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SC Court of Appeals

DECISION AND ORDER
OF THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 1805291

STARA S. MCLEOD,
Claimant,
vs.
CW GROUP, INC.,
Employer,
and
PMA INSURANCE GROUP,
Carrier.
Defendants.

APPELLATE PANEL
DECISION & ORDER

STATEMENT OF THE CASE

This matter is before the Appellate Panel of the South Carolina Workers Compensation Commission ("Appellate Panel") up the Form 30, *Request for Commission Review*, of the claimant, Stara McLeod ("Claimant"). Claimant seeks review of an August 2, 2021, Decision and Order of Commissioner Susan S. Barden ("Single Commissioner") in which the Single Commissioner denied Claimant benefits under the South Carolina Workers' Compensation Law (the "Act") for an alleged March 26, 2018 work-related accident.

This is a denied case. It is Defendants' contention that Claimant did not sustain a compensable injury by accident on March 26, 2018. Defendants contend that the evidence demonstrates that Claimant had a pre-existing condition for which she underwent a microdiscectomy at L5-S1 in 2017 and that she remained symptomatic following that procedure prior to and beyond the alleged date of injury of this claim. There was also a dispute regarding

the applicable compensation rate for the claim as Claimant alleged she had concurrent employment at the time of her injury.

In her Order, the Single Commissioner denied the claim on the basis that Claimant had failed to meet her burden of proof of a compensable injury by accident. The Single Commissioner further ruled the Claimant did not provide any admissible evidence of her wages for her concurrent employment and denied Claimant's request to hold this issue in abeyance. Claimant subsequently and timely filed her Form 30. A hearing on the Form 30 was held before the Appellate Panel on October 18, 2021.

Based on the entirety of the record, the briefs of the parties, and the arguments of counsel at the hearing, the Appellate Panel finds, as set forth fully below, that the decision and order of the Single Commissioner is **AFFIRMED**.

EVIDENCE OF THE CASE

Medical Evidence

Claimant had a lumbar MRI performed on October 25, 2016 that revealed an abnormal left L5-S1 disc protrusion with impingement on the left S1 nerve root. (Def. APA, p. 1) Claimant was seen by Dr. Todd Warrick, Sumter Spine and Pain Center, on October 27, 2016. (Def. APA, p. 13. Dr. Warrick notes that Claimant was a new patient with pain on her left side, lower back, that radiates into her left hip, leg, and foot for about two weeks. Claimant reported numbness and tingling in her left leg and foot. Dr. Warrick diagnosed Claimant with acute radicular pain from leftward L5-S1 HNP with S1 displacement and compression. (Def. APA, p. 15) Dr. Warrick recommended a transforaminal lumbar epidural steroid injection and noted consideration of a referral for a microdiscectomy. On November 28, 2016, Claimant reported 50% relief from the injection for 2.5 to 3 weeks. (Def. APA, p. 22) Dr. Warrick ordered a repeat injection. On

December 22, 2016, Claimant reported the second injection gave her no relief and actually made her pain worse. (Def. APA, p. 25). Dr. Warrick referred Claimant to Dr. Paul D. deHoll, Palmetto Health USC Orthopedic Center. On January 6, 2017, Dr. deHoll recommended a left-sided microdiscectomy at L5-S1. (Def. APA, p. 38) Claimant underwent this procedure on February 1, 2017. (Def. APA, p. 93)

Claimant was seen post-op by Dr. deHoll on February 10, 2017. (Def. APA, p. 42) Claimant reported overall that her leg pain had substantially improved but she did continue to complain of some continued generalized malaise and back pain. (Def. APA, p. 43) On February 23, 2017, Claimant reported her leg pain had largely resolved but she was having a little bit of numbness. (Def. APA, p. 49) Dr. deHoll released her back to work with restrictions of no lifting.

Claimant returned to Dr. deHoll on November 30, 2017. (Def. APA, p. 53) Dr. deHoll notes that Claimant reported that her pain has worsened since her last visit in February. He notes that she reported intermittent pain radiating into her left leg, as well as minimal numbness and tingling in her toes. (Def. APA, p. 54) Under his review of systems, Dr. deHoll notes that Claimant's left ankle reflex is "absent." (Def. APA, p. 47) Dr. deHoll referred Claimant for physical therapy with consideration of additional injections if her symptoms did not improve. (Def. APA, pp. 47, 55)

On April 13, 2018, Claimant was seen by Dr. deHoll for a follow up. (Def. APA, p. 56) Dr. deHoll notes that Claimant was last seen in November 2017 and that she has been doing physical therapy since that visit. (Def. APA, p. 58) Dr. deHoll ordered a lumbar x-ray that showed loss of disc height at L5-S1. (Def. APA, pp. 58, 60) He ordered additional physical therapy with follow up after completion.

