and records as a whole? (Finding of Fact No. 14)
12. Did the hearing Commissioner err as a matter of fact and law in finding as fact Claimant suffered a compensable injury to his back and left leg on June 11, 2016, arising out of and in the course of his employment with the aforesaid Employer, the error including, but not being limited to, the fact such finding of fact is neither reflective of the claimant's allegations he had not suffered an injury by accident, but rather an aggravation of a preexisting condition, nor is it reflective of the testimony, medical evidence and record as a whole? (Finding of Fact No. 15).
13. Did the hearing Commissioner err as a matter of fact and law in finding as fact the care and treatment Claimant has received to date relating to his back and left leg problems has been necessary and appropriate and that Defendants are responsible for related past medical expenses, the error including, but not being limited to, the fact such finding is not reflective of the testimony, medical evidence and record as a whole? (Finding of Fact No. 16)

14. Did the hearing Commissioner err as a matter of fact and law in finding as fact Claimant is entitled to continuing medical care as recommended by Dr. Mitchell, including, but not limited to, surgery, the error including, but not being limited to, the fact such finding is not reflective of the testimony, medical evidence and record as a whole? (Finding of Fact No. 17)
15. Did the hearing Commissioner err as a matter of fact and law in finding as fact Defendants are entitled to select a back specialist to provide continuing medical care to Claimant for his back and left leg, however, should Defendants decide to switch Claimant's care from Dr. Mitchell, Defendants may not select Dr. Boyd or Dr. Kanos (or any other doctor in their respective practices) to provide such treatment, the error including, but not being limited to, the fact such finding is in violation of South Carolina Workers' Compensation Regulation 67-509? (Finding of Fact No. 18)
16. Did the hearing Commissioner err as a matter of fact and law in concluding as law under Section 42-1-160, Claimant did sustain an injury by accident, arising out of and in the course of his employment the error including, but not being limited to, the fact such conclusion of law is neither reflective of the claimant's allegations he had not suffered an injury by accident, but rather an aggravation of a preexisting condition, nor is it reflective of the testimony, medical evidence and record as a whole? (Conclusion of Law No.2)
17. Did the hearing Commissioner err as a matter of fact and law in concluding as law under Section 42-15-60, Claimant has received proper medical care and is entitled to additional medical care including, but not limited to, back surgery, the error including, but not being limited to, the fact such conclusion of law is not reflective of the testimony, medical evidence and record as a whole? (Conclusion of Law No.3)
18. Did the hearing Commissioner err as a matter of fact and law in ordering that the Defendants shall pay medical, hospital, surgical, doctors and nurses bills incurred as a direct result of Claimant's injury by accident suffered on July 11, 2016 and shall continue to be responsible for related medical care, including, but not limited to back surgery, the error including, but not being limited to, the fact such award is not reflective of the testimony, medical evidence and record as a whole? (Award)
19. Did the hearing Commissioner err as a matter of fact and law in failing to find as fact, conclude as law, and order, among other things, that the claimant lacked credibly, the error including, but not being limited to, the fact that failing to make such finding, conclusion, and order is not reflective of the testimony, medical evidence and record as a whole?
20. Did the hearing Commissioner err as a matter of fact and law in failing to give greater weight to the medical opinions of Dr. Boyd and Dr. Kanos, as well as

the medical evidence as a whole, the error including, but not being limited to fact that failure to give such weight to such evidence resulted in an outcome that is arbitrary and capricious, not adequately set forth in the record, not supported by the greater weight of the evidence, and not supported by the reliable, probative, and substantial evidence of the case?

21. Did the hearing Commissioner err as a matter of fact and law in failing to find as fact, conclude as law, and order, among other things, that the claimant had failed to satisfy his burden of proof that he had sustained an injury by accident or aggravation of his preexisting condition, the error including, but not being limited to, the fact that failing to make such finding, conclusion, and order is not reflective of the testimony, medical evidence and record as a whole?
22. Did the hearing Commissioner err as a matter of fact and law in making the above-referenced findings of fact, conclusions of law, orders, and awards in that such findings, conclusions, orders, and awards are arbitrary and capricious, not adequately set forth in the record, not supported by the greater weight of the evidence, and the reliable, probative, and substantial evidence of the case does not support such findings, conclusions, orders, and awards or such findings, conclusions, orders, and awards are affected by other error of law?
23. Did the hearing Commissioner err as a matter of fact and law in failing to make, among other things, the above-referenced findings of fact, conclusions of law, orders, and awards in that failing to make such, and other relevant, findings, conclusions, orders, and awards resulted in an outcome which was arbitrary and capricious, not adequately set forth in the record, not supported by the greater weight of the evidence or the reliable, probative, and substantial evidence, and was affected by other error of law?

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. §42-17-50, 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. After careful review in the instant case, the Panel, by unanimous vote, **Affirms** the Single Commissioner's Decision and Order, with one amendment.

