

APPELLATE PANEL
DECISION AND ORDER OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 1701477

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APR 03 2019

SC Court of Appeals

ROBERT DARBY, JR.

EMPLOYEE / CLAIMANT /
APPELLANT,

vs.

CAROLINA WOOD, INC.

EMPLOYER,

and

PALMETTO TIMBER FUND

CARRIER,

DEFENDANTS /
RESPONDENTS.

APPELLATE PANEL'S
DECISION AND ORDER

HEARING:

Appellate Panel Review held in Columbia, South Carolina on November 27, 2018 per notices timely and properly served on all parties of interest.

APPEARANCES:

Matthew W. Jackson, Esquire, on behalf of the Employee / Claimant / Appellant.

John W. Rabb, Esq., Esquire, on behalf of the Employer - Carrier / Defendants / Respondents.

APPELLATE PANEL DECISION AND ORDER
FILED:

March 4, 2019

STATEMENT OF THE CASE

The parties were heard by Commissioner R. Michael Campbell, II, in Orangeburg County, South Carolina. On March 14, 2018, Commissioner Campbell issued the following:

FINDINGS OF FACT:

Based on the pleadings, medical submissions, exhibits, I make the following findings of fact:

1. I find that the South Carolina Workers Compensation Commission has jurisdiction over both the parties to and the subject matter of this claim.
2. I find that at the time of Claimant's alleged work related accident on February 17, 2017, both the Claimant and the Employer were subject to the Workers Compensation Act.
3. I find that notice of the hearing was timely and properly served upon all parties of interest.
4. I find that venue in Orangeburg County is proper.
5. The average weekly wage is \$700.00 and the compensation rate is \$466.66.
6. Claimant alleged he sustained an injury to his left knee arising out of and in the course and scope of his employment on Friday 02/17/2017. He alleged a pine tree he was cutting got caught or "hemmed up" in another tree and then kicked around and hit him on the left side, leg, and down below the knee. This was an unwitnessed accident. The accident occurred at 11:30 AM. After the accident, he sat on top of a log pile for about 25 minutes. "Knock off time was 12:00 PM.
7. Claimant first sought medical treatment on Sunday February 19th at Summerville Medical Center. He testified he called Mr. Williams, his supervisor, the night before and told him he believed he had sprained his leg. Tr.pg 14-15. X-rays revealed he sustained a fracture to his leg, specifically the tibia below his knee. He subsequently received treatment at Summerville Health Center and Dr. Franklin Fetter MD and the Medical University of South Carolina (MUSC).
8. Claimant testified at the Hearing the tree hit him so hard it knocked him down, but he was able to walk 15-20 feet to a hill to sit down. Tr.pg 19. 1. 1 1-22.

9. Claimant testified he had a small limp when he was coming out of the woods, and he wasn't in any pain at the time. Tr. pg 12. 1. 10-14. He testified at the Hearing he had a conversation with Mr. Williams before the accident for about a minute about a burnt out sparkplug. Tr. pg 13 1.9-24.
10. In his sworn testimony on 07/13/2017, the Claimant testified he did not speak to Mr. Williams before he left work, but waved and went to his truck. He did not report the accident to Mr. Williams. He was walking with a small limp. Darby Deposition, Tr.pg 3 1. 23-25, pg. 33, 1. 6-25.
11. In his sworn testimony on 07/13/2017, Mr. O'Dell Williams testified that although he believed Mr. Darby was honest, he had a specific and lengthy conversation (1 hour) with Mr. Darby after the alleged incident on the day in question. Specifically, Mr. Darby's demeanor was all right, he was laughing and cutting up, he was not favoring his leg or limping in any way and did not appear to have anything wrong with him. Williams Deposition, Tr. pgs 20-22.
12. With only the Claimant's subjective complaints and absent any causally-related medical evidence or eyewitnesses, and due to the discrepancies in sworn testimony, I hereby find Claimant did not meet his burden of proof that he sustained a compensable work-related injury to his left knee.

Commissioner Campbell issued the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The burden lies with the claimant to demonstrate causation by a preponderance of the evidence. S.C. Second Injury Fund v. Liberty Mutual, 353 S.C 576, S.E.2d 199 (2005).
2. Workers' compensation awards must not be based on surmise, conjecture or speculation. Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963).

