

DECISION AND ORDER

OF THE

**SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S
APPELLATE PANEL**

W.C.C. FILE NO.: 1822255

DAVID CASEY,

CLAIMANT/APPELLANT,

-vs-

Aptim Federal Services,

EMPLOYER,

-and-

XL Specialty Insurance Company,

**CARRIER,
DEFENDANTS/RESPONDENTS.**

RECEIVED

Nov 04 2020

SC Court of Appeals

Appellate Panel Review held in Columbia,
South Carolina on March 16, 2020 per notices timely
and properly served on all parties in interest.

Appellate Panel Decision and Order filed

June 29, 2020

APPEARANCES:

Richard C. Alexander, Esq., Shelly Leeke Law
Firm, North Charleston, South Carolina,
appearing on behalf of the
Claimant/Appellant.

Daniel B. Eller, Esquire of Eller, Tonnsen, &
Bach, of Greenville, South Carolina.,
appearing on behalf of the
Defendants/Respondents.

STATEMENT OF THE CASE

The parties were heard by Commissioner R. Michael Campbell, II on July 1, 2019. The purpose of this hearing was to determine the issues as set forth in the Forms 50 and 51, specifically to determine compensability of injuries, to determine entitlement to past, present and future total disability benefits, and to determine entitlement to future medical care. This is a denied claim with an alleged injury by accident to the Claimant's back that occurred on December 10, 2018, while under the employment of APTIM Federal Services. Claimant received causally related medical treatment at the Bayview Urgent Care, Midlands Ortho, Palmetto Imaging, and Progressive PT.

Claimant contended he injured his back on December 10, 2018, when a car beside him started backing up and cut their wheel too quickly and hit his door and pinned him between the door and the door frame of his vehicle. Claimant also contended he is entitled to past, present, and ongoing medical care and past, present, and future temporary benefits. He sought a finding of compensability of his back and a finding of entitlement to future medical treatment as well as past temporary benefits. Defendants denied compensability of the alleged injuries and therefore entitlement to any temporary benefits or medical care.

On December 12, 2019, Commissioner Campbell issued the following:

FINDINGS OF FACT

The following Findings of Fact are based on the stipulations of the parties, written and evidentiary submissions, and testimony rendered at the hearing:

1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. The Claimant's average weekly wage is \$2,372.54 yielding a corresponding maximum compensation rate of \$838.21.

3. Claimant sustained a compensable injury to the back arising out of and in the course and scope of his employment when he was pinned between two vehicles. (Claimant's APA 1, pp. 1-6).
4. Claimant was transported via EMS and underwent initial treatment with Chesapeake Regional Hospital. He then followed up with Bayview Urgent Care, VA Hospital, Lexington Family Medical, and Midlands Orthopaedics. (Claimant's APAs 1-4; Defendants' APAs 5-7).
5. On March 14, 2019, Dr. Ivan E. LaMatta of Midlands Orthopaedics and Neurosurgery evaluated Claimant and opined: "From the surgical standpoint, the patient has reached maximum medical improvement. There is no additional therapy, injections, or surgery that can be recommended for the patient. I see no contradictions for the patient to do limited light duty to medium duty work lifting up to 40-45 pounds." (Claimant's APA 4, p. 19).
6. In his May 9, 2019 follow-up appointment, Dr. LaMatta opined: "My recommendation is for the patient to perform core exercises and stretching on a daily basis as well as incorporating a yoga program along with weight loss. More than likely, with time, the patient's condition should continue to improve. I really see no contradictions for the patient to return to regular duty. The patient has reached maximum medical improvement. At this time, I see loss of function for his lumbar spine and therefore no permanent impairment. There is no need for future medical care. The patient will follow up on as-needed basis only if his contortion were to significantly deteriorate." (Claimant's APA 4, p. 16).

