

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, Commissioner

WCC FILE NO: 1009201

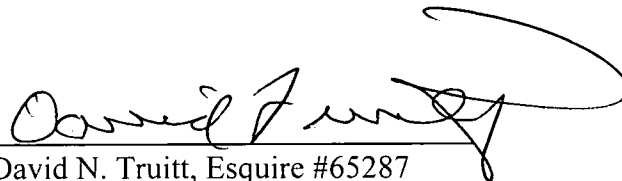
Homer Williams, Respondent,

v.

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

INITIAL BRIEF OF RESPONDENT

June 28, 2013



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STATEMENT OF ISSUES ON APPEAL

- I. THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS COMPENSATION COMMISSION DID NOT ERR IN FINDING THAT CLAIMANT SUSTAINED AN INJURY BY ACCIDENT ARISING OUT OF HIS COURSE AND SCOPE OF EMPLOYMENT. THE EVIDENCE DOES SUPPORT THAT FINDING AS THE CLAIMANT WAS WORKING ON THE DATE OF ACCIDENT, JUNE 10, 2010 7

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- VI. THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS COMPENSATION AND THE SOUTH CAROLINA COURT OF APPEALS DOES NOT HAVE APPELLATE JURISDICTION TO HEAR THIS CASE AS APPELLANTS FAILED TO TIMELY FILE THE FORM 30 APPEAL; AS A RESULT, THIS APPEAL SHOULD BE DISMISSED AND THE SINGLE COMMISSIONER ORDER AND AWARD REINSTATED AND AFFIRMED IN ITS ENTIRETY 25

STATEMENT OF THE CASE

Respondent (Claimant) filed a Form 50 hearing request on October 24, 2011, and Appellants (Defendants) filed a Form 51 denying the claim. This case was heard by Commissioner Gene McCaskill on February 2, 2012, at which time the parties and/or their representatives appeared and evidence was received.

The Claimant sought benefits under the South Carolina Workers' Compensation Act based upon an accidental injury occurring on June 10, 2010, while in the employment of the Defendants. The Claimant suffered an injury by accident while stepping down from the cab of a tractor-trailer, causing injury to his right knee. He was treated initially by Dr. Keith Lobel and referred to Dr. David Kingery. Claimant underwent multiple injections with Dr. Kingery. On October 11, 2010, Dr. David Kingery provided a 0% permanent impairment rating to the right knee. On August 15, 2011, Dr. Daniel Westerkam provided a 12% permanent impairment rating to the right knee. The issue in this case was whether Claimant sustained a work-related right knee injury on June 10, 2010, and if so, whether Claimant is entitled to back temporary total disability (TTD) benefits, a permanent disability award, reimbursement for past medical care, future medical care, medication (past and future) and medical mileage (past and future). Defendants denied that Claimant sustained a work-related injury. Medical records were submitted under the Administrative Procedures Act as evidence and made part of the Commission record. The deposition of Dr. Daniel Westerkam, noticed by Defendants and taken February 1, 2012, was submitted into evidence without objection.

By Order filed May 21, 2012, Commissioner McCaskill found that: (1) Claimant suffered a work-related injury by accident to his right knee on June 10, 2010, arising out of and in the course of his employment; (2) Claimant has a 12% disability to the right lower extremity; (3) Claimant

reached MMI on October 11, 2010; (4) Claimant will need a knee brace, cane, and nonsteroidal anti-inflammatory medications; (5) Defendants can choose an authorized treating physician to prescribe those nonsteroidal anti-inflammatory medications (NSAIDS), as well as provide medical care which would tend to lessen the Claimant's disability; (6) Defendants shall provide Claimant lifetime future medical care, medications, and medical equipment including, but not limited to, follow-up visits, a knee brace, a cane, nonsteroidal anti-inflammatory medications, and injections, which tend to lessen Claimant's period of disability and maintain his current level of functioning; (7) Claimant is entitled to temporary total disability (TTD) benefits from June 10, 2010, through October 11, 2010; (8) Claimant is not entitled to a weight loss program or surgery; (9) Four motions were filed in this case. The information found at tabs B, C, D, and E was not required to reach a decision in this case. As such, that information was given no weight; (10) Defendants are responsible and shall pay for all causally related medical care including, but not limited to, the care of Dr. Keith Lobel, Dr. David Kingery, and any diagnostic tests; (11) Defendants are responsible and shall pay for all causally related medications; (12) Defendants are responsible and shall pay for all causally related medical mileage; (13) Claimant gave proper and timely notice of the accident to the Defendants based on Claimant's testimony and the Form 12A; (14) Claimant timely filed this claim; (15) Claimant's average weekly wage is \$1,173.81, yielding a maximum compensation rate of \$689.71; (16) Claimant is 66 years old; (17) Claimant is five feet, four inches tall and weighs 240 pounds; (18) Claimant has a tenth grade education and has worked as a truck driver for 42 years; (19) Claimant started working for the Defendants in 2005; and, (20) Claimant fully cooperated with the Defendants' investigation and gave their insurance adjuster, Mr. Steve Anthony, a detailed, recorded statement of how the accident occurred on June 17, 2010, and the injury he sustained. The

Claimant's statement was consistent with what Claimant told the Employer and all of the doctors he saw.

