

AMENDED APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 1708722

TIMOTHY CLAYTON, CLAIMANT/APPELLANT,

VERSUS

SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION AND SC STATE
ACCIDENT FUND, DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in Columbia, South
Carolina on August 19, 2019 per notices timely and
properly served on all parties of interest.

Appellate Panel Decision and Order filed:

April 20, 2020

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APR 22 2020
SC Court of Appeals

APPEARANCES:

Claimant was represented by Elizabeth M. Pentz of
McWhirter, Bellinger & Associates, P.A., 119 East
Main Street, Lexington, SC 29072.

Defendants were represented by Erin Farthing,
Esquire, of The South Carolina State Accident
Fund, P.O. Box 102100, Columbia, South Carolina
29221.

STATEMENT OF THE CASE

This matter arises out of an admitted injury by accident that occurred on March 28, 2017 while Timothy Clayton ("Claimant") was acting within the course and scope of his employment with Defendant South Carolina Department of Transportation ("SCDOT"). Defendants admitted an injury to Claimant's low back, and Claimant further alleged an injury to his right hip and also that his right leg and preexisting psychological condition were affected.

This claim came before the Single Commissioner pursuant to Defendants' Form 21 and Claimant's Forms 22 and 50. In their Form 21, Defendants' sought a determination of permanency and the amount of compensation due. In their Form 50, Claimant requested payment for an ambulance and emergency room treatment July 20, 2017, related to an alleged seizure that Claimant claimed was the result of an injection by the authorized treating orthopedic. Further, the Claimant requested a compensability determination regarding whether his work injury aggravated his preexisting psychological condition. Claimant also filed a Form 22 response and Amended Form 50 alleging permanent and total disability. The parties conducted mandatory mediation, which failed.

A hearing on Defendants' Form 21 and Claimant's Forms 22 and 50 was held before the Single Commissioner on March 6, 2019. On May 14, 2019, the Single Commissioner issued a decision and order, wherein he set forth the following findings of fact and conclusions of law:

FINDINGS OF FACT

The undersigned Commissioner carefully reviewed all the evidence submitted in this case and concludes that the employee, Timothy N. Clayton, not only sustained a causally related medical episode July 20, 2017, subsequent to an authorized injection, but also aggravation of his preexisting psychiatric and psychological conditions. Further the undersigned Commissioner is of the opinion that the Claimant, at the time of the hearing, has not reached maximum medical improvement for his aggravated psychological condition and is entitled to additional treatment.

A record such as is necessary for decision was made of the proceedings in this matter, and after a careful consideration and study of all the evidence as well as a personal observation of the Claimant's demeanor, there is substantial and reliable probative evidence to support the following Findings of Fact:

That all parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Department of Transportation as the Employer and State Accident Fund as the Carrier.

1. The undersigned submitted the hearing directives to all parties on March 20, 2019. The Claimant received the hearing transcript March 29, 2019.

2. “[T]his case was originally set on a 50, 51, and a 21, I think both parties agree that we’re going to handle the 50, 51 and 21 toda[y].” [Hrg. Tr. Pg. 4, ll.12-22].
The July 13, 2018, mediation failed. [Hrg. Tr. Pg. 4, ll. 23-25].

3. The testimony of Claimant, Timothy M. Clayton, was clear and honest. Mr. Clayton possesses a ninth (9th) grade education. [Hrg. Tr. Pg. 51, ln. 25-pg. 52, ln. 2]. His preexisting psychological issue dates to his childhood. Mr. Clayton cutoff all contact

with father. [Hrg. Tr. Pg.127, ln. 24-pg. 128, ln. 9]. In the past, the Claimant experienced increased work to larger vehicles and increased pressure from job, but continued to work until July 17, 2017, with the Employer even during his treatment with James R. Kirkland, M.D., which were generally three (3) months apart, but sometimes sooner, especially after the March 28, 2017, on the job accident . [Hrg. Tr. Pg.53, ll. 5-15; Pg. 85, ll.1-9; Pg. 86, ll.6-18; Pg. 94, ll. 2-6, 19-21; CL APA#1, pgs. 1-5; DEF APA#1, pgs. 1-10]. Since receiving psychological counseling pursuant to Dr. Kirkland's recommendation, the Claimant did not think his psychological condition was any better or worse; everything is about the same; treatment does not seem to be working. [Hrg. Tr. Pg. 98, ln. 20- pg. 100, ln.2]. The Claimant's medications were increased. [C-1].

