

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

Jennie Cox,)
)
Employee,)
vs.)
)
Palmetto State Transportation,)
)
Employer,)
)
and)
)
Cherokee Insurance Company,)
)
Carrier,)
)
Defendants)
_____)

WCC FILE NO: 1206236

FULL COMMISSION APPELLATE
PANEL ORDER

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SC Court of Appeals

HEARING DATE: August 19, 2019, in Columbia, South Carolina.

APPEARANCES: Claimant represented by Juliette B. Mims, Esquire and Henry J. Mims, Esquire of the Mims Law Firm and Adrienne Turner, Esquire of Columbia, South Carolina.

Defendants represented by George D. Gallagher, Esquire of Columbia, South Carolina.

PANEL: Commissioner Susan S. Barden, Chair
Commissioner Avery B. Wilkerson
Commissioner R. Michael Campbell

FILED: October 18, 2019

STATEMENT OF THE CASE

Jennie Cox ("Claimant") sustained compensable facial, dental, and shoulder injuries arising out of and in the course of her employment as a truck driver for Palmetto State Transportation ("Palmetto") on May 31, 2012. Specifically, Claimant was unloading freight from her trailer at a facility in Georgia when a machine fell on top of her, knocked her to the floor of the loading dock where she struck her jaw and mouth, and pinned her underneath. Her primary injuries were a broken jaw and several missing teeth for which she received emergency treatment and extensive follow up treatment with multiple dental and facial reconstruction specialists. She later developed shoulder pain, which was treated conservatively. Palmetto's carrier, Cherokee Insurance Company ("Cherokee") accepted compensability of the claim and provided medical and compensation benefits in accordance with the Act. Claimant was paid approximately 48 weeks of temporary total disability benefits (TTD) before ultimately returning to full duty work as a truck driver. She remained gainfully employed until June of 2016 when she resigned her employment, citing inability to continue working due to chronic pain, fatigue, and malnourishment.

This matter initially came before Commissioner Aisha Taylor for Hearing on February 2, 2017 pursuant to Forms 50 and 51. Claimant alleged entitlement to permanent and total disability benefits (PTD) under S.C. Code §42-9-10 secondary to her work injuries. Defendants disputed her PTD claim but acknowledged her entitlement to scheduled disability compensation under §42-9-30 and WCC R. 67-1101. By Order dated May 23, 2017 Commissioner Taylor found, *inter alia*, that Claimant's accident and injuries aggravated her preexisting depression and awarded her PTD. Defendants appealed Commissioner Taylor's findings and PTD award to the Full Commission Appellate Panel ("Panel"), citing numerous factual and legal errors.

By Order dated May 21, 2018 the Panel reversed Commissioner Taylor's entire Order and remanded the case to a jurisdictional commissioner for entry of an award of permanent partial disability benefits ("PPD") for specifically enumerated scheduled members pursuant to S.C. Code §42-9-30 and WCC Regulation 67-1101. Specifically, the Panel stated, in pertinent part, on page 24 of its Order that it **"REVERSES AND REMANDS the Decision and Order of the Hearing Commissioner dated May 23, 2017. The Findings of Fact and Conclusions of Law set forth herein, shall become, and hereby are, the law of the case."** The Panel further states in its Finding of Fact # 1 that "Claimant did sustain compensable injuries to her teeth, mandible, left shoulder, and facial

nerve, as well as scarring to her chin.” Finally, the Panel ordered that a “Hearing Commissioner should determine Claimant’s permanency award for her compensable injuries sustained because of her May 31, 2012 injury pursuant to this Order.”

This matter was then heard by Commissioner Scott Beck on February 12, 2019 pursuant to the Panel’s remand instructions. Despite the Panel’s clear mandate, Claimant sought additional relief not addressed by the Panel’s Order, specifically, an order for psychological evaluation and treatment. Defendants countered that the Panel clearly reversed ALL the original Hearing Commissioner’s findings, orders, and award, including her finding of a compensable psychological overlay injury. The Panel, as the ultimate fact finder, then found that the scope of Claimant’s compensable injuries was limited to those enumerated in its Finding of Fact # 1- teeth, mandible, left shoulder, facial nerve, and scarring to her chin. In reply, Claimant argued that the Panel did not make a specific finding denying compensability of Claimant’s psychological injury; therefore, that issue remains unresolved and enabled Commissioner Beck to grant their requested relief.¹

In addition, Claimant sought to introduce additional evidence generated after the original Hearing before Commissioner Taylor, specifically, an addendum from the Claimant’s vocational expert and medical records from providers with dates of service after the original Hearing. Defendants objected to these submissions, contending that Commissioner Beck must render an award per the Panel’s remand instructions based on the existing Record at the time of the Panel’s decision. The objection was sustained. Robert Brabham’s report dated 7/16/2018 and records from Claimant’s primary care provider, Dr. Ellis, generated after the original Hearing were specifically excluded. However, Claimant’s counsel was granted leave to proffer additional evidence that was not part of the original Record.