Claimant presented to Palmetto Health Toumey Emergency Room on April 23, 2018 (Def. APA, p. 3) According to the note, Claimant reported emptying a mop bucket “two weeks ago at work”, that she felt something “pop,” and “now has pain to buttocks, and has numbness to left leg.” The note further reflects that Claimant reported her symptoms were similar to previous episodes. (Def. APA, p. 6) Claimant was prescribed medications and told to follow up with her primary care physician. (Def. APA, p. 10)

Claimant returned to Palmetto Health USC on April 27, 2018 and was seen by Douglas Dow, PA. (Def. APA, p. 61) Mr. Dow notes that Claimant had continued lower back pain for the past couple of years with a previous surgery in 2017. He also notes that Claimant had attempted physical therapy but her pain increased to the point she was unable to do it. Claimant reported decreased strength in her left leg and that she’s been taking NSAIDs since December without any relief in her pain or symptoms. (Def. APA, p. 62). Mr. Dow ordered an MRI of her lumbar spine. (Def. APA, p. 63) The MRI was performed on May 3, 2018. (Def. APA, p. 34)

Claimant was seen at Sumter Physical Therapy Clinic on April 30, 2018. (Def. APA, p. 94) The therapist notes for this visit indicate that Claimant was unable to relieve her radicular symptoms during that session. An August 8, 2018 discharge note indicates that Claimant no-showed at her next appointment and did not return. She was discharged from care. (Def. APA, p. 97)

On May 3, 2018, Dr. deHoll reviewed Claimant’s MRI. He notes that there is minimal bulging and evidence of her prior hemilaminotomy but no recurrent herniation. (Def. APA, p. 69) He did note severe discogenic collapse at L5-S1 with mild modic endplate changes. Dr. deHoll notes a preference to avoid any possible surgery so he recommended a left-sided SI joint

injection. Claimant received an SI injection from Dr. Warrick on June 18, 2018. (Def. APA, p. 31)

On July 19, 2018, Claimant returned to Dr. deHoll reporting worsening of her pain after her SI injection. (Def. APA, p. 73) Dr. deHoll states that his surgical recommendation at that time would be for a ALIF procedure at L5-S1 but that Claimant wanted to try to avoid that. Dr. deHoll referred her to Dr. Koranloo for pain management to see if he could improve her symptoms. On August 7, 2018, Dr. Koranloo recommended an EMG/NCS and an L5-S1 LESI. (Def. APA, pp. 76-77) Claimant EMG/NCS was normal. (Def. APA, pp. 82-83) On August 22, 2018, Dr. Koranloo indicates that Claimant got minimal relief from the injections and she was going to return to Dr. deHoll for the next course of action. (Def. APA, p. 85)

Claimant was seen by Dr. Donald Johnson for an IME on August 23, 2018. (Clmt APA, pp. 36-37). Dr. Johnson notes that Claimant had undergone an L5-S1 laminectomy in January 2016 and that Claimant did well from the surgery and was able to return to all activities. Dr. Johnson states that he reviewed records from Dr. deHoll, including August 7, 2018. He also reviewed her MRI and noted that she does not have a large recurrent disc herniation but did have disc space collapse. Dr. Johnson states that he agrees with Dr. deHoll's recommendation of an ALIF at L5-S1 and that Claimant would be a good candidate. Dr. Johnson further states that it is his opinion to a reasonable degree of medical certainty that Claimant's current symptoms are causally related to her work injury of March 26, 2018 "by way of an exacerbation of a symptomatic exacerbation of a pre-existing asymptomatic condition." (Clmt APA, p. 37) Dr. Johnson states that Claimant is not at maximum medical improvement.

