THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION
Derrick L. Williams, Commissioner
T. Scott Beck, Commissioner
Avery B. Wilkerson, Jr., Commissioner

WCC File No. 1009201
Homer Williams,.................................... Respondent,

v.

Walter P. Rawl and Sons, Inc. and Great American Alliance Insurance Company...................Appellants.

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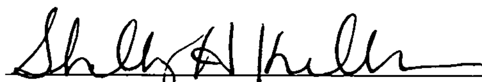
SC Court of Appeals

INITIAL BRIEF OF APPELLANTS

May 31st, 2013



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STATEMENT OF ISSUES ON APPEAL

I. THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS COMPENSATION COMMISSION ERRED IN FINDING THAT CLAIMANT SUSTAINED AN INJURY BY ACCIDENT ARISING OUT OF HIS COURSE AND SCOPE OF EMPLOYMENT, THE ERROR BEING THAT THE EVIDENCE DOES NOT SUPPORT THAT FINDING AS THE CLAMANT WAS NOT WORKING ON THE ALLEGED DATE OF ACCIDENT JUNE 10, 2010.

II. THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS COMPENSATION COMMISSION ERRED IN FINDING THAT CLAIMANT SUSTAINED AN INJURY BY ACCIDENT ARISING OUT OF HIS COURSE AND SCOPE OF EMPLOYMENT, THUS ENTITLING HIM TO MEDICAL BENEFITS AND PERMANENT DISABILITY, THE ERROR BEING THAT THE CLAIMANT DID NOT MEET HIS BURDEN OF PROOF AND THE FINDING IS NOT SUPPORTED BY THE EVIDENCE.

III. THE CLAIMANT DID NOT MEET HIS BURDEN OF PROVING AND THE PREPONDERANCE OF THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CLAIMANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS.

IV. THE APPELLATE PANEL ERRED IN FINDING THAT THE CLAIMANT WAS ENTITLED TO LIFETIME FUTURE MEDICAL CARE AND A KNEE BRACE, CANE AND NON-STEROIDAL ANTI-INFLAMMATORY MEDICATIONS, THE ERROR BEING THAT THE EVIDENCE DOES NOT SUPPORT THAT THESE MODALITIES WILL TEND TO LESSEN THE CLAIMANT'S DISABILITY AND THE CLAIMANT IS NOT PERMANENTLY AND TOTALLY DISABLED.

V. THE APPELLANT PANEL ERRED IN FINDING AS FACT, CONCLUDING AS A MATTER OF LAW AND ORDERING THAT THE CLAIMANT IS ENTITLED TO 12% IN PERMANENT DISABILITY, THE ERROR BEING THAT THE CLAIMANT DID NOT MEET HIS BURDEN OF PROOF AND THE FINDING IS NOT SUPPORTED BY THE EVIDENCE.

STATEMENT OF THE CASE

This matter was before the Commission upon the issues raised in Claimant's Form 50 hearing request filed on October 24, 2011, and in the Defendants' Form 51. This case was heard by the Single Commissioner on February 2, 2012. It is a denied work-related injury.

The Respondent (Claimant) seeks benefits under the South Carolina Workers' Compensation Act based upon an alleged injury occurring on June 10, 2010, while in the employment of the Appellant (Defendant). The Claimant contends that he suffered an injury by accident while stepping down from the cab of a tractor-trailer, causing injury to his right knee.

Defendants deny that Claimant sustained a work-related injury upon several grounds, one of which is that the claimant was not working on June 10, 2010. An Order was issued on May 22, 2012 by the Single Commissioner finding that the claimant was entitled to: (1) $16,139.21 in a lump sum amount based on a 12% disability to the right lower extremity; (2) $12,217.72 in a lump sum amount for back temporary total disability benefits, which is 17.7143 weeks multiplied by the stipulated maximum compensation rate of $689.71 (3) lifetime future medical care pursuant to SC Code Ann. Section 42-15-60, medications, and medical equipment including, but not limited to, follow-up visits, a knee brace, a cane, non-steroidal anti-inflammatory medications, and injections, which tend to lessen Claimant's period of disability and maintain his current level of functioning; (4) causally related medical care and prescribe causally related medications and (5) causally related medication and medical mileage. This order was upheld by the

South Carolina Workers Compensation Commission Appellate panel on January 3, 2013. The Defendants appealed to this Court.

