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SC Court of Appeals

**APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 1900834
GILBERTO SALGUERO, CLAIMANT
V.
VARGAS DRYWALL LLC, EMPLOYER
AND
RIVERPORT INSURANCE COMPANY, CARRIER**

Appellate Panel Review held in Columbia, South Carolina, on January 25, 2021, per notices timely and properly served upon all parties of Interest.

Appellate Panel Decision and Order filed:
April 1, 2021

APPEARANCES:

Appellant- Claimant represented by Calhoun Law Firm PA with Mark R. Calhoun appearing.

Respondent-Employer represented by Speed, Seta, Martin, Trivett and Stubley, LLC with Briggs Tucker appearing.

Within the statutory period, counsel for the Claimant filed Application for Review in the case setting forth the grounds of appeal, copies of which were furnished to all interested parties prior to oral arguments presented before the Appellate Panel on January 25, 2021.

By appeal, Appellant-Claimant respectfully submitted:

1. Did the Hearing Commissioner err in the finding of fact and as a matter of law in setting the average weekly wage at \$750.00 with a compensation rate of \$500.03 when these findings are contrary to the greater weight of the evidence and do not fairly represent the Claimants future earnings?

STATEMENT OF THE CASE

The parties were heard by Commissioner Melody James on February 21, 2020, in Columbia, South Carolina. Under date of August 6, 2020 the Hearing Commissioner issued the following Findings of Fact, Conclusions of Law and Order which we Affirm in Part and Reverse in Part:

FINDINGS OF FACT

1. The sole issue before this panel was the determination of average weekly wage and compensation rate of the claimant. The employer has accepted this claim and has agreed to provide causally related medical treatment for injuries to the claimants head and left upper extremity. All other issues in the Claimants Form 50 are held in abeyance and would need to be addressed by the filing of another Form 50.
2. There are no written records of the payments to the claimant made by Vargas Drywall LLC, other than a summary payroll sheet for 2019 prepared by Elvi Vargas.(APA p. 158) The sheet indicates pay to the claimant for only three weeks which includes the week of the accident.(APA 159) However, Elvi Vargas testified via deposition that the claimant was working under Johnny

Vargas, his brother, at the time of the accident and the claimant was being paid by Johnny Vargas. Elvi Vargas does not know how much the payments were. Elvi said he personally paid claimant \$400.00 a week in cash. But he admitted that the wage records he produced in discovery indicating Elvi Vargas paid the claimant \$400.00 a week in cash were prepared by him and there is no purpose for Elvi Vargas keep such records since Johnny Vargas actually was the person who paid the claimant. (Elvi Vargas Depo p.28-29)

3. For the project what are the claimant was injured, Vargas Drywall LLC was paid by Precision for the work performed. The brothers, Elvi and Johnny Vargas, had a relationship where they would each find jobs, and then Elvi would run the job through the company. The business relationship does not have clear parameters.

4. For this project, the brothers operated like subcontractors. Elvi Vargas allowed the job that Johnny Vargas found to be paid through the company and then he paid Johnny cash for the job. Thereafter, Johnny Vargas paid the claimant in cash.

5. Elvi Vargas does not have a clear understanding what wages were paid to the claimant.

6. The testimony of the two witnesses with knowledge of the claimant's wages, (Rosa Salguero sister of the claimant and girlfriend of Johnny Vargas) and the claimant is not refuted. The testimony of both is clear that sometimes the claimant was paid \$1000.00 a week, and if he did not work the entire days, he would be paid \$100.00 a day.

7. There is no clear testimony as to what percent of time the claimant would work the entire week. Rosa testified in her deposition that it was almost always. However, she was not always present. The claimant who would always be present for his payments, did not testify in a manner in which a percentage of time could be calculated. He states that some weeks they would not work a full week, and sometimes they would work a full week.

8. The testimony is clear that if the claimant completed all hours every day for the full week, he would be paid \$1000.00 for the week. However, this did not always happen.

9. The employer can provide no wage records where the claimants average weekly wage can be calculated by either using the period of 52 weeks immediately preceding the date of injury or the last four quarters immediately preceding the injury under §42-1-40. I therefore find that exceptional reasons exist to determine the average weekly wage that is fair and equitable to both parties. The average weekly wage that is fair and equitable to the parties is an amount that is averaged between the \$500.00 figure that could be paid if the claimant worked less than full hours for each day of the week, and that of full hours for completing an entire week, \$1000.00. The average weekly wage is therefore set at \$750.00 with a corresponding compensation rate of \$500.03. This most nearly approximates the amount which the claimant would be earning were it not for the injury. S.C. Code Annotated §42-1-40.

10. Claimant is entitled to temporary total disability benefits commencing on February 5, 2019 and continuing at the compensation rate of \$500.03. The employer is entitled to a credit for the amount of any TTD benefits paid.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Laws 1976, as amended, §42-17-40, it is the determination of this Commissioner that:

1. Under §42-1-160, the Claimant sustained a compensable injury by accident arising out of and in the course of his employment.

2. Under §42-1-40, the Claimant's average weekly wage is \$750.00, with a corresponding compensation rate of \$500.03.

3. Under §42-15-60, the defendants are to provide causally related medical treatment per the Act.

4. Under §42-9-10, the Claimant is entitled to temporary total disability from February 5, 2019 and onward until ended by agreement of the parties or Order of this Commission.

ORDER

IT IS, THEREFORE, ORDERED that the Findings of Fact and Conclusions of Law are incorporated herein as if set forth verbatim, and that the employer shall make the following payments:

1. Weekly TTD payments in the amount of \$500.03 from February 5, 2019 to the present and continuing until further Order of this Commission.
2. Under §42-15-60, the defendants are to provide causally related medical treatment per the Act.

