THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1402652

James Lipscomb, Employee, Respondent-Appellant,

v.

Stein Fibers/Innovative Fibers, Employer,
and Key Risk Management, Carrier, Appellants-Respondents.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Lipscomb was employed by Innovative Fibers as a baler at its Spartanburg plant. (Dep. Claimant, p. 12). On August 27, 2014, Lipscomb filed a Form 50 (Notice of Claim) alleging that he suffered an injury to his right upper extremity on March 20, 2014. (Form 50, dated 3/27/14). Thereafter, On September 3, 2014, Appellants filed a Form 51 (Employer's Answer) denying that Lipscomb suffered an injury by accident arising out of and in the course of his employment and asserting Section 42-9-60, S.C. Code Ann. (1976) as an affirmative defense contending that Lipscomb's injury was occasioned by his intoxication. (Form 51, dated 9/3/14). On January 15, 2015, Lipscomb filed an amended Form 50 requesting a hearing and alleging that on March 20, 2014, he suffered an injury to his right upper extremity when his arm was caught in the conveyor of an industrial baler. (Form 50, dated 1/15/14). Appellants again filed a Form 51 denying that Lipscomb suffered an injury by accident arising out of and in the course of his employment and asserting the affirmative defense of intoxication under Section 42-9-60, S.C. Code Ann. (1976). (Form 51, dated 2/10/15). A hearing was held before a Single Commissioner on April 14, 2015 in Spartanburg, South Carolina. On December 22, 2015, the Single Commissioner issued her Decision and Order finding, inter alia, that Lipscomb suffered an injury to his right arm on March 20, 2014 arising out of and in the course of his employment and denying Appellants' intoxication defense. (Decision and Order, filed 12/22/15). On December 28, 2015, Appellants filed their Form 30 (Request for Commission Review) alleging numerous grounds of error. (Form 30, dated 12/28/15).

An Appellate Panel heard the appeal on March 21, 2016, and on May 24, 2016, issued its Order affirming the Single Commissioner's Order in part and reversing in part. (Decision and Order, filed 5/24/16). The Panel affirmed so much of the Single Commissioner's Order as found that Lipscomb suffered an injury in the course and scope of his employment, that he had suffered a 100% loss of use of his right arm, that he was entitled to causally related medical treatment and mileage, and that Appellants had failed to prove that alcohol was the proximate cause of Lipscomb's injury. (Decision and Order, filed 5/24/16, pp, 10-11). However, the Panel reversed the Single Commissioner's holding that Lipscomb was entitled to temporary total disability compensation, finding that Lipscomb's blood alcohol level at the time of the injury violated Innovative Fibers' Alcohol Abuse Policy and resulted in his being terminated for cause. (Decision and Order, filed 5/24/16, p. 11).

On June 3, 2016, Appellants filed a Motion for Rehearing contending that the Appellate Panel had overlooked Appellants' defense that Lipscomb's injury and accident did not "arise out of" the employment because of Lipscomb's violation of Innovative Fibers' Alcohol Abuse Policy. (Motion for Reheairng, dated 6/3/16). On June 20, 2016, the Appellate Panel issued a form Order denying Appellants' Motion for Rehearing. (Order, dated 6/20/16).

On July 20, 2016, Appellants timely filed their Notice of Appeal with the South Carolina Court of Appeals. (Notice of Appeal, filed 7/20/16).

STATEMENT OF THE FACTS

Lipscomb was hired by Innovative Fibers on April 30, 2013. (Dep. Claimant, p. 6). At the time of his injury, he had worked as a baler for approximately one year. (Dep. Claimant, p. 12; Tr. 15-9). [1] Innovative Fibers manufactures fibers used in the automobile industry, household furnishings, BMW bed liners, truck bed liners, Clorox toilet wands, and Brillo pads. (Dep. Claimant, p. 12; Tr. 16, 70). As a baler, Lipscomb is the last person in the manufacturing process. (Dep. Claimant, p. 15).

Lipscomb worked night shifts from 8:00 p.m. to 8:00 a.m. (Dep. Claimant, p. 12). He had worked the night shift on Wednesday, March 19, 2014, and had gotten off at 8:00 a.m., Thursday morning. (Dep. Claimant, p. 25; Tr. 18). Lipscomb asked a co-worker, nicknamed "Buzzard," to come by his house after work to help him repair his hot water heater. (Dep. Claimant, p. 25; Tr. 18). Lipscomb and "Buzzard" worked on the hot water heater until approximately 11:30 a.m. (Dep. Claimant, p. 26). During the period that they worked on the hot water heater, Lipscomb admitted that he had one shot of Christian Brothers brandy and "Buzzard" drank beer. (Dep. Claimant, p. 30; Tr. 27-38). Lipscomb testified that he drank the shot of brandy at about 8:30 a.m. (Dep. Claimant, p. 29). When Lipscomb was asked if he drank more than one shot of brandy, he testified "No, not that I know, 'cause I had to go to Lowe's." (T. 38). (Emphasis added). [2]

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[1] Lipscomb had also worked for approximately seven months at Leigh Fibers as a baler (Dep. Claimant, p. 6), and therefore knew the baling procedure, although the baling system was different. (Tr. 14).

