APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 1106685

DAVID G. JONES, EMPLOYEE . . . . . CLAIMANT/APPELLANT/RESPONDENT

VS.

WARDEN & SMITH CONCRETE, EMPLOYER,

AND

BRIDGEFIELD CASUALTY INSURANCE COMPANY
C/O SUMMIT HOLDINGS, INC., CARRIER . . . . . DEFENDANTS/RESPONDENTS/APPELLANTS.

Appellate Panel Review Hearing
held in Columbia, South Carolina,
on February 20, 2013, per notices
timely and properly served upon
all parties of interest.

Appellate Panel Decision and Order
filed, 4-4-13

APPEARANCES: CLAIMANT/APPELLANT/RESPONDENT represented by William L. Smith, II, Esquire, of Columbia, South Carolina; and

DEFENDANTS/RESPONDENTS/APPELLANTS represented by Nicolas L. Haigler, Esquire, of Columbia, South Carolina.

STATEMENT OF THE CASE

This is a cross-appeal by David G. Jones ("Claimant" or "Appellant/Respondent"), and Warden & Smith Concrete and Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc. ("Respondents/Appellants" or "Defendants") from the Decision and Order of Commissioner Melody L. James, filed on October 18, 2012.

This claim was before the South Carolina Workers' Compensation Commission pursuant to the Form 21 filed by the defendants on May 15, 2012. It is the position of the defendants that the claimant reached maximum medical improvement (MMI) with regard to his low back on December 15, 2011 and, therefore, defendants are entitled to terminate temporary total disability (TTD) benefits. In addition, defendants contend the claimant has not sustained any permanent partial disability with regard to his back under Section 42-9-30; however, if so defendants request credit for the extent of pre-existing disability sustained to the claimant's back. Moreover, defendants contend the claimant is not entitled to further medical benefits under Section 42-15-60. The defendants also request credit for the payment to TTD benefits after the date of MMI, and request a determination as to the credibility of the claimant.

Per the Reply to Defendants' Stop Pay Application, it is the position of the claimant that the claimant has not reached MMI as the claimant has been referred for a neurological opinion which has not been provided by defendants. The claimant also requests a second orthopedic opinion. In the alternative, if the claimant is found to have reached MMI, the claimant contends he is permanently and totally disabled under Section 42-9-10 or Section 42-9-30.

The Hearing in this matter was held on June 28, 2012, in Florence, South Carolina, before Commissioner Melody L. James ("Hearing Commissioner"). By way of Decision and Order filed on October 18, 2012, the Hearing Commissioner determined the claimant reached MMI on June 26, 2012, with seven (7%) percent permanent partial disability to the back. The Hearing Commissioner further determined the defendants were entitled to a credit for payment of TTD benefits after the date of MMI, June 26, 2012;

determined the claimant was not entitled to further medical benefits under the Act; and did not find the claimant to be credible.

Within the statutory period, the both parties filed Applications for Review in the case setting forth their reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Appellate Panel on February 20, 2013. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the undersigned members of the Full Commission Appellate Panel and has since been under study and consideration. Specifically, the claimant respectfully requests the Appellate Panel to reverse the Decision and Order of the Hearing Commissioner based upon the following grounds:

1. Did the Single Commissioner err in her Finding of Fact No. 2 in finding that the claimant was not credible when the greater weight and preponderance of the evidence showed that claimant was credible? Further, the Single Commissioner apparently based her decision on the use of a wheelchair and did not consider the testimony of the doctors in stating that claimant was not malingering and that there were reasons for his pain and for the use of the wheelchair.

2. Did the Single Commissioner err in her Finding of Fact No. 3 in finding that the claimant reached maximum medical improvement when the greater weight and preponderance of evidence showed that claimant was in need of further medical care and the defendants had not provided the medical care required of them in the previous Consent Order?

3. Did the Single Commissioner err in her Finding of Fact No. 4 in finding that Dr. Edwards had just discharged the claimant from his care when the greater weight and preponderance of evidence showed that he opined that claimant was in need of further medical treatment and had referred him to the care of the neurologist and which never provided the care as recommended by Dr. Healy. Further the Single Commissioner apparently misunderstood the deposition testimony of Dr. Healy in which he indicated that claimant's problems were causally related to his on the job injury and that he was in need of further medical and that the claimant was not malingering?