ARGUMENTS

1 **THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS COMPENSATION COMMISSION ERRED IN FINDING THAT CLAIMANT SUSTAINED AN INJURY BY ACCIDENT ARISING OUT OF HIS COURSE AND SCOPE OF EMPLOYMENT, THE ERROR BEING THAT THE EVIDENCE DOES NOT SUPPORT THAT FINDING AS THE CLAMANT WAS NOT WORKING ON THE DATE OF THE ACCIDENT, JUNE 10, 2010.**

The Claimant did not meet his burden of proof and the substantial evidence does not reflect that he suffered a compensable work related accident thereby entitling him to disability benefits and medical treatment. "A claimant must establish by the preponderance of the evidence the facts which will entitle him to an award under the Workmen's Compensation Act." *Walsh v. US Rubber Co.* (1961) 238 SC 411, 120 SE2d 685. "The burden is upon the **claimant** to prove such facts as will render the injury compensable within the provisions of the Workmen's Compensation Act, and such award must not be based upon surmise, conjecture, or speculation." *Walker v. City Motor Car Co.* (1958) 232 SC 392, 102 SE2d 373.

The Claimant did not meet his burden of proof and the testimonial evidence does not support the Commissioner's award. This is an un-witnessed accident whereby the Claimant contends he injured himself on June 10, 2010 while stepping out of his tractor-trailer. (Hearing Transcript p. 20). The claimant stated that he was sure that the accident happened on June 10, 2010:

Q. And you are 100% sure?

A. I'm 100% sure.
Q. that's how it happened on June 10th?
A. Yes, sir.
Hearing Transcript p. 49 lines 16-19, Single Commissioner.

The claimant did not meet his burden of proof that an injury occurred because the DOT logs completed by the claimant show that the claimant was not working on June 10, 2010:

Q. And this log shows that you were off June 10th through June 30th, correct?
A. Yes it shows that.

Hearing Transcript p. 52, lines 21-23, Single Commissioner

The claimant then goes on to testify at the hearing that in his deposition he stated that he filled out the logs the very day that he was injured and turned the logs in:

Q. All right, in other words you're now still in the tractor?
A. Yes sir.
Q. The truck part?
A. Yes, sir.
Q. All right. So what did you do—so did you do your logs that day? What did you say? Line 18, What's your answer?
A. Yes, sir.
Q. Then what did you do? What did you say?
A. Go back to the receiving office and then they...
Q. "They got a place where they put that?"
A. Yes.

Hearing Transcript p. 55, lines 2-10

The claimant then testifies that he would never falsify his DOT logs:

Q. Did you sign it?
A. Yes, sir.
Q. That's a true and accurate log?
A. Yes, sir.

Hearing Transcript Single Commissioner p. 51, lines 20-23.

However, when he was confronted at the hearing, the claimant contended that the logs filled out by him which shows that he was not working that day, were false. (Hearing Transcript p. 45).

Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. *Small v. Pioneer Machinery, Inc.* 494 SE 2d 835, 329 S.C. 448 (1997). Only one reasonable inference can be deduced from the evidence of the claimant's own testimony is that the claimant did not work on the date of the accident and as such, the court's finding was an error of law.

2 THE CLAIMANT DID NOT MEET HIS BURDEN OF PROVING AND THE PREPONDERANCE OF THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CLAIMANT SUSTAINED AN INJURY BY ACCIDENT ARISING OUT OF HIS COURSE AND SCOPE OF EMPLOYMENT, THUS ENTITLING HIM TO MEDICAL BENEFITS AND PERMANENT DISABILITY.

If an incident did occur on June 10, 2012, there was no injury by accident. Three days before the incident, the claimant was receiving treatment for knee problems. (Hearing Transcript p. 12-15). These knee problems were to such a degree that the clamant had to be put on medication six months before the accident. (Hearing Transcript p. 12-15). The Claimant was diagnosed with osteoarthritis in both knees in 2009, and his family doctor gave him Celebrex. (Hearing Transcript p. 23). The claimant has a Baker's cyst and degenerative changes to his right knee. In the claimant's own words during his recorded statement, he says that the doctor x-rayed his knee after the accident and said that he didn't hurt anything. (Hearing Transcript p. 74). Moreover, the claimant states that all tests performed on the knee were negative (Hearing Transcript p. 74). Because

the claimant suffered no injury, there was no injury by accident, but only a continuation of his underlying complaints that made the claimant seek treatment to his knees just days before an alleged accident.

