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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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SC Court of Appeals

APPELLATE CASE NO. 2016-001509

James Lipscomb, Employee, **Respondent-Appellant,**

v.

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

RESPONDENT'S BRIEF OF RESPONDENT-APPELLANT

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STATEMENT OF THE CASE

This brief is filed on behalf of Respondent/Appellant James Lipscomb (Lipscomb) in response to the appeal filed by Innovative Fibers to the Decision and Order of the South Carolina Workers' Compensation Commission (Commission), filed May 24, 2016. (R. pp. 2-13). This 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). Commissioner 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 as a baler and denied Innovative Fibers' intoxication defense. (R. pp. 28-29). Commissioner Taylor found that Lipscomb was attempting to remove scraps of material which had not fully cleared the baling machine during the re-feeding process when the baler was activated and the injury occurred. (R. p. 26, lines 8-10). 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 gave very little weight to Dr. Mennear's toxicology report, as Dr. Mennear never met or examined Lipscomb and it was unclear from Dr. Mennear's report if he even had specific details as to how the injury occurred. (R. p. 27, lines 10-12). Commissioner Taylor also found the facts of this case distinguishable from Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994). (R. p. 27, lines 3-9). Commissioner Taylor awarded Lipscomb 220 weeks of benefits 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, as well as reimbursement of medical expenses and mileage. (R. p. 27, lines 17-18).

On December 28, 2015, Innovative Fibers 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 ruling that Lipscomb sustained a compensable injury to his right arm within the course and scope of his employment. (R. p. 11, lines 12-13). The Commission found that at the time of the accident, Lipscomb had been working as a baler at Innovative Fibers and that part of his responsibilities as a baler required him to manually re-feed bales into the baler by hand. (R. p. 7, lines 4-10). The Commission found that Lipscomb was attempting to remove scraps of material which had not fully cleared the baling machine during the re-feeding process when the baler was activated and the injury occurred. (R. p. 7, lines 15-17). The Commission further found that Lipscomb was standing on the floor when the accident occurred and was not standing on the machine or

reaching over a safety cage. (R. p. 7, lines 18-20). The Commission also found this case to be distinguishable from Wright v. Bi-Lo, Inc., 314 S.C. 152, 442 S.E.2d 186 (Ct. App. 1994). (R. p. 8, lines 10-15).

The Commission affirmed the Single Commissioner's award of 220 weeks of benefits for the right upper extremity, as well as the award for medical expenses and mileage. (R. p. 11, lines 15-17). In so doing, the Commission affirmed the Single Commissioner's finding that the greater weight of the evidence did not support Innovative Fiber's contention that Lipscomb's consumption of alcohol proximately caused his injury and that Innovative Fibers did not meet their burden to show that Lipscomb's intoxication proximately caused his injury. (R. p. 12, lines 4-11). The Commission also gave very little weight to Dr. Mennear's toxicology report for the same reasons as stated above. (R. p. 8, lines 16-18). 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). Lipscomb has appealed the reversal of TTD benefits.

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 8:00 p.m. until 8:00 a.m., four days a week. (R. p. 80, lines 19-25; p. 80, lines 1-2). Prior to the shift during which the accident occurred, Lipscomb had a twelve (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 17-23:14; 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 testified that prior to going to sleep he did not drink any other alcoholic beverages but that he did consume some cough syrup because he was sick. (R. p. 84, line 25-p. 85, line 4). Lipscomb woke up about 6:30 p.m. and got ready for work. (R. p. 174, lines 4-5).

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). According to Innovative Fibers' Substance Abuse and Testing Policy, the role of the supervisor includes determining whether or not an employee is impaired. (R. p. 386). 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. pp. 162, 163). 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 this was important because during the process, they had to take samples which required them to physically reach into the machine. (R. pp. 91, 92; R. p. 115, lines 1-19).

Lipscomb testified that, immediately prior to the accident, he had signaled to the cutter to stop the machine and that as he (Lipscomb) was clearing scraps from the baling machine by hand, the machine had not been on. (R. pp. 82, 83; R. p. 101, lines 13-25; R. p. 108, line 25; p. 109, lines 1-25). Lipscomb testified that the cutter was not watching him 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 21-25; 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 waited with Lipscomb until they were able to get Lipscomb's arm out of the machine. (R. p. 125, lines 8-25; p. 126, lines 1-22). 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 testified that, with the exception of screaming out in pain, Lipscomb was alert and able to answer questions during this time. (R. p. 126, lines 23-25; p. 127, lines 1-10). 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 (HR) 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. Mathieson testified that she also spoke with Lipscomb at the hospital. (R. p. 215, line 25-p. 216, line 1). 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).

