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**SC Court of Appeals**

APPELLATE PANEL  
DECISION AND ORDER  
OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1501883

Stephen Livingston,

APPELLANT  
CLAIMANT,

vs.

The Building Center, Inc.,

EMPLOYER,

AND

Old Republic Insurance Company,

CARRIER,  
DEFENDANTS/RESPONDENTS

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Appellate Panel Review held in Columbia, South Carolina on  
December 12, 2016 per notices timely and properly served  
upon all parties of interest.

Appellate Panel Decision and Order filed  
February 23, 2017

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APPEARANCES:

Appellant Stephen Livingston, Claimant of Columbia, South  
Carolina represented by Holly S. Atkins, Esquire.

Defendants/Respondents represented by Tracy Welsh Tiddy,  
Esquire of Willson Jones Carter & Baxley, P.A. in  
Greenville, South Carolina.

## STATEMENT OF THE CASE

Claimant filed a Form 50, Request for Hearing, on or about April 22, 2016, alleging either a specific injury to his right shoulder on February 12, 2016, or a repetitive trauma injury while he was "carrying heavy items on his shoulder." Defendants filed a Form 51 on April 27, 2016, denying both a specific injury and a compensable repetitive trauma injury. A hearing was held before Commissioner T. Scott Beck on July 21, 2016, in Columbia, South Carolina. At the hearing, Claimant contended he had sustained a repetitive trauma injury to his right shoulder, resulting in impingement syndrome and aggravation of a lipoma. He also requested medical treatment and all related benefits under the Act. Claimant did not seek temporary benefits.

At the hearing, it was Defendants' position that Claimant cannot satisfy his burden of proving a compensable repetitive trauma injury pursuant to S.C. Code Ann. § 42-1-172. Specifically, Defendants denied that Claimant's job responsibilities are repetitive in nature. In addition, Defendants contended that the greater weight of the evidence does not support a conclusion that Claimant has impingement syndrome which was directly caused by his work activities. Defendants also maintained that the greater weight of the evidence does not support a finding that Claimant's lipoma was either directly caused or aggravated by his work duties or the conditions under which his work was performed. Accordingly, Defendants sought a denial of the claim.

The parties were heard by Commissioner T. Scott Beck, on July 21, 2016, in Columbia, South Carolina. On September 21, 2016, the Single Commissioner issued the Decision and Order.

The Single Commissioner made the following Findings of Fact:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Stephen Livingston as Employee-Claimant and The Building Center as Employer and Old Republic

Insurance Company as Carrier, Defendants. Such a finding is based upon the parties' stipulation within the Commission's file.

2. Claimant's average weekly wage is \$515.42 with a corresponding compensation rate of \$343.63. Such a finding is based upon the parties' stipulation and the Commission's file.

3. Claimant alleges an injury to his right shoulder, occurring on February 12, 2015, as a result of repetitive trauma. Such a finding is based upon the Claimant's testimony, the Commission's file, and the positions of counsel at hearing.

4. Claimant testified he injured his right shoulder because his job included lifting windows, doors, and trim on his shoulder and his complaints could not have "come from no more than that type of work." Claimant also testified he does not "do anything else more than lifting with my shoulder but on the job." Such finding is based on Claimant's testimony.

5. The primary issues for determination in this matter are the compensability of a repetitive trauma injury to the claimant's right shoulder, the aggravation of a lipoma on Claimant's right shoulder and resulting medical care, if found compensable.

6. The record contains reports from two competing IMEs involving one-time visits. Dr. Lee was selected by the Claimant and opines that both conditions are compensable. Dr. Evans was selected by the Defendants and opines that neither condition is related; such finding is based on the medical records of Dr. Lee and Dr. Evans.

7. While Dr. Lee completed a questionnaire for Claimant's counsel and testified he felt Claimant's shoulder problems were most probably related to his work, Dr. Lee's understanding of Claimant's job duties is in opposition with Claimant's testimony. Claimant admitted he lifts lumber for approximately 20 percent of the day and drives the rest of the day. However, Dr. Lee understood putting pieces of wood on Claimant's shoulder was "pretty much what he does most of the day." Further, Dr. Lee and Claimant's counsel repeatedly referred to "lumber" that is "heavy"

in Dr. Lee's deposition. To the contrary, Claimant lifts "trim" and "doors" weighing between 30 and 40 pounds. Furthermore, Claimant routinely had a helper assigned to work with him. Such findings are based on Claimant's testimony, the testimony of Bo Koon, the deposition of Dr. Lee, and the medical record as a whole.

