

5

ORIGINAL

**THE STATE OF SOUTH CAROLINA
In The Court Of Appeals**

**CROSS-APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION**

APPELLATE CASE NO. 2016-001509

RECEIVED

JAN 04 2017

SC Court of Appeals

James Lipscomb, Employee,

Respondent-Appellant,

v.

**Stein Fibers/Innovative Fibers, Employer,
and StarNet Insurance Company, Carrier,**

Appellants-Respondents.

APPELLANT'S BRIEF OF THE RESPONDENT-APPELLANT

W. Scott Palmer
W. SCOTT PALMER LAW FIRM, PA
Post Office Box 722
Santee, South Carolina 29142
(803) 854-4417
Attorney for Respondent-Appellant
SC BAR NUMBER 0011936

TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Statement of the Facts.....	3
Standard of Review.....	7
Argument	
I. JAMES LIPSCOMB IS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS BECAUSE HIS INABILITY TO EARN WAGES IS DUE TO HIS WORK-RELATED INJURY.....	8
II. THE COMMISSION ERRED IN FINDING THAT JAMES LIPSCOMB’S EMPLOYMENT WAS TERMINATED “SHORTLY” AFTER THE ACCIDENT.....	10
III. THE COMMISSION’S RELIANCE UPON THE FACT THAT JAMES LIPSCOMB DID NOT ADMINISTRATIVELY CONTEST OR APPEAL THE EMPLOYER’S DECISION TO TERMINATE IS MISPLACED.....	11
Conclusion.....	12

TABLE OF AUTHORITIES

Cases

<u>Broughton v. South of the Border</u> , 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999).....	8
<u>James v. Anne's Inc.</u> , 390 S.C. 188, 701 S.E.2d 730 (2010).....	7
<u>Jones v. Georgia-Pacific Corp.</u> , 355 S.C. 413, 586 S.E.2d 111 (2003).....	8
<u>Lark v. Bi-Lo, Inc.</u> , 276 S.C. 130, 276 S.E.2d 304 (1981).....	8
<u>Pollack v. Southern Wine & Spirits of America</u> , 405 S.C. 9, 747 S.E.2d 430 (2013).....	8, 9, 10

Statutes and Regulations

S.C. Code Ann. § 42-9-260 (Supp.2012).....	8
25A S.C. Code Reg. 67-502(B)(1) (Supp.2012).....	8

STATEMENT OF ISSUES ON APPEAL

- I. Whether the Commission erred in reversing the Single Commissioner's award of temporary total disability benefits, finding that the post-accident emergency room blood test report constituted a violation of the Employer's drug and alcohol policy, thereby denying James Lipscomb's award of temporary total disability benefits.
- II. Whether the Commission erred in finding that Innovative Fiber's termination of James Lipscomb's employment "shortly" following the compensable injury was sufficient grounds for reversing the Single Commissioner's award of temporary total disability benefits.

STATEMENT OF THE CASE

This is an appeal on behalf of Respondent/Appellant James Lipscomb (Lipscomb) from the Decision and Order of the South Carolina Workers' Compensation Commission (Commission), filed May 24, 2016. (R. pp. 2-13). The case arises out of an injury to Lipscomb's right upper extremity due to an industrial accident suffered on March 20, 2014, while Lipscomb was working as a baler for Innovative Fibers/Stein Fibers (Innovative Fibers).

James Lipscomb filed his initial Form 50 claim on August 27, 2014. (R. p. 46). In their Form 51, Innovative Fibers denied that Lipscomb suffered an injury by accident arising out of and in the course of his employment and asserted the statutory defense of intoxication under Section 42-9-60, S.C. Code Ann. (1976). (R. p. 45). On January 15, 2015, Lipscomb filed an amended Form 50. (R. p. 44). He requested a hearing and again alleged that on March 20, 2014, he suffered an injury to his right upper extremity when his arm was caught in the conveyer of an industrial baler. Innovative Fibers filed a Form 51 and again denied that Lipscomb suffered an injury by accident arising out of and in the course of his employment and asserted the affirmative defense of intoxication. (R. p. 43).

A hearing was held before Commissioner Aisha Taylor on April 14, 2015 and on December 22, 2015, Commissioner Taylor issued her Decision and Order. (R. pp. 14-31). Commission Taylor found, among other things, that Lipscomb suffered an injury to his right arm on March 20, 2014, arising out of and in the course of his employment and denied Innovative Fibers' intoxication defense. Commissioner Taylor found that the greater weight of the evidence did not support the contention that Lipscomb's consumption of alcohol proximately caused his injury. (R. p. 26, lines 19-22). Commissioner Taylor's award of 220 weeks of benefits was based upon a finding of 100% disability to his right upper extremity. (R. p. 27, lines 14-16).