By Order dated May 21, 2019 Commissioner Beck awarded the following PPD compensation per the Panel’s remand instructions:

- a) 45 weeks of compensation (\$32,646.15) for 15% loss of use of the shoulder;

¹ Although not specifically referenced in the Panel’s remand instructions, S.C. Code §42-15-60 (B)(2) requires the Commission to determine a claimant’s entitlement to ongoing and/or reasonably anticipated future medical treatment along with any permanency award. Per this statutory mandate, Defendants stipulated at the Remand Hearing to provide lifetime repair, replacement, and/or removal of Claimant’s mandibular appliance and dental implants, as well as physical therapy for Claimant’s shoulder, if necessary. Commissioner Beck accepted the stipulation.

- b) 25 weeks of compensation (\$18,136.75) for injury to the mandible;
- c) 22 weeks of compensation (\$15,960.34) for loss of 11 teeth;
- d) 2 weeks of compensation (\$1450.94) for injury to the facial nerve; AND
- e) 1 week of compensation (\$725.47) for scarring/disfigurement to the chin.

Commissioner Beck denied Claimant's request for further psychological evaluation/treatment on grounds that such relief was not permitted by the Panel's Order, which specifically only instructed him to enter scheduled disability awards for the specifically delineated injured body parts. Commissioner Beck also reasoned that he could not order additional psychological evaluation/treatment because the Panel found, at least implicitly, that Claimant was at MMI by determining that entry of a permanency award was ripe. Finally, Commissioner Beck stated, "[a]ny Appeal to the Full Commission from this Decision and Order should be heard by the same Panel in order to clarify issues regarding the alleged psychological condition and any other issues not addressed in the remand instructions. All other issues, if any, not specifically addressed herein are only addressable by the Panel."

Claimant appealed Commissioner Beck's Order back to the Panel. Claimant raised numerous exceptions to the Order, but her grounds for appeal can essentially be consolidated as follows: 1) Commissioner Beck erred by denying her request for further psychological evaluation/treatment; 2) Commissioner Beck erred by excluding evidence from consideration at the remand Hearing that was not part of the existing Record; AND 3) Commissioner Beck erred in limiting his permanency award according to the Panel's instructions and by not finding her permanently and totally disabled.

STANDARD OF REVIEW

It is elementary that when an appellate tribunal remands a case, the lower tribunal has only the jurisdiction and authority mandated by the higher tribunal. Prince v. Beaufort Memorial Hospital, 392 S.C. 599, 709 S.E.2d 122 (Ct. App. 2011). Therefore, matters heard and decided by the higher tribunal cannot be reheard, reconsidered, or relitigated in the lower tribunal. Ackerman v. McMillan, 324 S.C. 440, 477 S.E.2d 267 (Ct. App. 1996). Under the South Carolina Workers Compensation Act, the Full Commission Appellate Panel is the ultimate finder of fact and arbiter of the claim and is not bound by a single commissioner's findings of fact and conclusions of law. See Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (SC 1989). The Panel is

empowered to make its own findings and conclusions consistent or inconsistent with those of the single commissioner. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (SC 1992). Finally, upon review of a single commissioner's Order and award, the panel may "reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award." S.C. Code §42-17-50.

FINDINGS OF FACT

This matter was reheard by the Panel at the Review Hearing on August 19, 2019. After careful consideration of able arguments by counsel for the parties and review of the evidentiary Record and applicable law, the Panel concludes that Commissioner Beck's Order is legally and factually correct as stated, and his Award is supported by the preponderance of the evidence in the record. As such, the Order is hereby **AFFIRMED WITH AMENDMENTS**. Specifically, the Panel makes the following Findings of Fact independent of Commissioner Beck's findings and conclusions:

- 1) Commissioner Beck properly followed this Panel's remand instructions to determine Claimant's entitlement to PPD compensation benefits for the following compensable body parts as found in the Panel's prior order: teeth, mandible, left shoulder, facial nerve, and scarring to the chin.
- 2) Because Commissioner Beck was constrained by the Panel's specific instructions to only enter an award for PPD to the enumerated body parts, he correctly concluded that he was not authorized to order Defendants to provide Claimant with further psychological evaluation and treatment.
- 3) In response to Commissioner Beck's prayer for clarification of the Panel's intentions regarding the alleged psychological claim, the Panel reiterates that Claimant's alleged psychological injury is DENIED, which was the express intent of the Panel when it REVERSED the Decision and Order of Commissioner Taylor dated May 23, 2017. This constitutes a complete reversal of Commissioner Taylor's findings regarding the alleged psychological injury.
- 4) To further clarify our original Order, the Panel also finds that Claimant has reached maximum medical improvement (MMI) for all compensable injuries stemming from her May 31, 2012 accident.

