

**APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 1514048
ALEJANDRO HERNANDEZ, CLAIMANT
V.
COOPER HOME AND STABLE, EMPLOYER
AND
TRAVELERS PROPERTY AND CASUALTY OF AMERICA, CARRIER**

Appellate Panel Review held in Columbia, South Carolina, on September 18, 2017, per notices timely and properly served upon all parties of Interest.

Appellate Panel Decision and Order filed:

12/19/17

APPEARANCES:

Appellant-Defendant represented by Hedrick Gardner with Nicole Haltiwanger, appearing.

Respondent-Claimant represented by Calhoun Law Firm PA with Mark R. Calhoun appearing.

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SC Court of Appeals

Within the statutory period, counsel for the Plaintiff and Defendant filed Application for Review in the case setting forth the grounds of appeal, copies of which were furnished to all interested parties prior to oral arguments presented before the Appellate Panel on September 18, 2017.

By appeal, Appellant-Defendants respectfully submitted:

1. The Single Commissioner erred in finding of fact No. 5 in finding the testimony of claimant to be honest, upfront and on point as this finding is against the substantial evidence in this case.
2. The Single Commissioner erred in finding of fact No.6 in finding the testimony of George Galvan to not be credible and wishy washy as this finding is against the substantial evidence in this case.
3. The Single Commissioner erred in finding of fact No. 8 in finding the deposition of claimant to be consistent with his testimony and the deposition of George Galvan to not be consistent with his testimony with numerous inconsistencies and changes in his testimony as this finding is against the substantial evidence in this case.
4. The Single Commissioner erred in finding of fact No. 12 in finding there is no verification that the claimant has worked at Shaw industries as this finding is against the substantial evidence in this case.
5. The Single Commissioner erred in finding of fact No. 13 in finding that he does not believe the person in the photograph produced by Shaw industries as Alejandro Escobar is the same person as is the photograph of claimant because the haircut and jewelry in the two photographs are different and the claimant testified he has a twin brother who works at Shaw industries . The Single Commissioner further erred in finding Shaw industries

likely produced a photograph of the claimant's brother. These findings are against the substantial evidence in this case.

6. The Single Commissioner erred in finding of fact No. 15 in finding the compensable body parts to be claimant's back, left shoulder and left knee as this finding is against the substantial evidence in this case.
7. The Single Commissioner erred in finding of fact No. 16 in finding Cooper Home and Stable to be responsible for this claim as this finding is against the substantial evidence in this case.
8. The Single Commissioner erred in finding of fact No. 17 in finding TTD should be paid to claimant from July 24, 2015 to the present and continuing until the claimants TTD is properly ended upon further order of the Commission as this finding is against the substantial evidence in this case.
9. The Single Commissioner erred in finding claimant will be sent to an authorized treating physician for medical treatment to the back, left shoulder and left knee and that if no treating physician can be agreed upon by the parties, the claimant's attorney may choose the doctor for treatment as this finding is against the substantial evidence in this case.
10. The Single Commissioner erred in conclusion of law No. 1 in concluding claimant sustained compensable injuries to his left shoulder, left knee and back as this conclusion is not supported by the substantial evidence in this case or the applicable laws governing workers compensation claims.
11. The Single Commissioner erred in conclusion of law No. 5 in concluding claimant is entitled to receive causally related medical care for his left knee, left shoulder and back and that if claimant and defendant cannot agree on authorized treating physicians the

claimant's attorney may choose the doctor for treatment of the authorized body parts as this conclusion is not supported by the substantial evidence in this case or the applicable laws governing workers compensation claims.

12. The Single Commissioner erred in conclusion of law No. 6 in concluding claimant is entitled to receive TTD from July 24, 2015 to the present and continuing until terminated properly by further order of this Commission as this conclusion is not supported by the substantial evidence in this case or the applicable laws governing workers compensation claims.

13. The Single Commissioner erred in conclusion of law No. 7 in concluding Cooper Home and Stable and it's carrier Travelers Property Casualty Company of America, the upstream statutory employer of George Galvan d/b/a Fences by George will be the responsible party for this claim as this conclusion is not supported by the substantial evidence in this case or the applicable laws governing workers compensation claims.