Commissioner Taylor also awarded temporary total benefits from March 20, 2014 through March 23, 2015. (R. p. 27, lines 17-18).

On December 28, 2015, Defendants filed their Form 30 (Request for Commission Review) alleging numerous grounds of error. (R. p. 37). Both parties submitted appeal briefs, and the parties presented oral arguments before the Appellate panel on March 21, 2016.

On May 24, 2016, the Workers' Compensation Commission Appellate Panel issued its Decision and Order. (R. p. 2-13). The Commission affirmed the Single Commissioner's award of 220 weeks benefits for the right upper extremity, as well as the award for medical expenses and mileage. (R. p. 11, lines 15-17). However, the Commission reversed the award of temporary total disability (TTD) benefits, based upon a factual finding that Lipscomb had been terminated for cause shortly following the injury. (R. p. 12, lines 12-20). Notice of Appeal was timely filed on July 26, 2016 with an Amended Notice of Appeal filed August 2, 2016. This appeal is based upon the reversal of the temporary total disability award.

STATEMENT OF THE FACTS

On March 20, 2014, James Lipscomb suffered an injury while working as a baler at Innovative Fibers. (R. p. 79, lines 2-8). Innovative Fibers manufactures fibers used in the automobile industry, household furnishings, BMW bed liners, truck bed liners, Clorox toilet wands, and Brillo pads. (R. p. 159, lines 1-5; R. p. 81, lines 19-24; R. p. 135, lines 16-25). At the time of the injury, Lipscomb had been operating the baling machine for approximately one year. (R. p. 80, lines 8-12). Baling is the last step in manufacturing process and involves cutting the fiber into sheets and placing straps around the bales of fiber sheets. (R. p. 162, lines 11-16). Before becoming a baler, Lipscomb worked at Innovative Fibers as a creeler. (R. p. 79, lines 2-8). Prior to working at Innovative Fibers, Lipscomb worked as a baler at Leigh Fibers. (R. p. 79,

lines 9-16).

At the time of the accident, Lipscomb was working 12-hour shifts, from 8 p.m. until 8 a.m., four days a week. (R. p. 80, lines 19-25; p. 81, lines 1-2). Prior to the shift during which the accident occurred, Lipscomb had a 12 hour break following his previous shift. (R. p. 83, lines 6-18). During this break, Lipscomb and a co-worker, "Buzzard," worked on Lipscomb's hot water heater until about 11:30 a.m. (R. p. 172, lines 17-23; R. p. 83, lines 19-25; p. 84, lines 4-15). Lipscomb testified that while he was working on the hot water heater, he had taken a shot of brandy about 8:30 a.m. (R. p. 176, lines 11-15). He testified that he did not take more than one shot because he needed to drive to get parts for the water heater. (R. p. 177, lines 11-23). Lipscomb testified that he went to the hardware store two times. (R. p. 173, lines 15-20). After the water heater was fixed, Buzzard left and Lipscomb went to sleep. (R. p. 174, lines 2-3). Lipscomb woke up about 6:30 p.m. and got ready for work. (R. p. 174, lines 4-13).

Lipscomb's co-worker and friend, Nashid Henderson, picked him up for work at about 7:00 p.m. (R. p. 175, lines 16-18; R. p. 87, lines 5-6). On the way to work, they stopped at the Hot Spot and bought snacks and energy drinks, and Lipscomb then drove them from the Hot Spot to work. (R. p. 87, lines 13-17). Lipscomb testified that he did not have any difficulties making that drive. (R. p. 87, lines 20-21). Mr. Henderson testified that at the time he picked up Lipscomb, he was given no reason to believe that Lipscomb had consumed any alcoholic beverage. (R. p. 123, lines 7-19).

Lipscomb arrived at work at approximately 7:45 p.m. (R. p. 178, lines 9-17). Prior to the beginning of his shift at 8:00 p.m., Lipscomb attended the mandatory safety meeting with his supervisor. (R. p. 178, lines 9-25; R. p. 87, line 22; p. 89, lines 1-10). The other employees on the shift were also present at the meeting, including Mr. Henderson. (R. p. 88, lines 9-15). Mr.

Henderson testified that he did not notice anything unusual about Lipscomb during that meeting. (R. p. 123, lines 20-25; p. 124, lines 1-3).