7. On July 1, 2019, at the hearing before the undersigned Commissioner, Claimant testified regarding his admitted work-related injury, the medical treatment he has received, his work status, the time he was out of work due to his restrictions, the issues he continues to have, and his desire for second opinion (see "Evidence of the Case" above).
8. Claimant is entitled to reimbursement for all past out-of-pocket causally-related treatment (i.e., copays for primary care visits) and Defendants are required to pay for all other past causally-related treatment (i.e., EMS, ER, etc.).
9. Claimant is entitled to a second opinion by a spine specialist of Defendants' choosing and all causally-related treatment, if recommended, by said spine specialist.
10. The parties are to designate a physician within 30 days of the date of this Order or contact the Commissioner to have him designate a physician.
11. Claimant has not provided a physician note writing him out of work, and his work restrictions were accommodated by Defendants. As such, Claimant failed to meet his burden of proving he is entitled to back temporary total disability benefits.
12. Claimant is not at MMI.
13. A determination of permanency is premature at this time.
14. All other issues are held in abeyance.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Workers' Compensation Act, the undersigned Commissioner makes the following conclusions of law:

1. Under S.C. Code Ann. § 42-1-130, the Claimant was a covered Employee at the time in question and under § 42-1-140, the Employer was a covered Employer.
2. Under S.C. Code Ann. § 42-1-160, the Claimant sustained a compensable injury to his back arising out of and in the course of his employment on December 10, 2018.
3. Under S.C. Code Ann. § 42-1-40, the Claimant's average weekly wage of \$2,372.54 yields a corresponding maximum compensation rate of \$838.21.
4. Under *Lee v. Bondex, Inc.*, 406 S.C. 97, 102, 749 S.E.2d 155, 157 (Ct. App. 2013), Claimant bears the burden of proving entitlement to temporary disability compensation. To do so, he must prove that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light-duty employment. *Id.* at 102-03, 749 S.E.2d at 157. In this case, Claimant has failed to meet his burden of proving he is entitled to TTD for any alleged period.
5. Under S.C. Code Ann. § 42-15-60, the Claimant has not reached maximum medical improvement and requires additional treatment for his back.
6. Under S.C. Code Ann. § 42-15-60, the Defendants shall procure a treating physician for the Claimant's back.
7. Under S.C. Code Ann. § 42-17-30, the Commission may appoint a doctor.
8. Under S.C. Code Ann. § 42-15-60, the Defendants shall reimburse the Claimant for all out-of-pocket causally-related medical expenses, including but not limited to office visits, surgery, medications, co-pays, and mileage, incurred as a result of the compensable back injury.

9. Under S.C. Code Ann. §§ 42-9-10, 42-9-20, and 42-9-30, a determination of the permanency of the Claimant's injuries is premature at this time.

ORDER

IT IS THEREFORE, HEREBY ORDERED that the Claimant has not reached maximum medical improvement for his back injuries;

IT IS FURTHER ORDERED that a determination of permanency is premature at this time;

IT IS FURTHER ORDERED that Claimant's request for a second opinion is hereby granted;

IT IS FURTHER ORDERED that Defendants are to authorize a treating physician and the Claimant is entitled to all causally related medical treatment as recommended by said treating physician;

IT IS FURTHER ORDERED that Defendants shall reimburse the Claimant for all out-of-pocket causally related medical expenses, including but not limited to office visits, surgery, medications, co-pays, and mileage, incurred as a result of the compensable right inguinal hernia, left leg, and left foot injuries;

IT IS FURTHER ORDERED that Claimant's request for an award of TTD is denied;

IT IS FURTHER ORDERED that the parties have 30 days from the date of this Order to designate a physician. Should the parties fail to reach a consensus on a physician within 30 days, they shall notify the undersigned Commissioner's office that they are at an impasse and he will designate a physician;

IT IS FURTHER ORDERED that all other issues are held in abeyance at this time.

IT IS SO ORDERED!

Within the statutory period, Claimant filed an Application for Review in the case, setting forth their reasons, copies of which were furnished to all interested parties. All parties appeared at oral arguments on March 16, 2020, and presented their case on appeal.

All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration.

