

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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SC Court of Appeals

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APPEAL FROM SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION

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Appellate Case No.: 2016-001398

WCC No: 1405219

KEVIN WIKEL, Claimant.....Respondent

v.

PC METRO BOTTLING, Employer, and INDEMNITY INS. CO. of NA, Carrier.....Appellants.

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RESPONDENT'S INITIAL BRIEF

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**TABLE OF AUTHORITIES**

**CASES**

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## STATEMENT OF ISSUES ON APPEAL

- I. THE FULL COMMISSION WAS CORRECT IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW CLAIMANT SUFFERED COMPENSABLE INJURIES TO THE BACK AND LEFT LEG ON MAY 9, 2014 BASED UPON THE TESTIMONY PRESENTED AT THE HEARING.
  
- II. THE FULL COMMISSION WAS CORRECT IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW CLAIMANT SUFFERED COMPENSABLE INJURIES TO THE BACK AND LEFT LEG ON MAY 9, 2014 BASED UPON THE MEDICAL EVIDENCE PRESENTED AT THE HEARING.
  
- III. THE FULL COMMISSION WAS CORRECT IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CLAIMANT'S CREDIBILITY.

## STATEMENT OF THE CASE

This matter came before the Hearing Commissioner on December 1, 2015 pursuant to South Carolina Workers Compensation Commission Forms 50 and 51. Claimant alleged he suffered compensable injuries by accident to the low back and left leg on May 9, 2014 while in the scope and course of employment with Employer when he lifted a case of drinks and felt pain in his low back with pain down the left leg. Claimant sought an Order of the Commission for compensability of his injuries; the Appellants responsibility to pay all causally-related medical treatment; Claimant's entitlement to temporary total disability benefits from April 2, 2015 through June 29, 2015; and a finding of permanent partial disability benefits in line with the 10% impairment rating to the back and 13% impairment rating to the left leg per Dr. Scott Strohmeyer.

The Appellants took the position Claimant failed to prove by a preponderance of the evidence a compensable injury by accident arising out of and in scope and course of his employment on May 9, 2014. Specifically, the Appellants relied on their perceived discrepancies between Claimant's report of injury on May 9, 2014 to his supervisor, the 1-800-JOB-HURT adjuster and his deposition testimony taken by defense counsel to defeat compensability. As such, the Appellants requested an Order of the Commission denying compensability of the claim and Claimant's entitlement to benefits under the Act.

By Order dated January 29, 2016, the Hearing Commissioner found Claimant suffered compensable injuries to the back and left leg on May 9, 2014. Pursuant to the finding of compensability, the Hearing Commissioner awarded causally-related medical treatment, temporary total disability benefits and permanent partial disability benefits. On February 10, 2016, the Appellants filed a Form 30, Request for Commission Review, challenging the Hearing

Commissioner's Decision and Order. Oral arguments were heard by the Full Commission on April 18, 2016 in Columbia, South Carolina. By Order dated June 23, 2016, the Full Commission fully affirmed the Hearing Commissioner's January 29, 2016 Decision and Order.

On June 28, 2016, the Appellants filed the Notice of Appeal to this Honorable Court challenging the Full Commission's June 23, 2016 Decision and Order. Claimant submits this brief in support of the Full Commission's Decision and Order and requests full affirmation of the Order.

### **STANDARD OF REVIEW**

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981); Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Burse v. South Carolina Dept of Health and Env'tl. Control, 360 S.C. 135, 600 S.E.2d 80, (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp. 2003). Under the scope of review established in the APA, this 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 where the decision is affected by an error of law. Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp. 2003). Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to

reach the conclusion the administrative agency reached in order to justify its action. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999).

The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000); Parsons v. Georgetown Steel, 318 S.C. 63, 456 S.E.2d 366 (1995). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999).

### ARGUMENT

I. **THE FULL COMMISSION WAS CORRECT IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW CLAIMANT SUFFERED COMPENSABLE INJURIES TO THE BACK AND LEFT LEG ON MAY 9, 2014 BASED UPON THE TESTIMONY PRESENTED.**

The testimony presented at the hearing supports the Full Commission's finding of compensability. Claimant and his supervisor, Landon Papay, were the only two witnesses to testify. The testimony of these two witnesses is consistent with the Full Commission's findings regarding Claimant's May 9, 2014 injury by accident. An appellate court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Tiller v. National Health Care of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999). As the Full Commission's findings of compensability are supported by substantial evidence they should be affirmed.