4. Did the Single Commissioner err in her Finding of Fact No. 5 in finding the claimant had reached maximum medical improvement on June 26, 2012, when the greater weight and preponderance of evidence showed that both doctors recommend further medical care for his causally related condition?

5. Did the Single Commissioner err in her finding that defendants were entitled to credit for payment of temporary total disability benefits after June 26, 2012, when the greater weight and preponderance of evidence showed claimant had not reached maximum medical improvement and remained totally disabled?

6. Did the Single Commissioner err in her Finding of Fact No. 7 in finding that claimant had sustained 7% permanent partial disability to the back when the greater weight and preponderance of evidence showed that claimant had not reached maximum medical improvement and/or had a much greater degree of disability?

7. Did the Single Commissioner err in her Finding of Fact No. 8 in finding that the claimant was not entitled to further medical benefits under the Act when the greater weight and preponderance of evidence showed that both of the doctors were recommending additional treatment for claimant?

8. Did the Single Commissioner err in her Conclusion of Law No. 3 in finding that the claimant had sustained a 7% permanent partial disability to the back when the greater weight and preponderance of evidence showed claimant had not reached maximum medical improvement and/or had a much greater degree of disability?

9. Did the Single Commissioner err in her Conclusion of Law No. 4 in finding claimant was not entitled to further medical care when the greater weight and preponderance of evidence showed claimant had not reached maximum medical improvement and was in need of additional medical to lessen his disability?

10. Did the Single Commissioner err in her Conclusion of Law No. 5 in finding the defendants were owed credit for temporary total disability benefits after June 26, 2012, when the greater weight and preponderance of evidence showed that claimant had not reached maximum medical improvement and remained temporarily totally disabled?

11. Did the Single Commissioner err in her Order in finding that claimant had sustained 7% permanent partial disability to the back, that defendants were entitled to credit for temporary total disability payments after June 26, 2012, and in finding that claimant was not entitled to further medical care when the greater weight and preponderance of evidence showed that claimant had not reached maximum medical improvement, was in need of additional medical treatment, remained temporarily totally disabled, and/or had a greater degree of disability?

In addition, the defendants respectfully request the Appellate Panel to reverse, in part, the Decision and Order of the Hearing Commissioner based upon the following grounds:

1. Finding that the claimant reached MMI on June 26, 2012, is not supported by the greater weight of the evidence in the record, as the claimant actually reached MMI on December 15, 2011, or January 12, 2012.

2. The Hearing Commissioner erred in awarding defendants credit for payment of TTD only back to June 26, 2012, as the actual date of MMI was either December 15, 2011, or January 12, 2012.

The defendants request the remainder of the Decision and Order of the Hearing Commissioner be affirmed in its entirety.

After careful review in the instant case of all grounds raised, the evidence in the record, and oral arguments from both counsel, the Commission finds that, by unanimous vote, the Decision and Order of the Hearing Commissioner must be Affirmed in its entirety.

FINDINGS OF FACT

After careful review of the evidence presented by the parties, including the Hearing testimony of the claimant and Rebecca Chavis Jones, the deposition testimony of W.S. Edwards, M.D., and P. Joseph Healy, M.D., and the medical records and exhibits submitted through the APA, IT IS FOUND AS A FACT THAT:

1. All parties to the proceeding are subject to and bound by the terms of the South Carolina Workers' Compensation Act with David G. Jones as employee, Warden & Smith Concrete as employer, and Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc., as carrier.

2. We do not find the claimant credible. Claimant is using a wheelchair when both treating physicians indicated that there is not a reason for it. Neither treating physician believes there is a reason for the use of a wheelchair. Dr. Edwards even recommends against using a walker. Dr. Edwards indicates that that is symptom magnification. See Deposition of Dr. Edwards, p. 32. Dr. Edwards testified that most patients go to work within 7 days of this type of problem. See Deposition of Dr. Edwards, p. 52. Claimant testified that he cannot shave himself, as well as other upper extremity activities; however, the injury is to his lower back. Claimant testifies that there is extreme pain; however, he has not sought pain medications. Dr. Healy said that the test grips were weak, but when the claimant stood up and held on to him he felt his grip on this arm. See Deposition of Dr. Healy, pp. 60-61. Dr. Healy testified that he had exaggerated or amplified or thought that he was injured worse than what he could find. See Deposition of Dr. Healy, p. 13. Dr. Johnson, on October 18, 2011, stated that I think some of his pain is out of proportion to what his MRI shows me. See Defendants' APA, p. 82.