By appeal, it is respectfully submitted by the Claimant that the Hearing Commissioner erred in finding as fact and concluding as a matter of law in the following particulars listed below:

1. *Did the Hearing Commissioner err as a matter of fact and matter of law by ignoring and/or excluding specific hearing testimony that supports Claimant's claim?*
2. *Did the Hearing Commissioner err as a matter of law and fact in Finding of Fact 11 by finding the greater weight of the evidence supported Claimant not being entitled to past temporary total disability benefits?*
3. *Did the Hearing Commissioner err as a matter of law by ruling Claimant did not meet his burden under S.C. Code Ann. § 42-9-10 to warrant payment of TTD while Defendants kept him out of work for a work-related injury?*

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code 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 Conclusions of Law consistent or inconsistent with those of the Hearing Commissioner.

The Full Commission is empowered to make its own findings of fact and to reach its own conclusions of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E.2d 162 (1992). In this case, the preponderance of evidence in the record supports a reversal of the Hearing Commissioner's findings/conclusions regarding entitlement to temporary total disability benefits from January 18, 2019 until May 13, 2019 when he was first able to return to work.

In determining entitlement to TTD, Claimant bears the burden of proving entitlement to TTD. For TTD, "a claimant must prove only that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light-duty employment. . . . [T]he claimant satisfies his burden by proving work restrictions that prevent him from performing his regular job and the unavailability of light-duty employment through the same employer." *Lee v. Bondex, Inc.* 406 S.C. 97, 749 S.E.2d 155 (2013).

Claimant testified (discussed in detail below) that after returning from Virginia he spent the next few weeks doing as little as possible hoping to get better. Unfortunately, he went back to work in the second week of January in a support position, and his problems persisted. After returning from this assignment, Claimant sought treatment at the Veterans Administration on January 18, 2019 (APA 2). At that visit, he was advised not to return to work until medically cleared and noted to have a work restriction of lifting no more than ten (10) pounds (Id. at P. 7). On March 14, 2019, Dr. LaMotta evaluated Appellant and reduced his restrictions to lifting no more than forty to forty-five (40-45) pounds (Id. at P. 19). Dr. LaMotta saw Claimant again on May 9, 2019, and he released Claimant to full duty with no restrictions.

Claimant testified on his own behalf at the hearing. Claimant works for Defendant Employer as an unexploded ordnance technician (hereinafter "UXO"), which involves working on active ranges or flood sites doing metal detection for unexploded ordnance and then, if necessary, disposing of any ordnance (Single Commissioner Hr. Tr. P. 8, l. 20 : P. 9, l. 17). He discussed the high physical demands of his work, which include extensive digging and lifting items as heavy as 80 pounds (Id. at P. 11, ll. 11-17). He further testified that to perform his normal UXO work when he first started working for Defendant Employer, he was required to pass an OSHA physical and be able to lift a minimum of 40-45 pounds. That amount was increased to 50 pounds at some point after he went out of work from this accident. (Id. at P. 13, l. 12 : P. 14, l. 3).

On December 10, 2018, Claimant was putting something in the back seat of his truck when the car beside him started backing up, and the driver cut his wheel too quickly, hitting Mr. Casey's door and pinning him between the door and the door frame. Claimant testified that he went to the emergency room that day and an urgent care in Virginia the next day, at the direction of his employer. (Id. at P. 14, ll. 7-15). He finished his work on December 13, 2018 and returned home. Medical

records note that the work he was doing in December was in a supervisory role with no rigorous physical activity required (APA 3, P. 13). He testified that the urgent care released him to full duty since they were not going to be seeing him again because his current assignment in Virginia was ending in a couple days, not because he was not injured. Despite repeated and repetitive cross examination about being released to full duty, Claimant testified that the "full duty" release clearly said not to do anything that would aggravate his injury. (Id. at P. 50, ll. 17-24).

