

APPELLATE PANEL
DECISION AND ORDER
OF THE

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SC Court of Appeals

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1020064

Ivette Bosnjak,

CLAIMANT/APPELLANT

vs.

Sunbelt Human Advancement,

EMPLOYER,

AND

State Accident Fund,

CARRIER,
DEFENDANTS/RESPONDENTS

Appellate Panel Review held in Columbia, South Carolina,
on April 29, 2019 per notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed

June 20, 2019, 2019

APPEARANCES:

Appellant Ivette Bosnjak, Claimant of Easley, South Carolina
represented by Stephen N. Garcia.

Defendants/Respondents represented by Ian C. Gohean,
Esquire of Willson Jones Carter & Baxley, P.A. in Greenville,
South Carolina.

STATEMENT OF THE CASE

Claimant sustained admitted injuries to her left leg and left foot as a result of a compensable work accident on September 9, 2010. On October 26, 2017, Defendants filed a Form 21, requesting a hearing to terminate temporary total disability (TTD) payments and determine if permanent ~~disability compensation was due to Claimant. On November 28, 2017, Claimant filed a Form 50,~~ requesting a hearing and alleging that Claimant is permanently and totally disabled. The parties participated in mandatory mediation of the claim on January 16, 2018, and mediation resulted in an impasse. A hearing was held before Commissioner Aisha Taylor (hereinafter, "the Hearing Commissioner") in Greenville, South Carolina, on May 16, 2018, to determine the issues on the Forms 21, 50, and 51.

It was Claimant's position that she sustained a compensable psychological condition as a result of her work accident and associated injuries. Claimant sought a finding that her psychological condition is compensable. Claimant also sought a finding that she is permanently and totally disabled, pursuant to S.C. Code Ann. Section 42-9-10. Claimant contended she is permanently and totally disabled as a result of her psychological condition alone, as a result of her physical conditions alone, and/or as a result of a combination of her physical and psychological conditions.

It was Defendants' position that Claimant had reached MMI for her admitted injuries, and that Claimant was entitled to permanent partial disability (PPD) awards pursuant to Section 42-9-30, but that Claimant was entitled to no additional indemnity benefits beyond an award of PPD for her left leg and foot. Defendants contended Claimant could not carry her burden of proving that her alleged psychological condition is compensable, and Defendants sought a finding denying compensability of Claimant's alleged psychological condition.

On November 16, 2018, the Hearing Commissioner issued a Decision and Order, finding that Claimant could not carry her burden of proving a compensable psychological condition, that

Claimant was entitled to PPD awards for her left knee and foot pursuant to S.C. Code Ann. Section 42-9-30, and that Claimant is not permanently and totally disabled as a result of her work accident and associated injuries. The Hearing Commissioner issued the following Order/Award:

IT IS HEREBY ORDERED that Claimant reached maximum medical

~~improvement on May 1, 2017.~~

IT IS FURTHER ORDERED that Claimant has sustained 40% permanent partial disability to her left foot as a result her left foot/ankle injury, and Claimant has sustained 8% permanent partial disability to her left leg as a result of her left knee injury.

IT IS FURTHER ORDERED Claimant is entitled to future causally-related medical treatment for her left foot injury, to include only Cymbalta or any generic or brand equivalent per Dr. Behr's recommendation, so long as it is continued to be recommended by the authorized treating physician.

IT IS FURTHER ORDERED that Claimant has not sustained any serious and permanent disfigurement as a result of this accident, and as such Defendants are not liable for same.

No hearing costs are assessed in this instance.

IT IS SO ORDERED.

Claimant timely filed a Form 30, Request for Commission Review, asserting the Hearing Commissioner erred in Findings of Fact 8, 9, 10, 11, 12, 13, 14, 15, and 16, and in Conclusions of Law 3, 4, 5, and 6. The parties submitted Briefs, and oral arguments were held before the Full Commission Appellate Panel on April 29, 2019. In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. Section 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 Conclusion of Law consistent with or inconsistent with those of the Hearing Commissioner. Based upon a review of the foregoing, the Appellate Panel hereby AFFIRMS the Hearing Commissioner's Decision and Order and enters the following Findings of Fact, Conclusions of Law, and Order as its own.

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. Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Ivette Bosnjak as Employee-Claimant, and Sunbelt Human Advancement as Employer and State Accident Fund as Carrier, Defendants.

2. The average weekly wage of Employee at the time of the above-described accident was \$526.44, making a compensation rate of \$350.98 applicable in this matter.