According to Innovative Fibers' Substance Abuse and Testing Policy, when investigating an incident, the role of the HR Department includes determining whether substance abuse has occurred and if the employee is impaired. (R. p. 386). However, following her investigation, Ms. Matthiesen did not order any post-accident drug testing. (R. p. 140, lines 6-10; p. 141, lines 6-10). Rather, 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). 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 testified that she did not have any idea what the test procedure at Spartanburg Regional consisted of. (R. p. 141). Ms. Matthiesen testified that Innovative Fibers had nothing to do with the test performed at Spartanburg Regional; Innovative Fibers neither ordered the test nor directed the hospital to take the test. (R. p. 140, line 6-p. 141, line 6). Indeed, Ms. Matthiesen made no apparent effort to even follow up with regard to the test results; she was not aware of the results until she received them from

Innovative Fibers' insurance company. (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.[1] The effective date of termination was May 21, 2014; it was not made retroactive to the date of the accident. (R. p. 396).

Pursuant to the letter of termination, Lipscomb was terminated "in accordance with company policy" because the post-accident alcohol test was "determined to be above the legal limit according to [Innovative Fibers'] Drug Free Work Place Policy." (R. p. 396). However, termination is not automatic under the policy; the policy itself makes clear that any violations of the policy are "subject to disciplinary action *up to and including* termination." (R. p. 385, lines 20-21)(emphasis added). The policy also makes clear that "employees ... who have a positive confirmed test result will be given the option of a 2nd test on the same specimen provided, that specimen will be sent to a laboratory and retested and read by an MRO." (R. p. 386, lines 30-33). Lipscomb was never given such opportunity. As stated, the intent of the Substance Abuse and Testing Policy is "to offer a helping hand to those who need it" with the goal to "balance respect for individuals with the need to maintain a safe, productive, and drug-free environment." (R. p. 390, lines 17-21).

Following the accident, 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

[1] During the hearing before the Appellate Panel, counsel for Lipscomb stated that he thought Lipscomb received the letter of termination within two or three days but also stated that he could not recall the date. (R. p. 82, lines 17-25)

100% impairment to the right upper extremity, and a 60% to the whole man. (R. p. 335).

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard of review of decisions of the Worker's Compensation Commission. Hall v. Desert Aire, Inc., 376 S.C. 338, 346, 656 S.E.2d 753, 757 (Ct.App.2007)(citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1981))(other citations omitted). In reviewing a decision of the Commission, 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).

Pursuant to the APA, the appellate court's review is "limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law." Hall, 376 S.C. at 347, 656 S.E.2d at 757 (citing Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007))(other citations omitted). "Any review of the Appellate Panel's factual findings is governed by the substantial evidence standard." Id. (citing Lockridge v. Santens of Am., Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct.App.2001)). An appellate 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)). As such, the findings of the

Commission are presumed correct and will be set aside by the appellate court only if unsupported by substantial evidence. Hall, 376 S.C. at 347, 656 S.E.2d at 758 (citing Bass v. Kenco Group, 366 S.E. 450, 528, 622 S.E.2d 577, 581 (Ct.App.2005))(other citations omitted).

"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). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." Hall, 376 S.C. at 348, 656 S.E.2d at 758 (citing Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999))(other citations omitted). "The final determination of witness credibility and the weight assigned to the evidence is reserved to the Appellate Panel." Id. (citing Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000))(other citations omitted). "Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive." Hargrove v. Titan Textile Co., 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct.App.2004)(citing Etheredge v. Monsanto Co., 349 S.C. 451, 455, 562 S.E.2d 679, 681 (Ct.App.2002). "The appellate court is prohibited from overturning a finding of fact of the Appellate Panel, unless there is no reasonable probability the facts could be as related by the witness upon whose testimony the finding was based." Id.

ARGUMENT

I.

SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT JAMES LIPSCOMB'S INJURY WAS NOT PROXIMATELY CAUSED BY INTOXICATION.

The Commission reviewed the substantial evidence below and correctly determined that Innovative Fibers failed to carry its burden in proving that Lipscomb's injury was proximately caused by intoxication. The below must be affirmed because this finding is supported by the substantial record evidence and because Innovative Fibers cannot establish that error of law has been committed.

