

RECEIVED

SEP 08 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2015-000808

James Osment.....Appellant,

v.

The Timken Company,
and Phoenix Insurance Company,Respondents.

INITIAL REPLY BRIEF OF APPELLANT

John David Hawkins
South Carolina Bar No.5891
Charles Logan Rollins
South Carolina Bar No. 78395
George Randall Taylor
South Carolina Bar No. 10151
The Hawkins Law Firm
P.O. Box 5048
Spartanburg, SC 29304
(864) 574-8801

ATTORNEYS FOR
APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

ARGUMENTS.....1

 I. THE SUBSTANTIAL EVIDENCE OF THE CASE SUPPORTS BUT ONE CONCLUSION: THAT APPELLANT SUSTAINED A COMPENSABLE INJURY TO HIS BACK AND RIGHT HIP AND IS PERMANENTLY AND TOTALLY DISABLED.....1

 II. THE SUBSTANTIAL EVIDENCE OF THIS CASE MANDATES OVERTURNING FINDINGS AGAINST APPELLANT AS TO HIS CREDIBILITY.....2

 A. Inferences In Workers Compensation Cases Must Be Drawn In Favor Of The Injured Worker. The Inferences Behind Findings Of Fact #11 and #14 Were Improperly Drawn Against The Appellant.....2

 III. THE SUBSTANTIAL EVIDENCE SUPPORTS A FINDING THAT APPELLANT HAS SUSTAINED FAR MORE THAN 60% PERMANENT PARTIAL DISABILITY TO HIS RIGHT KNEE AS A RESULT OF HIS MAY 20, 2010 WORK ACCIDENT.....4

CONCLUSION.....6

TABLE OF AUTHORITIES

Cases

Beckman v. Sysco Columbia, 408 S.C. 501, 759 S.E.2d 750 (Ct. App. 2014)1,2

Statutes and Regulations

S.C. Code Ann. § 42-9-10.....2

ARGUMENTS

I.

THE SUBSTANTIAL EVIDENCE OF THE CASE SUPPORTS BUT ONE CONCLUSION: THAT APPELLANT SUSTAINED A COMPENSABLE INJURY TO HIS BACK AND RIGHT HIP AND IS PERMANENTLY AND TOTALLY DISABLED.

The only medical opinion in the record consists of orthopedic expert and Appellant's Authorized Treating Physician, Dr. Anthony Sanchez, who opined, most probably and to a reasonable degree of medical certainty, that Appellant's right hip and back injuries are causally related to his admitted work-related injury to his right knee (Claimant's APA pp. 134-135). Dr. Sanchez assigned a 50% permanent impairment rating to Appellant's right lower extremity (Claimant's APA p. 90) and a 20% permanent impairment rating to Appellant's right hip (Claimant's APA p. 137). Despite the fact that Appellant's initial injury to his right knee occurred on May 20, 2010, the Respondents have failed to produce any expert opinion to deny or contradict the above-referenced opinions of Dr. Sanchez.

Under authority of Beckman v. Sysco Columbia, 408 S.C. 501, 759 S.E.2d 750 (Ct. App. 2014), Appellant is entitled to an award of permanent and total disability under the general disability model as he has permanent impairment ratings to two scheduled members, along with the report of a vocational expert Adger Brown, who opined that Appellant is permanently and totally disabled (Claimant's APA p. 145). Again, despite the fact that this claim dates back to May 20, 2010, the Respondents have failed to produce any vocational expert of their own to deny or otherwise contradict the opinion of Adger Brown. The substantial permanent impairment ratings

to two scheduled members, the Vocational Evaluation of Adger Brown and the fact that Dr. Sanchez wrote Appellant out of work indefinitely with no return to work expected (Claimant's APA p. 133), forcing Appellant into early retirement (at a reduced Social Security Benefit because he was not yet 65), require the conclusion that Appellant is permanently and totally disabled under Beckman and S.C. Code Ann. § 42-9-10.

II.

