THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

Susan S. Barden, Commissioner, Chair
Aisha Taylor, Commissioner
Avery B. Wilkerson, Jr., Commissioner

Appellate Case No. 2017-002069
W.C.C. File No. 1604067

Courtney Forrest, Employee, Respondent,

v.

Advanced Disposal Services, Inc., Employer, and

Arch Insurance Company Carrier, Appellants.

INITIAL BRIEF OF APPELLANT

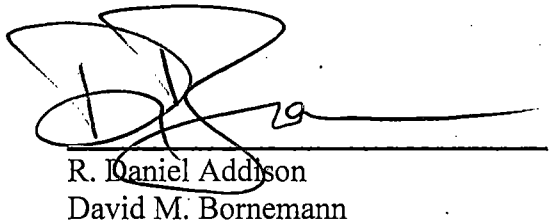

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. DID THE APPELLATE PANEL ERR IN FINDING THAT THE CLAIMANT SUSTAINED A COMPENSABLE INJURY TO THE ANKLE IN THE COURSE AND SCOPE OF EMPLOYMENT ON APRIL 12, 2016 WHEN SUCH A FINDING IS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD?

2. DID THE APPELLATE PANEL ERR IN GRANTING A RUNNING AWARD OF TEMPORARY TOTAL BENEFITS IN EXCESS OF THOSE CONTEMPLATED BY HIS MEDICAL PROVIDER AND DESPITE CLAIMANT'S TESTIMONY THAT HE WAS ABLE TO RETURN TO WORK WHEN SUCH A FINDING IS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD?

STATEMENT OF THE CASE

On April 26, 2016, Claimant filed a Form 50, Request for Hearing, asserting an injury to the left ankle and leg on April 12, 2016, just days after beginning working for the Employer. Defendants responded with a Form 51 dated May 25, 2016, denying the claim.

Commissioner T. Scott Beck presided over a hearing on August 10, 2016, wherein the Claimant contended he sustained an injury to the left ankle and left leg on April 12, 2016 (less than two weeks post-hire) and requested temporary total compensation, payment of past medical expenses, and additional future medical treatment. The Defendants denied that Claimant sustained any injury arising out of and in the course and scope of his employment. The Defendants denied that Claimant was entitled to any benefits under the Act.

Commissioner Beck issued an Order on October 25, 2016 finding that Claimant satisfied his burden of proving a compensable injury to the left ankle and awarding causally-related medical care and temporary total disability benefits from the date of injury to the present and continuing (despite concerns regarding surveillance footage of Claimant, showing his physical abilities after the alleged injury).

The Defendants/Appellants subsequently requested the Appellate Panel of the Workers' Compensation Commission review the prior decision. The Appellate Panel received briefs, evidence, and heard oral arguments on June 19, 2017. Thereafter, on September 6, 2017, the Appellate Panel issued an Order affirming the Order of the Single Commissioner. This appeal follows.

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) provides the standard for judicial review of decisions by the [Appellate Panel]." Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); *accord* Lark v. Bi–Lo, Inc., 276 S.C. 130, 133–34, 276 S.E.2d 304, 306 (1981). Under the APA, this court can reverse or modify a decision of the Appellate Panel if the substantial rights of the appellant "have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010); S.C.Code Ann. § 1–23–380(5)(d), (e) (Supp.2012).

"In Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383, we held that awards of the Industrial Commission may not rest upon surmise, conjecture or speculation but must be founded upon substantial evidence, and that if the evidence is all one way, or if the findings of the Commission are based on surmise, speculation or conjecture, then the issue becomes one of law for the court and not of fact for the Commission. In this same case we held that expert testimony is not binding upon the fact-finding body if there is competent substantial evidence to the contrary, though in matters of such kind which are not of common knowledge, fact-finding body must accept opinion of experts." Herndon v. Morgan Mills, Inc., 246 S.C. 201, 210, 143 S.E.2d 376, 381 (1965).

ARGUMENTS

I. THE APPELLATE PANEL ERRED IN FINDING THAT THE CLAIMANT SUSTAINED A COMPENSABLE INJURY TO THE ANKLE IN THE COURSE AND SCOPE OF EMPLOYMENT ON APRIL 12, 2016 WHEN SUCH A FINDING IS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD.