Defendants also contend that this is not a work related injury or accident because it did not arise out of the claimant's course and scope of employment. Section 42-1-160 provides that injury and personal injury shall mean only injury by accident arising out of and in the course of employment. It was not a work related accident because it did not arise out of his employment. To sustain an award under the Workers' Compensation Act, an injury must result from an accident which both "arose out of" and occurred "in the course of" the employment. *Williams v. The South Carolina State Hospital,* 245 S.C. 377, 140 S.E. 2d 601 (1965). The phrases "arising out of" and "in the course of employment" are used conjunctively. One of these elements without the other will not sustain an award. The two elements must co-exist. *Dicks v. Brooklyn Cooper Ridge Co.,* 208 S.C. 139, 37 S.E. 2d 286 (1946); *Brady v. Sacony of St. Matthews,* 232 S.C. 84, 101 S.E. 2d 50 (1957). "Arising out of refers to the origin of the cause of the accident. *Eaddy v. Smurfit-Stone Container Corporation,* 355 S.C. 154, 584 S.E. 2d 390 (Ct. App. 2003), (*rehearing denied.*) The employee's injury must bear a "logical causal relation" to his employment. *Dukes v. Rural Metro Corp.,* 356 S.C. 107, 587 S.E.2d 687 (2003), *quoting, Bright v. Orr Lyons Mill,* 285 S.C. 58, 59, 328 S.E.2d 68, 70 (1985).

"It (the injury) arises 'out of the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the

work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and have flowed from that source as a rational consequence." *Douglas v. Spartan Mills,* 245 S.C. 265, 140 S.E.2d 173 (1965), *quoting, Fowler v. Abbott Motor Co.,* 236 S.C. 226, 113 S.E.2d 737 (1960)."Under the 'increased-risk doctrine' for workers' compensation purposes, an injury arises out of the employment if some risk inherent to the employment was a contributing cause of the injury; the risk must be one to which the general public would not be equally exposed." *Simmons v. City of Charleston* (S.C. App. 2002) 349 S.C. 64, 562 S.E.2d 476, *rehearing denied certiorari dismissed.*"

The simple of act of the claimant stepping out of a vehicle while he was in complete control of his actions is not peculiar to his employment as a truck driver. For the first time at the hearing, the claimant states that his tractor trailer was parked on an incline and that the step was twenty two inches to the ground. Regardless of this newfound contention, the claimant was totally in control coming out of the tractor-trailer and his hand was still on the bar when he put both feet on the ground. (Hearing Transcript p. 48-51). He did not jump or step the entire height of the alleged 22 inch distance. He

was on the bottom step and in control of his movement. When he touched his toe to the ground, he was still supporting his weight with his right and left hand and he didn't step on anything or trip, stumble, or fall (Hearing transcript p. 48-51). Regardless of whether the claimant was stepping from a tractor trailer truck, he was not stepping the distance of the entire step down from the tractor trailer. He merely touched his toe to the ground when he felt pain. With all of the claimant's prior conditions and taking into consideration the claimant's height and weight, pain symptoms could have occurred simply by the claimant taking a step anywhere. For the Commissioner to determine that the height of the step in this instance was the cause of the claimant's knee problems, it would be a decision based upon surmise, conjecture and speculation. This is not a work related injury because it did not arise out of the course and scope of his employment.

It was error for the single commissioner to rely on the claimant's testimony to prove that the injury was compensable. The claimant's own interpretation of the accident facts vary. He told one doctor that he jammed his knee when stepping out of the tractor trailer, yet in his deposition he stated that he was in control when he touched his foot to the ground from the last step. He also told one physician that he "hopped" out of the truck, but denied hopping or jumping during his testimony at the hearing. (Claimant's APA 4, p. 6). He told one physician that he "twisted" his knee, however he denied doing so during his deposition and at the hearing (Claimant's APA 2). The claimant also states that he would never falsify DOT logs, but contends at the same time that the DOT logs provided by the Defendants which show he was not working on the day were falsely filled out. The claimant stated in his deposition that he injured himself so badly that he had to hop back to the truck yet he didn't immediately call anyone at the office or go into

the office to tell them about his injuries. Because the claimant' testimony is unreliable, reliance on it to prove this compensable injury would be error.

3 THE CLAIMANT DID NOT MEET HIS BURDEN OF PROVING AND THE PREPONDERANCE OF THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CLAIMANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS.

To show that one is entitled to temporary total disability benefits, one must prove that "the incapacity for work resulting from an injury is **total**." S.C. Code Ann. Section 42-9-10 (1976, as amended). South Carolina Cases have held compensation for **total** disability "is based on loss of earning capacity." *See Bateman v. Town and Country Furniture Co.*, 287 S.C. 158, 159, 336 S.E. 2d 890, 891 (Ct. App. 1985). The employee bears the burden of proving the generally acceptable test of **total** disability which is "that he was unable to perform services other than those that were so limited in quality, dependability, or quantity that a reasonably stable market for them did not exist." *See Coleman v. Quality Concrete Products*, 245 S.C. 625, 630, 142 S.E.2d 43, 45 (1965). Because the claimant did not suffer from an injury as the result of a work related accident as discussed above, the claimant cannot meet his burden of proving that he was incapacitated from work for the work related injury. Moreover, the claimant did not meet his burden of proof and the evidence does not show that the claimant was unable to perform services other than those that were so limited that a reasonably stable market did not exist. The claimant is currently working at Salem Carriers as a truck driver (Hearing transcript p.30). As such, the single commissioner and the Appellate Panel erred in determining that the claimant was entitled to TTD benefits.