The Claimant, the only witness at the hearing, testified that he is a truck driver for the Defendants and has been since 2005. The Claimant started work at about 2:00 a.m. on June, 10, 2010. He made deliveries on June 10, 2010, to Limehouse in Charleston, South Carolina, Piggly Wiggly in Charleston, South Carolina, and Food Lion and then back to Rawls (Hearing Transcript p. 18, lines 4-25; p. 19, line 1).

After parking the tractor trailer truck on the Defendant's lot, the Claimant got out of the cab and stepped down with his right foot. When his right foot touched the ground, he heard something like a pop and he had so much pain in his knee that he could not put any weight on it. Claimant grabbed the truck to keep from falling to the ground (Hearing Transcript p. 20, lines 3-11). After the injury, the Claimant hopped on his left leg to his personal truck, which was only three feet away. The Claimant, at the instruction of the Defendants, then took another employee to pick up a truck Defendants had rented (Hearing Transcript p.21, lines 9-20).

Claimant hoped that the right knee pain might lessen, but when it did not, Claimant called Ferri in the Defendant's transportation office and told her what happened (Hearing Transcript p. 21, lines 21-25). The Claimant told Ferri that when he stepped out of the truck, that he thought he had jammed his knee (Hearing Transcript p. 22, lines 9-14). After dropping the other driver off, the Claimant called Ferri again to tell her that he had to go to his family doctor (Hearing Transcript p. 22, lines 15-23). Claimant's family doctor is Lexington Family Practice (Hearing Transcript p. 23, lines 2-8).

The Claimant was diagnosed with osteoarthritis in both knees in 2009, and his family doctor gave him Celebrex, which did help. Claimant did not miss any time from work due to the arthritis in his knees (Hearing Transcript p. 23, lines 9-23; Defendant's APA 1, p. 66).

The Claimant went to see his family doctor three days prior to the accident. Claimant went because the muscles in the calf of his right leg were hurting. When the doctor performed a physical examination of the Claimant's knees, there was some pain in his knees. Claimant, however, did not go to his family doctor on June 7, 2010, because of knee pain (Hearing Transcript p. 24, lines 3-19; Defendant's APA 1, p. 52). The Claimant worked up until the time he got hurt on June 10, 2010 (Hearing Transcript p. 24, lines 20-25).

The Claimant was unable to go back to work for four months following the June 10, 2010, work accident (Hearing Transcript p. 25, lines 1-5).

The Claimant treated with Dr. Lobel at Lexington Family Practice for his right knee injury. Dr. Lobel ordered an MRI of his right knee. After the MRI, Claimant was referred to Dr. Kingery at Lexington Orthopaedics (Hearing Transcript p. 25, lines 20-25; p. 26, lines 1-16). Dr. Kingery performed 4 - 5 knee injections in order to lessen the Claimant's period of disability (Hearing Transcript p. 27, lines 2-11).

From the day of the accident until October 1 or 2, 2010, Claimant was unable to work and received no income or TTD from the Defendants. The Employer had no light duty work available (Hearing Transcript p. 27, lines 22-25; p. 28, lines 1-25; p. 29, lines 1-3).

When the Claimant returned to work for the Employer, he was not able to do the unloading part of his job. Claimant worked for Employer until July 8, 2011, when he retired (Hearing Transcript p. 29, lines 4-23).

The treatment provided to the Claimant by Dr. Kingery helped ease his pain. The injections were effective for 2 ½ to 3 months and then the Claimant had to return to Dr. Kingery for more care (Hearing Transcript p. 30, lines 7-17).

The Claimant had to step down 22 inches from his tractor trailer cab when he was injured on June 10, 2010. Claimant's personal vehicles require a step down of a foot or less (Hearing Transcript p. 31, lines 13-20; p. 32, lines 2-10). No other vehicle Claimant has ridden in has a step down as far as his tractor trailer cab (Hearing Transcript p. 32, lines 8-10).

The Claimant cannot fish any more since this accident as his knee hurts too much with sitting (Hearing Transcript p. 32, lines 11-25; p. 33, line 1-5).

The Claimant takes prescription Celebrex, which helps reduce his pain and allows him to still drive a truck (Hearing Transcript p. 33, lines 12-24). The Claimant saw Dr. Daniel Westerkam for an IME at the request of the Defendants, and Claimant wants Dr. Westerkam's recommendations regarding a knee brace, cane, nonsteroidal anti-inflammatory medicine, and lifetime medical care approved and ordered by the Commission (Hearing Transcript p. 35, lines 18-25; p. 36, lines 1-4).

The Defendants listed at least eight potential witnesses and called none to testify.

On May 21, 2012, Commissioner Gene McCaskill issued a signed Order by email to all parties.

The fourteen day appellate jurisdiction deadline for the Form 30 was June 4, 2012. S.C. Code Ann. §42-17-50; Reg. 67-701.

The Form 30 was signed by counsel for the Employer/Carrier on June 7, 2012, hand-delivered to the Claimant's attorney's law office on June 8, 2012, and received by the Commission on June 11, 2012. Thus, the Form 30 was not filed within the fourteen day jurisdictional deadline.

As required by S.C. Reg. 67-701A, Attorney for Defendants attached the Order of the single Commissioner to the Form 30. In the bottom right hand corner of the first page, "Form 30 due 6-1-12 caw" was handwritten.

Respondent filed a motion to dismiss the appeal on June 14, 2012. On June 20, 2012, Appellants/Defendants filed a reply to Claimant's Motion to Dismiss.