By appeal, Appellant-Plaintiff respectfully submitted:

1. Did the single Commissioner err in finding as fact and concluding as law that claimant's average weekly wage at the time of his July 24, 2015 accident was \$520.00 with a compensation rate of \$346.68 the error being the Commissioner did not use a 48 hour work week at \$13.00 per hour before the date of injury in violation of §42-1-40?

STATEMENT OF THE CASE

The parties were heard by Commissioner Avery Wilkerson on October 31, 2016, in Columbia, South Carolina. Under date of March 17, 2017 the Hearing Commissioner issued the following Findings of Fact, Conclusions of Law and Order:

FINDINGS OF FACT

1. The order instructions were provided to both parties on December 1, 2016.(Due to technical problems with the recording equipment there was a delay in the transcript being completed. There is also an incomplete transcript. The court reporter notes "During the first half of this hearing there were technical difficulties with the audio resulting in many inaudibles".)
2. It is undisputed that George Galvan was working for Cooper Home and Stable on July 24, 2015. It is also undisputed that Mr. Galvan was uninsured.
3. The parties stipulated that the Worker's Compensation Commission has jurisdiction, venue was proper in Richland County, and that notice was properly served on all parties. There were no objections to APA submissions by the defendant and the claimant only objected to the hearsay portions of the investigators report.
4. The primary issue to be decided by this Single Commissioner is the average weekly wage and compensation rate. Also whether the claimant is entitled to medical treatment, determination of the responsible party and entitlement to TTD from July 24, 2015 to the present and continuing.
5. I find the testimony of the claimant to be honest, upfront, and on point.
6. I find the testimony of George Galvan (owner of Fences by George) to not be credible, and wishy-washy. Galvan admits the accident occurred and happened in the same manner

as described by the claimant. He testified he had no insurance coverage at the time of accident, could not remember the last time he had insurance coverage and still had no insurance coverage at the time of hearing. Galvan stated he never had a show cause hearing and the record reflects he did not appear for the show cause hearing. He had coverage at one time but let it lapse and did not secure new coverage.

7. I give minimal weight to the testimony of investigator James Douglas Parker. Mr. Parker only reviewed the investigative report, he did not perform the investigation. The actual investigator, Barry Davis was surveilling the wrong residence, he was actually at the residence of the claimant's brother Francisco Hernandez. His testimony was that the red dodge ram pickup truck he was following was owned by Francisco Hernandez. The individual on the video had a mustache, long hair and wore no glasses. The claimant has short hair-a crew cut, no mustache, and wears glasses.
8. I find the deposition of the claimant to be consistent with his testimony. I find the deposition of George Galvan to not be consistent with his testimony with numerous inconsistencies and changes in his testimony.
9. Mr. Galvan stated his address is 848 Joyner Pond Rd., Aiken SC 29803 and his business address as P.O. Box 3768, Aiken, SC 29802. His phone number is 803-522-2884.
10. South Carolina Worker's Compensation Commission file number X151534 and the order issued against George Galvan for operating his business without insurance coverage is a part of this claim and Mr. Galvan continues to operate his business in violation of that Order.
11. I find that George Galvan is still not in compliance as of the hearing date as per his hearing testimony. Mr. Galvan states he cannot afford coverage yet his deposition and

hearing testimony make it clear he has an over abundance of work for his 8-10 man crew and hired the claimant in order to keep up with this surplus of work.

12. The record was left open until Monday, November 14, 2016 and this was agreed to by all parties. Information from the carrier (55 page personnel file of Alejandro Escobar) and the UEF (16 pages of unverified checking account documents from George Galvan) was received on November 15, 2016 and allowed in the record. No objection by any party. Check copies were submitted by George Galvan (not from a banking institution) and a personnel file of Alejandro Escobar was submitted from Shaw Industries (not in the Claimants name). These check copies were allowed in the record. I find there is no verification that the claimant has worked at Shaw Industries. The birthdate and Social Security number of Alejandro Escobar in the personnel file from Shaw is different than the claimants. The claimant's brother, sister in law and wife work at Shaw Industries. No employee of Shaw Industries has identified the claimant as being an employee and the July 8, 2016 letter from Shaw states that the Alejandro Escobar in the personnel file was not offered a job. I further find that it is not credible that George Galvan who is the only witness claiming the claimant works at Shaw Industries, testified he did not issue a 1099 or W-2 to the claimant because the claimant did not provide him with a drivers license or Social Security card. Yet, Mr. Galvan testified the claimant was able to obtain a job at Shaw Industries.

