

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

**COMMISSION PANEL: THE HONORABLE T. SCOTT BECK; THE HONORABLE
MICHAEL CAMPBELL; THE HONORABLE SUSAN BARDEN**

SCWCC FILE NO.: 1112328

Samuel Rose,

Employee,
Appellant

v.

JJS Trucking, Uninsured Employer, and
Chris Thompson Services, Upstream Employer,

Employers, and

Bridgefield Casualty Insurance Company and
South Carolina Uninsured Employers' Fund,

Carrier, Defendants.

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JUL 29 2019

SC Court of Appeals

UPON REMITTITUR FROM THE SOUTH CAROLINA COURT OF APPEALS

Filed:

June 24, 2019

STATEMENT OF THE CASE

This matter was before the Single Commissioner on September 23, 2013 in St. Matthews, South Carolina, pursuant to the Defendants' Form 21 requesting permission to terminate compensation, following a previous Commission Order finding that the Claimant sustained an injury by accident on August 10, 2011 and was entitled to a medical evaluation to determine the extent of his injuries, as well as ongoing temporary total disability compensation. The Claimant argued that he had not reached maximum medical improvement and was entitled to ongoing compensation or, in the alternative; the Claimant argued he was permanently and totally disabled.

Following the hearing, on November 8, 2013, the Defendants, Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company, by and through their attorney, learned for the first time that the Claimant had an ongoing third-party claim arising out of the August 10, 2011 accident pending in the Charleston County Court of Common Pleas. On November 12, 2013, the Defendants filed a Motion to Introduce Newly Discovered Evidence, specifically the Claimant's pleadings in connection with the third-party claim he filed in the Charleston County Court of Common Pleas on February 20, 2013. The Defendants argued that this newly discovered evidence was relevant to the determination of the issues pending before the undersigned Commissioner, because the record reveals that the Claimant failed to file a Form S-2 with the Workers' Compensation Commission, the employer, or the carrier within thirty days after filing his third-party claim and, to date, has never filed a Form S-2. As a result, the Defendants argue that the Claimant was not entitled to additional benefits under the Workers' Compensation Act as a matter of law for failure to comply with the requirements

of S.C. Code Ann. § 42-1-560. The Claimant filed a Motion in Opposition on November 21, 2013, and Motion to Introduce Newly Discovered Evidence on December 20, 2013, which sought to introduce evidence of a voluntary dismissal of Claimant's third-party claim. The Defendants' Motion was granted by Administrative Order dated January 3, 2014 and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case. Claimant's Motion in Opposition and Motion to introduce the voluntary dismissal were denied.

On September 2, 2014, the Hearing Commissioner issued a Decision and Order that held Defendant had no liability for any additional benefits under the SC Workers' Compensation Act following the commencement of the third-party action on February 20, 2013. The Appellate Panel affirmed the Hearing Commissioner by way of Decision and Order dated February 8, 2016. Claimant appealed the Decision and Order of the Appellate Panel to the South Carolina Court of Appeals, and on April 18, 2018, the Court of Appeals found that Claimant's stipulation of dismissal should have been allowed into evidence and as such, the Hearing Commissioner's finding that Claimant's claim was barred was in error. The SC Court of Appeals reversed the Order of the Commission and remanded the matter back to the Commission for proceedings consistent with the opinion.

Upon Remittitur to the Commission, the matter was assigned back to the Single Commissioner on July 16, 2018 for further proceedings consistent with the opinion of the Court of Appeals. The parties appeared via telephone conference with the Single Commissioner on April 25, 2019 wherein Claimant's counsel requested the Single Commissioner be recused on the basis that the Single Commissioner had previously heard the matter and ruled against the Claimant. The Motion for Recusal was granted on April 29, 2019 via email correspondence to the parties. Jurisdiction of

this matter now rests with the Appellate Panel of the Full Commission pursuant to the original Remittitur from the SC Court of Appeals.

EVIDENCE SUMMARY

The Claimant testified on his own behalf. At the time of the hearing, the Claimant, Samuel Rose, was 43 years old. He is a high school graduate and worked for J.J.S. Trucking for approximately six months. (Hrg. Transcript p. 17, ll. 18-25). The Claimant was rear ended on August 10, 2011 while traveling on I-26, allegedly injuring his head, neck, back, and legs. (Hrg. Transcript p. 19, l. 17- p. 20, l. 23).