4. The Claimant continued treatment with Dr. Kirkland. [Hrg. Tr. Pg. 95, ln. 3-13; Pg. 95. ln. 25-pg. 96, ln. 13; Pg. 100, ll.2-5; CL. APA#1, Pgs. 5-8; 11-14].

5. Dr. Kirkland provided two (2) causation statements December 5, 2017 and May 15, 2018, that opined to a reasonable degree of medical certainty that the Claimant's increase anxiety, panic attacks, and depression were most probably aggravated by his low back/right leg/right hip pain. [Cl. APA #1, Pgs. 9-10; 15-16]. The Defendants submitted Dana-Lowndes Rosen's, M.D. March 16, 2018, independent psychiatric evaluation. [DEF. APA#2]. In this report, Dr. Rosen references Mr. Crocker and Mr. Lang. [DEF. APA#2, Pg. 27].

6. The Claimant's preexisting psychiatric and psychological conditions were aggravated subsequent to his March 28, 2017, on the job accident.

7. The Claimant is not at maximum medical improvement for the psychological overlay and is entitled to additional treatment.

8. A full psychological evaluation needs to be done by a certified psychiatrist.

9. The Claimant experienced previous seizure type symptoms including falling off a toilet and waking up on floor, but never received a medical diagnosis of a seizure disorder. [Hrg. Tr. Pg.76, ll. 5-12; Pg. 82, ln. 22- Pg. 84, ln.19; Pg. 87, ln. 14-pg. 88, ln.7; Pg. 102, ln.5-pg. 103, ln. 16]. The Claimant passed out on July 20, 2017, at the authorized treating doctor's office after receiving an injection. [Hrg. Tr. Pg. 57, ln. 17-pg. 60, ln. 1]. The medical record notes a "New onset non provoked seizure." [CL. APA#10, Pg. 116]. The Claimant does not know if ever had a medically diagnosed seizure. [Hrg. Tr. Pg.76, ll. 5-12; Pg. 82, ln. 22- Pg. 84, ln.19; Pg. 87, ln.14-pg. 88, ln.7; Pg. 102, ln.5-pg. 103, ln. 16]. The Claimant's EEG was normal. [CL. APA#15, Pg. 193]. Based on greater weight of evidence I would find the ambulance bill and emergency room bill are causally related at authorized doctor's appointment. Subject to medical fee schedule. I would find based on the preponderance of the evidence that the pre-existing psychological was clearly aggravated by the accident.

10. On April 9, 2018, Ivan E. Lamotta, M.D. opined to a reasonable degree of medical certainty that the Claimant's July 20, 2017, in office seizure was most probably a reaction to the injection administered which required medical treatment. [CL. APA#7, pg. 101-102]. On December 13, 2018, Dr. Lamotta testified in his deposition that the Claimant experienced symptoms after the July 20, 2017, post injection incident. [CL. Exb. C: Dep. Pgs. 12-13]. However, he was not a seizure expert and would defer to a neurologist for seizure opinion. [CL. Exb. C: Dep. Pg. 15, ll. 4-22]. Dr. Lamotta's opinion remained the same that the post injection symptoms were casually related to the

injection. [CL. Exb. C: Dep. Pg. 21, ll.17-25; Pg. 22, ll.1-22; Pg. 24, ll. 7-20; Pg. 24, ll. 24-25; Pg. 25, ll. 1-15; Pg. 28, ll. 16-23].