Deposition of Dr. Douglass deHoll

Dr. deHoll was deposed in this matter on August 23, 2018. Dr. deHoll testified that he had previously performed surgery on Claimant sometime in late-2016, early-2017, but he wasn't sure of the exact date without referencing any records. (Def. APA, pp. 105-6) He testified that he saw Claimant for follow-ups from that procedure in February and November of 2017. (Def. APA, p. 107) Dr. deHoll stated that in November 2017, Claimant presented with worse back pain and pain radiating into her left leg. (Def. APA, p. 108) He testified that when Claimant returned to him in April of 2018, she was there for the same complaints. (Def. APA, p. 108). He testified that her symptoms on April 27, 2018 were "basically what she's been complaining about in the last several months." (Def. APA, p. 110) Dr. deHoll testified that he did not recall having any conversation with Claimant about a work injury. (Def. APA, p. 110) He stated that he did not make any diagnosis that was different from any of her prior visits. (*Id.*) He testified that he ordered an MRI in May 2018 in order to rule out a re-herniation at the surgical level and concluded that she had not. (Def. APA, pp. 110-11) Dr. deHoll did testify that there was a degenerative collapse at that level and that it was "not an injury; it's wear and tear." (Def. APA, p. 111). When asked whether Claimant aggravated her prior condition in her alleged work accident, Dr. deHoll responded that had no history of anything happening at work and that it was never mentioned to him. (Def. APA, p. 119) He further explained that the absence of any such reference was important because he uses a scribe and does not write his own notes. (Def. APA, p. 120) He testified that the first time a work accident was mentioned was during his most recent visit. (Def. APA, p. 121) Dr. deHoll did testify that it is possible for someone to aggravate or get hurt while lifting and pouring. (Def. APA, p. 122) He further testified that since his records

reflect no reference to or report of a work injury, there is no way for him to correlate her issues to a work incident. (Def. APA, p. 126)

Dr. deHoll did testify that a Form 14B was apparently prepared by his office but that form should be disregarded as he was not involved in its preparation. (Def. APA, pp. 129-30) A blank Form 14B containing the hand written message “No knowledge of a work-related injury in treatment of this patient” was done by him. (*Id.*) According to Dr. deHoll, his diagnosis and treatment recommendations would not have changed even if he had knowledge of an alleged work injury. (Def. APA, p. 130-31)

Hearing Testimony

At the hearing, Claimant testified on her own behalf. Claimant testified that she resides in Dalzell, South Carolina with her husband and 16-year old daughter. Claimant graduated from Sumter High School and later attended Allen University but did not graduate. Claimant’s work history includes working as a page at the South Carolina State House, some part-time work, and jobs with various health care providers. She has been employed by the South Carolina Department of Mental Health since 2015 and is currently an employment specialist. While still working the Department of Mental Health, Claimant took a second job working for Employer in October/November of 2017 performing janitorial services. Claimant was stationed to work at Shaw Air Force Base. Claimant described the various duties she performed in this job, including details regarding utilizing mops and buckets.

Claimant testified that she had surgery on her back in 2017.¹ Claimant testified that prior to this surgery she had experienced some pain and tightening in her back for which she sought

¹ The hearing testimony regarding the date of surgery was internally inconsistent in many places and included references to dates in late-2016, and early-2017. On cross-examination, Claimant was presented with documentation that the surgery actually took place on February 1, 2017.

chiropractic treatment. She was later referred to a pain specialist, Dr. Todd Warrick, and finally to Dr. deHoll for surgery. Claimant testified that she had follow ups with Dr. deHoll after her surgery with the last being in February, 2017. Claimant testified that she had no problems with her back between February, 2017 and when she started working for Employer. According to Claimant, she returned to Dr. deHoll in November 2017 “as a precaution.” She explained that she had been doing strenuous work for Employer and wanted to make sure she was fine. Claimant testified that she told Dr. deHoll that she did have some “tightening” in her back and that he was fully aware that she was working a second job. She testified that Dr. deHoll did not take her out of work and that she then returned to work for employer.

Claimant testified that her accident occurred on either a Wednesday or Thursday at around 7:00 – 8:00 p.m. She testified that she was working in a building. She described that she took a mop bucket into the janitorial space with a floor sink and proceeded to turn the bucket over to empty it in the sink. As she was standing back up, she felt a popping, burning sensation in her back. She described feeling an immediate tingling with numbness and pain shooting down her butt area, down into her left leg. She testified that she didn’t do anything about it at first but continued to work to finish up that building. She testified she did mention something to a co-worker about her back hurting. According to Claimant, this co-worker came over and started massaging her butt area. Claimant testified that she called in sick the next Friday and has not been back to work for Employer at all since.

Claimant admitted that the surgery could have taken place on that date and she was just uncertain of the exact date. (*See* Hearing Transcript, pp. 43-45). An operation note in the record confirms the date of February 1, 2017. (*See* Defendants’ APA #6, p. 93). References to this surgery in this order shall refer to the correct date, rather than the date erroneously referenced during the testimony.

Claimant testified that she was later told by Ms. Teresa to go see a doctor. Claimant testified that she tried to go to Doctors Care about a week after the incident but the office visit was not authorized by Employer. Claimant testified she then went to see Dr. deHoll on April 16, 2017. She also later went to the ER.

