

THE STATE OF SOUTH CAROLINA
in The Court of Appeals

APPEAL FROM DARLINGTON COUNTY
S.C. Workers Compensation Commission

Appellate Panel Judges:
T. Scott Beck
Melody L. James
Avery B. Wilkerson, Jr.

Case No. 2013-000759

Kevin S. Stokes,

v.

Appellant,

Techno Loading Arms, a division of
Aluminum Ladder Company, Employer,
and Bridgefield Casualty Insurance
Company, c/o Summit Holdings, Inc., Carrier

Respondent.

REPLY BRIEF

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ARGUMENT

I. Appellant's arguments are not conclusory and should not be abandoned on appeal.

The Appellant asserts that this case is fact driven. There are no novel issues of law. The only legal issues involved are whether or not the Appellant suffered an injury by accident pursuant to §42-1-160 of the S. C. Code of Laws, and whether he suffered an aggravation to a pre-existing condition pursuant to §42-9-35 of the S.C. Code of Laws Ann.

These statutes were cited in the Appellant's Initial Brief.

II. The substantial evidence of record supports a finding that the Appellant suffered an injury by accident.

The medical evidence from Dr. Chokshi supports an injury by accident. In his deposition Dr. Chokshi testified that he had a conversation with the Appellant and his fiancée about a workers compensation claim in September of 2011 during one of his office visits. Dr. Chokshi testified that the Appellant stated that his back problem was related to a work injury but because the Appellant was unsure how quickly the workers comp claim would get processed he decided to go forward with surgery under his medical insurance because of the emergency nature of the Appellant's injury. Dr. Chokshi stated in his deposition that there was nothing in his medical records concerning this conversation but he testified that he did specifically recall it and stated, *"if I didn't write it, it doesn't mean that we didn't talk about it."* (Dr. Chokshi deposition, Page 16). Dr. Chokshi went on to say that he was focusing on the medical treatment which the Appellant needed immediately rather than focusing on whether or not it was a workers compensation claim.

Clearly Dr. Chokshi remembered a conversation in which it was discussed with the Appellant that his back injury was the result of an on-the-job, workers compensation, injury.

III. The testimony of the Appellant and the eyewitnesses William Belin and George Ray are entirely consistent and outweigh the medical records.

The Appellant testified at the hearing that he and William Belin were moving a piece of TC-10 ladder when he injured his back. William Belin testified consistently with this stating that he had come over to help the Appellant Scott Stokes move the TC-10 ladder when Scott's knees buckled, his back tweaked, and he broke out in a cold sweat and said he thought he had hurt his back again. The testimony of the Appellant and that of William Belin concerning the accident is entirely consistent. George Ray's testimony, who did not actually see the accident, but did see the Appellant immediately thereafter, is also consistent with the observations of William Belin. The fact that both eyewitnesses testified that the accident occurred some time in late August or early September is consistent with the testimony of the Appellant that the accident occurred on August 26, 2011. Lay witnesses are not prepared to testify to every incident they observe and although their testimony was consistent as to the details of the accident and the injury, the fact that they could not remember the specific date does not invalidate their testimony.

The Respondent points out that the Appellant testified he told his supervisor about the accident before leaving the plant on August 26, 2011. He then points out that the Appellant did not depose or call the supervisor as a witness. The Appellant would point out that the Respondent did not call the supervisor to contradict this testimony, which is telling in itself. Obviously the Respondent had access to the supervisor and could have questioned him about the Appellant's testimony and could have called him as a witness to contradict the Appellant's testimony, if in fact he could do so. The fact that he was a supervisor and an employee of the Respondent gives Respondent unique access to him and it is telling that he was not called as a witness. One can only assume that the reason he was not called by Respondent is that his testimony would have been consistent with that of the Appellant.

IV. The appellant suffered an aggravation of a pre-existing condition which is supported by the testimony of Dr. Chokshi, his treating surgeon.

The Respondent points to §42-9-35 and states that “the right to compensation for an aggravation of a pre-existing condition arises when the claimant has a dormant condition that becomes disabling because of the aggravating injury.” Murphy v. Owens Corning, 393 S.C.77, 710 SE2d 454 (Ct. App. 2011). Here, the claimant worked full time and had to perform heaving lifting, bending, and twisting, in his job on a daily basis. He did this without any problems in his job until he suffered this injury on August 26, 2011. Although he did experience some back pain from time to time prior to this injury, he was able to work and work full time in a very exertional job until his back injury on August 26, 2011 when he hurt his back and became unable to work. He did manage to work for approximately two or three weeks after the injury but his back pain and back problems became so severe that he had to stop working and has been unable to work since that time. Further, Dr. Chokshi described his back condition as one which required immediate surgical intervention which was performed shortly after the Appellant stopped working in September of 2011. It is respectfully submitted that the Appellant’s condition was dormant until he suffered this disabling injury on August 26, 2011.

