

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

RECEIVED

JUL 14 2014

APPELLATE PANEL:

SC Court of Appeals

AISHA TAYLOR, COMMISSIONER
T. SCOTT BECK, COMMISSIONER
MELDOY JAMES, COMMISSIONER

72831

W.C.C. FILE NO.: 1008485

Rusty Lowery, Employee.....Appellant,

v.

Pioneer Associates, Employer and Chartis Casualty Company, Carrier.....Respondents.

NOTICE OF APPEAL

Rusty Lowery appeals the Appellate Panel Decision and Order of the South Carolina Workers' Compensation Commission dated and filed June 16, 2014. The Appellant received written notice of the Appellate Panel Decision and Order by email on June 16, 2014.

Pursuant to S.C. Code Ann. §42-17-60, the grounds for the appeal are as follows:

1. The Full Commission erred as a matter of law in admitting, considering and relying upon any evidence regarding the criminal investigation of the Appellant or his alleged drug activity in direct contravention of Fore v. Griffco of Wampee, Inc., Op. No. 5242 (S.C. Ct. App. filed June 30, 2014).
2. The Full Commission erred as a matter of law in excluding from

evidence an email created by the employer which clearly established that the Appellant was taken out of work because of “memory issues.”

3. The findings and conclusions that the Appellant sustained only mild permanent physical brain damage are not supported by the reliable, probative and substantial evidence in the record.
4. Even if the Appellant did not sustain physical brain damage, the Full Commission erred as a matter of law in failing to find the Appellant permanently and totally disabled.
5. The finding of the Appellant’s after-injury average weekly wage is not supported by the reliable, probative and substantial evidence in the record.
6. The finding that, subsequent to his injury by accident, the Appellant performed his work duties as usual without any problems is not supported the reliable, probative and substantial evidence in the record.
7. The finding that the employer “would have accommodated the Appellant’s permanent restrictions” is not supported by the reliable, probative and substantial evidence in the record.
8. The Full Commission’s rejection of the Appellant’s request for lump sum payment of benefits is founded upon inadmissible and irrelevant evidence and amounts to an error of law.
9. The finding that the Appellant reached maximum medical improvement on October 30, 2012 is not supported by the reliable, probative and substantial evidence in the record.
10. The Full Commission erred as a matter of law by repeatedly referencing and misrepresenting illegal drug usage in an effort to make otherwise inadmissible evidence relevant.
11. The Full Commission erred as a matter of law in finding as a fact that the Appellant has outstanding warrants for his arrest related to illegal drug charges, the error being that criminal charges are irrelevant to the workers’ compensation claim. There was no evidence of any convictions of Appellant.
12. The Full Commission erred as a matter of law in finding as a fact that the Appellant has used methamphetamine after the date of accident in this matter, the error being that the existence of pending criminal

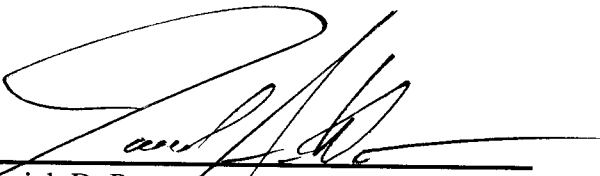
charges or investigation and evidence of alleged drug use is irrelevant to the workers' compensation claim.

13. The Full Commission erred as a matter of law in finding as a fact that the Appellant was involved with illegal drugs, specifically methamphetamine, before the accident and after the accident, the error being pending criminal charges and alleged drug use is irrelevant to workers' compensation claim. There was no admissible testimony or evidence introduced at the hearing on this issue.
14. The Full Commission erred as a matter of law in finding as a fact that the Appellant exaggerated his symptoms in his neuropsychological testing, the error being that the reliable, probative and substantial evidence in the record does not support such a finding.
15. The Full Commission erred as a matter of law in finding as a fact that Appellant entered into an agreement to work as a confidential informant with SLED to set up a buy of methamphetamine with some drug dealers out of Atlanta, and to this point evade arrest for his pending warrants all of which indicate a level of independent function and decision making, the error being that criminal charges are irrelevant to the workers' compensation claim and the reliable, probative and substantial evidence in the record does not support these findings. There was no evidence introduced that Appellant set up a drug deal or that he is or has evaded arrest. The overwhelming evidence is contrary of this finding and the transcript reveals that the Commission even stated that Appellant's rebuttal witness was not needed to show financial and decision making ability based on the lack of evidence to the contrary.
16. The Full Commission erred as a matter of law in finding as a fact that the Appellant's brain injury is mild and not severe, the error being the reliable, probative and substantial evidence the record fails to support such a finding. The overwhelming evidence contradicts this finding, including the defendant's own authorized treating physicians.
17. The Full Commission erred as a matter of law in finding as a fact that, according to a credible witness, the Appellant worked for many months after the accident and performed his duties as usual; the error being the reliable, probative and substantial evidence in the record fails to support such a finding. The evidence showed that the witness was not credible and the Full Commission improperly excluded an email signed by the witness which directly contradicted his testimony.