The Appellant filed a Form 30 request for Commission review on March 22, 2018. The primary issue raised in the Appellant's Form 30 was whether the single Commissioner erred in not finding the Appellant sustained a compensable injury by accident in the course and scope of his employment as the weight of the evidence shows the Appellant has sustained a compensable injury by accident in the

course and scope of his employment. The Appellant contends that the single Commissioner's Decision and Order includes errors of law as the single Commissioner ruled that the Appellant did not meet his burden of proof pursuant to Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963).

ISSUE PRESENTED

1. Whether the single Commissioner erred in ruling that the Appellant failed to prove that he sustained a compensable injury by accident to his left leg and knee as a result of a February 17, 2017 work accident, precluding him from any workers' compensation benefits.

ARGUMENT

1. The single Commissioner erred, as a matter of law, in finding that the Appellant failed to meet his burden of proof that he sustained a compensable injury by accident and was entitled to appropriate benefits under the South Carolina Workers' Compensation Act.

The South Carolina Workers's Compensation Act provides a definition of injury and personal injury in § 42-1-160. In order to be entitled to workers' compensation benefits, the employee must show that he or she sustained an injury by accident and arising out of and in the course of employment. Owens v. Anderson County Sheriff's Department, (S.C. 1993) 315 S.C. 297, 433 S.E.2d 869, Rehearing Denied.

The three criteria for determining whether an injury is compensable are: (1) accident, (2) arising out of employment, and (3) arising in the course of employment. Doe v. South Carolina State Hospital, (S.C. App. 1985) 285 S.C. 183, 328 S.E.2d 652.

In determining whether a work-related injury is compensable, courts liberally construe workers' compensation law toward providing coverage and resolve any reasonable doubt as to construction of the law in favor of coverage. Whigham v. Jackson Dawson Communications, (S.C. 214) 410 S.C. 131, 763 S.E.2d 420, Rehearing Denied.

The Workers' Compensation Act should be construed in favor of coverage, and any reasonable doubts as to the construction of the Act should be resolved in favor of the claimant. Hall v. Desert Aire, Inc., (S.C. App. 2007) 367 S.C. 338, 656 S.E.2d 753, Rehearing Denied.

The Workers' Compensation Act is entitled to a liberal construction in furtherance of the beneficial purposes for which it was designed. Carter v. Penney Tire & Recapping Co., (S.C. 1973) 261 S.C. 341, 200 S.E.2d 64.

The Workers' Compensation Act has to be construed liberally in favor of coverage and doubtful cases should be resolved in favor of the injured employee. Douglas v. Spartan Mills, Startex Division, (S.C. 1965) 245 S.C. 265, 140 S.E.2d 173.

APPELLANT'S TESTIMONY

In the above-referenced matter, the Appellant testified that on February 17, 2017, he was cutting trees, a job he has done for the Defendant/Respondent for nearly 29 years, and one tree got caught up in the other tree, swung around and hit him in his left knee and leg. The Appellant reported the injury to the Employer within 90 days. In fact, the Appellant was unable to return to work for the Employer after this incident. The Appellant testified that the Employer had had conversations with other people above him that they were to avoid having any workers' compensation benefits as the same would affect their ability to work. (Claimant's Depo., 37:15-23, July 13, 2017). The contents of this conversation were confirmed by the Defendant, Mr. Williams, the owner, in his deposition transcript. He affirmed that it was openly discussed that workers' compensation claims needed to be avoided and could affect their ability to keep the work. (Defendant's Depo., 11: 13-21, July 13, 2017).

The Appellant testified that the injury occurred around noon on the Friday in question. He sat down on top of a log pile after he was hit. He sat down for about 25 minutes while the Employer and his son came and drug trees that he had cut off with a skidder. The Appellant testified that although he had a limp, it was slight limp, and not something that anyone would notice because the pain was not great after he sat down for a period of time. The Appellant testified that when he left the job site that Josh, the Employer's son, was gone. (Hrg. Tran., 9-12, August 15, 2017).

The Appellant testified that his pain intensified on his ride home. He testified in his deposition that his ride home was approximately 45 miles. (Claimant's Depo., 34:6-13, July 13, 2017). The Appellant testified that when he got home he took a bath and laid down. The Appellant testified that he did not feel pain until the next morning. The Appellant testified that his leg was swollen like a pillow the next morning. The Appellant testified that he got in a bath with some salt water to try and help the joint, but that did not do any good.