The Claimant alleges an injury to the left ankle on April 12, 2016, less than two weeks following his initial employment with Advanced Disposal Services South Carolina, LLC and just two days on the job post-training. (Hearing Tr. p. 10, ll. 17-20; p. 28, ll. 15-19). Claimant alleges that while working on a vehicle in the yard, he fell forward and did not twist his ankle but felt a pull in his leg. (Hearing Tr. pp. 15, ll. 5-14). Claimant testified that he reported the accident to his direct supervisor named Joe. (Hearing Tr. p. 16, ll. 12- p.17, ll. 8). The next day, the Claimant sought treatment from the VA. Following the trip to the VA, Claimant called his Employer and was sent to Doctors Express (Hearing Tr. p. 18, ll. 13-21). He had a note for one week out of work from the VA and took that note to Doctors Express with him. Doctors Express wrote Claimant out of work and recommended physical therapy. (Hearing Tr. p. 20, ll. 11-14). The Employer, based upon their investigation of this claim, denied any further medical care. The Claimant underwent physical therapy on his own, but had stopped by the time of the Hearing and Claimant produced no evidence to support any further orders for causally-related treatment at either the VA or Moncrief Army Hospital. The Claimant further testified that he was able to return to work, but that he was not willing to return to light duty for his employer. (Hearing Tr. p. 24, l. 15 – p. 26, l. 14).

Although disadvantaged by reading Claimant's live testimony rather than witnessing it, there are a variety of inconsistencies in the record and it is clear that the Claimant was less than forthcoming in his testimony. He did admit that when he went to the VA on April 12, 2016, his

history was that he stepped on a rock the other day. Claimant had only been on regular duty (post-training) for two days at the time of the alleged accident. (Hearing Tr. p. 28, ll. 15-19). Although his testimony was of an injury to the back of the leg, the complaint recorded by the VA shows reports of left shin pain. (Hearing Tr. p. 27, l. 10 – p. 28, l. 6; APA at 22). Claimant admits that he wore steel-toed work boots that laced up and supported the ankle. (Hearing Tr. p. 36, ll. 6-10). Claimant testified that he finished his shift working on a white pickup truck, but was limping. (Hearing Tr. p. 38, ll. 4-11).

Furthermore as to credibility, Claimant acknowledged that he falsified answers on his application regarding prior health issues. As part of the hiring process, the Claimant completed a post-offer/pre-employment medical questionnaire, wherein he denied any prior injuries, pain, or discomfort to the back, ankle, knee, or psyche. (Exhibits at 61-62). He further denied any prior disability ratings or any other physical conditions the Employer should be aware of. (Exhibits at 62). This questionnaire included a statement that Employer relied on these assertions and workers' compensation benefits could be voided if false information were supplied. (Exhibits at 61). Claimant certified on his application that "all information I have provided to Advanced Disposal Services, Inc. in support of my application for employment is true and accurate." (Exhibits at 51).

The Claimant admittedly lied on his application about these prior health issues. At the Hearing, in the course of attempting to explain his responses regarding his prior health and disability ratings, he felt disclosing prior health information "should be if I want to tell you or not." (Hearing Tr. pp. 28, ll. 19-pp. 32, ll. 19). Claimant admitted that he requested a re-evaluation by the VA to increase his disability rating of 10% (which was not disclosed) about a year prior to applying for work with the Employer. When asked why he did not tell his Employer about any of his prior

injuries or disability, Claimant stated "I don't believe they ever need to know. Because I'm not applying for disability with them. I'm applying for a job based on my skills." Claimant admitted that, after he was hired by the Employer, he received notice that he had been approved by the VA as 90% disabled. (Hearing Tr. p. 28, l. 20 – p. 31, l. 15).

Furthermore, the Employer presented testimony of Mike Stanley, the maintenance manager of the shop, who investigated the reported fall. Mr. Stanley preserved the security footage on the date and time following the fall as the Claimant worked on the white pickup truck. Claimant had no dirt or other signs of a fall on his dark clothing. In one brief stretch of video, there is a question of a limp, but the Claimant does not limp or demonstrate any limitation on his activities during the vast bulk of the video. (Surveillance clips 1, 2, 3). Mr. Stanley also testified that you could not fall in the yard and not be covered in the dust from the crush and run. (Hearing Tr. p. 46, l. 24 – p. 47, l. 15).

