IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WORKERS' COMPENSATION COMMISSION

Case No. 2014-002572

Johnathon Ashley Richardson, Employee/Appellant,

v.

Beal Lumber Company, Inc., Employer, and Palmetto Timber SI Fund Carol Walker Hunter Associates, Inc., Carrier/Respondents.

Trial Court Case No. 1122307

INITIAL BRIEF OF APPELLANT

February 20, 2015

SAMUEL M. PRICE, JR.
Bar No. 04566
Attorney for Employee/Appellant
1413 Main Street, P. O. Drawer 836
Newberry, South Carolina 29108
(803) 276-0796

TABLE OF CONTENTS

Page

Table of Authorities 4

Statement of Issues on Appeal 6

Statement of the Case 7

Standard of Review 8

Arguments

1. Did the Panel err in finding that Appellant did not suffer from a compensable repetitive trauma injury on February 8, 2011 or April 27, 2012? (No. 1) 8

2. Did the Panel err in finding that Appellant did not give notice to the Employer of an injury by accident due to repetitive trauma on February 8, 2011 or April 27, 2012? (No. 3) 10

3. Did the Panel err in finding that Appellant's testimony was difficult to follow and he did not answer questions with clarity; in finding that Appellant's testimony was inconsistent and never described an injury by accident or a repetitive trauma accident; and in finding that Appellant was not credible in his testimony? (Nos. 4 and 5) 14

4. Did the Panel err in finding that Appellant exaggerated his symptoms? (No. 6) 15

5. Did the Panel err in finding that Appellant's job duties are not repetitive? (No. 7) 16

6. Did the Panel err in finding that Appellant's supervisor, Kenneth Hill, testified that the Appellant did not provide notice of an injury at work? (No. 8) 17

7. Did the Panel err in finding that Appellant's supervisor, Kenneth Hill, testified that the Appellant reported he injured his back off the job while

moving logs with his dad? (No. 9) 17

8. Did the Panel err in finding that the owner of Beal Lumber, Frank Skipper Beal, testified that the Appellant was not injured on the job? (No. 10) 18

9. Did the Panel err in finding that Dr. McLoughin's (sic) deposition testimony indicates that the Appellant gave inconsistent dates regarding when his back pain started? (No. 12) 18

10. Did the Panel err in finding that Dr. McLoughlin could not state within a reasonable degree of medical certainty that the Appellant's medical condition was caused by his work-related activities? (No. 13) 19

11. Did the Panel err in finding that based on the entire record, testimony of the Appellant, medical reports, video description of the job, and Dr. McLoughlin's deposition testimony, this is not a compensable repetitive trauma claim? (No. 14) 19

Conclusion 22

TABLE OF AUTHORITIES

Statutes — Page

S.C.Code Ann. § 42-1-172(A) (Supp.2010) 8

S.C.Code Ann. § 42-9-35 21

S.C.Code Ann. § 42-15-20(C) 9, 12, 20

Cases

Bass v. Isochem, 365 S. C. 454, 617 S.E.2d 369 (CASC 2005) 9, 20

Brown v. R.L. Jordan Oil Company, 291 S.C. 272, 353 S.E.2d 280 21

Dickinson-Tidewater, Inc. v. Supervisor of Assess., 273 Md. 245, 329 A.2d 18, 25 (Md. 1974) 8

Etheredge v. Monsanto Company, 349 S.C. 451, 562 S.E.2d 679 (SCCA 2002) 12, 13

Ferguson v. State Highway Department, 197 S.C. 520, 15 S.E.2d 775 (1941) 20

Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 114 S.E.2d 565 (1960) 20

Hanks v. Blair Mills, Inc., 286 S.C. at 381, 335 S.E.2d at 93..... 20

Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009) 8

King v. International Knife and Saw-Florence, 395 S.C. 437, 718 S.E.2d 227 (SCCA 2011) 13

Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) 8

Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951) 20

Murphy v. Owens Corning, 393 S.C. 77, 82, 710 S.E.2d 454, 457 (Ct.App.2011) 13, 21

Pendleton v. Flippo Construction Company, 1 Va.App. 381, 339 S.E.2d 210 (1986) 21

Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010) 8

Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977) 20

Teigue v. Appleton Co., 221 S.C. 52, 68 S.E.2d 878 (1952) 20

Wigfall v. Tideland Utilities, Inc., 354 S.C. 1t 116, 580 S.E.2d at 108 9

STATEMENT OF ISSUES ON APPEAL

1. Did the Panel err in finding that Appellant did not suffer from a compensable repetitive trauma injury on February 8, 2011 or April 27, 2012? (No. 1)