[2] Lipscomb was administered a blood alcohol test at Spartanburg Regional Medical Center after his injury which revealed a blood ethanol level of 97 mg/dl (or .097%). (APA #2, p. 16; APA #9, p. 171). Dr. John Mennear, a toxicologist, opined that the concentration of ethyl alcohol in Lipscomb's blood was not consistent with Lipscomb's testimony that he consumed only one shot of brandy at 8:30 a.m. (APA #7, p. 158).

Lipscomb arrived at work at approximately 7:45 p.m. on Thursday night, March 20, 2014. (Dep. Claimant, p. 31). At that time, he attended a preshift safety meeting. (Dep. Claimant, p. 31; Tr. 22-3). Lipscomb was advised at the safety meeting that he would be working on a re-feed bale. (Tr. 24). A "re-feed bale" is a bale that has been damaged or contaminated and has to be re-fed into the baling machine by hand. (Tr. 24). Lipscomb testified that he had to pick up the fiber by hand and throw it onto the rollers of the baling machine. (Tr. 25-27; Dep. Claimant, p. 35). The fiber in the re-feed bale has already been cut in the initial baling process, so Lipscomb just had to throw the cut fiber onto baling machines. (Dep. Claimant, p. 35). Rollers then move the fibers onto a conveyor which takes the fibers to a hopper. (Dep. Claimant, p. 35; Tr. 42-43). The baling machine then compresses the fibers into a bale weighing approximately 550-560 pounds. (Dep. Claimant, p. 35). Lipscomb places the fiber into cloth bales and puts six plastic straps around the bale. (Dep. Claimant, pp. 15-16). The bale is then weighed. (Dep. Claimant, p. 16).

Lipscomb testified that at approximately 49 minutes into the shift, he had thrown a lot of fiber onto the rollers. (Tr. 27). When he took his hand to knock the fiber off the rollers, his first two fingers were caught by the rollers and his right arm was pulled into the conveyor of the baling machine. (Tr. 27; Dep. Claimant, pp. 35-6). As a result, Lipscomb suffered a degloving injury to his right arm. (APA #3, p. 57). Lipscomb testified that everyone knew that you should not put your hand near the rollers to knock off the cut fiber (Dep. Claimant, pp. 36, 38), that he had never done this before (Dep. Claimant, p. 38), and

that he had never seen another employee use his hand to knock down fibers into the rollers. (Dep. Claimant, p. 38).[3]

Following the injury, EMS was called. (APA #1, pp. 1-9). The Employer's HR Manager, Joanne Matthiesen, arrived at the plant shortly after the EMS and found Lipscomb sitting in a chair surrounded by EMS personnel. (Dep. Matthiesen, p. 14; Tr. 78). Ms. Matthiesen testified that Lipscomb was calm, awake and alert. (Id.) She further testified that she did not encounter any information personally that would lead her to believe that Mr. Lipscomb may have been under the influence of alcohol that night. (Tr. 80). However, she subsequently received a call from a nurse at Spartanburg Regional Medical Center indicating that they had smelled alcohol on Lipscomb's breath. (Tr. 83). Ms. Matthiesen told the nurse to do post-accident drug testing. (Tr. 83-85).

Ms. Matthiesen testified that Innovative Fibers has drug testing to include pre-employment/post offer, random, reasonable suspicion, and post accident. (Tr. 71). The company also has a written Substance Abuse Policy, which includes an Alcohol Abuse Policy. (Tr. 71; Defendants' Exhibit 1). The Alcohol Abuse Policy provides:

> The consumption or possession of alcoholic beverages on this company's premises is prohibited. (Company sponsored activities which may include the serving of alcoholic beverages are not included in this provision). An employee whose normal faculties are impaired due to the consumption of alcoholic beverages, or whose blood alcohol level tests .04 or higher while on duty/company business shall be guilty of misconduct, and shall be subject to discipline up to and including termination.