A. Innovative Fibers Failed To Establish Proximate Cause

South Carolina Code Ann. § 42-9-60 (1976) provides that "[n]o compensation shall be payable if the injury ... was occasioned by the intoxication of the employee ...." Our Supreme Court has "interpreted this provision as barring compensation when the employee's intoxication is the proximate cause of the injury." Baggot v. Southern Music, Inc., 330 S.C. 1, 7, 496 S.E.2d 852, 855 (1998). Intoxication must proximately cause the injury; it is not enough that intoxication just precede the injury. *See* Kinsey v. Champion Am. Service Ctr., 268 S.C. 177, 183, 232 S.E.2d 720, 723 (1977).

"Intoxication is a condition that results from the use of a stimulant, which renders an employee impaired in his or her faculties to the extent that the employee is incapable of carrying on the accustomed work without danger to the employee." Jones v. Harold Arnold's Sentry Buick, Pontiac, 376 S.E. 375, 379, 656 S.E.2d 772, 774 (Ct.App.2008)(citing Reeves v. Carolina Foundry Mach. Works, 194 S.C. 403, 408, 9 S.E.2d 919, 921 (1940)). As the party claiming the applicability of § 42-9-60, the burden of proof is upon Innovative Fibers to show that Lipscomb's intoxication was the proximate cause of his injury. S.C. Code Ann. § 42-9-60 (1976); *see also* Chandler v. Suitt Constr. Co., 288 S.C. 503, 504, 343 S.E.2d 633, 634

(Ct.App.1986); South Carolina Department of Highways and Public Transportation v. Higgins, 284 S.C. 359, 363, 326 S.E.2d 425, 426 (Ct.App.1985).

In their appeal brief, Innovative Fibers asserts that the evidence to support their defense of intoxication is "overwhelming." That, simply, is not the case. In support of their argument, Innovative Fibers argues that Lipscomb admitted to consuming alcohol and that his admission of taking only one shot of brandy was refuted by the "clear scientific evidence" of the blood alcohol test taken at Spartanburg Regional. However, the record is replete with uncontroverted testimony that Lipscomb did not appear to be intoxicated or otherwise impaired on the day of the accident.

At the time of the injury, Lipscomb was working in his assigned position as a baler with Innovative Fibers. (R. p. 79, lines 2-8). Lipscomb worked 12-hour shifts and had gotten off the previous shift around 8:00 a.m. on the day of the injury. (R. p. 80, lines 19-25; p. 81, lines 1-2). During his break, Lipscomb and a co-worker worked on Lipscomb's hot water heater until about 11:30 a.m. (R. p. 172, line 17-23; p. 173, line 14; R. p. 83, lines 19-25; p. 84, lines 4-15). Although Lipscomb admitted to consuming one shot of brandy during this time, he consumed it 10-12 hours prior to his next shift and he had slept for approximately 6 hours in between. (R. p. 174, lines 2-3; R. p. 176, lines 23-29). Lipscomb 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 also testified that prior to going to sleep he did not drink any other alcoholic beverages. (R. p. 84, line 25-p. 85, lines 1-4).

The following morning Lipscomb's co-worker, Nashid Henderson, picked him up for work. (R. p. 175, lines 16-18; R. p. 87, lines 5-6). On their way to work, they stopped to buy snacks and energy drinks and then Lipscomb drove the rest of the way to work. (R. p. 87, lines

13-17). Lipscomb did not have any problems making that drive and Mr. Henderson testified that at no time did he observe anything about Lipscomb that would indicate that Lipscomb was under the influence of alcohol. (123, lines 3-19).

Lipscomb arrived for work on time, attended a pre-shift safety meeting, and stood within several feet of his supervisor and co-workers. (R. p. 178, lines 9-25; R. p. 88, lines 9-15; 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). There is nothing in the record to indicate that the supervisor—who according to Innovative Fibers' Substance Abuse Policy should be trained to look out for impaired employees—noted that Lipscomb was in any way intoxicated or that he smelled alcohol on Lipscomb's breath.

Lipscomb performed his duties as a baler without difficulty until the moment of the accident giving rise to his injury. During the re-feeding process, the machine was not running automatically; rather, the cutter operated the pedal that activated the baling machine. (R. p. 180). 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. 185-187, 91). Lipscomb testified that this was important because during the process, they had to take samples which required them to physically reach into the machine. (R. p. 91-93, 115). Lipscomb testified that immediately prior to the accident, Lipscomb had signaled to the cutter to stop the machine and that as he (Lipscomb) was clearing scraps from the baling machine by hand, the machine had not been on. (R. p. 82, line 23-p. 83, line 2; p. 101, lines 13-22; p. 108, line 25-p. 109, line 21). But 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 21-25; p. 92, lines 1-23). As a result of the accident, Lipscomb suffered a severe degloving injury to his right arm. (R. p. 57, lines 15-16).

