

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1404157

Freddie Tarver)
Claimant-Appellant,)
Vs.)
Beech Island Rural Community,)
Employer,)
Auto Owners Insurance Company,)
Carrier.)

ORDER OF THE FULL COMMISSION

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SC Court of Appeals

HEARING: Held in Columbia, South Carolina on October 22, 2018.

APPEARANCES: Hyman S. Rubin, Jr. for the Claimant; James P. Newman, Jr. for Beech Island Rural Community/Auto Owners Insurance Company

PURPOSE OF HEARING: Hearing was set on Claimant Freddie Tarver's request for review (Form 30 appeal) – dated June 19, 2018.

DECISION AND ORDER: Commission Panel: Commissioners Gene McCaskill, Susan S. Barden and Scott Beck (Chair)

FILED: April 26, 2019

This matter came to be heard before the Single Commissioner on September 27, 2016 in Aiken, South Carolina to determine issues set forth in the Defendants' Form 21 as well as Forms 50 and 51. By his Decision and Order dated December 5, 2016, the Single Commissioner made Findings of Fact and Conclusions of Law which were subsequently appealed by the Claimant by request for Commission review and attached exceptions dated December 19, 2016.

By its Order of January 22, 2018, the panel reversed the Single Commissioner's Finding of Fact number nine (9) by which it was determined that the Claimant did not sustain a compensable injury to the teeth as alleged, thereby finding the alleged injury to the Claimant's teeth to be compensable. In light of that finding, the case was remanded by the Full Commission Panel to the Hearing Commissioner to analyze the impact of that ruling on S.C. Code Section §42-9-10 and analysis of wage loss S.C. Code Section §42-9-20 to include Findings of Fact and Conclusions of Law.

A conference call was conducted between counsel for the parties and the Hearing Commissioner on April 12, 2018 at which point counsel for the parties presented their respective positions which were considered by the Single Commissioner.

By his Decision and Order dated June 5, 2018, the Single Commissioner made the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

(1) A relationship of employer and employee existed at the time in question, and both were subject to the South Carolina Workers' Compensation Act with Freddie Tarver, employee, Beech Island Rural Community, employer, and Auto Owners Insurance Company, insurance carrier.

(2) The Claimant sustained an injury to his back and pelvis by accident arising out of and in the course of his employment. This finding is based upon a review of the medical records submitted by the parties.

(3) The Claimant's average weekly wage is \$1,037.41, which computes to a compensation rate of \$691.69. This finding is based upon the Form 20 submitted by the employer and the fact that as it relates to additional employment of the Claimant, no Form 20 was submitted by the Claimant pursuant to the Regulations of the South Carolina Workers' Compensation Commission. Additionally, though the Claimant's income tax returns reflect earnings from a plumbing concern operated by the Claimant and from ministry work, according to the Claimant testimony, he continues to be engaged in those forms of employment.

(4) Jurisdiction and venue have been agreed to by the parties.

(5) The Defendants contend the Claimant reached maximum medical improvement as of June 16, 2014 and the Claimant contends that maximum medical improvement has not been reached and he is in need of further medical care. Based on a review of the records of medical treatment and testimony, I find maximum medical improvement to have been the date he returned to work on July 10, 2014.

(6) Based on the testimony in the record, the Claimant returned to full time regular duty employment on July 10, 2014 and continued to work in that capacity until he took voluntary retirement on March 27, 2015. In his hearing testimony, the Claimant conceded that he had no work excuse from a physician taking him out of work at that point.

(7) The vocational findings of Glen Adams as reflected on Pages 144 through 153 of the Claimant's APA submissions and the findings of Jan Westmoreland as reflected on Pages 154 through 165 of the Claimant's submissions reflect that their findings were rendered after the Claimant had returned to work for almost a year and approximately 2 years after the date of accident.

(8) The Claimant was paid temporary total disability benefits for a period from April 16, 2014 through July 9, 2014. This finding is based upon the agreement of the parties.

(9) By Order of the Full Commission Panel, the Claimant was found to have sustained a compensable injury to teeth numbers 8 and 9 as alleged and that any and all medical treatment recommended by the dentists shall be covered under the South Carolina Workers' Compensation Act. This finding is made pursuant to Finding of Fact number 6 of the Order of the Full Commission Panel dated January 22, 2018 by which this matter was remanded.

