THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Andrea C. Roche, Commissioner
Gene McCaskill, Commissioner

WCC File No. 1214612

James Smoak,.....Respondent,

v.

Husqvarna and Ace American Insurance Company,.....Appellants.

REPLY BRIEF

January 30, 2014

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STATEMENT OF THE CASE

This matter has been denied by the Appellants since its inception. On October 17, 2012, the Respondent, Mr. James Smoak, was employed by the Appellant Employer as a lawnmower repairman. At the time, he had been employed with them for approximately a year and a half. During this time period, the Respondent never missed any work nor complained of injuring his back while at work.

On October 17, 2012, the Respondent was performing his job repairing a riding lawnmower. After inspection of the mower, he realized that a plug was not connected. As he reached over to connect the plug, the Respondent had to lean and bend over to insert the plug. It was at this moment, while performing his job, that he felt a sharp pain in his back which dropped him to his knees.

The Respondent has never denied having a pre-existing back problems. However, the testimony and evidence is clear that he has never missed any time from work nor has he ever in the past, made a workers' compensation claim for a back injury. In addition, there is no evidence in the APA submissions nor testimony that the Respondent was having any problems performing his duties for the Appellant Employer.

The Single Commissioner determined that the Claimant did sustain an injury that arose out of and in the course of his employment. The Appellants appealed to the Full Commission. Upon hearing arguments, the Full Commission unanimously affirmed the Single Commissioner's findings. The Appellants have since appealed to this Honorable Court.

ARGUMENT 1

DOES SUBSTANTIAL EVIDENCE SUPPORT THE FACTUAL FINDINGS THAT THE CLAIMANT'S INJURIES AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT, SATISFYING THE LEGAL STANDARD FOR COMPENSIBLITY UNDER SECTION 42-1-160 OF THE SOUTH CAROLINA CODE OF LAWS?

In *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 656 S.E.2d 753 (S.C.App.2007), this Court set forth the standard of review for these cases.

> As provided by the APA, a reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decision are affected by other error of law; [or] are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. *Id.* See S.C. Code Ann. § 1-23-380 (A)(5)(d)(e)(Supp.2006).

Further, the APA sets forth that this Court's review is limited to deciding whether the Appellant Panel's decision is unsupported by substantial evidence or is controlled by some error of law. *Id.* See *Grant v. Grant Textiles*, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007). Any review of the Appellate Panel's factual findings is governed by the substantial evidence standard. *Id.* Citing *Lockridge v. Santen of Am. Inc.*, 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct.App.2001). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. *Id.* Citing *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct.App.2005) (further citing *Sharpe* at 105.) It is not within the reviewing court's province to reverse findings of the Appellate Panel which are supported by substantial evidence. Id. Citing *Frame v. Resort Services, Inc.,* 357 S.C 520, 528, 593 S.E.2d 491, 495 (Ct.App.2004).

This case is analogous with *Sharpe v. Case Produce Co.,* 329 S.C. 534, 495 S.E.2d 790 (S.C.App.1997). In *Sharpe*, the Claimant was involved in an altercation with his girlfriend. As a result, he sustained a back injury. His employer knew of the incident and the injuries to the claimant's back. The claimant had returned to work for two days and did not have problems with his back until he attempted to lift and load boxes of tomatoes into the trunk of his car. He was loading the tomatoes to make a delivery for the employer. It was at that moment that he felt a sharp pain in his back and fell to the ground.

This Court found in favor of the claimant in *Sharpe*. "We have reviewed the evidentiary record with circumspection under the substantial evidence rule and conclude no evidence is in the record to support the conclusion reached by the Commission that Sharpe did not sustain an 'injury by accident arising out of and in the course of' his employment with Case Produce. The accident occurred when Sharpe was placing the tomatoes in the trunk. The strain occasioned by this action caused the injury to Sharpe's back." *Id.*

In the present case, the Respondent testified at the hearing that "because the test bays are raised up there's a lot of bending over, stooping, kneeling and sometimes the lawnmowers have to be brought up on a crane; so I'm actually laying down on my back underneath them from time to time." (Hearing Transcript P.9, L 10-14). Further, he testified that on the day of the incident, he had worked on a lawnmower and "had to lean over to plug up the plug and I felt something move in my back and when that happened I went straight to my knees." (Hearing Transcript P.11, L 16-18). The Respondent certainly didn't expect an injury to arise from this incident as he testified that he worked for the Appellant employer for approximately a year and a half and never had an injury at work related to his back. Further, he testified that he never missed any time from work for a work related injury. The act of bending and leaning to plug the cable is the causal sequence that makes this pre-existing back injury compensable. Therefore, the Respondent's pre-existing back injury is compensable as it arises out of an accident and in the course of his employment with the Appellant employer. Again, on cross examination, the Respondent testified, "I leaned over the top of the tractor, across the top of the tractor, to plug it in and as I was leaning, bending over, to--to reach to plug it in is when I felt something move in my back." (Hearing Transcript P.30, L15-18). It was the strain of leaning and bending that caused the injury to the Respondent's back. There was a direct causal connection between his

