THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

Melody L. James, Commissioner
Mike Campbell, Commissioner
Avery B. Wilkerson, Jr., Commissioner

Trial Court Case No. 1215107
Appellate Case No. 2016-002416

Randy Faulkenberry, Employee, Claimant, Respondent,

v.

Conbraco Industries, Inc., Employer, and Great American Alliance Insurance Company, Carrier, Appellants.

INITIAL BRIEF OF APPELLANT

March 31, 2017

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9. **Is the Commission's Order defective, improper and not enforceable because it fails to SEPERATELY state each individual finding of Fact and Conclusions of Law and does not have a specific ORDER? The multiple subsections set forth, violate the SC Workers Compensation Act and The APA regarding separately stating each finding of fact and conclusion of law.**
10. **Is the Commission's Order defective, improper and not enforceable on the grounds that there is no separate statement of evidence of case to support findings of fact and conclusion of Order?**

STATEMENT OF THE CASE

On June 19, 2012, Claimant, Randy Faulkenberry, contends that he sustained a compensable back injury when he slipped on oil. Claimant initially claimed an injury to the groin only, but then alleged an injury to his back. At the hearing, the claimant dropped his claim for any treatment or payment for benefits related to the groin injury. Defendants denied the claim on

the basis that the accident was unwitnessed and could not have occurred in the way that he claims and the claimant's back problems were not causally related to the injury.

By Form 50 dated May 6, 2015, Mr. Faulkenberry sought: (a) a determination he had sustained a compensable back injury on June 19, 2012; (b) satisfaction of previously incurred/causally related medical expenses, as well as additional causally related medical care for the consequences of this back injury; (c) Commission designation of an appropriate treating physician; and (d) accrued/continuing temporary total disability compensation.

The Defendants denied on the grounds the claimant did not complain about any back problems until months after the incident. Defendants also contend that this is an unwitnessed accident and the claimant has numerous stories of how the accident occurred are unreliable. Further, Defendants contend that he suffered no injury as his problems with his back are the same as they were prior to the date of this incident.

A hearing was held on October 28, 2015 in Columbia, South Carolina. After the hearing, the Commissioner issued an order on May 24, 2016 finding the claim compensable.

EVIDENCE OF THE CASE

Mr. Faulkenberry, is a 63 year old high school graduate, who worked as a general factory laborer for Conbraco Industries, Inc., where he had been employed for approximately 3.5 years.

The claimant initially contends that he hurt his groin on June 19, 2012 when he slipped and fell in oil. He had surgery for the groin/hernia and later filed a claim to add an alleged back component. Ultimately, at the hearing, the request for benefits for the groin/hernia were dropped and the only claim brought was for the back.

The claimant contends has a pre-existing back problem of stenosis that he contends was aggravated by the injury. The claimant visited doctors numerous times after the accident without mentioning a back problem. On August 28, 2012, just two months after the accident, the claimant had no back pain and no swelling when he visited his family doctor (Dr. Afulukwe). The neurologist in 2015 stated that there is no evidence of an acute injury on the claimant's MRI and that he had lumbar spinal stenosis and degenerative changes that required years to develop. Therefore, the accident couldn't have cause or aggravated the back problems. Moreover, even if the claimant mentioned any back issues, it was with relation to the problems with the groin.

The Defendants were given multiple versions of mechanics of the accident, such that his credibility cannot be maintained and that the claimants initial complaints only involved the groin and for months after the alleged hernia/groin injury, the claimant did not mention the back. **Even Dr. Johnson, who relates the back injury didn't know the mechanics of the accident.**

