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 StarNet Insurance Company, Carrier, Appellants-Respondents.

APPELLANTS' INITIAL REPLY BRIEF OF APPELLANTS-RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

Appellants-Respondents (Innovative Fibers) now reply to Respondent-Appellant's (Lipscomb's) erroneous arguments regarding the blood alcohol test, Dr. John Mennear's expert opinion, and the proper weight of intoxication evidence.

I. The Blood Alcohol Test Is Properly in Evidence.

Lipscomb's argument that the blood alcohol test lacks authentication fails. (Respondent-Appellant's Brief p. 17). The blood alcohol test properly remains in evidence for three reasons.

A. Lipscomb submitted the blood-alcohol test in his APA and therefore waived any objection to foundation.

Lipscomb wrongfully argues that Innovative Fibers had the burden of establishing a foundation and chain of custody for the blood test as a prerequisite for admission of the test into evidence. However, even assuming that Innovative Fibers had this burden, Lipscomb waived this objection when he put the blood-alcohol test into evidence as part of his APA submissions. Lipscomb submitted as part of his APA submissions numerous pages of records from Spartanburg Regional Medical Center, including a page containing the blood-alcohol test. (APA #3, p. 16). Commission Regulation 67-612 mandates that Lipscomb's submissions remain in the evidence of the case:

> Any report submitted to the opposing party in accord with B(1) or B(2) above **shall be submitted as an APA exhibit at the hearing unless withdrawn with the consent of the other party**, and the non-moving party shall submit only reports not submitted by the moving party.

Commission Reg. 67-612(D) (Emphasis added). When Lipscomb submitted the blood alcohol report to Innovative Fibers, absent a consent to withdraw, that report became an APA exhibit at the inception of the hearing. By introducing the same material that

Lipscomb objects to in Innovative Fibers' APA submissions, Lipscomb has waived any objection regarding foundation. See Jervey v. Martint Envtl., Inc., 396 S.C. 442, 451, 721 S.E.2d 469, 474 (Ct. App. 2012) (defining waiver as the "voluntary and intentional relinquishment or abandonment of a known right.").

In addition, at the hearing, Lipscomb did not specifically object to Innovative Fibers' APA submission containing the blood alcohol test. (See APA #9.) Rather, he objected only to Innovative Fibers' expert report that relied on the blood-alcohol test.

> Mr. Palmer:
>
> > I have an objection to the Employer's APA submission number seven, the report of Dr. Mennear. My objection is several layers. . . .
>
> The Commissioner:
>
> > Thank you. Any other objections, Mr. Palmer?
>
> Mr. Palmer:
>
> > No, Commissioner.

(Tr. 4:24 – 8:6.) While objecting to Dr. Mennear's report, Lipscomb asserted that Dr. Mennear should not have relied on the blood alcohol test, because there was no evidence of chain of custody. However, Lipscomb did not object to the particular APA submission containing the blood alcohol test itself. Regulation 67-612(I) plainly allows objection to particular exhibits: "By complying with this regulation, the parties do not waive any evidentiary objections to the introduction of a particular exhibit." However, the plain language of subsections (D) and (I) would require an evidentiary objection to the particular exhibit sought to be excluded. Without such particular objection, Regulation 67-612 operates to make the records submitted the evidence in the claim.

B. Lipscomb waived his argument for exclusion by his failure to appeal.

Lipscomb failed to preserve for appellate review the alleged error as to the introduction of the blood alcohol test and, therefore, has waived any allegation of error made by the Single Commissioner.

> Only issues raised to the Commission within the application for review of the single commissioner's order are preserved for review. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1952) (holding that all findings of fact and law by the Hearing Commissioner became and are the law of the case, unless within the scope of the appellant's exception to the Full Commission).