(APA #1, p. 5). (Emphasis added). Lipscomb's blood alcohol test at the hospital registered 97 mg/dl (or .097%) which was substantially above the company's policy of .04. (APA

[3] Lipscomb testified that the company discusses "safety, safety, safety, all the time." (Dep. Claimant, p. 32).

#2, p. 16; APA #9, p. 171). Lipscomb was subsequently terminated from his employment because of the drug test results. (Appellants' Exhibit #5).

At the hearing, Appellants presented the report of Dr. John H. Mennear, a toxicologist and Professor Emeritus of Pharmacology and Toxicology at Campbell University. [4] (APA 37, pp. 160-164). Dr. Mennear reviewed the medical reports, the Ethanol-Blood Test, and Lipscomb's deposition testimony. (APA #7, p. 158). He concluded that the concentration of ethyl alcohol in Lipscomb's blood was not consistent with Lipscomb's statement that he had only consumed "a shot of brandy" at approximately 8:30 a.m. (Id.) Dr. Mennear opined that if that had been the case, his blood alcohol concentration at the hospital would have been less than the detectable limit of the assay. (APA #7, p. 159). Dr. Mennear further noted that Lipscomb's blood alcohol level was 24% greater than the .08 concentration considered impairing for operators of automobiles. (Id.) He stated that a person with a .097 blood alcohol level feels as if he is functioning at a better level than he really is. (Id.) He further noted that at a .097 blood alcohol level it is more difficult to perceive danger, and judgment, self control, reasoning and caution are impaired. (Id.) Furthermore, a .097 blood alcohol level was sufficient to cause slight impairment of balance. (Id.) Dr. Mennear opined:

> Because of the known pharmacologic effects of ethyl alcohol and the recognized relationship between blood concentration and effects on the central nervous system it is my opinion with a high degree of scientific certainty, that alcohol was the proximal cause of Mr. Lipscomb's accident.

(Id.) Lipscomb submitted no expert opinion to counter Dr. Mennear's opinion.

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[4] Dr. Mennear had also worked as an Expert Toxicologist for the National Institute of Health, as Director of Corporate Toxicology for Baxter Travenol Laboratories, and as a Consultant Scientist in Pharmacology and Toxicology in pharmaceutical, legal and chemical industries. (APA #7, pp. 160-1).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the standard for judicial review of decisions of the Appellate Panel of the Workers' Compensation Commission. Fredrick v. Wellman, Inc., 385 S.C. 8, 682 S.E.2d 516 (Ct. App. 2009). Under the scope of review established by the Administrative Procedures Act, an appellate court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse or modify the Commission's decision if the appellant's substantial rights have been prejudiced because the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *See* Stone v. Traylor Bros., Inc., 360 S.C. 271, 600 S.E.2d 551 (S.C. App. 2004).

Section 1-23-380(5) of the South Carolina Code specifically provides:

> **The Court may reverse or modify the decision if substantial rights of the Appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are . . . (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.**

S.C. Code Ann., § 1-23-380(5) (2007)(Emphasis added).

Thus, "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 610 S.E.2d 488 (2005)(citing Hendricks v. Pickens County, 335 S.C. 405, 517 S.E.2d 698 (S.C. App. 1999)). The "substantial evidence" required to support the

factual findings of the Commission is not a mere scintilla of evidence, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the Commission reached in order to justify its action. *See* Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (S.C. App. 1995); Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).

The appellate court's review of findings of fact is limited to determining whether the findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987); Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998). "Substantial evidence" necessary to support a decision of the Commission is:

> such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . It must be enough to justify, if the trial were [sic] to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . . This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Lark v. Bi-Lo, Inc., 276 S.C. at 136, 276 S.E.2d at 307.

Additionally, an award from the Commission cannot be based upon mere possibilities, probabilities, surmise or conjectures. Broughton v. South Carolina Game & Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951). If the findings of the Commission are based on surmise, speculation or conjecture, then the issue becomes one of law for the court and not of fact for the Commission. Herndon v. Morgan Mills, Inc., 246 S.C. 201, 143 S.E.2d 376 (1965).

ARGUMENT

I.

THE COMMISSION ERRED IN FAILING TO FIND THAT LIPSCOMB'S INJURY AND ACCIDENT DID NOT ARISE OUT OF HIS EMPLOYMENT BECAUSE OF HIS VIOLATION OF INNOVATIVE FIBERS' ALCOHOL ABUSE POLICY.