At the conclusion of the meeting, Lipscomb's supervisor told him that he (Lipscomb) needed to re-feed bales during his shift. (R. p. 89, lines 11-25; p. 90, lines 1-7). Re-feeding bales meant that Lipscomb would be required to feed material into the baling machine by hand. (R. p. 89, lines 5-9). Running the baler was a two-man operation with one person as the "cutter" and one person as the "gunner" or "baler". (R. p. 162, lines 21-25). During the re-feeding process, the machine was not running automatically; rather, the cutter operated the pedal that activated the baling machine. (R. p. 181, lines 3-23). When manually operating the baler, the cutter was supposed to observe Lipscomb (baler), and not activate the baling machine unless he observed that Lipscomb's hands were free of the baling machine. (R. p. 91, lines 15-25).

Lipscomb testified that, immediately prior to the accident, he was clearing scraps from the baling machine by hand and the machine had not been on. (R. p. 101, lines 13-22.) Lipscomb testified that the cutter was not watching Lipscomb and while Lipscomb's hands were still near the machine, the cutter activated the machine. (R. p. 101, lines 3-22). The machine's rollers caught Lipscomb's fingers on his right hand and pulled his arm into the baling machine causing the accident to occur. (R. p. 91, lines 22-25; p. 92, lines 1-23). As a result of the accident, Lipscomb suffered a severe degloving injury to his right arm. (R. p. 281, lines 15-16).

After the accident, Mr. Henderson was one of the first individuals to see Lipscomb. (R. p. 125, lines 8-25; p. 126, lines 1-19). Mr. Henderson testified that he did not smell any alcohol coming from Lipscomb or see any evidence that Lipscomb had had anything to drink. (R. p. 127, lines 11-16). Mr. Henderson further testified that he has never known Lipscomb to drink on the job and, on the day of the accident, did not see Lipscomb drink anything with alcohol in it. (R.

p. 129, lines 17-21).

EMS was immediately called to the plant following the accident. (R. pp. 225-233). Joanne Matthiesen, Innovative Fiber's Human Resource Manager, arrived at the plant at about the same time as the ambulance and found Lipscomb sitting in a chair surrounded by EMS personnel. (R. p. 212, lines 15-20). Ms. Matthiesen testified that it was standard protocol for her to go to the plant when an employee was injured and that when she arrived at the plant that evening, she found Lipscomb to be calm, awake and alert. (R. p. 212, lines 21-22; R. p. 142, lines 20-25; p. 143, line 16). There is no reference in the EMS records of any presence of alcohol or intoxication on behalf of Lipscomb. (R. pp. 225-233).

Ms. Matthiesen testified that she, along with the plant manager and the maintenance manager, conducted an accident investigation that night. (R. p. 213, lines 1-5; R. p. 144, lines 6-23). As part of the investigation, they met with the supervisors on duty that night and talked with the employees who were in the work area. (R. p. 213, lines 1-5, 17-21). Ms. Matthiesen testified that no one told her that Lipscomb was under the influence of alcohol on the night of the accident and she did not encounter any information that would have led her to believe that Lipscomb was under the influence of alcohol that night. (R. p. 216, lines 11-18; R. p. 145, lines 15-23). Ms. Mathieson testified that she also spoke with Lipscomb at the hospital. (R. p. 215, line 25; p. 216, line 1).

Ms. Matthiesen testified that after the accident, she received a call from a nurse at Spartanburg Regional Medical Center who indicated that they had smelled alcohol on Lipscomb's breath and wanted to know if the company did post-accident drug testing (R. p. 148, lines 11-16). Ms. Matthiesen testified that, when the company has blood tests performed, the tests are performed by Mary Black Industrial Health, and not Spartanburg Regional Medical

Center. (R. p. 140, lines 15-22). However, Ms. Matthiesen told the nurse to go ahead and do the drug testing. (R. p. 149, line 25; p. 150, lines 1-2). Ms. Matthiesen further testified that Innovative Fibers did not order or direct the hospital to take the test or have anything else to do with the test. (R. p. 140, lines 6-10; p. 141, lines 2-6). Indeed, Ms. Matthiesen made no apparent effort to follow up with regard to the test results and was not aware of the results until she received them from Innovative Fibers' insurance company two months later. (R. p. 138, lines 13-15; p. 146, lines 3-15).