The Claimant testified that he is currently experiencing stiffness and throbbing pain in his neck that radiates to his shoulders, arms, and head. (Hrg. Transcript p. 28, ll. 1-10). He is also experiencing numbness in his arm and fingers and he claims that he can only lift about 25 pounds with his right arm. (Hrg. Transcript p. 28, ll. 14-25). He stated his left arm is worse than his right. (Hrg. Transcript p. 29, l. 1- p. 30, l. 4).

Regarding the Claimant's lower back, he testified that he currently experiences throbbing, radiating pain in his lower back near his spine. (Hrg. Transcript p. 30, ll. 10-18). He testified that his back is fine when he is moving, but hurts when he stops. (Hrg. Transcript p. 31, ll. 2-10).

The Claimant also testified that his right leg occasionally gives out and swells. (Hrg. Transcript p. 31, ll. 15-18). His knee sometimes hurts, but not always. (Hrg. Transcript p. 31, ll. 17-24). He was previously diagnosed with Osgood-Schlatter's Disease, but he claims he was not experiencing any pain in his right knee at the time of the accident. (Hrg. Transcript p. 32, ll. 4-10).

The Claimant also testified that the back of his head swells up, and he constantly has headaches, dizziness, and blurred vision. (Hrg. Transcript p. 32, ll. 11-17). The Claimant further testified that he did not believe he could go back to work in his current condition because he believes he cannot take the vibrations of driving the truck or doing the pre-trip inspection. (Hrg. Transcript p. 33, ll. 3-10).

On cross-examination, the Claimant testified that he fell down a flight of stairs at his mother's house in November of 2011 and again in January of 2012 and re-injured his back and neck on both occasions. (Hrg. Transcript p. 35, ll. 2-7). The Claimant admitted he went to Tri-County Spinal Care, but he initially stated it was only for pain management. (Hrg. Transcript p. 35, ll. 14-23). After further questioning, the Claimant denied receiving treatment, but later he admitted that he had received injections and MRI's and x-rays had been taken. (Hrg. Transcript p. 35, ll. 6-19).

The Claimant also admitted that he currently carries his cane in the wrong hand, his right hand, even though the doctors advised him that he needs to carry the cane in his *left* hand if he is actually having *right* knee pain. (Hrg. Transcript p. 38, l. 16 – p. 39, l. 7). He also testified that he did not remember Dr. Wildstein telling him that his complaints were out of proportion with what the physical exam showed. (Hrg. Transcript p. 39, ll. 21-25).

The Claimant admitted that he has not applied for any jobs or even looked for work anywhere. (Hrg. Transcript p. 42, ll. 9-14). He also testified that he has not been incarcerated again since the last hearing. (Hrg. Transcript p. 42, l. 23 – p. 43, l. 5). He admits that he was incarcerated after the August 10, 2011 accident.

Upon further cross-examination, the Claimant testified that he believes he needs the cane for dizziness, which he relates to his headaches. (Hrg. Transcript p. 44, l. 14 – p. 45, l. 14). The Claimant was also forced to admit that, despite his testimony that “nothing’s been done” for him, Dr. Abel’s records indicate the Claimant saw him 42 times. (Hrg. Transcript p. 45, l. 24 – p. 46, l. 4). He was also forced to admit that he has been treated and evaluated Dr. Kellett, Dr. Wildstein, Dr. Wills, Dr. Poletti, and Dr. Jones and he has received both injections and pain medicine. (Hrg. Transcript p. 46, ll. 8-20).

On re-direct examination, the Claimant testified that Dr. Wildstein said he might potentially benefit from a one level anterior cervical discectomy and fusion. (Hrg. Transcript p. 50, ll. 2-24). The Claimant also testified he was feeling depressed even though depression was never raised in his Form 50 or his response to the Form 21 submitted by the Defendants. (Hrg. Transcript p. 51, l. 10 – p. 52, l. 10).