(10) By his own admission, the Claimant did not undergo any form of surgery as the result of the injuries sustained in this accident.

(11) The medical records and testimony in the record reveals that the Claimant's condition became much worse after his retirement.

(12) Pursuant to the testimony of the Claimant, he continues to perform work as a part time minister and in running his own plumbing business and though he worked 28 years in the state retirement system, he is not currently drawing state retirement benefits. He appears to have applied for Social Security benefits though he is not drawing those and since the time of this accident he has built a \$225,000.00 house in which he and his wife continue to live.

(13) The Claimant's supervisor, David Scott, who was called as a witness by Claimant's counsel testified that he was a good worker, that they were friends and that he would've given him a light duty job if the Claimant would have requested one.

(14) Pursuant to the remand Order of the Full Commission Panel dated January 22, 2018, the back, pelvis and teeth are found to be compensable and pursuant to the instructions of the Full Commission Panel I hereby find that the Claimant is entitled to two (2) weeks of permanent disability benefits for each tooth due to the loss of teeth numbers 8 and 9.

(15) Pursuant to Findings of Fact number 6 in the January 22, 2018 Order of the Full Commission Panel, I further find that as to the back and pelvis the Claimant sustained no wage loss pursuant to S.C. Code Sections 42-9-10 and 42-9-20.

(16) Pursuant to Finding of Fact number 8 of the Order of the Full Commission Panel dated January 22, 2018, the Claimant sustained compensable injury to the back, pelvis, hip and 2 teeth. As such, I have reviewed the evidence to include a review under 42-9-10 and 42-9-20 as to additional body parts.

(17) Having done so, I hereby conclude that the Claimant is entitled to Twenty-Five (25%) Percent to the back to include radiculopathy, Two (2%) to the hip, and 2 weeks for the loss of each tooth pursuant to S.C. Code Section 42-9-30.

(18) I further find that S.C. Code Sections 42-9-10 and 42-9-20 do not apply.

(19) The Claimant is entitled to a lump sum payment of the award of permanent partial disability and Utica Mohawk Language.

CONCLUSIONS OF LAW

(14) A. Section 42-1-130 of the South Carolina Code of Laws (1985) defines "employee" and Section 42-1-140 defines "employer".

(15) B. Section 42-1-160 of the South Carolina Code of Laws (1985) governs injury by accident.

(16) C. Section 42-15-60 of the South Carolina Code of Laws (1985) governs medical treatment.

(17) D. Section 42-9-10 of the South Carolina Code of Laws (1985) governs permanent general disability and Section 42-9-30 of the South Carolina Code of Laws, (1985) governs permanent specific disability.

(18) E. Regulation 67-1603 of the Regulations of Workers' Compensation Commission provides the methods for calculating the Claimant's average weekly and compensation rates.

The Claimant filed a Form 30 with regard to the June 5, 2018 Order of the Single Commissioner on June 19, 2018 on the following grounds:

1. In denying the Claimant-Appellant's claim for total and permanent disability under S.C. Code Ann. § 42-9-10, the error being that by an overwhelming preponderance of the probative evidence, including the medical opinions of the Claimant-Appellant's physician of many years, Dr. John Velky (report of 9/15/16, Claimant's APA #1), the IME physician who addressed the Claimant-Appellant's overall impairments resulting from the accident, Dr. Justin K. Hutcheson (report of 12/19/15, Claimant's APA #2), the FCE performed by Tracy Hill, P.T. (Report of 4/23/15, Claimant's APA #5), and the assessment of vocational expert Glen K. Adams (report of 2/8/16, Claimant's APA #3), the Claimant-Appellant was totally and permanently disabled.

2. In failing to take into account the Claimant-Appellant's permanent impairments to four different body parts (i.e., the back, the hip, loss of tooth number 8, and loss of tooth number 9) in his FINDINGS OF FACT number 15 ("Claimant sustained no wage loss pursuant to S.C. Code Sections 42-9-10 and 42-9-20") and FINDING OF FACT number 18 ("I find that S.C. Code Sections 42-9-10 and 42-9-20 do not apply"), the error being that based on his findings of multiple causally-related body parts combined with the unanimous opinions of the vocational experts that the related body parts combined with the unanimous opinions of the vocational experts that the Claimant-Appellant had suffered wage loss compelled the conclusion the Claimant-Appellant had the right to elect wage loss rather than scheduled member recovery under Singleton and its progeny.