Steve Kirchin testified for the defendants. He is the human resources and safety manager at Conbraco and has worked there for 36 years. Mr. Kirchin investigated the accident site after the accident was reported to him by claimant's supervisor. He did not talk with the claimant initially, but they did talk later when he came back in, they talked about light duty. The claimant reported to Steve that he was cleaning up the coolant; he stepped over the fan; his foot slipped out from under him and he fell on the fan, straddled the fan. The claimant never mentioned a back injury to Steve Kirchin but only a groin injury. At the hearing, the claimant contends that he injured himself in 2012 when he was instructed to clean up a coolant spill. The claimant testified that he was sucking up the coolant with a shop vac as some of the coolant had flowed to an inaccessible portion of the floor ("a caged-in area around the machine"; "inside the cage that's around the motors and stuff on the machine"), he "couldn't reach it . . . just standing on the ground" (See, Hearing Transcript, pp. 27 – 28, 34). The claimant then testified that he took his

foot and set it up on the side of the machine, and pull . . . [him]self-up there so [he] . . . could lean over and get down in there and get it out with the wand . . . ." (See, Hearing Transcript, p. 28). After placing his right foot on the side of the machine and using a nearby pipe to "pull . . . myself up . . . so I could get my body and my wand up to reach over, . . . [this] foot . . . [, which had previously] been in coolant[,] . . . shot out from under" him. (See, Hearing Transcript, pp. 28 and 32). He then stated that he went airborne, coming down with the fan between his legs and the fan shot out from under him. The claimant visited the doctor several times after the incident and did not mention any back problems until his doctor's visit on June 28, 2012. At that time, he only admitted to back pain and did not say anything about the fall causing the same. The claimant has an MRI performed. In a visit after the appointment on September 4, 2012, he didn't even complain of back problems. Several MRI's were taken of the claimants back and the MRI's revealed the same stenosis that the claimant was experiencing in 2006.

ARGUMENTS

1. **The Commission erred in finding that the claimant suffered an injury to his lower back when this finding is not supported by the evidence.**
(Questions Presented 1-4)

The claimant has the burden of proving his entitlement to benefits by the greater weight of the evidence. Hill v. Jones, 255 S.C. 219, 178 S.E.29, 142 (1970). In deciding whether substantial evidence supports a finding of causation, it is appropriate to consider both the lay and expert evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154 (S.C. 1999).

The lay evidence in the form of the Claimant's testimony does not support an injury by accident to the claimant's back. This is an unwitnessed accident. As evidenced by the claimant's own medical records and the testimony of Steve Kirchen, the claimant did not mention back pain until months after this alleged injury. The claimant visited a doctor three times after this dated injury for treatment specifically for the work accident and never mentions back pain or a work

related back injury and when he finally mentions back pain three months after the accident occurred he does not say that the work injury caused the back problems.

This injury occurred on June 19, 2012. He visited Dr. Afulukwe on June 28, 2012 and DENIED BACK PAIN. He again visits that doctor on August 28, 2012 and mentions a split on the stairs but **makes no mention of back pain**. On September 4, 2012, the claimant visits CHC urgent Care for his work related injury and **again does not mention back pain**. His first mention of back pain is to his urologist, Dr. Thomas Douglas on September 24, 2012. At that time, he simply states that he "has pain across beltline and into back." **He does not mention that it was caused by a fall or his work injury**. In fact, Dr. Douglas specifically stated that he could not even relate the groin injury to the work incident as he already had a pre-existing groin problem.

The claimant tells no less than three versions of how the accident occurred which further draws into question whether this unwitnessed accident occurred. By Form 50 dated June 4, 2014 the claimant states that the accident occurred while he was stepping over a fan and he slipped on a wet surface.

He testified at the hearing that the accident occurred when he was positioned approximately four feet above the plant floor surface at the time of this slip, then fell, initially straddling a floor fan "between [his] . . . legs [making] the fan shoot out from under [him] . . . , causing [his] . . . butt to hit the ground, and the back of [his] . . . head . . . [to strike] against the machine." (See, Hearing Transcript, pp. 28, 29, 31, 56 – 57). At CHC on September 4, 2012, the claimant stated that the injury occurred when he attempted to put his right leg over a fan and his right leg slipped. Pt landed on the fan and hit his groin and testicular area.