Defendants submitted the following APA submissions as evidence: Medical records from Gregory M. Jones, M.D. (APA pp. 1-4); JJS Trucking Certificate of Insurance (APA p. 5); Deposition of Sedrick Smalls (APA pp. 6-17); Deposition of Samuel Rose (APA pp.18-28); Petition to Transfer Liability (APA pp. 29-33); SCWCC Form 18 (APA pp. 34); SLED (APA pp. 35-42); and Third-Party Complaint – Charleston Common Pleas (Exhibit A to 11/12/13 Motion to Introduce Newly Discovered Evidence).

The Claimant submitted the following APA submissions as evidence: Medical records from Stuart M. Leon, M.D. (APA pp. 43-44); Dr. Andrew Conrad, M.D. (APA pp. 45-47); Christopher Erikson, M.D. (APA pp. 48-49); Peter White, M.D. (APA pp. 50-51); Alan Abel,

M.D. (APA pp. 52-72); Michael Rissing, M.D. (APA pp. 73-74); Cameron Willis, D.C. (APA pp.75-76); Richard Kellett, M.D. (APA pp. 77-90); Troy Marlow, M.D. (APA pp.91-92); Michael Wildstein, M.D. (APA pp. 93-96); Donald Olofsson, D.O. (APA pp.97-98); Steven Poletti, M.D. (APA pp. 99-100); Traffic Collision Report SCHP (APA pp. 101-104); Statement of Account - Dr. Abel (APA pp. 105-107); Statement of Account – Tricounty Spinal Care (APA pp. 108-111); Statement of Account – Southeastern Medical Solutions (APA p. 112); and Stipulation of Dismissal (Exhibit 2 to 12/20/13 Motion to Introduce Newly Discovered Evidence).

DISCUSSION

Upon remittitur from the Court of Appeals, the undersigned Appellate Panel reviewed this matter as a whole including all of the testimony, medical records and other evidence presented at the Single Commissioner's September 23, 2013 hearing on the merits of Defendants' Form 21 Request for Hearing as well as all exhibits to post-hearing motions filed with the Hearing Commissioner. Based on the preponderance of the evidence WE, THE APPELLATE PANEL, HEREBY MAKE THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

FINDINGS OF FACT OF THE APPELLATE PANEL

1. By Order of the South Carolina Court of Appeals, Claimant filed a voluntary dismissal on December 5, 2013, after the date of the Single Commission Hearing, and as such, the voluntary dismissal leaves the situation as though no suit had ever been filed. As a result, there is no violation of S.C. Code Ann. § 42-1-560.
2. As to the merits of the claim, the parties originally appeared for a hearing before Commissioner McCaskill on May 15, 2012, which resulted in a Decision and Order of the Single Commissioner on August 23, 2012. The August 23, 2012 Decision and Order was appealed to the Full Commission and on May 15, 2013, the Appellate Panel

entered a Decision and Order, which was ultimately unappealed and is now the law of the case.¹

3. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, Samuel Rose was an employee of JJS Trucking on August 10, 2011.
4. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, Claimant sustained compensable injuries to his head, [right] knee, [right] leg, back, and neck arising out of and in the course of his employment with JJS Trucking.
5. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, Claimant has an average weekly wage of \$650.00 and a compensation rate of \$433.34.
6. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, on or about October 8, 2010, JJS Trucking, LLC represented to Chris Thompson Services, LLC that it had workers' compensation insurance.
7. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, On August 10, 2011, JJS Trucking, LLC was operating without proper insurance as required by the Workers' Compensation Act.
8. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, on August 10, 2011, JJS Trucking, LLC was operating as a subcontractor for Chris Thompson Services, LLC, and is an "upstream employer" pursuant to §42-1-415.

¹ The issue of whether the Commission erred as a matter of law in failing to transfer liability to the UEF pursuant to S.C. Code Ann. § 42-1-415 was preserved for appeal by Defendants Christ Thompson, LLC and Bridgefield Casualty's subsequent Motion and resulting appeals to the Full Commission and the S.C. Court of Appeals. By Order of the Court of Appeals dated January 28, 2015, Defendants' appeal was dismissed as not immediately appealable and preserved for further adjudication or appeal after a final decision of the Commission.