2. Did the Panel err in finding that Appellant did not give notice to the Employer of an injury by accident due to repetitive trauma on February 8, 2011 or April 27, 2012? (No. 3)

3. Did the Panel err in finding that Appellant's testimony was difficult to follow and he did not answer questions with clarity; in finding that Appellant's testimony was inconsistent and never described an injury by accident or a repetitive trauma accident; and in finding that Appellant was not credible in his testimony? (Nos. 4 and 5)

4. Did the Panel err in finding that Appellant exaggerated his symptoms? (No. 6)

5. Did the Panel err in finding that Appellant's job duties are not repetitive? (No. 7)

6. Did the Panel err in finding that Appellant's supervisor, Kenneth Hill, testified that the Appellant did not provide notice of an injury at work? (No. 8)

7. Did the Panel err in finding that Appellant's supervisor, Kenneth Hill, testified that the Appellant reported he injured his back off the job while moving logs with his dad? (No. 9)

8. Did the Panel err in finding that the owner of Beal Lumber, Frank Skipper Beal, testified that the Appellant was not injured on the job? (No. 10)

9. Did the Panel err in finding that Dr. McLoughin's (sic) deposition testimony indicates that the Appellant gave inconsistent dates regarding when his back pain started? (No. 12)

10. Did the Panel err in finding that Dr. McLoughlin could not state within a reasonable degree of medical certainty that the Appellant's medical condition was caused by his work-related activities? (No. 13)

11. Did the Panel err in finding that based on the entire record, testimony of the Appellant, medical reports, video description of the job, and Dr. McLoughlin's deposition testimony, this is not a compensable repetitive trauma claim? (No. 14)

The numbers at the end of each Issue on Appeal are the numbers of the **Findings of Facts and Rulings of Law** set forth on pages 3 and 4 of the Appellate Panel Decision and Order filed November 3, 2014.

STATEMENT OF THE CASE

Appellant worked for employer on two occasions (October 12, 2010, through April 27, 2011 and July 6, 2011, through May 23, 2012). See Work Calendar R. _____ Appellant sustained a compensable work related injury to his back. On his first Form 50, Appellant alleged February 8, 2011. Thereafter, Appellant amended the Form 50 to indicate the injury may have been April 27, 2012. Appellant indicates that he was injured due to a repetitive lifting, twisting, and pushing hardwood lumber. Appellant alleged that he gave notice to the employer of back problems due to repetitive trauma. He gave notice to employer on multiple occasions that he had back problems because of the repetitive nature of his job.. Defendants denied this claim in its entirety and contend that Appellant failed to provide notice and further that Appellant injured his back off the job.

A hearing was held before a single commissioner pursuant to Appellant's Form 50s and defendant's Form 51. The single commissioner issued an Order dated April 28, 2014, in which he found that Appellant failed to meet his burden of proof to show that he suffered from a compensable repetitive trauma injury. Further, the single commissioner found that the Appellant failed to provide sufficient notice of an alleged repetitive trauma injury. Within the statutory

period, Appellant filed a Form 30 Application for Review setting forth exceptions to the single commissioner's ruling.

The Appellate Panel heard the matter on September 16, 204, and issued its decision on November 3, 2014, in which all claims of Appellant were denied.

STANDARD OF REVIEW

In workers' compensation cases, the Commission is the ultimate fact finder. Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009). An appellate court must affirm the findings made by the Commission if they are supported by substantial evidence. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." Id. The substantial evidence test "need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment;" and a judgment upon which reasonable men might differ will not be set aside. Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (quoting Dickinson-Tidewater, Inc. v. Supervisor of Assess., 273 Md. 245, 329 A.2d 18, 25 (Md. 1974)).

ARGUMENT

In reply to the Findings of Fact and Rulings of Law set forth above:

1. Did the Panel err in finding that Appellant did not suffer from a compensable repetitive trauma injury on February 8, 2011 or April 27, 2012? (No. 1)

Repetitive trauma.

> "By its nature, a repetitive trauma injury lacks a definite time of injury because the damage 'is gradual in onset and caused by the cumulative effects of repetitive traumatic events'. S.C.Code Ann. § 42-1-172(A) (Supp.2010) . . . Nothing in the

Act suggests our legislature intended to compensate an employee for aches, pains, or other conditions that do not interfere with his ability to do his job, even if those conditions are work-related. Cf. Wigfall, 354 S.C. 1t 116, 580 S.E.2d at 108."