3. Claimant was born in Puerto Rico and moved to the United States after graduation from the Catholic University of Puerto Rico with a Bachelor's Degree in Education. She met her husband in the United States and got married, and she has been a United States resident since approximately 1987. (Testimony of Claimant)

4. Since moving to the United States, Claimant has worked as a cashier at Target, a teacher for one year, and she began working for SHARE in May 2005. (Testimony of Claimant)

5. Claimant's job with SHARE was as a family advocate, assisting families in crisis. She spoke only English in her job position. (Testimony of Claimant)

6. On September 9, 2010, Claimant sustained a compensable injury to her left foot and left leg (knee) within the course and scope of her employment. (Medical record as a whole; Admission by Defendants)

7. We find Claimant's ankle injury in this instance is a separate injury to the foot as part of her medical treatment included a calcaneal osteotomy, which, we find affects her foot. (APA, pp. 236-237)

8. Claimant also alleges psychological overlay as a result of her work-related injury. We find Claimant failed to meet her burden of proving a causally-related psychological condition. This finding is based on the preponderance of the evidence as a whole including, but not limited to, the following:

a. We find that although Claimant has submitted causation statements regarding her

psychological condition, a detailed review of the records on which those causation opinions were based reveals Claimant did not disclose her prior history of psychological conditions and treatment for the same. As such, we cannot give great weight to these causation statements, as they are based on inaccurate information when compared to Claimant's medical history as a whole.

- i. On January 25, 2000, Dr. Breeden Hollis at Neurology Associates of Greenville noted that Claimant displays "Some degree of depression or nervousness." (APA, pp. 74-77)
- ii. On January 9, 2004, the practitioner at Powdersville Family Practice (PFP) noted a diagnosis of anxiety, and Claimant was prescribed Lorazepam. (APA, p. 10)
- iii. On January 22, 2004, a note from PFP indicates that Claimant stated the following, apparently related to a previous motor vehicle accident: "I am depressed. I lost my job because I was out due to the accident. I cannot sleep and I am nervous all the time." Claimant was prescribed Celexa. (APA, p. 12)
- iv. On February 17, 2004, Claimant presented to PFP for a follow-up for depression and anxiety, and Claimant was again prescribed Celexa. (APA, p. 14)
- v. On January 3, 2006, PFP noted Claimant's ongoing issues to include anxiety. (APA, pp. 21-22)
- vi. On April 23, 2007, PFP noted that Claimant stated she was "...not going to the pain management center - did not want to take an antidepressant." (APA, p. 31)
- vii. On March 10, 2010, PFP noted that Claimant had stress at work and she was prescribed Lorazepam with three refills. (APA, p. 47)
- viii. On September 23, 2010, PFP noted that Claimant stated, "trouble sleeping, I have a lot going on with my job." Claimant was diagnosed with insomnia that was exacerbated by job stress. It was also noted that anxiety and stress were present. Claimant was prescribed Lorazepam with three refills. (APA, p. 49)
- ix. On September 29, 2010, Dr. Wes Merriwether's note indicates that Claimant "is able to bring in today the chronic medicines that she takes, which are a muscle relaxer and Lortab, which apparently she takes regularly throughout the day for some sort of back issues. It is interesting that these are written down on a sticky note from a behavioral health provider in Anderson. When questioned about this, she says she has begun to see somebody there and, based on our last encounter, I think is very important for her to continue that followup. It sounds like they have started her on

another medication, but she is not aware of what it is. She does have upcoming followup today with that provider.” (APA, p. 182)

- x. On January 5, 2012, Claimant presented to PFP for evaluation and management of stress. The note indicated she had worries about job issues and there are associated symptoms including sleep disturbance. Claimant was prescribed Lorazepam with two refills. (APA, p. 62)
- ~~xi. On September 14, 2015, Dr. Mathis of PFP diagnosed Claimant with depression and stated that it was “a chronic problem.” Claimant was given a prescription of Cymbalta. (APA, pp. 411-412)~~
- xii. On June 21, 2016, the note from Piedmont Psychiatric indicates that Claimant has “no history of anxiety or depression before her fall at work in 2010.” (APA, p. 568) We find this is inconsistent with Claimant’s medical records.
- xiii. On March 27, 2017, a questionnaire completed by Joseph Friddle indicates that Claimant “had no prior psychiatric history before her injury.” (APA, pp. 594-596) We find this is inconsistent with Claimant’s medical records.
- xiv. On March 27, 2017, a questionnaire completed by Natasha Patino, MA, LPC, indicates that Claimant “has history of anxiety & depression, but at the time of work incident, was not struggling with this. So, acute psychological injury.” (APA, pp. 562-65) We find this is inconsistent with Claimant’s medical records. In particular, the note from Dr. Merriweather dated September 29, 2010. (APA, p. 182)
- xv. During the hearing, Claimant initially testified that she has never had any psychological problems before her September 2010 work accident. (Tr. pp. 51-52)
- xvi. When presented with the record from January 2000 indicating she had some degree of depression or nervousness, Claimant admitted she had some prior issues, but never anything that caused her to lose her job. (Tr. pp. 53-55; APA, p. 62)
- xvii. Claimant testified she has never seen a psychiatrist or psychologist before the 2010 work accident. (Tr. p. 56)
- xviii. During the hearing, Claimant was questioned about the note from Dr. Wes Meriwether, dated September 29, 2010 (*20 days after the work accident*), which indicated that Claimant was seeing someone at a behavioral health provider in Anderson. Claimant was asked by defense counsel, and by the Undersigned Commissioner, whether she was seeing a behavioral health professional in Anderson in September 2010. (Tr. pp. 56-60) Claimant ultimately testified that she did not recall. (Tr. p. 60; APA, p. 182)
- xix. The opinions of Joseph Friddle and Natasha Patino were expressly based on

