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APPELLATE PANEL DECISION AND ORDER **SC Court of Appeals**

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1704918

Raqual Cunningham

EMPLOYEE,
CLAIMANT/APPELLANT

VS.

BMW Manufacturing Corporation, LLC

EMPLOYER,

AND

Hartford Accident & Indemnity Company c/o
Sedgwick Claims Management Services, Inc.

CARRIER,
DEFENDANTS/RESPONDENTS,

Appellate Panel Review on the Record held in Columbia, South
Carolina, on July 20, 2020 per notices timely
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

November , 2020

March 10, 2021

Claimant/Appellant is unrepresented or Pro Se

Defendants/Respondents represented by Vernon F. Dunbar

last

STATEMENT OF THE CASE

Raqucal D. Cunningham, Claimant/Appellant, is a 46 year old female who began working as a production associate for BMW Manufacturing Corporation, LLC, the Employer/Respondent, on September 21, 2015. On May 2, 2017, Appellant injured her left ankle while climbing a flight of stairs during a bathroom break. Appellant was immediately treated at Industrial Health Services (IHS). The medical providers at IHS referred Appellant to Greer Memorial Emergency Room for further evaluation and X-ray studies. Physicians at Greer Memorial Emergency Room diagnosed Appellant as having suffered a lateral ankle sprain. Appellant was fitted with an air cast.

Because conservative medical modalities proved to be ineffective, Appellant began treating with Dr. Michael Tollison, an orthopedic surgeon. Dr. Tollison performed a left ankle reconstruction surgery which involved surgical procedures on the peroneal tendon and lateral left ankle ligaments. On August 6, 2018, Dr. Tollison released Appellant to return to work without restrictions and he assigned her a five percent (5%) medical impairment rating to the left lower extremity. Appellant contested Dr. Tollison's conclusion she had attained maximum medical improvement.

Dr. Stephan Pill, an orthopedic surgeon with Steadman Hawkins Clinic, began treating Appellant. Dr. Pill opined Appellant would benefit from repeat arthroscopic surgery in order to remove scar tissue, which in turn would potentially lessen her pain and discomfort and improve her ability to walk, stand and lift.

On August 9, 2019, Dr. Pill performed surgery on Appellant's left ankle, despite Appellant's effort to postpone the surgery to a later date. After undergoing physical therapy, Dr. Pill opined in a Form 14B dated November 5, 2019, Appellant had attained maximum medical

improvement as of October 24, 2019. Dr. Pill assigned Appellant a ten percent (10%) medical impairment rating to the left leg.

The Honorable R. Michael Campbell, II, scheduled a Form 21 or Stop Payment Hearing, which was held on March 5, 2020. Commissioner Campbell promulgated an order on April 23, 2020, finding Appellant had attained maximum medical improvement as of October 24, 2019. Commissioner Campbell awarded Respondents credit for the overpayment of temporary total disability compensation benefits beginning from January 10, 2020 or the date the Form 21 was filed. Finally, Commissioner Campbell awarded Claimant 25% disability to the left leg or 48.75 weeks of compensation benefits.

Appellant filed a Form 30 appealing Commissioner Campbell's Decision and Order on or about April 27, 2020.

GROUND OF APPEAL

Appellant appeals the Hearing Commissioner's 25% disability award to the left leg as insufficient and inadequate. Appellant argues the Hearing Commissioner should have awarded her greater disability and/or wage loss.

HEARING COMMISSIONER FINDINGS OF FACTS AND CONCLUSIONS OF LAW

1. Claimant sustained an admitted work related injury to her left ankle arising out of and during the course and scope of her employment duties as a production associate with BMW Manufacturing Corporation on May 2, 2017. Specifically, Claimant was walking up a flight of stairs when she lost her balance and fell.
2. Claimant initially received medical treatment from Industrial Health Services (IHS). In particular, Dr. Bradley Collins, a physician with IHS, prescribed conservative medical

modalities to treat Claimant's symptoms of left ankle pain and swelling. X-rays were ordered and Claimant was prescribed Advil for ankle pain. Claimant was also directed to apply ice. (APA p. 6)

3. Claimant was initially diagnosed with a left ankle sprain as a result of the X-rays being deemed negative for any fractures or dislocation. (APA p. 17)
4. Claimant expressed continuous complaints of left ankle pain and swelling. Despite elevating the left leg, applying ice, taking prescriptive medications and being authorized to remain out of work and engaging in therapeutic exercises, Claimant's condition remained unchanged. To this end, Drs. Ken Hommel and Bradley Collins, physicians at IHS, referred Claimant to Dr. Michael Tollison, an orthopedic surgeon with Piedmont Orthopedic Associates.
5. Dr. Tollison first treated Claimant on September 19, 2017. Claimant complained of dull aching throbbing ankle pain, which was aggravated with any slight period of standing and walking. Claimant reported that rest greatly alleviated her symptoms. Dr. Tollison recommended a MRI upon suspicion of tendinosis and peritenonitis of the peroneus brevis tendon. (APA pp. 40-41).
6. In a report dated November 5, 2018, Dr. Tollison noted Claimant had seen Dr. James Behr who had recommended injections and use of the medication, Voltaren. Claimant declined the recommended pain management treatment. However, Claimant did complete formal physical therapy. (APA pp. 43-44).
7. Because conservative medical modalities did not improve Claimant's condition, Dr. Tollison performed surgery on November 15, 2018, in which he repaired a left peroneal tendon tear and stabilized Claimant's lateral ankle ligament. (APA p. 45)