- 5) For these reasons, Commissioner Beck correctly declined Claimant's request for further psychological evaluation and treatment.
- 6) Commissioner Beck properly excluded and rejected consideration of evidence proffered by Claimant, including an addendum from the Claimant's vocational expert and medical records from providers with dates of service after the first Hearing in this matter. The Panel did not intend for the remand Hearing before Commissioner Beck to be *de novo*. As such, Commissioner Beck was proper in only considering relevant portions of the original Record necessary to comply with the Panel's instructions that were resubmitted by the parties as APA Submissions for purposes of the remand Hearing.
- 7) Moreover, the Panel did not consider Claimant's proffered evidence on the grounds that it is irrelevant to the issues currently before the Commission in light of the Panel's prior Order. Specifically, additional vocational evidence from Claimant's expert is not relevant to the issue of PPD compensation based on medical impairment and/or loss of use of the individual compensable injuries found. Likewise, evidence from Claimant's primary care provider generated after the original Hearing is not relevant because its probative value only goes to the alleged psychological injury, which as noted earlier, was found to be not compensable by the Panel.
- 8) Defendants stipulated to responsibility for causally related replacement and maintenance of Claimant's dental implants and prosthetic appliances in her jaw for her lifetime, as well as physical therapy for the left shoulder if necessary.
- 9) Claimant could not pinpoint the number of teeth she lost secondary to this accident, and conceded she was missing teeth prior to her injury. The objective medical records confirm that Claimant had the following teeth extracted and/or replaced with implants following the accident: tooth #'s 3, 5, 6, 11, 12, 14, 20, 23, 25, 27 and 30. Claimant is therefore entitled to 22 weeks of compensation for these 11 lost teeth (2 weeks per tooth per Regulation 67-1101). An award for additional lost teeth would be based purely on speculation.
- 10) Commissioner Beck noted on the record that he observed a very faint scar in two locations on Claimant's chin for which he awarded 1 week of compensation. There is no evidence in the Record indicating this award was insufficient.

- 11) Regarding Commissioner Beck's award of compensation for injury to Claimant's facial nerve, WCC Regulation 67-1101 states such award shall be made in accordance with the AMA Guides to the Evaluation of Permanent Impairment. ("Guides"). The applicable sections of the Guides 13.4e and table 13-12. Dr. Cobb assigned a 1% rating to the facial nerve, which corresponds to a Class I Impairment under the Guides. Therefore, the award of 2 weeks of compensation for the facial nerve injury is proper and supported by evidence in the Record.
- 12) Claimant was assigned a 7% rating to the mandible by Dr. Cobb. Pursuant to WCC R. 67-1101 the minimum number of weeks of compensation due for a permanent mandibular injury is 25 weeks. Claimant's residual problems with chewing is clear evidence of a permanent injury. As such, Commissioner Beck properly awarded 25 weeks of PPD benefits for Claimant's jaw injury.
- 13) Regarding PPD compensation for the left shoulder injury, the Panel finds that Claimant has sustained a 15% specific loss of use the left shoulder and is therefore entitled to 45 weeks of compensation. The Panel gives more weight to the opinions and ratings of Dr. Svazas as the authorized treating physician than the rating from Claimant's IME provider, Dr. Grady.

CONCLUSIONS OF LAW

The issues presented in the current action before the Panel are governed by the following provisions of applicable law:

- 1) Under the South Carolina Workers Compensation Act, the Full Commission Appellate Panel is the ultimate finder of fact and arbiter of the claim and is not bound by a single commissioner's findings of fact and conclusions of law. *See Ross v. American Red Cross*, 298 S.C. 490, 381 S.E.2d 728 (SC 1989). The Panel is empowered to make its own findings and conclusions consistent or inconsistent with those of the single commissioner. *McGuffin v. Schlumberger-Sangamo*, 307 S.C. 184, 414 S.E.2d 162 (SC 1992).
- 2) Upon review of a single commissioner's Order and award, the panel may "reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award." S.C. Code §42-17-50. Inherent in the Panel's jurisdiction to

“amend the award” is the authority to delegate the matter to a single commissioner for further findings if it so chooses. *See* S.C. Code §42-17-40 (“The commission or any of its members shall hear the parties at issue ... and shall determine the dispute in a summary manner.”) However, the single commissioner is obviously bound by the duties delegated to him or her by the Panel, and the single commissioner may not rule on issues beyond the scope of the Panel’s remand instructions.