inaccurate information provided by Claimant, and we therefore give them very little weight for the purpose of determining causation of Claimant's alleged psychological overlay. (The Commission is not required to blindly accept an expert's opinion. While there may be circumstances where medical testimony is conclusive, ordinarily such opinions, although uncontradicted, are not conclusive in the sense that they must be accepted as true. They may be rejected if found inconsistent with the facts or otherwise unreasonable. *Wyndham v. City of Florence*, 221 S.C. 350, 359, 70 S.E.2d 553, 556 (1952) (~~citing *Anderson v. Campbell Tile Co.*, 202 S.C. 54, 24 S.E.2d 104; *In re Crawford*, 205 S.C. 72, 30 S.E.2d 841; *Poston v. Southeastern Construction Co.*, 208 S.C. 35, 36 S.E.2d 858; *Kilpatrick v. Brotherhood of Railroad Trainmen Insurance Department*, 210 S.C. 379, 42 S.E.2d 891).~~)

- b. Notwithstanding the finding above, we find that, due to Claimant's preexisting psychological condition, this claim requires a medical causation statement regarding an aggravation or exacerbation of a preexisting condition, per S.C. Code Section 42-9-35. No such causation statement has been entered into evidence. While Claimant has submitted causation statements with regard to her psychological condition, those statements do not satisfy the requirements of Section 42-9-35, as they do not indicate Claimant has suffered an aggravation of her preexisting condition. Therefore, Claimant cannot carry her burden of proving an aggravation of her preexisting psychological condition.
- c. Claimant alleges her psychological condition is due to chronic pain. A review of the record as a whole reveals Claimant has a long history of substantial medical treatment. Even in the hearing, Claimant referenced several other workplace incidents (not part of this claim) as having led to her current psychological condition. Claimant also acknowledged other family and personal reasons for her need for psychological care. As such, we find Claimant's work injury is not the primary cause of her work condition as required by *Nawa v. Wackenhut Corp.*
 - i. During the hearing, Claimant testified she has pain in numerous locations in her body, including her back and hip, which she attributes to her left ankle injury. (Tr. pp. 87-91) Upon questioning by the Single Commissioner at the hearing, Claimant admitted she has had back surgery before, but she testified that she was having no pain in her back the day before the work accident occurred in September 2010. (Tr. p. 91) Upon further questioning, she admitted she may have been having pain prior to the work accident, but it became worse after her accident. (Tr. pp. 91-94) Claimant ultimately testified that all of the pain that she has in her body is a result of her left ankle condition. (Tr. pp. 111-112) Medical records document pain in numerous locations throughout Claimant's body, but there is no evidence in the record to support Claimant's contention that these other problems are related to her work injury.
 - ii. Claimant's medical records document an extensive history of chronic pain unrelated to her September 2010 workers' compensation claim. (Medical Record as a whole, including, but not limited to, APA, pp. 5, 71-73, 6, 74-77, 78, 7, 8, 9, 11, 13, 15, 16, 17, 18, 81-82, 83, 21-22, 23, 24, 25-26, 27,

102-103, 79, 28-29, 30, 80, 31, 32, 34-35, 36, 37, 38, 39-40, 42, 43, 44, 45-46, 112-113, 114, 144-145, 146, 147, 148, 50-51, 185, 53-54, 55-56, 57, 115-118, 119-120, 121-122, 123-124, 125-129, 130-131, 133-134, 135-136, 63, 188-191, 137-138, 139-140, 64-65, 149, 142-143, 150, 151, 152, 155-156, 157, 69-70, 159-161, 408, 407, 162-163, 265, 414-416, 423-425, 164-171, 440, 442-445, 455, 324, 461, 531, 486, 537, 341-342, 343, 547, 553, 501)

~~iii. During the hearing, Claimant was questioned about the September 23, 2010,~~

note from her family physician, Dr. Mathis, which indicated she was having trouble sleeping, she had a lot going on with her job, she was having insomnia, and anxiety and stress were present, and which indicated she was prescribed Lorazepam with three refills. Claimant was asked whether she recalled this visit, and she testified that she did recall, and that it was related to a crisis she was having related to pain in her back at that time. (Tr. pp. 61-62)