8. Dr. Lee has not pinpointed an exact condition the Claimant has. He predicts it may be impingement, but this is backed by little evidence. Because Dr. Lee has not identified a specific injury, it is difficult to link the injury with repetitive trauma in the workplace. Such findings are based on the deposition of Dr. Lee and the medical record as a whole.

9. Claimant is essentially asking the Defendant to provide an MRI to determine what, if any, injury exists. Such finding is based on the Claimant's testimony, the parties' positions at hearing, and the deposition of Dr. Lee.

10. Dr. Lee's opinion that repetitive is "anything more than once a day" is inconsistent with the intent of the South Carolina Workers' Compensation Act. Such a finding is based on the deposition of Dr. Lee and the record as a whole.

11. Dr. Lee admitted lipomas are idiopathic in nature. Further, Dr. Lee admitted the resting of work materials on Claimant's shoulder would not alter the state of the lipoma. Such findings are based on the deposition of Dr. Lee and the medical record as a whole.

12. I find insufficient medical evidence in Dr. Lee's report or deposition to conclude that the lipoma was either caused or aggravated by the Claimant's employment. Such finding is based on the medical record of Dr. Lee and Dr. Lee's deposition.

13. Dr. Lee's medical opinion is speculative. Such a finding is based on Claimant's testimony, the deposition of Dr. Lee, and the medical record as a whole.

14. Dr. Evans opined most probably to a reasonable degree of medical certainty that the Claimant's shoulder problems (the lipoma and non-specific shoulder pain) were not related to

carrying lumber on his shoulder. I give Dr. Evans medical opinion greater weight. Such finding is based on the deposition of Dr. Lee, the report of Dr. Evans and the medical record as a whole.

15. Claimant has not met his burden of proving that his repetitive lifting of trim at work caused an injury or an aggravation of a pre-existing condition on or about February 12, 2015. Such finding is based on Claimant's testimony, the deposition of Dr. Lee, and the medical record as a whole.

16. Claimant has further not met the burden supporting that his lipoma was caused or aggravated by his work duties. Such finding is based on Claimants' testimony, the deposition of Dr. Lee, and the medical record as a whole.

17. Claimant has failed to carry his burden of proving that he sustained a repetitive trauma injury, aggravation of a preexisting condition, or any other alleged injury to his right shoulder arising from his work duties. These findings are based on the record as a whole. Therefore, Claimant's claim is hereby denied, and this matter is dismissed.

The Single Commissioner made the following Conclusions of Law:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.
2. Under § 42-1-160, Claimant did not sustain a compensable injury by accident arising out of and in the course and scope of his employment on or about February 12, 2015.
3. Under § 42-9-35, Claimant did not sustain a compensable aggravation of a preexisting condition on or about February 12, 2015.
4. Under § 42-1-172, Claimant cannot satisfy his burden of proving a compensable repetitive trauma injury.
5. Under § 42-9-60 Claimant is not entitled to medical benefits as he has not established a compensable injury by accident, arising out of his employment, under § 42-1-160, §

42-1-172 or § 42-9-35.

6. Claimant is not entitled to benefits for permanency under § 42-9-30 or § 42-9-10 as he has not established a compensable injury.

On September 23, 2016, Claimant timely appealed the Single Commissioner's Decision and Order via filing a Form 30, Request for Commission Review, asserting the following exceptions to the Single Commissioner's September 21, 2016 Decision and Order:

1. The Single Commissioner erred in Finding of Fact number 7, the error being that the greater weight of the evidence supports that Dr. Lee understood the job duties of Mr. Livingston.
2. The Single Commissioner erred in Finding of Fact number 8, the error being that the greater weight of the evidence supports that Dr. Lee did pinpoint an exact condition that needs further evaluation to determine treatment.
3. The Single Commissioner erred in Finding of Fact number 9, the error being that the Claimant is asking for an MRI to determine proper treatment, not if an injury exists. Dr. Lee opines an injury does exist.
4. The Single Commissioner erred in Finding of Fact number 10, the error being that Dr. Lee's statements about what constitutes a repetitive injury are taken out of context, and using one sentence in a lengthy discussion to discredit Dr. Lee misrepresents the intent of his medical opinion.
5. The Single Commissioner erred in Finding of Fact number 12, the error being that the greater weight of the evidence supports that the lipoma was aggravated by the Claimant's employment. Such finding is based on the medical record of Dr. Lee and Dr. Lee's deposition.

