

RECEIVED

Feb 12 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

SCWCC File No. 1921668

Evaristo Verdugo Morales, Claimant, Appellant,

v.

Insulation by Cohen's and Sprayfoam
by Cohen's, LLC, Employer, and
Builder's Premier Insurance Co., Carrier, Respondents.

NOTICE OF APPEAL

Appellant, Evaristo Verdugo Morales, appeals the Appellate Panel Decision and Order of the SC Workers' Compensation Commission filed December 3, 2024, which was served via email on December 3, 2024, and also the Appellate Panel Order denying Appellant's Motion for Reconsideration served via email on January 13, 2025. A copy of both Orders are attached hereto.

Pursuant to SC Code §42-17-60, the grounds of the appeal which involve specific, fundamental and egregious errors of law

are presented to the Court as set out hereinafter.

1. That pursuant to S.C. Code of Laws §42-17-50, the Appellant requests a review of all of the Findings of Fact, the Conclusions of Law, the Order and Award and of all rulings and decisions made by the Commission at the hearing, as contained in the Record or as made at any unrecorded pre-hearing conference, and in any communications concerning the claim, Order, Award and Decision rendered by the Hearing Commissioner in this matter.

2. That the Appellant requests review for all the reasons as set forth in the Motions for Reconsideration that were filed with the Commission electronically on June 26th and December 5th, 2024, attached hereto and incorporation herein by reference (Exhibits A & B), and reversal of the Decision as a matter of law based on the errors as set forth in the Motion.

3. That wherein the Appellant made a request for an Award for total and permanent disability based on a total loss of earning capacity under SC Code §42-9-10(A), the Commission erred as a matter of law by failing to make one single Finding of Fact or Conclusion of Law or decision on the Appellant's entitlement to an Award for total and permanent disability for a total loss of earning capacity as defined in the Act. The Appellant's burden is by a preponderance of the evidence, which wherein if

the scales and evidence tip ever so slightly in favor of the injured worker, the Award must be made. Quoting from Broughton v. SC Game & Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951):

"Claimant who asserts the right to compensation carries the burden of establishing the necessary facts to entitle him to such compensation. The evidence will ordinarily be regarded as sufficient where the circumstances shown tend to establish the ultimate facts in issue and prove a basis from which they reasonable may be inferred. An award cannot, however, be based upon mere possibilities, probabilities, surmises or conjectures."

4. That the Commission erred by not awarding the Appellant total and permanent disability for having lost 50% or more of the functional use of his back to do work requiring the use of his back. Mr. Morales testified that in his opinion he had lost 80% of the functional use of his back to do work requiring the use of his back. There is no Finding of Fact on that testimony or challenging that opinion.

Further, while the Commission gave no weight to the testimony of Dr. Leonard Forrest due to the contested Functional Capacity Evaluation, Dr. Forrest's impairment evaluation was based on his evaluation and was made under the AMA Guides. Dr. Forrest assigned a regional impairment to the thoracic spine injury of greater than 100% to the thoracic spine and 22% to the whole person. Dr. Steven Poletti whose opinion was not given any

weight because he is a "patient's advocate", also based on his evaluation assigned a 28% whole person impairment which converted to over 100% impairment to the thoracic spine as a Regional impairment. The treating physical therapist stated at the end of treatment that the Appellant could return to no more than "sedentary" work. The physical therapist who conducted the contested Functional Capacity Evaluation based on the first summary page found the results to be valid based on the valid and consistent effort he gave during the evaluation and limited him to light duty work. Thus, under the decisions of the SC Supreme Court and Court of Appeals, the Commission should have awarded the Appellant total and permanent disability for having lost 50% or more of the functional use of his back to do work requiring the use of his back based on the medical testimony, testimony of the Appellant, and other evidence in the Record other than the contested Functional Capacity Evaluation.

5. That the Commission erred by failing to set out the evidence upon which they relied in arriving at the disability award of 45% to the back.

6. That the Commission erred by not addressing the overall loss of use of the Appellant's back regardless of whether or not the upper or lower back were compensable under

the SC Supreme Court and Court of Appeals decisions. The Commission cannot ignore or change the law and is not only duty bound to a liberal construction of the Act and to resolve every inference and ambiguity and presumption in favor of benefits to the injured worker, but the Commission is duty bound to decide cases under a preponderance of the evidence standard and view the evidence in the light most favorable to the injured worker. The preponderance of the evidence standard dictates that where the scales of justice tip ever so slightly in favor of benefits to the injured worker, benefits are to be awarded.

7. That the Commission erred as a matter of law by failing to make Conclusions of Law or even cite Conclusions of Law in reference to SC Code §42-9-10(A) and failing to note the SC Supreme Court and Court of Appeals decisions on total and permanent disability for a loss of earning capacity including by not following the directions to the Commission by the Courts under SC Code §42-9-190. That section requires that where a claimant claims that he is disabled and the employer and its insurance carrier do not offer or procure suitable work within his residual capacity pursuant to their claim that he is not disabled and the worker establishes a prima facie case that he is totally disabled as defined in the Act under SC Code §42-1-

120 and §42-9-10(A) and thus makes a prima facia case entitled him to an award, the defendants must put up evidence to the contrary; of which there is none in this case.

8. That the Commission erred as a matter of law by failing to apply the preponderance of the evidence standard to the evidence in this matter.

9. That the Commission erred as a matter of law by going outside of the Record in making its decision and specifically including citing case law that was not cited to the Commission by either party and making such Findings of Fact as Finding #12 wherein it states and gives no weight to the opinion of Dr. Poletti based on information outside of the Record. That very Finding is arbitrary and capricious and constitutes an abuse of discretion and requires reversal.