- iv. Claimant was presented with a note from Dr. Mathis from March 10, 2010 (6 months before her work accident), which indicated Claimant was reporting stress at work and was prescribed Lorazepam with three refills. Claimant testified this was related to an incident where a manager slapped Claimant's face. (Tr. pp. 62-69) Claimant became emotional and upset during this testimony and testified that she had buried this psychological problem inside her, and this testimony woke her up. (*Id.*) A brief recess was required at this point of the hearing to allow Claimant to gather herself. (*Id.*)
- v. Claimant was asked about a 2007 report from Dr. Mathis which indicated Claimant was not going to the pain management center because she did not want to take an antidepressant. Claimant testified initially that the antidepressant was prescribed for her pain, and because she would get "flashes" from a car accident she had been involved in during 2004. (Tr. pp. 71-75)
- vi. Claimant was asked by the Single Commissioner what was the cause of Claimant's psychological issues, and Claimant testified that "everything was combined," including the way she was treated at work, the pain in her knee, the pain in her vein, the pain in the ankle, and everything in her life changed. (Tr. p. 85)

9. Claimant testified on her own behalf at the hearing. We find Claimant's testimony was unreliable as she appeared to become emotional several times throughout the course of the hearing and was even excused from the hearing room for an extended period of time. We find Claimant was non-responsive to many of the answers during cross-examination and interjected many statements into the record on her own accord - without having been asked any questions. We find Claimant's testimony was overall unreliable due to the factors noted above. (Testimony of Claimant in its entirety; Testimony of Claimant as compared to the medical and other evidence in the record)

10. Consistent with our observations of Claimant's testimony during the hearing, the medical records and evidence in the record are replete with notations of difficulties.

- a. On September 22, 2010, Dr. Stacey Newsom noted that Claimant "verbalized being unhappy with her care today. Specifically, she was upset that she was not taken out of work. The carrier will be notified to assist her in finding another provider." (APA, p. 179)
- b. On September 22, 2010, Dr. Wes Merriweather noted the following:
- i. ~~"Hypertalkative, angry, defensive Hispanic female, seated in no acute distress. There is almost pressured speech. It is very difficult to get a~~ history, as she talks over my questions and I am unable to even complete a question without her answering with comments that address other issues than the question I am asking. She tells me and the people up front that she is here only because she was made to come. When I offered to allow her to leave without further treatment, she becomes accusatory and remains for management. Very difficult experience." (APA, p. 180)
 - ii. "There is a prominent varicosity at the left medial malleolus which resolves with leg elevation. Per the patient this was not present prior to her fall. (She is adamant about this and before I can even comment, accuses me of not believing her.)" (APA, p. 180)
- c. On December 27, 2010, Dr. Merriweather's note stated the following:
- i. "Patient was reporting a lot of discomfort. When I did discuss with her that Dr. Merriweather had mentioned referral to orthopedics, she seemed very pleased with that."
 - ii. "Patient followed me out of the exam room, walking absolutely normally down the hallway without exhibiting any discomfort. She was very pleased that we are referring her to orthopedics.... I was a little perplexed at the visit today because she was demonstrating a lot of discomfort in the exam room, and then appeared to walk well down the hall. We will go ahead and move forward on this somewhat confusing case." (APA, p. 185)
- d. On December 5, 2013, Claimant saw Dr. William C. James at Midlands Orthopedics for a second opinion of her ankle. His notes indicated "As I was discussing these recommendations with her, the patient became quite agitated and visibly upset. She stated: 'no one wants to help me.' Stated: 'I wasted my time driving here today.' As I discussed with her today, the purpose of this independent medical examination was simply for evaluation and for me to offer my recommendations. She was quite unhappy with this. She left the office visibly upset, and in a boisterous manner. I appreciate the opportunity to evaluate this patient. My recommendations are as above. I do not wish to see her back." (APA, pp. 224-226)
- e. On July 31, 2014, Claimant insisted on having surgery done inpatient at the hospital, despite being told that it was an outpatient procedure. (APA, pp. 192, 238)

