THE STATE OF SOUTH CAROLINA
In The Court Of Appeals



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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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WCC FILE NO. 1402652

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James Lipscomb, Employee, Respondent-Appellant,

v.

Stein Fibers/Innovative Fibers, Employer,
and StarNet Insurance Company, Carrier, Appellants-Respondents.

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# RESPONDENTS' BRIEF OF APPELLANTS-RESPONDENTS

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## STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE COMMISSION ERRED IN DENYING TEMPORARY TOTAL DISABILITY BENEFITS BECAUSE LIPSCOMB WAS TERMINATED FOR CAUSE FOR VIOLATING INNOVATIVE FIBERS' ALCOHOL ABUSE POLICY?

II. WHETHER THE COMMISSION ERRED IN FINDING THAT THE REASON FOR LIPSCOMB'S TERMINATION WAS HIS VIOLATION OF INNOVATIVE FIBERS' ALCOHOL ABUSE POLICY?

## STATEMENT OF THE CASE

Lipscomb was employed by Innovative Fibers as a baler at its Spartanburg plant. (R.p. 78, 159). 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. (R.p. 46). Thereafter, on September 3, 2014, the Employer and Carrier (hereinafter Innovative Fibers) 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. (R.p. 45). 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. (R.p. 44). Innovative Fibers 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). (R.p. 43).

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 Innovative Fibers' intoxication defense. (R.pp. 14-31). The Single Commissioner did not address Innovative Fibers' defense that the injury did not "arise out of" the employment because of Lipscomb's violation of the company's Alcohol Abuse Policy. On December 28, 2015, Innovative Fibers filed a Form 30 (Request for Commission Review) alleging numerous grounds of error. (R.pp. 37-42).

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. (R.pp. 2-13). 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. (R.pp. 11-12). 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. (R.p. 12).

On June 3, 2016, Innovative Fibers filed a Motion for Rehearing contending that the Appellate Panel had overlooked Innovative Fibers' 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. (R.pp. 35-36). On June 20, 2016, the Appellate Panel issued a form Order denying Innovative Fibers' Motion for Rehearing. (R.p. 1).

On July 20, 2016, Innovative Fibers timely filed their Notice of Appeal with the South Carolina Court of Appeals. On July 28, 2016, Innovative Fibers filed its Amended Notice of Appeal. (R.p. 33). On July 25, 2016 Lipscomb filed his Notice of Cross-Appeal. On July 29, 2016, Lipscomb filed his Amended Notice of Cross-Appeal. (R.p. 32).

## STATEMENT OF THE FACTS

Lipscomb was hired by Innovative Fibers on April 30, 2013. (R.p. 153). At the time of his injury, he had worked as a baler for approximately one year. (R.pp. 80, 159). [1] Innovative Fibers manufactures fibers used in the automobile industry, household furnishings, BMW bed liners, truck bed liners, Clorox toilet wands, and Brillo pads. (R.pp. 81, 135, 159). As a baler, Lipscomb is the last person in the manufacturing process. (R.p. 162).

Lipscomb worked the night shift from 8:00 p.m. to 8:00 a.m. (R.p. 159). He had worked the night shift on Wednesday, March 19, 2014, and had gotten off at 8:00 a.m., Thursday morning. (R.pp. 83, 172). Lipscomb asked a co-worker, nicknamed "Buzzard," to come by his house after work to help him repair his hot water heater. (R.pp. 83, 172-173). Lipscomb and "Buzzard" worked on the hot water heater until approximately 11:30 a.m. (R.p. 173). 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. (R.pp. 84, 102-103, 177). Lipscomb testified that he drank the shot of brandy at about 8:30 a.m. (R.p. 176). 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." (R.p. 103). (Emphasis added).[2]

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[1] Lipscomb had also worked for approximately seven months at Leigh Fibers as a baler (R.pp. 153-154), and therefore knew the baling procedure, although the baling system was different. (R.p. 79).

[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%). (R.pp. 240, 353). 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. (R.p. 340).

Lipscomb arrived at work at approximately 7:45 p.m. on Thursday night, March 20, 2014. (R.p. 178). At that time, he attended a preshift safety meeting. (R.pp. 87-88, 178). Lipscomb was advised at the safety meeting that he would be working on a re-feed bale. (R.p. 89). 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. (Id.) Lipscomb testified that he had to pick up the fibers by hand and throw it onto the rollers of the baling machine. (R.pp. 90-92, 182). The fibers in the re-feed bale have already been cut in the initial baling process, so Lipscomb just had to throw the cut fibers onto baling machines. (R.p. 182). Rollers then move the fibers onto a conveyor which takes the fibers to a hopper. (R.pp. 107-108, 182). The baling machine then compresses the fibers into a bale weighing approximately 550-560 pounds. (R.p. 182). Lipscomb places the fibers into cloth bales and puts six plastic straps around the bale. (R.p. 162-163). The bale is then weighed. (R.p. 163).

