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May 13, 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 Reply Brief of Appellant 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

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 REPLY BRIEF OF APPELLANT

May 13, 2015

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IN REPLY TO RESPONDENT'S FACTS

On page 4 of Respondent's Brief, respondent refers to the notes of Dr. Bernardo dated January 26, 2012, that appellant was thrown from a car as a result of a wreck which occurred "about 2-3 years ago". Appellant would admit this statement is in Dr. Bernardo's records. However, appellant would deny that those notes are accurate. Appellant was not thrown from the car but his back was sore for only two or three weeks following the wreck.

On page 6 of Respondent's Brief, respondent claims that after viewing the video depicting the type of work generally performed by appellant, Dr. McLoughlin testified that appellant's work could not cause or aggravate the narrowing of the spinal canal (Page 27, lines 2-20) (R _____). However, earlier in his deposition when Dr. McLoughlin was questioned by E. Scott Winburn, Esquire, attorney for employer/carrier, (Page 19, line 9-22) (R _____):

Q My question is whether you can give an opinion as to whether you believe the work at the lumber yard 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 that as is an aggravation of, quite likely, a preexisting condition.

Q Right

A Specifically with the standing and walking, the symptoms that are often produced by that kind of activity.

After the deposition, an interrogatory was submitted to Dr. McLoughlin in which he stated that:

> 6. Johnathan A. Richardson's job, which consisted of repetitively handling heavy rough cut hardwood lumber, taking the individual boards off the chain line and stacking the lumber requiring standing, walking, lifting, twisting, and grabbing, AGGRAVATED the central stenosis of L3-4 and a lesser extent L2-3. (R_____)

There is no evidence other than Dr. McLoughlin's interrogatory and deposition testimony that appellant had a preexisting spinal condition. That's the only evidence there is. There is no evidence that appellant's spine was not aggravated by his work.

On page 6 of Respondent's Brief, it is stated that as to Dr. Rambo cancelling appellant's appointment vs. appellant cancelling the appointment. In appellant's deposition testimony, on page 31, lines 15-25 (R_____):

Q And what's the other doctor you've been to?

A I tried to go see Dr. Rambo in Columbia, but – --

Q And who sent you to Dr. Rambo?

A My mom actually set me up an appointment with him. Nobody referred me to him.

Q But you said you didn't go?

A I did go, but the insurance company - - they told me, basically, he couldn't see me.

The truth of the matter is, appellant had filed a Workers' Compensation claim related to his back injury. Therefore, his mother's healthcare insurance would not cover him with Dr. Rambo because Dr. Rambo's office was not authorized by the Workers' Compensation carrier to treat appellant. Therefore, appellant did not cancel the appointment. He appeared for the appointment but was not seen because of the insurance issue.

STANDARD OF REVIEW

Workers' compensation law is to be liberally construed in favor of coverage to serve the beneficent purpose of the Workers' Compensation Act; therefore, only exceptions and restrictions on coverage are to be strictly construed. James v. Anne's Inc., 390 S.C. 188, 189, 701 S.E.2d 730, 735 (2010). On appeal from an appellate panel of the Workers' Compensation Commission, this Court can reverse or modify the decision if it is affected by an error of law or

is clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture or speculation." Crisp v. SouthCo., 401 S.C. 627, 641; 738 S.E.2d 835, 842 (2013). In a workers' compensation case, the appellate panel is the ultimate fact-finder. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622, 594 S.E.2d 272, 273 (2004). However, where there are no disputed facts, the question of whether an accident is compensable is a question of law. Grant v. Grant Textiles, 372 S.C. 196, 201, 641 S.E.2d 869, 872 (2007).

IN RESPONSE TO RESPONDENT'S ARGUMENTS

I. Claimant failed to appeal and/or preserve certain findings and holdings which are now binding on him.

Claimant raised four (4) issues:

(a) Did the Commissioner err in his finding that claimant's injury was not related to his work?

(b) Did the Commissioner err in his finding that the injury was not repetitive trauma incident?

(c) Did the Commissioner err in his finding that no notice was given to the employer?

(d) Did the Commissioner err in his finding that claimant's testimony was not credible?

Respondent argues that since appellant has not distinguished between a repetitive injury to a pre-existing condition that appellant has somehow waived his right to appeal the issue as to whether the injury work-related. The question, "Did Commissioner err in his finding that claimant's injury was not related to his work?" is a broad enough argument that would preserve appellant's right to have this court to consider the cause the aggravation and the source of

appellant's injury. Respondent argues that by taking the position that the repetitive injury aggravate a pre-existing injury, that appellant cannot do so. Section 42-1-170 provides that the definition of repetitive trauma injury is clear from the interrogatory and deposition testimony of Dr. McLoughlin that the repetitive motion aggravated a preexisting condition which has caused injury to appellant.