- f. On August 4, 2014, the GHS notes indicates Claimant "was at home and says she had some sort of slipping incident with her crutch and planted her foot a little bit. It does not sound that she planted it very aggressively, but she is concerned about having increased pain as well as not being able to use crutches properly. Overall, she harbors a lot of distress for everyone taking care of her. She makes several inappropriate and rude comments about Dr. Anderson, the nursing staff, the radiology department, and myself while she is in the hospital. Many of these were witnessed by multiple people. She makes multiple attempts to manipulate and dictate her own care. ~~Despite her lack of willingness to undergo care, she initially~~ would not allow me to take her splint off to examine her wound even though she was here for increasing pain. She eventually allowed this then she did not want to get x-rays because she felt that they were not necessary and that they were going to be negative. She eventually allowed this after multiple trips by the radiology techs and actually I had to be in the room during the shooting of the films so that she would allow them to be shot. We had several attempts to replace her splint and each time was met with resistance. I was thrown out of the room twice, but it was important to get the splint back on to prevent loss of the good work by Dr. Anderson, so I eventually convinced her of this. A splint was placed, and a wheelchair was offered for her for safety and comfort she agreed to this. Multiple questions were asked of her about how she is getting around at home and how things were going and how we could help her out. All of these were met with blank stares and her rolling her eyes. Several instances her daughter tried to help her respond to the questions and she quite aggressively snapped at her daughter and told her not to answer questions. Her daughter was in tears during most of the visit." (APA, p. 193)
- g. On September 18, 2014, Dr. Anderson's notes indicate that Claimant "went to PT to learn crutch training and states they were very ugly and mean to her. She wishes not to go back there for her PT." (APA, p. 249)
- h. On October 23, 2014, Dr. Anderson listed Claimant's pain at 3/10. He also stated that "She is doing much better." "She seems to have excellent returning function from the tendon transfer." (APA, pp. 252-253)
- i. On December 9, 2014, Dr. Anderson's notes indicated that Claimant "overall is improving. It is going slower than I had hoped. See back in a month or so and hopefully make some long-term plans for her work return." (APA, pp. 255-256)
- j. On February 17, 2015, Dr. Anderson's notes indicated that Claimant's pain was now 10/10, and Claimant was "now is holding the foot in supination and states she cannot flatten it out." (APA, p. 258)
- i. The note further stated: "I am able to straighten this foot but she cannot and cannot keep it there. When she walks she walks on the lateral border of her foot." (APA, p. 259)
- k. On March 9 2015, at Advanced PT, the notes indicate "patient was continually talking and when the therapist was trying to explain to her that if she thinks

something is broken, she needs to go to the ER. Patient would not stop talking to listen to that explanation nor stop talking to listen to any explanation or discussion about her left leg. Patient only spoke about her pain and how disappointed she was in her care to this point. Patient had therapy cut short due to only talking and not performing any exercises while talking." (APA, p. 401)

- i. With regard to Claimant's ankle position, the note also stated that "Patient is able to achieve neutral when not thinking about and with passive range of motion, but actively will not gain neutral." (APA, p. 401)

- l. On March 17, 2015, Dr. Anderson's notes stated that a "Second opinion was not done but nerve conduction study was normal. At this point, I do not know what else I would do." (APA, p. 260a, b,c).

- i. The note further noted, "All I can suggest is the possibility of a second opinion. I do not want to lengthen the posterior tibial tendon after the transfer. This would be almost unheard of to have to do this. If she continues to have pain, this would have to be considered.... I suspect, at this point, she is pretty much at maximum medical improvement unless another surgeon feels if there is something he can do different for her. I would place the foot and ankle impairment rating at 25%." (APA, p. 260a, b,c)

- m. On March 19, 2015, the Advanced PT note indicates, "Patient complains so much about her pain and her lack of care, and her opinion, that several exercise repetitions have to be cut out due to time constraints." (APA, p. 404)

- n. On March 20, 2015, Dr. Shallcross's notes indicate that Claimant "Recently had upper and lower NCS which were normal. She doesn't feel the NCS were normal because the initial part of the test she did not feel." (APA, pp. 159-161)

- o. On March 23, 2015, the Advanced PT note indicates, "patient cannot go more than 10 seconds without complaining about some pain, whether foot, knee, back, thoracic, shoulder, or arm. Patient then takes 2-3 minutes to talk about this pain while constantly being requested by therapist to continue her exercises. Therapist spends greater than 50% of the time listening to these complaints, assessing them, and trying to get the patient to perform appropriate exercises for her left ankle." (APA, p. 408)

- i. The note also indicates, "Patient is unable to perform exercises due to lack of desire and fear of future injury. For now, patient is to stop therapy." (APA, p. 408)

- p. On April 14, 2015, Dr. Anderson's note states that Claimant "was upset about her 25% foot and ankle impairment rating. I tried to explain to her this is actually quite a high impairment rating, but I am not certain that she understood this." (APA, p. 261)