"An employee's obligation to report a work-related repetitive trauma injury is not triggered by the onset of pain but, rather, by the employee's diligent discovery that his condition is compensable. § 42-15-20(C)."

Repetitive motion. In Bass v. Isochem, 365 S. C. 454, 617 S.E.2d 369 (CASC 2005), this was a case concerning carpal tunnel. The Court found in part that

"To deny (Appellant) benefits based on one position in her Form 50 denies the whole purpose of the South Carolina Workers' Compensation Act which is to protect injured workers."
"The opinion of this Court, therefore, is that the Full Commission and the hearing commissioner's Order is not supported by substantial evidence of record and should be reversed. The medical records, particularly the testimony of Dr. Seastrunk coupled with Ms. Bass' testimony, clearly indicated that this was a repetitive motion injury deemed by our Supreme Court to be compensable. The purpose of the South Carolina Workers' Compensation Act is for inclusion of injured workers not exclusion. Ms. Bass was injured in the course and scope of her employment and is entitled to benefits." (emphasis added)

In the case before this Court, Dr. McLoughlin indicated that although he did not believe to a degree of medical certainty that the work at Beal Lumber Company had caused Appellant's back difficulty, Dr. McLoughlin did say it was his opinion to a degree of medical certainty that such work had aggravated a pre-existing condition. See Questionnaire number 6 dated 12/12/13. See also deposition of Gregory S. McLoughlin, M.D.

Q. My question is whether you can give an opinion as to whether you believe the work at the lumberyard aggravated a preexisting condition or whether you can't, based upon the histories that we've been talking about today?
A. I think my interpretation of what he described to me is that working aggravated his pain. I think that's what I would take that as is an aggravation of, quite likely, a preexisting condition.
P 19, L 9-18

The very nature of a repetitive trauma injury makes it very difficult to identify a precise

date when this injury occurred. A review of the Newberry County Memorial Hospital Emergency Room records (see ADA Exhibits numbers _____).

The information below reveals date of emergency room treatment and reason for seeking treatment.

Date	Detail
February 8, 2011	BACK PAIN. . .
March 28, 2011	Diagnostic Imaging Department INDICATION: Back pain. TECHNIQUE: Lumbar spine series three views. IMPRESSION: Minimal loss of height of the anterior aspect of L1 vertebrae body that likely is chronic.
March 28, 2011	BACK PAIN. Onset-about 3 months ago and is still present. It has been constant.
November 13, 2011	LOWER EXTREMITY PAIN. . .
June 20, 2012	BACK PAIN. Onset-about 2 weeks and is still present. . .
June 28, 2012	BACK PAIN. . .

According to Dr. McLoughlin's letter dated July 17, 2012, Dr. McLoughlin found

"His symptoms have progressed to the point where he has a hard time standing or walking for any length or distance. Extending his spine is worse for him and sleeping is similarly uncomfortable. He obtains at least some partial relief sitting down or leaning forward. His pain typically is a 7/10 on a daily basis and seems to be progressing rapidly. He does have some urinary hesitancy. Work at a lumbar (sic) mill seems to have aggravated his symptoms.

. . . a surprising high degree of central stenosis at L3-4 and to a lesser extent L2-3 for such a young age. His central stenosis at L3-4 is what I would consider to be severe."

As is indicated, Appellant has been seeking medical help.

2. Did the Panel err in finding that Appellant did not give notice to the Employer of

an injury by accident due to repetitive trauma on February 8, 2011 or April 27, 2012? (No. 3)

Appellant testified at the hearing before the Single Commissioner in part:

Q. Tell us how you notified Beal Lumber Company of your injury – or your repetitive injury.

A. Where were supervisors on the green chain, one was named Rick, one was named Josh Riser. I let them know that I needed to get off the line, I needed someone to watch my spot on several occasions to go talk to Mr. Kenny Hill to let him know that back was hurting. He would tell me, you know, This the job, everyone's back hurts, you need to go continue working or you can go home, it's your choice. I took that as, well, maybe I do need to go continue working, because otherwise I'm not going to have a job. Like I said, this was several occasions, not just one. I also told Skipper one day that I was clocking out because my back hurt so bad –

Q. Now, tell us who Skipper is?

A. Kenny's boss, the owner of the company, as far as I'm aware.

Q. Okay.

A. I told Skipper that I was clocking out, I needed to go home. Went to a doctor, because my back was hurting so bad that day I could not hardly stand up, much less stack lumber.