9. Pursuant to the May 15, 2013 Decision and Order of the Appellate Panel, Chris Thompson Services, LLC is liable to pay Claimant all benefits to which he is entitled under the Act.
10. As a result of the May 15, 2013 Appellate Panel Decision and Order, Claimant was found to not be at maximum medical improvement and Defendants Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company were ordered to provide Claimant with "an evaluation to determine the extent of his injuries" and further ordered that Claimant was "entitled to ongoing medical treatment as prescribed by an authorized treating physician to be selected by the carrier." The Full Commission also found that Claimant was entitled to temporary total disability benefits beginning on August 10, 2011 and continuing until such time as he reached maximum medical improvement.
11. After a review of the evidence as a whole, we find Defendants Thompson Services, LLC and Bridgefield Casualty Insurance Company provided Claimant with the medical evaluation pursuant to the original Single Commissioner Order dated August 23, 2012 and affirmed with amendments by the May 15, 2013 Decision and Order of the Appellate Panel. This evaluation with Dr. Greg Jones of Charleston Spine & Physical Medicine dated March 20, 2013 and updated on April 16, 2013, address Claimant's neck, back and right knee complaints. Dr. Jones reviewed Claimant's history of treatment modalities including epidural blocks to the lumbar spine, physical therapy, epidural injections and right-sided cervical facet injections to the cervical spine, and medications. Dr. Jones opined Claimant would likely not benefit significantly from single level fusion C5-6 as there was no evidence of definitive cervical radiculopathy.

(Defendants' APA p. 4). Dr. Jones placed Claimant at maximum medical improvement as of March 20, 2013.

12. During the same time as his evaluation with Dr. Jones, Claimant continued treating on his own with his family physician, Dr. Alan N. Abel. While Dr. Abel had initially referred Claimant to a neurosurgeon for evaluation of surgery on his neck back in October of 2012, after reviewing Dr. Jones' records, Dr. Abel opined that he was "essentially in agreement with this interpretation." Dr. Able also placed Claimant at maximum medical improvement and noted he was "not optimistic that [Claimant] will improve to any significant degree in the future." Dr. Abel noted that "perhaps" Claimant could benefit from physical therapy and also referenced a EMG to see if there is nerve decompression in his neck requiring cervical intervention. (Claimant's APA p. 70).
13. On July 15, 2013, Claimant obtained his own Independent Medical Evaluation with Dr. Steven C. Poletti who reviewed Claimant's MRI scans of the cervical spine that showed two-level disc herniations at C5-6 and C6-7 as well as bilateral C6 nerve root compression. Dr. Poletti diagnosed Claimant with cervical disc herniation with spondylosis, cervical radiculopathy, low back pain of indeterminate etiology, and history of right knee contusion/impaction fracture. Dr. Poletti opined Claimant required an evaluation by a knee specialist and that surgery was indicated for Claimant's two-level cervical disc disease with pain radiating into his arm. Dr. Poletti also opined Claimant needed an MRI scan of his lumbar spine.
14. Upon review of the preponderance of the evidence as a whole, we find Claimant is not at maximum medical improvement for his August 10, 2011 work injury. We give

greater weight to the medical opinions of Dr. Poletti than we do the medical opinions of Dr. Jones. Specifically, Dr. Poletti agreed with Claimant's prior treating physician, Dr. Wildstein, who had previously recommended a cervical fusion. In addition, it is important to note Dr. Jones is a physical medicine and rehabilitation doctor, as opposed to Dr. Wildstein and Dr. Poletti, both of whom are orthopaedic surgeons specializing in the spine. We give great weight to Dr. Poletti's assessment of Dr. Jones's medical opinion wherein Dr. Poletti stated, "a non-surgical recommendation from a non-surgeon doesn't really mean all that much to me." (Claimant's APA pp. 99-100).

15. With regards to Claimant's cervical spine, we find the opinions of the two orthopaedic spine surgeons, Drs. Wildstein and Poletti, outweigh the medical opinion of Dr. Jones. As such, we find Claimant is entitled to additional medical treatment to include the recommended cervical fusion as recommended as it has been shown by a preponderance of the evidence that it would tend to lessen his period of disability.
16. We find Defendants had the surgical recommendations of Dr. Wildstein and Dr. Poletti at time of the September 23, 2013 hearing before the Hearing Commissioner and elected to deny the surgery, which was their right, and rely on the medical opinion of Dr. Jones. As such, we find the Claimant has shown good cause to direct his own medical care and hereby appoint Dr. Steven C. Poletti, or other referral from Dr. Poletti, as the authorized provider for Claimant's cervical and lumbar spine treatment.
17. We find Claimant is entitled to an evaluation with an orthopaedic surgeon who specializes in the knee/lower extremity to obtain updated MRI scans and an assessment of Claimant's continued complaints of pain in his right knee. This finding is based upon the preponderance of the evidence including the recommendation of Dr. Poletti,

of which we give great weight, as well as the testimony of the Claimant. Defendants retain the right to direct Claimant's medical treatment as it relates to his right knee injury.