- i. The note also states: "It is very interesting that this left foot went from being in a planovalgus position, which was apparent on exam, less apparent on x-ray, which has to do with somebody incompletely putting weight on it during the x-ray, to having a fairly good result out of the immediate post-op course from the calcaneal osteotomy and the tendon transfer. However, she has not done well at all and continues to have a large amount of complaints from her foot. She complains of her right foot hurting, her hips, her back, her shoulders. At this point, it appears as if she is in a cavovarus position ~~from the correction which certainly is possible. In twenty years of this I have not seen this occur.~~" (APA, p. 261)
- q. On April 21, 2015, the Advanced PT note indicates that Claimant "reports doctor is to write a note to workers comp carrier. Patient states pain continues to hurt and left hip, low back, right thoracic area, and right shoulder with intermittent cervical pain. Patient is very frustrated with lack of care given for other areas of her body, along with left foot." (APA, p. 407)
- i. The notes also indicate that Claimant "ambulates with greatly altered gait. Patient ambulates with altered, but better, gait when distracted." (APA, p. 407)
- r. On May 28, 2015, Dr. Shallcross's note indicates that Claimant "is complaining that she wants me to document that the problems on the right side are due to the problems on the left side." (APA, pp. 162-163)
- i. The note further indicates: "Patient has an obvious problem with her left foot, but she now wishes to attribute problems on the right side to the problems with her left side. Unfortunately, I cannot document this. I have multiple patients with amputations who work full time and others who have multiple reasons for varicose veins that are not related to other workers compensation injuries. She is extremely tearful on hearing this." (APA, pp. 162-163)
- s. On October 22, 2015, Dr. Anderson's note indicates, "she has had difficulty putting foot plantigrade and has a supinated foot but can be passively corrected. She has other complaints with things not working including her fourth and fifth toe and weakness in the lateral muscles primarily what she is preferring to avoid the peroneals. She has had an EMG which did not show any neurological deficit in this nerve distribution. However, she questions the validity of this and states that she does not believe that result." (APA, p. 270)
- i. The note also states, "she ambulates as stated in a supinated position with some varus at the heel. Considering this can easily be corrected to neutral position. With any type of movement, she immediately supinated again." (APA, p. 272)
- ii. The note also states, "She has asked that the nerve conduction studies be done by another physician of her choice and certainly that is fine. We are

just trying to help her in the fashion that we can, and we will order this to be done where she would like it.” (APA, p. 272)

- t. On January 29, 2016, upon Defendants scheduling a second opinion evaluation for Claimant with Dr. Lee Patterson, Claimant’s prior attorney emailed Defendants’ attorney, stating the following:
 - i. “I have spoken with Ivette and [she] insists on seeing Dr. Nunley in Charlotte ~~for her work-related condition. She is not willing to go to Greenwood and~~ see Dr. Patterson at Lakelands Ortho because she does not know this doctor or his skill level.” (Commission File; Previous Order of Commissioner Campbell)
- u. On February 2, 2016, Defendants filed a Motion to Compel Claimant to submit to a second opinion evaluation with Dr. Patterson. On February 24, 2016, the Motion was granted by Commissioner McCaskill. (Commission File)
- v. On April 6, 2016, prior to her second opinion with Dr. Patterson, and unbeknownst to Defendants, Claimant presented on her own to Dr. Nunley at Duke. Dr. Nunley indicated that surgery would be required, and he ordered an MRI. (Commission File; APA, pp. 297-306)
- w. On April 13, 2016, Claimant presented to Dr. Patterson for her scheduled second opinion. Claimant presented a copy of Dr. Nunley’s report to Dr. Patterson at the evaluation, and Dr. Patterson indicated he agreed with Dr. Nunley’s recommendations. (APA, pp. 295-296)
- x. On June 13, 2016, Dr. Nunley reviewed an MRI and indicated surgery was not recommended. He referred Claimant for pain management. (APA, pp. 316-321)
- y. On September 7, 2016, Joseph Friddle’s notes indicate, “I told her that for her own safety, she needed to be admitted to the hospital. While I was contacting my medical assistant she left the office, got in her car and drove away. I am no longer willing to see her. I do not feel she is willing to make adjustments to improve, and she is not willing to accept my recommendations to ensure her own safety by going inpatient.” (APA, pp. 581-582)
- z. On October 31, 2016, Dr. Shallcross’s note indicates, “She is asking for a wheelchair to use at work when she needs it.” (APA, pp. 173-175)
 - i. The note also indicates, “Rx is offered for a rolling walker with a seat to aide in ambulation. Patient states she has 2 walkers at home and a set of crutches. She does not feel this helps with her walking. Dr. Shallcross does not feel her condition warrants use of a wheelchair.” (APA, pp. 173-175)
- aa. Four days after being refused a wheelchair prescription by Dr. Shallcross, Claimant presented to PFP on November 4, 2016, and the notes indicate Claimant “would like to try using a wheelchair at work.” (APA, p. 447)

bb. On January 25, 2017, Dr. Walter Hembree of Blue Ridge Orthopaedics stated, "unfortunately she has not done well with the operation. She has seen multiple surgeons for second opinions notably in Greenwood and at Duke. One of her chart notes indicates attempt to get a second opinion and Tennessee which was declined by that surgeon. According to chart notes in epic all surgeons have told her there is no other surgery that can be done to help her." (APA, p. 335)

i. ~~The note also states, "according to Dr. Anderson's most recent note patient~~ had EMG/NCS which were normal. Despite this fact patient still states she is unable to actively evert and dorsiflex her left foot." (APA, p. 335)

ii. The note also states, "patient has chronic ankle and foot pain with apparent supination deformity when she and elites. However, her foot is passively correctable to neutral." (APA, p. 337)