The document purported to be the blood alcohol test results taken at the hospital showed a blood alcohol level of .097. (R. p. 138, lines 13-23; p. 139, line 3). Ms. Matthiesen testified that Lipscomb's employment was terminated as a result of the post-accident blood test taken at Spartanburg Regional. (R. p. 138, line 8; p. 139, line 11). Despite the fact that the "test result" was available on March 21, 2014, Innovative Fibers did not send Lipscomb a notice of termination until May 22, 2014. The effective date of termination was May 21, 2014; it was not made retroactive to the date of the accident. (R. p. 396). During that time, Lipscomb was not paid any temporary total disability benefits, and did not work, due to the nature and severity of his work-related injury.

Lipscomb underwent a series of surgical procedures and skin grafts during the year following his injury. On March 23, 2015, Dr. Clark D. Moore assigned a 100% impairment to the right upper extremity, and a 60% to the whole man. (R. p. 335).

STANDARD OF REVIEW

In reviewing a Workers' Compensation decision, 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 a decision if the findings and conclusions of the Commission are (1)

affected by an error of law, (2) clearly erroneous in view of the reliable and substantial evidence on the whole record, or (3) arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion. James v. Anne's Inc., 390 S.C. 188, 192, 701 S.E.2d 730, 732 (2010). "This Court will not overturn a decision by the Commission unless the determination is unsupported by substantial evidence." Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 14, 747 S.E.2d 430, 432 (2013) (citing Jones v. Georgia-Pacific Corp., 355 S.C. 413, 416, 586 S.E.2d 111, 113 (2003); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981)). "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." Broughton v. South of the Border, 336 S.C. 488, 495, 520 S.E.2d 634, 638 (Ct. App. 1999). An appellate court may reverse or modify the Commission's decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions or decisions are affected by other error of law. Id.

ARGUMENT

I. JAMES LIPSCOMB IS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS BECAUSE HIS INABILITY TO EARN WAGES IS DUE SOLELY TO HIS WORK-RELATED INJURY.

The payment of temporary total disability (TTD) benefits is governed by the provisions of South Carolina Code Ann. § 42-9-260, which provide in relevant part that TTD payments are paid when "an employee has been out of work *due to* a reported work-related injury ... for eight days[.] ..." S.C. Code Ann. § 42-9-260 (Supp.2012)(emphasis added). Disability is considered "incapacity *because of injury* to earn wages which the employee was receiving at the time of the injury[.]..." 25A S.C. Code Reg. 67-502(B)(1) (Supp.2012)(emphasis added). A disability is

"presumed to continue until the employee returns to work or compensation is otherwise suspended or terminated according to Section 42-9-260." Id.

"Pursuant to Section 42-9-260 and the accompanying regulations, the entitlement of TTD benefits is premised on a nexus between the *work-related injury* and the inability to earn wages." Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 15, 747 S.E.2d 430, 433 (2013)(emphasis added). Accordingly, "an injured employee will be entitled to TTD compensation when his incapacity to earn wages is *due to* or *because of* the injury." Id. at 16, 747 S.E.2d at 434. This is a question of fact for the Commission. Id. As a result, the Court here is limited to determining whether substantial evidence supports the Commission's finding that Lipscomb's inability to earn wages was a result of his termination for cause, not his work-related injury. Id. It does not.

It is undisputed that Lipscomb's degloving arm injury left him immediately and permanently unable to work again as a baler. Following the degloving injury, Lipscomb received emergency medical treatment from Spartanburg Regional Medical Center. Several days later, he began what would be a series of reconstructive surgeries and skin grafts. On March 22, 2014, two days after the accident, his treating physician described his injury as a "crush injury, right upper extremity, with open both-bone forearm fracture." Following the surgery to repair the bones in his forearm, Dr. Broderick reported "he is not to do any lifting or pushing off for 3 months." (R. p. 298). During the two week period that followed, Lipscomb was to undergo four additional procedures, as well as months of rehabilitative therapy. On March 23, 2015, one year after the accident, Dr. Clark Moore opined "He is currently unemployable and will be for the foreseeable future." (R. p. 335). Given the succession of medical treatment that Lipscomb had for the year following the accident, and the opinions of several physicians, it is clear that his

inability to earn wages following his accident was *due to his disability*, and had nothing to do with his termination, allegedly “for cause.” As such, Lipscomb is entitled to receive TTD benefits as a matter of law.

II. THE COMMISSION ERRED IN FINDING THAT JAMES LIPSCOMB’S EMPLOYMENT WAS TERMINATED “SHORTLY” AFTER THE ACCIDENT.

Innovative Fibers denial of TTD benefits also must be scrutinized carefully, considering an employer’s possible motivation to “look for” a reason to fire an injured worker. Pollack, 405 S.C. at 16, 747 S.E.2d at 434.