The record also contains a note from co-worker, Shane Patrick, who stated that around midnight on April 12, 2016 (shortly before the alleged injury), Claimant approached him to talk about the workplace. In the conversation, Claimant was asking "about the cameras and which ones worked or not.... Then he talked about how laid back it was here not having to change tires or do any larger project jobs. Within these conversations he told [Mr. Patrick] he rolled his ankle on a rock getting out of a truck in the yard." (Exhibits at 73).

Another employee provided a statement that Claimant told him he turned his ankle slightly, but said he was okay and just walked it out, but didn't mention any discomfort as they continued to work in the coming hours. (Exhibits at 75).

Both the Single Commissioner and Appellate Panel acknowledged the inconsistencies were compelling; however, they determined the medical evidence was sufficient to find the claim

compensable. However, a close look at the medical evidence demonstrates that it is not compelling. It is also important to note that only partial evidence was submitted from Moncrief Army Hospital (records Defendants were unable to obtain prior to the Hearing), which were also most recent records in evidence and the only ones not to comment on work status.

The medical evidence submitted consists of a record from the VA which shows that, predating April 12, 2016, Claimant called on March 18, 2016 and received refills for salsalate (anti-inflammatory), gabapentin (drug for neuropathy), hyaluronate (drug for arthritic joints), and sertratine (drug for depression and panic attacks). His description of the event at approximately 11:00AM on April 12, 2016 is that he stepped on a rock "the other day at work" and felt pain and swelling in the foot, ankle, and left front part of the shin. (APA at 22). At approximately 1:30PM, the description changes to his "foot caught the gravel" while walking and fell forward with a pop in the back of the ankle. (APA at 19). Claimant's testimony at the Hearing was that he lost his footing and went forward, rolling on to his back. (Hearing Tr. p. 15, ll. 5-13). The ankle was x-rayed at the VA and showed only degenerative changes and "there may be mild soft tissue swelling... There is no acute fracture. Trace soft tissue swelling... that might represent sprain. (APA at 15). Claimant was placed out of work by the VA for April 12-15, 2016 only. (APA at 24).

Claimant was also seen by Doctors Express on April 12, 2016 following the VA visit. At that time, Claimant reported a fall at work, twisting the left foot and ankle. No swelling was noted on the exam. There was abnormal motion and tenderness reported, therefore he was advised to elevate and ice and advised to return in 4-5 days if not improved. (APA at 1-2). Claimant returned for follow up on April 18 and at that time the injury is charted as right ankle in one place and left in the other. (APA at 9). The Claimant was referred to physical therapy and instructed to return after

the evaluation. Claimant was written out of work until he could be assessed by a physical therapy evaluation (not to remain off work until therapy is completed, but only until an evaluation took place). (APA at 12, 14). No medical provider documented an acute injury to a reasonable degree of medical certainty.

Furthermore, given the allegations of left ankle injury which include the left foot, the Defendants assert that the conglomeration of undisclosed pre-existing conditions, including the left foot, render an injury or exacerbation more of a foregone conclusion than an "accident," as is required by the Act.

Pursuant to S.C. Code Ann. §42-1-160 (1976), the terms "injury" and "personal injury" mean injury by accident arising out of and in the course of employment. The word "accident" has been applied by our courts in the workers' compensation context to mean an "unlooked for or untoward event that the injured person did not expect, design or intentionally cause." Capers v. Flautt, 305 S.C. 254, 256–57, 407 S.E.2d 660, 661 (Ct. App. 1991) (citing Linnen v. Beaufort Co. Sheriff's Dept., 305 S.C. 341, 408 S.E.2d 248 (S.C.Ct.App.1991) (Davis Adv. Sheet No. 12 at 13); Stokes v. First National Bank, 298 S.C. 13, 17, 377 S.E.2d 922, 924 (Ct.App.1988); Yates v. Life Ins. Co. of Georgia, 291 S.C. 301, 353 S.E.2d 297 (Ct.App.1987)).