The Respondent points out in his brief and quotes some of the testimony from Dr. Chokshi concerning whether or not he could give an opinion to a reasonable degree of medical certainty as to whether or not the Appellant had an acute injury or an aggravation of a pre-existing condition on August 26, 2011. However he does not point out that after those questions Dr. Chokshi was asked again whether or not he could state to a reasonable degree of medical certainty that the Appellant suffered an event that caused the 70% disc bulge, and suddenly not being able to work, and Dr. Chokshi stated, “*it is certainly possible, yes*” and Dr. Chokshi was asked, “*can you state that to a reasonable degree of medical certainty*”, and Dr. Chokshi answered, “*I can*”. (Dr. Chokshi deposition Pages 48-49). This was at Pg. 48-49 of Dr. Chokshi’s deposition after he had answered the Respondent’s questions at pages 44-46.

Thus, there is medical evidence to a reasonable degree of medical certainty that the Appellant did suffer a work related injury and Dr. Chokshi stated in his deposition that this injury "would be an aggravation of a previously degenerative disc or previously injured disc." (Dr. Chokshi deposition Page 15).

CONCLUSION

The eyewitness testimony of William Belin and George Ray is uncontradicted, and both of them testified consistently with the Appellant concerning the details of his on-the-job injury. Certainly this eyewitness testimony outweighs the fact that there are some inconsistencies in the medical evidence. The medical evidence does not prove or disprove an injury. It is the evidence concerning the accident which proves or disproves an injury and here there is eyewitness testimony from two witnesses, and the Appellant, all consistent with each other, which proves the Appellant suffered an on-the-job injury on August 26, 2011.

Further, the testimony of Dr. Chokshi is clear that the Appellant suffered a severe back injury which required immediate surgery and which was an aggravation of a pre-existing condition, that is the pre-existing herniated disc which was operated on several years before.

It is respectfully submitted that the substantial evidence of record supports a finding the Appellant suffered a compensable on-the-job injury pursuant to §42-1-160 and that he suffered an aggravation of a pre-existing condition pursuant to §42-9-35 of the S.C. Code of Laws.

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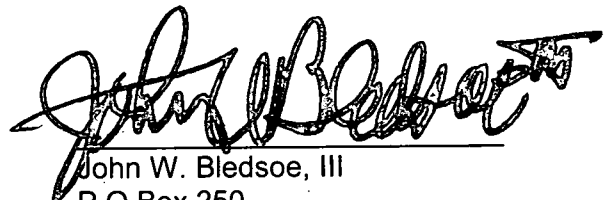
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CERTIFICATION OF APPELLANT

I certify that the Reply Brief contains no matter which is irrelevant to this appeal.

August 26, 2013



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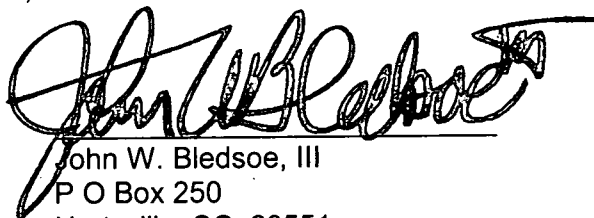
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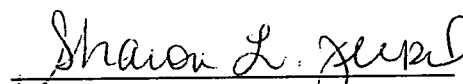
PROOF OF SERVICE

I certify that I have filed and served the Reply Brief by hand delivery, on August 26, 2013 to The Honorable Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals, 1015 Sumter Street, Suite #5, Columbia, SC 29201.

August 26, 2013



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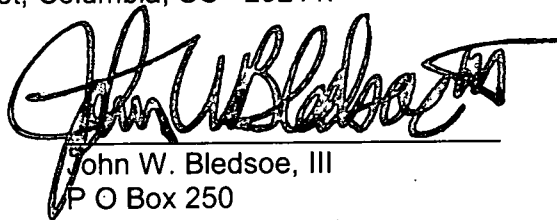
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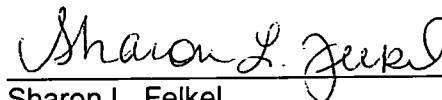
PROOF OF SERVICE

I certify that I have served the Reply Brief on Techno Loading Arms and Bridgefield Casualty Insurance Company by hand delivery, on August 26, 2013, to their attorney of record, Nicolas L. Haigler, 1310 Gadsden Street, Columbia, SC 29211.

August 26, 2013



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