13. At the request of Attorney Dewana Looper I have been asked to make a specific finding of fact of; Do I believe Shaw Industries person on file photograph of Alejandro Escobar is the same person as the photograph of Alejandro Hernandez? In addition to the differences noted in paragraph 15, I find that the haircut and jewelry worn in the two

photographs is different and the Claimant testified he has a twin brother that works at Shaw Industries. This brother lives next door to the Claimant and is the same person driving the red dodge ram pick-up truck in the surveillance videos. There is no DNA testing or fingerprint match presented, only a visual identification request. To a reasonable degree of certainty I cannot say this is the same person. I find Shaw industries likely produced a photograph of the defendants brother and there is no verification that the person in the photograph from Shaw Industries actually worked there.

14. I find the average weekly wage to be \$520.00, with a corresponding compensation rate of \$346.68, pursuant to South Carolina Code Ann. §42-1-40. This is based on a 40 hour work week with the claimant making \$13.00 per hour.
15. The compensable body parts the claimant will be treated for are the back, left shoulder and left knee.
16. Based on the greater weight of the evidence, I find the upstream statutory employer, Cooper Home and Stable, to be responsible for this claim. George Galvan testified he was uninsured on the date of accident and could not remember the last date he had coverage.
17. TTD should be paid back at the rate of \$346.68 from July 24, 2015 to the present and continuing until the claimants TTD is properly ended upon further order of this Commission.
18. The claimant will be sent to an authorized treating physician for medical treatment to the back, left shoulder, and left knee. If no treating physician can be agreed upon by the parties, the claimant's attorney may choose the doctor for treatment of these authorized body parts.

19. Since the upstream statutory employer Cooper Home and Stable is insured, the SCUEF is not liable and will be dismissed as a party to this action.

CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact and under the Code of Law of South Carolina, as amended, it is concluded that:

1. Under §42-1-160, Claimant sustained a compensable injury by accident arising out of and in the course of his employment, said injuries being to the Claimant's left shoulder, left knee and back.
2. Under §42-15-20 proper notice of the injury was given to the Employer.
3. Under §42-15-40, the claim was properly filed.
4. I find and conclude that under §42-1-10, the appropriate average weekly wage is \$520.00 resulting in an applicable weekly compensation rate of \$346.68.
5. Under §42-15-60, Claimant is entitled to receive causally related medical care for his left knee, left shoulder and back. If the claimant and defendant cannot agree on authorized treating physicians the claimant's attorney may choose the doctor for treatment of the authorized body parts. Treatment will be provided until at maximum medical improvement.
6. Under §42-1-40, the claimant is entitled to receive TTD from July 24, 2015 to the present and continuing until terminated properly by further order of this Commission.
7. Cooper Home and Stable and its carrier Travelers Property Casualty Company of America, the upstream statutory employer of George Galvan d/b/a Fences by George will be the responsible party for this claim.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law it is hereby:

ORDERED, ADJUDGED, AND DECREED the Claimant sustained a compensable injury by accident to the left knee, left shoulder and back arising out of and in the course of his employment; and it is further;

ORDERED, ADJUDGED, AND DECREED that the Claimant is entitled to be paid TTD at the rate of \$346.68 from July 24, 2015 and will continue until terminated in accordance with the rules and regulations of the South Carolina Worker's Compensation Act. and it is further;

ORDERED, ADJUDGED, AND DECREED that the responsible party will be Cooper Home and Stable and its carrier Travelers Property Casualty Company of America, and it is further;

ORDERED, ADJUDGED, AND DECREED that the Claimant shall receive medical treatment for his left knee, left shoulder and back by physicians the parties will agree upon until at maximum medical improvement.

ORDERED, ADJUDGED AND DECREED that Cooper Home and Stable is the statutory employer so the SCUEF has no liability and will be dismissed as a party to this action.