Similar to the facts in Capers (which involved a claimant with a pre-existing condition applying for a job likely to exacerbate that undisclosed condition), here, the Claimant was aware of serious and significant pre-existing disability, to include the right ankle and both right and left feet. Claimant knowingly and willfully applied for a physical labor job at a facility that a reasonable person would recognize would expose them to uneven surfaces. Claimant then alleges that he sustained a new injury to his left foot and ankle when he stepped on an uneven surface. Given these

facts, the Claimant's injury was not an "unlooked for or untoward event."

Furthermore, even if the Claimant sustained an injury at work and could not reasonably have foreseen that he was in danger of exacerbating his pre-existing conditions as in Capers, the record is replete with evidence that Claimant knew of his pre-existing disabilities, including arthritic conditions, pre-existing right ankle injury and pre-existing left and right foot injury/disability, and provided false information to his Employer, which was relied upon in the hiring and placement process. Given these factors, even an unexpected injury to the previously disabled left foot would be precluded under Cooper v. McDevitt & St. Co., 260 S.C. 463, 196 S.E.2d 833 (1973) due to Claimant's fraud in the application. The Court in Cooper adopted the rule that a false statement in an employment application will bar benefits if: (1) The employee must have knowingly and willfully made a false representation as to his physical condition. (2) The employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. (3) There must have been a causal connection between the false representation and the injury. Id.

In this case, the Claimant admittedly lied on his application about his prior health issues, including a disabled left foot. At the Hearing, in the course of attempting to explain his responses regarding his prior health and disability ratings, he felt disclosing prior health information "should be if I want to tell you or not." (Hearing Tr. pp. 28, ll. 19-pp. 32, ll. 19). Claimant admitted that he requested a re-evaluation by the VA to increase his disability rating of 10% (which was not disclosed) about a year prior to applying for work with the Employer. When asked why he did not tell his Employer about any of his prior injuries or disability, Claimant stated "I don't believe they ever need to know. Because I'm not applying for disability with them. I'm applying for a job based on my skills." As per the documents, the Employer relied on the Claimant's assertions in making

employment and placement decisions. (Exhibits at 60-63).

For the reasons cited above, the Appellants respectfully request the Court of Appeals reverse the Appellate Panel Order finding the claim compensable.

II. THE APPELLATE PANEL ERRED IN GRANTING A RUNNING AWARD OF TEMPORARY TOTAL BENEFITS IN EXCESS OF THOSE CONTEMPLATED BY HIS MEDICAL PROVIDER AND DESPITE CLAIMANT'S TESTIMONY THAT HE WAS ABLE TO RETURN TO WORK WHEN SUCH A FINDING IS CLEARLY ERRONEOUS IN VIEW OF THE RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD.

The Claimant was written out of work by Doctors Express on April 18, 2016 for a minor ankle sprain "until physical therapy evaluation." (APA at 12, 14). Importantly, although the Single Commissioner and Appellate Panel expressed that they felt constrained by the medical records, the plain language of the medical records states that Claimant was only written out until such time as physical therapy evaluated him. If the Commission is constrained by a reading of the records, a period of temporary total disability benefits should not exceed the date that Claimant appeared for physical therapy and another medical provider could comment on whether there was an ongoing need to remain out of work.

While we do not know what the Claimant's physician at Moncrief Army Hospital may have commented on work status when he presented on April 20, 2016 (due to partial records submitted into evidence and Defendants' inability to procure the records in advance of Hearing), at a minimum, we know that Claimant appeared for physical therapy by May 13, 2016. (APA at 31). Records as to the physical therapist's recommendation on work status were not produced or submitted by the Claimant.

Importantly, as part of the out of work instructions, **Claimant was instructed to return to Doctors Express "once he is seen by PT."** [Emphasis added] (APA at 14). Claimant failed to

comply with orders to return to the clinic following his physical therapy evaluation and; therefore, it would be prejudicial to assume the work restrictions continued on into perpetuity (much less more than a few days after the PT evaluation) when the Claimant simply has not returned for further evaluation with the clinic who wrote him out of work.