Following the accident, Mr. Henderson stayed with Lipscomb until they were able to get Lipscomb's arm out of the machine. (R. p. 125, line 8; p. 126, line 22). Mr. Henderson 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). Lipscomb was alert and able to answer questions during this time. (R. p. 126, line 23-p. 127, line 10). Mr. Henderson 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 17-22).

Following the accident, Lipscomb was treated by Spartanburg EMS personnel, who described Lipscomb's level of consciousness as "alert" in their report, with absolutely no notation of signs of intoxication (R. p. 227). Joanne Mathieson, the Innovative Fibers' HR Manager who was called in to the plant immediately following the accident, observed Lipscomb being treated by EMS personnel and described him as "calm...awake, and alert." (R. p. 212, lines 21-22). At the Spartanburg Regional Emergency Room, less than 30 minutes following the accident, Lipscomb's condition (besides the obvious injury) was noted as follows:

NEURO:	motor intact, sensory grossly intact
MENTAL STATUS:	speech clear, oriented x3, responds appropriately to questions
PSYCH:	normal affect

This report contains no notation of any observation that would indicate suspicion of intoxication on the part of Lipscomb. (225-233; 348).

Ms. Matthiesen conducted an investigation into the accident that night which consisted of

interviewing the shift supervisors and Lipscomb's co-workers that were in the work area at the time of the accident. (R. p. 213, lines 19-25). Ms. Matthiesen also spoke with Lipscomb at the hospital. (R. p. 215, line 25; p. 216, line 1). As HR Manager, Ms. Matthiesen's duties when investigating incidents included determining whether substance abuse occurred and if the employee was impaired. (R. p. 386). As such, she should have been trained on what to look for and should have been evaluating Lipscomb for any signs and symptoms of intoxication. However, Ms. Matthiesen testified that at no time did she encounter any information that would have led her to believe that Lipscomb was under the influence of alcohol. (R. p. 216, lines 11-18). Following her investigation, Ms. Matthiesen did not order any post-accident drug testing. (R. p. 140, line 6; p. 141, line 6). And, as testified to by Ms. Matthiesen, Innovative Fibers had nothing to do with the test that was performed at Spartanburg Regional; Innovative Fibers neither ordered the test nor directed the hospital to take the test. (R. p. 140, line 6; p. 141, line 6). Indeed, Ms. Matthiesen made no apparent effort to even follow up with regard to the test results; she 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).

On the date of the accident, Lipscomb was observed in close proximity by his co-workers, shift supervisors, his HR Manager, EMS personnel, and emergency room staff without the slightest notation of any suspicion of being under the influence of alcohol or otherwise impaired. Accordingly, the Commission was correct in affirming the Single Commissioner. Substantial evidence supports the Commission's finding that Innovative Fibers did not meet their burden of proving that Lipscomb's injury was proximately caused by intoxication.

B. The Commission Properly Gave Little Weight To Dr. Mennear's Toxicology Report

In arguing that the Commission erred in finding that Lipscomb's injury and accident were

not proximately caused by his intoxication, Innovative Fibers also argues that the Commission's basis for disregarding Dr. Mennear's opinion was invalid and constitutes an abuse of discretion. In support of their statutory defense, Innovative Fibers argues the "clear scientific evidence" of the emergency room blood test result underlying Dr. Mennear's report. However, missing from their "scientific" evidence, is any science: the testimony of any physician, nurse, medical practitioner, phlebotomist, lab technician, toxicologist, or any other qualified person who could assist the trier of fact in understanding whether this test was conducted in accordance with established medical or scientific protocol, what type of testing methodology was applied, the procedure used in the blood draw, the chain of custody of the blood sample, or whether the sample was even verified to be Lipscomb's blood. This accident happened at Innovative Fibers, situated in Spartanburg, minutes away from the emergency room where Lipscomb was taken following the accident. The hearing before the Single Commissioner was also held in Spartanburg. Innovative Fibers did not offer the testimony of anyone affiliated with the Spartanburg Regional Hospital to authenticate the purported blood alcohol report. Dr. Mennear, whose report was offered as an expert opinion, does not even provide any insight as to these issues; his entire report is predicated on the speculative assumption that the testing was performed correctly, competently, and accurately. Innovative Fibers is offering this uncorroborated, non-validated test result as irrefutable proof of their statutory defense of intoxication, and to the issue of proximate cause.

