

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

CROSS-APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

APPELLATE CASE NO. 2016-001509

RECEIVED
AUG 02 2016
SC Court of Appeals

James Lipscomb, Employee,

Respondent-Appellant,

v.

Stein Fibers/Innovative Fibers, Employer,
and Key Risk Management, Carrier

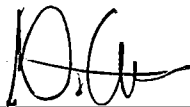
Appellants-Respondents.

AMENDED
NOTICE OF CROSS-APPEAL

James Lipscomb hereby appeals, in part, the Orders of the South Carolina Workers' Compensation Commission Appellate Panel, dated May 18, 2016, and June 20, 2016, on the following grounds:

1. Whether the Commission erred in reversing the Single Commissioner's award of temporary total disability (TTD) benefits, finding that the post-accident emergency room blood test report constituted a violation of the Employer's drug and alcohol policy, thereby denying the Employee/Claimant's award of TTD.
2. Whether the Commission erred in finding that the Employer's termination of Claimant's employment shortly following the compensable injury was sufficient grounds for reversing the Single Commissioner's award of TTD.

July 29, 2016



W. Scott Palmer
Bar No.: 011936
W. SCOTT PALMER LAW FIRM, P.A.
Post Office Box 722
Santee, South Carolina 29142
(803) 854-4417
Attorney for Respondent-Appellant

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
JUDICIAL CONFERENCE DECISION AND ORDER

RECEIVED

James Lipscomb v Innovated Fibers
SCWCC: 1402652
Panel: Beck, Campbell, Wilkerson

AUG 02 2016

SC Court of Appeals

This matter was heard before the South Carolina Workers' Compensation Full Commission in Judicial Conference on a **Motion to Rehear Appeal**. The Commissioners considered the matter and ordered the matter handled in the following manner:

IT IS, THEREFORE, ORDERED the pending appeal of the Administrative Order of the Commission is hereby;

Dismissed as Interlocutory. Set for Oral Argument.

IT IS, THEREFORE, ORDERED the pending motion be, and hereby is;

Granted. Denied. Dismissed Preserved for hearing

BEFORE THE;

Hearing Comm. Jurisdictional Comm. Full Commission.

IT IS, THEREFORE, ORDERED this matter be, and hereby is; remanded to take such action and enter an Order consistent with the Court's directive.

Remand to Panel as indicated below.

Barden
 Beck

James
 Campbell
 McCaskill

Taylor
 Wilkerson

Remand for Order consistent with the Order of the Court.

Remand to the Hearing Commissioner.
 Remand to the Jurisdictional Commissioner.

Other: _____

Remand: Panel Oral Argument. En Banc Oral Argument.

AND IT IS SO ORDERED.


T. Scott Beck, Chair
For the Commission

Columbia, South Carolina

6/20 2016

CONCURRING:

Commissioner Susan S. Barden
Commissioner Melody James
Commissioner Aisha Taylor
Commissioner Avery Wilkerson
Commissioner Michael Campbell
Commissioner Gene McCaskill

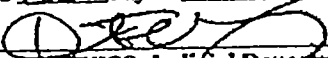
NOT PARTICIPATING:

DISSENTING:

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THE UNDERSIGNED HAS THIS DATE SERVED THIS ORDER IN THE ABOVE ENTITLED ACTION UPON ALL PARTIES ELECTRONICALLY OR BY DEPOSITING A COPY HEREOF, POSTAGE PAID, IN THE UNITED STATES MAIL.

This 20th day of June, 2016.

By: 
SCWCC Judicial Department

RECEIVED

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

AUG 02 2016

Court of Appeals

JAMES LIPSCOMB,)

Employee/Claimant)

vs.)

STEIN FIBERS / INNOVATIVE FIBERS,)

Employer,)

and)

KEY RISK MANAGEMENT,)

Carrier.)

W.C.C. FILE NO.

1402652

ORDER AND DECISION
OF THE APPELLATE PANEL

Hearing: Columbia, South Carolina

Appearances: For the Claimant:

W. Scott Palmer, Esquire
W. Scott Palmer Law Firm, P.A.
Santee, South Carolina

For the Employer:

Richard B. Kale, Esquire
Willson Jones Carter & Baxley, P.A.
Stein Fibers / Innovative Fibers:

Purpose of Hearing: To determine issues as set forth in the Form 30, filed by Employer.

