APPELLATE PANEL DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 1316364

Louis L. Washington	EMPLOYEE, CLAIMANT/APPELLANT
VS.	
Napa Auto Parts	EMPLOYER,
American Casualty Company c/o CNA Insurance Company	CARRIER, DEFENDANTS/RESPONDENTS

Appellate Panel Review held in Columbia, South Carolina, on June 25, 2015, per notices timely and properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

September 8, 2015

APPEARANCES: Claimant/Appellant represented by Tiffany Spann-Wilder, Esquire

Defendants/Respondents represented by Allison C. Nussbaum, Esquire

STATEMENT OF THE CASE

This matter came before the Single Commissioner on July 17, 2014 pursuant to the Claimant's Form 50 and Defendants' Form 51. At the hearing, Claimant alleged that he sustained a compensable work-related injury to his back on or about October 25, 2013 and subsequently re-injured himself on October 29, 2013 while moving a 55-gallon drum. Claimant contended he gave his employer notice of his injury and that he is entitled to temporary partial disability benefits from November 9, 2013 through February 21, 2014, as well as temporary total disability benefits from February 22, 2014 and continuing, as a result of the injury. Claimant also requested payment of all causally-related medical treatment and authorization for ongoing medical treatment.

Defendants denied this claim in its entirety and argued Claimant is barred from receiving benefits based on fraud in his application pursuant to *Cooper v. McDevitt & Street*, 196 S.E.2d 833. Defendants argued Claimant suffered from an injury on September 23, 2009 to his lumbar spine with radiculopathy into his right and left sides while working for a previous employer, Staples. Further, Defendants stated Claimant was released from medical care as of October 11, 2010 and assigned permanent work restrictions to include restricted climbing, bending, stooping occasionally, and no lifting over 15 pounds. Defendants' position was Claimant applied for a job with the Defendant/Employer and knowingly and willingly failed to disclose his work restrictions, which Defendants relied on to hire him, thus he should not be entitled to benefits under the Act. In the alternative, Defendants' position was Claimant's current complaints are not related to a compensable work-related injury.

At the conclusion of the hearing, the Single Commissioner issued a Decision and Order, making the following findings of fact and conclusions of law:

SINGLE COMMISSIONER FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. The Claimant did not suffer from a compensable injury on October 25, 2013.

2. At the time of his work injury, the Claimant earned average weekly wages of $371.75 with a corresponding compensation rate of $247.84.

3. The Claimant failed to notify his Employer of his prior back injury and permanent work restrictions at the time of his hiring in April 2012. I find this omission constitutes a "knowingly and willfully made false statement for purposes of *Cooper v. McDevitt & Street Co.*"

4. I find Mr. Vaughn's testimony credible as it relates to his communication with Claimant during the hiring process, including the physical expectations of the job.

5. I find Mr. Vaughn relied on Claimant's omission in hiring Claimant. I find Mr. Vaughn's testimony credible wherein he stated he hired Claimant because he did not indicate any problems with meeting the job requirements. Thus, Mr. Vaughn's reliance on Claimant's silence as to any prior back condition was a substantial factor in Claimant's hiring.

6. I find there was a causal connection between the false representation by omission and the work-related injury. Claimant had a permanent impairment and permanent lifting restrictions as a result of his prior back injury. The job requirements for NAPA Auto Parts substantially exceeded Claimant's permanent lifting restrictions. Claimant was injured while performing a job outside of his permanent work restrictions.

7. Based on the entire record, testimony of the Claimant, testimony of the Employer, Larry Vaughn, and medical reports all claims for benefits under the Act are hereby denied.

Conclusions of Law

Pursuant to S.C. Code Ann. Section 42-1-160 the Claimant did not suffer from a compensable injury.

1. Pursuant to *Cooper v. McDevitt & Street Co.* the Claimant knowingly and willfully made false statements on his application in which the Employer relied on when hiring the Claimant, therefore the Claimant's claim is barred for falsifying his job application.

2. Pursuant to S.C. Code Ann. Section 42-15-60 and other applicable law, the Claimant is not entitled to medical treatment.

3. Pursuant to S.C. Code Ann. Sections 42-1-120 and 42-9-10, Claimant is not entitled to temporary total disability benefits.

Thereafter, the Claimant filed a Form 30 Request for Commission Review on March 12, 2015. The Claimant presented one question for review:

1. Did the Hearing Commissioner err in Finding of Fact No. 1 – Finding of Fact No. 7 by finding that the Claimant did not sustain a compensable injury by accident by knowingly and willfully making a false statement on his application for employment in which the employer relied to its detriment?