Lipscomb testified that at approximately 49 minutes into the shift, he had thrown a lot of fibers onto the rollers. (R.p. 92). Without saying anything to his partner (the cutter), he was using his right hand to knock the fibers off the rollers, when his first two fingers were caught by the rollers and his right arm was pulled into the conveyor of the baling machine. (R.pp. 92, 182-183, 186-187). As a result, Lipscomb suffered a degloving injury to his right arm. (R.p. 281). Lipscomb testified that everyone knew that you should not put your hand near the rollers to knock off the cut fibers (R.p. 183, 185), that he had never done this before (R.p. 185), and that he had never seen another employee use his hand to knock down fibers into the rollers. (Id.)[3]

[3] Lipscomb testified that the company discusses "safety, safety, safety, all the time." (R.p. 179).

Following the injury, EMS was called. (R.pp. 225-233). 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. (R.pp. 143, 212). 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. (R.p. 145). However, she subsequently received a call from a nurse at Spartanburg Regional Medical Center indicating that they had smelled alcohol on Lipscomb's breath. (R.p. 148). Ms. Matthiesen told the nurse to do post-accident drug testing. (R.pp. 148-150).

Ms. Matthiesen testified that Innovative Fibers has drug testing to include pre-employment/post offer, random, reasonable suspicion, and post-accident. (R.p. 136). The company also has a written Substance Abuse Policy, which includes an Alcohol Abuse Policy. (R.pp. 136, 385-389). 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.

(R.p. 389). (Emphasis added). Lipscomb's blood alcohol test at the hospital registered 97 mg/dl (or .097%)[4] which was substantially above the company's policy of .04. (R.pp. 240, 353). On May 22, 2014, Lipscomb was terminated from his employment because his blood alcohol test results violated Innovative Fibers' Alcohol Abuse Policy. (R.p. 396).

[4] It should be noted that Lipscomb's attorney submitted into evidence the hospital's blood alcohol test results. (R.p. 240).

At the time, it was unknown that Lipscomb would file a workers' compensation claim. Lipscomb did not file his claim until August 27, 2014. (R.p. 46).

At the hearing, Appellants presented the report of Dr. John H. Mennear, a toxicologist and Professor Emeritus of Pharmacology and Toxicology at Campbell University. [5] (R.pp. 340-346). Dr. Mennear reviewed the medical reports, the Ethanol-Blood Test, and Lipscomb's deposition testimony. (R.p. 340). 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. (R.p. 341). 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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[5] 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. (R.pp. 342-343).

## 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." Section 1-23-380(5), S.C. Code Ann. (1977). *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., Section 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). The Court will not overturn a decision by the Commission unless the determination is unsupported by substantial evidence. Jones v. Georgia-Pacific Corp., 355 S.C. 413, 416, 586 S.E.2d 111, 113 (2003). "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 WAS CORRECT IN DENYING TEMPORARY TOTAL DISABILITY COMPENSATION BECAUSE LIPSCOMB WAS TERMINATED FOR CAUSE FOR VIOLATING INNOVATIVE FIBERS' ALCOHOL ABUSE POLICY.**

Innovative Fibers has an Alcohol Abuse Policy that 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.

(R.p. 389) (Emphasis added). Lipscomb's blood alcohol test performed at Spartanburg Regional Medical Center registered 97 mg/dl or .097%, which was more than twice the limit placed by Innovative Fibers' Policy. (R.pp. 240, 353). On May 22, 2014, Lipscomb was notified that his employment was terminated, because his post-accident blood alcohol test violated Innovative Fibers' Alcohol Abuse Policy. (R.p. 396). As noted by the Commission, Lipscomb did not contest or appeal his termination. (R.p. 12). Lipscomb was well aware of Innovative Fibers' Alcohol Abuse Policy as he had signed a company form acknowledging that he had received and read the policy, that he would submit to testing, and that he understood that a positive result might lead to termination of his employment and might affect his right to obtain workers' compensation benefits. (R.p. 391).