Innovative Fibers has repeatedly argued by analogy that Lipscomb's blood alcohol level was significantly higher than .08, the blood alcohol concentration level that creates a rebuttable presumption of impaired driving under South Carolina law. S.C. Code Ann. § 56-5-2930 (1976). This is also the analysis applied by Dr. Mennear in his report. (R. p. 377). This analogy does

little to help Innovative Fibers meet the statutory burden of proof in this case. Primarily, there is no expert testimony of record that establishes any degree of reliability of the emergency room laboratory report. While the standard for admissibility is quite different under the APA than it would be in a DUI prosecution, Innovative Fibers has offered no evidence that the blood alcohol test is reliable evidence. For this reason and for the reasons outlined in Argument II., the Commission properly gave very little weight to Dr. Mennear's report.

II.

THE COMMISSION'S DECISION TO GIVE VERY LITTLE WEIGHT TO THE REPORT OF DR. JOHN MENNEAR DID NOT CONSTITUTE AN ABUSE OF DISCRETION

"An abuse of discretion occurs if the Commission's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." Thompson v. Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 878 (Ct.App.2006)(citing Steinke v. S.C. Dep't of Labor, Licensing and Regulation, 336 S.C. 373, 398, 520 S.E.2d 142, 155 (1999)). As such, in order to show that the Appellate Panel abused its discretion in giving little weight to Dr. Mennear's report, Innovative Fibers must show that there is no evidentiary support of the Panel's ruling. It cannot.

A. Dr. Mennear's Report Is Not Reliable

In support of their statutory affirmative defense of intoxication, Innovative Fibers offered the report and *curriculum vitae* of John H. Mennear, PhD, as an APA exhibit at the hearing. These documents were admitted over the objection of Lipscomb's counsel. Lipscomb's objection was based upon three (3) grounds. Primarily, it did not appear that Dr. Mennear's professional experience qualified him to render an expert opinion about the effect of ethanol on a worker in an industrial setting. Secondly, Lipscomb objected to Dr. Mennear's report as being based upon

an emergency room blood test, for which no validating evidence had been offered, such as the blood draw process, chain of custody of the blood sample, or the actual testing procedure. Dr. Mennear's opinion seemed to be based upon the unsubstantiated assumption that the testing had been performed correctly, with the accepted protocol, despite not having investigated these issues. Thirdly, the objection to admissibility was based upon Dr. Mennear's inclusion in his report of a reference to a 2007 emergency room report, during which Lipscomb had provided hospital admission questionnaire information about general alcohol use. Lipscomb maintained that this information had no relation to the claim, and whatever probative value this information may have offered was far outweighed by its prejudicial effect. (R. pp. 70-72) Lipscomb further moved to keep the record open to allow the deposition of Dr. Mennear, with regard to his qualifications. This motion was taken under advisement, and later denied. (R. p. 72).

Dr. Mennear's listing of professional experience includes such entries as "design and oversight of acute, subacute and chronic toxicology and carcinogenesis studies in laboratory animals," "research and administration in toxicology studies of drugs, biomaterials, medical devices and nutritional products," and the development of various academic programs. Dr. Mennear's letterhead titles him a "Professor Emeritus, Pharmacology and Toxicology." Nowhere in his *curriculum vitae* is there listed any experience or publication related to the effects of ethanol on humans, and its impact in an industrial or vocational setting. Moreover, there is no indication from the *curriculum vitae* that Dr. Mennear has ever been involved in the actual treatment, examination, or testing of the effects of ethanol.

Also absent from Dr. Mennear's report and *curriculum vitae* is any reference to experience or qualifications in forensic toxicology. A forensic toxicologist analyzes blood, urine, biological and non-biological samples for the presence of alcohol, drugs, and poisons. After

analyzing these samples, forensic toxicologists interpret the results for coroners, police officers, and courts. Interpreting these results involves an examination of how different levels of drugs and/or alcohol cause an individual to act or respond under their influence. State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct.App.2011). Our courts have recognized the important distinction between forensic toxicology and both pharmacology and toxicology. In Martin, this Court upheld the trial court's qualification of a forensic toxicologist, who distinguished pharmacology, which involves testing for the presence of drugs, from *forensic* toxicology, that "takes it a step further" and determines the level of impairment for courts. Id. at 514, 706 S.E.2d 43. The expert further explained that forensic toxicology also differs from toxicology in that forensic toxicology determines an individual's level of impairment for courts. Id. There is nothing among Dr. Mennear's professional qualifications that indicates he has ever been qualified as an expert in forensic toxicology, or even testified in court with regard to impairment.