3. We find the claimant has reached maximum medical improvement (MMI). Both treating physicians, orthopedist and neurologist, indicated that they had nothing further to offer the claimant. The only change appears to be when claimant went to Dr. Healy in April alleging that he had previously fallen. This finding is based upon the greater weight of the evidence in the records, specifically the medical records and deposition testimony of Dr. Edwards and Dr. Healy.

4. On December 15, 2011, Dr. Edwards (orthopedist) discharged the claimant from his care. See Defendants' APA, p. 73. He indicated that work-up failed to show any obvious problem that could be dealt with either medically or surgically. He issued a rating on January 12, 2012, and deferred him to a neurologist. Dr. Healy (neurologist) saw him on November 10, 2011, and stated that he did not have anything neurologic to recommend. See Defendants' APA, p. 94. Dr. Healy then saw him on April 5, 2012, and recommended testing; however, in his deposition he testified that the difference in his opinion from November to April would be that the claimant had indicated he had fallen. See Deposition of Dr. Healy, p. 50. He stated that he thought it was odd that the claimant did not contact him for 3 months after falling. See Deposition of Dr. Healy, p. 50. Dr. Healy testified that before the April visit he did not have anything to offer him; that he didn't find anything wrong with him from a neurological standpoint. See Deposition of Dr. Healy, p. 32. He stated that as of April he was recommending the EMG, but back in November he would have recommended it. See Deposition of Dr. Healy, p. 66. He testified that as of the deposition date (June 26, 2012) that it is still his opinion that day that he did not find any neurological problem. See Deposition of Dr. Healy, p. 23. Dr. Healy testified that he would basically agree that the claimant ought to be able to go back to work without any restrictions, because he did not find any neurological problems. See Deposition of Dr. Healy, pp. 22-23.

5. We find the claimant reached MMI on June 26, 2012. Both treating doctors found that they had nothing to offer the claimant in late 2011 (Dr. Edwards on December 15, 2011 and Dr. Healy on November 10, 2011). Dr. Edwards issued an impairment rating on January 12, 2012. As there are some notes deferring between the doctors to each other, and the doctors' reports needed clarification from the deposition, we find that the date of MMI is the date of Dr. Healy's deposition, June 26, 2012, in which he provides an explanation as to his opinions.

6. We find the defendants are entitled to credit for payment of temporary total disability benefits after June 26, 2012, the date of MMI. See Curiel v. Envtl. Management Servs., 655 S.E.2d 482 (2007)

7. We find the claimant sustained seven (7%) percent permanent partial disability to his back. This finding is based upon the greater weight of the evidence in the record.

8. We find the claimant is not entitled to further medical benefits under the Act. This finding is based upon the greater weight of the evidence in the record, specifically the medical records and deposition testimony of Dr. Healy and Dr. Edwards

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, and as provided by the Code of Laws of South Carolina, § 42-17-40, it is the determination of the Commission that:

1. Under § 42-1-130, claimant was a covered employee at the time in question.

2. Under § 42-1-140, defendant-employer was a covered employer under the Act.

3. Under § 42-9-30, claimant sustained seven (7%) percent permanent partial disability to his back.

4. Under § 42-15-60, claimant is not entitled to further medical treatment.

5. Under Curiel v. Envtl. Management Servs., 655 S.E.2d 482 (2007), defendants are entitled to credit for temporary total disability benefits paid after June 26, 2012, the date of maximum medical improvement.

ORDER

IT IS, THEREFORE, ORDERED, that the Decision and Order of the Hearing Commissioner filed in the above-captioned matter on October 18, 2012, is hereby AFFIRMED.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Commissioner T. Scott Beck
For the Appellate Panel

Commissioner Andrea C. Roche

Commissioner Gene McCaskill

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

By Valerie Deller on April 4, 2013