The Commission completely misunderstood or overlooked Appellants' "arising out of" defense which is based upon this Court's decision in Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (S.C. App. 1994). In that case, Bi-Lo, the Employer, had a specific policy prohibiting hourly wage earners, including Wright, from approaching or apprehending suspected shoplifters. Their role was limited to observing suspected shoplifters and reporting their suspicions to management. On the day of his death, Wright, whose principal duty was bagging groceries, got on his moped and went after a suspected shoplifter despite instructions from his supervisor to go back into the store. Subsequently, Wright was found next to his moped, dead of a heart attack. The questions presented was whether Wright stepped outside the scope of his employment by violating the store's rules on shoplifters. The Wright Court quoted the South Carolina Supreme Court's decision in Johnson v. Merchants Fertilizer Co., 198 S.C. 373, 378-9, 17 S.E.2d 695, 697-8 (1941) as stating the applicable law:

> [N]ot every violation of an order given to a workman will necessarily remove him from the protection of the Workmen's Compensation Act. . . . Certain rules concern the workman within the sphere of his employment, while others limit the sphere itself. A transgression of the former class leaves the scope of his employment unchanged, and will not prevent the recovery of compensation, while a transgression

> of the latter sort carries the workman outside the sphere of his employment and compensation will be denied.[5]

Wright v. Bi-Lo, Inc., 314 S.C. 152, ___, 442 S.E.2d 186, 188 (S.C. App. 1994).

The Court in Wright, supra, held that:

> When an employer limits the sphere of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in the scope of employment and, therefore, not compensable.

Wright, supra, at 155, 442 S.E.2d at 188. The Court held that there was substantial evidence to establish that Wright left the sphere of his employment by violating specific orders not to confront, pursue or apprehend suspected shoplifters. (Id.)

In this case, Innovative Fibers had limited the sphere of employment by an Alcohol Abuse Policy that specifically prohibited employees from being at work with a blood alcohol level of .04 or higher. Lipscomb's blood alcohol level at the hospital following his accident was .097, more than twice Innovative Fibers' Policy limit.[6] Lipscomb not only signed an acknowledgment as to the Alcohol Abuse Policy (Appellants' Exhibit #2), but also a Certificate of Agreement that he had received and read Innovative Fibers' Substance Abuse and Testing Policy and agreed to submit to substance abuse testing. (Appellants' Exhibit #3). Clearly, Lipscomb knowingly violated Innovative Fibers' Alcohol Abuse Policy. Therefore, he was not in the scope of his employment at the time of his accident, and his claim is not compensable under the Wright v. Bi-Lo, supra, case.

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[5] The Court in Johnson, supra, determined that the Employer had not proved that the Employee had violated a positive order or that he was ever clearly told not to enter the prohibited area. Johnson v. Merchants Fertilizer Co., 198 S.C. 373, 379, 17 S.E.2d 695, 698 (1941).

[6] Since the blood alcohol test was performed at the hospital sometime after his injury, it would be presumed that his blood alcohol level was even higher at the time of the accident.

However, the Single Commissioner completely misapprehended Appellants' "arising out of" defense. She apparently thought the defense dealt with a "general" safety policy dealing with the operation of the baling machine. (Finding of Fact No. 12, Order of December 22, 2015). This was simply not the case. The Appellants' position was clearly stated to the Single Commissioner at the beginning of the hearing.

> As an additional defense, we also contend that Mr. Lipscomb was outside the course and scope of his employment because his intoxication was in direct violation of a specific and express written policy of the company, and we have submitted the company policy in Exhibit One, page five, which talks about alcohol abuse, and it says, "An employee whose normal faculties are impaired due to his consumption of alcoholic beverages or whose blood alcohol level tests .04 or higher while on duty/company business shall be guilty of misconduct and shall be subject to discipline up to and including termination." Certainly his blood alcohol of .097 was higher than the level permitted by the company policy. I have submitted in Exhibit Two Mr. Lipscomb's acknowledgement form where he acknowledged the company policy. Exhibit Three is a certificate saying that he had read Innovative Fibers' Substance Abuse and Testing Policy and understood that a positive test may lead to his termination. Exhibit Four [sic] is a letter from Ms. Matthiesen where she terminated his employment on May 22, 2014, after his blood alcohol test was revealed, and we cite the case of Wright versus Bi-Lo, Inc., 442 S.E.2d 182, a Court of Appeals case in 1994, to support our position on that.

(Hearing Transcript, pp. 10-11). (Emphasis added). Given the Single Commissioner's total misapprehension of the defense, her Order was clearly erroneous and should have been reversed by the Appellate Panel.