On October 22, 2012, the Appellate Panel of the South Carolina Workers' Compensation Commission held a hearing. On January 3, 2013, the Appellate Panel fully and unanimously affirmed the order of the single Commissioner filed May 21, 2012. The Appellate Panel did not address the appellate jurisdiction issue regarding the Appellants/Defendants failing to file the Form 30 appeal notice within the 14 day appellate jurisdiction deadline.

On February 11, 2013, Respondent filed a Motion to Dismiss in the South Carolina Court of Appeals based on lack of appellate jurisdiction. On February 15, 2013, Appellants filed a Return to Respondents Motion to Dismiss. On May 1, 2013, the South Carolina Court of Appeals issued an Order denying Respondent's motion, but allowing the timeliness of the appeal from the single commissioner issue to be raised in the parties' briefs.

ARGUMENTS

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

Appellants continue to argue that Respondent was not injured on June 10, 2010, even though the evidence clearly demonstrates that Respondent was injured on that date.

Appellants attempted to use driver's logs at the hearing, which were not provided in response

to Respondent's subpoena served on July 25, 2011. Commissioner McCaskill rightly concluded that the Exhibits B, C, D, and E were not required to reach a decision in this case and correctly gave these documents no weight.

Respondent submitted the correct driver's logs pursuant to a Motion filed on February 9, 2012, in response to the Appellants challenging the date the injury occurred. Incredibly, Appellants still make this argument even though Appellants should be aware of its falsity. Respondent's Motion for Adjournment or Motion to Keep the Record Open and Motion to Suppress filed on February 9, 2012, explains in detail how this was an invalid and misleading defense presented to the Court.

On July 25, 2011, Respondent's attorney served a comprehensive subpoena to Appellants' attorney for any and all records relating to this workers' compensation claim to be provided prior to Respondent's deposition on July 29, 2011 at 10:00 a.m.

Appellants' attorney on July 29, 2011, responded with a letter and production of documents.

The documents produced by Appellants' attorney on July 29, 2011, did not contain Exhibit B, pp. 118 - 124.

The documents produced by Appellants' attorney on July 29, 2011, did not contain the Form 12A relating to this incident, which the Employer is required to retain for two years pursuant to SC Reg. 67-411B.(1). The Form 12A was never produced to the Respondent by the Appellants.

At the hearing on February 2, 2012, Appellants' attorney represented to the Court that Exhibit B, pp. 118 - 124, was submitted to Respondent's attorney in response to the Respondent's subpoena dated July 25, 2011. This was not true. The first time Respondent received the documents contained in Exhibit B was on February 2, 2012, the date of the hearing.

Appellants' attorney cross-examined Respondent with Exhibit B and the Form 12A, of which Exhibit B was provided on the day of the hearing in violation of Respondent's July 25, 2011, subpoena.

At the hearing, Respondent testified that he had the driver's log from June 10, 2010, at home and would have brought it to court if he knew that was an issue. Respondent testified that the reason he signed Exhibit 8 (Exhibit B, p.124), the driver's log indicating that he was off work from June 10 - 30, 2010, is because the person at Walter P. Rawl & Sons, Inc. asked him to sign it so she could close her books for the month of June 2010. Respondent explained to her that he worked June 10, 2010, and the driver's log was in the truck at that time and unavailable. Subsequently, Respondent later obtained the driver's log for June 10, 2010, and kept it.

Respondent submitted the driver's log from June 10, 2010 (see Exhibit #3), and the payroll amount for the week of June 13, 2010 (see Exhibit #4, Exhibit C, p. 201). Exhibit 4 was provided in response to Respondent's July 25, 2011, subpoena. The amount earned for the week of June 13, 2010, \$235.00, is consistent with Respondent working two days that week. Exhibit 5 (Exhibit C, p. 204), a handwritten time card sheet filled out by person unknown for the week of June 13, 2010, was provided in response to Respondent's July 25, 2011, subpoena. Exhibit 5 shows that Respondent worked on June 8, 2010, and June 9, 2010, and earned \$235.00. However, the route recorded for June 8, 2010, on the handwritten time card sheet by person unknown is the *same* route that Respondent ran and signed the driver's log for on June 9, 2010 (see Exhibit 7; Exhibit B, p. 123). Furthermore, the route recorded for June 9, 2010, on the handwritten time card sheet by person unknown is the *same* route that Respondent ran and signed the driver's log for on June 10,

2010 (see Exhibit 3). Thus, an unknown person moved the actual days worked by Respondent one day up on the handwritten time card sheet.

However, the driver's logs in Exhibits 6 - 8 (Exhibit B, pp. 122 - 124) are not consistent with Exhibits 4 and 5, which both show Respondent earned \$235.00 for the week of June 13, 2010. Exhibit 5 shows that Respondent worked *two* days that week even though the dates are incorrect. Exhibits 6 - 8 (Exhibit B, pp. 122 - 124) show Respondent only worked *one* day that week, June 9, 2010, which is not correct when compared to Exhibits 3, 4, 5, and 7. Exhibit 3, the driver's log from June 10, 2010, and Exhibit 7, the driver's log from June 9, 2010, both show that Respondent worked two days that week.

