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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: 1713760

Randall G. Dalton

EMPLOYEE,
CLAIMANT/RESPONDENT

VS.

The Muffin Man, Inc.

EMPLOYER,

AND

Amerisure Mutual Insurance Company, Inc.

CARRIER,
DEFENDANTS/APPELLANTS,

Appellate Panel Review held virtually in South
Carolina, on November 23, 2021 per notices timely
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

January 7, 2022

APPEARANCES: Claimant/Appellant represented by C. Logan Rollins
Defendants/Respondents represented by John D. Stroud

STATEMENT OF THE CASE

The parties were heard by Commissioner Avery B. Wilkerson on April 13, 2021 in Greenville, South Carolina. On June 30, 2021, the hearing Commissioner issued the following Order:

That Claimant is entitled to an award for 15% disability to his right shoulder and a combined rating for cervical and lumbar spine of 15% to his back.

That the award shall be paid in lump sum, and Claimant's proceeds of Sixty-Three Thousand, Four Hundred, Thirty-Three and 80/100 (\$63,433.80) shall be allocated as follows: Twenty-One Thousand, One Hundred, Forty-Four and 60/100 (\$21,144.60) Dollars in attorney's fees and Four Thousand, Two Hundred, Ninety-Four and 37/100 (\$4,294.37) Dollars in costs; Thirty-Seven Thousand, Nine Hundred, Ninety-Four and 83/100 (\$37,994.83) Dollars in compromise settlement of disputed future disability benefits to Claimant at the rate of \$36.81 per week commencing June 28, 2021, for 19.85 yrs (1,032.20 wks) based upon the claimant's life expectancy thereafter pursuant to Section 19-1-150 of the South Carolina Code of Law, (1976 as Amended), and as is interpreted by the South Carolina Supreme Court in the decision of *Utica Mohawk Mills vs. Orr*, 87 S.E.2d 589 (S.C. 1955); *Sciarotta v. Bowen*, 837 F.2d 135 (3rd Cir. 1988; *Lemire v. Secretary of Health and Human Services*, 682 F. Supp. 102 (D.C.N.H.) and *Hatch v. Heckler*, 626 F. Supp. 1367 (N.D. California 1986). POMS §52001.555 (c) (4)." See *James v. Anne's Inc.*, 390 S.C. 188, 701 S.E.2d 730 (S.C. 2010). For ERISA and social security disability purposes, these settlement funds are to be apportioned for the entire life span of 19.85 yrs (1,032.20 wks).

That Claimant is entitled to causally-related future medical treatment for the neck and low back as recommended by Dr. Behr, which is ongoing pain management to include medications for at least 2 years, as well as lifetime maintenance and repair of Claimant's hardware installed during the surgery on his right shoulder.

That Claimant failed to prove a compensable injury to the right hand, left hand, groin, right lower extremity, left lower extremity, and right hip, and therefore is not entitled to any benefits under the act for those body parts.

That Defendants are not entitled to any credit for overpayment of temporary total disability benefits.

In support of his order, the Hearing Commissioner made the following Findings of Facts and Conclusions of Law:

HEARING COMMISSIONER'S FINDINGS OF FACT

1. Based upon the average weekly wage stipulated by the parties, I find that at the time of the injury Claimant made approximately \$54,973.36 a year. Based on his testimony, Claimant is now paid a salary of \$72,000 a year.
2. I find the employer has made accommodations for Claimant's permanent restrictions. By all accounts, including his own testimony, Claimant is a valued employee. Claimant is the only person who understands and knows the old equipment, and nobody else can do his job at Muffin Mam. Claimant was transferred from a former location to the new location in Laurens, South Carolina. Claimant has major lifetime restrictions of no lifting more than 10 pounds overhead, yet the employer has accommodated these restrictions over the past 3 years.
3. I do not find sheltered environment employment. Therefore, I do not find Claimant is permanently and totally disabled. Claimant is making more money now than before accident.
4. Claimant has hardware stemming from the shoulder surgery authorized by Defendants. Therefore, Claimant is entitled to lifetime maintenance and repair of said hardware.
5. Defendants are not entitled to any credit for overpayment of TTD benefits. No evidence was produced at the hearing to prove overpayment. The record was left open and documents were submitted after the hearing. However, the documents submitted by Defendants do not provide any reliable information or prove an overpayment.