If the Claimant is allowed to rely on the opinion of this physician to assert he is entitled to benefits for placement out of work, fairness dictates that the Claimant should be expected to comply with the physician's orders to return to the clinic for further assessment once he was seen by physical therapy (May 13, 2016).

Furthermore, at the Hearing, the Claimant testified that he was able to work. (Hearing Tr. p. 24, l. 15 – p. 26, l. 2). He also testified that he was not willing to return to work for this Employer, which is consistent with his deposition testimony which was made part of the record. (Dep. p. 10, l. 20 – p. 11, l. 2). Claimant has produced no medical evidence to support his continuing time out of work beyond the date of his physical therapy evaluation which occurred at least by May 13, 2016. (APA at 31).

Given Claimant's failure to comply with instructions to return for follow up with Doctors Express following his physical therapy evaluation, or even to produce evidence that he followed up with any other physician of his own choosing, there is no current medical opinion that his time out of work subsequent to May 13, 2016 is related to his minor, left ankle sprain (rather than his pre-existing conditions for which he was rated as 90% disabled by the VA). Moreover, there is no evidence in the record to suggest that any physician anticipated or expected their out of work directions to continue on an indefinite basis beyond physical therapy evaluation.

An interpretation of the Doctors Express opinion that Claimant "will be off work until PT

evaluation" that ignores the instructions for Claimant to "[return to clinic] once he is seen by PT," necessarily relies on surmise, conjecture, and speculation to arrive at a conclusion that temporary total benefits should continue indefinitely despite Claimant's conduct ignoring instructions to return for follow up assessment.

"In Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383, we held that awards of the Industrial Commission may not rest upon surmise, conjecture or speculation but must be founded upon substantial evidence, and that if the evidence is all one way, or if the findings of the Commission are based on surmise, speculation or conjecture, then the issue becomes one of law for the court and not of fact for the Commission. In this same case we held that expert testimony is not binding upon the fact-finding body if there is competent substantial evidence to the contrary, though in matters of such kind which are not of common knowledge, fact-finding body must accept opinion of experts." Herndon v. Morgan Mills, Inc., 246 S.C. 201, 210, 143 S.E.2d 376, 381 (1965).

In this claim, the medical evidence all points that the Claimant was written out of work until the physical therapy evaluation (May 13, 2016 at the latest). Even if you consider the lay testimony at Hearing, there is not "competent substantial evidence to the contrary." Claimant testified that he did believe he could work, at a minimum in a light duty capacity. (Hearing Tr. p. 24, l. 15 – p. 26, l. 2).

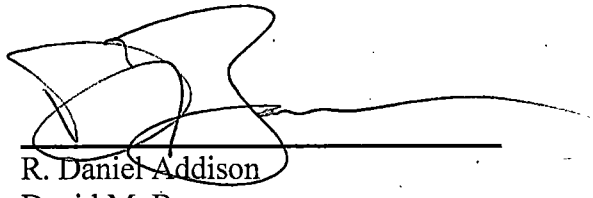
Based on the above, the Defendants would respectfully request the Court of Appeals reverse the decision of the Appellate Panel that Claimant was entitled to a running award at any point beyond May 13, 2016.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Appellate Panel of

the South Carolina Workers' Compensation Commission.

Respectfully submitted,



March 7, 2018

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APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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Arch Insurance Company, Employer, and
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Appellants

PROOF OF SERVICE

This is to certify that a copy of the foregoing **Initial Brief of Appellant and Designation of Matter** has been served upon the flowing by placing the same in the United States mail, first class postage pre-paid, addressed as shown below on the 7th day of March, 2018.

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March 7, 2018

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RE: Forrest, Courtney v. ADS Waste Holdings, Inc.
Appeal No. 2017-002069
Our File No.: 00614L.00003

Dear Ms. Kitchings:

Enclosed for filing is the Initial Brief of Appellant and Designation of Matter in the above referenced Workers' Compensation claim and the Proof of Service.

By copy of this letter I am herewith serving a copy of the enclosed on opposing counsel.

Very truly yours,

David M. Bornemann

DMB/hrv

cc: Christopher Archer, Esq.