According to Claimant, the pain following this incident is different from the pain she felt prior to her 2017 surgery. She described the new pain as being more in her tailbone, like she's sitting on something. She testified that she still has pain down her leg and numbness in her toes and foot.

Claimant testified that in December of 2018, she was diagnosed with breast cancer and started treatment for that in January, 2019. Claimant testified that she has had surgeries, as well as chemotherapy and radiation. She continues to treat for this condition while also still experiencing back pain. Claimant testified that her back problems affect her ability to carry on various activities because she can't sit for long periods of time. Claimant's limited treatment that she has received to her back since the injury has been paid for by her, out of pocket.

On cross-examination, Claimant testified that the tingling and numbness down her left leg after this accident was something that she had previously after her 2017 surgery. When asked about Dr. deHoll's notes from November 2017 that reference radiating pain and numbness/tingling, Claimant denied that she was experiencing those symptoms at that time. She also denied experiencing worsening pain in November 2017 as referenced in Dr. deHoll's notes. Claimant reiterated that went to Dr. deHoll because she was feeling "tightness" in her back and wanted to have it checked out.

Following her alleged date of accident, Claimant returned to Dr. deHoll on April 13, 2017. While the note indicates that Claimant had been doing physical therapy since November,

Claimant testified that she had only been to one therapy session but she did not go back. She testified that she did tell Dr. deHoll that her problems were work related despite the fact that the records do not contain any reference to it. Claimant did admit to have some additional treatment to her back since her accident, including injections and a physical therapy session in April 2018. According to Claimant, she only had one session of PT because the pain was so bad that the therapist said there was no need to do more until her pain got under control. Claimant disputed the discharge note saying she was discharged for no-showing at her next visit.

Following the May 26, 2021 hearing, the Single Commissioner made the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Claimant alleges that she injured her low back and left leg in a work-related accident on March 26, 2018, aggravating a pre-existing condition.
2. Claimant is 43 years of age. (This finding is based on the medical evidence establishing Claimant's date of birth as November 4, 1977; *see also* Claimant's Deposition, p. 6).
3. Claimant is a high school graduate. She also attended college, and is 11 hours shy of a bachelor's degree in business administration/management (This finding is based on testimony of Claimant; Claimant's Deposition, pp. 14-15; Claimant's APA, Exhibit B, pp. 3-4).
4. Claimant's job with Employer was custodian (This finding is based on the testimony of Claimant. *See also* Claimant's Deposition, p. 21; Claimant's APA, Exhibit B, pp. 1 and 4).
5. Although employment tenure is never dispositive with regard to compensability, it is evidence to consider: Claimant had only worked for several months when the alleged accident occurred. Claimant testified that she took the job as she needed to pay for private school

and college tuition. She also testified that she has credit card debt. (This finding is based on the testimony of Claimant, pp. 26, 53; *see also* Claimant's Deposition, pp. 20 and 24-25).

6. Claimant's pre-existing low back condition (beginning in 2016) involved herniation at L5-S1, including left-side S1 nerve root compression affecting the leg/foot (This finding is based on Defendants' APA #1, p. 1; Defendants' APA #2, pp. 15 and 27; Defendants' APA #4, pp. 38-41).

7. Notwithstanding various misstatements in the record as to the date of Claimant's prior lumbar surgery (*See* Hearing Transcript, pp. 23, 24, 43-45; Deposition of Dr. deHoll, pp. 6-7 and 31; Dr. Koranloo's misstatement as contained in Claimant's APA #1, p. 17, and Claimant's APA #7, p. 39; Claimant's Deposition that she underwent prior back surgery in 2015, p. 31 and 34, and that the surgery was to L4--a different spinal level than that which was operated on), Claimant actually underwent the prior L5-S1 surgery with Dr. deHoll on February 1, 2017. (This finding is based on the Operative Report of February 1, 2017, as contained in Defendants' APA #6, p. 93).

8. Prior to the alleged injury of March 2018, Claimant returned to her treating surgeon (Dr. deHoll, a spine specialist) in **November 2017** with worsening back pain, such that Dr. deHoll ordered physical therapy. This evidence contradicts and is inconsistent with Claimant's testimony that she had no back problem other than some "tightness," and that the November 2017 medical visit was only preventative. At this visit, Claimant's left ankle reflex is noted to be "absent" (*See* Hearing Transcript, pp. 42-43, 47-48, 60; Claimant's Deposition, pp. 33-34; Defendants' APA #4, pp. 47 and 53-55; Deposition of Dr. deHoll, pp. 4 and 7-9).