THE SUBSTANTIAL EVIDENCE OF THIS CASE MANDATES OVERTURNING FINDINGS AGAINST APPELLANT AS TO HIS CREDIBILITY

A. Inferences In Workers Compensation Cases Must Be Drawn In Favor Of The Injured Worker. The Inferences Behind Findings Of Fact #11 and #14 Were Improperly Drawn Against The Appellant

In the Decision and Order filed on November 24, 2014, the Single Commissioner gave the greatest weight - of all the evidence - to the records of Appellant's first family doctor visit post-accident (March 2014 - 4 years after the date of the accident and 6 months prior to the date of the hearing) and the records of Appellant's follow-up visit with his family doctor one week later, noting that the records do not contain any documentation of back or hip pain. (Order of the Single Commissioner p. 18, Finding of Fact #11). The inference drawn by the Commission in this instance is that since there is no mention of back or hip pain in the records of the family doctor, the back and hip pain do not exist, and therefore, the Appellant is not credible. The purpose for Appellant's visits to his family doctor on March 19, 2014 and March 26, 2014 was primarily because he had been experiencing chest pains, a symptom of a potentially life-threatening condition, which makes

it very unlikely that the Appellant, or anyone for that matter, would take time or have the presence of mind to discuss back and hip pain under such circumstances when these symptoms are already being treated by an orthopedic specialist to begin with. (Defendants' APAs pp. 333-340)

The Commission next erroneously attributed a record from Appellant's cardiologist, Dr. Stephen Cherry, in April 2014 as being a record from Appellant's family doctor. Not surprisingly, no mention of back or hip pain is found in this medical record either, (Defendants' APAs pp. 341-342) yet the Commissioner used this record as well to draw an inference that Appellant's back and hip pain do not exist because no mention of these symptoms is made in the medical record of a cardiologist. (Order of the Single Commissioner p. 19, Finding of Fact #14). These findings were crucial to the overall ruling against the Appellant with regard to his claim that he has injured body parts in addition to his right knee. Again, the above Findings required the Commission to draw inferences against the Appellant which are impermissible in a workers compensation case. Without these adverse Findings based upon impermissible inferences, the substantial evidence in this case invariably leads to a conclusion in favor of Appellant regarding all issues so impacted by these Findings.

As Appellant testified at the hearing, when walking on the cement floors at Timken, his [right] knee would swell and his pain level would be at a level of 8 to 9 on a scale of 10. (Hrg. Tr. pp. 34-35) Any reasonable inference concerning Appellant's gait when walking while experiencing such a high degree of pain is that he would have almost certainly been walking with a limp. It is hard to imagine anyone experiencing such a high level of pain walking without a limp. Indeed, the Appellant has consistently maintained that walking on the cement floors at Timken caused pain in his right knee and, ultimately, in his lower back and right hip. (Hrg. Tr. 65)

Appellant never testified that he does not walk with a limp. Most importantly, Dr. Sanchez testified in his deposition that Appellant walks with a limp which exacerbated his symptoms. (Claimant's APA pp. 182-183)

With the only medical expert in this case, a well-known and widely respected orthopedic surgeon, testifying under oath that Appellant walked with an altered gait, it is inconceivable that the Commission would construe Appellant's testimony to find that he "rejected an antalgic gait theory" as a medical cause for his back and hip pain when all he said is that walking on the cement floors at Timken caused his pain. The only logical and fair inference/conclusion to draw from Appellant's testimony is that walking on the cement floors caused pain which resulted in Appellant walking with a limp or altered gait.

III.

THE SUBSTANTIAL EVIDENCE SUPPORTS A FINDING THAT APPELLANT HAS SUSTAINED FAR MORE THAN 60% PERMANENT PARTIAL DISABILITY TO HIS RIGHT KNEE AS A RESULT OF HIS MAY 20, 2010 WORK ACCIDENT.

While it is true that Appellant was experiencing pain in his right knee/leg, right hip and lower back when Dr. Sanchez wrote him out of work on September 9, 2013, the pain and problems with the right knee were the primary reason for Appellant being unable to continue to work. The medical records from Dr. Sanchez subsequent to Appellant's total knee replacement on October 12, 2011 are replete with references of substantial pain and swelling in the right knee, particularly after Appellant returned to work and he was walking on the cement floors at Timken. (Claimant's APAs pp. 79-113).

Appellant testified at the hearing concerning the pain in his right knee after a typical day that involved walking on the cement floors at Timken. Appellant indicated that after walking a good distance, his knee would swell and start stiffening up. His knee pain was rated as 8 to 9 on a scale to 10. When he got home from work, he would have to sit down and apply ice to his right knee. (Hrg. Tr. pp. 34-35)

Moreover, on September 9, 2013, Dr. Sanchez stated in his narrative reports that Appellant "...is felt to be a candidate for permanent disability with respect to his knee. I do not believe he can return to work at his present employment." (emphasis added) (Claimant's APAs pp. 111-113) It was at this office visit on September 9, 2013 that Dr. Sanchez wrote Appellant out of work. Respondents' argument that the right knee was not the reason for Appellant being taken out of work is completely without merit.