6. The Single Commissioner erred in Finding of Fact number 13, the error being that the greater weight of the evidence supports that Dr. Lee is a credible doctor, and that he made his opinions regarding Claimant's shoulder to a reasonable degree of medical certainty, most probably, and it is not speculative.
7. The Single Commissioner erred in Finding of Fact number 14, the error being that the greater weight of the evidence supports that Dr. Lee's medical opinion should be given greater weight than Dr. Evan's medical opinion.
8. The Single Commissioner erred in Finding of Fact number 15, the error being that Claimant did prove by a preponderance of the evidence that his repetitive lifting of trim at work caused an injury and an aggravation of a pre-existing condition on or about February 12, 2015. Such finding is based on Claimant's testimony, the deposition of Dr. Lee, and the medical record as a whole.
9. The Single Commissioner erred in Finding of Fact number 16, the error being that Claimant did prove by a preponderance of the evidence that his lipoma was aggravated by his work duties. Such finding is based on Claimant's testimony, the deposition of Dr. Lee, and the medical record as a whole.
10. The Single Commissioner erred in Finding of Fact number 17, the error being that Claimant did prove by a preponderance of the evidence that he sustained a repetitive trauma injury, aggravation of a pre-existing condition, or any other alleged injury to his right shoulder, and thus the Claimant's claim should be accepted.
11. The Single Commissioner erred as a Matter of Law, in Conclusions of Law number 2, the error being that the greater weight of the evidence supports the Claimant did sustain a compensable injury by accident arising out of and in the course and scope of his employment on or about February 12, 2015, under § 42-1-160.

12. The Single Commissioner erred as a Matter of Law, in Conclusions of Law number 3, the error being that the greater weight of the evidence supports that Claimant did sustain a compensable aggravation of a pre-existing condition on or about February 12, 2015, under § 42-9-35.
13. The Single Commissioner erred as a Matter of Law, in Conclusions of Law number 4, the error being that Claimant did prove by a preponderance of the evidence that he suffered a compensable repetitive trauma injury, under § 42-1-172.
14. The Single Commissioner erred as a Matter of Law, in Conclusions of Law number 5, the error being that Claimant did prove by a preponderance of the evidence that he is entitled to medical benefits because he has established a compensable injury by accident, arising out of his employment, under § 42-1-160, § 42-1-172, or § 42-9-35.
15. The Single Commissioner erred as a Matter of Law, in Conclusions of Law number 6, the error being that the greater weight of the evidence supports that Claimant is entitled to benefits for permanency under § 42-9-30 or § 42-9-10 as he has established a compensable injury.

Oral arguments were heard by the undersigned Commissioners of the Appellate Panel on December 12, 2016. The Appellate Panel hereby fully affirms the September 21, 2016 Decision and Order of the Single Commissioner and makes the following Findings of Fact and Conclusions of Law.

#### **FINDINGS OF FACT**

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and

provisions of the South Carolina Workers' Compensation Act, as amended, with Stephen Livingston as Employee-Claimant and The Building Center as Employer and Old Republic Insurance Company as Carrier, Defendants. Such a finding is based upon the parties' stipulation within the Commission's file.

2. Claimant's average weekly wage is \$515.42 with a corresponding compensation rate of \$343.63. Such a finding is based upon the parties' stipulation and the Commission's file.

3. Claimant alleges an injury to his right shoulder, occurring on February 12, 2015, as a result of repetitive trauma. Such a finding is based upon the Claimant's testimony, the Commission's file, and the positions of counsel at hearing.

4. Claimant testified he injured his right shoulder because his job included lifting windows, doors, and trim on his shoulder and his complaints could not have "come from no more than that type of work." Claimant also testified he does not "do anything else more than lifting with my shoulder but on the job." Such finding is based on Claimant's testimony.

5. The primary issues for determination in this matter are the compensability of a repetitive trauma injury to the claimant's right shoulder, the aggravation of a lipoma on Claimant's right shoulder and resulting medical care, if found compensable.

6. The record contains reports from two competing IMEs involving one-time visits. Dr. Lee was selected by the Claimant and opines that both conditions are compensable. Dr. Evans was selected by the Defendants and opines that neither condition is related; such finding is based on the medical records of Dr. Lee and Dr. Evans.