- 3) MMI is the point at which, in the commission’s opinion, no further medical treatment will tend to lessen the degree of claimant’s impairment. O’Banner v. Westinghouse, 319 S.C. 24, 459 S.E.2d 324 (Ct. App. 1995). Once a claimant has been adjudged to have reached MMI, entitlement to permanent disability compensation is ripe for determination. *See* Curiel v. Environmental Management Systems, 655 S.E.2d 482 (Ct. App. 2007).
- 4) S.C. Code § 42-9-30 (14) governs the award of PPD compensation for loss of use of the shoulder up to a maximum of 300 weeks.
- 5) S.C. Code § 42-9-30 (23) governs proper and equitable compensation for visible scarring and disfigurement to members exposed in the workplace up to a maximum of 50 weeks.
- 6) WCC Regulation 67-1101 governs compensation for loss of other scheduled members and body parts not specifically enumerated in § 42-9-30, including the mandible, facial nerve, and teeth.
- 7) S.C. Code § 42-15-60 provides for maintenance and replacement of prosthetic devices and ongoing/future medical treatment.

ORDER AND AWARD

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Commissioner Becks’ award of PPD benefits is hereby **AFFIRMED**. Specifically, Claimant is entitled to the following weeks of permanent partial disability compensation at the stipulated compensation rate of \$725.47:

- a) 45 weeks of compensation (\$32,646.15) for 15% loss of use of the shoulder;
- b) 25 weeks of compensation (\$18,136.75) for injury to the mandible;
- c) 22 weeks of compensation (\$15,960.34) for loss of 11 teeth;
- d) 2 weeks of compensation (\$1450.94) for injury to the facial nerve; AND

e) 1 week of compensation (\$725.47) for scarring/disfigurement to the chin.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants shall tender this award of compensation to Claimant in a non-commuted lump sum per WCC Regulation 67-1605.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that Claimant's prayer for additional evaluation and treatment of her alleged psychological injury is hereby **DENIED**.

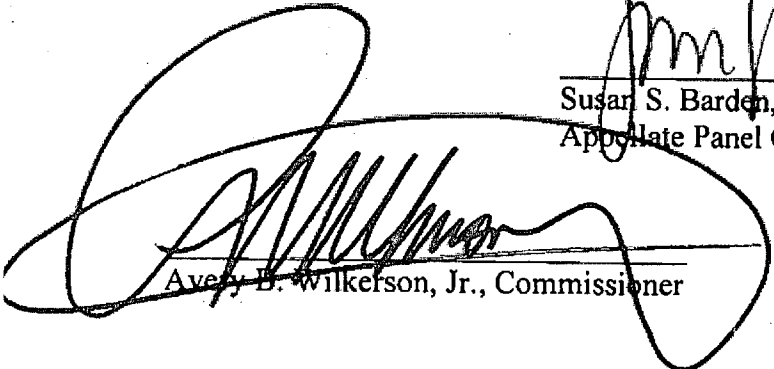
IT IS FINALLY ORDERED, ADJUDGED AND DECREED that Defendants shall be financially responsible for causally related maintenance and replacement, if necessary, of Claimant's prosthetic devices secondary to the accident and injuries referenced herein, specifically, the 11 dental implants and appliances in her jaw for her lifetime per S.C. Code §42-15-60 (C), and physical therapy for the left shoulder, if necessary, per S.C. Code §42-15-60 (B).

IT IS SO ORDERED!

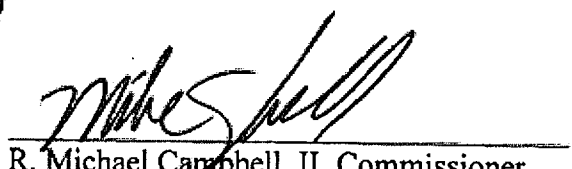
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION



Susan S. Barden, Commissioner,
Appellate Panel Chair



Avery B. Wilkerson, Jr., Commissioner



R. Michael Campbell, II, 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 October 18, 2019