9. Additionally, Claimant told Physician Assistant Dow that she had “been taking NSAIDs since December [2017] without any relief in her [back] pain or symptoms” [emphasis added] (See Claimant’s APA #1, p. 5, dated April 2018; Defendants’ APA #4, p. 62).

10. Claimant reported an alleged work accident to Employer on April 2, 2018 (See Claimant’s APA, Exhibit B, p. 18).

11. Claimant returned to Dr. deHoll on **April 13, 2018** (See Claimant’s APA #1, pp. 1-3) and reported further worsening back pain, restricted range of motion, numbness, and tingling. Dr. deHoll referred Claimant to more physical therapy and prescribed various medications. **Claimant never reported a work injury to Dr. deHoll**, a finding I base on these records and on Dr. deHoll’s deposition testimony (See Defendants’ APA #5, p. 92, in which Dr. deHoll writes “no knowledge of a work related injury;” Deposition of Dr. deHoll, e.g., pp. 8-9, 19-21, 26, and 29: “I have no history of anything happening at work” and “She didn’t mention anything specific about work.”)

12. Dr. deHoll states that given the evidence in this case, there is no way for him to correlate Claimant’s current back condition to an alleged work injury (See Deposition of Dr. deHoll, p. 26).

13. Dr. deHoll states that Claimant had no different diagnosis after the date of the alleged accident than she had prior (See Deposition of Dr. deHoll, pp. 9-11).

14. Claimant went to the Emergency Room on **April 23, 2018**, stating that she had sustained a work injury 2 weeks earlier (placing the accident date at approximately April 9). Instead of mentioning the worsening which began in November 2017, Claimant described her back and leg pain as “sudden,” i.e., “now” for “2 weeks” occurring with the alleged retroactive date of an accident (See Claimant’s APA #2, e.g., pp. 20-23; Defendants’ APA #1, pp. 2-12).

15. In the summer of 2018, Claimant advised Dr. deHoll that he would be deposed and that she had sustained a work injury (*See* Deposition of Dr. deHoll, p. 21).

16. Claimant's post-alleged accident MRI shows that Claimant's pre-accident herniation "is gone," but Claimant has "significant discogenic collapse with modic changes at L5-S1." There is no re-herniation, re-rupture, or other acute finding; Dr. deHoll states that there is instead degenerative collapse of the L5-S1 disc or "wear and tear" (*See* Claimant's APA #1, p. 15; Defendants' APA #4, p. 69; Deposition of Dr. deHoll in its entirety, but see particularly pp. 11, 13, 15, 18, and 25).

17. "Clinical History" in Claimant's MRI report of May 2018 states that Claimant has had "low back pain since November 2017." (*See* Claimant's APA #4, p. 31; Defendants' APA #3, p. 34).

18. Dr. Koranloo's medical record states that there was an injury in April 2018—not March 2018. Dr. Koranloo did not provide a causation/aggravation statement (*See* Defendants' APA #4, pp. 76 and 85; Defendants' APA #5, p. 89).

19. Dr. Troyer's record states that Claimant's symptoms have been present "since April [2018]" (*See* Defendants' APA #7, p. 98).

20. Dr. deHoll, who has treated Claimant both prior to and after the date of the alleged accident, states that Claimant never contemporaneously reported a work accident to him. When deposed, the most he would opine to is that Claimant's alleged accident "can" cause, "could" cause, or "could have" caused Claimant's condition. He does not opine that it did (This finding is based on the Deposition of Dr. deHoll in its entirety, including but not limited to pp. 14, 18-20, 22, and 31-32).

21. Dr. Warrick, a pain specialist who treated Claimant for her back/leg both before and after the alleged work accident, did not provide a causation/aggravation statement. (This finding is based on medical evidence in its entirety; Claimant's Deposition, pp. 32 and 40).

22. As Claimant's treating physicians did not provide causation/aggravation statements, Claimant provided a causation opinion with a one-time IME (Dr. Johnson), who opined that Claimant's "asymptomatic [pre-existing] condition" was aggravated, an opinion unsupported by Dr. deHoll's and other treatment records [emphasis added]. I give greater weight to Dr. deHoll's treatment records and to his deposition testimony than I give to Dr. Johnson's inaccurate statement that Claimant's pre-existing condition was "asymptomatic" (See Claimant's APA #6, pp. 36-37).