Employer filled out an OSHA Form 301 Injury and Illness Incident Report (Exhibit C, p. 187), but Appellants' attorney only provided part of this report in response to Claimant's July 25, 2011, subpoena (see Exhibit 9, Exhibit C, p. 187). The page which contains the critical information regarding the date and time of the workers' compensation accident was not provided by Appellants' attorney in response to Claimant's July 25, 2011, subpoena (see Exhibit 10). Situations such as this demonstrate why trial by ambush is not allowed - inaccurate, invalid, false, incomplete, or misleading evidence may trick the trier of fact into making an incorrect finding of fact. Hearings should be decided based on all of the relevant evidence. It is obvious that only some of the evidence was provided to Respondent in response to Respondent's July 25, 2011, subpoena.

At the hearing, the Respondent explained why he signed two driver's logs dated June 10, 2010.

(Verbatim excerpt from Hearing Transcript):

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1 Q. Yes, you can. You're always allowed to

2 explain.

3 A. The log -- the day that I was -- got hurt, the
4 log was in my logbook. When I come back, the girl wanted
5 me to fill the log out for that day because she had to
6 have it. The truck was gone with my logs in it, and she
7 asked me to put it this way. And that's the reason it's
8 like that. But I've got the log at home that I can show
9 you that I logged that day just like I'm supposed to be.
10 But when I come back, she wanted me to fill -- there's a
11 girl sits up front, gets the logs, puts them on the
12 machine, and this is what she asked me to do and I done
13 what she asked me to do. So truly I done what she asked
14 me to and it's a true log for what she asked me to do and
15 she takes care of the logs. But the log for that day,
16 I've got it at my house right now shows you where I
17 worked that day. That's the reason it's like this.

18 Q. All right. I want to make sure I got this
19 correctly then. After you came back from the vacation

20 A. Yes.

21 Q. -- that's when you filled out the log?

22 A. No, sir. When I come up there to talk to them
23 while I was out of work, the girl that sits up front,

24 does the logs, said, I need the log. I said, The log is
25 in the truck. The truck is gone. She said, Fill it out

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1 like this right here.

2 Q. So you didn't turn in a log. The log that you
3 filled out on June 10th, you didn't turn

4 A. You don't turn your log in until the end of
5 that day. I couldn't turn it in because if they had
6 called me back to go to work, then the log would have
7 been falsified because you can't turn it in until at
8 midnight.

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REDIRECT EXAMINATION

BY MR. TRUITT:

5 Q. Please explain your answer.

6 A. What I -- I said I turned logs in. I didn't
7 say that day's logs because I usually turn them in like a
8 week at a time or three or four days. Now if he had
9 asked me did you turn that log in that day, I would have
10 said no, sir. I can't do it because the DOT says you
11 can't fill your logs out ahead of time.

Respondent testified that on June 10, 2010, he called Ferri, the assistant to the transportation manager for Walter P. Rawl & Sons, on the phone 15 minutes after he injured his knee. Respondent testified that he thought the pain might cease, but when it did not, he called Ferri (Hearing Transcript p. 21, lines 21-25; p. 22, lines 1-14). Once Respondent dropped off a co-worker, his knee was still hurting so he called Ferri a second time to tell her that he was going to his family doctor (Hearing Transcript p. 22, lines 11-25). Respondent testified he went to Lexington Family Practice (Hearing Transcript p. 23, lines 1-5). The medical record for Lexington Family Practice verified that:

This is a 65-year old male who presents with acute onset of right knee pain after jamming his leg about an hour ago. He was hopping out of his truck at the time. He felt the knee pop. It sounds like it was locked in place when he hit the ground. He misjudged the distance to the ground causing the event. He is now having pain with bearing weight, difficulty walking. No previous injury to the knee. No swelling yet (Claimant's APA 4, p. 6).

On June 14, 2010, Claimant returned to Dr. Lobel. The medical record states: The patient is a 65-year old male who presents for a 4-day recheck of acute right knee pain after having an injury while at work. This is a worker's comp case. I sent home him for the weekend with activity as tolerated. He was using crutches initially but is now off those. Symptomatically, he is feeling about 50% better with respect to pain. He is not needing any pain medication at this time. He is not quite ready to go back to work. He is a truck driver, does a lot of climbing in and out of his truck cab. He does need clearance when appropriate to go back to work without restrictions (Claimant's APA 1, p. 5).

In addition, the first report of injury, Form 12A, has June 10, 2010, as the date of accident and 1:15 p.m. as the time of accident. The Appellants called no witnesses to dispute the date of accident. Thus, it is obvious that the Employer did not contest the date of injury.

In addition, there is an OSHA Form 301 Injury and Illness Incident Report; however, Appellants only provided part of this report in response to Respondent's subpoena of July 25, 2011. The page containing the information regarding the date and time of the workers' compensation accident was not provided by Appellant's attorney and still has been provided by the Appellants.

Appellants should not be allowed to benefit by hiding critical evidence, which would disprove their defense.

Furthermore, Respondent gave a statement to the insurance adjuster for the Appellants only a week after the incident. On June 17, 2010, Respondent gave a detailed, recorded statement of how the accident occurred and the injury he sustained. Respondent's statement was consistent with what he told the Employer and all of the doctors he saw.

(Verbatim excerpt from Hearing Transcript): 65

14 ...

15 BY MR. TRUITT:

16 Q. All right. This is -- you remember

17 Mr. Anthony coming to talk to you on June 17th which is a
18 week after the accident?

19 A. Yes.

20 Q. And I'm going to ask you, did you tell him the
21 date the accident was?

22 A. Yes.

23 Q. What did you tell him? This is Page 1 and
24 it's several lines down.

25 A. June the 10th.

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1 Q. That was the 10th? That was your answer?