I went up to Kenny's office on several occasions and talked to him in person and told him – even though he told me that, Yeah, everybody's back hurts, everybody's going to need days off, and everybody's going to get sore out there – I told him that mine continuously got worse, it was not getting any better. It was not just sore, it was pain shooting into my legs and my legs going numb. It was not just the normal, Oh, I'm sore from a hard day's work. It progressively got worse over time. And I could not convince Mr. Kenny. And he would ask me, Well, how do you think – why do you think your back's injured, what's wrong with it. And I would tell him, I had never had any back problems, any back pain, whatsoever, before I started here.

And I told him also that I thought at some times there was too much wood for one person in my spot, because I would have four or five packs of wood at sometimes. It would tell him, It's just too much, it's just too much. And my back, I can't take

it. It's getting to the point where it hurts so bad that I can't hardly walk –
(Transcript Page 16 Line 12 - Page 18 Line 8)

"Q. . . . when you would talk to Kenny about your back would you make it pretty clear to him that you hurt your back there at work?

A. I made it very clear that I've never had any pain before I started that job, that I know that that job, what I was doing consistently – this is not something you do and then you can turn around and do it another way, and then you can turn around and do it another way. Once you get a hang of what you're doing that's what you do. You don't change your routine, you stack lumber, whether it's heavy lumber, long lumber, short lumber, you stack lumber, and you do it as fast and as productive as you can. And every – from the first time to the last time I mentioned my back being hurt on the job there Kenny said, There's no way, I've had guys out here doing this for years, there's no way, why are their backs not messed up."
(Transcript Page 20 Line 19 – Page 21 Line 11.

Notice of Appellant's back injury was clearly given to the Employer. Appellant's statement that he had never had back problems or back pain before he began working this job clearly indicates Appellant believed his back pain was caused by the job. This belief was communicated to Kenny Hill and Skipper Beal.

Notice. Section 42-15-20 provides in part,

"(C) in the case of repetitive trauma, notice must be given by the employee within 90 days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable, unless reasonable excuse is made to the satisfaction of the commission for not giving time of notice and the commission is satisfied that the employer has not been unduly prejudiced thereby."

In the case of Etheredge v. Monsanto Company, 349 S.C. 451, 562 S.E.2d 679 (SCCA 2002), the Court ruled in its conclusion,

"We rule the language of §42-15-20 in regard to notice should be liberally construed in favor of Appellants. We conclude that notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case

might involve a potential compensation claim."

In Etheredge, Etheredge visited Dr. Deborah Grate on August 18, 1998. On that date, Dr. Grate prepared the following statement addressed to Etheredge's supervisor:

> "Ms. Sandra Etheredge has acute muscles [sic] strain and spasms of her neck and shoulder muscles. Having to do overhead work aggrevates [sic] her problems because these are the muscles groups that are used. She may return to work doing a job which does not require her to raise arm [sic] above the level of her shoulders. She has been referred to physical therapy."

It should be noted that there is nothing in the note of Dr. Grate which was forwarded to the employer that indicates this is a job related injury.

In the case before this Court, there was a medical excuse dated April 27, 2012, which indicated that Appellant should return on May 29, 2012, at 3:20 and there should be no lifting or carrying over 10 pounds and no repetitive bending. It further indicated that Appellant could return to work on April 30, 2012. _____ On May 11, 2012, a second statement was given; may return to work on May 14, 2012. No lifting or carrying over 10 pounds. No repetitive twisting. No repetitive bending. No repetitive stooping. _____ These two excuses were delivered to the employer. In the testimony at the hearing, it was admitted that these statements were received and employer indicated that an effort was made to put Appellant on light duty. (Transcript Page 36 Line 20 through Page 37 Line 13) This falls on all squares with the method of notice given in the Etheredge case as quoted above.

In King v. International Knife and Saw-Florence, 395 S.C. 437, 718 S.E.2d 227 (SCCA 2011), the Court stated that SC Code Annotated Section 42-15-20 (C)(Supp. 2010),

> "The statutory notice requirements in this section 'should be liberally construed in favor of Appellants.' Murphy v. Owens Corning, 393 S.C. 77, 82, 710 S.E.2d 454, 457 (Ct.App.2011)."