All proffered testimony has been taken. Such, together with all documentary evidence has been delivered by argument to the individual members of the Panel and has since been under study and consideration. We find:

FINDINGS OF FACT

1. The order instructions were provided to both parties on December 1, 2016. (Due to technical problems with the recording equipment there was a delay in the transcript being completed. There is also an incomplete transcript. The court reporter notes "During the first half of this hearing there were technical difficulties with the audio resulting in many inaudibles".)

2. It is undisputed that George Galvan was working for Cooper Home and Stable on July 24, 2015. It is also undisputed that Mr. Galvan was uninsured.

3. The parties stipulated that the Worker's Compensation Commission has jurisdiction, venue was proper in Richland County, and that notice was properly served on all parties. There were no objections to APA submissions by the defendant and the claimant only objected to the hearsay portions of the investigators report.

4. The primary issue to be decided by this Commission is the average weekly wage and compensation rate. Also whether the claimant is entitled to medical treatment, determination of the responsible party and entitlement to TTD from July 24, 2015 to the present and continuing.

5. We find the testimony of the claimant to be honest, upfront, and on point.

6. We find the testimony of George Galvan (owner of Fences by George) to not be credible, and wishy-washy. Galvan admits the accident occurred and happened in the same manner as described by the claimant. He testified he had no insurance coverage at the time of accident, could not remember the last time he had insurance coverage and still had no insurance coverage at the time of hearing. Galvan stated he never had a show cause hearing and the record reflects he did not appear for the show cause hearing. He had coverage at one time but let it lapse and did not secure new coverage.

7. We give minimal weight to the testimony of investigator James Douglas Parker. Mr. Parker only reviewed the investigative report, he did not perform the investigation. The actual investigator, Barry Davis was surveilling the wrong residence, he was actually at the residence of the claimant's brother Francisco Hernandez. His testimony was that the red dodge ram pickup truck he was following was owned by Francisco Hernandez. The

individual on the video had a mustache, long hair and wore no glasses. The claimant has short hair-a crew cut, no mustache, and wears glasses.

8. We find the deposition of the claimant to be consistent with his testimony. We find the deposition of George Galvan to not be consistent with his testimony with numerous inconsistencies and changes in his testimony.

9. Mr. Galvan stated his address is 848 Joyner Pond Rd., Aiken SC 29803 and his business address as P.O. Box 3768, Aiken, SC 29802. His phone number is 803-522-2884.

10. South Carolina Worker's Compensation Commission file number X151534 and the order issued against George Galvan for operating his business without insurance coverage is a part of this claim and Mr. Galvan continues to operate his business in violation of that Order.

11. We find that George Galvan is still not in compliance as of the hearing date as per his hearing testimony. Mr. Galvan states he cannot afford coverage yet his deposition and hearing testimony make it clear he has an over abundance of work for his 8-10 man crew and hired the claimant in order to keep up with this surplus of work.

12. The record was left open until Monday, November 14, 2016 and this was agreed to by all parties. Information from the carrier (55 page personnel file of Alejandro Escobar) and the UEF (16 pages of unverified checking account documents from George Galvan) was received on November 15, 2016 and allowed in the record. No objection by any party. Check copies were submitted by George Galvan (not from a banking institution) and a personnel file of Alejandro Escobar was submitted from Shaw Industries (not in the Claimants name). These check copies were allowed in the record. We find there is no verification that the claimant has worked at Shaw Industries. The birthdate and Social Security number of Alejandro Escobar in the personnel file from Shaw is different than the claimants. The

claimant's brother, sister in law and wife work at Shaw Industries. No employee of Shaw Industries has identified the claimant as being an employee and the July 8, 2016 letter from Shaw states that the Alejandro Escobar in the personnel file was not offered a job. We further find that it is not credible that George Galvan who is the only witness claiming the claimant works at Shaw Industries, testified he did not issue a 1099 or W-2 to the claimant because the claimant did not provide him with a drivers license or Social Security card. Yet, Mr. Galvan testified the claimant was able to obtain a job at Shaw Industries.