Hilton v. Flakeboard Am. Ltd., Op. No. 27670 (S.C. Sup. Ct., 2016). Lipscomb objected to Innovative Fibers' expert report at the hearing. That objection was overruled. (Tr. 7:12-13.) Therefore, in order to preserve any alleged error for review, Lipscomb was required to file a Form 30, Request for Commission Review. By not filing a Form 30, Lipscomb has waived any evidentiary objection he previously made. Therefore, he may not at this stage allege an error by the Single Commissioner.

C. Lipscomb fundamentally misunderstands submission of evidence under the Administrative Procedures Act.

Lipscomb erroneously argues that Innovative Fibers has the burden to establish foundation and chain of custody for the blood-alcohol test. (Respondent-Appellant's Brief, p. 17.) However, under the Administrative Procedures Act (APA), Defendants do not bear the burden of establishing the foundation for an expert opinion when submitting a report under the APA, as would be required in a civil proceeding. The system for submitting evidence before the Workers' Compensation Commission is set forth by following the applicable statutes and regulations.

Section 1-23-330(1), S.C. Code Ann. (1976) provides that "[e]xcept in proceedings before the Industrial Commission the rules of evidence as applied in civil cases in the court of common pleas shall be followed." Therefore, the rules of evidence are not applicable before the Workers' Compensation Commission. Following this sentence from the statute, "when a hearing will be expedited and the interests of the parties will not be prejudiced substantially, any part of the evidence may be received in written form." Section 1-23-330(1), S.C. Code Ann. (1976).

The Court of Appeals has recognized the wisdom of allowing written reports into evidence as part of the policy promoting timely adjudication of workers' compensation claims: "The utilitarian efficacy of admissibility under Workers' Compensation regulations is salutary and salubrious. Historically, the regulations allow for written reports and documentation in lieu of live testimony, concomitantly saving time and expense in the presentation of testimony before the single commissioner." Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262, 269 (Ct. App. 2006).

Under the regulatory scheme and the policy acknowledged in Gadson, the party seeking to submit expert evidence pursuant to Regulation 67-612 need only submit the reports to the opposing party timely. Indeed, the title of the Regulation is "Admission of Expert's Report as Evidence." Therefore, the opposing party in receipt of the objectionable evidence has the burden of submitting evidence necessary to support exclusion:

> B. A written expert's report to be admitted as evidence at the hearing must be provided to the opposing party as follows:
>
> (1) The moving party must provide the report to the opposing party at least fifteen days before the scheduled hearing.
>
> (2) The non-moving party must provide to the moving party any report not provided by the moving party at least ten days before the scheduled hearing.

> D. Any report submitted to the opposing party in accord with B(1) or B(2) above **shall be submitted** as an APA exhibit at the hearing unless withdrawn with the consent of the other party, and the non-moving party shall submit only reports not submitted by the moving party.

(Emphasis added). Therefore, any report served on the opposing party is required to be submitted as an APA exhibit. However, per subsection (I), the parties do not waive evidentiary objections. Therefore, the language of the statute requires that a timely report would come into evidence as an APA exhibit, but remains subject to objection. Subsection J clarifies this apparent conflict by requiring that "[a]ll available evidence and testimony shall be presented at the scheduled hearing . . . ." S.C. Code Ann. Reg. 67-612(J). Therefore, any evidence bearing on exclusion of a report must be submitted at a hearing.

This presentation of evidence was understood and explained in Gadson:

> Hutchinson's report was properly filed as an APA submission and timely served on Mikasa. The regulations allow for APA submissions. Gadson complied with the regulations by giving notice. Further, it was clear from the APA submission and the Brief that the vocational expert would not be testifying live but a report would be submitted in lieu of live testimony. After the service of the Brief on Mikasa, defense counsel made no attempt to depose Hutchinson so as to challenge her credentials or expertise nor did he attempt to subpoena her to the hearing or to subpoena any additional qualifications he may have desired. Mikasa objected to the report at the hearing but made no request to depose Hutchinson at a later date. Moreover, the Administrative Procedures Act, S.C.Code Ann. § 1-23-310, et seq., allows for submission of such a report. Thus, Hutchinson's report was admissible under the APA and Regulations 67-611 and 67-612.

Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E.2d 262, 269 (Ct. App. 2006). Similarly, Innovative Fibers submitted the report of Dr. Mennear as their APA #7, along with Dr. Mennear's *curriculum vitae*. Pursuant to the Exhibit sheet, this APA submission was submitted on April 2, 2015, for a hearing on April 14, 2015. (APA Exhibit Sheet, dated April 2, 2015). Because Innovative Fibers was the non-moving party, this submission was

timely pursuant to Regulation of 67-612. Therefore, Innovative Fibers met the requirements for submission of Dr. Mennear's report as an APA exhibit. While Lipscomb timely and specifically objected to Dr. Mennear's report before the Single Commissioner, that objection was overruled. (Tr. 7:12-13.) Lipscomb did not submit a deposition of Dr. Mennear nor did he pursue a specific Order adjourning the hearing for the deposition of Dr. Mennear. Moreover, Lipscomb did not submit any evidence at the time of the hearing rebutting the basis of Dr. Mennear's opinion. Indeed, Lipscomb did not submit any expert evidence regarding intoxication. Therefore, pursuant to Regulation 67-612, not only is Dr. Mennear's report in evidence, but Lispcomb, without submitting any expert evidence, has no evidentiary basis to impugn or impeach the methods or conclusions used by Dr. Mennear as explained in the report. Based solely on the allowable procedures under the Administrative Procedures Act, the content of Dr. Mennear's report is unassailable on appeal.

Lipscomb also impugns the opinion of Dr. Mennear, because Dr. Mennear relied upon the deposition testimony in assessing his expert opinion, rather than the more detailed hearing testimony. (Respondent's Br. p. 21). However because of the requirement that expert opinion reports be submitted prior to the hearing, an expert could never rely on hearing testimony. See Commission Reg. 67-612(B),(E). The expert's report must be submitted prior to the hearing in order to be considered, and, absent an order for adjournment, all evidence must be submitted at the time of the hearing. Commission Reg. 67-612(J). The regulations allow no mechanism for a party to collect the hearing transcript and provide the same to its expert, in order for the expert to issue a written opinion based upon the hearing testimony. In this claim, it is undisputed that Dr. Mennear reviewed

Lipscomb's sworn deposition testimony and rendered an opinion, based in part, on that testimony.

II. The Lay Evidence of Intoxication Supports Dr. Mennear's Report.

Finally, Lipscomb spends a significant amount of time weighing the lay evidence of intoxication versus the expert evidence. Dr. Mennear is the sole person to offer expert evidence of intoxication in this claim. Lipscomb offered no expert opinion in response to Dr. Mennear. However, Lipscomb attempts to attack this opinion through inference of lay testimony, which is not persuasive.

Three witnesses provided live testimony at the hearing: Lipscomb, Nashid Henderson, and Joanne Matthiesen. Nashid Henderson was the only witness to have interacted with Lipscomb prior to the accident on the date of injury. Lipscomb attempts to portray Mr. Henderson as an objective employee who saw no outward signs of intoxication of Lipscomb. (See Tr. 62.) However, Lipscomb omits key information describing Mr. Henderson's relationship with Lipscomb, which supports an inference of bias in favor of Lipscomb. Namely, Lipscomb and Henderson had known each other since childhood. (Tr. 40-42, 55.) Their relationship was close enough that they would call each other "brother." (Tr. 40, 55.) Lipscomb described Henderson as his best friend. (Tr. 40.) Henderson would provide Lipscomb rides to work. (Tr. 40, 57.) This relationship implies bias in favor of Lipscomb, and Henderson's testimony should be viewed through the lens of his relationship with Lipscomb.

