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

WCC FILE NUMBER: 1820190

JAMES SIMS, Employee, Claimant,
Appellant,

-vs.-

AUTOMATION PERSONNEL SERVICES, INC., Employer,

and

ZURICH AMERICAN INSURANCE CO., Carrier,

and

GALLAGHER BASSETT SERVICES, INC., Third-Party Administrator,

Respondents.

Appellate Panel Review
Anderson, South Carolina
During the Last Term of Review

Appellate Panel Decision and Order,
assigned to Commissioner Beck,
filed on November 5, 2021

Thomas Phillips, Esquire on behalf of the Employee/Claimant/Appellant.

Walter R. Frye, III, Esquire, on behalf of the Employer, Carrier, and Third-Party Administrator/Defendants/Respondents.

STATEMENT OF THE CASE

This claim was rescheduled for a hearing on November 13, 2020 in Anderson, South Carolina pursuant to Forms 50/51 and Defendant's Form 21 to determine if the employer/carrier could stop payment of temporary benefits and to determine Defendants' entitlement to a credit for overpayment of benefits. The claim was previously set for a hearing on September 24, 2020, but the parties thought there was an agreement for a consent order and the hearing did not go forward. A consent order was not executed, and Defendants requested that the hearing be rescheduled pursuant to the prior hearing requests. At the call of the case, Claimant requested that the undersigned commissioner dispose of their Form 50 hearing request without prejudice and the hearing proceeded pursuant to Defendants' Form 21.

At the hearing, Defendants argued that they were entitled to a credit for temporary benefits from July 20, 2020 until November 6, 2020 as Claimant refused suitable employment during that period. Defendants also objected to the inclusion of a medical questionnaire from Dr. Loudermilk obtained following the original hearing date as they assert it was untimely submitted. Claimant took the position that she was entitled to additional temporary disability payments.

This claim was heard before the Single Commissioner on November 23, 2020. By his Decision and Order filed March 5, 2021, the Hearing Commissioner issued the following findings of fact and Conclusions of Law:

FINDINGS OF FACT

Based upon the parties' stipulations, the testimony of the Claimant, the APA/Evidentiary submissions of the parties, and the Commission file relative to this claim, the undersigned Commissioner made the following findings of fact as required by S.C. Code Anno., § 42-17-40, 1976:

1. The Claimant suffered a compensable work-related injury arising out of and within the course and scope of the employment on 08/20/2018 when she severed her left Achilles tendon on broken glass.
2. The questions at bar in this hearing are as follows: Is the Claimant entitled to back temporary total disability for weeks missed from about October 2020 until the Claimant returned to work on light duty in November 2020? Is the Claimant entitled to penalties for those weeks? Are the Defendants entitled to a credit for overpayment of TTD back to 07/20/2020? And additionally, is this claim ripe for a determination as to permanency?
3. Claimant treated with Dr. Michael E. Le who completed a Form 14B on July 23, 2020.
4. Dr. Le stated on that form that the Claimant had reached maximum medical improvement as of July 14, 2020.
5. He assigned the Claimant a medical impairment of five percent (5%) to the left lower extremity.
6. He opined that the Claimant could return to work at a medium duty level.
7. He also opined that the Claimant did not possess any retained hardware.

8. Dr. Le did not indicate that the Claimant would require any future medical care or treatment as a result of this work-related accident.
9. Defendants contend that they then offered the Claimant a position on July 20, 2020, but Claimant declined that job because it paid thirteen dollars an hour and she would not work for less than fourteen dollars an hour.
10. Defendants assert that Claimant was then offered a job at the rate of fourteen dollars an hour. This job would require the Claimant to wear steel toed boots.
11. Claimant declined that job offer citing her inability to wear steel toed boots.
12. Claimant was then offered a third job at fourteen dollars an hour which was also declined.
13. All three of those positions were within the work restrictions assigned by Dr. Le. No other restrictions were in existence at that time.
14. In addition to the treatment with Dr. Le, the Claimant asked for pain management, which was granted with Dr. Eric Loudermilk on April 17, 2020.
15. Dr. Loudermilk opined that he suspected Claimant was suffering from nerve damage and suggested a nerve conduction study and issued Claimant prescriptions to assist with any nerve pain.
16. Claimant underwent a functional capacity exam on June 20, 2020. Sam McKelvey, PT wrote of that functional capacity exam that "the overall classification of effort is invalid due to the client, James Sims, performing inconsistently during a repeated measures protocol."
17. Given that he reached that conclusion, I am a little puzzled that he also wrote, "The client meets the material handling demands for a medium demand