While under these restrictions, Claimant testified that he was given another light duty construction support assignment by Defendant Employer that started on January 7, 2019 and ran for approximately a week until January 15, 2019 (Id. at P. 17, ll. 6-22). It was during this return to work that he really started to notice the pain in his back, and this was when he started seeking follow up care. He testified that he was advised by XL Specialty Insurance Company (hereinafter "Defendant Carrier") to seek treatment with his primary care physician and get notes so Defendant Carrier could address future care, which is exactly what he did. For the next six weeks or so, he testified that he was strung along by Defendant Carrier until he finally got an attorney. He testified that his case was finally transferred to South Carolina when he obtained an attorney, and he was authorized to see Dr. LaMotta in March 2019. At this point, he had already completed a round of physical therapy that had been ordered by his primary care physician, and he was advised to continue those exercises he learned in physical therapy (Id. at P. 19, l. 6 : P. 22, l. 18). Claimant testified that he returned to Dr. LaMotta on May 9, 2019 wherein he requested to be released to full duty because he could not continue to be held out of work without pay (Id. at P. 23, ll. 6-20).

Claimant testified that from the time he left his assignment where he was injured in December until he was released to full duty, he worked approximately one week in construction support in January, four or five days in March, and three or four days in April. He testified that all the jobs he

was able to work while under restrictions were construction support. (Id. at P. 11, l. 3 : P. 12, l. 8; P. 24, l. 19 : P. 25, l. 15). Claimant testified that he missed out on several job opportunities with Defendant Employer as a UXO because he was under restrictions from his work injury that precluded him from being assigned to those jobs. He testified about a job that was available in December in Quantico, Virginia as well as other opportunities in Dam Neck, Virginia and Adak, Alaska. (Id. at P. 15, l. 18 : P. 17, l. 15). Claimant reiterated later in testimony about his restrictions precluding him from working several assignments that came up while he was under restrictions until he was released and returned to work in May 2019 (Id. at P. 53, l. 23 : P. 56, l. 8).

The Single Commissioner erred by finding Claimant's work restrictions were accommodated by Defendants and that Claimant did not meet his burden proving entitlement to TTD. While the Single Commissioner's Finding of Fact 11 is accurate regarding Appellant not being written out of work completely, it is inaccurate that Defendants accommodated his restrictions continuously throughout the period he was under restrictions. Claimant met his burden of proof establishing a compensable injury with work-related restrictions that Defendants did not continuously accommodate from January 18, 2019 through May 12, 2019.

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. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act.
2. The Claimant's average weekly wage is \$2,372.54 yielding a corresponding maximum compensation rate of \$838.21.

3. Claimant sustained a compensable injury to the back arising out of and in the course and scope of his employment when he was pinned between two vehicles. (Claimant's APA 1, pp. 1-6).
4. Claimant was transported via EMS and underwent initial treatment with Chesapeake Regional Hospital. He then followed up with Bayview Urgent Care, VA Hospital, Lexington Family Medical, and Midlands Orthopaedics. (Claimant's APAs 1-4; Defendants' APAs 5-7).
5. On March 14, 2019, Dr. Ivan E. LaMatta of Midlands Orthopaedics and Neurosurgery evaluated Claimant and opined: "From the surgical standpoint, the patient has reached maximum medical improvement. There is no additional therapy, injections, or surgery that can be recommended for the patient. I see no contradictions for the patient to do limited light duty to medium duty work lifting up to 40-45 pounds." (Claimant's APA 4, p. 19).
6. In his May 9, 2019 follow-up appointment, Dr. LaMatta opined: "My recommendation is for the patient to perform core exercises and stretching on a daily basis as well as incorporating a yoga program along with weight loss. More than likely, with time, the patient's condition should continue to improve. I really see no contradictions for the patient to return to regular duty. The patient has reached maximum medical improvement. At this time, I see no loss of function for his lumbar spine and therefore no permanent impairment. There is no need for future medical care. The patient will follow up on as-needed basis only if his contortion were to significantly deteriorate." (Claimant's APA 4, p. 16).