23. Although by no means dispositive or pivotal, the mechanics of the alleged accident are also not entirely consistent: Claimant testified at the Hearing and at her deposition that she was standing back up after emptying a water bucket when she sustained an alleged injury (See Hearing Transcript, pp. 29-30 and Claimant's Deposition, p. 38, lines 8-13). Employer's accident report states that Claimant was lifting up the bucket and pouring when she injured her back (See Claimant's APA, Exhibit B, p. 19). The Emergency Room records states that Claimant was in the process of emptying a bucket (See Defendants' APA #1, pp. 3 and 5); and Claimant's counsel seems to indicate to Dr. deHoll that Claimant was lifting when she felt a pop (See Deposition of Dr. deHoll, p. 12, lines 22-24; p. 13, lines 24-25; and p. 14, lines 6-7).

24. Benefits under the Act are denied. Although pre-existing conditions may be readily aggravated, there are simply too many inconsistencies in the record for me to find this claim compensable.

25. Claimant's average weekly wage is \$169.91, yielding a compensation rate of \$113.28. I base this finding on the payroll records as contained in Claimant's APA, Exhibit B, pp. 20-21. This claim has been pending since 2018 (i.e., for more than 3 years), and no concurrent employment Form 20 has ever been filed with the Commission. Nor was there a Motion made to leave the record open for a concurrent employment Form 20. The Commission cannot require a claimant to file a concurrent Form 20, as the law requires her to file one only if she wants other income considered. I decline to hold—or ask another commissioner to hold—another hearing for an issue over which Claimant has had ample time and opportunity to address. This was not a “surprise” hearing, but one that was properly noticed.

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 S.C. Code §42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.
2. Under S.C. Code §42-1-130, Stara S. McLeod was a covered employee.
3. Under S.C. Code §42-1-140, CW Group, Inc. was a covered employer.
4. Under S.C. Code §42-3-150, there was an employer/employee relationship between the parties.
5. Under S.C. Code §42-17-20, venue in Sumter County, South Carolina, was proper and agreed to by the parties.
6. Under S.C. Code §1-23-320(b) and Regulation 67-607, notice of hearing was timely and properly served upon all parties of interest.

7. Under S.C. Code §42-1-160, the claimant, Stara S. McLeod, has failed to meet her burden of proof to show a compensable injury by accident arising out of and in the course of her employment. Likewise, Claimant has failed to meet her burden of proof to show a compensable aggravation of a pre-existing condition under S.C. Code §42-9-35.

8. Under S.C. Code §42-1-40, the claimant's average weekly wage is \$169.91, yielding a compensation rate of \$113.28. Claimant's alleged average weekly wage and compensation rate are unsupported by a Form 20 as required by S.C. Code Reg 67-1603(H). As such, any alleged concurrent employment wages cannot be considered in computing the average weekly wage and compensation. No motion was made to leave the record open for submission of a Form 20 was made so this determination is made in accordance with the Act.

9. All benefits under the Act are DENIED.

DECISION OF THE APPELLATE PANEL

Based upon its review of the record, the briefs of the parties, and the arguments of counsel, the Appellate Panel finds that the Single Commissioner did not err with respect to her order denying Claimant's claim. Therefore, after careful consideration, the Appellate Panel **Affirms** the decision and order of the Single Commissioner, as set for the below.

Following the October 18, 2021 hearing, and based on the record as a whole, the briefs of the parties, and the arguments of counsel, the Appellate Panel makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Claimant alleges that she injured her low back and left leg in a work-related accident on March 26, 2018, aggravating a pre-existing condition.

2. Claimant is 43 years of age. (This finding is based on the medical evidence establishing Claimant's date of birth as November 4, 1977; *see also* Claimant's Deposition, p. 6).

3. Claimant is a high school graduate. She also attended college, and is 11 hours shy of a bachelor's degree in business administration/management (This finding is based on testimony of Claimant; Claimant's Deposition, pp. 14-15; Claimant's APA, Exhibit B, pp. 3-4).

4. Claimant's job with Employer was custodian (This finding is based on the testimony of Claimant. *See also* Claimant's Deposition, p. 21; Claimant's APA, Exhibit B, pp. 1 and 4).

5. Although employment tenure is never dispositive with regard to compensability, it is evidence to consider: Claimant had only worked for several months when the alleged accident occurred. Claimant testified that she took the job as she needed to pay for private school and college tuition. She also testified that she has credit card debt. (This finding is based on the testimony of Claimant, pp. 26, 53; *see also* Claimant's Deposition, pp. 20 and 24-25).

6. Claimant's pre-existing low back condition (beginning in 2016) involved herniation at L5-S1, including left-side S1 nerve root compression affecting the leg/foot (This finding is based on Defendants' APA #1, p. 1; Defendants' APA #2, pp. 15 and 27; Defendants' APA #4, pp. 38-41).