As further evidence that the award of 60% Permanent Partial Disability to the right lower extremity is woefully insufficient under the facts of this case, it must be noted that Dr. Sanchez first assigned the 50% medical (permanent) impairment on August 22, 2012. Appellant was still able to continue working at Timken which he did for more than a year until September 9, 2013 when Dr. Sanchez determined he was a candidate for permanent disability with respect to his knee and wrote him out of work indefinitely. It is disingenuous for Respondents to argue in their brief that Timken had sedentary work available to accommodate Appellant's work restrictions when they know very well that they never effectively communicated any offer of sedentary employment to the Appellant, and the Commission indeed made a finding that no effective offer of sedentary employment was ever made to Appellant. Thus, given the vocational impact of Appellant's knee injury which caused him to lose his ability to continue working at Timken, the statement of Dr.

Sanchez in the medical records that Appellant was a candidate for permanent disability because of his knee, the vocational evaluation of Adger Brown (Claimant's APA p. 145), together with the very significant pain, swelling and overall physical limitations the knee injury has caused Appellant, the substantial evidence in this case requires a much higher award of permanent partial disability to the right lower extremity than the mere 60% awarded by the Commission.

CONCLUSION

The evidence in this case is uncontradicted concerning Appellant's complete loss of earning capacity. If the Court determines that the substantial evidence in this case indicates that the subject accident has resulted in an injury affecting more than one body part, the Appellant must be found permanently and totally disabled under S.C. Code Ann. § 42-9-10.

If the Court concludes that the subject accident has only affected one body part (i.e. the right lower extremity), the substantial evidence in this case concerning the vocational and personal impact of the injury requires an award of permanent partial disability far greater than the 60% awarded by the Commission.

Finally, this case should not be remanded to allow Respondents an opportunity to obtain and introduce additional medical evaluations, vocational evaluations, or other evidence as their failure to obtain such evidence on a claim that originated over five years ago amounts to waiver or laches on the part of Respondents.

[SIGNATURE PAGE TO FOLLOW]

George Randall Taylor

George Randall Taylor
South Carolina Bar No. 10151
John David Hawkins
South Carolina Bar No. 5891
Charles Logan Rollins
South Carolina Bar No. 78395
The Hawkins Law Firm
P.O. Box 5048
Spartanburg, SC 29304
(864) 574-8801

ATTORNEYS FOR
APPELLANT

September 4, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

APPELLATE CASE NO. 2015-000808

James Osment.....Appellant,

v.

The Timken Company and Phoenix Insurance Company.....Respondents.

PROOF OF SERVICE

I CERTIFY THAT I HAVE SERVED the Initial Reply Brief of Appellant on Respondents,
The Timken Company and Phoenix Insurance Company, by depositing a copy of the same in the
United States Mail, Postage prepaid, on September 4, 2015, to their attorney of record as follows:

J. South Lewis of
Willson Jones Carter & Baxley, PA,
872 Pleasantburg Drive,
Greenville, SC 29607
jslewis@wjlaw.net

Ms. Amy Bracy, Judicial Director
SC Workers' Compensation Commission
PO Box 1715
Columbia, SC 29202-1715

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

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



John David Hawkins
South Carolina Bar No. 05891
Charles Logan Rollins
South Carolina Bar No. 78395
George Randall Taylor
South Carolina Bar No. 10151
The Hawkins Law Firm
P.O. Box 5048
Spartanburg, SC 29304
(864) 574-8801

ATTORNEYS FOR APPELLANT

September 4, 2015



HAWKINS LAW FIRM

John D. Hawkins
john@hawklawfirm.com

C. Logan Rollins
logan@hawklawfirm.com
September 4, 2015

Randy Taylor
randy@hawklawfirm.com

RECEIVED

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29221

SEP 08 2015
SC Court of Appeals

Re: James Osment, Appellant v. The Timken Company and Phoenix Insurance Company, Respondents
Appellate Case No. 2015-000808

Dear Ms. Kitchings:

Enclosed please find the original and one copy each of the Initial Reply Brief of Appellant, and Proof of Service. Please file with the Court, and return stamped copies to us in the enclosed, self-addressed stamped envelope.

By copy of this letter, I herewith serve opposing counsel of record with the same. Should you have any questions or need additional information please do not hesitate to contact our office.