8. On a Form 14B dated January 15, 2019, Dr. Tollison opined to a reasonable degree of medical certainty that Claimant had attained maximum medical improvement as of December 28, 2018. Dr. Tollison assigned Claimant a five (5%) percent medical impairment to the left lower extremity. Dr. Tollison assigned permanent physical limitations on medium waist to floor lifting/lower end of heavy for front carrying. Dr. Tollison concluded no additional medical treatment was warranted. (APA p. 51)
9. Despite being released to work, Claimant was unable to perform her essential job function. To this end, Claimant was authorized to remain out of work and began receiving temporary total disability benefits on or about December 31, 2018.
10. Commissioner Taylor held a Form 21 hearing and ordered continued payment of temporary total disability benefits and additional medical care. The hearing transcript and order are a part of the Commission's file and were reviewed and considered.
11. Claimant began treating with Dr. Stephan G. Pill, an orthopedic surgeon with Steadman Hawkins Clinic.
12. In a report dated February 14, 2019, Dr. Pill reported Claimant had complained of ankle instability and a popping of the left ankle. Claimant complained of intense pain that had continued since her work related accident of May 2, 2017. Dr. Pill recommended Claimant continue to use a cane and brace for stability. (APA pp. 57-60)
13. Claimant returned to Dr. Pill on June 25, 2019. (APA pp. 62-67). Dr. Pill concluded that Claimant's ligament was stable in the left ankle. However, there was evidence of thickening of the retinaculum and ongoing tendinosis in the area of the peroneal tendon. Dr. Pill recommended surgery to debride the peroneal tendon and repair the retinaculum.

(APA p. 66). On August 9, 2019, Dr. Pill performed the recommended surgical procedure.

14. On November 5, 2019, Dr. Pill completed a Form 14B. Dr. Pill opined in the Form 14B Claimant had attained maximum medical improvement as of October 24, 2019. Dr. Pill assigned Claimant a 10% medical impairment to the left lower extremity. Dr. Pill assigned no permanent physical limitations and did not recommend any future or additional medical treatment. (APA p. 112)
15. During the hearing before the undersigned Commissioner observed Claimant's left and right ankles and left surgical scar.
16. Based upon the undersigned Commissioner's observations of Claimant's injury site, her ability to ambulate and stand, medical evidence and forgoing testimonies, Defendants proved by preponderance of the evidence Claimant attained maximum medical improvement as of October 24, 2019. Thus, Defendants are entitled to stop or terminate payment of temporary total disability compensation benefits.
17. Based upon Claimant's age, education, work history and medical evidence, which includes a 5% and 10% medical impairment rating to the left lower extremity, Claimant has a 25% disability left lower extremity. Although Claimant's surgical scar does not constitute serious permanent disfigurement of the face, head and neck, or is normally exposed in employment pursuant to §42-9-30 (23), the 25% disability award takes into account Claimant's resulting disfigurement from the surgical scar.
18. Claimant's 25% disability award was significantly enhanced beyond the impairment rating because of Claimant's testimony of current ankle pain and instability. While it is clear Claimant is able to perform all of her necessary daily living activities and engage in

recreational activities, she is not able to perform the essential functions of a Production Associate based on her 25% loss of use of the left leg.

19. Defendant proved it provided Claimant with suitable employment after she reached MMI resulting from the first surgery with Dr. Tollison. However, by virtue of Claimant's testimony, she was still incapable and unable to work because of incapacitating pain and because her left ankle has continuously "popped out".
20. Claimant did not prove that she is entitled to future or additional medical treatment. Thus, Defendants are not responsible for any further medical treatment beyond the date of maximum medical improvement or October 24, 2019.
21. Defendants are entitled to credit for the overpayment of temporary total disability compensation benefits dating from the date upon which it filed a Form 21, which was on January 10, 2020.
22. Defendants shall take credit for the overpayment of temporary total disability compensation benefits beginning on January 10, 2020 until the date upon which Defendants issue a permanent partial disability lump sum award.
23. Because the injury only involves one body part, Claimant is not entitled to an award of wage loss or permanent and total disability. Also, Claimant failed to prove by a preponderance of the evidence that she has suffered disability in greater 25%, much less 75% disability to the left leg.