Although Appellants raised in their Form 30 (Request for Commission Review) that the Single Commissioner had misunderstood the Appellants' "arising out of" defense under the Wright case (Form 30, dated December 28, 2015), the Appellate Panel failed to address this ground for review in its Order. Therefore, Appellants raised the issue again by filing a Motion for Rehearing and pointing out clearly that the Panel has overlooked this

issue. (Motion for Rehearing, dated June 3, 2016). The Panel denied Appellants' Motion for Rehearing by Form Order without comment about the oversight. (Order of South Carolina Workers' Compensation Commission, filed June 20, 2016).

However, the Appellate Panel did find as a fact that Lipscomb had violated Innovative Fibers' Alcohol Abuse Policy by having a blood alcohol level greater than .04 at work. (Appellate Panel Order, finding #7, p. 11). The Appellate Panel further noted that Lipscomb's violation resulted in his termination from employment, a decision that he did not contest or appeal. (Id.)

The Appellate Panel's finding that Lipscomb violated Innovative Fibers' Policy is supported by substantial evidence in the record. Records submitted by both parties from Spartanburg Regional Emergency Center established that at 9:23 p.m. on March 20, 2014, approximately 38 minutes after Lipscomb's injury had occurred at approximately 8:45 p.m. (Claimant's Dep., p. 24), Lipscomb's blood was tested at the hospital's laboratory and revealed a blood alcohol level of 97 mg/dl. (Claimant's APA #2, p. 16; Defendants' APA #9, p. 171).[7] This is clearly substantial evidence to support the Commission's finding of fact that Lipscomb violated Innovative Fibers' Alcohol Abuse Policy.

The question of whether an injury arises out of employment is largely a question of fact for the Commission. Ervin v. Richland Mem'l Hospital, 386 S.C. 245, 249, 687 S.E.2d

[7] While Lipscomb's Attorney did object to the admission of Dr. Mennear's report, he did not object to the admission of the blood alcohol test results. In fact, Lipscomb submitted the test results in his APA submission. (Claimant's APA #2, p. 16). Moreover, Lipscomb did not challenge the blood alcohol test results by appeal to the Appellate Panel. Therefore, Lipscomb's blood alcohol level of 97 mg/dl (.097%) is an undisputed fact and the law of the case. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712, 716 (1940) (All findings of fact and law by the Hearing Commissioner become the law of the case, except those within the scope of an exception.) Smith v. South Carolina Dept. of Mental Health, 329 S.C. 485, n.9, 494 S.E.2d 630, 639 n.9 (S.C. App. 1997); Hendricks v. Pickens County, 335 S.C. 405, 413, 517 S.E.2d 698, 703 (S.C. App. 1999); Transport Ins. Co. v. Flagstar Corp., 389 S.C. 422, 431, 699 S.E.2d 687, 691-2 (2010).

337, 339 (S.C. App. 2009). However, where the facts are established or undisputed, the question of whether an accident arises out of the employment becomes a question of law. Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73, 61 S.E.2d 654 (1950); Douglas v. Spartan Mills, 245 S.C. 265, 266, 140 S.E.2d 173 (1965); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (S.C. App. 1999). In this case, the uncontradicted evidence established that Claimant's blood alcohol level of .097% violated Innovative Fibers' Alcohol Abuse Policy, and therefore renders the question of whether Lipscomb's injury arose out of his employment, one of law to be determined by the Court.

To establish a violation of Innovative Fiber's Alcohol Abuse Policy, it is not necessary to prove that Claimant was intoxicated, it is only necessary to prove that his blood alcohol level exceeded .04%. In this case, it is undisputed that Claimant's blood alcohol level approximately thirty minutes after his injury was .097% more than twice the Policy's limit. When the evidence gives rise to but one reasonable inference then the question becomes one of law for the Court to decide. Black v. Barnwell County, 243 S.C. 531, 535, 134 S.E.2d 753, 755 (1964); Herndon v. Morgan Mills, 246 S.C. 201, 210, 143 S.E.2d 376, 381 (1965). It is clear in this case that Lipscomb violated the specific prohibition of Innovative Fibers' Alcohol Abuse Policy by working at the time of his injury with a blood alcohol level of at least .097. By doing so, Lipscomb took himself outside the scope of his employment, and, therefore, his injury is not compensable.

II.

THE COMMISSION'S FAILURE TO GIVE EVIDENTIARY WEIGHT TO THE TOXICOLOGY REPORT OF DR. JOHN H. MENNEAR, PH.D. WAS ARBITRARY AND CAPRICIOUS AND CONSTITUTED AN ABUSE OF DISCRETION.