13. At the request of Attorney Dewana Looper, the single Commissioner was asked to make a specific finding of fact of; Did he believe Shaw Industries person on file photograph of Alejandro Escobar is the same person as the photograph of Alejandro Hernandez? In addition to the differences noted in paragraph 15, he found that the haircut and jewelry worn in the two photographs is different and the Claimant testified he has a twin brother that works at Shaw Industries. This brother lives next door to the Claimant and is the same person driving the red dodge ram pick-up truck in the surveillance videos. There is no DNA testing or fingerprint match presented, only a visual identification request. The Single Commissioner could not say this is the same person. He found Shaw industries likely produced a photograph of the defendant's brother and there is no verification that the person in the photograph from Shaw Industries actually worked there. As the Claimant was present before the Single Commissioner, we give deference to his opinion in this matter.

14. We find the average weekly wage to be \$624.00, with a corresponding compensation rate of \$416.02, pursuant to South Carolina Code Ann. §42-1-40. This is based on a 48 hour work week with the claimant making \$13.00 per hour.

15. The compensable body parts the claimant will be treated for are the back, left shoulder and left knee.

16. Based on the greater weight of the evidence, We find the upstream statutory employer, Cooper Home and Stable, to be responsible for this claim. George Galvan testified he was uninsured on the date of accident and could not remember the last date he had coverage.

17. TTD should be paid back at the rate of \$416.02 from July 24, 2015 to the present and continuing until the claimants TTD is properly ended upon further order of this Commission.

18. The claimant will be sent to an authorized treating physician for medical treatment to the back, left shoulder, and left knee. If no treating physician can be agreed upon by the parties, the claimant's attorney may choose the doctor for treatment of these authorized body parts.

19. Since the upstream statutory employer Cooper Home and Stable is insured, the SCUEF is not liable and will be dismissed as a party to this action.

CONCLUSIONS OF LAW

Upon the foregoing Findings of Fact and under the Code of Law of South Carolina, as amended, it is concluded that:

1. Under §42-1-160, Claimant sustained a compensable injury by accident arising out of and in the course of his employment, said injuries being to the Claimant's left shoulder, left knee and back.
2. Under §42-15-20 proper notice of the injury was given to the Employer.
3. Under §42-15-40, the claim was properly filed.
4. We find and conclude that under §42-1-10, the appropriate average weekly wage is \$624.00 resulting in an applicable weekly compensation rate of \$416.02.

5. Under §42-15-60, Claimant is entitled to receive causally related medical care for his left knee, left shoulder and back. If the claimant and defendant cannot agree on authorized treating physicians the claimant's attorney may choose the doctor for treatment of the authorized body parts. Treatment will be provided until at maximum medical improvement.

6. Under §42-1-40, the claimant is entitled to receive TTD at the rate of \$416.02 from July 24, 2015 to the present and continuing until terminated properly by further order of this Commission.

7. Cooper Home and Stable and its carrier Travelers Property Casualty Company of America, the upstream statutory employer of George Galvan d/b/a Fences by George will be the responsible party for this claim.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law it is hereby:

ORDERED, ADJUDGED, AND DECREED the Claimant sustained a compensable injury by accident to the left knee, left shoulder and back arising out of and in the course of his employment; and it is further;

ORDERED, ADJUDGED, AND DECREED that the average weekly wage is \$624.00 with a compensation rate of \$416.02 based on a forty eight (48) hour work week at \$13.00 per hour.

ORDERED, ADJUDGED, AND DECREED that the Claimant is entitled to be paid TTD at the rate of \$416.02 from July 24, 2015 and will continue until terminated in accordance with the rules and regulations of the South Carolina Worker's Compensation Act. and it is further;

ORDERED, ADJUDGED, AND DECREED that the responsible party will be Cooper Home and Stable and its carrier Travelers Property Casualty Company of America, and it is further;


ORDERED, ADJUDGED, AND DECREED that the Claimant shall receive medical treatment for his left knee, left shoulder and back by physicians the parties will agree upon until at maximum medical improvement.

ORDERED, ADJUDGED AND DECREED that Cooper Home and Stable is the statutory employer so the SCUEF has no liability and will be dismissed as a party to this action.

ORDER

The Order of the Single Commissioner filed in the above titled matter on March 17, 2017, is hereby affirmed in part and reversed in part by the panel and the same shall constitute the Decision and Order of the Appellate Panel.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION


Commissioner Melody James


Commissioner Aisha Taylor


Commissioner Scott Beck

CERTIFICATE OF SERVICE

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

By Valerie Deller on December 19, 2017