EVIDENCE OF THE CASE

The Claimant testified that he is 51 years old, married, and finished the twelfth grade. He began working with NAPA Auto Parts in April 2012. He also worked for Bumper to Bumper as a delivery driver. The Claimant testified that Mr. Larry Vaughn was his supervisor while working for Bumper to Bumper, and that when he left his employment there he went to work for Staples.

The Claimant said that he reached out to Mr. Vaughn in order to get the job with Defendant Employer, NAPA Auto Parts. He went down to the store, picked up an application, and spoke with Mr. Vaughn. He said that when he went to speak with Mr. Vaughn they talked about old times and he told Mr. Vaughn about his on-the-job injury when he fell off the truck while working for Staples. He took the application home and filled it out. When he returned, he gave it to Mr. Vaughn. At that time, the Claimant said that Mr. Vaughn did not ask him any questions about medical issues or ask him for a physician's report.

The Claimant states that when he first started working he did not have any issues being able to complete his job. On October 25, 2013 the Claimant said he came into work and there was a 55-gallon drum of antifreeze mix located in the warehouse that needed to be moved. The Claimant testified that he asked for help to move the drum, but Mr. Vaughn told him to do it

himself and deliver it. The Claimant said he did it and that four days later on October 29th he came and there was a 55-gallon drum of antifreeze that needed to be delivered. The Claimant testified he asked for help again, but Mr. Vaughn told him to do it himself. He said that both times the barrels "tore me up". The Claimant testified that moving these drums was not something he did consistently as a delivery driver. He had moved them before with assistance. The Claimant went on to testify that on October 25th he completed the task of moving the drum and delivering it and then he returned to the store. He told Mr. Vaughn at that time that he felt something on the 25th. The Claimant said that Mr. Vaughn responded by saying if he couldn't do the work to go home. The Claimant reported for work every day from the 26th – 29th. He testified that he did not tell anyone else about the injury on October 25th other than Mr. Vaughn. On October 29th he returned to the shop after delivering the drum and reported to Mr. Vaughn that he was hurt on the job and needed to go to the doctor. The Claimant said that he was having problems in his groin area and around his waistline under his navel and radiating down his back to his legs and also in his shoulder blades.

The Claimant testified that after he told Mr. Vaughn, Mr. Vaughn told him to talk to Arnold, Assistant Store Manager, about seeing the doctor. The Claimant said he spoke to Arnold around November 4th or 5th and Arnold told him he would have to schedule an appointment with the doctor. The Claimant went to see Dr. Byron Williams who gave him light duty work restrictions. The Claimant said that he called and talked to Mr. Vaughn and that Mr. Vaughn laughed and said they did not have a light duty job. He was never contacted about a light duty job. Thereafter, the Claimant testified that he was working for Hospital Systems performing light duty work such as cleaning the elevators and stair steps. The Claimant said he was able to do that job until about mid-February when his manager said he could no longer work light duty.

The Claimant said that he had a prior work injury to his back. He said that this recent injury on October 25, 2013 initially started as the same thing but then it got worse because it was radiating on the left side. He said the first injury was more on the right side. Now it is both sides. The Claimant said that from the time he was released by his old doctor from his prior workers' compensation claim until he had this recent injury, he has not been to see a doctor for his back. The Claimant testified that he had issues with his back from time to time and he would take over-the-counter medication or his wife would massage his back. Since this most recent accident, the Claimant testified that he is having problems making love to his wife, he is able to do minimum household chores, he cannot sleep on his back, and he has to change positions often while sleeping.

On cross-examination, the Claimant testified that he worked at Corporate Express, or Staples, from April 2006 – October 20, 2010. When asked if he left his employment there because he had a back injury, the Claimant said no. However, he then conceded he did not return to Staples because they were not able to accommodate his work restrictions. He also testified that in fact he wasn't physically working at Staples on October 2010. His last date of work was September 23, 2009 and he did not return there because they were unable to accommodate his work restrictions.

