THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

The Honorable Avery B. Wilkerson, Jr., the Honorable Melody L. James,
and the Honorable R. Michael Campbell, II
Commissioners for the Appellate Panel

Appellate Case No. 2023-001155
Case No.: W.C.C. File No.: 1914733

William Oliver,
Employee..Respondent,

v.

Syncreon, Employer, and Travelers Insurance Company, Carrier..........................Appellant.

REPLY BRIEF OF APPELLANT - FINAL

November 17, 2023

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I. There is no credible evidence of a compensable work accident.

The inescapable fact of this case is that there is no credible evidence of the time, place and circumstances of a work accident. This has been Appellants' primary defense from the inception of the claim. An accidental injury must "aris[e] out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (2015). 'Arising out of' refers to the injury's origin and cause, whereas 'in the course of' refers to the injury's time, place, and circumstances. Turner v. SAIIA Constr., 419 S.C. 98, 107–08, 796 S.E.2d 150, 156 (Ct. App. 2016).

Again, Respondent is unable to direct this Court to any credible evidence of the time, place and circumstances of an accidental injury. In his Brief to this Court, Respondent carefully approaches this issue, but does not actually provide this Court with any credible evidence of a compensable work accident. First, Respondent points to the Single Commissioner's conclusions as evidence to support the "in the course of" requirement. See Respondent's Brief at p. 6. Respondent notes the Single Commissioner reviewed "medical evidence and testimony" and "found [Respondent] sustained an injury by accident." Id. A review, however, of the medical evidence and testimony in the record reveals a lack of credible evidence of the time, place and circumstances of an accidental injury.

With regard to the "medical evidence" as the basis for evidence of the time, place, and circumstances of an injury at work, Respondent posits "medical evidence in this case was a primary reason for determining causation." Id. And that Dr. Owens "opined that [Respondent] had sustained an aggravation of his left shoulder condition *as a result of his job injury on September 14, 2019*." (emphasis added). Id. Dr. Owens' records are void of any description of a work accident, much less the time, place and circumstances of a work accident. The question Respondent cannot address is - what "job injury on September 14, 2019?" Therefore, the "medical evidence" does not provide any evidence of the time, place, and circumstances an accident at work and, at best, just refers to a "job injury." This does not satisfy the "in the course of" requirement.

With regard to the "testimony" as the basis for evidence of the time, place, and circumstances of an injury at work, the only testimony to support an injury is from Respondent. The one consistent fact of this entire claim, despite numerous hearings and appeals, has been that the Single Commissioner (twice) and the Workers' Compensation Appellate Panel (twice) determined Respondent was not credible. Most recently, the Appellate Panel found that it could not rely on the testimony of Respondent. (R. p. 11). Therefore, removing this uncredible testimony, there is no other testimony to support the time, place, and circumstances of an injury at work. Respondent called no other witnesses.

Second, Respondent does not cite to nor identify any credible evidence in the record of the time, place, and circumstances of an injury at work. See Respondent's Brief at p. 10. Instead, Respondent only relies upon his uncredible hearing testimony to support the time, place, and circumstances of an injury at work. Id. at p. 10-11. Again, the Appellate Panel found that it could not rely on the testimony of Respondent. (R. p. 11). Thus, there is no credible evidence upon which Respondent can rely to carry his burden of establishing a compensable accidental injury occurred. In other words, evidence of the time, place, and circumstances of an injury at work.

Third, Respondent argues "the Commission gave greater weight to the opinion of the authorized treating physician that Claimant had sustained a new injury to his left shoulder that was ultimately caused **by his work accident**." See Respondent's Brief at p. 11 (emphasis added). What work accident? And what credible evidence supports the work accident? In other words, where is the evidence of the time, place, and circumstances of an injury at work.

Fourth, Respondent raises a new issue cloaked as a "spoliation of evidence" matter. A bedrock part of error preservation is that an issue must have been ruled upon in the trial court in order for it to be preserved for appellate review." Gleaton v. Orangeburg County, 440 S.C. 350 (2023) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 76, (1998)). "Without a ruling, there is nothing for us to

review." There have been no rulings, orders or matters appealed to this Court with regard to the "spoliation of evidence" claim Respondent raises.

With that said, Respondent's "spoliation of evidence" claim is noteworthy for another reason. Respondent alleges "the Appellants failure to properly collect and produce the complete video in this case resulted in the spoliation of the evidence that would have been used to help prove Oliver's case." See Respondent's Brief at p. 13. As noted above, the basis for which Respondent intends to use this issue is not proper. But, in doing so, Respondent admits he needs more "evidence" to "prove" his "case." This is exactly the point by Appellant – there is no credible evidence of the time, place, and circumstances of an accident at work. Respondent's testimony is not credible and therefore does not provide the evidence Respondent needs to "prove" his "case."