10. That having found that Dr. Douglas Stofko did not endorse the Form 14B and thus the impairment or anything else on the Form 14B, by making Finding of Fact #30. The Commission nowhere, and the Appellant would reiterate nowhere, makes a finding that the greater weight of the evidence indicates that the Appellant sustained a 5% impairment to his back. This is simply an attempt to bolster the decision.

11. That the Commission erred by affirming the Order of the Hearing Commissioner by endorsing and making Findings of Fact #18, #19, #20, #21, #22, #24, #25, #26, #27, #28, and #30 where as there is absolutely no mention of any of those Findings of Fact or about that evidence in the Commissioner's Notes for Decision. It is the Commission's responsibility to make Findings of Fact upon which it bases its decision and the Respondents' lawyer admitted that these Findings of Fact were entered to augment/bolster the Commission's Decision.

12. That the Commission erred as a matter of law by affirming the Hearing Commissioner's Notes for Decision Finding #8 and Order Finding of Fact #11 in reference to giving no weight to the vocational evaluation based on due process concerns. Without citing any cases or statutory provisions allowing for such evaluations, the Commission found that due to the Respondents' inability to obtain expert vocational and neurological evaluations in this claim and in order to, "protect Defendants' due process rights claimant's vocational evaluation is given no weight", gave the vocational evaluation no weight. The Respondents have absolutely no right to a vocational evaluation under the Act or requiring the Appellant to submit to an evaluation by a neuropsychologist or a vocational expert. The

Respondents have every right to take the Appellant's discovery deposition and to have a vocational analysis done based on that and other evidence which they did not do in this case.

Therefore, even assuming that the Respondents had some kind of due process right, the Appellant did not obstruct it by not agreeing to attend such an evaluation. The only conceivable violation that could be thought of would be that the Appellant would not submit to an evaluation by their vocational expert, which is not required by law nor allowed for under the Act.

13. That the entire Commission's Order is the subject of bias and prejudice, and is arbitrary and capricious, an abuse of discretion in the consideration of the evidence with a bias towards denying the Appellant an award for total and permanent disability either on the basis of wage loss or having lost 50% or more of the functional use of his back to do work requiring the use of his back. The Commission goes as far as not making one Finding of Fact or Conclusion of Law in reference to an Award for total loss of earning capacity.

14. That the Commission failed in its statutory duty to make detailed Findings of Fact and Conclusions of Law under SC Code §42-9-5; §42-17-40; and §1-23-380.

Respectfully submitted,



Preston F. McDaniel, Bar #3770
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

and

Don C. Gibson, Bar #2466
GIBSON LAW FIRM, LLC
Post Office Box 60669
North Charleston, SC 29419
(843) 744-1887

Attorneys for the Appellant

February 12, 2025

Other Counsel of Record:

Stephen L. Brown, Esquire
Robert P. Gruber, Esquire
Russell G. Hines, Esquire
Graydon V. Olive, IV, Esquire
Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402
(843) 720-5488

Attorneys for Respondents

RECEIVED

Feb 12 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

SCWCC File No. 1921668

Evaristo Verdugo Morales, Claimant,Appellant,

v.

Insulation by Cohen's and Sprayfoam
by Cchen's, LLC, Employer, and
Builder's Premier Insurance Co., Carrier, Respondents.

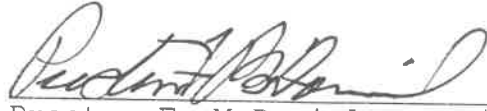
PROOF OF SERVICE

I certify that I have served the **NOTICE OF APPEAL** by depositing a copy of it in the United States Mail, postage prepaid, on February 12, 2025 addressed as follows:

Ms. Amy Bracy, Judicial Director
SC Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

Stephen L. Brown, Esquire
Robert P. Gruber, Esquire
Russell G. Hines, Esquire
Graydon V. Olive, IV, Esquire
Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402

Respectfully submitted,



Preston F. McDaniel, Bar #3770
McDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

and

Don C. Gibson, Bar #2466
GIBSON LAW FIRM, LLC
Post Office Box 60669
North Charleston, SC 29419
(843) 744-1887

Attorneys for the Appellant

February 12, 2025

McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers
for over 45 years.

Preston F. McDaniel

Daniel E. Peagler

Telephone (803) 771-7211

Facsimile (803) 252-0709

February 12, 2025

**VIA EMAIL: ctappfilings@sccourts.org
AND US MAIL**

Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RECEIVED

Feb 12 2025

SC Court of Appeals

**RE: Evaristo Verdugo Morales, Claimant v. Insulation by
Cohen's and Sprayfoam by Cohen's, LLC, Employer, and
Builder's Premier Insurance Company, Carrier.
SCWCC File No.: 1921668**

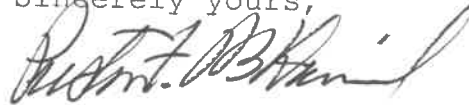
Dear Ms. Kitchings:

Enclosed for filing with the Court is the original and one
(1) copy of our Notice of Appeal in the above referenced matter.
Also, enclosed are the following:

1. Proof of Service of the Notice of Appeal on the
Respondents;
2. a copy of the Orders which are to be challenged on
appeal; and
3. the required filing fee of \$250.00.

We would appreciate your returning to us a clocked-copy in
the enclosed self-addressed envelope. I hope this is sufficient
for filing with the Court but should you need any additional
information, please let us know.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: Amy Bracy, Judicial Director, SCWCC
Don C. Gibson, Esquire
Stephen L. Brown, Esquire
Robert P. Gruber, Esquire
Russell G. Hines, Esquire
Graydon V. Olive, IV, Esquire