iii. The note also states, "In my opinion, there is no further surgery that will alleviate all of her complaints.... May continue under treatment of psychiatry and pain management. While I empathize with her complaints and pain unfortunately I have nothing to offer the patient from a surgical standpoint that would improve her condition. May return to my office as needed." (APA p. 337)

cc. On March 27, 2017, the PFP notes state Claimant "would like a wheelchair to help with her ambulation and hopefully this would help her leg and back pains." (APA, p. 464)

dd. On May 1, 2017, Dr. Behr's notes state that Claimant "currently describes the pain really encompassing her entire body. In the pain diary, specifically, she describes pain in her neck, arms, low back, radiating down the bilateral legs. She describes the pain as a constant 10/10." (Def APA 341)

i. The notes also state:

1. "In a wheelchair today" (APA, p. 342)

2. "There is hypersensitivity around the left ankle and foot with a notable supination deformity that is easily reducible to at least neutral. There is no active eversion with testing." (APA, p. 342)

3. "She currently has a very significant pain complaints that are in part related to the ankle but are in part very likely related to other issues, including chronic low back pain, likely chronic radiculopathy, and all of this is very likely significantly affected by anxiety and depression." (APA, p. 343)

4. "With specific regards to the ankle, I would not recommend ongoing use of opiates. The patient has recently seen Dr. Walker, whose

plan, based on the notes I do have available, I agree with completely. I would recommend discontinuing the opiates, as he has done, and I do think that Cymbalta is an excellent choice." (APA, p. 343)

5. "Continue HEP. I do not see any injections or pain procedures that are likely to provide significant benefit." (APA, p. 343)

ee. On May 16, 2017, Claimant underwent a functional capacity evaluation (FCE) at CORA Rehab. The report states, "The results of this evaluation show that Miss Bosnjak demonstrated inconsistent and submaximal effort. The test results and the referral diagnosis do not correlate. Therefore, this FCE is not a reliable indication of her true functional abilities at this time." (APA, p. 346)

ff. The FCE report also indicates the following:

i. "Client demonstrated the ability to perform at a light-duty PDC level which meets her work required PDC level as a social worker." (APA, p. 346)

ii. "It is important to note that client demonstrated inconsistent effort, displayed distracted inconsistencies, had non-physiologic responses to muscle testing, and was positive for symptom magnification. Today's FCE was not a true and reliable indication of client's potential and should be considered a minimum of her capabilities. Despite this client demonstrated the ability to safely continue working full-time/full duty as a social worker." (APA, p. 346)

iii. The FCE also noted:

1. "Inconsistent and submaximal effort on 9 hand and pinch grip tests." (APA, p. 348)

2. "Demonstrated maximum grip strength of 20 pounds with testing but was able to grip 40 pounds with distracted rapid exchange testing." (APA, p. 348)

3. "Demonstrated dorsiflexion to 0° (neutral) while putting on the boot." (APA, p. 348)

4. "Demonstrated below functional strength for bilateral ankle plantar flexion, bilateral ankle dorsiflexion, bilateral ankle inversion, bilateral ankle E version, bilateral great toe IP flexion, bilateral great toe MP extension, bilateral hip flexion, bilateral hip extension, bilateral hip abduction, bilateral hip adduction, bilateral hip IR, bilateral hip ER, bilateral knee flexion, and bilateral knee extension." (APA, p. 360)

gg. On August 17, 2017, Dr. Stanbro's notes state, "Right leg varicose and spider veins that she attributes to overcompensating with her right leg." (APA, p. 501)

he can do different for her. I would place the foot and ankle impairment rating at 25%." (APA, pp. 260a, b,c)

d. On May 23, 2016, Dr. Nunley noted: "Given her overall clinical examination and history, I do not feel that surgical intervention at this time is recommended." Dr. Nunley referred Claimant for pain management. (APA, pp. 311-323)

~~e. On January 25, 2017, Dr. Walter Hembree of Blue Ridge Orthopaedics stated, "In my opinion, there is no further surgery that will alleviate all of her complaints.... May continue under treatment of psychiatry and pain management. While I empathize with her complaints and pain unfortunately I have nothing to offer the patient from a surgical standpoint that would improve her condition. May return to my office as needed." (APA p. 337)~~

f. On October 30, 2017, Dr. Behr completed a questionnaire, opining that Claimant reached MMI on May 1, 2017, with 25% impairment to the left foot/ankle. (APA, pp. 344-345)

g. Dr. Behr also noted: "FCE demonstrates inconsistent and submaximal effort. I would give her restrictions of no greater than medium PDC." (APA, pp. 344-345)

h. Dr. Behr opined that Claimant would require future treatment of Cymbalta and home exercise program. (APA, pp. 344-345).

