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SC Court of Appeals

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

WCC FILE NO.:1701642

PAUL MISURACA, Employee/Claimant,

Respondent

vs.

CHARLESTON COUNTY, Employer/Defendant

and

SC ASSOCIATION OF COUNTIES SIF,
Carrier/Defendant.

Appellants

Appellate Panel Review
Columbia, South Carolina
March 16, 2020

Appellate Panel Decision and Order filed
on August 3, 2020.

Catherine D. Meehan, Esquire, of Steinberg Law Firm, L.L.P., on behalf of
Claimant/Respondent.

William H. Lyon, Esquire, of Willson Jones Carter & Baxley, P.A., on behalf of
the Defendants/Appellant.

STATEMENT OF THE CASE

This claim was heard by Commissioner Avery B. Wilkerson, Jr. on July 25, 2019 in Goose Creek, South Carolina. On November 25, 2019, Commissioner Wilkerson made the following findings of facts and conclusions of law and issued the following order:

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. The Hearing Commissioner issued instructions to the parties for preparing a proposed Decision and Order on August 7, 2019.
2. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Paul Misuraca as Employee-Claimant and Charleston County as Employer and SC Association of Counties SIF as Carrier, Defendants.
3. That Claimant's average weekly wage is \$1,144.26, resulting in a compensation rate of \$762.88.
4. That Claimant was an employee of the above-named Employer on and prior to February 16, 2017, on which date he did sustain a compensable injury by accident to the left ankle arising out of and in the course of his employment, and proper notice was given to Employer.
5. That this is a WCC Form No. 21 hearing only. On the Form 21, Defendants requested a hearing only to determine permanent partial disability to the admitted left leg and address termination of temporary total disability benefits.
6. That a hearing was scheduled on June 24, 2019. Claimant objected to the hearing going forward as temporary total disability benefits were not current and had been terminated without authorization. An interim order was issued on June 27, 2019 ordering Defendants to become current with temporary total disability benefits and rescheduling the hearing for July 25, 2019. Defendants complied

with the Order and brought Claimant up to date on temporary total disability benefits at the time of the hearing on July 25, 2019.

7. That Claimant is presently receiving temporary total compensation and payments are up to date.

8. That Defendants requested the Hearing Commissioner to address whether Claimant sustained compensable injuries to the back and depression as alleged in Claimant's Form 50 and Claimant's Form 58-Pre-Hearing Brief. This was a Form 21 hearing only to address only the single member, the left leg and left ankle. See Russell v. Walmart Stores, Inc., Op. No. 27875 (S.C. April 3, 2019) and Tucker v. SCDOT, Op. No. 27906 (S.C. July 24, 2019).

9. That during the pre-hearing conference, Claimant withdrew his claim for benefits for the alleged and denied back and depression injuries without prejudice. Claimant also withdrew APA submissions #10 and #11 as well as Exhibit "G" Defendants objected to the Claimant amending his pre-hearing brief and withdrawing the alleged back and depression injuries. However, the hearing Commissioner allowed the hearing to go forward on Defendants Form 21 only, addressing only those issues pled on the Form 21, dated May 1, 2019, and the Defendants' Form 58, Prehearing Brief – determination of permanent partial disability to the admitted left leg and left ankle only and termination of temporary total disability benefits.

10. That Claimant is a 35 year employee of Charleston County. He Served in the military and spent 6 years in the Army and 16 years in the Navy. He served in Iraq. He is honest.

11. That Claimant underwent two surgeries on his left ankle and has retained hardware in the left ankle and is entitled to lifetime repair/replacement of the retained left ankle hardware.

12. That the authorized treating physician, Dr. Christopher Kestner, placed Claimant at maximum medical improvement on February 8, 2019. By WCC Form No. 14B, dated March 30, 2019, he assigned a 5% impairment to the left leg/2% whole person impairment. Dr. Kestner released Claimant to work with no restrictions.

13. That Claimant was seen by Dr. Bright McConnell on June 3, 2019 for an independent medical evaluation. Dr. McConnell also determined Claimant had reached maximum medical improvement and assigned a 10% impairment to the left leg/4% whole person.

14. That Claimant reached maximum medical improvement for the left leg and left ankle on February 8, 2019, as indicated by the medical reports in the records and stipulated by counsel.

15. That based on the greater weight of the evidence all ratings were taken into consideration. They don't indicate the true disability. Claimant's testimony represents a clear view of his actual disability. Claimant has limitations walking, running, moving, and daily limitations.

16. That Claimant is entitled to 48.75 weeks of permanent partial disability compensation at the rate of \$762.88, representing twenty five percent (25%) permanent partial disability to the left leg, as a result of the February 16, 2017 workplace accident.

17. Defendants are entitled to a credit for the overpayment of temporary total compensation since July 3, 2019, the date that temporary total compensation was brought current and reinstated, against the award for permanent partial disability ordered herein.