CONCLUSIONS OF LAW

1. S.C. Code Ann. §42-9-260 (2020) governs awards of temporary total disability compensation benefits and stop payment applications.

2. S.C. Code Ann, §42-9-210 (2020) governs credit for the overpayment of temporary total disability compensation benefits.
3. S.C. Code Ann. §42-15-60 governs past, present and future medical treatment.
4. S.C. Code Ann. §42-9-30 (16) (2020) governs permanent disability awards for partial loss of use of a leg.

LEGAL DISCUSSION

Appellant argues the hearing Commissioner's 25% disability award is not enough to compensate her for her leg injury. On the contrary, Appellant asserts she should have been awarded compensation benefits due to wage loss.

The Hearing Commissioner did not err in awarding Appellant permanent partial disability benefits pursuant to section 42-9-30. *S.C. Code Ann. §42-9-30 (16) (2020)*. The Hearing Commissioner awarded Appellant 25% disability to the left leg. The compensation award was correctly and properly based upon functional loss of the left leg rather than loss of earnings. *Dykes v. Daniel Const. Co., 262 S.C. 98, 202 S.E.2d 646 (1974)*. Also, Claimant did not raise this issue of wage loss during the hearing before the hearing Commissioner. Hence, it is not preserved for review. *Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940)*.

Because Appellants injury is confined to the left leg, a scheduled member, and no other body part is impaired or affected by the admitted left ankle injury, Appellant's recovery or damages is limited to the scheduled compensation per section 42-9-30. *Colonna v. Marlboro Park Hosp., 404 S.C. 537, 745 S.E.2d 128 (Cl. App. 2013)*

Thus, Appellant's argument that she should be awarded wage loss is without merit and should be dismissed as a matter of law. *Id.*

APPELLATE PANE FINDINGS OF FACT

The Appellate Panel hereby affirms the findings of the Hearing Commissioner and makes the following Findings of Fact:

1. Appellant sustained an admitted work related injury to her left ankle arising out of and during the course and scope of her employment duties as a production associate with BMW Manufacturing Corporation on May 2, 2017. Specifically, Appellant was walking up a flight of stairs when she lost her balance and fell.
2. Appellant initially received medical treatment from Industrial Health Services (IHS). In particular, Dr. Bradley Collins, a physician with IHS, prescribed conservative medical modalities to treat Appellant's symptoms of left ankle pain and swelling. X-rays were ordered and Appellant was prescribed Advil for ankle pain. Appellant was also directed to apply ice. (APA p. 6)
3. Appellant was initially diagnosed with a left ankle sprain as a result of the X-rays being deemed negative for any fractures or dislocation. (APA p. 17)
4. Appellant expressed continuous complaints of left ankle pain and swelling. Despite elevating the left leg, applying ice, taking prescriptive medications and being authorized to remain out of work and engaging in therapeutic exercises, Appellant's condition remained unchanged. To this end, Drs. Ken Hommel and Bradley Collins, physicians at IHS, referred Appellant to Dr. Michael Tollison, an orthopedic surgeon with Piedmont Orthopedic Associates.
5. Dr. Tollison first treated Appellant on September 19, 2017. Appellant complained of dull aching throbbing ankle pain, which was aggravated with any slight period of standing and walking. Appellant reported that rest greatly alleviated her symptoms. Dr. Tollison

recommended a MRI upon suspicion of tendinosis and peritenonitis of the peroneus brevis tendon. (APA pp. 40-41).

6. In a report dated November 5, 2018, Dr. Tollison noted Appellant had seen Dr. James Behr who had recommended injections and use of the medication, Voltaren. Appellant declined the recommended pain management treatment. However, Appellant did complete formal physical therapy. (APA pp. 43-44).
7. Because conservative medical modalities did not improve Appellant's condition, Dr. Tollison performed surgery on November 15, 2018, in which he repaired a left peroneal tendon tear and stabilized Appellant's lateral ankle ligament. (APA p. 45)
8. On a Form 14B dated January 15, 2019, Dr. Tollison opined to a reasonable degree of medical certainty that Appellant had attained maximum medical improvement as of December 28, 2018. Dr. Tollison assigned Appellant a five (5%) percent medical impairment to the left lower extremity. Dr. Tollison assigned permanent physical limitations on medium waist to floor lifting/lower end of heavy for front carrying. Dr. Tollison concluded no additional medical treatment was warranted. (APA p. 51)
9. Despite being released to work, Appellant was unable to perform her essential job function. To this end, Appellant was authorized to remain out of work and began receiving temporary total disability benefits on or about December 31, 2018.
10. Commissioner Taylor held a Form 21 hearing and ordered continued payment of temporary total disability benefits and additional medical care. The hearing transcript and order are a part of the Commission's file and were reviewed and considered.
11. Appellant began treating with Dr. Stephan G. Pill, an orthopedic surgeon with Steadman Hawkins Clinic.

