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.

REPLY BRIEF OF APPELLANTS

July 22nd, 2013

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VI. THE APPELLATE PANEL DID NOT ERR IN FINDING THAT THE FORM 30 APPEAL WAS TIMELY AND THIS COURT HAS JURISDICTION OVER THIS MATTER.

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

I. THE HEARING COMMISIONER ERRED IN RULING AND THE APPELLATE PANEL ERRED IN AFFIRMING THE DETERMINATION THAT THE RESPONDENT INJURED HIS RIGHT LOWER EXTREMITY ON JUNE 10, 2010

The claimant's attorney asserts in his brief that the driver's logs submitted by the appellants at the hearing should not be relied upon by the Court. The claimant's attorney basis this argument on the erroneous assertion that the driver's logs were not submitted in response to the claimant's subpoena. However, the claimant's attorney received these logs on July 25, 2011 pursuant to his subpoena request and did not object to them becoming a part of the record prior to the hearing. The "corrected" DOT logs submitted by the claimant's attorney after the date of the hearing were not and should not be considered by the Court. The Commissioner erred in not considering the DOT logs, which were given to the claimant's attorney prior to the hearing.

The claimant's attorney also contends that the Form 12 A is evidence of the claimant's accident. However, the Form 12 A says that the "employee states while exiting his truck, he felt pain in his right leg behind the knee to the point that he could not put weight on it." The Form 12A is yet another regurgitation of what the claimant told an employer's representative about what happened. The 12 A is actually evidence that an injury did not occur as it states that the employee was complaining of a sore leg a week before the incident.

The claimant's attorney next states that the claimant's accident description should be believed because his recorded statement taken with the adjuster is consistent with his statements to all of the doctors. **This is untrue**. In the recorded statement, the claimant stated that the simply stepped out of his truck and jammed his knee. He tells doctor at Lexington family Practice that he hopped down from his truck (Claimant's APA 4, .6). He told Dr. Westerkam that he had a misstep or stepped awkwardly Westerkam's dep. P.

29. **The claimant, in his deposition states: I did not fall or stumble, I did not trip. I did not step on any object or rock. I did not twist my knee. (Claimant's Dep. pp. 49-50).** The Form 12A, and recorded statement are not evidence of that accident occurred but rather evidence that the claimant's testimony is unreliable. As such, the Commissioner's Relying upon his testimony to make a decision is erroneous.

II. THE APPELLATE PANEL ERRED IN DETERMINING THAT THE EVIDENCE SUPPORTS A FINDING OF COMPENSABILITY OF THE CLAIM.

Contrary to the claimant's assertion, every doctor that examined the respondent did not state to a reasonable degree of medical certainty that the claimant had a work related accident. The claimant's attorney contends that the claimant's visit with the doctor on the date of the accident is evidence that the accident occurred. However, the reports are not evidence that an accident actually occurred but rather that the claimant told the doctor an accident occurred. The claimant visited the hospital three days before the accident complaining of pain in his knee and sought treatment. There is no way to tell that the pain that the claimant experienced after this accident was the result of this incident and to do so would be conjecture and speculation. Moreover, the claimant was not forthright with the doctors during his description of the accident.

The claimant's attorney gives excerpts from the medical records to support his argument that this claim is compensable. However, the office notes are simply a regurgitation of what the claimant told the doctor happened. Moreover, a review of the medical records would show that the claimant's testimony about the accident is not consistent. The office note of Lexington Family Practice states that the claimant was hopping out of his truck. The claimant told Dr. Kingery that he twisted his knee (Claimant's APA 2 p. 26)

The claimant's attorney contends that the positive MRI is evidence of a knee injury however, the MRI clearly shows that there is "no acute trauma." (Dep. of Dr. Westerkam p. 63 lines 7-17). The claimant's attorney also relies upon the deposition on Dr. Westerkam to support the claimant's claim. However, Dr. Westerkam's opinion changed dramatically after he was given all of the facts of this case. Dr. Westerkam, in his deposition, opined that the injuries were not a result of this incident. (Dep.of Dr.

Westerkam pp. 26-27). Dr. Westerkam also stated that he could no longer state to a reasonable degree of medical certainty that the claimant suffered a 12% impairment (Dep. of Dr. Westerkam p. 33-34)

The claimant's attorney contends that the questionnaires of Dr. Lobel and Dr. Kingery are evidence that the claimant suffered an injury. The questionnaires that the knee injury was most probably resulted from his performance of his job activities and/or work related aggravation of a pre-existing condition (claimant's APA 2 pp 14&. 17).However, these questionnaires are useless as the questionnaires are a compound question. Was the injury a result of his work incident or did the injury aggravate his preexisting conditions? We will never know that answer to that question because their depositions were never taken and to based a finding of compensability upon this would be conjecture and speculation.

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. This was clearly not a part of his employment as a truck driver. With all of the claimant's prior conditions and taking into consideration the claimant's height and weight, an injury 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.