7. Notwithstanding various misstatements in the record as to the date of Claimant's prior lumbar surgery (*See* Hearing Transcript, pp. 23, 24, 43-45; Deposition of Dr. deHoll, pp. 6-7 and 31; Dr. Koranloo's misstatement as contained in Claimant's APA #1, p. 17, and Claimant's APA #7, p. 39; Claimant's Deposition that she underwent prior back surgery in 2015, p. 31 and 34, and that the surgery was to L4--a different spinal level than that which was operated on), Claimant actually underwent the prior L5-S1 surgery with Dr. deHoll on February

1, 2017. (This finding is based on the Operative Report of February 1, 2017, as contained in Defendants' APA #6, p. 93).

8. Prior to the alleged injury of March 2018, Claimant returned to her treating surgeon (Dr. deHoll, a spine specialist) in **November 2017** with worsening back pain, such that Dr. deHoll ordered physical therapy. This evidence contradicts and is inconsistent with Claimant's testimony that she had no back problem other than some "tightness," and that the November 2017 medical visit was only preventative. At this visit, Claimant's left ankle reflex is noted to be "absent" (*See* Hearing Transcript, pp. 42-43, 47-48, 60; Claimant's Deposition, pp. 33-34; Defendants' APA #4, pp. 47 and 53-55; Deposition of Dr. deHoll, pp. 4 and 7-9).

9. Additionally, Claimant told Physician Assistant Dow that she had "been taking NSAIDs *since December [2017] without any relief in her [back] pain or symptoms*" [emphasis added] (*See* Claimant's APA #1, p. 5, dated April 2018; Defendants' APA #4, p. 62).

10. Claimant reported an alleged work accident to Employer on April 2, 2018 (*See* Claimant's APA, Exhibit B, p. 18).

11. Claimant returned to Dr. deHoll on **April 13, 2018** (*See* Claimant's APA #1, pp. 1-3) and reported further worsening back pain, restricted range of motion, numbness, and tingling. Dr. deHoll referred Claimant to more physical therapy and prescribed various medications. **Claimant never reported a work injury to Dr. deHoll**, a finding I base on these records and on Dr. deHoll's deposition testimony (*See* Defendants' APA #5, p. 92, in which Dr. deHoll writes "no knowledge of a work related injury;" Deposition of Dr. deHoll, e.g., pp. 8-9, 19-21, 26, and 29: "I have no history of anything happening at work" and "She didn't mention anything specific about work.")

12. Dr. deHoll states that given the evidence in this case, there is no way for him to correlate Claimant's current back condition to an alleged work injury (See Deposition of Dr. deHoll, p. 26).

13. Dr. deHoll states that Claimant had no different diagnosis after the date of the alleged accident than she had prior (See Deposition of Dr. deHoll, pp. 9-11).

14. Claimant went to the Emergency Room on **April 23, 2018**, stating that she had sustained a work injury 2 weeks earlier (placing the accident date at approximately April 9). Instead of mentioning the worsening which began in November 2017, Claimant described her back and leg pain as "sudden," i.e., "now" for "2 weeks" occurring with the alleged retroactive date of an accident (See Claimant's APA #2, e.g., pp. 20-23; Defendants' APA #1, pp. 2-12).

15. In the summer of 2018, Claimant advised Dr. deHoll that he would be deposed and that she had sustained a work injury (See Deposition of Dr. deHoll, p. 21).

16. Claimant's post-alleged accident MRI shows that Claimant's pre-accident herniation "is gone," but Claimant has "significant discogenic collapse with modic changes at L5-S1." There is no re-herniation, re-rupture, or other acute finding; Dr. deHoll states that there is instead degenerative collapse of the L5-S1 disc or "wear and tear" (See Claimant's APA #1, p. 15; Defendants' APA #4, p. 69; Deposition of Dr. deHoll in its entirety, but see particularly pp. 11, 13, 15, 18, and 25).

17. "Clinical History" in Claimant's MRI report of May 2018 states that Claimant has had "low back pain since November 2017." (See Claimant's APA #4, p. 31; Defendants' APA #3, p. 34).

18. Dr. Koranloo's medical record states that there was an injury in April 2018—not March 2018. Dr. Koranloo did not provide a causation/aggravation statement (*See Defendants' APA #4*, pp. 76 and 85; *Defendants' APA #5*, p. 89).

19. Dr. Troyer's record states that Claimant's symptoms have been present "since April [2018]" (*See Defendants' APA #7*, p. 98).