7. On July 1, 2019, at the hearing before the undersigned Commissioner, Claimant testified regarding his admitted work-related injury, the medical treatment he has received, his work status, the time he was out of work due to his restrictions, the issues he continues to have, and his desire for second opinion (see "Evidence of the Case" above).
8. Claimant is entitled to reimbursement for all past out-of-pocket causally-related treatment (i.e., copays for primary care visits) and Defendants are required to pay for all other past causally-related treatment (i.e., EMS, ER, etc.).
9. Claimant is entitled to a second opinion by a spine specialist of Defendants' choosing and all causally-related treatment, if recommended, by said spine specialist.
10. The parties are to designate a physician within 30 days of the date of this Order or contact the Commissioner to have him designate a physician.
11. Claimant has provided a physician note with work restrictions that Defendants/Respondents were unable to continuously accommodate from January 18, 2019 through May 12, 2019 (less the ten days he was accommodated with light duty work). As such, Claimant met his burden of proving he is entitled to back temporary total disability benefits during this period.
12. Claimant is not at MMI.
13. A determination of permanency is premature at this time.
14. All other issues are held in abeyance.

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 S.C. Code Ann. § 42-1-130, the Claimant was a covered Employee at the time in question and under § 42-1-140, the Employer was a covered Employer.
2. Under S.C. Code Ann. § 42-1-160, the Claimant sustained a compensable injury to his back arising out of and in the course of his employment on December 10, 2018.
3. Under S.C. Code Ann. § 42-1-40, the Claimant's average weekly wage of \$2,372.54 yields a corresponding maximum compensation rate of \$838.21.
4. Under *Lee v. Bondex, Inc.*, 406 S.C. 97, 102, 749 S.E.2d 155, 157 (Ct. App. 2013), Claimant bears the burden of proving entitlement to temporary disability compensation. To do so, he must prove that work restrictions prevent him from performing the job he had before the injury, and that his current employer has not offered him light-duty employment. *Id.* at 102-03, 749 S.E.2d at 157. In this case, Claimant met his burden of proving he is entitled to TTD from January 18, 2019 through May 12, 2019 (less the ten days he was accommodated with light duty work).
5. Under S.C. Code Ann. § 42-15-60, the Claimant has not reached maximum medical improvement and requires additional treatment for his back.
6. Under S.C. Code Ann. § 42-15-60, the Defendants shall procure a treating physician for the Claimant's back.
7. Under S.C. Code Ann. § 42-17-30, the Commission may appoint a doctor.
8. Under S.C. Code Ann. § 42-15-60, the Defendants shall reimburse the Claimant for all out-of-pocket causally-related medical expenses, including but not limited to office visits, surgery, medications, co-pays, and mileage, incurred as a result of the compensable back injury.

9. Under S.C. Code Ann. §§ 42-9-10, 42-9-20, and 42-9-30, a determination of the permanency of the Claimant's injuries is premature at this time.

ORDER

IT IS THEREFORE, HEREBY ORDERED that the Claimant has not reached maximum medical improvement for his back injuries;

IT IS FURTHER ORDERED that a determination of permanency is premature at this time;

IT IS FURTHER ORDERED that Claimant's request for a second opinion is hereby granted;

IT IS FURTHER ORDERED that Defendants are to authorize a treating physician and the Claimant is entitled to all causally related medical treatment as recommended by said treating physician;

IT IS FURTHER ORDERED that Defendants shall reimburse the Claimant for all out-of-pocket causally related medical expenses, including but not limited to office visits, surgery, medications, co-pays, and mileage, incurred as a result of the compensable back injury;

IT IS FURTHER ORDERED that Claimant's request for an award of TTD is granted for the dates listed herein;

IT IS FURTHER ORDERED that the parties have 30 days from the date of this Order to designate a physician. Should the parties fail to reach a consensus on a physician within 30 days, they shall notify the undersigned Commissioner's office that they are at an impasse and he will designate a physician;

IT IS FURTHER ORDERED that all other issues are held in abeyance at this time.

IT IS SO ORDERED!

S.C. WORKERS' COMPENSATION COMMISSION

Melody L. James
Melody L. James, Commissioner

Aisha Taylor
Aisha Taylor, Commissioner

Avery Wilkerson
Avery Wilkerson, Commissioner
B JR.

DISSENTING

*affirmal
Commission
MSCA Kill
FN
full.*

Order Served via E-Mail:

Richard Charles Alexander Shelly Leeke Law Firm chip@leekelaw.com	Daniel B. Eller Eller Tonnsen Bach deller@etblawfirm.com
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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 June 29, 2020