Lipscomb also attempts to bolster this lay evidence in opposition to intoxication by repeating a conclusion that is at best a mischaracterization of Innovative Fibers' alcohol policy. Lipscomb repeats that the Employer's supervisors "should be trained to look out for impaired employees." (Respondent-Appellant's Brief 14; see also id. at 6 ("the role of

the supervisor includes determining whether or not an employee is impaired.").) This is not accurate. The policy on alcohol abuse sets forth that "it is the responsibility of the company supervisors to counsel employees whenever they see changes in performance or behavior that suggest an employee has a drug or alcohol problem." (Defendants' Exh. 2, p. 6.) The text of this policy implies that a supervisor should monitor performance or behavior over the course of time and consider whether any changes result from a substance abuse problem. There is nothing in the alcohol abuse policy that would suggest training or expertise in identifying an intoxicated employee on a day-to-day basis. Therefore, this supposed absence of evidence is not indicative that Lipscomb was not intoxicated. Rather, at most the company's supervisors had seen no pattern of intoxication from Lipscomb's behavior or performance over the course of his employment. Indeed, this is the only reasonable interpretation of the policy, as the policy itself puts the responsibility on the employee to monitor his alcohol consumption, and that an employee should not attend work when he is under the influence of alcohol or has a blood alcohol level of .04 or higher. (Defendants' Exh. 2, p. 6.)

Finally, Lipscomb makes much of the lay testimony denying intoxication. However, there is equally compelling lay testimony that supports the inference that Lipscomb was intoxicated. First, this accident occurred within the first hour of the work day. (Tr. 26.) After a safety meeting and after preparing his work station, Lipscomb began his re-feeding work, when he made the misguided judgment to reach into a machine. (Tr. 24-27.) Furthermore, Lipscomb admitted multiple times that he had never previously placed his hand inside the machine and had never seen another employee place a hand inside the machine. (Tr. 49-50; Cl.'s Dep. 38.) Lipscomb's decision to place his hand in a

machine, when he had never done so previously, and knew not to, is perfectly consistent with Dr. Mennear's opinion:

> 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, and caution are impaired.

(Defendants' APA #7, p. 159 (Emphasis added).) Dr. Mennear's opinion is the only expert evidence in the Record. He opines that, at the blood alcohol concentration as shown in the hospital record, Lipscomb would have had a more difficult time perceiving danger, with judgment and caution impaired. Lipscomb then places his hand near the roller, something that he had not done before and knew not to do. The reasonable inference from this lay evidence in the Record is consistent with Dr. Mennear's opinion, and the observations of Lipscomb's best friend are not sufficiently probative to disregard Dr. Mennear's opinion in this matter.

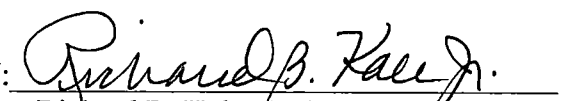
CONCLUSION

For the reasons set forth above and in the Appellants-Respondents' Initial Brief, the Appellants-Respondents request a reversal of the Orders of the Commission.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

November 16, 2016

BY: 

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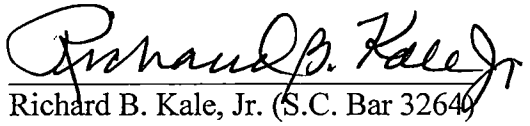
PROOF OF SERVICE

I certify that I have served the Appellants' Initial Reply Brief of Appellants-Respondents on James Lipscomb by depositing a copy of it in the United State Mail, postage prepaid, on November 16, 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.

November 16, 2016



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November 16, 2016

The Honorable Jenny Abbott Kitchings
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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:

I enclose for filing one copy of the Appellants' Initial Reply Brief of Appellants-Respondents. By copy of this letter I am also serving a copy of the Initial Reply Brief on the attorney for the Respondent-Appellant.

With cordial best wishes, I am

Very truly yours,

WILLSON JONES CARTER & BAXLEY, P.A.

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RBK,Jr/jw

cc: Mr. W. Scott Palmer