12. In a report dated February 14, 2019, Dr. Pill reported Appellant had complained of ankle instability and a popping of the left ankle. Appellant complained of intense pain that had continued since her work related accident of May 2, 2017. Dr. Pill recommended Appellant continue to use a cane and brace for stability. (APA pp. 57-60)
13. Appellant returned to Dr. Pill on June 25, 2019. (APA pp. 62-67). Dr. Pill concluded that Appellant's ligament was stable in the left ankle. However, there was evidence of thickening of the retinaculum and ongoing tendinosis in the area of the peroneal tendon. Dr. Pill recommended surgery to debride the peroneal tendon and repair the retinaculum. (APA p. 66). On August 9, 2019, Dr. Pill performed the recommended surgical procedure.
14. On November 5, 2019, Dr. Pill completed a Form 14B. Dr. Pill opined in the Form 14B Appellant had attained maximum medical improvement as of October 24, 2019. Dr. Pill assigned Appellant a 10% medical impairment to the left lower extremity. Dr. Pill assigned no permanent physical limitations and did not recommend any future or additional medical treatment. (APA p. 112)
15. The Hearing Commissioners' observed Appellant's left and right ankle and left surgical scar.
16. Based upon the Hearing Commissioner's observations of Appellant's injury site, including his observations of her ability to ambulate and stand; and a review of the medical evidence and forgoing testimonies, Respondents proved by preponderance of the evidence Appellant attained maximum medical improvement as of October 24, 2019. Thus, Respondents are entitled to stop or terminate payment of temporary total disability compensation benefits.

17. Based upon Appellant's age, education, work history and medical evidence, which includes a 5% and 10% medical impairment rating to the left lower extremity, Appellant has a 25% disability left lower extremity. Although Appellant's surgical scar does not constitute serious permanent disfigurement of the face, head and neck, or are normally exposed in employment pursuant to §42-9-30 (23), the 25% disability award takes into account Appellant's resulting disfigurement from the surgical scar.
18. Appellant's 25% disability award was significantly enhanced beyond the impairment rating because of Appellant's testimony of current ankle pain and instability. While it is clear Appellant is able to perform all of her necessary daily living activities and engage in recreational activities, she is not able to perform the essential functions of a Production Associate based on her 25% loss of use of the left leg.
19. Respondent proved it provided Appellant with suitable employment after she reached MMI resulting from the first surgery with Dr. Tollison. However, by virtue of Appellant's testimony, she still is currently incapable and unable to work because of incapacitating pain and because her left ankle has continuously "popped out".
20. Appellant did not prove that she is entitled to future or additional medical treatment. Thus, Respondents are not responsible for any further medical treatment beyond the date of maximum medical improvement or October 24, 2019.
21. Respondents are entitled to credit for the overpayment of temporary total disability compensation benefits dating from the date upon which it filed a Form 21, which was on January 10, 2020.

22. Respondents shall take credit for the overpayment of temporary total disability compensation benefits beginning on January 10, 2020, until the date upon which Respondents issue a permanent partial disability lump sum award.
23. Because the injury only involves one body part, Appellant is not entitled to an award of wage loss or permanent and total disability. Also, Appellant failed to prove by a preponderance of the evidence that she has permanent disability greater than 25%, and clearly not 75% disability to the left leg as she alleges.

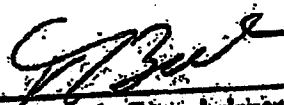
APPELLATE PANEL CONCLUSIONS OF LAW

1. S.C. Code Ann. §42-9-260 (2020) governs awards of temporary total disability compensation benefits and stop payment applications.
2. S.C. Code Ann. §42-9-210 (2020) governs credit for the overpayment of temporary total disability compensation benefits.
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ORDER

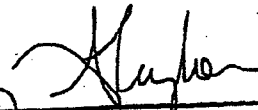
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Hearing Commissioner's award of 25% disability to the left leg is hereby affirmed.

AND IT SO ORDERED.

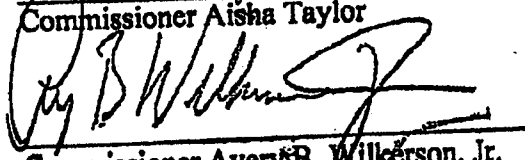


T. Scott Beck, Commissioner

WE CONCUR:



Commissioner Aisha Taylor



Commissioner Avery B. Wilkerson, Jr.

Order Served via USPS:

Raqucal Cunningham 114 Vermillion Drive Spartanburg, SC 29306	Vernon F. Dunbar McAngus Goudelock & Courie, LLC P.O. Box 2980 Greenville, SC 29602
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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 March 10, 2021