3. Did the Panel err in finding that Appellant's testimony was difficult to follow and he did not answer questions with clarity; in finding that Appellant's testimony was inconsistent and never described an injury by accident or a repetitive trauma accident; and in finding that Appellant was not credible in his testimony? (Nos. 4 and 5)

Appellant was 26 years old at the time of the hearing. He has an 11th grade education. All his work has been blue collar work. He is not a polished speaker. At his own admission, he is not a good historian. The finding that Appellant's testimony was difficult to follow, he did not answer questions with clarity, testimony was inconsistent and Appellant never described an injury by accident or repetitive trauma accident. The finding that Appellant was not credible all lack substantial evidence for such findings. The only inconsistencies are as follows:

(1) Appellant testified that he told Kenny Hill on numerous occasions that he was in extreme pain. He had no back problems before he started working for employer. He delivered two (2) work excuses to Kenny Hill. He was put on light duty. The employer's testimony was that he never told us he was hurt on the job.

(2) Appellant could not remember precise dates of when his excruciating pain began. Kenny Hill could not remember when Appellant delivered the two (2) work excuses.

The only reason to find that Appellant's testimony was inconsistent, never described an injury, and his testimony was not credible, was to justify denying this claim. There is no substantial evidence to find Appellant's testimony was not credible or otherwise inconsistent.

This should not prevent Appellant from the benefits under the Workers' Compensation Act. Appellant's attorney, on two occasions, attempted to clarify Appellant's dates of

employment by the introduction of the Employer's work records. (Transcript Page 13 Line 21 – Page 14 Line 1 and Transcript Page 23 Line 11 – Page 24 Line 1) By permitting reference to Appellant's employment dates, additional clarity would have been added to Appellant's testimony. As an employee, Appellant depended upon his employer to note his complaints about his back problems and back pain. This was a reasonable expectation on the part of Appellant. Appellant knew nothing about Workers' Compensation law. He did not know he should have kept a log of his complaint. The fact that Appellant's testimony was difficult to follow, that he did not answer questions with clarity, and Appellant's testimony was inconsistent does not and should not be interpreted as untruthful. The issue is who was telling the truth. The medical records indicate that Appellant sought treatment for months for his back.

4. Did the Panel err in finding that Appellant exaggerated his symptoms? (No. 6)

Dr. McLoughlin indicated on page 1 of his letter dated July 17, 2012, to Darly Bernardo, M.D.,

> "he (Appellant) is a 24 year old male who has been really struggling with neurogenic claudication for such a young age for the past year and a half. His symptoms have progressed to the point where he has a hard time standing or walking for any length or distance. . . His pain typically is a 7/10 on a daily basis and seems to be progressing rapidly. He does have some urinary hesitancy. Work at a lumbar (sic) mill seems to have aggravated his symptoms . . ."

A review of the Newberry County Memorial Hospital emergency room records demonstrates multiple trips to the emergency room for back pain.

The records of Family HealthCare – Newberry indicate Appellant sought treatment for back pain.

Midlands Orthopedic records indicate treatment for back pain.

Lexington Medical Center records indicate treatment for back pain.

Records of Pinner Clinic indicate treatment for back pain.

There is no substantial evidence to suggest Appellant is exaggerating his symptoms. There is no evidence that he participates in sports. There is no evidence that he is able to do any household chores. Without treatment, Appellant's future is bleak. There is no substantial evidence that Appellant exaggerated his symptoms.

5. Did the Panel err in finding that Appellant's job duties are not repetitive? (No. 7)

Appellant's job was to remove hardwood lumber of various sizes from the "green line" and separate into "packs" of different sizes. There is a video in evidence submitted by the Employer that shows the "green line" and the work performed thereon. Appellant disputes the speed and volume shown on the video; but, would agree that it shows the basic function Appellant's job required.

According to Dr. McLoughlin's letter dated July 17, 2012, Dr. McLoughlin found

> "His symptoms have progressed to the point where he has a hard time standing or walking for any length or distance. Extending his spine is worse for him and sleeping is similarly uncomfortable. He obtains at least some partial relief sitting down or leaning forward. His pain typically is a 7/10 on a daily basis and seems to be progressing rapidly. He does have some urinary hesitancy. Work at a lumbar (sic) mill seems to have aggravated his symptoms.

Dr. McLoughlin indicated that although he did not believe to a degree of medical certainty that the work at Beal Lumber Company had caused Appellant's back difficulty, Dr. McLoughlin did say it was his opinion to a degree of medical certainty that such work had aggravated a pre-existing condition. See Questionnaire number 6 dated 12/12/13.

There is no substantial evidence to find that Appellant's back injury was not caused by

repetitive trauma.