Thus, the Appellate Panel Finds and Concludes as follows:

FINDINGS OF FACT

1. The parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended to date, with BB&T Corporation as Employer, and Hartford Accident & Indemnity Company as Employer's carrier; and Claimant was an Employee of the Employer on July 11, 2016.
2. Claimant's compensation rate is \$583.89.
3. It is without dispute that Claimant has a history of pre-existing back problems dating back to 2010.
4. In 2010, Dr. Rollins recommended to Claimant that he undergo a 3-level fusion, but Dr. McCorkle recommended conservative treatment in a second opinion. Claimant elected the conservative course of treatment recommended by Dr. McCorkle, which included injections and physical therapy.
5. Claimant did not treat with any back specialists after seeing Dr. McCorkle in 2010 until he saw Dr. Mitchell on July 29, 2016.
6. Claimant did continue to treat occasionally for back and left leg problems from 2010 through July 2016 with his family doctor, and Claimant testified that he continued to have back and left leg pain during this period.
7. On July 11, 2016, Claimant reported to his Unit Leader, David Lanihan, that he possibly injured himself moving a desk at work earlier that same day, as noted in the Form 12-A completed by Lanihan and per Claimant's hearing testimony. The undersigned finds this constitutes timely notice to Employer.
8. Defendants' witness, Tonya Holmes, confirmed Claimant was one of the BB&T employees who assisted in moving the desk at work on July 11, 2016, and further testified she had never known Claimant to be dishonest. Holmes was not present during the lifting of the desk (and thus did not see any of this activity) – as such, there was nothing she could add regarding the actual lifting and/or repositioning of the desk.
9. The testimony from Tonya Holmes that Claimant could have declined to assist with moving the desk does not preclude a finding of compensability. Claimant performed this activity at work, with other co-workers, at the request of a superior, and for the benefit of Employer (specifically, for the benefit of his Department Manager, whose desk was actually moved in her office and at her request).
10. Defendants sent Claimant to Dr. Kaysi on July 12, 2016, the day after he assisted in lifting a desk at work. Dr. Kaysi noted Claimant injured his back lifting a heavy object at work the day before.

11. While claimant was involved in a motor vehicle accident on July 23, 2016, it does not appear this accident likely changed his back and left leg condition in any significant way. This finding is based upon Claimant's hearing testimony regarding this motor vehicle accident, the fact that Claimant had already been referred by Dr. Hess to Dr. Mitchell at the time of his accident, as well as Dr. Mitchell's opinion that this accident was unlikely to have exacerbated or changed his condition from his work accident of July 11, 2016.
12. Dr. Mitchell opined Claimant most likely aggravated/exacerbated his pre-existing back condition in lifting the desk at work on July 11, 2016, which also most probably caused the new injury (extruded disc fragment pressing on L2 nerve root) he noted on the MRI.
13. Both Dr. Boyd and Dr. Kanos opined that they did not believe Claimant's low back and left lower extremity problems were caused or aggravated by any accident at work on July 11, 2016.
14. Greater weight is given to the opinion offered by Dr. Mitchell in this instance. Dr. Mitchell actually treated (and continues to treat) Claimant, whereas Dr. Boyd and Dr. Kanos were paid to provide opinions by Defendants without ever seeing him a single time. Further, it is unclear what actual documents Dr. Boyd and Dr. Kanos reviewed and/or whether they were provided complete copies of the pertinent records in this instance, which is particularly important given that their opinions purport to be based solely upon such records.
15. The undersigned find Claimant suffered a compensable injury to his back and left leg on June 11, 2016, arising out of and in the course of his employment with the aforesaid Employer.
16. The care and treatment Claimant has received to date relating to his back and left leg problems has been necessary and appropriate. The undersigned find that Defendants are responsible for related past medical expenses.
17. Claimant is entitled to continuing medical care as recommended by Dr. Mitchell, including, but not limited to, surgery.
18. Defendants are entitled to select a back specialist to provide continuing medical care to Claimant for his back and left leg. However, should Defendants decide to switch Claimant's care from Dr. Mitchell, Defendants may not select Dr. Boyd or Dr. Kanos (or any other doctor in their respective practices) to provide such treatment.

CONCLUSIONS OF LAW

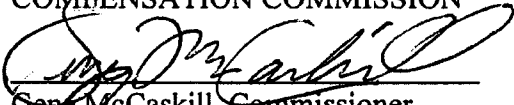
Accordingly, as provided in the South Carolina Laws, 1976, as amended, Section 42-17-40, it is the determination of the Commission:

- (1) Under Section 42-1-130, Claimant was a covered employee at the time in question; and under Section 42-1-140, Defendant-Employer was a covered employer under the Act.
- (2) Under Section 42-1-160, Claimant did sustain an injury by accident, arising out of and in the course of his employment.
- (3) Under Section 42-9-35, Claimant did sustain an aggravation of a preexisting condition.¹
- (4) Under Section 42-15-60, Claimant has received proper medical care and is entitled to additional medical care including, but not limited to, back surgery.

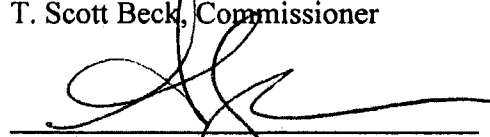
ORDER

IT IS, THEREFORE, ORDERED that the Decision and Order of the Single Commissioner filed in the above-captioned matter on January 7, 2018, is hereby **affirmed** by the Panel (with amendment) and shall constitute the Decision and Order of the Appellate Panel.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION


Gene McCaskill, Commissioner


T. Scott Beck, Commissioner


Aisha Taylor, Commissioner

CONCUR:

¹ The Appellate Panel amends the Single Commissioner's Rulings of Law to add this conclusion.

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 27, 2018