At the deposition, he stated that: his foot slipped while he was moving ...and he fell off the machine; groin went directly on top of fan, it turned it over and he remembers something bumping his head; then, when he hit the floor on his tailbone, it threw him back up against the

machine. Even the doctor who relates the back injury to the claim was not sure of how the accident occurred. Defendants contend that based upon the lapse in time of any mention of a back injury and the numerous accounts of how the accident occurred, that the claimant did not have a work related accident.

Even if the claimant had an accident, he did not suffer any injury. The claimant initially contended that he hurt his groin during a fall, but failed to mention any problems with his back. The claimant has had back pain for numerous years preceding this claim.

On December 8, 2005, the claimant visited Springs Memorial Hospital and gave a history of both degenerative Joint disease and back pain.

On November 12, 2010, the claimant visited Heath Springs Memorial and reported body aches and multi-level joint pain because his job is manual.

On March 11, 2011, the claimant again visits Heath Springs Memorial and tells the doctor that he does not think that he can keep working at this rate.

On August 26, 2011, he states that he has fatigue and pain all over this body all of the time, is miserable and cannot wait to retire. Before the claimant even had this alleged injury with this employer, the claimant was already contemplating retirement for pain all over his body and he has prior back pain. In fact, the problems that the claimant is having now are the same problems that he had before. On July 6, 2006, the claimant visited Carolinas Health care System after sustaining a fall. During that visit, a CT of the Lumbar Spine was performed an it revealed an annular bulge and moderate central stenosis at L3-4. Moderate to severe central stenosis at L4-5.

The claimant sees Dr. Johnson for an IME on February 20, 2013, nearly nine months after the accident. While Dr. Johnson mentions the claimant's back pain, and relates the

problems to the claimant's back injury, he states that the claimant has no history of prior back pain.

The MRI taken of the claimant on March 7, 2013 may be the most telling of the medical evidence. The impression states that there is "no evidence of trauma." It again mentions the stenosis that is present in the claimant's 2006 MRI and the diagnosis is multilevel degenerative disc disease and arthritis.

The MRI performed on May 27, 2015 confirms that the claimant was having a degenerative issue only with his back. Therefore, even if the claimant was having back issues, it was from a degenerative change. The claimant was not forthcoming to Dr. Sanjay Nandurkar on April 22, 2013. At that visit, the claimant complained of chronic back pain that began after his fall but denies any back problems before then.

After he was referred to general surgery of Lancaster for his groin problem on December 6, 2012, the doctor's impression is that the claimant has "back pain secondary to osteoarthritis." Again, there is no mention of a back related workers compensation injury and again the doctor opines that the back pain is degenerative. The Surgery Center of Lancaster performed an MRI of the lumbar spine on April 9, 2013. At that time, he was diagnosed with spinal stenosis at the L4-5 area with scoliosis and spinal stenosis. However, the note specifically stated that he does not agree that the sole cause of the problem was from an injury at work.

The IME's of Dr. Gunter and Dr. Riber's causally related statement are void because they relate the back problems. Because the groin injury has not been found work related, the commissioner should not have relied on the opinions of those two doctors. Dr. Riber did not even see the claimant until two and ½ years after the accident and he based his evaluation on the basis that the claimant fell directly onto the fan. This description of the accident is different than several of the other version of how the fall occurred. For example, the claimant told Dr. Johnson

that he was "stepping over a standing fan, his foot slipped resulting in a split which mashed his groin and turned the fan over". The description provided to Dr. Gunter was: "there was a coolant spill and he fell 4-6 feet landing on the cover of a fan....landing centered on his scrotum and testicles.....the fan slipped out of the way and he went backwards falling another 2-3 feet landing directly on his tailbone onto the concrete floor and then his head hit the machine".

The Commissioner also erred in awarding temporary total disability benefits because the claimant cannot prove a loss of earning capacity. The claimant was written out of work and on disability for unrelated issues (COPD) as of June 17, 2014. Therefore, he cannot prove loss of earning capacity as a result of this injury.