Decision and Order: Commission Panel: Beck, Campbell, Wilkerson: Chair
Order Assigned to Commissioner Beck.

Filed: _____, 2016.

PROCEDURAL HISTORY

This is an appeal on behalf of Defendant employer from the Decision and Order of Commissioner Aisha Taylor, filed December 22, 2015. The case arises out of an injury to Claimant's right upper extremity due to an industrial accident suffered on March 20, 2014, while Claimant was working as a baler for Innovative Fibers/Stein Fibers.

Claimant filed his initial Form 50 claim on August 27, 2014. In their Form 51, Defendants denied that Claimant suffered an injury by accident arising out of and in the course of his employment and asserted the statutory defense of intoxication under Section 42-9-60, S.C. Code Ann. (1976). On January 15, 2015, Claimant filed an amended Form 50. He requested a hearing and again alleged that on March 20, 2014, he suffered an injury to his right upper extremity when his

arm was caught in the conveyer of an industrial baler. Defendants filed a Form 51 and again denied that Claimant suffered an injury by accident arising out of and in the course of his employment and asserted the affirmative defense of intoxication.

A hearing was held before Commissioner Aisha Taylor on April 14, 2015 and on December 22, 2015, Commissioner Taylor issued her Decision and Order. Commission Taylor found, among other things, that Claimant suffered an injury to his right arm on March 20, 2014, arising out of and in the course of his employment and denied Defendant's intoxication defense. Commissioner Taylor found that the greater weight of the evidence did not support Defendants' contention that Claimant's consumption of alcohol proximately caused Claimant's injury.

On December 28, 2015, Defendants filed their Form 30 (Request for Commission Review) alleging numerous grounds of error. Both parties filed briefs, and the parties presented oral arguments before the Appellate Panel on April 1, 2016.

EVIDENCE SUMMARY

APA SUBMISSIONS

Under the Administrative Procedures Act, the following documents appear of record in this case:

I. CLAIMANT'S APA SUBMISSIONS

| <u>APA</u> | <u>NAME OF PHYSICIAN/OTHER</u> | <u>DATES OF REPORTS</u> | <u>APA PAGE NO.</u> |
|------------|---|-------------------------|---------------------|
| 1. | Spartanburg EMS | 03/20/14 | 1-9 |
| 2. | Spartanburg Regional Emergency Center | 03/20/14 | 10-39 |
| 3. | Spartanburg Regional Medical Center | 03/20/14-04/04/14 | 40-108 |
| 4. | Carolina Musculoskeletal Institute | 03/23/15 | 109-113 |
| 5. | Spartanburg Regional Medical Center (bill) | 03/20/14-04/02/14 | 114-132 |

II. EMPLOYER'S APA SUBMISSIONS

| <u>APA</u> | <u>NAME OF PHYSICIAN/OTHER</u> | <u>DATES OF REPORTS</u> | <u>APA PAGE NO.</u> |
|------------|--|-------------------------|---------------------|
| 6. | Innovative Fibers Substance Abuse Policy | November 12, 2014 | 1-5 |
| 7. | Claimant Acknowledgment of Alcohol Abuse Policy | February 27, 2013 | 6 |
| 8. | Claimant's Certification of Agreement To Company's Substance Abuse and Testing Policy | February 27, 2013 | 7 |
| 9. | Claimant's Attendance at Lockout/Tagout Safety Meeting | August 13, 2012 | 8-11 |
| 10. | Claimant's Termination Letter | May 22, 2014 | 12 |
| 11. | John H. Mennear, Ph. D. | August 18, 2014 | 13-20. |
| 12. | Spartanburg Regional Ethanol/Blood test | April 03, 2014 | 14 |

13. Dr. Shawn A. Birchenough

12/09/07- 03/21/14

15-46

EXHIBIT(S):

The transcript deposition of the Claimant dated July 23, 2014;

The transcript deposition of Joanne Matthiesen dated November 24, 2014.