In his brief opinion letter, Dr. Mennear states: "In addition to these materials, I relied upon personal knowledge and experience gained during a 50 year career of teaching and research in pharmacology and toxicology." (R. p. 340). However, there is no indication on Dr. Mennear's opinion report, or his *curriculum vitae*, that would inform the reader exactly what his "personal knowledge and experience" is that qualifies him to render an opinion on the effects of alcohol on Lipscomb. There was no apparent consideration of Lipscomb's height, weight, age, or physical condition, presumably because, as Commissioner Taylor noted, Dr. Mennear never examined Lipscomb. (R. p. 14)

Innovative Fibers asserts, as a ground for appeal, that it was an abuse of discretion for the Single Commissioner to disregard Dr. Mennear's opinion because it was unclear from his report that he had specific details of how the accident occurred. Innovative Fibers' basis for this

position is the fact that Dr. Mennear had been provided a copy of Lipscomb's deposition, taken several months after he sustained the injury. Innovative Fibers' suggestion that a review of Lipscomb's deposition testimony would have been a thorough and complete account of the moments leading up to his accident is not accurate.[2] The deposition transcript does not completely describe the circumstances giving rise to the accident with the baling machine. The information set forth in Lipscomb's deposition testimony is limited by the scope of the questions that were asked by Innovative Fibers' counsel. The testimony excerpt from Lipscomb's deposition that Dr. Mennear relied upon was only 5 pages of testimony that was limited in scope and missing important details. (R. pp. 183-188). Lipscomb provided a more complete and detailed account of the sequence of events leading up to his injury at the hearing before the Single Commissioner. In fact, the hearing transcript contains no less than sixteen (16) pages of Lipscomb's direct and cross examination testimony, during which Lipscomb provides a detailed account of the procedure involved in running the baling machine, the role and function of the "cutter," and his explanation of how the accident happened (R. pp. 91, 92, 101, 107-118). In addition, Lipscomb's co-worker, Nashid Henderson, was called as a witness at the hearing. Mr. Henderson offered testimony that provided details about his observation of the accident leading to Lipscomb's injury. (R. pp. 124-125). In fact, following Mr. Henderson's direct and cross examinations, Commissioner Taylor herself asked him a number of questions in an effort to have him provide additional details about the area surrounding the baling machine, and the machine itself. (R. pp. 131-133). Prior to the April 2015 hearing, Henderson had not been deposed.

This combined twenty-one (21) pages of hearing testimony provided substantially more

[2] In cherry-picking deposition testimony, Innovative Fibers' misrepresented Lipscomb's testimony regarding how the accident happened. (Appellants' Initial Brief of Appellants/Respondents, pp.17-18). When cross-examined by counsel for Innovative Fibers regarding the exact same testimony at the hearing, Lipscomb testified that he had not seen anyone else do what he had done on "that day"—meaning on the day accident. (Tr. 49:10-20).

information that the several pages of Lipscomb's deposition. This was clearly what the Single Commissioner was referring to when she found it was unclear from Dr. Mennear's report whether he had specific details of how the injury occurred. Dr. Mennear issued his report on August 18, 2014, approximately eight (8) months before the hearing took place.

B. The Appellate Panel Gave Proper Weight to Dr. Mennear's Report

Once expert testimony is admitted, is to be considered just like any other testimony. Hargrove v. Titan Textile Co., 360 S.C. 276 294, 599 S.E.2d 604, 613 (Ct.App.2004)(citing Tiller v. National Health Care Ctr., 334 S.C. 333, 340, 513 S.E.2d 843, 846 (1999))(other citation omitted). The Appellate Panel determines the weight and credit to be given to the expert testimony and although expert testimony is entitled to great respect, the Appellate Panel may disregard it if there is other competent evidence in the record. Id. (*See* Tiller, 334 S.C. at 340, 513 S.E.2d at 846 (stating that medical testimony should not be held conclusive irrespective of other evidence)). In deciding whether substantial evidence supports a finding of causation, it is appropriate to consider both the lay and expert evidence. Id. (citing Sharpe v. Case Products, Inc., 336 S.C. 154, 161, 519 S.E.2d 102, 106 (1999)).

Here, the Appellate Panel appropriately considered both lay and expert testimony and properly gave little weight to the opinion of Dr. Mennear. As outlined above in Argument I., substantial evidence supports the finding that Lipscomb's injuries were not proximately caused by intoxication.