2 A. Yes, sir.

3 Q. All right. Did you also tell Mr. Anthony how
4 the accident happened?

5 A. Yes, sir.

6 Q. I'm going to direct your attention to page 6
7 of the statement, and this is a little further down where
8 it says -- where it's highlighted.

9 A. I said, "Well, I thought I jammed my knee when
10 I stepped out of the truck. But the doctor says maybe
11 pulled a liter (sic) or muscle in back of my leg. He
12 x-rayed my knee and said that I didn't hurt nothing or
13 break anything."

14 Q. Okay. All right. A few lines further down on
15 Page 6, what did you further explain what is says right
16 there?

17 A. "I stepped out of the truck when I hit -- hit
18 the" -- it's supposed to be ground, but it ain't on here.
19 "When I stepped on the ground, I felt something in my leg
20 give. It sounded like something cracked."

21 Q. Okay. And this was one week after the
22 accident?

23 A. Yes.

24 Q. All right. Then he asked you the next

25 question, "Did you fall," on Page 6. And on Page 7, the

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1 first line, what is your answer?

2 A. "Yep. I fell. I caught ahold of the truck,
3 but I couldn't stand up and put no weight on my leg at
4 all." He said, "Did you fall to the ground completely?"
5 "No. I caught -- see, I caught ahold of the
6 truck before I hit the ground, but I will -- was going to
7 hit to the ground when my knee of leg give away."

8 Q. Okay. All right. And that's what happened;
9 is that correct?

10 A. Yes.

11 Q. And that's what you told Ferri, that's what
12 you told Steve Anthony, and that's what you told any
13 doctor you've been to?

14 A. Yes.

15 Q. And that's what you're telling Commissioner
16 McCaskill today?

17 A. Yes.

18 ...

**II. THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS
COMPENSATION COMMISSION DID NOT ERR IN FINDING THAT THE
CLAIMANT MET HIS BURDEN OF PROOF AND THE PREPONDERANCE OF
THE EVIDENCE DOES SUPPORT A 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.

Respondent reported the accident on the same day it occurred within 15 minutes of the accident (Hearing Transcript p. 21, lines 21-25). Respondent went to his family doctor, Lexington Family Practice, the same day the accident occurred.

This is a 65-year old male who presents with acute onset of right knee pain after jamming his leg about an hour ago. He was hopping out of his truck at the time. He felt the knee pop. It sounds like it was locked in place when he hit the ground. He misjudged the distance to the ground causing the event. He is now having pain with bearing weight, difficulty walking. No previous injury to the knee. No swelling yet (Claimant's APA 4, p. 6).

On June 14, 2010, Claimant returned to Dr. Lobel. The medical record states: The patient is a 65-year old male who presents for a 4-day recheck of acute right knee pain after having an injury while at work. This is a worker's comp case. I sent home him for the weekend with activity as tolerated. He was using crutches initially but is now off those. Symptomatically, he is feeling about 50% better with respect to pain. He is not needing any pain medication at this time. He is not quite ready to go back to work. He is a truck driver, does a lot of climbing in and out of his truck cab. He does need clearance when appropriate to go back to work without restrictions (Claimant's APA 1, p. 5).

On June 18, 2010, Claimant went back to Dr. Lobel. The medical record states, "The patient returns for a recheck for right knee injury after stepping out of this truck on June 10. This is a Worker's Compensation case. He felt the knee pop at the time... His pain is persisting with positive McMurray test. Set up MRI..." (Claimant's APA 1, p. 4).

In addition, Respondent had a positive MRI on July 24, 2010, which showed a bone bruise, meniscal damage, swelling, and a Baker's cyst. All of these findings are consistent with a traumatic knee injury. Dr. Westerkam described at great length the finding of the MRI in his deposition taken on February 11, 2012, at pages 67-72. The positive findings on the MRI cannot be faked according to Dr. Westerkam. According to Dr. Westerkam, the swelling is consistent with somebody actually

injuring their knee (Deposition of Daniel Westerkam, M.D. p. 69, lines 6-14). Dr. Westerkam testified that the bone bruise comes from trauma (Deposition of Daniel Westerkam, M.D. p. 70, lines 2-7). Dr. Westerkam further testified that the mechanism of injury described by Respondent would cause the bone bruise (Deposition Transcript of Daniel Westerkam, M.D. p. 70, lines 15-25).

Dr. Westerkam also found that he believed Respondent had a 12% impairment for his right lower extremity and that the injury was work-related (Claimant's APA 4, pp. 44-47; Deposition of Transcript of Daniel Westerkam, M.D., p.46, lines 24-25; p. 47, lines 1 - 7; p. 53, lines 17-25; p. 54, lines 1-24).

At his deposition, Dr. Westerkam reiterated his opinion in his Questionnaire and Independent Medical Examination that Respondent suffered a work-related injury and permanent disability from his June 10, 2010, work-related accident.