STATEMENT OF THE CASE

This matter came before the undersigned Appellate Panel for a hearing to determine issues set forth on timely filed form 30. This claim involves an alleged industrial accident that occurred on March 20, 2014. The claim involves an injury to the right upper extremity. The Claimant alleges total and permanent disability, and also seeks an award of temporary total benefits and medical bills. The Employer denies the Claimant has a compensable claim, alleging that the claimant is statutorily barred from recovery due to his intoxication at the time of injury, and that he was working outside the course and scope of his employment at the time of injury, due to his alleged noncompliance with acknowledged company policy. The Claimant was treated by Dr. Shawn Birchenough, Dr. Manny Trujillo, Dr. Michael Orseck, Dr. Todd Cook, and Dr. John Broderick, for a severe injury and degloving of his right arm, and associated reconstructive surgery. On March 23, 2015, Dr. Clark D. Moore assigned a 100% impairment to the right upper extremity, and a 60% impairment to the whole man (APA #4, p. 113).

FINDINGS OF FACT

In her December 27, 2015 order, the Single Commissioner made the following

findings of fact:

1. Claimant sustained a compensable injury to his right arm within the course and scope of his employment.
2. On March 20, 2014, Claimant was working as a baler at the Innovative Fibers plant in Spartanburg, South Carolina.
3. At the beginning of his shift, Claimant attended the mandatory safety meeting with his supervisor which was attended by the other employees on his shift.
4. Following the safety meeting, Claimant was told by his supervisor that he would be re-feeding bales during his shift that night.
5. Re-feeding bales requires feeding materials into the baler by hand.
6. Manually re-feeding material in this manner was part of Claimant's responsibilities as a baler.
7. During the re-feeding process, the baler is not running automatically but is activated manually by the cutter operating a pedal.
8. Claimant was attempting to remove scraps of material which had not fully cleared the baling machine during the re-feeding process when the baler was activated and the injury occurred.
9. Claimant was standing on the floor when the accident occurred. Claimant was not standing on the machine or reaching over a safety cage when the accident occurred.
10. Defendants' intoxication defense is denied. In order to bar a recovery based on intoxication, the injury must be "occasioned" by the intoxication of the

employee, which means that the proximate cause of the injury must be the intoxication of the employee. (See *Reeves v. Carolina Foundry & Machine Works*, 194 S.C. 403, 9 S.E.2d 919 (1940).)

11. The greater weight of the evidence does not support Defendants' contention that Claimant's consumption of alcohol proximately caused his injury. For intoxication to be a bar to recovery, it must be the proximate cause of the injury, and not just precede the injury. (See *Baggot v. Southern Music, Inc.*, 330 S.C. 1, 496 S.E.2d 852 (S.C. 1998) and *Kinsey v. Champion Am. Service Ctr.*, 268 S.C. 177, 232 S.E.2d 720 (S.C. 1977).)

12. Although there was a general safety policy as it pertained to the position of a "baler," there were some instances in the performing of the job that allowed the Claimant some discretion as to how to remove scraps that didn't fully clear the machine. Thus, this case is distinguishable from *Wright v. BI-LO, Inc.*, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994), wherein Claimant's claim was denied after he ignored specific and contemporaneous instructions from his supervisor.

13. Very little weight was given to Dr. Mennear's toxicology report, as he never met or examined the Claimant. Also, it is unclear from Dr. Mennear's report whether he had specific details of how the injury occurred.

14. Claimant is at maximum medical improvement.

15. Claimant has sustained 100% loss of use of his right arm as a result of his work injury and is entitled to the full 220 weeks of benefits based on the same.

16. Claimant is entitled to temporary total disability from March 20, 2014, to

March 23, 2015.

17. Defendants are liable for all causally-related medical treatment related to this injury.

18. Claimant is entitled to reimbursement for all causally-related out of pocket expenses, including mileage reimbursement, if any.

19. Claimant's claim for disfigurement to his right and left thigh is denied as high thighs are not normally exposed in his employment.

20. Claimant is entitled to receipt of his award in a lump sum.

21. No hearing costs are assessed.

CONCLUSIONS OF LAW

The Single Commissioner concluded as follows:

1. Claimant sustained a compensable injury to his right arm within the course and scope of his employment.

2. Defendants' intoxication defense is denied. In order to bar a recovery based on intoxication, the injury must be "occasioned" by the intoxication of the employee, which means that the proximate cause of the injury must be the intoxication of the employee. (See *Reeves v. Carolina Foundry & Machine Works*, 194 S.C. 403, 9 S.E.2d 919 (1940).)