III.

SUBSTANTIAL EVIDENCE SUPPORTS THE COMMISSION'S FINDING THAT JAMES LIPSCOMB'S ACCIDENT AND INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT.

After not being able to satisfy their burden and show that intoxication proximately caused

Lipscomb's injury, Innovative Fibers attempts to circumvent the law by claiming that Lipscomb's accident and injury did not arise out of and in the course of his employment because of his alleged violation of Innovative Fibers' alcohol abuse policy. This argument is wholly without merit. There is nothing in the record to even suggest that Lipscomb was acting outside the scope of his employment when the accident happened; on the contrary, the substantial evidence supports the finding that Lipscomb's injury arose out of and in the course of his employment.

To be compensable, an injury must be one "arising out of and in the course of employment." S.C. Code Ann. § 42-1-160 (Supp.2006). The phrase "arising out of" refers to the injury's origin and cause; whereas, "in the course of" refers to the time, place, and circumstances under which the injury occurred. Hall, 376 S.C. at 348, 656 S.E.2d 758 (citing Baggott, 330 S.C. at 4, 496 S.E.2d at 854 (1998))(other citations omitted). For an injury to "arise out of" employment, the injury must be proximately caused by the employment. Houston v. Deloach & Deloach, 378 S.C. 543, 553, 663 S.E.2d 85, 90 (Ct.App.2008) (citing Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 50, 508 S.E.2d 21, 24 (1998); *see also* Fowler v. Abbott Motor Co., 236 S.C. 226, 230, 113 S.E.2d 737, 739 (1960) (accident "arises out of" employment when it arise because of it, as when the employment is a contributing proximate cause)). An injury occurs "in the course of" employment when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto. Houston, 378 S.C. at 555, 663 S.E.2d at 91 (citing Baggott, *supra*)(other citation omitted). In determining if an accident arose out of and in the course of employment, each case must be decided on its own facts. Id. at 350, 656 S.E.2d at 759 (citing Lanford v. Clinton Cotton Mills, 204 S.C. 423, 425, 30 S.E.2d 36, 41 (1944)).

"The general policy in South Carolina is to construe the Workers' Compensation Act in favor of coverage, and any reasonable doubts as to construction should be resolved in favor of the claimant." Id. (citing Davis v. S.C. Dep't of Corr., 289 S.C. 123, 125, 345 S.E.2d 245, 246 (1986)).

It is undisputed that at the time of the accident, Lipscomb was working his regular shift as a baler at Innovative Fibers and that the accident occurred while Lipscomb was performing his assigned job of re-feeding the baling machine. As such, Lipscomb was injured in the course of his employment. Nevertheless, Innovative Fibers contends that by violating Innovative Fibers' alcohol abuse policy, Lipscomb was acting outside the scope of his employment. In support of their contention, Innovative Fibers cites Wright v. Bi-Lo, Inc., 314 S.C.152, 442 S.E.2d 186 (Ct.App.1994).

Wright v. Bi-Lo involved a grocery store clerk who died of a heart attack while pursuing a suspected shoplifter. Mr. Wright's principal job at Bi-Lo was bagging groceries. Bi-Lo had a specific policy regarding employee involvement in the detection and prevention of shoplifting, as well as the apprehension of suspected shoplifters. Employees such as Mr. Wright were allowed to observe suspected shoplifters and report those observations to management but were prohibited from approaching or apprehending suspected shoplifters. Mr. Wright violated this policy on at least two occasions prior to his death and following each occasion, he was instructed by his manager to never again confront a suspected shoplifter. Despite these clear instructions, on the day of his death, Mr. Wright again followed a suspected shoplifter outside the store. His supervisor told him to go back inside the store but Mr. Wright refused and stated that he was "going after" the suspect. Mr. Wright jumped on his moped and gave chase, and apparently died of a heart attack shortly thereafter. Id. at 153-54, 442 S.E.2d at 187-88.

In Wright, the controlling question was whether Mr. Wright stepped outside the scope of his employment by violating the store's rules on shoplifters. The Wright Court quoted the South Carolina Supreme Court's decision in Johnson v. Merchants Fertilizer Co., 198 S.C. 373, 378-379, 17 S.E.2d 695, 697-698 (1941) as succinctly stating the applicable law on this question:

> [N]ot every violation of an order given to a workman will necessarily remove him from the protection of the Workmen's Compensation Act.... "Certain rules concern the conduct of the workman within the *sphere of his employment,* while others *limit the sphere itself.* A transgression of the former class leaves the scope of his employment unchanged, and will not prevent the recovery of compensation, while a transgression of the latter sort carries the workman outside of the sphere of his employment and compensation will be denied."