(Verbatim excerpt from Deposition Transcript of Dr. Daniel Westerkam): 53

17 Q Let me try to break some of this down for you. If
18 you know that even though he had preexisting
19 osteoarthritis in his knees but Mr. Williams was
20 able to do his trucking job without interruption
21 because of -- because of any kind of knee issue,
22 and did it all the way up until June 10th, 2010,
23 and then he had this specific incident where he has
24 severe pain which keeps him out of work for four
25 months, according to him because of the pain in his

54

1 knee, --
2 Right.
3 -- and then is able to only go back periodically
4 due to the pain, assuming that's true, --
5 Right.
6 -- would your opinion be that the 12 percent right
7 knee impairment came from the fall on June 10th,
8 2010?
9 Yes, and that's exactly how-- what I thought at
10 that time. That's exactly right.
11 All right. So, assuming those facts I just gave
12 you are true, your answers in your questionnaire
13 that you signed for us, which I think basically
14 reiterates -- and this is page 44 and 45 of the
15 of the claimant's APAs that you signed January
16 13th, 2012 is simply a reiteration of your
17 independent medical examination findings. Is that
18 correct?
19 That's correct. I used the IME to answer those
20 questions.
21 Okay. And all the answers that you've given today
22 have been most probably to a reasonable degree of

23 medical certainty?
24 Best I can tell, yes. Correct.
25 And you said that in your independent medical

55

1 examination, as well?
2 Yes.

Dr. Lobel completed a medical questionnaire where he stated to reasonable degree of medical certainty that the Claimant's right knee injury most probably results from his performance of his job activities and/or work-related aggravation of a pre-existing condition (Claimant's APA 2, p. 17).

On August 8, 2011, Dr. Kingery completed a medical questionnaire where he stated to reasonable degree of medical certainty that the Claimant's right knee injury most probably results from his performance of his job activities and/or work-related aggravation of a pre-existing condition (Claimant's APA 2, p. 14). Dr. Kingery also stated most probably to a reasonable degree of medical certainty that Claimant will need future medical care to include an occasional injection to his knee and one follow up medical visit per year, which will tend to lessen Claimant's period of disability for his right knee work-related injury through maintaining his present level of functioning (Claimant's APA 2, p. 15).

On October 11, 2010, Dr. Kingery provided the following addendum to his medical records:

The patient when first seen on August 5, 2010 indicated his original injury occurred when he stepped out of his truck and twisted his knee. Prior to me seeing him, he had treatment by other physicians and underwent MRI where degenerative meniscal changes were identified along with a Baker cyst. I have treated him for this condition. Most of his symptoms are resolved. We have released him to return to his work.

It is my medical opinion that the patient's knee problem for which I treated him for initially on August 5, 2010 was either directly caused by or aggravated by his injury on June 10, 2010 when he stepped from his truck in the Pelion, SC work yard twisting his knee. Based upon his last visit, I believe he has reached maximum medical improvement but has 0% partial permanent impairment. It is likely that he may require future care for his meniscal tear or Baker cyst in the future (Claimant's APA 2, p. 26).

Thus, every doctor that treated or examined Respondent stated to a reasonable degree of medical certainty that Respondent had a work-related knee injury on June 10, 2010. There is no evidence to the contrary.

The Claimant suffered a work-related injury by accident to his right knee on June 10, 2010, arising out of and in the course of his employment. The hearing Commissioner based this conclusion on the testimony of the Claimant, the medical evidence contained in the APA submissions, and the medical questionnaires of Dr. Keith Lobel and Dr. David Kingery. Both of these doctors treated the Claimant.

After parking the tractor trailer truck on the Defendant's lot, the Claimant got out of the cab and stepped down with his right foot. When his right foot touched the ground, he heard something like a pop and he had so much pain in his knee that he could not put any weight on it. Claimant grabbed the truck to keep from falling to the ground (Hearing Transcript p. 20, lines 3-11). After the injury, the Claimant hopped on his left leg to his personal truck, which was only three feet away. The Claimant, at the instruction of the Defendants, then took another employee to pick up a truck Defendants had rented (Hearing Transcript p.21, lines 9-20).

The Claimant had to step down 22 inches from his tractor trailer cab when he was injured on June 10, 2010. Claimant's personal vehicles require a step down of a foot or less (Hearing Transcript p. 31, lines 13-20; p. 32, lines 2-10). No other vehicle Claimant has ridden in has a step

down as far as his tractor trailer cab (Hearing Transcript p. 32, lines 8-10). Claimant is 5 feet, 4 inches tall and weighs 240 pounds (Claimant's APA 4, p. 47). The force exerted onto Claimant's right knee during this 22 inch step down from the tractor trailer cab at work is greater than any force Claimant would encounter outside of his employment and that this danger was peculiar to his employment. The causative danger of the 22 inch step down from the tractor trailer cab was peculiar to Claimant's work and not common to the neighborhood.

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 adjective 'accidental' qualifies and describes the injuries contemplated by the statute as having the quality or condition of happening or coming by chance or without design, taking place unexpectedly or unintentionally. If one becomes ill while at work from natural causes, the state or condition is not accidental since it is a natural result or consequence and might be termed normal and to be expected. If, however, there is a subsisting condition of illness or incapacity or physical disability which is caused, increased, or accelerated by some act or event coming by chance or happening fortuitously, then the requisite quality or condition of the injury will exist so as to make it accidental. Neither is it necessary that the accidental quality or condition be created by wound or

external violence." *Riley v. South Carolina Ports Authority*, 253 S.C. 621, 172 S.E. 2d 657 (1970).

In other words, the injury itself can be the accident; however, proximate causation must still be proven by preponderant evidence.