12. Claimant alleges permanent and total disability based on her orthotic injuries (foot and leg) as well as for her alleged psychological injuries pursuant to Section 42-9-10. As noted above, we find Claimant's psychological overlay claim fails. Competing vocational opinions were submitted into the record and were reviewed as a whole. We give greater weight to the vocational assessment of Jan Westmoreland over that of Rock Weldon as Ms. Westmoreland's report contained a more detailed history of Claimant's medical history, work history and transferable skills. Ms. Westmoreland's report also contained a Labor Market survey, which identified several potential employers considering Claimant's physical condition, transferable skills, and medium duty work restrictions. Interestingly, both vocational opinions referenced many difficulties obtaining information from Claimant due to the inability to stay on task/subject and repeated outbursts. We find Claimant is not permanently and totally disabled as a result of her orthopedic injuries. This finding is based on the record as a whole, including the medical records, FCE results (which indicate Claimant is capable of performing at a level consistent with her job with the Defendant Employer), personnel records, audio recordings, testimony of Claimant, testimony of Janice Jackson, and the professional vocational opinion of Jan Westmoreland, which we find is entitled to greater weight than the opinion of Rock Weldon.

a. Claimant testified that, prior to her termination in November 2017, she was still working eight hours per day, and she was interacting with other individuals regularly on the phone or in-person. (Tr. pp. 121-122)

b. Claimant testified that she would still be working and doing her job if she had not been terminated in November 2017. (Tr. p. 123)

13. We find this claim is governed by S.C. Code Section 42-9-30.

14. Under Section 42-9-30, we find Claimant has sustained 40% permanent partial disability to her left foot as a result of her work injuries to her left foot/ankle. We find Claimant has sustained 8% permanent partial disability to her left leg as a result of her left knee injury. This finding is based on the medical evidence as a whole, including Dr. Anderson's and Dr. Behr's 25% permanent impairment rating for Claimant's left "foot/ankle" injury, and Dr. Vann's 5% permanent impairment rating for Claimant's left knee injury. Dr. Behr's opinion that Claimant gave sub-maximal effort during her PCE and her medium duty work restrictions factored into this finding as well.

15. Claimant is not entitled to any additional temporary or permanent indemnity benefits under the Act, beyond those specified in Finding of Fact No. 14.

16. We find Claimant is entitled to future causally-related medical treatment for her left foot, to include only Cymbalta or any generic or brand equivalent per Dr. Behr's recommendation, so long as it is continued to be recommended by the authorized treating physician. This finding is based on the opinion of Dr. Behr.

17. Claimant is entitled to a lump-sum payment of her permanent partial disability award, and Claimant is entitled to *James v. Anne*'s SSA apportionment language.

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. 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 to her left leg and foot arising out of and in the course of her employment.

3. Under Section 42-1-160 and Section 42-9-35, Claimant has failed to carry her burden of proving a compensable psychological injury or condition.

4. Under Section 42-15-60, Claimant reached maximum medical improvement on May 1, 2017.

5. Under Section 42-9-30, Claimant has sustained 40% permanent partial disability to her left foot as a result her left foot/ankle injury, and Claimant has sustained 8% permanent partial disability to her left leg as a result of her left knee injury. Beyond these permanent partial disability awards, Claimant is entitled to no additional indemnity benefits under Sections 42-9-10, 42-9-20, or 42-9-30.

6. Under Section 42-15-60, Claimant is entitled to future causally-related medical treatment for her left foot injury, to include only Cymbalta or any generic or brand equivalent per

Dr. Behr's recommendation, so long as it is continued to be recommended by the authorized treating physician.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED that Claimant reached maximum medical improvement on

May 1, 2017.

IT IS FURTHER ORDERED that Claimant has sustained 40% permanent partial disability to her left foot as a result her left foot/ankle injury, and Claimant has sustained 8% permanent partial disability to her left leg as a result of her left knee injury.

IT IS FURTHER ORDERED Claimant is entitled to future causally-related medical treatment for her left foot injury, to include only Cymbalta or any generic or brand equivalent per Dr. Behr's recommendation, so long as it is continued to be recommended by the authorized treating physician.

IT IS FURTHER ORDERED that Claimant has not sustained any serious and permanent disfigurement as a result of this accident, and as such Defendants are not liable for same.

No hearing costs are assessed in this instance.

IT IS SO ORDERED.

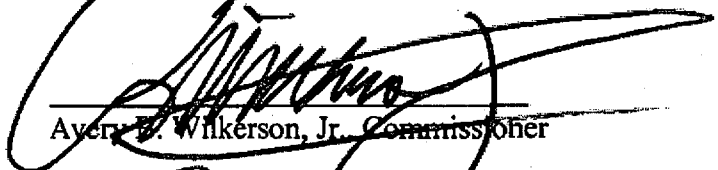
AFFIRMED

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION




Michael Campbell, Chair

CONCUR:



Avery B. Wilkerson, Jr., Commissioner



J. Scott Beck, 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 Hollmon on June 20, 2019