vocation, per the Dictionary of Occupational Titles." The report says what the report says.

18. The parties were noticed of a hearing in this claim pursuant to both a Form 50 and Form 21 in Greenville on September 24, 2020.

19. Prior to going on the record, the parties attempted to find a path forward and the hearing was reset.

20. Claimant had a return visit to Dr. Loudermilk on November 13, 2020. Dr. Loudermilk opined in a questionnaire submitted to him by Claimant's counsel that had the Claimant not already been restricted to sedentary duty at the first appointment with him, restrictions of (1) no prolonged standing or walking greater than 30 minutes at a time; and (2) no climbing ladders or exposure to unprotected heights would have been ordered and remained in place.

21. Defendants contend that the Claimant agreed to sign the Form 17 if they would authorize a second opinion. They authorized that appointment and assert that the Claimant, even though the second opinion was provided, failed to sign the Form 17.

22. Claimant does not acknowledge that there was a nexus between the two.

23. Defendants, believing they had an understanding as to a nexus between the two, stopped Claimant's benefits.

24. When the evidence—lay and medical—is viewed as a whole, I find that the opinion of Dr. Loudermilk must be given great weight. Dr. Loudermilk is a pain management specialist while Dr. Le is an orthopedic surgeon. Even though

Dr. Loudermilk's opinion was not in existence at the time of the job offers from the Employer, it speaks to the Claimant's capacity to work at that time.

25. As such, I cannot find that the Defendants are entitled to credit for overpayment of TTD.

26. As to Claimant's contention that she was due back-owed temporary compensation from the period following the September hearing date to November 6, 2020, as well as penalties for ceasing her compensation payments, I cannot find that Claimant is entitled to those benefits. While there is a difference of understanding as to whether the Claimant had agreed to sign the Form 17, the Employer still offered Claimant light duty employment within her restrictions. While that offer was not immediate, the length of time was not unreasonable either. The Claimant was provided a job within her restrictions. It is clear from a totality of the record that the Employer has worked within the spirit of the Act throughout this claim. The earlier offers of jobs were made with an understanding as to restrictions as they existed at that time. The Employer and by extension the Carrier did not act in bad faith. As such, I am not persuaded that they should be penalized.

27. Given the record as it exists, this claim is ripe for a determination of permanency.

28. I find that the Claimant is at maximum medical improvement as of July 14, 2020.

29. I find that the Claimant has sustained 10% permanent partial disability to her left leg.

30. Claimant is not entitled to future medical care and treatment as a result of this work-related injury.

CONCLUSIONS OF LAW

Based upon the findings of fact set forth above, and in accordance with § 42-17-40, S.C. Code Anno., 1976, the undersigned Commissioner made the following rulings of law:

1. Pursuant to § 42-1-160, Claimant did sustain an injury by accident, arising out of and in the course of her employment.
2. Pursuant to § 42-15-60 and other applicable law, Claimant is not entitled to any further medical treatment pursuant to the opinion of Dr. Le.
3. Pursuant to Curiel v. Envtl. Mgmt. Servs., 376 S.C. 23, 655 S.E.2d 482, 485 (2007) and other applicable law, Claimant is not entitled to any benefits for the specified period from September 24, 2020 to November 6, 2020.
4. Pursuant to § 42-9-30(12) Claimant is entitled to an award of 10% loss of use of her left leg.