Section 1-23-380(5) provides inter alia, that:

> The Court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> . . . . .
>
> (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See, James v. Anne's Inc., 390 S.C. 188, 192, 701 S.E.2d 730, 732 (2010); Gray v. The Club Group, 339 S.C. 173, 182, 528 S.E.2d 435, ___ (Ct. App. 2000). An abuse of discretion occurs if the Commission's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. Thompson v. Steel Erectors, 369 S.C. 606, ___, 632 S.E.2d 874, 878 (Ct. App. 2006); Trotter v. Trane Coil Facility, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011).

Appellants submitted into evidence at the hearing the report of Dr. John H. Mennear, Ph.D., a toxicologist and Professor Emeritus of Pharmacology and Toxicology at Campbell University. (Defendants' APA #7, pp. 158-164). Dr. Mennear stated in his report:

> Because of the known pharmacologic effects of ethyl alcohol and the recognized relationship between blood concentration and effects on the central nervous system it is my opinion held to a high degree of scientific certainty, that alcohol was the proximal cause of Mr. Lipscomb's accident.

(Id. at 159). Dr. Mennear further stated that:

> A blood alcohol concentration of 97 mg/dl is 24% greater than the concentration considered impairing for operators of automobiles (80 mg/dl). A person with this concentration feels as if he/she is functioning at a better level than they really are. At this concentration it is more difficult to perceive danger and judgment, self-control, reasoning are impaired. A concentration of 97 mg/dl is sufficient to cause slight impairment of balance.

(Id.) The Single Commissioner, and apparently the Appellate Panel, disregarded or gave very little weight to the opinion of Dr. Mennear for two reasons: (1) he never met or examined the Respondent; and (2) it was unclear from Dr. Mennear's report whether he had specific details of how the injury occurred. Both reasons for disregarding Dr. Mennear's opinion are baseless, without common reasoning, and totally erroneous.

First, Dr. Mennear is a scientist in the field of pharmacology and toxicology, a Professor Emeritus of Pharmacology and Toxicology, and former Chairman of the Department of Pharmaceutical Sciences at Campbell University's School of Pharmacy. As a scientist, his job is to take medical, biological, and chemical data to determine its adverse effects on humans. He is not a medical doctor and does not examine patients. Secondly, a medical examination performed a day, a week or a month after Lipscomb's accident would have been of no benefit in determining the issue of Lipscomb's intoxication on March 20, 2014.[8] Therefore, the fact that Dr. Mennear did not examine Lipscomb is clearly an arbitrary and unwarranted reason for discounting Dr. Mennear's report and opinion and constitutes an abuse of discretion.

[8] Lipscomb did not file his Form 50 claim until on or about August 27, 2014, some five months after his accident. (Form 50, dated August 27, 2014). A medical exam at that time would have revealed nothing.

The Single Commissioner's second reason for disregarding Dr. Mennear's opinion was that it was "unclear from Dr. Mennear's report whether he had specific details of how the injury occurred." Appellants submit that this is also an invalid reason. Dr. Mennear stated in his Toxicology Report what information he reviewed to reach his opinion, and this included Lipscomb's deposition testimony. In his deposition, Lipscomb described in specific detail how the accident occurred. (Dep. Claimant, pp. 32-44).

Q. Tell me how you injured your hand.

A. I was just throwing it in normal like I did a hundred times and throwing it in, throwing it in. There was a big -- it was a lot of material right there. I knocked it off and –

Q. When you say, a lot of material right there, where are you talking about?

A. On the roller. It's on the roller. So I just did like that and kept throwing it in. Caught these two fingers.

Q. Was your hand caught in the conveyor?

A. Yes.

Q. And the rollers you're talking about are --

A. It went through the rollers first. The rollers are what actually caught my two fingers and pulled my arm in like this.

Q. But the rollers were there at the conveyor?

A. Yes. It's part of the machine.

Q. Had you ever been warned or instructed not to put your hands where the rollers are?

A. Anybody can see the machine you not supposed to put your hand in the rollers.

(Dep. Claimant, pp. 35-36).

* * * * * * *

A. Everybody know -- not warned, per se. Just something you know not to do. It was just a whole bunch of material right there. All I did was knock it down where it need to go and it happened.

Q. Had you ever done that before?

A. No, sir.

Q. That was the first time?

A. Yes.

Q. Had you ever seen anybody else do that, stick their hand down where the rollers are?

A. No, because when you -- the cutter has to watch out for the bailer [sic].

(Dep. Claimant, p. 38).

* * * * * * *

Q. So you've never seen anybody do what you did?

A. No.

(Dep. Claimant, p, 41). The Single Commissioner did not specify why it was unclear to her whether Dr. Mennear had specific details of how the injury occurred. The deposition transcript was submitted into evidence at the hearing (Tr. 49), so the Hearing Commissioner should have known exactly what information Dr. Mennear had regarding how the accident occurred. Again, this basis for disregarding or giving little weight to Dr. Mennear's opinion was arbitrary and capricious and constituted an abuse of discretion.