6. Did the Panel err in finding that Appellant's supervisor, Kenneth Hill, testified that the Appellant did not provide notice of an injury at work? (No. 8)

This is not true. Appellant told Kenneth Hill on multiple occasions that his back was in pain. Appellant told Mr. Hill that he had never had any back problems or back pain before. It must be coming from the job.

Kenny Hill was given medical work excuses. As indicated by the Etheredge case, the medical excuses are notice. Appellant's testimony was precise when he recalled Kenny Hill's statement to Appellant about "Everybody's back hurts." (Transcript Page 17 Line 13-14). Kenny Hill testified that Appellant never gave him notice of a back injury. Mr. Hill did testify that he received work excuses. The receipt of work excuses is notice. There is no substantial evidence for the finding that Mr. Hill never received notice.

7. Did the Panel err in finding that Appellant's supervisor, Kenneth Hill, testified that the Appellant reported he injured his back off the job while moving logs with his dad? (No. 9)

Appellant did not injure his back while helping his father move logs. This case has an incredibly large number of medical records. There is no indication in any of the medical records that Appellant injured his back while helping his father lift logs. Mr. Hill could not remember when Appellant helped his father lift logs and allegedly hurt his back. It is reasonable for a witness such as Mr. Hill not to remember dates of such information. It is also reasonable for Appellant to not remember each and every detail of the facts of his case. However, the single commissioner and the panel found Appellant to be not credible, his testimony difficult to follow,

answered questions without clarity, and testimony inconsistent. No such finding was made toward Mr. Hill or Mr. Beal. There is no substantial evidence that Appellant injured his back while helping his father move logs. In his deposition, Appellant testified "And I was throwing it (log) into a dumpster and my foot slipped in the mud and I actually fell into the dumpster and hit my ribs." (Deposition Page 41, Lines 11-13).

8. Did the Panel err in finding that the owner of Beal Lumber, Frank Skipper Beal, testified that the Appellant was not injured on the job? (No. 10)

Mr. Beal indicated that a lot of facts are just not clear. He has other people hired to keep up with details. Mr. Beal keeps up with the overview of things. He stated, "Yes, he did not suffer an on the job injury, as far as I know." (Transcript Page 45 Lines 9-22). "As far as I know." This testimony is of no value because "a lot of facts are just no clear".

9. Did the Panel err in finding that Dr. McLoughin's (sic) deposition testimony indicates that the Appellant gave inconsistent dates regarding when his back pain started? (No. 12)

When Dr. McLoughlin was deposed, he was asked about Newberry County Memorial Hospital Emergency Room records, attorney for Employer would read an Emergency Room record, read the date and then read when the back pain first started. It is true that at each Emergency Room visit, the date that the back pain began was sometimes inconsistent. This fact is reasonable. If Appellant was able to identify when back pain first began as the same date or timeframe each time he went to the Emergency Room, it would appear to be a plan to fabricate an injury. Appellant simply did the best he could on those days he went to the Emergency Room.

If Appellant went to the emergency room for back pain, he was seeking relief. His

recollections of his pain were not a priority to him. Appellant was seeking relief from pain.

10. Did the Panel err in finding that Dr. McLoughlin could not state within a reasonable degree of medical certainty that the Appellant's medical condition was caused by his work-related activities? (No. 13)

That is true. The key word is "caused". In his deposition, Dr. McLoughlin was asked by Employer's attorney

> "Q. My question is whether you can give an opinion as to whether you believe the work at the lumberyard aggravated a preexisting condition or whether you can't, based upon the histories that we've been talking about today?
>
> A. I think my interpretation of what he described to me is that working aggravated his pain. I think that's what I would take that as is an aggravation of, quite likely, a preexisting condition." (Page 19 Lines 9 – 18) Emphasis added.
>
> According to Dr. McLoughlin's letter dated July 17, 2012, Dr. McLoughlin found
>
> "His symptoms have progressed to the point where he has a hard time standing or walking for any length or distance. Extending his spine is worse for him and sleeping is similarly uncomfortable. He obtains at least some partial relief sitting down or leaning forward. His pain typically is a 7/10 on a daily basis and seems to be progressing rapidly. He does have some urinary hesitancy. Work at a lumbar (sic) mill seems to have aggravated his symptoms.

Dr. McLoughlin indicated that although he did not believe to a degree of medical certainty that the work at Beal Lumber Company had caused Appellant's back difficulty, Dr. McLoughlin did say it was his opinion to a degree of medical certainty that such work had aggravated a pre-existing condition. See Questionnaire number 6 dated 12/12/13.