The Appellate Panel determined that Lipscomb was out of work because he violated Innovative Fibers' Alcohol Abuse Policy. By this misconduct, which resulted in his

termination from employment, Lipscomb effectively denied Innovative Fibers the opportunity to offer him suitable employment after his injury. Innovative Fibers had no choice but to enforce company policy and terminate Lipscomb's employment.[6]

In Pollack v. Southern Wine & Spirits, 405 S.C. 9, 747 S.E.2d 430 (2013), the Supreme Court affirmed the Commission's denial of temporary total disability benefits (TTD), because the Claimant had been terminated for cause. Pollack suffered an admitted injury to his back while lifting a case of alcohol. He was allowed to return to work five days later with lifting restrictions. Two months after the work injury, and while on light duty, Pollack was terminated from his employment for failure to report an accident involving a company vehicle. The Commission determined that Pollack was terminated for cause stemming from his violation of company policy. The Commission stated that Section 42-9-260 cannot be read to provide that an employer may never terminate an employee for cause without triggering temporary total disability benefits (TTD). The Supreme Court held that there was substantial evidence to support the Commission's finding that Pollack's inability to earn wages was the result of his termination for cause.

In this case, Lipscomb was terminated because he violated company policy by coming to work with a blood alcohol level of .097. As in Pollack, to hold that Lipscomb

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[6] A delay in terminating Lipscomb's employment for violating a company policy in order to provide light duty in a workers' compensation case would have allowed Lipscomb to argue that a later termination was retaliatory. As noted by the Court of Appeals in Wallace v. Milliken & Co., 300 S.C. 553, 558, 389 S.E.2d 448, 450-1 (S.C. App. 1989):

> Had Milliken, as it claims, discharged Wallace solely because he violated safety rules, a charge Wallace denies, it would have told Wallace he was fired immediately, upon concluding its investigation into his accident. Milliken would not have waited until Wallace returned to work in December, considering what the record suggests Milliken does in other cases involving employee violations of its safety rules.

The Court of Appeals affirmed the trial judge's finding that Wallace was terminated in retaliation and not because he violated a safety rule.

is entitled to TTD would lead to the absurd result that an employer could never terminate an employee whose injury was accompanied by a violation of a specific company policy, without triggering TTD benefits. By his misconduct, Lipscomb effectively prevented Innovative Fibers from having the opportunity to offer restricted duty. Therefore, Lipscomb's inability to earn wages was due to his own misconduct which resulted in his termination for cause from his employment and the removal of any possibility that he could be offered modified duty.

Also, Lipscomb failed to present evidence that he was totally disabled continuously for the entire period from March 20, 2014 to March 23, 2015. No out of work slips from the treating physicians were submitted into evidence showing continuing total disability for the more than one year period. A claimant bears the burden of proving entitlement to temporary disability compensation. Lee v. Bandex, Inc., 406 S.C. 97, ___, 749 S.E.2d 155, 157 (S.C. App. 2013); Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646, 648 (1967). The Claimant satisfies his burden by proving work restrictions that prevent him from performing his regular job and the unavailability of light-duty employment through the same employer. Lee 406 at ___, 749 S.E.2d at 158. Lipscomb proved neither element. He did not prove his work restrictions, and the unavailability of light duty was due to his own misconduct in violating Innovative Fibers' Alcohol Abuse Policy. Therefore, there was no evidence in the record upon which the Single Commissioner could find that Lipscomb was unable to work for the entire one year period.

Moreover, the Single Commissioner failed to make the necessary finding that Lipscomb suffered "disability" as defined by Section 42-1-120, S.C. Code Ann. (1976). Since Lipscomb failed to present facts establishing his right of temporary disability

compensation, the Single Commissioner's award of TTD was based upon conjecture and speculation. Shealy v. Algernon Blair, Inc., 156 S.E.2d 15 648. 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). It is well established that a claimant, who asserts the right to compensation, must establish by the preponderance of the evidence the facts which will entitle the claimant to an award under the Workers' Compensation Act, and such award must not be based on surmise, conjecture or speculation. Lorick v. South Carolina Elec. & Gas Co., 245 S.C. 513, ___, 141 S.E.2d 662, 664 (1965); Glover v. Columbia Hospital, 236 S.C. 410, 114 S.E.2d 565 (1960). Lipscomb simply failed to carry his burden of proof.

Finally, Innovative Fibers would also rely upon the Argument made in its Appellants' Brief that because of Lipscomb's violation of the company's Alcohol Abuse Policy, his injury did not "arise out of" the employment. Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (S.C. App. 1994). Obviously, if Lipscomb's injury is not compensable, he would not be entitled to temporary total disability compensation benefits.