The reasons given by the Hearing Commissioner for disregarding Dr. Mennear's report and opinion were simply not valid reasons. Therefore, the Single Commissioner's and Appellate Panel's disregard of Dr. Mennear's opinion was arbitrary and capricious and

was characterized by an abuse of discretion. See Section 1-23-380(5)(f). As stated previously, an abuse of discretion occurs when the conclusion of the Commission are either controlled by an error of law or are based on unsupported factual conclusions. See, Carson v. CSX Transportation, Inc., 400 S.C. 221, 734 S.E.2d 148 (2012). Clearly, the Hearing Commissioner's disregard of Dr. Mennear's opinion was based upon invalid factual conclusions and should be reversed.

III.

THE COMMISSION ERRED IN FINDNG THAT LIPSCOMB'S INJURY AND ACCIDENT WERE NOT PROXIMATELY CAUSED BY HIS INTOXICATION.

Section 42-9-60, S.C. Code Ann. (1976) provides:

> No compensation shall be payable if the injury or death was occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another. In the event that a person claims that the provisions of this section are applicable in any case, the burden of proof shall be upon such person.

(Emphasis added). It is well settled in South Carolina that the provision "was occasioned by the intoxication of the employee" means that the employee's intoxication was the proximate cause of the injury. Baggott v. Southern Music, Inc., 330 S.C. 1, 496 S.E.2d 852 (1998); Kinsey v. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977). In this case, overwhelming evidence established that Lipscomb's arm injury was occasioned by his intoxication.

A. The Evidence Clearly Established Proximate Cause

Lipscomb admitted, both at his deposition and at the hearing, that he had consumed brandy during the twelve hours that he was off work between shifts. (Dep. Claimant, p. 29; Tr. 19). Therefore, it is undisputed that Lipscomb consumed some amount of alcohol

before he went to work on the evening of March 20, 2014. The question is how much? Lipscomb's self-serving testimony was that he only had one shot of brandy that morning.[9] However, Lipscomb did not call any witness to corroborate his testimony that he only had one shot, and his testimony was refuted by the clear scientific evidence of the blood alcohol test. When Lipscomb was at the hospital, a nurse smelled alcohol on Lipscomb's breath and called the Employer to ask if post-accident drug testing was requested. (Tr. 75, 83). Joanne Matthiesen, Innovative Fibers' HR Manager, told the nurse to perform the blood alcohol test. A test was performed at Spartanburg Regional Medical Center which showed a blood alcohol level of 97 mg/dl. (APA #2, p. 16; APA #9, p. 171).[10] Dr. Mennear stated that Lipscomb's testimony about having only one shot of brandy was simply not credible, because if that had been the case, Lipscomb's blood alcohol concentration at the hospital at approximately 9:23 p.m. would have been less than the detectable limit of the assay, which is usually 10 mg/dl. (APA #7, pp. 158-9). Appellants would also submit that it is quite doubtful that the nurse would have smelled alcohol on Lipscomb's breath, if he had only had one shot of brandy at 8:30 a.m.

Dr. Mennear noted that Lipscomb's blood alcohol level of 97 mg/dl was 24% greater than the concentration considered impairing for operators of motor vehicles, which

[9] At his deposition, Lipscomb testified he only had one shot of brandy at around 8:30 a.m. (Dep. Claimant, p. 29). At the hearing he testified that it was around 9-10 a.m. (Tr. 19).

[10] Appellants submitted the toxicology report of Dr. John H. Mennear, a toxicologist and Professor Emeritus of Pharmacology and Toxicology at Campbell University. Lipscomb's Attorney objected at the hearing to Dr. Mennear's report and indirectly as to the hospital blood alcohol test. However, the Hearing Commissioner overruled Lipscomb's objection, (Tr. 5-7), and no appeal was taken by Lipscomb as to her ruling. Therefore, her ruling is the law of the case. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940).

is 80 mg/dl. (APA #7, p. 159).[11] Dr. Mennear further noted that a person with blood alcohol concentration of 97 mg/dl would have difficulty perceiving danger, and judgment, self control, reasoning and caution would be impaired. (Id.)[12] He further indicated that at Lipscomb's blood alcohol level his balance would be slightly impaired. (Id.) Finally, Dr. Mennear opined that:

> Because of the known pharmacologic effects of ethyl alcohol and the recognized relationship between blood concentration and effects on the central nervous system it is my opinion, held with a high degree of scientific certainty, that alcohol was the proximal cause of Mr. Lipscomb's accident.