Claimant admitted his job at Staples required him to lift up to 75 pounds. The Claimant testified that between September 23, 2009 and November 5, 2010 he did not work anywhere. He further stated that he did not mention on his application to Defendant Employer NAPA that he was out of work for over a year. The Claimant went on to state that he treated with Dr. Stovall and also Dr. Patel who performed epidural injections and an ablation procedure. The Claimant

agreed that when his deposition was taken on October 24, 2010 he was still having periods of numbness in his legs, his pain level was a 7 out of 10, and he was taking Tramadol, Mobic and Flexeril. Further, he agreed that he testified in his deposition that he was under work restrictions of no lifting over 15 pounds, limit sitting, squatting, bending and twisting. Defense counsel further questioned the Claimant regarding his need for additional medical treatment after he was released from Dr. Patel and the Claimant agreed that Dr. Patel said he would require additional medication, physical therapy, epidural steroid injections and radio frequency ablations on either side. The Claimant admitted that he is currently receiving this exact treatment from Dr. Zgleszewski. In particular, he's received injections and an ablation.

The Claimant also testified that in his deposition testimony back in October of 2010 he said he was no longer able to jog or drive. Claimant stated that he was able to go to work driving because as time went on he was feeling better. Further, he testified in his October 2010 deposition that he was going to need an ablation procedure on his left side. The Claimant went on to state that when he was deposed in October 2010 he told defense counsel about his work restrictions from Dr. Patel, however when he was deposed in 2014 he did not have any work restrictions. The Claimant testified that after his ablations he started feeling normal again.

The Claimant stated that this was the second time he worked for Larry Vaughn as a delivery driver. He knew what the job duties were and he knew that the job at NAPA would require him to lift over 15 pounds. (H.T. P. 114, L. 21) He doesn't have any documents from a doctor releasing him to return to work full duty before he went to work for NAPA.

He went on to testify that he worked his regular hours October 28 – November 1, 2013. The Claimant said that he was able to do what he could, but he was not able to work full duty.

He said that he messed up an order because he was unable to deliver parts that were too heavy. The Claimant testified that he told Mr. Vaughn he was unable to complete the delivery because it was too strenuous. He said that the symptoms he experienced after the October 25, 2013 accident were the same symptoms he had as a result of the earlier accident with Staples but his symptoms were worse.

On redirect examination by Claimant's counsel, the Claimant explained that he thought when he was released from Dr. Patel with a 7% rating that was it. However, he testified that he knew what his restrictions were when his deposition was taken on October 14, 2010.

Testimony of Larry Vaughn

Mr. Larry Vaughn testified on behalf of the Employer, NAPA Auto Parts. He stated that he has been working with the Employer for between 9 and 10 years. Mr. Vaughn is currently the store manager which means that he runs the store. He will go to the owner for advice if needed, but he does the hiring, firing and scheduling. Mr. Vaughn primarily works at the Reynolds Avenue location, but he is also the store manager for the Sam Rittenburg location.

Mr. Vaughn indicated that when an individual goes through the application process, he or she fills out an application with general information regarding prior employment history and contact information. He then stated that once the application is made, the individual will come into the store and he goes over the job description verbally. Employees are not required to bring in a statement from a physician about what they can and cannot do; however, Mr. Vaughn testified that he determines whether an individual is fit for the job when he discusses the job description with them. He expects they will speak up and say they are unable to perform specific

job duties explained to them through this process. (H.T. P. 16, L. 12) Mr. Vaughn went on to say that he uses the U.P.S. driver guidelines to discuss the requirements of the job and they reflect a 50 pound limit. However, the NAPA does not have written job descriptions for all positions.

Mr. Vaughn testified that he has known Claimant for approximately six to seven years. He said that he hired the Claimant sometime in April 2012. He also worked with Claimant when the store was under the name Bumper to Bumper. Opposing counsel presented Mr. Vaughn with Claimant's APA p. 23 which he identified as the Claimant's application dated January 10, 2012. Mr. Vaughn testified that although he applied for the job in January, he wasn't hired until April or May. When Claimant applied for the job, Mr. Vaughn was the assistant manager and was unable to make the decision about hiring the Claimant. He became store manager on April 1st and made the decision to hire the Claimant about a week or two later. Mr. Vaughn testified that between January and April before the Claimant was hired, the Claimant called him constantly indicating he needed a job. During these conversations, Mr. Vaughn testified they did not discuss any health concerns that the Claimant was having. Mr. Vaughn testified further that he did not ask the Claimant about his prior employment listed on his application. Mr. Vaughn later testified that he did not discuss with the Claimant how much money he made at his old job with Staples. Further, he did not verify employment references on the Claimant's application because he knew the Claimant and he was a good worker.