11. Did the Panel err in finding that based on the entire record, testimony of the Appellant, medical reports, video description of the job, and Dr. McLoughlin's deposition testimony, this is not a compensable repetitive trauma claim? (No. 14)

In Issues number 1 through 10, Appellant has responded in detail. There is no substantial evidence for the findings of any of the issues with the exception of number 10. (As to number 10: Appellant's repetitive injury did not cause his back injury, it simply aggravated an unknown but preexisting condition.)

> "Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practical, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Title prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident or that the party required to five such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person. No compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." Bass v. Isochem, 365 S. C. 454, 617 S.E.2d 369 (CASC 2005)
>
> There has been no showing of prejudice to the employer.
>
> "Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability or his own liability. See Teigue v. Appleton Co., 221 S.C. 52, 68 S.E.2d 878 (1952); Hanks, 286 S.C. at 381, 335 S.E.2d at 93. While the notice requirement must be construed liberally in favor of Appellants, it is 'not to be treated as a mere formality or technicality and dispensed with as a matter of course.' Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951)."

In the case before this Court, Appellant gave multiple oral notices to his employer. See Testimony.

> When a previously diseased condition is aggravated by injury or accident arising out of and in the course of the employment, disability is compensable. Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977); Glover v. Columbia Hospital of Richland County, 236 S.C. 410, 114 S.E.2d 565 (1960); Ferguson v. State Highway Department, 197 S.C. 520, 15 S.E.2d 775 (1941). It is on defense

> that the accident, standing alone, would not have caused the Appellant's condition, because the employer takes the employee as he finds him. If the accident accelerates or aggravates a preexisting condition, the resulting injury is compensable. On the other hand, a condition due solely to natural progression of a preexisting disease is not compensable. Pendleton v. Flippo Construction Company, 1 Va.App. 381, 339 S.E.2d 210 (1986)." Brown v. R.L. Jordan Oil Company, 291 S.C. 272, 353 S.E.2d 280.

The case of Murphy v. Owens Corning, 393 S.C. 77, 710 S.E.2d 454, provides in part an analysis of the aggravation of the preexisting condition.

> "Section 42-9-35 applies to the aggravation of a pre-existing condition and provides in relevant part:
> (A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:
> (1) the subsequent injury aggravated the preexisting condition or permanent physical impairment; or
> (2) the preexisting condition or the permanent physical impairment aggravates the subsequent injury.
> (B) The commission may award compensation benefits to an employee who has a permanent physical impairment or preexisting condition and which incurs a subsequent disability from an injury arising out of and in the course of his employment for the resulting disability of the permanent physical impairment or preexisting condition and the subsequent injury."

The Panel erred in dismissing Appellant counsel's brief and not considering any arguments made therein. Any items that were not in the record were so indicated in his brief and it would be proper to dismiss those portions but not the entire brief because it gave the employer an unfair advantage. In Appellant's brief before the Panel, one issue was the following statement, "Although it was not developed at testimony at the time claimant was seeing Midlands Orthopedic, he was covered through his mother's healthcare insurance." (Brief of Appellant page 7). The undersigned considers this a minor issue. Surely this should not have caused Appellant's brief to be dismissed.

Appellant's brief before the Panel refers to the incident of helping his father put logs in

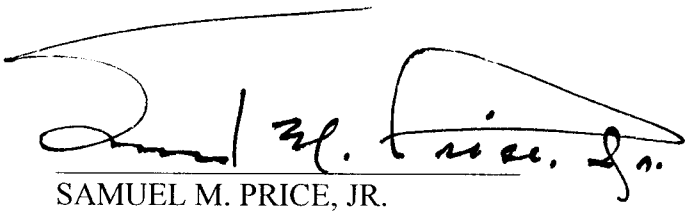
the dumpster. (Brief of Appellant page 5). When asked

> Commissioner Barden: Okay. Was that taken up at the hearing, that he fell onto the lip on his left side?
> Mr. Price: The - - Kenny Hill testified that he had fallen into a dumpster.
> Commissioner Barden: Right, but I'm talking about where you've written "fell onto the lip of a dumpster on his left side at this left armpit"? Was that before Commissioner Wilkerson?
> Mr. Price: I don't think it was.
> (Transcript of Panel page 11)

The fact related to Appellant's fall onto the dumpster was in the record pursuant to Appellant's deposition. (Appellant's deposition page 41 lines 3 – 19). Appellant's attorney misspoke when he said "I don't think it was." Therefore, these facts actually were before the Single Commissioner.