11. The Defendants submitted an August 31, 2018, Vocational Evaluation which determined the Claimant could return to work in response to the Claimant's March 28, 2017, Vocational Evaluation which determined the Claimant could not return to work. [DEF. APA#3; CL. APA#16].

12. The Claimant underwent two (2) FCE evaluations September 14, 2017, CORA Physical Therapy and December 7, 2017, Columbia Rehabilitation Clinic. [CL. APA#11, 13].

13. None of the doctors used in the treatment submitted in the parties' APAs are to be used by either party as treating doctors. I do not find either James. R. Kirkland, M.D., Scott Psychiatric Institute or Dyana-Lowndes Rosen, M.D., one-time IME, convincing based on the overall evidence. Mr. Clayton found Dr. Kirkland by internet referral. (DEF APA #1, Pg. 1).

14. Temporary total disability benefits shall begin once the claimant is written out of work by an authorized treating physician.

15. The Claimant was awarded Social Security Disability Benefits.

16. The Claimant met his burden of proof as he submitted two (2) causation statements by treating physician James R. Kirkland, M.D. (CL. APA#1, Pgs.9-10, 15-16).

17. I would find Mr. Clayton's S.C. Department of Transportation position to be in the medium to heavy duty category.

CONCLUSIONS OF LAW

Accordingly, as is provided in S.C. Code Ann. Section 42-17-40 of the South Carolina Code of Laws, 1976 (as amended), it is the determination of this Commissioner that S.C. Code Ann. Section 42-1-160 defines "injury and personal injury"; and Section 42-15-60 governs "medical"; and, that Section 42-1-120 defines "disability".

1. S.C. Code Ann. §42-1-160 of the South Carolina Code of Laws, 1976 (as amended), states that "injury" and "personal injury" are defined as "injury by accident arising out of and in the course of employment". Furthermore, Section 42-1-160 of the South Carolina Code stipulates that, "[a]s used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider." S.C. Code Ann. §42-1-160(g).

A. The testimony, medical evidence and Dr. Lamotta's opinion and subsequent deposition testimony satisfied the burden of proof that the Claimant's July 20, 2017, seizure episode was causally related to the original March 28, 2017, on the job accident. S.C. Code Ann. §42-1-160(D).

B. S.C. Code Ann. Section 42-1-160 of the South Carolina Code provides: "Stress, mental injuries, and mental illness alleged to have been aggravated by a work-related physical injury may not be found compensable unless the aggravation is:

- (1) admitted by the employer/carrier;
- (2) noted in a medical record of an authorized physician that, in the physician's opinion, the condition is at least in part causally related or connected to the

injury or accident, whether or not the physician refers the employee for treatment of the condition;

(3) found to be causally related or connected to the accident or injury after evaluation by an authorized psychologist or psychiatrist; or

(4) noted in a medical record or report of the employee's physician as causally related or connected to the injury or accident.

The testimony, psychiatric and psychological evidence, and Dr. Kirkland's two (2) causation statements met the burden of proof that the Claimant's preexisting anxiety, panic attacks, and depression were causally related to the original March 28, 2017, on the job accident.

C. Finally, S.C. Code Ann. §42-15-60 of the South Carolina Code of Laws, 1976 (as amended), requires Defendants to authorize causally-related medical treatment. S.C. Code Ann. §42-15-60. The Claimant is not at maximum medical improvement for his aggravated anxiety, panic attacks, and depression. He is entitled to additional causally related psychiatric and psychological conditions as direct by the S.C. State Accident Fund within thirty (30) days of the date of this order.