## II.

## THE COMMISSION WAS CORRECT IN FINDING THAT THE REASON FOR LIPSCOMB'S TERMINATION WAS HIS VIOLATION OF INNOVATIVE FIBERS' ALCOHOL ABUSE POLICY.

On May 22, 2014, JoAnne Matthiesen wrote to Lipscomb as follows:

> The post-accident alcohol test you took on March 20, 2014 has been determined to be above the legal limit according to our Drug Free Work Place Policy. The test was confirmed positive in accordance with Department of Health and Human Service Standards.

> In accordance with our company policy you are hereby terminated effective May 21, 2014. You may appeal this decision or challenge it legally or administratively at your expense.

(R.p. 396). (Emphasis added). Ms. Matthiesen testified that Lipscomb was terminated as a result of the failed post-accident blood alcohol test. (R.p. 139). Lipscomb's counsel did not contest that this was the reason for Lipscomb's termination and in fact concurred with that fact. In the deposition of JoAnne Matthiesen, Lipscomb's Attorney stated:

> Q. Okay. Now, I think I'm done with the transcript, but let me ask you, subsequently, Mr. Lipscomb was terminated. He was sent a letter, I believe, ---
>
> A. Yes.
>
> Q. --- sometime in May of 2014. And the reason cited that he tested positive, I think the letter said....
>
> * * * * *
>
> Q. So, is it a fair statement that that was the sole reason he was terminated, that test result?
>
> A. Yes.

(R.p. 145-146). In fact, Lipscomb's Attorney agreed at the Appellate Panel hearing that Lipscomb was terminated for violation of Innovative Fibers' Alcohol Abuse policy.

> COMMISSIONER BECK: I assume your client was terminated based on the drug-free policy?
>
> MR. PALMER: He was, Commissioner.
>
> COMMISSIONER BECK: When did that termination take effect?
>
> MR. PALMER: I think it was within two or three days I believe. He got a letter within two or three days. I believe. I don't remember the date....

(R.p. 63).

Now, Lipscomb's Attorney wishes to raise conjecture, without any evidence in the record, that there may have been some other reason for Lipscomb's termination. However, the Commission cannot make a finding based upon conjecture or speculation. Broughton v. South Carolina Game & Fish Dept., 219 S.C. 50, 64 S.E.2d 152 (1951).

Lipscomb's argument in this regard is based solely upon the fact that he was not terminated until May 22, 2014, approximately two months after his accident. However, his argument is based upon the erroneous assumption that the hospital records were available on March 21, 2014, the day following the accident. (Brief of Respondent-Appellant, p. 10). There is absolutely no evidence in the record to support that statement. There is no evidence that hospital records would have been released while Lipscomb was still in the hospital. In fact, the hospital records that Lipscomb submitted in his APA #2 and #3 indicate that they were printed on April 30, 2014. (R.pp. 234-327).

Moreover, Lipscomb's speculation that he was terminated "to retaliate for his asserting a claim for workers' compensation benefits" is patently frivolous, because Lipscomb had not filed a claim at the time of his termination and did not do so until August 27, 2014, three months after his termination. (R.p. 46).

Finally, Lipscomb argues that the Appellate Panel based its decision to deny temporary total disability benefits (TTD) upon the fact that Lipscomb did not contest or appeal his termination. It is clear from the termination letter of May 22, 2014 that Lipscomb was advised of his right to appeal or challenge the termination decision (R.p. 396), but chose not to exercise that right. While that is certainly additional evidence confirming that Lipscomb was terminated for violation of Innovative Fibers' Alcohol

Abuse policy, it is clear that the Commission's basis for reversing the award of TTD was Lipscomb's termination for cause as a result of his violation of company policy. (R.p. 12).

## CONCLUSION

For the reasons set forth above, the Commission's findings and conclusions that Lipscomb was not entitled to TTD benefits because of his termination for violation of Innovative Fibers' Alcohol Abuse Policy, should be affirmed.

Respectfully submitted,

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December 28, 2016

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## CERTIFICATE OF COUNSEL

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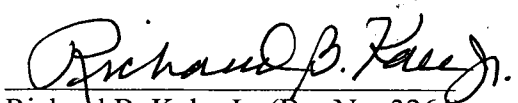
The undersigned certifies that the Final Respondents' Brief of Appellants-Respondents complies with Rule 211(b), SCACR

December 28, 2016



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