4. THE APPELLATE PANEL ERRED IN FINDING THAT THE CLAIMANT WAS ENTITLED TO LIFETIME FUTURE MEDICAL CARE PURSUANT TO 42-15-60 AND A KNEE BRACE, CANE AND NON-STEROIDAL ANTI-INFLAMMATORY MEDICATIONS, THE ERROR BEING THAT THE EVIDENCE DOES NOT SUPPORT THAT THESE MODALITIES WILL TEND TO LESSEN THE CLAIMANT'S DISABILITY AND THE CLAIMANT IS NOT PERMANENTLY AND TOTALLY DISABLED.

The Appellate Panel awarded the claimant lifetime medical treatment pursuant to SC Code Ann. Section 42-15-60. This award was in error. Under subsection (c) of SC Code Ann. Section 42-15-60, Lifetime medical treatment is awarded in cases in total and permanent disability only. The Claimant is not permanently and totally disabled. Therefore, the only possible award of future medical benefits would be an award under *Dodge v. Brucoli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (SC App. 1999) and this was not done.

The Claimant saw Dr. Daniel Westerkam for an IME at the request of the Defendants, and Dr. Westerkam recommended that the claimant would benefit from a knee brace, cane, and non-steroid anti-inflammatory medicine. (Tr. p. 35, lines 18 - 25; p. 36, lines 1 - 4). However, Dr. Westerkam states in his deposition that the claimant's knee problems were the result of his pre-existing conditions. (Hearing Transcript p. 6-7). Therefore, the defendant should not be responsible for paying for these modalities as his needs for them are due to the underlying condition. Moreover, the Claimant has reached maximum medical improvement based on the medical reports submitted under the APA, in particular, that he has been released with a 12% impairment rating to his lower extremity by Dr. Westerkam and 0% rating by Dr. Kingry. The Court of Appeals stated in *O'Banner v. Westinghouse Electric*, 319 S.C. 24, 459 S.E.2d 324, 327 that maximum medical improvement is a term used to indicate that a person has reached such a plateau

that in the physician's opinion there is no further medical care or treatment which will lessen the degree of impairment. See also; *Dodge v. Brucoli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (SC App. 1999). Because the Claimant has failed to show by a preponderance of the evidence that further medical treatment is necessary, the Commission's award of future medical care for these modalities was error.

5. THE APPELLATE PANEL ERRED IN FINDING AS FACT, CONCLUDING AS A MATTER OF LAW AND ORDERING THAT THE CLAIMANT IS ENTITLED TO 12% IN PERMANENT DISABILITY, THE ERROR BEING THAT THE CLAIMANT DID NOT MEET HIS BURDEN OF PROOF AND THE FINDING IS NOT SUPPORTED BY THE EVIDENCE.

The Commissioner and the Appellate Panel base their finding of 12% permanent disability to the claimant's right knee upon the 12% impairment rating by Dr. Westerkam. However, even the claimant's attorney stated that Dr. Westerkam went back on his opinion during his deposition (Hearing Transcript p. 6). Dr. Westerkam actually determined that it was more likely that the claimant's problems came from his preexisting arthritis. Because the 12% impairment was for prior conditions and not the result of this work injury, the claimant's award was error. While Defendant's contend that the claimant did not suffer from an injury by accident and therefore is not permanently disabled by statute, they would argue that it was error for the Commission to not take into account the 0% permanent impairment rating to the right knee given by Dr. Kingry. Because the Commissioner's determination that the claimant had suffered a 12% permanent partial disability was based on surmise, conjecture and speculation, the determination was erroneous and must be reversed. See *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998) ("The claimant has the burden of proving facts

that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation.").

CONCLUSION

Based upon the above cited arguments, the Defendants would ask that this court to reverse the findings of the South Carolina Workers Compensation Commission Appellate Panel.

Respectfully Submitted,

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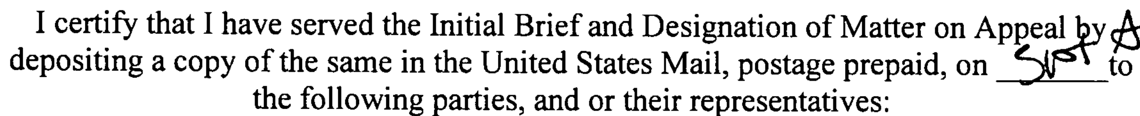

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