3. In denying the Claimant-Appellant's claim for permanent partial disability under S.C. Code Ann. § 42-9-20, the error being that the lay testimony, as well as the evidence

given by every doctor who rendered an opinion on the Claimant-Appellant's residual medical condition (see 2 above), including the Defendant/Respondent's IME physician, Dr. Daniel Westerkam (report of December 10, 2014), verified that the Claimant-Appellant could no longer perform the heavy physical labor he had performed during his lifetime including during his 28 years of employment with the Employer.

4. In failing to award permanent disability benefits under S.C. Code Ann. § 42-9-20 when under the law of South Carolina a claimant is entitled to elect benefits based on wage loss rather than scheduled benefits under S.C. Code Ann. § 42-9-30 where more than one body part has been affected by his accidental injuries (*Singleton v. Young Lumber Company*, 236 S.C. 454, 114 S.E. 2d 837 (1960) and the Workers' Compensation Act is to be liberally construed in favor of the injured claimant (*Carter v. Penney Tire & Recapping Co.*, 261 S.C. 341, 200 S.E.2d 64 (1973)).

5. In denying permanent disability benefits under S.C. Code Ann. § 42-9-10 or S.C. Code Ann. § 42-9-20 based on the fact that the Claimant-Appellant returned to work on July 10, 2014, and performed his regular duties for several months thereafter before retiring because of his inability to continue in his job, the error being that the effort by the Claimant-Appellant to keep working as long as possible did not negate or outweigh the overwhelming and uniform medical evidence, the uncontroverted hearing testimony, and both vocational assessments that he could not continue to perform the heavy labor required of his job because of the residual effects of the injuries as noted in FINDINGS OF FACT number 11 ("The medical records and testimony in the record reveals that the Claimant's condition became much worse after his retirement").

6. In inferentially concluding that the worsening of the Claimant-Appellant's condition after his employment with the Defendants/Respondents negates compensability for his diminished abilities, the error being that all evidence in the record supports the conclusion his worsened condition was caused by his accident-related injuries with no contrary evidence having been obtained or proffered in the record by the Defendants/Respondents.

7. In finding and concluding that the Claimant-Appellant suffered causally-related permanent injury to only four different body parts (the back, the hip, tooth number 8, and tooth number 9) when the uncontroverted probative evidence verifies that the Claimant-Appellant also sustained permanent injuries and permanent impairments to, inter alia, both lower extremities as a result of the accident-related injuries including **bilateral superior and inferior pubic rami fractures (with note that "the left superior pubic ramus fracture extends to the anterior most aspect of the left acetabulum")**; **a nondisplaced fracture of the posterior superior aspect of the S1 vertebral body with non-displaced fractures within the posterior elements of the sacrum from S1 to S4**; **an L5 lumbar transverse process fracture with minimal displacement**; **bilateral, right greater than left, extraperitoneal pelvic hematoma with small volume hematoma within the prevesical space**; **hematoma of right lower extremity**; **an extravascular extraperitoneal hemorrhage with compression of the bladder**; **an acute traumatic abdominal aortic injury**; **a pulmonary contusion**; **a "hollow organ" injury**; and **damaged teeth**.

8. In failing to make an award for the lower extremities when the uncontroverted medical evidence was that there was a 5% permanent disability to each lower extremity per Dr. Hutcheson because of the pelvic/hip injuries.

9. In incorporating into his findings regarding the Claimant-Appellant's ability or inability to perform full-time employment the fact that the Claimant-Appellant participated in undefined but clearly minimal activity in a part-time plumbing side-light and as an occasional minister including prison ministry, the error being that there is no probative evidence that he is able to earn a living in a competitive marketplace with those activities, and in fact the evidence in the record (Claimant's Exhibit 1, his 2013 tax records) is precisely the opposite—he had negligible income from those activities, and he could not perform full-time work (report of Glen K. Adams dated 2/8/16, Claimant's APA #3) and even the assessment of the Defendants/Respondents' vocational expert, Jan Westmoreland, concludes that the Claimant/Appellant's "physical capacity range appears to fall within the sedentary to light physical demand work capacity. He can anticipate earning from \$7.25/hour to \$8.00/hour" (report dated 3/16/16, Claimant's APA #4). (Emphasis added.) (It should be noted that the Claimant/Appellant was earning the equivalent of \$25.94 per hour based on a 40/hour week calculation using his AWW of \$1,037.41 per the Defendants/Respondents' Form 20, which did not include the additional self-employment income noted in item 11 below).