6. I find Claimant exerted full effort during his FCE, and the restrictions recommended in the FCE are reliable and an accurate representation of Claimant's permanent restrictions.
7. I find Claimant reached MMI for his shoulder on June 18, 2018. Dr. Hoenig assigned 8% to the right shoulder and did not recommend any further medical treatment.
8. I find Claimant reached MMI for his lumbar and cervical spine on November 7, 2018. Dr. Behr assigned an impairment rating of 4% to the cervical spine and 8% to the lumbar spine, and recommended ongoing pain management to include medications for at least 2 years.
9. I find Claimant failed to meet the burden required to establish a compensable injury to his right hand, left hand, groin, right lower extremity, left lower extremity, and right hip as pled on Claimant's Form 50 request for hearing and pre-hearing brief. Therefore, I find Claimant reached MMI for all compensable body parts as of November 7, 2018 per Dr. Behr's report.
10. Based on the evidence, I give greater weight to the two authorized treating physicians at Carolina Ortho and Neurosurgical Associates, Dr. Hoenig and Dr. Behr. I am not persuaded by Dr. Smith's testimony and rely on the opinions of the authorized treating physicians with regard to all issues, including date of MMI, level of impairment, and future medical care.
11. Based on the greater weight of the case, I would find Randall Dalton had a 15% disability to his right shoulder and a combined rating for cervical and lumbar spine of 15% to his back.

12. I find Claimant is entitled to causally-related medical treatment to the neck and lumbar spine as recommended by Dr. Behr, which is ongoing pain management to include medications for at least 2 years.
13. I find Claimant is entitled to life time maintenance and repair of the hardware installed in his right shoulder during the operation that took place on February 14, 2018. Claimant is not entitled to any other medical treatment for the shoulder.
14. I find Claimant is not entitled to any benefits under the Act for the right hand, left hand, groin, right lower extremity, left lower extremity, and right hip, as Claimant failed to meet the burden establishing a compensable injury to these denied body parts.

HEARING COMMISSIONER'S CONCLUSIONS OF LAW

1. Pursuant to S.C. Code Ann. §42-9-10, I find Claimant has failed to meet his burden of proof required to establish an award for permanent and total disability.
2. Pursuant to S.C. Code Ann. §42-9-30, I find Claimant has failed to meet his burden of proof required to establish an award for permanent and total disability.
3. I find that the Claimant has not met his burden of proof required to establish sheltered employment and entitlement to an award for permanent disability under Peoples v. Cone Mills Corporation 342 S.E.2d 798 (N.C. 1986) and other cited case law. I find the facts of this claim to be significantly different with the facts at issue in Peoples, and therefore the case law is inapplicable.
4. Defendants have failed to prove entitlement to credit for overpayment of TTD benefits under S.C. Code Ann. §42-9-210.

5. Claimant has failed to prove a compensable injury to the right hand, left hand, groin, right lower extremity, left lower extremity, and right hip pursuant to S.C. Code Ann. §42-1-160.
6. Claimant is not entitled to medical treatment for the right hand, left hand, groin, right lower extremity, left lower extremity, and right hip pursuant to S.C. Code Ann. §42-15-60.
7. Pursuant to S.C. Code Ann. §42-9-30, Claimant is entitled to an award of permanent partial disability of 15% to the spine and 15% to the right shoulder.
8. Pursuant to S.C. Code Ann. §42-15-60, I find Claimant is entitled to additional medical treatment to as recommended by Dr. Behr to the lower back and neck only, and lifetime maintenance and repair of Claimant's hardware installed during the surgery on his right shoulder.

Within the statutory period, counsel for the Claimant filed an Application for Review in the case setting forth his reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Appellate Panel on November 23, 2021.

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 that the Hearing Commissioner erred in the following:

1. Did the Single Commissioner err in determining that Claimant sustained only 15 percent disability to his right shoulder and only 15 percent disability to his back when the greater weight of the evidence establishes that Claimant's disability to each member substantially

exceeds 15 percent (I.e., if Claimant is not totally and permanently disabled—see below—was the scheduled member award nevertheless too low)?

2. Did the Single Commissioner err in finding that Claimant did not meet his burden to establish that he was permanently and totally disabled pursuant to S.C. Code Ann. § 42-9-30 (21) for loss of use to the back that exceeds 50 percent?
3. Did the Single Commissioner err in failing specifically to hold that the State of South Carolina does recognize the doctrine of “sheltered work” or “sheltered employment?”
4. Did the Single Commissioner err in finding that Claimant failed to meet his burden establishing that he was permanently and totally disabled pursuant to S.C. Code Ann. § 42-9-10, including his claim on the basis that “shelter employment” doctrine applied because all evidence (or at least the greater weight of evidence) in the record established that he could not compete for wages in the open marketplace?
5. Did the Single Commissioner err in disregarding *Clark v. Phillips Electronics*, 433 SC 186 (Ct. App. 2021) and its mandate to consider Claimant's uncontradicted vocational evaluation that unequivocally stated that Claimant was incapable of employment at any position other than his sheltered work with Respondent employer.