3. South Carolina Code Ann. § 42-9-60 provides that "[n]o compensation shall be payable if the injury ... was occasioned by the intoxication of the employee" Our Supreme Court has "interpreted this provision as barring compensation when the employee's intoxication is the proximate cause of the injury." (*Baggot v. Southern*

Music, Inc., 330 S.C. 1, 7, 496 S.E.2d 852, 855 (1998).) Intoxication must proximately cause the injury; it is not enough that intoxication just precede the injury. (See *Kinsey v. Champion Am. Service Ctr.*, 268 S.C. 177, 183, 232 S.E.2d 720, 723 (S.C. 1977).)

4. As the party claiming the applicability of § 42-9-60, the burden of proof is upon Defendants to show that that Claimant's intoxication was the proximate cause of his injury. South Carolina Code Ann. § 42-9-60.

5. The greater weight of the evidence does not support Defendants' contention that Claimant's consumption of alcohol proximately caused his injury. For intoxication to be a bar to recovery, it must be the proximate cause of the injury, and not just precede the injury. (See *Baggot v. Southern Music, Inc.*, 330 S.C. 1, 496 S.E.2d 852 (S.C. 1998) and *Kinsey v. Champion Am. Service Ctr.*, 268 S.C. 177, 232 S.E.2d 720 (S.C. 1977).)

6. Defendants have not met their burden to show that Claimant's intoxication proximately caused his injury.

7. Although there was a general safety policy as it pertained to the position of a "baler," I find there were some instances in the performing of the job, where the Claimant had some discretion as to how to remove scraps that didn't fully clear the machine. Thus, I find that this case is distinguishable from *Wright v. BI-LO, Inc.*, 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994), wherein Claimant's claim was denied after he ignored specific and contemporaneous instructions from his supervisor.

8. Claimant has sustained 100% loss of use of his right arm as a result of his work injury and is entitled to the full 220 weeks of benefits based on the same.

9. Claimant is entitled to temporary total disability from March 20, 2014, to March 23, 2015.

10. Defendants are liable for all causally-related medical treatment related to this injury.

11. Claimant is entitled to reimbursement for all causally-related out of pocket expenses, including mileage reimbursement, if any.

12. Claimant's claim for disfigurement to his right and left thigh is denied as high thighs are not normally exposed in his employment.

13. Claimant is entitled to receipt of his award in a lump sum.

14. No hearing costs are assessed.

DECISION

The Appellate Panel finds as follows:

1. The Single Commissioner's ruling that Claimant sustained a compensable injury to his right arm within the course and scope of his employment is affirmed.

2. The Single Commissioner's ruling that Claimant has sustained 100% loss of use of his right arm as a result of his work injury, and is entitled to the full 220 weeks of benefits based on the same, is affirmed.

3. The Single Commissioner's ruling that Defendants are liable for all causally-related medical treatment related to this injury is affirmed.

4. The Single Commissioner's ruling that Claimant is entitled to reimbursement for all causally-related out of pocket expenses, including mileage reimbursement, if any, is affirmed.

5. The Single Commissioner's ruling that Claimant's claim for disfigurement to his right and left thigh is denied as high thighs are not normally exposed in his employment is affirmed.

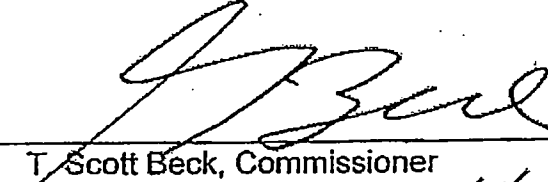
6. The Appellate panel affirms the Single Commissioner's finding that the greater weight of the evidence does not support Defendants' contention that Claimant's consumption of alcohol proximately caused his injury. For intoxication to be a bar to recovery, it must be the proximate cause of the injury, and not just precede the injury. (See *Baggot v. Southern Music, Inc.*, 330 S.C. 1, 496 S.E.2d 852 (S.C. 1998) and *Kinsey v. Champion Am. Service Ctr.*, 268 S.C. 177, 232 S.E.2d 720 (S.C. 1977)). The Appellate Panel affirms the Commissioner's finding that Defendants did not meet their burden to show that Claimant's intoxication proximately caused his injury.