Wright, 314 S.C. at 155, 442 S.E.2d at 188. "When an employer limits the sphere of employment by specific prohibitions, injuries incurred while violating these prohibitions are not in the scope of employment and, therefore, not compensable." Id. (citing Black v. Town of Springfield, 217 S.C. 413, 60 S.E.2d 854 (1950)). In Wright, the Court found that Mr. Wright left the sphere of his employment by violating the specific orders not to confront, pursue or apprehend suspected shoplifters. Id.

In simple terms, a work-related injury may still be compensable even though an employee was disobeying the employer's orders when he or she got hurt. If the employer's orders limited the scope of the worker's employment, the injury is not compensable. However, if the orders governed the employee's conduct while in the sphere of employment, the injury is covered. The reason why these are treated differently is because when an employee violates an order or breaks a rule that limits the course and scope of the employment, the worker is no longer going about the employer's business. Chasing shoplifters clearly was not part of Mr. Wright's job. *See also* Black, *supra*, (police chief's death not compensable where police chief violated City's express prohibition against riding in fire truck) and Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (Ct.App.2004)(employee left the scope of his employment by violating

specific order not to drive the company vehicle home).

Applying the principles set forth in Wright to this case, substantial evidence supports the finding that that Lipscomb *never* left his sphere of employment and that the accident and injury arose out of and in the course of his employment. As stated above, it is undisputed that at the time of the accident, Lipscomb was working his regular shift as a baler at Innovative Fibers and that the accident occurred while Lipscomb was performing his assigned job of re-feeding the baling machine. In other words, he was doing his job as assigned and at the appropriate time.

Indeed, the following Findings of Fact were affirmed by the Commission: On March 20, 2014, Lipscomb was working as a baler at the Innovative Fibers plant in Spartanburg, South Carolina. At the beginning of his shift, Lipscomb attended the mandatory safety meeting with his supervisor which was attended by other employees on his shift. Following the safety meeting, Lipscomb was told by his supervisor that he would be re-feeding bales during his shift that night. Re-feeding bales required feeding materials into the baler by hand. Manually re-feeding material in this manner was part of Lipscomb's responsibilities as a baler. During the refeeding process, the baler is not running automatically but is activated manually by the cutter operating the pedal. Lipscomb was attempting to remove scraps of material which had not fully cleared the baling machine during the re-feeding process when the baler was activated and the injury occurred. Lipscomb was standing on the floor when the accident occurred. Lipscomb was not standing on the machine or reaching over the cage when the accident occurred. (R. p. 7, lines 18-20).

There was no finding of fact made with regard to any violation of Innovative Fibers' alcohol abuse policy. Moreover, no violation the alcohol abuse policy could even serve to remove Lipscomb's accident injury from the course of his employment as it had nothing to do

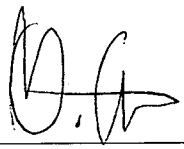
with defining or limiting Lipscomb's sphere of employment. For instance, it did not order or instruct him on what tasks he could perform, it did not order or instruct him on what machinery he could operate, and it did not order or instruct him on what areas of the plant were off limits. The clear purpose of the policy in question was not to "limit the sphere of employment" but rather it concerned the conduct of employees "within the sphere of employment." Indeed, the stated intent of the Substance Abuse and Testing Policy is "to offer a helping hand to those who need it" with the goal to "balance respect for individuals with the need to maintain a safe, productive, and drug-free environment." (R. p. 390). Termination is not automatic under the policy. (R. p. 385). Even Innovative Fibers recognized that Lipscomb's alleged violation did not remove Lipscomb's accident and injury from the course and scope of Lipscomb's employment. When Innovative Fibers terminated Lipscomb, they made the termination effective May 21, 2014. If, in fact, Lipscomb had not been within the scope of his employment at the time of the accident, his termination should have been effective prior to starting work on March 20, 2014.

As affirmed by the Commission, this case is meaningfully distinguishable from Wright v. Bi-Lo. Substantial evidence supports the finding that Lipscomb's accident and injury arose out of and in the course of his employment.

CONCLUSION

For the reasons stated herein, Lipscomb urges this Court to affirm the Findings of Fact and Conclusions of Law challenged on appeal.

Respectfully submitted,



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January 3, 2017

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

CROSS-APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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 Respondent's Brief of Respondent-Appellant complies with Rule 211(b), SCACR.

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