

IN 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

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SC Court of Appeals

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

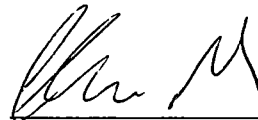
Courtney Forrest, Employee/Respondent,

v.

ADS Waste Holdings, Inc., Employer, and

Arch Insurance Company, Carrier, Appellants.

INITIAL BRIEF OF RESPONDENT



Christopher J. Archer
Goodwyn Law Firm, LLC
2519 Devine Street
Suite A
Columbia, SC 29205
carcher@goodwynlaw.com
(803) 251-4517
(803) 251-4527 fax
Attorney for Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. Is the Workers' Compensation Commission's Decision and Order finding Mr. Forrest sustained a compensable injury to his left ankle in the course and scope of his employment on April 12, 2016 supported by the substantial evidence contained in the record as a whole?**

- II. Is the Workers' Compensation Commission's Decision and Order finding Mr. Forrest was entitled to Temporary Total Disability Benefits from the date of the injury to the present and continuing supported by the substantial evidence contained in the record as a whole?**

STATEMENT OF THE CASE

This matter is before the South Carolina Court of Appeals for review of the Decision and Order of the South Carolina Workers' Compensation Commission, filed in this matter on September 6, 2017. For the reasons set forth below the Respondent respectfully submits that the South Carolina Workers' Compensation Commission's Decision and Order should be affirmed.

Respondent (hereafter also referred to as Mr. Forrest) in this case contends that he sustained injuries to his left ankle and left leg on April 12, 2016 as a result of an accident arising out of and in the course of his employment with Employer. (Respondent's Form 50; R. p. __). He further contends that he is entitled to payment of temporary total compensation and payment of medical expenses incurred as a result of his injury. (Respondent's Form 50; R. p. __). He also asserts that he has not reached the point of maximum medical improvement with regard to his injury and is entitled to receive additional medical treatment. (Respondent's Form 50; R. p. __).

Appellants deny that Mr. Forrest sustained any injury arising out of and in the course of his employment. (Appellants' Form 51; R. p. __). Appellants further deny that Mr. Forrest is entitled to any compensation and benefits under the Act. (Appellants' Form 51; R. p. __).

Commissioner Scott Beck initially heard this matter in August of 2016. (Decision and Order dated October 25, 2016; R. p. __). Following that hearing Commissioner Beck issued his Decision and Order finding Mr. Forrest satisfied his burden of proving a compensable injury to his left ankle and awarding Mr. Forrest causally related medical care and temporary total disability benefits from the date of injury to the present and continuing.

(Decision and Order dated October 25, 2016; R. p. __). Appellants subsequently requested that the Full Commission review that decision. (Appellants' Form 30; R. p. __). An Appellate Panel of the Commission then conducted a review hearing and subsequently affirmed Commissioner Beck's decision in this case. (Decision and Order dated September 6, 2017; R. p. __). Appellants' then filed a Notice of Appeal of the Commission's Decision.

STANDARD OF REVIEW

Upon review in South Carolina, a decision of an administrative agency should be affirmed unless that decision is clearly erroneous in view of the reliable, probative and substantial evidence on the record as a whole. S.C. Code Ann. § 1-23-380(g)(6)(1976); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E. 2d 304 (1981). The court reviewing the agency's decision should not substitute its own findings of fact for those of the agency nor should the court substitute its judgment for that of the agency as to the weight of the evidence. *Tobey v. L & P Construction Company*, 296 S.C. 122, 370 S.E. 2d 897 (Ct. App. 1988).

Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the agency involved reached to justify its decision. *Harrell v. Pacific Columbia Mills*, 291 S.C. 469, 471, 354 S.E. 2d 384, 385 (1987). The substantial evidence rule means that the court will not overturn findings of fact by an administrative agency unless there is no reasonable probability that the fact could be as related by the witness upon whose testimony the finding was based. *Lark v. Bi-lo, Inc, infra*. When factual findings are supported by substantial evidence, analogous to a jury's finding of fact on disputed issues, the agency's conclusions should be affirmed. *Hunter v. Patrick Construction Company*, 289 S.C. 46, 344 S.E. 2d 613 (1986).