Claimant testimony:

In June 2013, Claimant began working for Pepsi as a merchandiser. His duties included unloading and checking in merchandise, breaking down pallets and putting product on the shelves. Claimant testified the job required a lot of lifting and bending. (Hr. Tr. p. 17). Claimant denied having any difficulties performing his job duties prior to April 2014.

Claimant testified that during the 2 weeks prior to May 6, 2014, he had worked 13 straight days as a sales representative but performing the same job duties of a merchandiser. During this 13 day stretch, Claimant testified he began to experience pain in his lower back. (Hr. Tr. p. 21). Claimant had May 7<sup>th</sup> and 8<sup>th</sup> off work and rested. On May 9<sup>th</sup>, Claimant returned to work with Pepsi and while changing a display, he was lifting a case of Aquafina when he experienced pain in his low back and could no longer work. (Hr. Tr. pp. 21-22).

Claimant testified he reported the incident to his supervisor, Landon Papay, who instructed him to call 1-800-JOB-HURT, which he did. Claimant testified he reported he hurt his back at work, but couldn't give a specific incident. (Hr. Tr. p. 22).

A review of the 1-800-JOB-HURT transcript at Page 5, lines 8-10 states "I worked a couple of hours today and told them I wasn't going to be able to do it. My back was killing me too bad and they told me to call y'all. So." (APA p. 218). Clearly, this testimony is sufficient to establish Claimant's injury and reporting of injury on May 9, 2014.

Landon Papay testimony:

Appellants presented the testimony of Landon Papay, unit sales manager of the Employer and supervisor of Claimant. Mr. Papay was asked on direct examination by counsel for Appellants about Claimant's injury and reporting:

- Q. Okay. Did you ever hear about a work related accident on May 9<sup>th</sup>, 2014, by Mr. Wikel?
- A. If I remember correctly, he either called myself or Eric Smith, his direct supervisor, and stated that his back -- he could not -- he could no longer work that day; his back was hurting him too -- at that point in time too much where he could not work. He -- I believe, it was either Eric -- either Eric Smith or myself that told him at that point in time to call the 1-800-JOB-HURT number, for him to report it and then to go see the doctor.
- Q. Okay. And do you know where he was on May 9<sup>th</sup>, 2014?
- A. I -- I'd have to look at the sheets and see exactly what day and what -- what store he was at.
- Q. Do you recall how or -- he told you he injured himself?
- A. I believe he said he was lifting a case of product.
- Q. Okay. Did he say on that day or any particular day or --
- A. He said it was on that -- on that day -- that it was that morning, yes.
- Q. -- lifting something that morning?
- A. Uh-huh.
- Q. You just have to answer verbally yes or no.
- A. Yes. Sorry.  
(Hr. Tr. p. 66, l.5 – p. 67, l.6).

The only witness presented by the Appellants testified Claimant reported to him that he hurt his back lifting a case of product on May 9, 2014. The testimony of Landon Papay alone supports the Full Commission's finding of compensability. The testimony of the Claimant further supports the Full Commission's findings and therefore the findings should be fully affirmed.

II. **THE FULL COMMISSION WAS CORRECT IN FINDING AS A MATTER OF FACT AND CONCLUDING AS A MATTER OF LAW CLAIMANT SUFFERED COMPENSABLE INJURIES TO THE BACK AND LEFT LEG ON MAY 9, 2014 BASED UPON THE MEDICAL EVIDENCE PRESENTED.**

The medical evidence in the record also supports the Full Commission's finding of compensability. The Appellants allege there is no medical evidence to support an injury by accident on May 9, 2014. However, the substantial evidence in the record as a whole supports this conclusion. An appellate court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative, and substantial evidence on the record. Tiller v. National Health Care of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999). As the Full Commission's findings of compensability are supported by substantial evidence they should be affirmed.

The Full Commission's Finding of Fact #9 cites the medical evidence relied upon to determine compensability:

9. Based on the greater weight of testimony and medical evidence in the record, we find this case compensable as an injury by accident to the low back and left leg on May 9, 2014. The record, when considered as a whole, supports Claimant's May 9, 2014 injury by accident.
  - a. Testimony of Claimant and Landon Papay is consistent and credible to support the May 9, 2014 injury by accident.
  - b. APA p. 13 – Dr.'s Care note dated May 9, 2014. Low back pain x1 week after long shifts at work lifting and bending.
  - c. APA p. 27 – Dr.'s Care Physician's statement – Claimant diagnosed with low back and radicular pain, which is work related. Disability date May 9, 2014.
  - d. APA p. 31 – MRI at Belfair Clinical Summary dated May 22, 2014 – LBP w/ pain leg x2 wks lifting injury at work.
  - e. APA p. 38 – June 6, 2014 office note of Dr. Strohmeyer – Claimant does a lot of lifting. There was no one incident.
    - i. (This is report is consistent with Claimant's deposition testimony and hearing testimony regarding the low back pain starting over a period of 2 weeks followed by the May 9, 2014 event.)
  - f. APA p. 50 – February 23, 2015 office note of Dr. Strohmeyer – Claimant had a recurrence of his pain. There was no new trauma. It looks like he has a recurrence.