Mr. Vaughn went on to testify that while the Claimant was working for him he was able to do the jobs that were assigned to him. He does not recall the Claimant requesting assistance to move some drums on October 25, 2013, nor does he recall the Claimant reporting that he injured his back. However, Mr. Vaughn was aware that the Claimant went to see Dr. Byron Williams

and the Claimant provided a light duty work note to someone with the Employer, possibly Valerie Morris in the Human Resources Department. Mr. Vaughn testified that the Employer offered the Claimant light duty work but it was not sent to the Claimant in writing. (H.T. PP 25-26) Mr. Vaughn stated that he has not talked to the Claimant since his last day on the job. Thereafter, opposing counsel presented Mr. Vaughn with Defendants' APA pp. 188-189 entitled Corrective Counseling Report. Mr. Vaughn testified that he did not sign the first report dated September 26, 2013 regarding an unexcused absence, but he did sign the report dated November 5, 2013. Mr. Vaughn stated that the Claimant delivered a partial invoice and told the customer that he had to go to the store to pick up the rest of the order. Mr. Vaughn said the Claimant was suspended for two days due to his actions.

On cross-examination by Defense counsel, Mr. Vaughn reiterated that he has known the Claimant since they worked together at Bumper to Bumper. Further, he stated that the job requirements at Bumper to Bumper were the same as the job requirements at NAPA. Mr. Vaughn said that the Claimant was working as a delivery driver and he was required to lift up to 50 pounds. He said that he would be unable to perform the job under a 15 pound lifting restriction. Mr. Vaughn testified that he read the Claimant's application and assumed that the dates listed for his former employers was correct. Mr. Vaughn did not have any reason to believe that he was not working on those dates. Further, he testified that he did not have any reason to believe the information on the Claimant's application where he mentioned leaving the Corporate Express Job was that the company closed. Mr. Vaughn also said that on page two of the Claimant's application, he signed a statement indicating the facts contained in the application are true and complete and if they are falsified statements it is grounds for dismissal. Mr. Vaughn said that the Claimant never disclosed that he had a back injury while working for Staples and

that the first time he had knowledge of the Claimant's prior back injury was after he was involved in this current claim. Mr. Vaughn testified that the Claimant never told him that he injured his back, and if he had Mr. Vaughn would have asked him more questions. Further, Mr. Vaughn said that he would not have hired the Claimant with a 15 pound lifting restriction and additional restrictions of no stooping and squatting. Mr. Vaughn said the Claimant would not have qualified for the position of delivery driver with those restrictions. Mr. Vaughn said he relied on the Claimant's application and the statements the Claimant made to him when he was hired. Mr. Vaughn testified that during every application process he goes over the physical requirements of the position the person is applying for and when the Claimant applied for this job, Mr. Vaughn told the Claimant "You know what you have to do because you've already done this job with Bumper to Bumper." Mr. Vaughn said that the Claimant certified that he was able to perform the job.

Defense counsel then asked Mr. Vaughn whether the Claimant ever reported an on-the-job injury which occurred on October 25, 2013. Mr. Vaughn said that the Claimant never reported an injury and further he had no knowledge that the Claimant reported an injury to anyone. Mr. Vaughn said that on November 5, 2013 he wrote the Claimant up for failing to complete a delivery and at that time he still was unaware that the Claimant was reporting an on-the-job injury. Mr. Vaughn later learned that the Claimant contacted Mr. Dawson, the assistant store manager, and asked him what date he moved a drum because he injured his back. Mr. Vaughn said the conversation the Claimant had with Mr. Dawson was after the Claimant was written up on November 5, 2013.

Mr. Vaughn testified that he has had problems with the Claimant in the past, in particular that the Claimant would not show up at work. He was the only manager that would give the Claimant a chance. (H.T. P. 48, L. 7)

FULL COMMISSION FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Based on the substantial evidence, including the APA submissions submitted, the testimony of Larry Vaughn and Claimant's testimony, we find Claimant did not suffer from a compensable injury on October 25, 2013
2. Based on the substantial evidence, including the APA submissions submitted, the testimony of Larry Vaughn and Claimant's testimony, we find at the time of his work injury, the Claimant earned average weekly wages of $371.75 with a corresponding compensation rate of $247.84.
3. Based on the substantial evidence, including the APA submissions submitted, the testimony of Larry Vaughn and Claimant's testimony, we find Claimant failed to notify his Employer of his prior back injury and permanent work restrictions at the time of his hiring in April 2012. We find this omission constitutes a "knowingly and willfully made false statement for purposes of *Cooper v. McDevitt & Street Co.*"
4. Based on the substantial evidence, including the APA submissions submitted, the testimony of Larry Vaughn and Claimant's testimony, we find Mr. Vaughn's testimony credible as it relates to his communication with Claimant during the hiring process, including the physical expectations of the job.