The Appellant first treated for his injury at Summerville Medical Center. The medical record from Summerville Medical Center dated February 19, 2017 clearly states that the Appellant indicated that a log hit his lower leg. It also states he has been walking around. It gives the date of trauma as February 17, 2017. (Claimant's APA 13-15.) The primary impression from Summerville Medical Center was a fracture of the head of the left fibular. (Claimant's APA 17.) The Appellant was seen on March 28, 2017 by MUSC. These records state 59-year old African American male with left knee pain about four weeks ago when a tree hit him in the left knee. (Claimant's APA 3.) The impression from the physicians at MUSC was a comminuted fracture of the left fibular head with mild distraction of fracture fragments. Possible lateral capsular avulsion (Second fracture) suggestive of ACL injury. Avulsion fracture off the medial femoral condyle suggesting MCL injury. MRI should be considered for further evaluation of the ACL MCL and posterolateral corner. (Claimant's APA 5.)

The Appellant testified at the hearing that he called the Employer the night before he went to Summerville Medical Center and told him he thought he had a sprained leg. He was going to try to bathe it to see if the swelling would go down, and it did not. His leg got worse. He got up the next morning, Sunday, and went to Summerville Medical Center. The Appellant testified at the hearing that he would like to have any treatment that would make his leg feel better.

The Appellant testified that at the time of his hearing that he had not been able to work and had not worked anywhere since due to his injury. The Appellant testified that he had not received any workers' compensation benefits. The Appellant testified that he was on a prescription medication from a doctor but could not recall the name of the prescription. The Appellant testified that he would prefer to be out working cutting trees rather than being unable to work. The Appellant testified that the Employer wants him back very badly. The Appellant testified that the Employer would often call him and ask him if he was able to work. The Appellant also testified that he remembered his Employer saying that he believed the Appellant injured his knee just as he described at the hearing.

On cross-examination, the Appellant stated that he had little to no pain when he would move around. He had more pain when he would sit still. He testified that the owner, Mr. Williams, as well as his son, Josh, were not around when he was hit by the tree. He testified he could not recall whether the conversation with Mr. Williams regarding the spark plug was before or after he was injured. The Appellant testified that it took him 45 minutes to an hour to drive home. He testified that he did not have to stop and get out and stretch because he was driving his truck and it is an automatic. The Appellant testified that he did not tell his Employer the same day about his injury because he was told

by his Employer that if there were any work accident injuries they would be out of a job. He testified that he did not say anything to his Employer on the day of the accident because he was scared he would be out of a job.

DEFENDANT'S TESTIMONY

One of the most compelling pieces of evidence is contained in the deposition transcript of the Employer. He testified that he had known the Appellant for years, working on and off with him for nearly 30 years. He testified that he felt the Appellant was an honest man. He testified that following the accident, the Appellant called him Sunday afternoon and told him that his knee had started to swell up and he had to go to the emergency room and the emergency room told him he had a cracked knee cap. He asked, "You reckon workman's comp would help me out on it. I (Mr. Williams) said, well I don't know after you waited so long." (Williams Dep. 10:15-23, July 13, 2017.) The Appellant had reported his injury within 48-hours of when it happened.

The Claimant testified during his deposition that he didn't want to report a work accident injury because he had heard Mr. Williams and Mr. Barry Mears discussing the fact that if anybody had a workers' compensation claim, or was hurt on the job, they would more than likely lose the job. (Darby Dep. 37:15-23, July 13, 2017.) The contents of this conversation are confirmed by Mr. Williams, the owner, in his deposition transcript in which he affirms that it was openly discussed that workers' compensation claims needed to be avoided and could affect their ability to keep the work. (Williams Dep. 11:13-21, July 13, 2017.)

The absolute strongest piece of evidence in this claim is the fact that the Employer believes that the Appellant was injured in exactly the manner in which he states he was injured. The only issue the Employer had with the claim was the fact that the Appellant waited 48-hours to report the injury. The Employer testified that he believed that the Appellant was injured in exactly the way he alleges, on the date he alleges, and that he was honest about all of his deposition testimony. (Williams Dep. 18-19:21-24, July 13, 2017.)