Within the statutory period, Defendants filed an Application for Review in the case setting forth their exceptions, copies of which were furnished to all interested parties. Defendants stated the following grounds for review:

1. Did the hearing Commissioner err as a matter of law in finding that Claimant's preexisting psychiatric and psychological conditions were aggravated subsequent to the March 28, 2017 on the job accident where the Commissioner relied on the opinion of Dr. Kirkland in rendering that decision, but further found Dr. Kirkland to not be convincing?
2. Did the hearing Commissioner err as a matter of fact in finding that Claimant's preexisting psychiatric and psychological conditions were

aggravated subsequent to the March 28, 2017 on the job accident where the Commissioner relied on the opinion of Dr. Kirkland in rendering that decision, but further found Dr. Kirkland to not be convincing?

3. Did the hearing Commissioner err as a matter of law in ordering Defendants to provide full psychological evaluation of Claimant by a certified psychiatrist?
4. Did the hearing Commissioner err as a matter of fact in ordering Defendants to provide full psychological evaluation of Claimant by a certified psychiatrist?
5. Did the hearing Commissioner err as a matter of fact in finding that Claimant's July 20, 2017 seizure episode was causally related to the original March 28, 2017 on the job accident?
6. Did the hearing Commissioner err as a matter of law in finding that Claimant's July 20, 2017 seizure episode was causally related to the original March 28, 2017 on the job accident?

Oral arguments were delivered by the parties on August 19, 2019. All proffered testimony has been taken. Such, together with all documentary evidence and legal briefs, has been delivered to the individual members of the Full Commission and has since been under study and consideration.

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1976, as amended), review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefor, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

Erin Farthing for the Defendants and Elizabeth Pentz for the Claimant appeared at the scheduled hearing to present oral arguments on behalf of the parties. Having heard oral arguments on behalf of the parties, considered their briefs and viewed the records as a whole, the Appellate Panel hereby **AFFIRMS IN PART AND REVERSES IN PART** the Decision and Order of the Single Commissioner. Specifically, the Appellate Panel affirms the Single Commissioner's findings that Claimant sustained a causally related

medical episode July 20, 2017, subsequent to an authorized injection. However, the Appellate Panel reverses the Single Commissioner findings that Claimant sustained an aggravation of his preexisting psychiatric and psychological condition. Such findings were based solely on medical evidence that the Single Commissioner found to be unconvincing. The finding that this evidence was unconvincing was not appealed. Therefore, the finding of compensability of Claimant's psychiatric and psychological condition is wholly inconsistent with the finding that the evidence in support of compensability is unconvincing. As such, the Appellate Panel enters the following Findings of Act, Rulings or Law and Order as its own:

APPELLATE PANEL FINDINGS OF FACT

The undersigned panel carefully reviewed all evidence submitted in this case and concludes that the employee, Timothy N. Clayton, sustained a causally related medical episode July 20, 2017, subsequent to an authorized injection. However, this panel finds that Claimant did not sustain an aggravation of his preexisting psychiatric and psychological conditions.

A record such as is necessary for decision was made of the proceedings in this matter, and after a careful consideration and study of all the evidence as well as a personal observation of the Claimant's demeanor, there is substantial and reliable probative evidence to support the following Findings of Fact:

1. That all parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Department of Transportation as the Employer and State Accident Fund as the Carrier.

2. “[T]his case was originally set on a 50, 51, and a 21, I think both parties agree that we’re going to handle the 50, 51 and 21 toda[y].” [Hrg. Tr. Pg. 4, ll.1 2-22]. The July 13, 2018, mediation failed. [Hrg. Tr. Pg. 4, ll. 23-25].