(Id.) (Emphasis added). Lipscomb submitted no expert opinion to counter Dr. Mennear's opinion. In fact, Lipscomb testified at his deposition that he could not give any explanation for why his blood alcohol level was so high. (Dep. Claimant, p. 31).

B. The Commission's Disregard of Dr. Mennear's Toxicology Report requires reversal of the Commission's Order

The Hearing Commissioner's Finding of Fact #13 states:

> 13. I gave very little weight to Dr. Mennear's toxicology report, as he ever met or examined the Claimant. Also, it is unclear from Dr. Mennear's report whether he had specific details of how the injury occurred.

(Decision and Order, filed December 22, 2015). As stated in Argument II above, the Commission's basis for disregarding Dr. Mennear's opinion was invalid and constitutes an abuse of discretion. While the Commissioner made conclusory statements regarding Dr.

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[11] Lipscomb has previously been convicted of DUI. (Dep. Claimant, p. 22). In 2007, Lipscomb also gave a nurse at Spartanburg Regional a medical history of consuming ethanol daily. (APA #11, pp. 199, 200).

[12] Dr. Mennear also noted Lipscomb's deposition testimony that he had never previously reached into the machine, had never been instructed to reach into the machine, and had never seen anyone reach into the machine. (Dep. Claimant, pp. 36-41; APA #7, p. 158).

Mennear not examining Lipscomb, and it being "unclear" whether Dr. Mennear had specific details about the accident, the Commission never explained why these were reasons to discount Dr. Mennear's opinion. As noted previously, by the time Lipscomb filed his workers' compensation claim on August 27, 2014, no purpose would have been served by Dr. Mennear physically examining Lipscomb. Moreover, the Commission never points out how it was "unclear" whether Dr. Mennear understood how the accident occurred. Dr. Mennear clearly states in his report that he read the transcript of Lipscomb's deposition testimony. In his deposition Lipscomb testified specifically as to how the accident occurred. In fact, Dr. Mennear cited Lipscomb's deposition testimony in his report and as a part of the basis for his opinion. (APA #7, p. 158).

It is clear that the Commission wanted to get around Appellants' intoxication defense under Section 42-9-60, S.C. Code Ann. (1976) and the only way that could be done was to minimize Dr. Mennear's opinion. However, the reasons given by the Commission were clearly invalid and constitute an abuse of discretion.

In summary, the Commission's abuse of discretion in disregarding the opinion of Dr. Mennear, mandates that the Commission's Order of May 24, 2016 finding that Appellants failed to prove that Claimant's injury was proximately caused by his intoxication, be reversed.

CONCLUSION

For the foregoing reasons, the Orders of the Commission should be reversed on the following grounds:

1. That the Commission erred in not finding that Lipscomb's injury was outside the scope of his employment because of his violation of Innovative Fibers' written Alcohol Abuse Policy;

2. That the Commission's disregard of the opinion of Dr. Mennear constituted an abuse of discretion; and

3. That the Commission erred in finding that Appellants failed to prove that Lipscomb's injury and accident were proximately caused by his intoxication.

Respectfully submitted,

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August 26, 2016

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1402652

James Lipscomb, Employee, Respondent-Appellant,

v.

Stein Fibers/Innovative Fibers, Employer,
and Key Risk Management, Carrier, Appellants-Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellants and Designation of Matter to be Included in the Record on Appeal on James Lipscomb by depositing a copy of it in the United State Mail, postage prepaid, on August 26, 2016, addressed to his attorney of record, W. Scott Palmer, W. Scott Palmer Law Firm, P.A., P.O. Box 722, Santee, South Carolina 29142.

August 26, 2016

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August 26, 2016

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: James T. Lipscomb vs. Stein Fibers, LTD
Appellate Case No.: 2016-001509
WCC File No.: 1402652 DOI: 3/20/2014
Carrier: StarNet Insurance Company - Claim No.: 03149911
WJC&B File No.: 0310.01577

Dear Ms. Kitchings:

Pursuant to Rules 208 and 209 I enclose for filing one copy of the Initial Brief of Appellants and one copy of the Designation of Matters to be Included in the Record on Appeal with Proof of Service.

By copy of this letter I am also serving a copy of the Initial Brief and Designation of Matters to be Included in the Record on Appeal on the attorney for the Respondent-Appellant.

With cordial best wishes, I am

Very truly yours,

WILLSON JONES CARTER & BAXLEY, P.A.

Richard B. Kale, Jr.
S.C. Bar No. 3264

RBK,Jr/jw

cc: Mr. W. Scott Palmer

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