In a compensable workers' compensation case, *Ellis v. Spartan Mills*, 276 S.C. 218, 277 S.E.2d 590 (1981), the claimant bent forward and twisted in order to retrieve something involved with her employment ("Ellis testified that a thread had run off the machine and was lying on the floor. As she bent forward and to her right, twisting her body in an attempt to retrieve the thread, she testified that she felt something 'pop' in her back." *Id.* at 219, 591. "The facts as found by the Commission in this action reveal that Ellis suffered her injury when she twisted her back. Here, the injury resulted from the work activity.") *Id.* at 219, 592.

In another compensable workers' compensation case, *Sigmon v. Dayco Corp.*, 316 S.C. 260, 449 S.E.2d 497 (Ct. App. 1994), the claimant knelt down to tighten bolts, thereby placing pressure on his knee. ("In 1992, Sigmon knelt to tighten bolts on a machine that Dayco had assigned him to rebuild. His knee locked when he attempted to stand up.") *Id.* at 261, 498.

In another compensable workers' compensation case, *Creech v. Ducane Co.*, 320 S.C. 559, 467 S.E.2d 114 (Ct. App. 1995), the claimant bent down to pick up a filter rack from the floor. ("On July 12, 1993, Creech claimed he injured his back as he reached down to pick up a filter rack from the floor.") *Id.* at 559, 115. Although the filter was of insignificant weight, the task involved the bodily mechanics of bending down and reaching.

III. THE CLAIMANT DID MEET HIS BURDEN OF PROOF AND THE PREPONDERANCE OF THE EVIDENCE DOES SUPPORT A FINDING THAT THE CLAIMANT WAS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS.

Respondent testified that he was unable to work as a result of the accident (Hearing Transcript p. 27, lines 13-25). He further testified that the Employer had no light duty work available (Hearing Transcript p. 28, lines 7-16). Claimant testified that he was not able to go back to work until October 1st or 2nd (Hearing Transcript p. 29, lines 1-6). Dr. Kingery kept Respondent out of work until August 30, 2010, for light duty and September 30, 2010, for full duty (Claimant's APA 2, pp. 26, 28, 30). Thus, it is patent that Respondent could not work until October 1, 2010.

IV. THE APPELLATE PANEL DID FIND THAT THE CLAIMANT WAS ENTITLED TO LIFETIME FUTURE MEDICAL CARE AND A KNEE BRACE, CANE AND NON-STEROIDAL ANTI-INFLAMMATORY MEDICATIONS BUT THAT FINDING WAS NOT LIMITED TO ONLY 42-15-60. THE APPELLATE PANEL ALSO FOUND THAT *DODGE V. BRUCOLI* APPLIED TO CLAIMANT RECEIVING LIFETIME FUTURE MEDICAL CARE AND A KNEE BRACE, CANE AND NON-STEROIDAL ANTI-INFLAMMATORY MEDICATIONS. THE EVIDENCE DOES SUPPORT THAT THESE MODALITIES WILL TEND TO LESSEN THE CLAIMANT'S DISABILITY PURSUANT TO *DODGE V. BRUCOLI*. THE APPELLATE PANEL DID NOT FIND THAT THE CLAIMANT WAS PERMANENTLY AND TOTALLY DISABLED.

Dr. Kingery and Dr. Westerkam both stated to a reasonable degree of medical certainty that Respondent will need future medical care including, but not limited to, injections and nonsteroidal anti-inflammatory medications (Claimant's APA 2, p. 15; APA 4, pp. 45, 47).

The treatment provided to the Claimant by Dr. Kingery helped ease his pain. The injections were effective for 2 ½ to 3 months and then the Claimant had to return to Dr. Kingery for more care (Hearing Transcript p. 30, lines 7-17).

The Claimant takes prescription Celebrex, which helps reduce his pain and allows him to still drive a truck (Hearing Transcript p. 33, lines 12-24). The Claimant saw Dr. Daniel Westerkam for an IME at the request of the Defendants, and Claimant wants Dr. Westerkam's recommendations

regarding a knee brace, cane, nonsteroidal anti-inflammatory medicine, and lifetime medical care approved and ordered by the Commission (Hearing Transcript p. 35, lines 18-25; p. 36, lines 1-4).

The Appellate Panel order states on page 28, finding of fact number 5:

5. The Defendants can choose an authorized treating physician to prescribe those nonsteroidal anti-inflammatory medications (NSAIDS) as well as provide medical care which would tend to lessen the Claimant's disability. The Defendants shall provide future medical care and medications which tend to lessen Claimant's disability including, but not limited to, injections and nonsteroidal anti-inflammatory medications. (Claimant's APA 2, p. 15; Claimant's APA 4, pp. 45, 47).

The Appellate Panel order states on page 34, conclusions of law number 7:

7. Under §42-15-60 and *Dodge v. Brucoli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (S.C. App. 1999), Claimant shall receive and Defendants shall provide lifetime future medical care, 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.

Thus, the Appellate Panel order did award the Respondent lifetime medical care pursuant to *Dodge v. Brucoli, Clark, Layman, Inc.* and did state that this medical care would tend to lessen Respondent's disability.

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

The hearing Commissioner based this conclusion on the medical evidence submitted pursuant to the APAs and the testimony offered at the hearing.