There is no credible evidence in this matter to support the time, place and circumstances of a compensable injury by accident.

II. There is no injury by accident.

An independent and second defense bars Respondent's claim for benefits, specifically Respondent knowingly working beyond the physical limitations of his Permanent Work Restrictions[1]. South Carolina Code Annotated § 42-1-160 defines "injury" and "personal injury" to "mean only injury by accident arising out of and in the course of employment..." The word "accident" as used here is defined as an unlooked for and untoward event which is not expected or designed by the person who suffered the injury. Radcliffe v. Southern Aviation School, 209 S.C. 411, 40 S.E.2d 626 (1946); Green v. Bennettsville, 197 S.C. 313, 15 S.E.2d 334 (1941). In Pee v. AVM, the South Carolina Supreme Court held, "[a]n injury is unexpected, bringing it within the category of accident, if the worker did not intend it or expect it would result from what he was doing." 352 S.C. 167, 573

[1] As defined on page 5 of Appellant's Initial Brief.

S.E.2d 785 (2002). "Therefore, if an injury is unexpected from the worker's point of view, it qualifies as an injury by accident." Pee v. AVM, 352 S.C. 167, 573 S.E.2d 785 (2002).

In Landry, the Court affirmed the denial of Landry's workers' compensation claim due to no injury by accident and relied upon Pee, Capers and Havird. Landry v. Carolinas Healthcare Systems, 396 S.C. 149 (Ct.App. 2011) (relying on Pee v. AVM, 352 S.C. 167, 573 S.E.2d 785 (2002); Capers v. Flautt, 305 S.C. 254 (Ct.App. 1991); Havird v. Columbia YMCA, 308 S.C. 397 (Ct.App. 1992)). The Court noted Landry, like Capers and Havird, was (1) "aware of her physical condition"; (2) "knew which activities would worsen her symptoms"; and (3) "was warned by her doctor" that the type of work she was doing would worsen her condition. Landry, 396 S.C. at 156.

The Court concluded "Landry's injury was not unexpected." Landry, 396 S.C. at 1567.

In response to this issue, Respondent alleges "[t]his claim is different in that it involves a *specific, unexpected event*." See Respondent's Brief at p. 15 (emphasis added). Exactly on point with Appellant's primary argument – where is the credible evidence of the time, place and circumstances of this alleged "specific, unexpected event." Respondent *only* cites to his own uncredible hearing testimony in support of the alleged "specific, unexpected event." Id. Again, the Appellate Panel found that it could not rely on the testimony of Respondent. (R. p. 11).

Thus, what does the credible evidence in the record provide on this issue. Here, Respondent, like Landry, Capers and Havird, was aware of the Permanent Work Restrictions, knew he should have a more sedentary job and was warned by Dr. Fulton. (R. p. 57). Respondent's job responsibilities with Employer exceeded the boundaries of the Permanent Work Restrictions. (R. p. 630 – p. 633) He could not push or pull more than twenty, which would have included his own body weight. Likewise, he could not work at heights or climb. (R. p. 387).

In contrast to the sedentary work Respondent agreed to pursue when discharged by Dr. Fulton, Respondent voluntarily assumed a position that required work outside the Permanent Work

Restrictions. Respondent's work included job duties that required Respondent to work off the forklift; working in the dunnage area, where Respondent had to take car parts out of crates; loading/unloading trucks and unloaded trucks; changing the propane cylinder on the forklift and a process known as unblocking the dock. (R. p. 607, line 24 – p. 608, line 9; R p. 623, line 14 – p. 624, line 1). Mr. Krampp and Mr. Henderson, individuals with a strong understanding of the job requirements, both testified these responsibilities conflict with the Permanent Work Restrictions. (R. p. 631, line 16 -p. 632, line 22; R. p. 642, line 1 – p. 643, line 24).

Here, Respondent did not suffer an injury by accident. His left shoulder injury cannot be considered an unexpected or untoward event. Respondent is alleging he further injured his previously injured left shoulder when he knowingly took on employment which required Respondent to work in contradiction of the Permanent Work Restrictions. Respondent did not suffer an injury by accident and is not entitled to benefits. Respectfully, the Court should review the evidence and facts of this claim and determine there was not an injury by accident.

CONCLUSION

For all of the foregoing reasons, the Appellate Panel's decision should be reversed in its entirety.

[signature on following page]

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PROOF OF SERVICE AND RULE 211 CERTIFICATE

I certify that the foregoing Reply Brief complies with Rule 211 of the SCACR and that I have served the *Reply Brief of Appellant- FINAL* by forwarding via electronic mail and/or U.S. mail on November 17, 2023 addressed to attorney of record, Jacob Smith, Esq., to the South Carolina Court of Appeals, and to the South Carolina Workers' Compensation Commission at the following:

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