20. Dr. deHoll, who has treated Claimant both prior to and after the date of the alleged accident, states that Claimant never contemporaneously reported a work accident to him. When deposed, the most he would opine to is that Claimant's alleged accident "can" cause, "could" cause, or "could have" caused Claimant's condition. He does not opine that it did (This finding is based on the Deposition of Dr. deHoll in its entirety, including but not limited to pp. 14, 18-20, 22, and 31-32).

21. Dr. Warrick, a pain specialist who treated Claimant for her back/leg both before and after the alleged work accident, did not provide a causation/aggravation statement. (This finding is based on medical evidence in its entirety; Claimant's Deposition, pp. 32 and 40).

22. As Claimant's treating physicians did not provide causation/aggravation statements, Claimant provided a causation opinion with a one-time IME (Dr. Johnson), who opined that Claimant's "asymptomatic [pre-existing] condition" was aggravated, an opinion unsupported by Dr. deHoll's and other treatment records [emphasis added]. I give greater weight to Dr. deHoll's treatment records and to his deposition testimony than I give to Dr. Johnson's inaccurate statement that Claimant's pre-existing condition was "asymptomatic" (*See Claimant's APA #6*, pp. 36-37).

23. Although by no means dispositive or pivotal, the mechanics of the alleged accident are also not entirely consistent: Claimant testified at the Hearing and at her deposition

that she was standing back up after emptying a water bucket when she sustained an alleged injury (See Hearing Transcript, pp. 29-30 and Claimant's Deposition, p. 38, lines 8-13). Employer's accident report states that Claimant was lifting up the bucket and pouring when she injured her back (See Claimant's APA, Exhibit B, p. 19). The Emergency Room records states that Claimant was in the process of emptying a bucket (See Defendants' APA #1, pp. 3 and 5); and Claimant's counsel seems to indicate to Dr. deHoll that Claimant was lifting when she felt a pop (See Deposition of Dr. deHoll, p. 12, lines 22-24; p. 13, lines 24-25; and p. 14, lines 6-7).

24. Benefits under the Act are denied. Although pre-existing conditions may be readily aggravated, there are simply too many inconsistencies in the record for me to find this claim compensable.

25. Claimant's average weekly wage is \$169.91, yielding a compensation rate of \$113.28. The Appellate Panel bases this finding on the payroll records as contained in Claimant's APA, Exhibit B, pp. 20-21. This claim has been pending since 2018 (i.e., for more than 3 years), and no concurrent employment Form 20 has ever been filed with the Commission. Nor was there a Motion made to leave the record open for a concurrent employment Form 20. The Commission cannot require a claimant to file a concurrent Form 20, as the law requires her to file one only if she wants other income considered. We decline to hold—or ask another commissioner to hold--another hearing for an issue over which Claimant has had ample time and opportunity to address. This was not a "surprise" hearing, but one that was properly noticed.

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:

10. Under S.C. Code §42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.

11. Under S.C. Code §42-1-130, Stara S. McLeod was a covered employee.

12. Under S.C. Code §42-1-140, CW Group, Inc. was a covered employer.

13. Under S.C. Code §42-3-150, there was an employer/employee relationship between the parties.

14. Under S.C. Code §42-17-20, venue in Sumter County, South Carolina, was proper and agreed to by the parties.

15. Under S.C. Code §1-23-320(b) and Regulation 67-607, notice of hearing was timely and properly served upon all parties of interest.

16. Under S.C. Code §42-1-160, the claimant, Stara S. McLeod, has failed to meet her burden of proof to show a compensable injury by accident arising out of and in the course of her employment. Likewise, Claimant has failed to meet her burden of proof to show a compensable aggravation of a pre-existing condition under S.C. Code §42-9-35.

17. Under S.C. Code §42-1-40, the claimant's average weekly wage is \$169.91, yielding a compensation rate of \$113.28. Claimant's alleged average weekly wage and compensation rate are unsupported by a Form 20 as required by S.C. Code Reg 67-1603(H). As such, any alleged concurrent employment wages cannot be considered in computing the average weekly wage and compensation. No motion was made to leave the record open for submission of a Form 20 was made so this determination is made in accordance with the Act.

18. All benefits under the Act are DENIED.

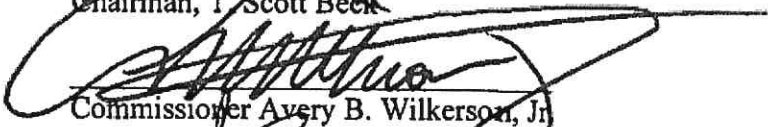
ORDER


IT IS THEREFORE ORDERED that Claimant's request for benefits under the Act is DENIED.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION


Chairman, T. Scott Beck


Commissioner Avery B. Wilkerson, Jr.


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 20, 2022