2. The Commission erred in determining that the treating physician is Dr. Kelby Hutchinson

(Question Presented 5)

The Workers Compensation Commission committed an error of law when they appointed Southeastern Spine Institute as the authorized treating facility. There was no basis for this appointment and this was error because this is not a situation under 42-15-60(a), that calls for the Commission to appoint a treating physician because this is a denied case:

> (a) The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. In addition to it, the original artificial members as reasonably may be necessary must be provided by the employer. During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown. The refusal of an employee to accept any medical, hospital, surgical, or other treatment or evaluation when provided by the employer or ordered by the commission bars the employee from further compensation until the refusal ceases and compensation is not paid for the period of refusal unless in the opinion of the commission the circumstances justified the refusal, in which case the commission may order a change in the medical or hospital service. **If in an emergency, on account of the employer's failure to provide the medical care as specified in this section, a physician other than provided by the employer is called to treat the employee, the reasonable cost of the service must be paid by the employer, if ordered by the commission.**

The Employer did not fail to provide medical care as specified in this section because they were not obligated to do so under the statute. Therefore, there is no reason for the commission to order treatment by a specific physician. Pursuant to **McKinney v. Kimberly Clark Corp**, 658 S.E.2d 112 (App. 2008), the defendants have the right to choose the physician. Therefore, the Commission committed an error of law in appointing a physician in this instance for treatment.

3. **The Commission's order is defective, improper and not enforceable because of numerous deficiencies.**

(Questions Presented 6-10)

Defendants contend that the order of the Hearing Commissioner is deficient and does not comply with the SC Workers Compensation Statute and the Administrative Procedures Act in the following respects: 1. the Conclusions of Law are not separately stated or supported by the preponderance of the evidence; 2. there is not a specific or direct Order after the Findings of Fact and Conclusion of Law as to what is being ordered; 3. that no statutory authority is stated for conclusion of law #3; and 4. because it fails to SEPERATELY state each individual finding of Fact and Conclusions of Law and does not have a specific ORDER.

Section 42-17-40 and 1-23-350 outline the requirements for an order. Section 42-17-40 requires that an award have a statement of the findings of fact, rulings of law and other matters pertinent to the questions at issue. Section 1-23-350 imposes the same requirements. However, it requires that a finding of fact shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings and they shall be separately stated. As the court in Aristizabal v. I.J. Woodside-Division of Dan River, Inc., 268 S.C. 366, 234 S.E.d 2d 21 (1977) states, "If a material fact is contested, the Hearing Commissioner must make a specific, express finding on it." Id. at 371. Statements not specifically designated as finding of fact or conclusion of law may not be considered and may results in at least a remand. Moore v. S.C. Alcohol

Beverage Control Commission, 304 S.C. 356, 404 S.E.2d 714 (S.C. App. 1991). Because the Order of the Hearing Commissioner is deficient, it should be reversed or the matter should be remanded.

CONCLUSION

Based on the above cited arguments, the Claimant would respectfully request that the Order of the South Carolina Workers Compensation Commission be reversed in its entirety.

Respectfully Submitted,

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Randy Faulkenberry, Employee, Claimant, Respondent,
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Conbraco Industries, Inc., Employer, and Great American Alliance Insurance Company, Carrier, Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Brief by depositing a copy of the same in the United States Mail, postage prepaid, on March 31st, 2017 to the following parties, and or their representatives:

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March 31, 2017

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Re: Randy Faulkenberry, Employee, Claimant, Respondent, v. Conbraco Industries, Inc., Employer, and Great American Alliance Insurance Company, Carrier, Appellants.
Trial Court Case No. 1215107
Appellate Case No. 2016-002416

Dear Honorable Kitchings:

Please find enclosed herewith the Initial Brief, Proof of Service and Designation of Matter.

By copy of this letter, I am hereby serving Randy Faulkenberry, through his attorney, Andrew N. Safran. If you have any questions, please do not hesitate to contact me.

Sincerely,

E. Ros Huff, Jr.
Huff & Hapeshis, LLC

ERHjr/eoa

Enclosure

cc: Andrew N. Safran, Esquire
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