III. THE APPELLATE PANEL ERRED IN DETERMINING THAT THE CLAIMANT IS ENTITLED TO TTD BENEFITS.

Under the Workers' Compensation Act, a claimant is entitled to compensation for total disability resulting from a work-related injury. S.C. Code Ann. § 42-9-10 (Supp. 2012). Disability is statutorily defined as "incapacity **because of injury** to earn the wages which the employee was receiving at the time of injury in the same or any other employment." S.C. Code Ann. § 42-1-120 (1985). 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 "because of the injury." As such, the Appellate Panel erred in determining that the claimant was entitled to TTD benefits.

IV. THE APPELLATE PANEL ERRED IN DETERMINING THAT THE CLAIMANT WAS ENTITELD TO LIFETIME FUTURE MEDICAL CARE INCLUDING A KNEE BRACE, A CANE, AND NONSTERIODAL ANTI-INFLAMMATORY MEDICATIONS.

The claimant's attorney states that the claimant is entitled to medical modalities such as a knee brace cane and injections. However, Dr. Westerkam stated the following in his deposition:

> Q. If Homer Williams has reached maximum most probably to a reasonable degree of medical certainty, what future medical care they're talking about here. and you said he's going to need a knee brace, a cane and non steroidal anti inflammatory meds is that correct?
>
> A. that's correct
> Q. And you still believe you need those for the condition found in his knee?
>
> A. Well,---
>
> Q. You tell me
>
> A.---I imagine if he was getting treatment three days before this injury it was probably some of those treatments, so its hard for me to say if that was due to the misstep. I imagine they gave him non-steroidal anti- inflammatories for the knee pain.

(Dep. of Dr. Westerkam p. 26)

Because Dr. Westerkam opined that the claimant was already receiving some of these treatments prior to the incident and that he could not determine that the meds were necessary treatment as a result of THIS accident, the Commissioner's award of these modalities was erroneous.

V. THE APPELLATE PANEL ERRED IN DETERMINING THAT THE CLAIMANT HAS A 12% PERMANENT DISABILITY FOR THE RIGHT LOWER EXREMITY.

It was error for the Commissioner to award and the Appellate Panel to uphold the determination that the claimant suffered a 12% in permanent disability. Dr. Westerkam, the only physician to assign a rating to the claimant's injured body part, gave the claimant a 12% permanent impairment to his right lower extremity and then determined that the claimant did not have any impairment.

> Q. Can you still today give an opinion to a reasonable degree of medical certainty that the 12 percent impairment rating that you've listed which you believe to be a true rating because of his condition, --but can you testify to a reasonable degree of medical certainty that the 12 percent is due to---either caused by or aggravated by what this patient said happened?
>
> **A. I can't say for sure, given the information that you just provided to me**
> (Deposition of Dr. Westerkam pp. 24-25)
>
> Q. Can you testify, to a reasonable degree of medical certainly based upon what you've learned today and the examination that you've done, that he has any permanent impairment to his leg that is a result of the stepping motion that I gave you today in the quoting of the deposition?
>
> A. based on what you've told me today **no**
> (Dep. of Dr. Westerkam pp. 33-34)

Because the evidence does not support the commissioner's determination that the claimant has 12% in disability to his right lower extremity, this ruling was erroneous.

VI. FORM 30 APPEAL

The claimant's attorney contends that the Appellant's form 30 appeal must be dismissed. The claimant's attorney filed a motion to dismiss to this effect. However, it is clear under 67-215 that Motions to Dismiss will not be entertained by the Commission. As such, his motion must be denied.

Claimant's attorney filed a motion to dismiss the appeal pursuant to S.C. Code Ann. Section 42-17-50 and Regulation 67-701 on the basis that the appeal was untimely filed because the Form 30 was not filed within the fourteen day jurisdictional deadline. Claimant's attorney also cites the Allison v. W. L. Gore and Associates, 394 SC 185, 714 SE2d 547 (2011) decision to support his arguments.

While we agree that the fourteen day time limit for filing of an appeal is jurisdictional, the time limit as set forth in SC Code Ann. Section 42-15-50 and Regulation 67-701, as interpreted in Allison, must be read in conjunction with Regulation 67-213. The Appellants are not asking the Commission to extend this jurisdictional deadline of 14 days as the claimant did in the Allison decision pursuant to SC Code Ann. Section 42-15-50 and Regulation 67-701.

Under Regulation 67-213, this appeal was timely filed. Regulation 67-213 allows five additional days of service of the Commission's order. It is the Commission's practice to add these five days to the filing of a Form 30 even when the order is sent via email. Therefore, when combining those five days under Regulation 67-213, to the fourteen days allowed by SC Code Ann. Section 42-15-50, the Form 30 was not due until Monday June 11, 2012. (the nineteenth day landed on a Saturday). It is clear that Appellants timely served and filed the Form 30 within that nineteen day time period.

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,

July 22nd, 2013

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PROOF OF SERVICE

I certify that I have served the Reply Brief by depositing a copy of the same in the United States Mail, postage prepaid, on 7/22 to the following parties, and or their representatives:

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