injury and his employment duties of repairing lawnmowers. In reviewing the testimony and evidence, there is absolutely no substantial evidence that would support reversing the findings of the Appellate Panel. The Appellants have not been prejudiced in any way by the decision of the Appellate Panel.

This is distinguishable from *Nicholson v. DSS, op. no. 5171* (S.C.Ct.App. filed Sept. 4, 2013). In *Nicholson*, the Claimant testified that only the friction from the carpet caused her to fall while walking to a meeting. She testified that the carrying of her files to the meeting had nothing to do with her fall. It was determined that the only fact connecting the Claimant's fall to her employment was that her injuries occurred while working in a carpeted area of DSS' building. This Court held the carpet on which the Claimant tripped and fell was not a hazard, a special condition, or peculiar to her employment. Therefore, the Claimant failed to show a causal connection between her injuries and her employment. *Id.*

In our case, there is testimony and medical evidence that supports the causal connection between the Respondent's injuries and his employment. He testified as to what his duties were while working for the Appellant Employer. He was in the act of repairing a lawnmower and had to lean and bend over to complete the task. Further, the medical doctors had opined to a reasonable degree of medical certainty that this action by the Respondent aggravated his pre-existing condition. Therefore, again, there is no substantial evidence to support reversing the Appellate Panel's decision in the case.

The Appellants would want you to believe that since the Respondent had treatment in the past for back problems that the injury should not be compensable. There is no substantial evidence to support their contention that the Respondent was having problems while he worked for the Appellant Employer. In addition, there is no substantial evidence that shows the

Respondent missed any time from work because of his pre-existing back condition. Further, as our case law sets forth, a condition is compensable unless it is due solely to the natural progression of a pre-existing condition. It is no defense that the accident, standing alone, would not have caused the claimant's condition, because the employer takes the employee as it finds him or her. *Sharpe* at 797.. See Also, *Brown v. R.L. Jordan,* 291 S.C. 272, 353 S.E.2d 280 (1987); *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E.2d 76 (Ct.App.1995).

Again, in *Sharpe*, this Court found that "even if Sharpe was injured in his altercation with Harper, he is nonetheless entitled to Workers' Compensation benefits. The accident...aggravated or accelerated this pre-existing condition. Sharpe worked at least two days after the fight and prior to the accident. The paralysis did not occur after the altercation with Harper. It happened immediately after the 'electricity' ran through Sharpe's body...when he attempted to place the boxes of tomatoes in the trunk of his car." *Sharpe* at 798.

In our case, the Respondent worked with his pre-existing condition and had never missed a day of work for his condition. He testified that he worked for the Appellant Employer for a year and a half and never missed a day of work because of his pre-existing back condition. (Hearing Transcript P.9-10, L19-12). His back problems never affected his work with the Appellant Employer until he had to lean and bend to plug in the electrical safety plug while repairing the lawnmower.

The Appellant Employer submitted APAs of over five hundred pages. This was mostly the Respondent's personnel file and the personnel file from his previous employer. There is no substantial evidence to support their contention that the Respondent's pre-existing back condition was a problem while at work with the Appellant Employer or his previous employer.

The Respondent submitted in his APAs the opinion of his treating physician, Dr. John F. Johnson, MD with Southeastern Spine Institute. Dr. Johnson opined that the Respondent was referred to him by the Claimant's family physician. Additionally, he opined to a reasonable degree of medical certainty that the Claimant's pre-existing low back condition was aggravated by an on the job injury which occurred on October 17, 2012. He went to opine to a reasonable degree of medical certainty that the Claimant suffered a new injury with the radicular symptoms into his buttocks from the same incident on October 17, 2012. (Cl's APA#4 P.43)

The Appellant Employer called two witnesses to testify in their case. The first witness was Ms. Adele Yvette Taylor, the Environmental Safety Manager for the Appellant Employer. She testified that she had asked the Claimant if they could get him ice or anything. In response, the Claimant had asked for the ice out of his lunch bag. On cross-examination, Ms. Taylor testified that the Claimant had told her that the ice was for him and would not answer the question as to whether the ice could have been used to keep his lunch cool. (Hearing Transcript P.39). Further, she testified that as the safety manager, she never wrote a statement as a first responder regarding this incident. Therefore, she testified as to what *she* remembered about the incident. However, other employees were asked to submit written statements about the incident two days after it occurred. Additionally, Ms. Taylor never mentioned a white back brace that the Claimant allegedly wore the day of the incident.