In an Appellate Review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1985,) 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 with or inconsistent with those of the Hearing Commissioner.

After careful review in the instant case, the Commission, by unanimous vote, has determined that the Hearing Commissioner’s Findings of Fact are correct in part and incorrect in part, however the Rulings of Law are correct. Accordingly, the Appellate Panel has stated the

following Findings of Fact and Rulings of Law and they shall become the law of the case; and, therefore, the Decision and Order of the Hearing Commissioner is Affirmed with Amendments, as follows.

FINDINGS OF FACT

1. Based upon the average weekly wage stipulated by the parties, we find that at the time of the injury Claimant made approximately \$54,973.36 a year. Based on his testimony, Claimant is now paid a salary of \$72,000 a year.
2. We find the employer has made accommodations for Claimant's permanent restrictions. By all accounts, including his own testimony, Claimant is a valued employee. Claimant is the only person who understands and knows the old equipment, and nobody else can do his job at Muffin Mam. Claimant was transferred from a former location to the new location in Laurens, South Carolina. Claimant has major lifetime restrictions of no lifting more than 10 pounds overhead, yet the employer has accommodated these restrictions over the past 3 years.
3. We do not find sheltered environment employment. Therefore, we do not find Claimant is permanently and totally disabled. Claimant is making more money now than before accident.
4. Further, we find from a vocational standpoint, it was the opinion of Claimant's vocational expert that an excellent rehabilitation outcome has been achieved in that Mr. Dalton is continuing to work with his same employer of about seventeen years in a modified position where he is performing legitimate work of value to his employer. Although he is not performing the full range of his prior work, Mr. Dalton is able to make use of his experience to direct, supervise, and train others, and intermittently perform work beyond

the range of light, and has remained consistently employed, with his employer advancing him from an hourly to a salaried status and making him a supervisor. (APA p. 183).

5. Claimant has hardware stemming from the shoulder surgery authorized by Defendants. Therefore, Claimant is entitled to lifetime maintenance and repair of said hardware.
6. Defendants are not entitled to any credit for overpayment of TTD benefits. No evidence was produced at the hearing to prove overpayment. The record was left open and documents were submitted after the hearing. However, the documents submitted by Defendants do not provide any reliable information or prove an overpayment.
7. We find Claimant exerted full effort during his FCE, and the restrictions recommended in the FCE are reliable and an accurate representation of Claimant's permanent restrictions.
8. We find Claimant reached MMI for his shoulder on June 18, 2018. Dr. Hoenig assigned 8% to the right shoulder and did not recommend any further medical treatment.
9. We find Claimant reached MMI for his lumbar and cervical spine on November 7, 2018. Dr. Behr assigned an impairment rating of 4% to the cervical spine and 8% to the lumbar spine, and recommended ongoing pain management to include medications for at least 2 years.
10. We find Claimant failed to meet the burden required to establish a compensable injury to his right hand, left hand, groin, right lower extremity, left lower extremity, and right hip as pled on Claimant's Form 50 request for hearing and pre-hearing brief. Therefore, we find Claimant reached MMI for all compensable body parts as of November 7, 2018 per Dr. Behr's report.
11. Based on the evidence, we give greater weight to the two authorized treating physicians at Carolina Ortho and Neurosurgical Associates, Dr. Hoenig and Dr. Behr. We are not

persuaded by Dr. Smith's testimony and rely on the opinions of the authorized treating physicians with regard to all issues, including date of MMI, level of impairment, and future medical care.

12. Based on the greater weight of the case, we find Randall Dalton had a 25% disability to his right shoulder and a combined rating for cervical and lumbar spine of 25% to his back.
13. We find Claimant is entitled to causally-related medical treatment to the neck and lumbar spine as recommended by Dr. Behr, which is ongoing pain management to include medications for at least 2 years.
14. We find Claimant is entitled to life time maintenance and repair of the hardware installed in his right shoulder during the operation that took place on February 14, 2018. Claimant is not entitled to any other medical treatment for the shoulder.
15. We find Claimant is not entitled to any benefits under the Act for the right hand, left hand, groin, right lower extremity, left lower extremity, and right hip, as Claimant failed to meet the burden establishing a compensable injury to these denied body parts.

