

BEFORE THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1107137

David Tunstall,	)	
	)	
Employee,	)	
Claimant/Respondent,	)	
	)	
vs.	)	ORDER OF THE FULL
	)	COMMISSION
Rare Earth Service, Inc.,	)	
	)	
Employer,	)	
	)	
Liberty Mutual Insurance,	)	
	)	
Carrier,	)	
Defendants/Appellants.	)	
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STATEMENT OF THE CASE

Claimant/Respondent David Tunstall (hereinafter, "Tunstall") commenced this Workers Compensation action by the filing of the Form 50 dates September 27, 2011. Tunstall alleged he suffered injuries to his left leg and back as a result of a work related accident that occurred on June 10, 2011, when he was shot while fueling his company truck. The Defendants filed their Form 51 on November 15, 2011, in which they denied that Tunstall sustained any injury by accident arising out of the course and scope of employment. Defendants specifically asserted that Tunstall was the victim of a random act of criminal violence that had no causal connection to his employment.

On January 10, 2012, Commissioner G. Bryan Lyndon held a hearing in Walterboro, South Carolina. Commissioner Lyndon issues a Decision and Order Finding that Tunstall's injuries arose out and in the course and scope of his employment by Order of April 24, 2012. Appellants timely appealed Commissioner Lyndon's Decision and Order to the Full Commission

asserting a single issue: "Whether the single Commissioner erred in finding that the Claimant sustained a compensable injury by accident under the Workers' Compensation Act." We find that the Commissioner's decision is supported by the overwhelming weight of the evidence.

### **FINDINGS OF FACT**

1. The Claimant's compensation rate is stipulated to per the Form 20 at \$631.69 with an average weekly wage of \$947.49. He is a salaried employee.

2. The Claimant has not received any weekly temporary total benefits or any other benefits under the Workers' Compensation Act through the date of the hearing. The Parties previously agreed to hear the singular issue of compensability. The issues of permanency were preserved for decision following the determination of the compensability issue.

3. The Parties agreed to use the deposition transcripts of claimant, David Tunstall, and his manager, Sean McCubbins, in lieu of live testimony during the initial hearing.

4. All medical reports and records were made part of the record prior to the hearing and without objection under the APA.

5. Venue was proper based upon consent in Colleton County.

6. The Claimant was 52 years of age at the time of the injury, having been born on June 1, 1959. The Claimant has a high school education and has worked as a construction services manager/field technician for the Employer in its materials testing business since January 2006.

7. The Claimant was shot in left leg shattering the tibia. As a result of the injury, the Claimant has had additional issues with his back as well as some psychological overlay. The Parties have agreed that the causation of these issues will be held in abeyance until the underlying question of compensability is ruled upon.

8. The Claimant had not reached Maximum Medical Improvement at the time of the initial hearing, and was continuing to recuperate.

9. At the time of the incident giving rise to this claim, the claimant was a salaried employee of Appellant Rare Earth Sciences, Inc. ("RES") and served as a construction services manager. In his capacity as a construction services manager, his job entailed "a little bit of everything" to borrow the phrase used by his employer. (Depo. of Sean McCubbins, p. 7, ll. 1-7). Claimant's job duties included managing minor projects, project initiation, reporting, and invoicing; managing the company's construction services department, which made him responsible for the company's operations and field technicians; and, field testing. (Id.) In executing these duties and responsibilities, Tunstall was required to travel throughout Georgia and South Carolina, and was given a company vehicle. (Depo of McCubbins, p. 7, ll. 8-13).

The Claimant's company vehicle was a Ford F-150 pickup truck which bore company logos and phone numbers, and indicated the "materials testing" aspect of the company's work. (Depo. of Tunstall, p. 18, ll. 20-25). The employer covered all expenses related to maintaining the truck, including oil changes, maintenance, and gasoline. (Depo of Tunstall, p. 18, l.25 - p. 22, l.6). Both Tunstall and his employer testified that the filling vehicles with fuel was part of individual employees' duties to maintain the company vehicles. (Depo. of McCubbins, p. 8, ll. 5-23).

The Claimant's company vehicle included the tools and equipment necessary for his job including company testing equipment, the company's computer and cell phone assigned to Claimant as well as other equipment. (Depo of McCubbins, pp.10-11; Depo of Tunstall, p. 42, l. 13 – p. 43, l. 3).

10. On June 10, 2011, the Claimant left his home in Varnville, S.C. in his employer's pickup truck on his way to a job in Savannah, Georgia. At about 5:45 AM, he stopped at an

Exxon Station to fill up his employer's truck with fuel. Immediately after filling up and while waiting for the receipt to print at the pump, an unidentified man approached the Claimant and demanded the keys to the work truck. (Depo. of Tunstall, p. 29, ll. 10-22). Immediately after the man stated "give me your keys," Tunstall turned and was shot in the left leg, splintering the bone and leaving Tunstall unable to perform his job duties for more than a year. (Id.)

There is no dispute at the time of the shooting the Claimant was filling up the company truck when he was shot. The act of filling up his company truck and receiving invoices for the gas was admittedly is a duty and responsibility of the company's individual employees in maintaining the truck. (Depo. of McCubbins, p. 8, ll. 5-23). In essence, the Claimant's company provided truck was his office. The company truck was all that was demanded before the Claimant was shot.

The attacker was never identified or arrested. (Depo. of Tunstall, pp. 29-30). The assailant stole the truck, which was later recovered by law enforcement near Douglas, Georgia.

### CONCLUSIONS OF LAW

1. Pursuant to §42-1-160, the Claimant sustained a compensable on-the-job injury to his person. Unlike other assault cases cited by the employer, the time, place and circumstances differentiate this assault from other reported cases. The Claimant's employment in the present incident not only placed the Claimant at the scene but also the use and possession of his company truck caused him to be shot, making the his injuries arise out of and in the course and scope of his employment. The employer's assertion that the Claimant's injury arose out of a random act of violence with no causal connection to the Claimant's employment is not supported by the facts of the case.

2. Pursuant to §42-15-60, the Claimant is entitled to have all related medical expenses paid by the defendant and its carrier; that the Claimant is entitled to be reimbursed for all mileage for travel to and from medical providers, outstanding treatment expenses, out of pocket medical expenses related to the claimant's injuries and treatment resulting from the June 10, 2011.

3. The Claimant shall be entitled to temporary total benefits from the date of the injury until the date of his release by his treating physicians to return to work.

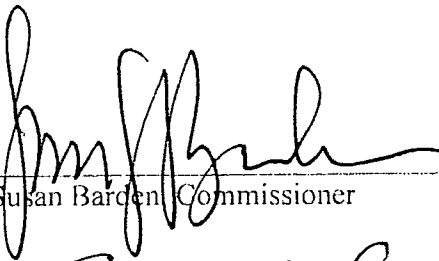
4. All other findings of the Single Commissioner's order shall be incorporated into this order.


**ORDER**

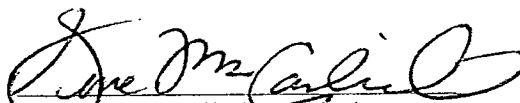
Based upon the evidence presented, the findings of the Single Commissioner are AFFIRMED IN FULL.

IT IS THEREFORE ORDERED, the employer/carrier shall pay the Claimant shall pay temporary total benefits, medical expenses, as well as any related out of pocket expenses.

IT IS SO ORDERED.

  
Susan Barden, Commissioner

  
Andrea C. Roche, Commissioner

  
Gene McCaskill, Commissioner

6-11, 2013

CERTIFICATE OF SERVICE

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

***By Valerie Deller on June 4, 2013***