3. The testimony of Claimant, Timothy M. Clayton, was clear and honest. Mr. Clayton possesses a ninth (9th) grade education. [Hrg. Tr. Pg. 51, ln. 25-pg. 52, ln. 2]. His preexisting psychological issue dates to his childhood. Mr. Clayton cutoff all contact with father. [Hrg. Tr. Pg.127, ln. 24-pg. 128, ln. 9]. In the past, the Claimant experienced increased work to larger vehicles and increased pressure from job, but continued to work until July 17, 2017, with the Employer even during his treatment with James R. Kirkland, M.D., which were generally three (3) months apart, but sometimes sooner, especially after the March 28, 2017, on the job accident. [Hrg. Tr. Pg.53, ll. 5-15; Pg. 85, ll.1-9; Pg. 86, ll.6-18; Pg. 94, ll. 2-6, 19-21; CL APA#1, pgs. 1-5; DEF APA#1, pgs. 1-10]. Since receiving psychological counseling pursuant to Dr. Kirkland’s recommendation, the Claimant did not think his psychological condition was any better or worse; everything is about the same; treatment does not seem to be working. [Hrg. Tr. Pg. 98, ln. 20- pg. 100, ln.2]. The Claimant’s medications were increased. [C-1].

4. The Claimant continued treatment with Dr. Kirkland. [Hrg. Tr. Pg. 95, ln. 3-13; Pg. 95. ln. 25-pg. 96, ln. 13; Pg. 100, ll.2-5; CL. APA#1, Pgs. 5-8; 11-14].

5. Dr. Kirkland provided two (2) causation statements December 5, 2017 and May 15, 2018, that opined to a reasonable degree of medical certainty that the Claimant’s increase anxiety, panic attacks, and depression were most probably aggravated by his low back/right leg/right hip pain. [Cl. APA #1, Pgs. 9-10; 15-16]. The Defendants submitted Dana-Lowndes Rosen’s, M.D. March 16, 2018, independent psychiatric evaluation.

[DEF. APA#2]. In this report, Dr. Rosen references Mr. Crocker and Mr. Lang. [DEF. APA#2, Pg. 27].

6. The Claimant experienced previous seizure type symptoms including falling off a toilet and waking up on floor, but never received a medical diagnosis of a seizure disorder. [Hrg. Tr. Pg.76, ll. 5-12; Pg. 82, ln. 22- Pg. 84, ln.19; Pg. 87, ln. 14-pg. 88, ln.7; Pg. 102, ln.5-pg. 103, ln. 16]. The Claimant passed out on July 20, 2017, at the authorized treating doctor's office after receiving an injection. [Hrg. Tr. Pg. 57, ln. 17-pg. 60, ln. 1]. The medical record notes a "New onset non provoked seizure." [CL. APA#10, Pg. 116]. The Claimant does not know if ever had a medically diagnosed seizure. [Hrg. Tr. Pg.76, ll. 5-12; Pg. 82, ln. 22- Pg. 84, ln.19; Pg. 87, ln.14-pg. 88, ln.7; Pg. 102, ln.5-pg. 103, ln. 16]. The Claimant's EEG was normal. [CL. APA#15, Pg. 193]. Based on greater weight of evidence I would find the ambulance bill and emergency room bill are causally related at authorized doctor's appointment.

7. On April 9, 2018, Ivan E. Lamotta, M.D. opined to a reasonable degree of medical certainty that the Claimant's July 20, 2017, in office seizure was most probably a reaction to the injection administered which required medical treatment. [CL. APA#7, pg. 101-102]. On December 13, 2018, Dr. Lamotta testified in his deposition that the Claimant experienced symptoms after the July 20, 2017, post injection incident. [CL. Exb. C: Dep. Pgs. 12-13]. However, he was not a seizure expert and would defer to a neurologist for seizure opinion. [CL. Exb. C: Dep. Pg. 15, ll. 4-22]. Dr. Lamotta's opinion remained the same that the post injection symptoms were casually related to the injection. [CL. Exb. C: Dep. Pg. 21, ll.17-25; Pg. 22, ll.1-22; Pg. 24, ll. 7-20; Pg. 24, ll. 24-25; Pg. 25, ll. 1-15; Pg. 28, ll. 16-23].

8. The Defendants submitted an August 31, 2018, Vocational Evaluation which determined the Claimant could return to work in response to the Claimant's March 28, 2017, Vocational Evaluation which determined the Claimant could not return to work. [DEF. APA#3; CL. APA#16].