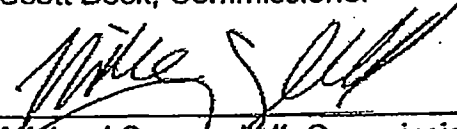
7. With regard to the award of temporary total disability (TTD) benefits, the Appellate Panel finds that, although the totality of the evidence is insufficient to meet the Defendant's burden of proof to prevail on its statutory defense, because the post-accident emergency room blood test report specifically violated the Employer's drug and alcohol policy (to which the Claimant had expressly agreed), the Claimant should not be entitled to an award of TTD. The Claimant's employment was terminated shortly following the injury for this reason, an administrative decision that he did not contest or appeal. Therefore, the Single Commissioner's award of temporary total disability benefits is reversed.

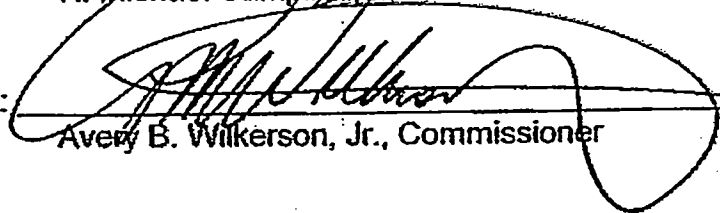
AFFIRMED in part, REVERSED in part.

AND IT IS SO ORDERED

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE
PANEL.

By: 
T. Scott Beck, Commissioner

By: 
R. Michael Campbell, Jr., Commissioner

By: 
Avery B. Wilkerson, Jr., Commissioner

May 17, 2016

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 May 24, 2016

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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CROSS-APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

AUG 02 2016
SC Court of Appeals

APPELLATE CASE NO. 2016-001509

James Lipscomb, Employee,

Respondent-Appellant,

v.

Stein Fibers/Innovative Fibers, Employer,
and Key Risk Management, Carrier,

Appellants-Respondents.

PROOF OF SERVICE

I do hereby certify that I have served the Amended Notice of Cross-Appeal, in the above captioned case, on Appellants-Respondents' counsel Richard B. Kale, Jr., Esquire, as well as the South Carolina Workers' Compensation Commission, via First Class U.S. Mail, with the proper postage affixed thereto, to address listed below:

Richard B. Kale, Jr., Esquire
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Dr.
Greenville, SC 29607

South Carolina Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

July 29, 2016

W. Scott Palmer, Esq.
Bar No. 011936
W. Scott Palmer Law Firm, P.A.
Post Office Box 722
Santee, South Carolina 29142
(803) 854-4417
wpalmer@santeeattorney.com
Attorney for Respondent-Appellant

W. SCOTT PALMER LAW FIRM, P.A.
ATTORNEY AT LAW
A PROFESSIONAL ASSOCIATION

8818 Old No. 6 Highway
Post Office Box 722
Santee, SC 29142
Telephone: (803) 854-4417
Facsimile: (803) 602-6820

wpalmer@santeeattorney.com
(W. Scott Palmer)
ggoodwin@santeeattorney.com
(Paralegal George Goodwin)

July 29, 2016

223 Church Street
Post Office Box 190
Ridgeville, SC 29472
Telephone: (843) 851-3212
Facsimile: (843) 851-0093

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AUG 02 2016

SC Court of Appeals

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

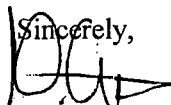
Re: James T. Lipscomb v. Stein Fibers
Appellate Case No.: 2016-001509

Dear Ms. Kitchings:

Enclosed for filing is an Amended Notice of Cross-Appeal in the above case. Also enclosed are the following:

1. Proof of Service of the Amended Notice of Cross-Appeal on the Appellants-Respondents;
2. Copy of the Orders which are challenged on appeal.

Should you have any questions, please do not hesitate to contact me.

Sincerely,


W. Scott Palmer
Bar No. 011936
W. Scott Palmer Law Firm, P.A.
Post Office Box 722
Santee, South Carolina 29142
(803) 854-4417
Attorney for Respondent

/pov
enclosures

cc: Richard B. Kale, Jr., Esq.
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Dr.
Greenville, SC 29607
(864) 527-3272
Attorney for Appellants-Respondents

cc: South Carolina Workers' Compensation Commission

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W. SCOTT PALMER, P. A.

Post Office Box 722
Santee, South Carolina 29142

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