5. Based on the substantial evidence, including the APA submissions submitted, the testimony of Larry Vaughn and Claimant's testimony, we find Mr. Vaughn relied on Claimant's omission in hiring Claimant. We find Mr. Vaughn's testimony credible wherein he stated he hired Claimant because he did not indicate any problems with meeting the job requirements. Thus, Mr. Vaughn's reliance on Claimant's silence as to any prior back condition was a substantial factor in Claimant's hiring.
6. Based on the substantial evidence, including the APA submissions submitted, the testimony of Larry Vaughn and Claimant's testimony, we find there was a causal connection between the false representation by omission and the work-related injury. Claimant had a permanent impairment and permanent lifting restrictions as a result of his prior back injury. The job requirements for NAPA Auto Parts substantially exceeded Claimant's permanent lifting restrictions. Claimant was injured while performing a job outside of his permanent work restrictions.
7. Based on the substantial evidence, including the APA submissions submitted, the testimony of Larry Vaughn and Claimant's testimony, we find all claims for benefits under the Act are hereby denied.

Conclusions of Law

It is concluded under the South Carolina Workers' Compensation Act in S.C. Ann. Section 42-1-10 S.C. Code of Laws, et. seq., that:

1. Section 42-1-160 governs injuries and includes injuries by accident arising out of and in the course of employment.
2. Pursuant to S.C. Code Ann. Section 42-15-10 and 42-17-20, jurisdiction and venue are proper.

3. Pursuant to South Carolina Workers' Compensation Commission Rules and Regulations, Reg. 67-210(B) and Reg. 67-213(C), the parties were properly served with Notice of the Hearing.

4. The scope of review of the Full Commission is not limited. The Commission can, like the Single Commissioner, consider all of the evidence and reach its own findings of fact and conclusions of law. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E. 2d 87 (S.C. Ct. App. 1984).

5. The Full Commission is not necessarily bound by the Single Commissioner's findings of fact, and is empowered to make its own findings of fact and to reach its own conclusions of law consistent or inconsistent with those of the Single Commission. Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 64, 156 S.E. 2d 318, 312 (S.C. 1967). *See also* Muir v. C.R. Bard, Inc.

6. Based on the substantial evidence, including the APA submissions submitted, the testimony of Larry Vaughn and Claimant's testimony, pursuant to S.C. Code Ann. Section 42-1-160 the Claimant did not suffer from a compensable injury.

7. Based on the substantial evidence, including the APA submissions submitted, the testimony of Larry Vaughn and Claimant's testimony, pursuant to *Cooper v. McDevitt & Street Co.* the Claimant knowingly and willfully made false statements on his application in which the Employer relied on when hiring Claimant: therefore, Claimant's claim is barred for falsifying his job application.

8. Based on the substantial evidence, including the APA submissions submitted, the testimony of Larry Vaughn and Claimant's testimony, pursuant to S.C. Code Ann.

Section 42-15-60 and other applicable law, the Claimant is not entitled to any medical treatment under the Act.

9. Based on the substantial evidence, including the APA submissions submitted, the testimony of Larry Vaughn and Claimant's testimony, pursuant to S.C. Code Ann. Sections 42-1-120 and 42-9-10, Claimant is not entitled to temporary total disability benefits under the Act.

10. Based on the substantial evidence, including the APA submissions submitted, the testimony of Larry Vaughn and Claimant's testimony, we find the Decision and Order of the Single Commissioner is affirmed in its entirety.

ORDER

IT IS HEREBY ORDERED that the substantial evidence in the record supports a finding that the Decision and Order of the Single Commissioner is **AFFIRMED IN ITS ENTIRETY.**

IT IS HEREBY ORDERED that the substantial evidence in the record supports a finding that Claimant's claim for an injury by accident is hereby denied in its entirety.

IT IS HEREBY ORDERED that the substantial evidence in the record supports a finding that Claimant has failed to carry his burden of proof and is not entitled to any causally-related medical treatment under the South Carolina Workers' Compensation Act.

IT IS HEREBY ORDERED that the substantial evidence in the record supports a finding that Claimant is not entitled to any temporary total disability benefits under the South Carolina Workers' Compensation Act.

IT IS HEREBY ORDERED that the substantial evidence in the record supports a finding that Claimant is not entitled to any benefits under the South Carolina Workers' Compensation Act.

AND, IT IS SO ORDERED.

Commissioner R Michael Campbell, II

We Concur:

Commissioner Gene McCaskill

Commissioner Melody L James

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on September 8, 2015