FINDINGS OF FACT

After due consideration of the claim and defense, and after reviewing all of the evidence contained in the record, as well as the single Commissioner's Order, as required under § 42-17-40, S.C. Code of Laws 1976, as amended, the following Findings of Fact are set forth:

1. The South Carolina Workers' Compensation Commission has jurisdiction over this claim. The Claimant was a covered employee and the employer was a covered employer at the time in question. The employee/employer relationship existed at the time of the Claimant's injury by accident.
2. That the venue for this claim was proper.
3. That the claim was heard by a full panel of Commissioners consisting of Commissioner Aisha Taylor, Commissioner T. Scott Beck, and Commissioner Gene McCaskill in accordance with notices timely and properly served upon all parties of interest.
4. That the Claimant sustained a compensable injury by accident arising out of and in the course and scope of his employment to his left lower extremity when he was hit by a tree limb.
5. That proper notice of the Claimant's injury by accident was provided to the Employer.
6. That at the time of the Claimant's injury by accident, the Claimant had an AWW of \$700.00, thereby entitling him to a CR of \$466.66.
7. That as a consequence of the Claimant's compensable injury, the Claimant was unable to work since the date of accident.
8. That the Claimant is to receive necessary and proper medical care, treatment, and/or surgery which would tend to effect a cure, give relief, or lessen the Claimant's disability. The treatment from medical providers to be chosen by the Defendants, to include consultations, diagnostic procedures, therapy, injections, medications, surgery, and other attendant care, shall be the responsibility of the Defendants, including reimbursement to the Claimant for mileage and prescription medications.

9. That the greater weight of the evidence does support a finding that the Claimant suffered a compensable injury to his left lower extremity as a result of his work accident on February 17, 2017.

CONCLUSION

Accordingly, as provided in § 42-17-40, S.C. Code of Laws 1976, as amended, it is the determination of the Commission as follows:

1. Under § 42-1-130, the Claimant was a covered employee at the time in question.
2. Under § 42-1-140, the Defendant employer was a covered employer under the Act.
3. Under § 42-1-40, the Claimant's AWW was \$700.00, resulting in an appropriate CR of \$466.66.
4. Under § 42-1-160, the Claimant sustained a compensable injury to his left lower extremity, arising out of and in the course and scope of his employment.
5. Under § 42-15-20, proper notice was provided to the Employer.
6. Under § 42-15-60, the Claimant is entitled to all medical care, treatment, therapy, consultations, diagnostic studies, rehabilitations, injections, hospitalizations, surgeries, and prescription medications related to his injury which would tend to effect a cure, provide relief and/or tend to lessen his period of disability including, but not limited to, past causally-related medical treatment for his injury.
7. Under § 42-9-10, the Claimant is entitled to temporary, total disability benefits from February 17, 2017 to the present and continuing in the amount of \$466.66 per week.

ORDER

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

ORDERED, ADJUDGED, AND DECREED, that the Claimant, Robert Darby, Jr., sustained a compensable injury by accident to his left lower extremity arising out of and in the course and scope of his employment with the Employer/Defendant, Carolina Wood, Inc., on February 17, 2017; and it is further

ORDERED, ADJUDGED, AND DECREED, that the Claimant, Robert Darby, Jr., is to receive necessary and proper medical care, treatment, therapy, injections, consultations, diagnostic procedures, medications, rehabilitations, surgery and other attendant care which will tend to lessen his disability, provide a cure, or maintain his current level of functioning. The Defendants shall be responsible for payment of all such care, including reimbursement to Claimant for mileage and prescription medications; and it is further

ORDERED, ADJUDGED, AND DECREED, that the Defendant, Carolina Wood, Inc., and its insurance carrier, Palmetto Timber Fund, shall be responsible for all causally-related past medical treatment, mileage reimbursement, and prescription medication reimbursement that is causally-related to the injury; and it is further

ORDERED, ADJUDGED, AND DECREED, that the Claimant, Robert Darby, Jr., is to receive temporary, total disability benefits from February 17, 2017 to the present and continuing until such time as they can be properly terminated under the Act.

No hearing costs are assessed in this matter.

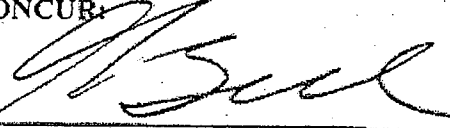
AND IT IS SO ORDERED!

**SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION**



AISHA TAYLOR, COMMISSIONER

WE CONCUR:



T. SCOTT BECK, COMMISSIONER



GENE McCASKILL, 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 Valerie Deller on March 4, 2019