CONCLUSIONS OF LAW

9. Pursuant to S.C. Code Ann. §42-9-10, we find Claimant has failed to meet his burden of proof required to establish an award for permanent and total disability.
10. Pursuant to S.C. Code Ann. §42-9-30, we find Claimant has failed to meet his burden of proof required to establish an award for permanent and total disability.
11. We find that the Claimant has not met his burden of proof required to establish sheltered employment and entitlement to an award for permanent disability under Peoples v. Cone Mills Corporation 342 S.E.2d 798 (N.C. 1986) and other cited case law. We find the

facts of this claim to be significantly different with the facts at issue in Peoples, and therefore the case law is inapplicable.

12. Defendants have failed to prove entitlement to credit for overpayment of TTD benefits under S.C. Code Ann. §42-9-210.
13. Claimant has failed to prove a compensable injury to the right hand, left hand, groin, right lower extremity, left lower extremity, and right hip pursuant to S.C. Code Ann. §42-1-160.
14. Claimant is not entitled to medical treatment for the right hand, left hand, groin, right lower extremity, left lower extremity, and right hip pursuant to S.C. Code Ann. §42-15-60.
15. Pursuant to S.C. Code Ann. §42-9-30, Claimant is entitled to an award of permanent partial disability of 25% to the spine and 25% to the right shoulder.
16. Pursuant to S.C. Code Ann. §42-15-60, we find Claimant is entitled to additional medical treatment to as recommended by Dr. Behr to the lower back and neck only, and lifetime maintenance and repair of Claimant's hardware installed during the surgery on his right shoulder.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Claimant is entitled to an award for 25% disability to his right shoulder and a combined rating for cervical and lumbar spine of 25% to his back.

IT IS FURTHER ORDERED that the award shall be paid in lump sum, and Claimant's proceeds of One Hundred-Five Thousand, Seven Hundred, Twenty-Three and 00/100

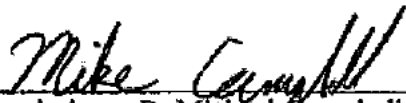
(\$105,723.00) shall be allocated as follows: Thirty-Five Thousand, Two Hundred, Forty-One and 00/100 (\$35,241.00) Dollars in attorney's fees and Four Thousand, Four Hundred, Forty-Four and 37/100 (\$4,444.37) Dollars in costs; Sixty-Six Thousand, Thirty-Seven and 63/100 (\$66,037.63) Dollars in compromise settlement of disputed future disability benefits to Claimant at the rate of \$66.63 per week commencing December 29, 2021, for 19.06 yrs (991.12 wks) based upon the claimant's life expectancy thereafter pursuant to Section 19-1-150 of the South Carolina Code of Law, (1976 as Amended), and as is interpreted by the South Carolina Supreme Court in the decision of Utica Mohawk Mills vs. Orr, 87 S.E.2d 589 (S.C. 1955); Sciarotta v. Bowen, 837 F.2d 135 (3rd Cir. 1988; Lemire v. Secretary of Health and Human Services, 682 F. Supp. 102 (D.C.N.H.) and Hatch v. Heckler, 626 F. Supp. 1367 (N.D. California 1986). POMS §52001.555 (c) (4)." See James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (S. C. 2010). For ERISA and social security disability purposes, these settlement funds are to be apportioned for the entire lifespan of 19.06 yrs (991.12 wks).

IT IS FURTHER ORDERED that Claimant is entitled to causally-related future medical treatment for the neck and low back as recommended by Dr. Behr, which is ongoing pain management to include medications for at least 2 years, as well as lifetime maintenance and repair of Claimant's hardware installed during the surgery on his right shoulder.

IT IS FURTHER ORDERED that Claimant failed to prove a compensable injury to the right hand, left hand, groin, right lower extremity, left lower extremity, and right hip, and therefore is not entitled to any benefits under the act for those body parts.

IT IS FURTHER ORDERED that Defendants are not entitled to any credit for overpayment of temporary total disability benefits.

IT IS SO ORDERED:



Commissioner R. Michael Campbell, II
For the Appellate Panel

WE CONCUR:



Commissioner Melody L. James



Commissioner Aisha Taylor

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 Valerie Deller on January 7, 2022