CONCLUSION

Appellant had no back problems when he went to work for the employer. Appellant's job was one of repetitive motion. Appellant did give notice of the back pain that worsened over time. The nature of what he did aggravated a preexisting condition. A review of the record finds no substantial evidence for the Findings of Facts and Rulings of Law of the Commission Panel. Appellant respectfully requests that the Panel Decision be reversed.



SAMUEL M. PRICE, JR.
Attorney for Employee/Appellant
1413 Main Street, P. O. Drawer 836
Newberry, South Carolina 29108
(803) 276-0796

Newberry, South Carolina
February 20, 2015

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WORKERS' COMPENSATION COMMISSION

Case No. 2014-002572

Johnathon Ashley Richardson, Employee/Appellant,

v.

Beal Lumber Company, Inc., Employer, and Palmetto Timber SI Fund Carol Walker Hunter Associates, Inc., Carrier/Respondents.

Trial Court Case No. 1122307

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant together with Designation of Matter to be Included in the Record on Appeal on Respondents Beal Lumber Company, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc. by depositing a copy of it in the United States Mail, postage prepaid, on February 20, 2015, addressed to their attorney of record, McAngus Goudelock & Courie, LLC, Helen F. Hiser, Esquire, 735 Johnnie Dodds Boulevard, Post Office Box 650007, Mount Pleasant, South Carolina 29465

SAMUEL M. PRICE, JR.
Attorney for Appellate
1413 Main Street, P. O. Drawer 836
Newberry, South Carolina 29108
(803) 276-0796

Newberry, South Carolina
February 20, 2015

Law Office
of
Samuel M. Price, Jr.
1413 Main Street
P. O. Drawer 836
Newberry, South Carolina 29108

Fax
Area Code 803
276-9495

Telephone
Area Code 803
276-0796

February 20, 2015

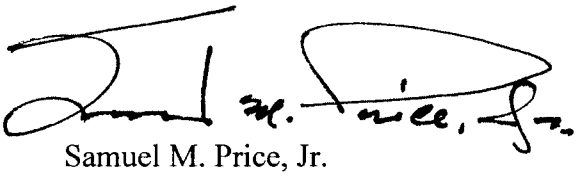
McAngus Goudelock & Courie, LLC
Attention Helen F. Hiser, Esquire
735 Johnnie Dodds Boulevard, Suite 200
P. O. Box 650007
Mt. Pleasant, South Carolina 29465

RE: Johnathon Ashley Richardson vs. Beal Lumber Company, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.
WCC File No.: 1122307
Appellate Case No. 2014-002572

Dear Ms. Hiser:

I enclose herewith and serve upon you the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal in regard to the above captioned matter. I also enclose Proof of Service of same. If you have any questions or need additional information, please do not hesitate to contact me.

Respectfully,



Samuel M. Price, Jr.

rfs

Enclosures

CC: The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Law Office
of
Samuel M. Price, Jr.
1413 Main Street
P. O. Drawer 836
Newberry, South Carolina 29108

Fax
Area Code 803
276-9495

Telephone
Area Code 803
276-0796

February 20, 2015

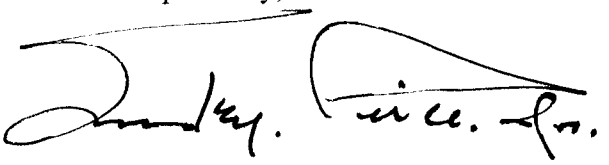
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Johnathon Ashley Richardson vs. Beal Lumber Company, Inc. and Palmetto Timber S.I. Fund c/o Walker, Hunter & Associates, Inc.
WCC File No.: 1122307
Appellate Case No. 2014-002572

Dear Ms. Kitchings:

Please find enclosed herewith the original Initial Brief of Appellant and original Designation of Matter to be Included in the Record on Appeal in regard to the above captioned matter. I also enclose Proof of Service of same. If you have any questions or need additional information, please do not hesitate to contact me.

Respectfully,



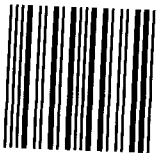
Samuel M. Price, Jr.

rfs

Enclosures

CC: McAngus Goudelock & Courie, LLC
Attention Helen F. Hiser, Esquire
735 Johnnie Dodds Boulevard, Suite 200
P. O. Box 650007
Mt. Pleasant, South Carolina 29465

1000



29211

U.S. POSTAGE
PAID
NEWBERRY, SC
29108
FEB 20, '15
AMOUNT

$2.03
00053548-07

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