18. The Full Commission erred as a matter of law in finding as a fact that the Employer would have accommodated the Appellant's permanent restrictions, the error being the reliable, probative and substantial evidence in the record fails to support such a finding. The Commissioner improperly refused to accept into evidence an email signed by the employer witness which directly contradicts this finding.
19. The Full Commission erred as a matter of law in finding as a fact that Appellant could have received anywhere from \$15-\$18 per hour for light/medium duty, the error being the reliable, probative and substantial evidence in the record fails to support such a finding.
20. The Full Commission erred as a matter of law in finding as a fact that Appellant has sustained permanent partial wage loss, the error being the reliable, probative and substantial evidence in the record supports only the finding and conclusion that Appellant sustained permanent and *total* disability.
21. The Full Commission erred as a matter of law in finding as a fact that Appellant reached MMI on October 30, 2013; the error being that the reliable, probative and substantial evidence in the record fails to support such a finding.
22. The Full Commission erred as a matter of law in considering and relying upon information not admitted into evidence.
23. The Full Commission erred as a matter of law in finding as a fact that Employer is entitled to a credit temporary total disability benefits paid after March 19, 2013; the error being that the reliable, probative and substantial evidence in the record does not support such a finding.
24. The Full Commission erred as a matter of law in concluding that Appellant has sustained permanent partial wage loss and two-thirds of the difference between the pre-injury average weekly wage and post injury average weekly wage which is \$485.89, the error being that the reliable, probative and substantial evidence in the record does not support such a finding.
25. The Full Commission erred as a matter of law in concluding that Appellant's entitlement to temporary total disability benefits ended as of March 19, 2013 and Employer is entitled to a credit for temporary total disability paid subsequently against the permanency award as shown herein, which shall be taken in pro rata amount weekly; the error being that the reliable, probative and substantial evidence in the record

does not support such a finding.

26. The Full Commission erred as a matter of law in concluding that Appellant's request for lump sum benefits is denied; the error being the reliable, probative and substantial evidence in the record does not support such a finding.
27. The Full Commission erred as a matter of law in allowing the Appellant's SLED report into evidence and allowing the SLED officer to testify to more than whether the Appellant made a profit as a drug dealer. The testimony witness was to be limited to the issue of profit, however, the officer testified she had no knowledge of profit and testified to other issues. On the issue of profit, the Commissioner specifically stated that the officer did not testify that Appellant made any profit as a drug dealer so Appellant's rebuttal witness on the issue was not allowed as the Commissioner deemed her not relevant. The Appellant's witness was his elderly mother who lives next door to him and handles his finances. The SLED officer's testimony was highly prejudicial and irrelevant. The Full Commission reliance upon the SLED officer's testimony was error.
28. The Full Commission erred as a matter of law in ignoring the overwhelming evidence in this case that the Appellant does have permanent and severe physical brain damage as stated by the authorized treating physicians and evidenced by the objective testing done by the physicians specifically trained in this diagnosis.
29. The findings of fact and conclusions of law of the Full Commission are clearly erroneous in light of the reliable, probative and substantial evidence in the record.



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July 11, 2014

ATTORNEYS FOR APPELLANT

Other Counsel Of Record:

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AISHA TAYLOR, COMMISSIONER
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v.

Pioneer Associates, Employer and Chartis Casualty Company, Carrier.....Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents and the South Carolina Workers' Compensation Commission by depositing a copy to them in the United States Mail, Postage prepaid, on July 10, 2014 addressed as follows:

Katharine D. Phipps, Esquire
Wilson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607

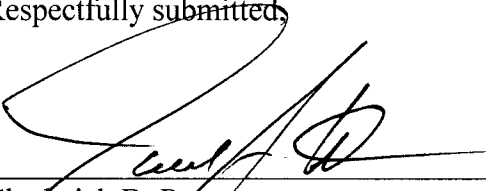
Ms. Virginia L. Crocker
Judicial Director
South Carolina Workers' Compensation
Commission
P.O. Box 1715
Columbia, SC 29202-1715

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Respectfully submitted,



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July 17, 2014

ATTORNEYS FOR APPELLANT

July 11, 2014

Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

**RE: Rusty Lowery, Employee v. Pioneer Associates, Employer and Chartis Casualty
Company Carrier
W.C.C. File No.: 1008485**

Dear Ms. Kitchings:

Enclosed please find the original and three copies of the Notice of Appeal in the above-referenced case. Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondents as well as the South Carolina Workers' Compensation Commission;
2. Copy of the order which is challenged on appeal;
3. Filing fee of a \$100.00.

Please return the filed copies to me in the self-addressed stamped envelope.

If you have any questions or concerns, please feel free to contact me.

Respectfully yours,



David A. Wilson

DAW/ccb
Enclosures

cc: Chad D. Pye, Esquire
Katherine D. Phipps, Esquire

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The Honorable Jenny A. Kitchings
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