7. While Dr. Lee completed a questionnaire for Claimant's counsel and testified he felt Claimant's shoulder problems were most probably related to his work, Dr. Lee's understanding of Claimant's job duties is in opposition with Claimant's testimony. Claimant admitted he lifts lumber for approximately 20 percent of the day and drives the rest of the day. However, Dr. Lee

understood putting pieces of wood on Claimant's shoulder was "pretty much what he does most of the day." Further, Dr. Lee and Claimant's counsel repeatedly referred to "lumber" that is "heavy" in Dr. Lee's deposition. To the contrary, Claimant lifts "trim" and "doors" weighing between 30 and 40 pounds. Furthermore, Claimant routinely had a helper assigned to work with him. Such findings are based on Claimant's testimony, the testimony of Bo Koon, the deposition of Dr. Lee, and the medical record as a whole.

8. Dr. Lee has not pinpointed an exact condition the Claimant has. He predicts it may be impingement, but this is backed by little evidence. Because Dr. Lee has not identified a specific injury, it is difficult to link the injury with repetitive trauma in the workplace. Such findings are based on the deposition of Dr. Lee and the medical record as a whole.

9. Claimant is essentially asking the Defendant to provide an MRI to determine what, if any, injury exists. Such finding is based on the Claimant's testimony, the parties' positions at hearing, and the deposition of Dr. Lee.

10. Dr. Lee's opinion that repetitive is "anything more than once a day" is inconsistent with the intent of the South Carolina Workers' Compensation Act. Such a finding is based on the deposition of Dr. Lee and the record as a whole.

11. Dr. Lee admitted lipomas are idiopathic in nature. Further, Dr. Lee admitted the resting of work materials on Claimant's shoulder would not alter the state of the lipoma. Such findings are based on the deposition of Dr. Lee and the medical record as a whole.

12. We find insufficient medical evidence in Dr. Lee's report or deposition to conclude that the lipoma was either caused or aggravated by the Claimant's employment. Such finding is based on the medical record of Dr. Lee and Dr. Lee's deposition.

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15. Claimant has not met his burden of proving that his repetitive lifting of trim at work caused an injury or an aggravation of a pre-existing condition on or about February 12, 2015. Such finding is based on Claimant's testimony, the deposition of Dr. Lee, and the medical record as a whole.

16. Claimant has further not met the burden supporting that his lipoma was caused or aggravated by his work duties. Such finding is based on Claimants' testimony, the deposition of Dr. Lee, and the medical record as a whole.

17. Claimant has failed to carry his burden of proving that he sustained a repetitive trauma injury, aggravation of a preexisting condition, or any other alleged injury to his right shoulder arising from his work duties. These findings are based on the record as a whole. Therefore, Claimant's claim is hereby denied, and this matter is dismissed.

#### CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.
2. Under § 42-1-160, Claimant did not sustain a compensable injury by accident arising out of and in the course and scope of his employment on or about February 12, 2015.
3. Under § 42-9-35, Claimant did not sustain a compensable aggravation of a preexisting condition on or about February 12, 2015.

4. Under § 42-1-172, Claimant cannot satisfy his burden of proving a compensable repetitive trauma injury.

5. Under § 42-9-60 Claimant is not entitled to medical benefits as he has not established a compensable injury by accident, arising out of his employment, under § 42-1-160, §42-1-172 or §42-9-35.

6. Claimant is not entitled to benefits for permanency under § 42-9-30 or § 42-9-10 as he has not established a compensable injury.

**APPELLATE PANEL ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law,

**IT IS, THEREFORE, ORDERED** that Claimant's request for benefits under the Act is denied.

**IT IS FURTHER ORDERED** that this claim is dismissed, with prejudice.

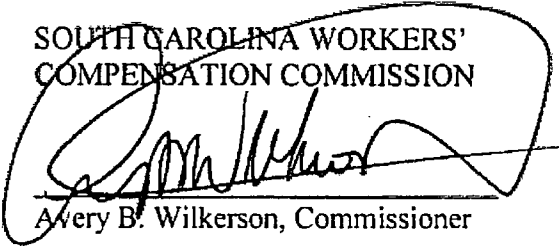
No hearing costs are assessed in this instance.

**THE DECISION AND ORDER OF THE SINGLE COMMISSIONER DATED SEPTEMBER 21, 2016 IS HEREBY AFFIRMED.**


**AND IT IS SO ORDERED.**

**AFFIRMED:**

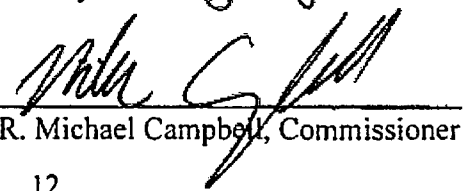
SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION



Avery B. Wilkerson, Commissioner



Melody L. James, Commissioner



R. Michael Campbell, Commissioner

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

***By Eugenia Hollmon on February 23, 2017***

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MAR 21 2017  
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