Lipscomb’s employment was not immediately terminated following the accident. Rather, Innovative Fibers didn’t notify Lipscomb that his job was terminated for more than two months after the date of the accident giving rise to Lipscomb’s debilitating injury. On May 22, 2014, Innovative Fibers sent Lipscomb a letter of termination with an effective date of termination of May 21, 2014—not the date of injury. (R. p. 396).

Moreover, Innovative Fibers only terminated Lipscomb’s employment after receiving the blood test from its insurance company. (R. p. 146, lines 3-10). Ms. Matthiesen, the company’s Human Resources representative, who was solely in charge of managing the company substance abuse testing program, was aware that the hospital blood test had been performed. (R. p. 208, lines 10-11). Based on the date of the report, the results were available on March 21, 2014, the date following the accident. (R. p. 353). From these facts, it can be reasonably inferred that Innovative Fibers did not consider it a priority to confirm whether Lipscomb had violated any company policy, or to proceed with the immediate enforcement of that policy. Indeed, Ms. Matthiesen testified that she conducted an investigation of the accident and she did not encounter

any information that would have led her to believe that Lipscomb was even under the influence of alcohol that night. (R. p. 216, lines 11-18; R. p. 145, lines 15-23).

Innovative Fibers took no apparent steps to terminate Lipscomb's employment for over two months following the accident. The date of termination is remote in time from the date of injury, the date Lipscomb's blood sample was provided to the emergency room lab, and the date the sample was tested. This delay suggests that the motivation to terminate Lipscomb's employment was not the desire to enforce company policy, but rather to retaliate for his asserting a claim for Workers' Compensation benefits. During that time, and continuing to the day he was declared to have reached maximum medical improvement, Lipscomb has been unable to return to his employment with Innovative Fibers, or any other job in a similar setting. The undisputed delay in the decision to terminate Lipscomb is clearly adverse to the factual assertion relied upon by the Commission in reversing the award of temporary total disability benefits. The Decision and Order of the Commission should be reversed and this Court should hold Lipscomb is entitled to receive TTD benefits as a matter of law.

III. THE COMMISSION'S RELIANCE UPON THE FACT THAT JAMES LIPSCOMB DID NOT ADMINISTRATIVELY CONTEST OR APPEAL THE EMPLOYER'S DECISION TO TERMINATE IS MISPLACED.

Paragraph 7 of the Order and Decision of the Appellate Panel reads:

With regard to the award of temporary total disability (TTD) benefits, the Appellate Panel finds that, although the totality of the evidence is insufficient to meet the Defendant's burden of proof to prevail on its statutory defense, because the post- accident emergency room blood test specifically violated the Employer's drug and alcohol policy (to which the Claimant had expressly agreed), the Claimant should not be entitled to an award of TTD. The Claimant's employment was terminated shortly following the injury for this reason, *an administrative decision that he did not contest or appeal*. Therefore, the Single Commissioner's award of temporary total disability benefits is reversed. (emphasis added).

The Appellate Panel cited no reference to any statutory or decided authority to support a

finding that an employer's decision to terminate an employee is an adjudication of fact, or an administrative finding to support the denial of an award of statutorily mandated benefits. The question of whether an employee chooses to contest an employer's "administrative" decision, or to pursue a civil action for wrongful termination, is not a proper basis for the denial of an award of TTD benefits.

CONCLUSION

For the foregoing reasons, the Court should reverse the Decision and Order of the Commission and Innovative Fibers should be directed to pay temporary total disability to Lipscomb for March 20, 2014 through March 23, 2015.

Respectfully submitted,



W. Scott Palmer, Esq.
Bar No. 011936
W. Scott Palmer Law Firm, P.A.
Post Office Box 722
Santee, South Carolina 29142
(803) 854-4417
wpalmer@santeeattorney.com
Attorney for Respondent-Appellant

January 3, 2017

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

RECEIVED

CROSS-APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

JAN 04 2017
SC Court of Appeals

APPELLATE CASE NO. 2016-001509

James Lipscomb, Employee,

Respondent-Appellant,

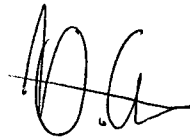
v.

Stein Fibers/Innovative Fibers, Employer,
and Key Risk Management, Carrier,

Appellants-Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Brief of the Respondent-Appellant complies with Rule 211(b), SCACR.



January 3, 2017

W. Scott Palmer, Esq.
Bar No. 011936
W. Scott Palmer Law Firm, P.A.
Post Office Box 722
Santee, South Carolina 29142
(803) 854-4417
wpalmer@santeeattorney.com
Attorney for Respondent-Appellant