10. In finding and concluding that maximum medical improvement was reached on June 16, 2014, the error being that all medical records after that date, the uncontroverted testimony at the hearing, the aforesaid medical experts' opinions, and the hearing commissioner's own finding of fact number 11 all negate a factual finding that MMI was reached on that date.

11. In calculating the Claimant-Appellant's average weekly wage based on the Defendant's/Respondent's Form 20 alone, the error being that fairness pursuant to S.C. Code Ann. § 42-1-40 would have been best achieved by incorporating the Claimant/Appellant's

verified outside income duly documented by the Claimant/Appellant's 2013 tax filing (Claimant's Exhibit 1) in order to avoid an unfair result.

STANDARD OF REVIEW

The Full Commission may review an award of the Single Commissioner and make its own Findings of Fact and Conclusions of Law either consistent or inconsistent with those of the hearing Commissioner. S.C. Code Ann Section 42-17-50; Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967).

FINDINGS OF FACT

(1) A relationship of employer and employee existed at the time in question, and both were subject to the South Carolina Workers' Compensation Act with Freddie Tarver, employee, Beech Island Rural Community, employer, and Auto Owners Insurance Company, insurance carrier.

(2) The Claimant sustained an injury to his back and pelvis by accident arising out of and in the course of his employment. This finding is based upon a review of the medical records submitted by the parties.

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(17) Having done so, we hereby conclude that the Claimant is entitled to Twenty-Five (25%) percent to the back to include radiculopathy, Two (2%) percent to the hip, and 2 weeks for the loss of each tooth pursuant to S.C. Code Section 42-9-30.

(18) We further find that S.C. Code Sections 42-9-10 and 42-9-20 do not apply.

(19) The Claimant is entitled to a lump sum payment of the award of permanent partial disability and *Utica Mohawk* language.

CONCLUSIONS OF LAW

(14) A. Section 42-1-130 of the South Carolina Code of Laws (1985) defines "employee" and Section 42-1-140 defines "employer".

(15) B. Section 42-1-160 of the South Carolina Code of Laws (1985) governs injury by accident.

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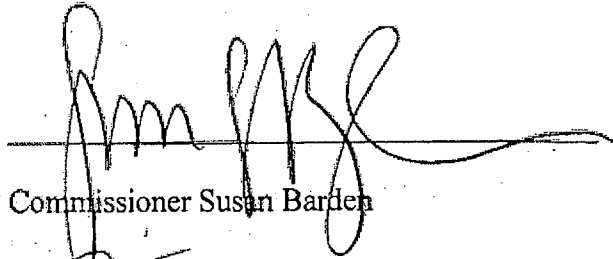
(17) D. Section 42-9-10 of the South Carolina Code of Laws (1985) governs permanent general disability, and Section 42-9-30 of the South Carolina Code of Laws, (1985) governs permanent specific disability.

(18) E. Regulation 67-1603 of the Regulations of Workers' Compensation Commission provides the methods for calculating the Claimant's average weekly and compensation rates.

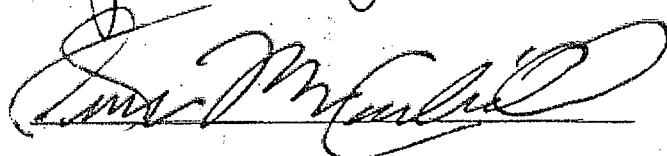
After reviewing the record in its entirety and considering the arguments of counsel:

ORDER

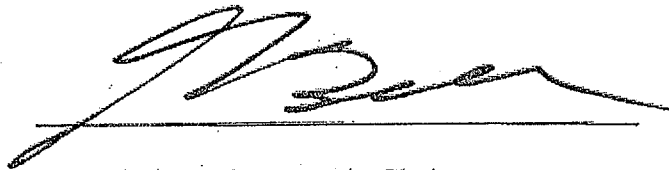
IT IS, HEREBY, ORDERED that the Findings of Fact and Conclusions of Law contained in the Single Commissioner's Order of June 5, 2018 are affirmed in their entirety and adopted as the findings of this panel.



Commissioner Susan Barden



Commissioner Gene McCaskill



Commissioner Scott Beck, Chair

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 Hollmon on April 26, 2019