18. Claimant is entitled to temporary total disability benefits from August 11, 2011 to the present and continuing until he is placed at maximum medical improvement. Claimant is entitled to a lump-sum award of any back payment of temporary total disability benefits due.
19. All other issues are held in abeyance and preserved for future adjudication or appeal.

CONCLUSIONS OF LAW

1. The parties to this proceeding are subject to and bound by the provisions of the South Carolina Workers' Compensation Act.
2. A voluntary dismissal leaves the situation as though no suit had ever been filed. Following this rule, Claimant's voluntary dismissal of his of his third party claim made the claim a nullity and S.C. Code Ann. Sec. 42-1-560 is not applicable. As a result, there is no violation of S.C. Code Ann. Sec. 42-1-560 when Claimant's third-party claim is treated as never being filed. *See Callahan v. Beaufort Cty. Sch. Dist.*, 375 S.C. 92, 97, 651 S.E.2d 311, 314 (2007).
3. "... [O]ur courts have clearly held the natural consequences flowing from a compensable injury, absent an independent intervening cause, are compensable." *Mullinax v. Winn-Dixie Stores*, 318 S.C. 431, 458 S.E. 2d 76, 79 (Ct. App. 1995); *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E. 2d, 200, 206 (Ct. App. 2012).

4. Claimant is not at maximum medical improvement for his injuries to his neck (cervical spine), back (lumbar spine), and right leg (knee).
5. Pursuant to S.C. Code Ann. § 42-15-60 and S.C. Code Ann. Section 42-15-80, Claimant is entitled to treatment for his neck, back, and right knee. Defendants are liable for Claimant's future treatment with Dr. Poletti or any referral made by Dr. Poletti for Claimant's neck and back injuries. Defendants are to direct Claimant's medical treatment for his right knee.
6. Claimant is entitled to temporary total disability benefits from August 11, 2011 through the present and continuing until he is placed at maximum medical improvement. Claimant is entitled to a lump-sum payment of any back-owed TTD accrued during litigation.

ORDER AND AWARD

Based upon the above Findings of Fact and Conclusions of Law set forth herein,


IT IS HEREBY ORDERED Claimant is not at maximum medical improvement for his injuries to his neck, back, and right knee.

IT IS HEREBY ORDERED Claimant is entitled to additional medical treatment to the neck and back, to include a cervical fusion and follow-up treatment with Dr. Steven C. Poletti or other referral made by Dr. Poletti.

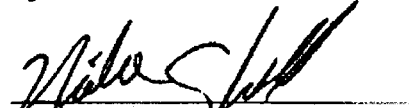
IT IS HEREBY ORDERED Claimant is entitled to an evaluation of his right knee, including an updated MRI, with an orthopaedic surgeon who specializes in the knee/lower extremity at the direction of Defendants.

IT IS HEREBY ORDERED Claimant is entitled to temporary total disability benefits from September 11, 2011 through the present and continuing until he is placed at maximum medical improvement. Claimant is entitled to a lump-sum payment for all back-owed TTD benefits as of the date of this Decision and Order

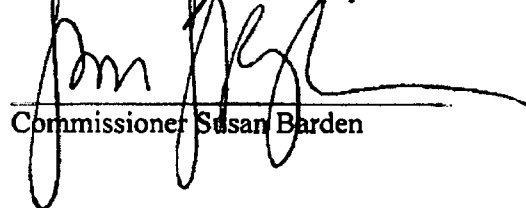
AND IT IS SO ORDERED.



Commissioner T. Scott Beck



Commissioner Michael Campbell



Commissioner Susan Barden

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 D. Deller on June 24, 2019