18. That there is no evidence in the record that any additional medical treatment would tend to lessen the period of Claimant's disability. Claimant has retained hardware in the left ankle and is entitled to lifetime repair/replacement of the surgical hardware.

CONCLUSIONS OF LAW

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.

2. Under § 42-1-160, Claimant did sustain an injury to his left ankle by accident arising out of and in the course and scope of his employment on February 16, 2017.

3. Under §§ 42-9-10 and 42-1-120, Claimant was entitled to receive temporary total disability benefits.

4. Under § 42-9-260, the Defendants terminated temporary total disability benefits without authorization in February 2019; however,

Defendants are not assessed as penalty for improperly terminating benefits as benefits were brought current.

5. Under § 42-15-60, Claimant was entitled to medical, surgical, hospital and other authorized treatment until February 8, 2019, the date on which Claimant reached maximum medical improvement for his left ankle and left leg, but not thereafter, there being no evidence that any additional medical treatment would tend to lessen the period of his disability.

6. Under § 42-15-60, Claimant is entitled to lifetime repair/replacement of the surgical hardware in his left ankle.

7. Under § 42-9-30, Claimant has sustained twenty five (25%) permanent partial disability to the left leg. From such award, Defendants are entitled to a credit for the overpayment of temporary total compensation since July 3, 2019.

ORDER/AWARD

IT IS HEREBY ORDERED that Claimant reached maximum medical improvement for his left leg on February 8, 2019 and Defendants are entitled to stop payment of temporary total benefits;

IT IS FURTHER ORDERED that as a result of Claimant's accidental injury occurring on February 16, 2017, he has sustained twenty five (25%) permanent partial disability to the left ankle, for which he is entitled to 48.75 weeks of compensation, at the compensation rate of \$762.88 per week;

IT IS FURTHER ORDERED that Defendants are entitled to a credit or offset for temporary total compensation paid since July 3, 2019;

IT IS FURTHER ORDERED that Claimant reached maximum medical improvement for the left leg on February 8, 2019, and as such Defendants are not liable for any additional medical, surgical, hospital or other medical treatment for Claimant's left leg after said date with the exception of the retained surgical hardware in Claimant's left ankle for which Defendants are responsible for lifetime maintenance/replacement;

No hearing costs are assessed in this instance.

IT IS SO ORDERED.

The Defendants/Appellants filed a WCC Form No. 30, Request for Commission Review, on December 6, 2019 asserting nine (9) grounds for review. The Defendants/Appellants asserted the Hearing Commissioner erred as a matter of law in allowing Claimant/Respondent to amend his Form 58 Pre-Hearing Brief at the time of the hearing and in permitting Claimant/Respondent to withdraw his claim for benefits with regard to the alleged back and depression injuries at the time of the hearing. The Defendants/Appellants contended the Hearing Commissioner erred as a matter of fact and law in finding the only issues for determination at the hearing were termination of temporary total disability benefits and permanent partial disability to the left ankle. The Defendants/Appellants contended the Hearing Commissioner erred as a matter of law and fact by limiting the scope of cross-examination to Claimant's left ankle injury thereby violating Defendants' due process rights. The Defendants/Appellants asserted the Hearing Commissioner erred as a matter of law and fact in finding Claimant sustained twenty-five percent (25%) permanent partial disability to the left leg and in finding that Defendants were only entitled to a credit for temporary total disability benefits paid since July 3, 2019 as opposed to the date of maximum medical improvement on February 8, 2019. Finally, the Defendants/Appellants asserted the Hearing Commissioner erred as a matter of law and fact by issue a decision and directives for a proposed order without reviewing or considering Defendants' APA and evidentiary submissions.

In response to the Defendants/Appellants' WCC Form No. 30, the Claimant/Respondent contended the Hearing Commissioner correctly allowed the Claimant/Respondent to defer litigation of the additional denied body parts, the back and depression/psychological overlay, because the Defendants did not amend their WCC Form No. 21 or WCC Form No. 58 to request a determination of compensability for the denied body parts. The Claimant/Respondent also contended the Hearing Commissioner correctly found the sole issue for determination at the hearing was the admitted left leg injury because the Defendants failed to plead any additional issues on their WCC Form No. 21 or WCC Form No. 58. The Claimant/Respondent asserted the Hearing Commissioner correctly found that the Defendants/Appellants were only entitled to a credit for temporary total disability benefits back to July 3, 2019 because the Defendants unlawfully terminated Claimant's temporary total disability benefits without Commission approval on February 19, 2019 and they were not current on temporary disability payments until July 3, 2019, after they filed their WCC Form No. 21 and after the first hearing was held on July 24, 2019. Finally, the Claimant/Respondent asserted the Hearing Commissioner correctly awarded 25% permanent partial disability to the left leg based on the substantial evidence in the record.