In conclusion, the Hearing Commissioner issued the following Order:

NOW, THEREFORE, IT IS HEREBY ORDERED that Claimant reached maximum medical improvement on July 14, 2020, and Claimant is not entitled to any further medical treatment in the future. Claimant is entitled to an award of 10% loss of use of her left leg. Finally, Defendants are not responsible for any weekly payments to Claimant during the period in which her weekly benefits were suspended following the originally scheduled hearing.

Appellants, by their WCC Form 30, timely appealed the Decision and Order of the Hearing Commissioner asserting the Hearing Commissioner erred as follows:

1. The Single Commissioner erred in finding that Appellant was not entitled to back-owed temporary compensation for a closed period.
2. The Single Commissioner erred in finding that Appellant was not entitled to penalties for Respondents' improper termination of temporary compensation.
3. The Single Commissioner erred in finding that Respondent was at MMI and not entitled to ongoing medical treatment.

Based upon the Commission's file, the Brief's submitted by both parties, and arguments of counsel, the Appellate Panel makes the following Findings of Fact and Conclusions of Law:

APPELLATE PANEL FINDINGS OF FACT

Based upon the parties' stipulations, the testimony of the Appellant, the APA/Evidentiary submissions of the parties, and the Commission file relative to this claim, the Appellate Panel makes the following findings of fact as required by S.C. Code Anno., § 42-17-50, 1976:

1. Appellant suffered a compensable work-related injury arising out of and within the course and scope of the employment on August 20, 2018 when she severed her left Achilles tendon on broken glass.
2. Respondents offered Appellant employment on July 20, 2020, but Appellant declined that job because it paid thirteen dollars an hour and she would not work for less than fourteen dollars an hour.

3. Respondents offered Appellant a job at the rate of fourteen dollars an hour. This job would require Appellant to wear steel toed boots.
4. Appellant declined that job offer citing her inability to wear steel toed boots.
5. Appellant was then offered a third job at fourteen dollars an hour which she also declined.
6. All three of those positions were within the work restrictions assigned by Dr. Le. No other restrictions were in existence at that time.
7. As such, the Single Commissioner did not err in finding that Appellant was not entitled to penalties for Respondents' termination of temporary compensation, as Appellant declined multiple job offers within her restrictions as they existed at the time of the offers.
8. The Single Commissioner did err in finding that Appellant was at MMI and not entitled to ongoing medical treatment, as the Single Commissioner limited the scope of the hearing to a specific period of temporary benefits, and the Single Commissioner's finding with respect to MMI and future medical treatment fall outside the scope of this limitation.

CONCLUSIONS OF LAW

Based upon the findings of fact set forth above, and in accordance with § 42-17-50, S.C. Code Anno., 1976, the Appellate Panel makes the following rulings of law:

1. Pursuant to § 42-1-160, Claimant did sustain an injury by accident, arising out of and in the course of her employment.

2. Pursuant to § 42-9-190, Appellant refused suitable employment and she is not entitled to penalties for suspension of those benefits following refusal of employment.
3. The Single Commissioner limited the scope of the testimony at the hearing to issues involving suspension of temporary benefits for a specified period and therefore, a determination of permanent loss of use and future medical treatment needs was improper.

ORDER

Based on the foregoing findings of fact and conclusions of law the Appellate Panel of the South Carolina Workers' Compensation Commission affirms in part and reverses in part the Decision and Order of the Single Commissioner and, therefore, it is hereby:

ORDERED, Adjudged and Decreed that the Single Commissioner's findings regarding TTD penalties are affirmed. Appellant is not entitled to penalties for Respondent's termination of temporary compensation.

ORDERED, Adjudged and Decreed that the Single Commissioner's findings regarding MMI and PPD are reversed.

AND IT IS SO ORDERED.

No hearing costs are assessed.

T. Scott Beck, Commissioner,
Chairperson, Appellate Panel
SC Workers Compensation Commission

Aisha Taylor, Commissioner,
SC Workers Compensation Commission

R. Michael Campbell, Commissioner,
SC Workers Compensation Commission

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 November 5, 2021