The second witness called by the Appellant Employer was Ms. Jacqueline Holman. Ms. Holman is a 30 year employee with the Appellant Employer and at the time of the incident was a supervisor. She testified as to what she remembered about the incident. She went on to further testify that the Claimant was wearing a white back brace. On cross-examination, the witness was asked to review her statement that she wrote *two days* after the incident. She was asked if she

had included the fact of the white back brace. She testified that she didn't put it in there. She testified that it was important but just didn't think about it when she wrote out her statement. (Hearing Transcript P.47). Again, in all of the other statements that were submitted in their APAs, there is not one mention of a white back brace from the other witnesses. For that matter, during the Respondent's cross-examination, counsel for the Appellants never asked the Respondent about the alleged white back brace. It was important enough to bring it up in their case in chief, but not important enough to ask the Respondent if he was wearing a back brace at the time of his injury, or much less, whether the Respondent even owned a back brace. This was never done because it was not true. Therefore, their witnesses have no credibility. It is not erroneous for the Appellate Panel to have concluded that the witness statements are not credible.

ARGUMENT II

WHETHER THE FULL COMMISSION WAS CORRECT IN ORDERING THE CLAIMANT'S CURRENT TREATING PHYSICIANS TO ACT AS HIS AUTHORIZED TREATING PHYSICIANS UNTIL THE CLAIMANT REACHES MAXIMUM MEDICAL IMPROVEMENT

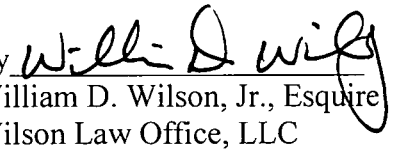
Finally, the Appellants argue that the Appellant Panel erred when it agreed to appoint Southeastern Spine as the authorized treating physicians for the Respondent. It is our position that the Panel did not. The Appellants cite the *McKinney* case. In that case, the Employer was entitled to select the treating physician after the commissioner determined that the claimant was permanently and totally disabled. In our case, that is no such finding of permanent and total disability. However, in *Martin v. Rapid Plumbing,* 369 S.C. 278, 631 S.E.2d 547 (S.C.App.2006), this Court found that appointing workers' compensation claimant's physician as authorized treating physician was warranted in workers' compensation proceeding; additional treatment would have lessened claimant's disability from back injury, and refusal by the

employer's medical group to see claimant and physician's subsequent diagnosis of annular tear created controversy warranting appointment of provider other than employer's chosen provider. In our case, the Appellants have refused to provide any treatment to the Respondent. Additionally, the Respondent's treating physician opined that the Respondent had suffered a new injury with the radicular symptoms into his buttocks from the October 17, 2012 incident.

CONCLUSION

The Appellants' rights have not been prejudiced because the administrative findings, inferences, conclusions or decisions have not been affected by error of law nor were they erroneous in view of the reliable, probative and substantial evidence on the whole record. For the foregoing reasons, the Respondent respectfully request that the Appellate Panel's decision be hereby affirmed in its entirety.

Respectfully submitted,

By 

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PROOF OF SERVICE

I certify that I have served the Reply Brief on Appeal by depositing a copy of the same in the United States Mail, postage prepaid, on January 30, 2014 to the following parties, or their representatives:

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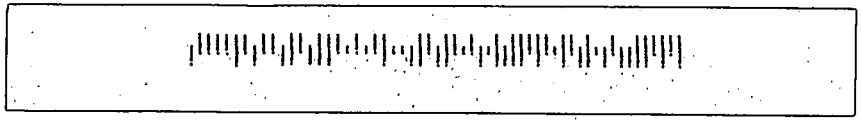

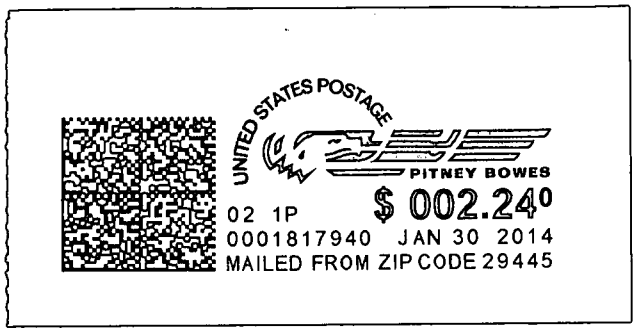

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