g. APA p. 69 – June 9, 2014 note of Dr. Batson – Claimant has lower pain radiates down the left leg. Began 5 weeks ago, occurred prolonged lifting, loading and driving while performing his job.

i. (This is report is consistent with Claimant’s deposition testimony and hearing testimony regarding the low back pain starting over a period of 2 weeks followed by the May 9, 2014 event.)

(Full Commission Order dated June 23, 2016, page 6 of 10)

The Appellants contend there is no medical evidence to support compensability of Claimant’s May 9, 2014 injury by accident despite these numerous consistent reports of back pain due to lifting at work. Further, the Appellants presented no medical evidence to show Claimant suffered injuries to his back and left leg in any other manner than he and his supervisor testified. As such, there is substantial evidence by way of the medical evidence presented which supports the Full Commission’s finding of compensability.

**III. THE FULL COMMISSION WAS CORRECT IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CLAIMANT’S CREDIBILITY.**

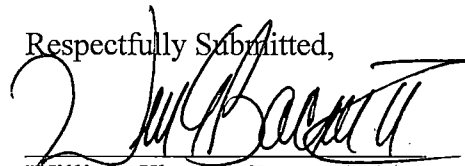
The Appellants requested a determination of Claimant’s credibility at the December 1, 2015 hearing. After witnessing the testimony of Claimant and Landon Papay, unit sales manager of the Employer and supervisor of Claimant, the Hearing Commissioner determined Claimant seemed “confused” at times, but was credible. The Full Commission relied upon the Hearing Commissioner who viewed the testimony of the witnesses at the hearing. The Full Commission is the ultimate finder of fact and determiner of credibility. “The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel.” Potter v. Spartanburg School District 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). As the Full Commission’s findings on the issue of credibility are not affected by an error of law, they should

be affirmed.

**CONCLUSION**

The testimony of both witnesses at the hearing is that Claimant suffered an injury to his back while lifting at work on the morning of May 9, 2014. The medical records are replete with Claimant's report of low back pain from lifting at work. The Appellants presented no evidence to contradict the testimony or medical evidence supporting Claimant suffered an injury to the back and left leg on May 9, 2014. The Hearing Commissioner viewed the testimony of the witnesses and made findings of credibility that were upheld by the Full Commission. Therefore, the Full Commission's June 23, 2016 Decision is Order is supported by substantial evidence and should be affirmed.

Respectfully Submitted,



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August 25, 2016

THE STATE OF SOUTH CAROLINA  
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APPEAL FROM THE SOUTH CAROLINA WORKERS  
COMPENSATION COMMISSION

SC Court of Appeals

Appellate Case No.: 2016-001398  
WCC Number: 1405219

Kevin Wikel, Employee, Claimant, .....Respondent,

v.

PC Metro Bottling, Employer, and Indemnity Insurance Co. Of NA, Carrier.....Appellants.

PROOF OF SERVICE

I certify that I have served the RESPONDENT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL, on the following parties by depositing a copy of these documents in the United States mail, first class postage prepaid, addressed as follows: Andrew D. Smith, Esquire, Goodman McGuffey, LLP, 147 Wappoo Creek Drive, Suite 204, Charleston, South Carolina 29412-2111; and Amy Bracy, Judicial Director, South Carolina Workers' Compensation Commission, Post Office Box 1715, Columbia, South Carolina 29202-1715 on this the 25<sup>th</sup> of August, 2016.

By:



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August 25, 2016

The Honorable Jenny Abbott Kitchings  
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SC Court of Appeals

Re: Kevin Wikel v. PC Metro Bottling  
Appellate Case No.: 2016-001398  
Date of Injury: May 12, 2014

Dear Ms. Kitchings:

Please find enclosed Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal for filing in the above-referenced matter.

By courtesy copy of this correspondence and Proof of Service, I have served all parties to the Appeal with a copy of same.

With kind regards, I am

Sincerely,  
  
William T. Bacon, IV

WTB:ala

Enclosures

cc: Kevin Wikel  
Amy Bracy, Judicial Director, SC Worker' Compensation Commission  
Andrew D. Smith, Esquire

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