Most probably to a reasonable degree of medical certainty, Dr. W. Daniel Westerkam, the doctor hired by the Defendants to perform an independent medical examination of Claimant, gave Claimant a 12% right lower extremity impairment (Claimant's APA 4, pp. 44, 47). Most probably to a reasonable degree of medical certainty, Dr. Westerkam stated that Claimant will need future medical care two times a year for his lifetime (Claimant's APA 4, p. 45).

From the day of the accident until October 1 or 2, 2010, Claimant was unable to work and received no income or TTD from the Defendants. The Employer had no light duty work available (Hearing Transcript p. 27, lines 22-25; p. 28, lines 1 - 25; p. 29, lines 1-3).

When the Claimant returned to work for the Employer, he was not able to do the unloading part of his job. Claimant worked for Employer until July 8, 2011, when he retired (Hearing Transcript p. 29, lines 4-23).

The Claimant cannot fish any more since this accident as his knee hurts too much with sitting (Hearing Transcript p. 32, lines 11-25; p. 33, line 1-5).

The treatment provided to the Claimant by Dr. Kingery helped ease his pain. The injections were effective for 2 ½ to 3 months and then the Claimant had to return to Dr. Kingery for more care (Hearing Transcript p. 30, lines 7-17).

The Claimant takes prescription Celebrex, which helps reduce his pain and allows him to still drive a truck (Hearing Transcript p. 33, lines 12-24). The Claimant saw Dr. Daniel Westerkam for an IME at the request of the Defendants, and Claimant wants Dr. Westerkam's recommendations regarding a knee brace, cane, nonsteroidal anti-inflammatory medicine, and lifetime medical care approved and ordered by the Commission (Hearing Transcript p. 35, lines 18-25; p. 36, lines 1-4).

VI. THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS COMPENSATION AND THE SOUTH CAROLINA COURT OF APPEALS DOES NOT HAVE APPELLATE JURISDICTION TO HEAR THIS CASE AS APPELLANTS FAILED TO TIMELY FILE THE FORM 30 APPEAL; AS A RESULT, THIS APPEAL SHOULD BE DISMISSED AND THE SINGLE COMMISSIONER ORDER AND AWARD REINSTATED AND AFFIRMED IN ITS ENTIRETY.

On May 21, 2012, Commissioner Gene McCaskill issued a signed Order by email to all parties.

The fourteen day appellate jurisdiction deadline for the Form 30 was June 4, 2012. S.C. Code Ann. §42-17-50; Reg. 67-701.

In *Allison v. W. L. Gore & Associates*, 394 SC 185; 714 SE2d 547 (2011), the Supreme Court held that, "...this Commission lacks the authority to extend the fourteen days permitted for the filing of an appeal from the decision of a single commissioner." *Id.* at 188-189. As a result, the master's order and decision of the Full Commission finding for Respondent were vacated since the attorney for Respondent did not file the Form 30 until sixteen days after receiving notice of the single commissioner's order.

The Form 30 was signed by counsel for the Employer/Carrier on June 7, 2012, hand-delivered to the Claimant's attorney's law office on June 8, 2012, and received by the Commission on June 11, 2012. Thus, the Form 30 was not filed within the fourteen day jurisdictional deadline; consequently, the Form 30 should be dismissed.

Pursuant to S.C. Reg. 67-213A(2), "...when service is made by first class mail, five days are added to the date of mailing. Service by first class mail is deemed complete five days after the date of deposit in the United States Postal Service." However, this Order was not served by first class mail. This Order was served by email on May 21, 2012. S.C. Reg. 67-213A allows the Commission

to serve orders, "...electronically, by certified mail, return receipt requested or by deposit in the United States Postal Service, first class postage, addressed to the parties according to R. 67-210." Thus, it is patent that five days are added only when service is by first class mail. There is no statute, regulation, or case that allows five days to be added to electronic service; as a result, the Form 30 was due fourteen days after the Order was received by email by all parties on May 21, 2012. S.C. Reg. 67-701A; S.C. Code Ann. §42-17-50.

As required by S.C. Reg. 67-701A, Attorney for Defendants attached the Order of the single Commissioner to the Form 30. In the bottom right hand corner of the first page, "Form 30 due 6-1-12 caw" was handwritten.

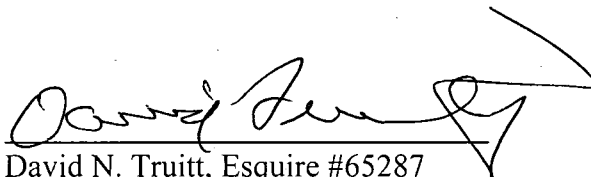
Thus, the South Carolina Court of Appeals does not have appellate jurisdiction to hear this case, and this appeal should be dismissed and the single commissioner order and award reinstated and affirmed in its entirety.

CONCLUSION

The greater weight of the evidence shows Respondent suffered a work-related injury to his right lower extremity on June 10, 2010, that arose out of and in the course and scope of his employment. The greater weight of the evidence further shows that Respondent missed work as a result of this accident and is entitled to temporary total disability benefits as awarded by the Appellate Panel and single commissioner. The greater weight of the evidence further shows Respondent is entitled to a 12% permanent disability for the right lower extremity. Accordingly, Respondent respectfully requests that the South Carolina Court of Appeals affirm the decision of the Appellate Panel in its entirety. In the alternative, Respondent respectfully requests that the South

Carolina Court of Appeals issue an Order dismissing this appeal for lack of Appellate jurisdiction and reinstating and affirming the single commissioner order and award in its entirety.

June 28, 2013



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