9. The Claimant underwent two (2) FCE evaluations September 14, 2017, CORA Physical Therapy and December 7, 2017, Columbia Rehabilitation Clinic. [CL. APA#11, 13].

10. None of the doctors used in the treatment submitted in the parties' APAs are to be used by either party as treating doctors. I do not find either James R. Kirkland, M.D., Scott Psychiatric Institute or Dyana-Lowndes Rosen, M.D., one-time IME, convincing based on the overall evidence. Mr. Clayton found Dr. Kirkland by internet referral. (DEF APA #1, Pg. 1).

11. The Claimant was awarded Social Security Disability Benefits.

12. The Claimant failed to meet his burden of proof that his preexisting anxiety, panic attacks, and depression were aggravated by his March 28, 2017, on the job accident as his only medical evidence supporting causation was two (2) causation statements by treating physician James R. Kirkland, M.D., who is found to be unconvincing (CL. APA#1, Pgs.9-10, 15-16).

13. I would find Mr. Clayton's S.C. Department of Transportation position to be in the medium to heavy duty category.

APPELLATE PANEL CONCLUSIONS OF LAW

1. Accordingly, as is provided in S.C. Code Ann. Section 42-17-40 of the South Carolina Code of Laws, 1976 (as amended), it is the determination of this

Commissioner that S.C. Code Ann. Section 42-1-160 defines "injury and personal injury"; and Section 42-15-60 governs "medical"; and, that Section 42-1-120 defines "disability".

2. S.C. Code Ann. §42-1-160 of the South Carolina Code of Laws, 1976 (as amended), states that "injury" and "personal injury" are defined as "injury by accident arising out of and in the course of employment". Furthermore, Section 42-1-160 of the South Carolina Code stipulates that, "[a]s used in this section, "medical evidence" means expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider." S.C. Code Ann. §42-1-160(g).

3. The testimony, medical evidence and Dr. Lamotta's opinion and subsequent deposition testimony satisfied the burden of proof that the Claimant's July 20, 2017, seizure episode was causally related to the original March 28, 2017, on the job accident. S.C. Code Ann. §42-1-160(D).

4. S.C. Code Ann. Section 42-1-160 of the South Carolina Code provides: "Stress, mental injuries, and mental illness alleged to have been aggravated by a work-related physical injury may not be found compensable unless the aggravation is:

- (1) admitted by the employer/carrier;
- (2) noted in a medical record of an authorized physician that, in the physician's opinion, the condition is at least in part causally related or connected to the injury or accident, whether or not the physician refers the employee for treatment of the condition;

- (3) found to be causally related or connected to the accident or injury after evaluation by an authorized psychologist or psychiatrist; or
- (4) noted in a medical record or report of the employee's physician as causally related or connected to the injury or accident.

Claimant failed to meet his burden of proof that his preexisting anxiety, panic attacks, and depression were aggravated by his March 28, 2017, on the job accident as the only medical evidence supporting causation has been found unconvincing.

ORDER


IT IS, THEREFORE, ORDERED the Order of the hearing Commissioner is AFFIRMED IN PART AND REVERSED IN PART.

AND IT IS SO ORDERED.

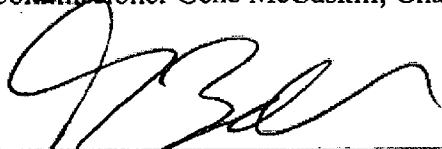
SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Commissioner R. Michael Campbell, II



Commissioner Gene McCaskill, Chair



Commissioner T. Scott Beck

Order Served via E-Mail:

Elizabeth Pentz, Attorney at Law McWhirter, Bellinger & Associates liz@mcwhirterlaw.com	
Erin Farthing, Attorney at Law State Accident Fund EFarthing@saf.sc.gov	

Order Served via USPS:

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 April 20, 2020