In an application for review pursuant to S.C. Code Ann. § 42-17-50, the Appellate Panel shall review the Award, and, if good grounds be shown therefore, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award by making its own Findings of Fact

and its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

After careful review of the Request for Review in the instant case, including review of the entire record and upon consideration of the memoranda and arguments of the parties, the Appellate Panel has determined all of the Hearing Commissioner's Findings of Facts and Conclusions of Law are correct as stated and fully affirms the Hearing Commissioner's Order.

Accordingly, the Hearing Commissioner's Findings of Fact and Conclusions of Law are adopted in their entirety as set forth below and the Hearing Commissioner's Order of November 25, 2019 is sustained in its entirety.

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. The Hearing Commissioner issued instructions to the parties for preparing a proposed Decision and Order on August 7, 2019.
2. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Paul Misuraca as Employee-Claimant and Charleston County as Employer and SC Association of Counties SIF as Carrier, Defendants.
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7. That Claimant is presently receiving temporary total compensation and payments are up to date.
8. That Defendants requested the Hearing Commissioner to address whether Claimant sustained compensable injuries to the back and depression as alleged in Claimant's Form 50 and Claimant's Form 58-Pre-Hearing Brief. This was a Form 21 hearing only to address only the single member, the left leg and left ankle. See Russell v. Walmart Stores, Inc., Op. No. 27875 (S.C. April 3, 2019) and Tucker v. SCDOT, Op. No. 27906 (S.C. July 24, 2019).

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14. That Claimant reached maximum medical improvement for the left leg and left ankle on February 8, 2019, as indicated by the medical reports in the records and stipulated by counsel.
15. That based on the greater weight of the evidence all ratings were taken into consideration. They don't indicate the true disability. Claimant's testimony represents a clear view of his actual disability. Claimant has limitations walking, running, moving, and daily limitations.
16. That Claimant is entitled to 48.75 weeks of permanent partial disability compensation at the rate of \$762.88, representing twenty five percent (25%) permanent partial disability to the left leg, as a result of the February 16, 2017 workplace accident.
17. Defendants are entitled to a credit for the overpayment of temporary total compensation since July 3, 2019, the date that temporary total compensation was brought current and reinstated, against the award for permanent partial disability ordered herein.
18. That there is no evidence in the record that any additional medical treatment would tend to lessen the period of Claimant's disability. Claimant has

retained hardware in the left ankle and is entitled to lifetime repair/replacement of the surgical hardware.

CONCLUSIONS OF LAW

Accordingly, as provided in § 42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.
2. Under § 42-1-160, Claimant did sustain an injury to his left ankle by accident arising out of and in the course and scope of his employment on February 16, 2017.
3. Under §§ 42-9-10 and 42-1-120, Claimant was entitled to receive temporary total disability benefits.
4. Under § 42-9-260, the Defendants terminated temporary total disability benefits without authorization in February 2019; however, Defendants are not assessed as penalty for improperly terminating benefits as benefits were brought current.
5. Under § 42-15-60, Claimant was entitled to medical, surgical, hospital and other authorized treatment until February 8, 2019, the date on which Claimant reached maximum medical improvement for his left ankle and left leg, but not thereafter, there being no evidence that any additional medical treatment would tend to lessen the period of his disability.

6. Under § 42-15-60, Claimant is entitled to lifetime repair/replacement of the surgical hardware in his left ankle.
7. Under § 42-9-30, Claimant has sustained twenty five (25%) permanent partial disability to the left leg. From such award, Defendants are entitled to a credit for the overpayment of temporary total compensation since July 3, 2019.

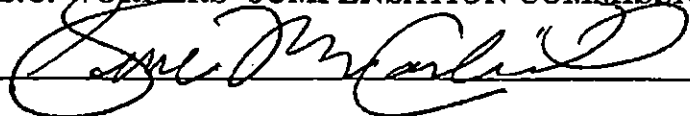
ORDER

Based on the above Findings of Fact and Conclusions of Law, it is,

ORDERED the Hearing Commissioner's Order filed in the above-captioned matter on November 25, 2019 is hereby affirmed in its entirety by the Appellate Panel and the same shall constitute the Decision and Order of the Appellate Panel.

AND IT IS SO ORDERED!

S.C. WORKERS' COMPENSATION COMMISSION



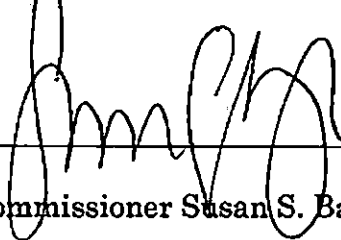
Commissioner Gene McCaskill

FULL AFFIRMATION

CONCUR:



Commissioner R. Michael Campbell, II



Commissioner Susan S. Barden

Columbia, South Carolina

Order Served via E-Mail:

<p>William H. Lyon Wilson Jones Carter & Baxley Whlyon@wjlaw.net</p>	<p>Catherine D. Meehan Steinberg Law Firm cmeehan@steinberglawfirm.com</p> <p>David T. Pearlman Steinberg Law Firm dpearlman@steinberglawfirm.com</p>
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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 August 3, 2020