II. The Commission properly determined that Claimant did not suffer from repetitive trauma injury.

The interrogatory of Gregory S. McLoughlin, M.D. indicated

> 6. Johnathan A. Richardson's job, which consisted of **repetitively** handling heavy rough cut hardwood lumber, taking the individual boards off the chain line and stacking the lumber requiring standing, walking, lifting, twisting, and grabbing, AGGRAVATED the central stenosis of L3-4 and a lesser extent L2-3. (Emphasis added) (R_____)

Evidence of a repetitive job aggravating appellant's condition is present.

III. Even if the Court were to consider Claimant's aggravation of underlying condition argument, the Commission found that Dr. McLoughlin could not state to a reasonable degree of medical certainty that Claimant's medical condition was caused by his work-related activities.

It is argued that the single commissioner found that Dr. McLoughlin could not state to a reasonable degree of medical certainty that claimant's medical condition was caused by his work related activities but Dr. McLoughlin did so state in the questionnaire. There is no other evidence other than conjecture that the repetitive motion of his job did not aggravate his pre-existing condition in his back. There was nothing in the record that would justify a finding that Dr. McLoughlin's opinions were not to a reasonable degree of medical certainty. On Dr. McLoughlin's interrogatory, it was clearly stated "The above opinions are stated to a reasonable degree of medical certainty." (R _____) The determination by the single commissioner that "13. Dr. McLoughlin could not state within a reasonable degree of medical certainty that the

claimant's medical condition was caused by his work-related activities." (R _____) is not supported by any evidence.

Workers' compensation law is to be liberally construed in favor of coverage to serve the beneficent purpose of the Workers' Compensation Act; therefore, only exceptions and restrictions on coverage are to be strictly construed. *James v. Anne's Inc.*, 390 S.C. 188, 189, 701 S.E.2d 730, 735 (2010).

IV. The Commission's credibility determinations were proper.

Respondent outlines reasons why it would appear that appellant's testimony was not credible. Appellant has less than a high school education. He has always worked unskilled jobs. Although appellant does not remember dates well, his poor memory does not prove he was not injured on the job. Respondent claims that appellant's testimony that he never experienced back pain prior to working for Beal Lumber is directly contradicted by the evidence in the record. The respondent's keeps bringing up a motor vehicle accident that happened two or three years prior to claimant's first trip to Newberry County Memorial Hospital emergency room. There was no medical evidence presented at the hearing before the single commissioner that appellant experienced severe back pain prior to working for Beal Lumber Company. Respondent has simply taken the date of medical records, the first visit, i.e. February 8, 2011, and taken appellant's statement "similar symptoms previously: he has had similar symptoms previously. (back pain priorly [sic] 2 y ago after mvc)." (R_____) Appellant did not seek medical treatment for this motor vehicle accident. Respondent's Brief stated on page 16, "He later testified that his back pain started approximately eight months after beginning work in September 2009, . . ." (R_____) Appellant's employment records indicate he first started work on October 11, 2010. Dr. McLoughlin's intake records of June 18, 2012, indicate as follows:

> These symptoms have been present for: >1 year
> These symptoms started on (give specific date, if known): 2 years
> (R_____)

There is no record of medical treatment prior to February 8, 2011; three months 29 days after he began work. The record is full of various medical reports from different doctors. If appellant had such severe symptoms prior to going to work at Beal Lumber Company, appellant would have had earlier medical records where he was seeking treatment for the pain. The point argued by respondent that appellant experienced back pain prior to his employment is the result of appellant's poor memory. Appellant's work did in fact aggravate a preexisting condition.

V. The Commission correctly determined that Claimant failed to provide notice to his Employer of a repetitive trauma injury.

The notice to Employer was fully briefed in Appellant's Brief; however, respondent attempts to distinguish Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679, from the case at hand. Etheredge is exactly on point. Although appellant did orally notify Kenny Hill on multiple occasions that his work caused back pain, the doctor's statement of Friday, 04-27-2012, would certainly be an indication that the employer was put on notice that there was a work related injury.

VI. The Commission committed no error when it dismissed Claimant's Amended Brief for failure to comply with its August 11, 2014 Order.

The Appellant's Amended Brief before the Workers' Compensation Panel was in fact dismissed. The Commission deprived appellant of serious consideration/reconsideration of his appeal. This was a significant error of law.

CONCLUSION

Appellant is severely injured. He has not worked since he worked at Beal Lumber Company. The purpose of Workers' Compensation is to take care of employees that are injured on the job. Appellant would respectfully request that the finding of the Appellate Panel Decision and Order of the South Carolina Workers' Compensation be reversed.

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PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant 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 May 13, 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

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