IT IS SO ORDERED.

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

FINDINGS OF FACT

1. The sole issue before this panel was the determination of average weekly wage and compensation rate of the claimant. The employer has accepted this claim and has agreed to provide causally related medical treatment for injuries to the claimant's head and left upper extremity. All other issues in the Claimants Form 50 are held in abeyance and would need to be addressed by the filing of another Form 50.
2. There are no written records of the payments to the claimant made by Vargas Drywall LLC, other than a summary payroll sheet for 2019 prepared by Elvi Vargas.(APA p. 158) The sheet indicates pay to the claimant for only three weeks which includes the week of the accident.(APA

159) However, Elvi Vargas testified via deposition that the claimant was working under Johnny Vargas, his brother, at the time of the accident and the claimant was being paid by Johnny Vargas. Elvi Vargas does not know how much the payments were. Elvi said he personally paid claimant \$400.00 a week in cash. But he admitted that the wage records he produced in discovery indicating Elvi Vargas paid the claimant \$400.00 a week in cash were prepared by him and there is no purpose for Elvi Vargas keep such records since Johnny Vargas actually was the person who paid the claimant. (Elvi Vargas Depo p.28-29) Elvi Vargas asked Rosa Salguero to commit perjury and testify the Claimant was only paid \$400.00 per week.

3. For the work project where the claimant was injured, Vargas Drywall LLC was paid by Precision for the work performed. The brothers, Elvi and Johnny Vargas, had a relationship where they would each find jobs, and then Elvi would run the job through the company. The business relationship does not have clear parameters.

4. For this project, the brothers operated like subcontractors. Elvi Vargas allowed the job that Johnny Vargas found to be paid through the company and then he paid Johnny cash for the job. Thereafter, Johnny Vargas paid the claimant in cash.

5. Elvi Vargas does not know what wages were paid to the claimant.

6. The testimony of the only two witnesses with knowledge of the claimant's wages, (Rosa Salguero sister of the claimant and girlfriend of Johnny Vargas) and the claimant is not refuted. The claimant's deposition transcript demonstrates he is a poor historian due to memory loss related to his multiple skull fractures. Therefore, the only reliable and comprehensive evidence on the claimant's average weekly wage comes from Rosa Salgueros testimony. She states the claimant and other employees were paid \$1000.00 per week, every week, by Johnny Vargas. She also stated Johnny Vargas would pay employees \$100.00 for a day of work (if they worked

for less than a week) but there is no evidence the claimant ever worked less than a full work week or was actually ever paid less than \$1000.00 per week.

7. The testimony is clear that the claimant worked for Johnny Vargas for over two (2) years and he would be paid \$1000.00 for each week and this happened “every week” or “almost all the time”.

8. The employer can provide no wage records where the claimants average weekly wage can be calculated by either using the period of 52 weeks immediately preceding the date of injury or the last four quarters immediately preceding the injury under §42-1-40 because he only paid the claimant in cash and maintained no credible documentation of what he paid claimant. We therefore find that exceptional reasons exist to determine the average weekly wage that is fair and equitable in determining the claimant’s future earnings. The average weekly wage is therefore set at \$1000.00 with a corresponding compensation rate of \$666.66. This most nearly approximates the amount which the claimant would be earning were it not for the injury. S.C. Code Annotated §42-1-40.

9. Claimant is entitled to temporary total disability benefits commencing on February 5, 2019 and continuing at the compensation rate of \$666.66. The employer is entitled to a credit for the amount of any TTD benefits paid.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Laws 1976, as amended, §42-17-40, it is the determination of this Commissioner that:

1. Under §42-1-160, the Claimant sustained a compensable injury by accident arising out of and in the course of his employment.
2. Under §42-1-40, the Claimant’s average weekly wage is \$1000.00, with a

corresponding compensation rate of \$666.66.

3. Under §42-15-60, the defendants are to provide causally related medical treatment per the Act.

4. Under §42-9-10, the Claimant is entitled to temporary total disability from February 5, 2019 and onward until ended by agreement of the parties or Order of this Commission.

ORDER

IT IS, THEREFORE, ORDERED that the Findings of Fact and Conclusions of Law are incorporated herein as if set forth verbatim, and that the employer shall make the following payments:

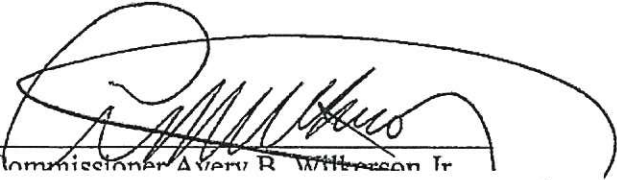
1. Weekly TTD payments in the amount of \$666.66 from February 5, 2019 to the present and continuing until further Order of this Commission. The Employer shall pay the claimant any and all back owed TTD but is entitled to a credit for any TTD paid to claimant.
2. Under §42-15-60, the defendants are to provide causally related medical treatment per the Act.


IT IS SO ORDERED.

ORDER

The Order of the Hearing Commissioner filed in the above titled matter on August 6, 2020 is hereby Affirmed in Part and Reversed in Part by a majority of the panel and the same shall constitute the Decision and Order of the Appellate Panel.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION


Commissioner Avery R. Wilkerson Jr.


Commissioner Mike Campbell


T. Scott Beck, Commissioner

Date: _____, 2021

Order Served via E-Mail:

Briggs P. Tucker Speed, Seta, Martin, Trivett, Stubley btucker@speed-seta.com	Mark R. Calhoun Calhoun Law Firm mark@calhounlawfirm.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 April 1, 2021