With kindest regards, I remain

Sincerely,

George Randall Taylor
Attorney for James Osment

GRT/vcc

Enclosure

cc: James Osment (w/encl)
J. South Lewis, II (w/encl)
Ms. Amy Bracy (w/encl)

Spartanburg Office:
5506 Reidville Road
Moore, SC 29369
(864) 574-8801

Greenville Office:
501 River Street, Suite 101
Greenville, SC 29601
(864) 312-9999

Charleston Office:
884 Johnnie Dodds Blvd., Suite 101
Mount Pleasant, SC 29464
(843) 737-9356

Mailing Address:
P.O. Box 5048
Spartanburg, SC 29304
(888) HAWKLA

Fax: (864) 574-8810
Email: info@hawklawfirm.com
www.hawklawfirm.com
thehawkinslawfirm

Extremely Urgent

This envelope is for use with the following services:

- UPS Next Day Air[®]
- UPS Worldwide ExpressSM
- UPS 2nd Day Air[®]

Visit theupsstore.com or call: **1-800-PICK-UPS[®]** (1-800-742-5877) to find a location near you.

Apply shipping documents on this side.

Domestic Shipments

- To qualify for the Letter rate, UPS Express Envelopes may only contain correspondence, urgent documents, and/or electronic media, and must weigh 8 oz. or less. UPS Express Envelopes containing items other than those listed or weighing more than 8 oz. will be billed by weight.

International Shipments

- The UPS Express Envelope may be used only for documents of no commercial value. Certain countries consider electronic media as documents. Visit ups.com/imporexport to verify if your shipment is classified as a document.
- To qualify for the Letter rate, the UPS Express Envelope must weigh 8 oz. or less. UPS Express Envelopes weighing more than 8 oz. will be billed by weight.

Note: Express Envelopes are not recommended for shipments of electronic media containing sensitive personal information or breakable items. Do not send cash or cash equivalent.

Do not use this envelope for:

- UPS Ground
- UPS Standard
- UPS 3 Day Select[®]
- UPS Worldwide Expedited[®]

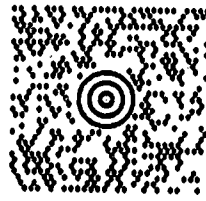
Visit theupsstore.com to learn more about our Print & Business Services.

JOHN HAWKINS
(864) 574-8801
THE UPS STORE #2011
STE C14
2153 E MAIN ST
DUNCAN: SC 29334-9296

0.1 LBS LTR 1 C
SHP WT: LTR
DATE: 04 SEP 2015

SHIP CLERK, SOUTH CAROLINA COURT OF APPEALS
TO: THE HONORABLE JENNY ABBOTT KITCHING
1220 SENATE ST

COLUMBIA SC 29201-3769



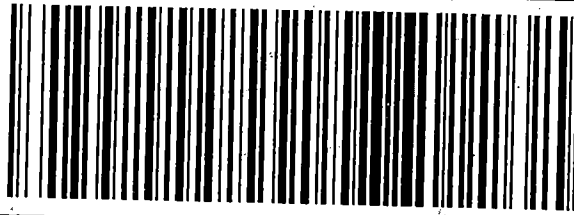
SC 292 9-01



UPS NEXT DAY AIR

TRACKING #: 1Z 866 54R 24 8959 0129

1



P/P

SIGNATURE REQUIRED

RECEIVED

SEP 08 2015

SC Court of Appeals

ISH 13.00N Z2P 450 66.5U 07/2015

SEE NOTICE ON REVERSE regarding UPS Terms, and notice of limitation of liability. Where allowed by law, shipper authorizes UPS to act as forwarding agent for export control and customs purposes. If exported from the US, shipper certifies that the commodities, technology or software were exported from the US in accordance with the Export Administration Regulations. Diversion contrary to law is prohibited. IR0615

GREEN'S TOPVIEW
LOOK-1004
SALES
SERVICES
2015
SEP 08
1030



Serving you for more than 100 years
United Parcel Service.

International Shipping Notice - Carriage hereunder may be subject to the rules relating to liability and other terms and/or conditions established by the Convention for the Unification of Certain Rules Relating to International Carriage by Air (the "Warsaw Convention") and/or the Convention on the Contract for the International Carriage of Goods by Road (the "CMR Convention"). These commodities, technology or software were exported from the U.S. in accordance with the Export Administration Regulations. Diversion contrary to U.S. law prohibited.