ARGUMENT

I. THE WORKERS' COMPENSATION COMMISSION'S DECISION AND ORDER FINDING MR. FORREST SUSTAINED A COMPENSABLE INJURY TO HIS LEFT ANKLE IN THE COURSE AND SCOPE OF HIS EMPLOYMENT ON APRIL 12, 2016 IS SUPPORTED BY THE SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD AS A WHOLE.

Substantial evidence in this case supports the Workers' Compensation Commission's finding that Mr. Forrest sustained a compensable injury to his left ankle in the course and scope of his employment on April 12, 2016. On this date, Mr. Forrest was employed as a heavy equipment mechanic with Advanced Disposal Services of South Carolina, LLC (hereafter also referred to as "Advanced") where he worked the night shift repairing the Employer's trucks. On the date of the injury, Mr. Forrest testified that, around 2:00 a.m. he walked in to the yard to retrieve a service vehicle that needed work. (Hrg. Trans. p. 13 l. 5-11; R. p. __, lines __). Mr. Forrest testified that the yard was dark, unpaved, and had scattered rocks and holes. (Hrg. Trans. pp. 13, l. 15 – 14, l. 7; R. p. __, line __ -p. __, line __). While in the yard, Mr. Forrest testified that he stepped on a rock or into a small depression causing him to lose his footing and fall. (Hrg. Trans. p. 15 l. 5-21; R. p. __, lines __). Mr. Forrest testified that he immediately knew he had injured his leg. (Hrg. Trans. pp. 15, l. 24 – 16, l. 2; R. p. __, line __ -p. __, line __). Mr. Forrest then immediately notified Joe, the shop supervisor on site, that he injured his leg falling in the yard. (Hrg. Trans. p. 16 l. 10-25; R. p. __, lines __). This is undisputed in the record. Mr. Forrest informed Joe that despite being in pain, he would attempt to work the remainder of his shift. (Hrg. Trans. p. 17 l. 7-8; R. p. __, lines __). Mr. Forrest finished his shift and then went home, with the hope his condition would improve but by the afternoon, it was clear that the injury was more serious.

Mr. Forrest is a veteran of the United States Army and on the afternoon of the injury he sought treatment for his leg at the V.A. Hospital in Columbia, South Carolina. Mr. Forrest reported to Dr. Carolyn Birchmore that he stepped on a rock while at work and felt a pop as he fell to the ground. (Respondent's APA 19; R. p. ____). Dr. Birchmore noted swelling and deformity in Mr. Forrest's foot and the radiology report indicated soft tissue swelling. (Respondent's APA 19-20; R. p. ____). Dr. Birchmore then diagnosed Mr. Forrest with a left ankle sprain, wrote him out of work through April 15, 2016 and noted that additional imaging would be beneficial. (Respondent's APA 20; R. p. ____). The same day, Mr. Forrest notified Employer of his visit to the hospital and the Employer sent him Doctors Express. (Hrg. Trans. p. 18 l. 13-22; R. p. ____).

At Doctors Express, Mr. Forrest reported to Dr. Michael Huncharek. Dr. Huncharek diagnosed Mr. Forrest with a sprain of unspecified ligament of left ankle and wrote him out of work through April 18, 2016 pending a scheduled follow-up appointment. (Respondent's APA 2 and 7; R. p. ____). On April 18, Mr. Forrest attended his follow-up appointment with Dr. Huncharek who noted continued swelling and abnormal range of motion in Mr. Forrest's left ankle. (Respondent's APA 9; R. p. ____). At this time, Dr. Huncharek ordered Mr. Forrest receive an evaluation for physical therapy and wrote Mr. Forrest out of work pending that evaluation. As of the date of the hearing before the Single Commissioner, Appellants had refused to authorize this evaluation. (Hrg. Trans. p. 20 l. 19-25; R. p. ____).

Prior to this injury, Mr. Forrest had scheduled an appointment at Moncrief Army Hospital for issues related to his blood pressure and blood sugar. Mr. Forrest attended this appointment on April 20, 2016 and while there, reported his recent work injury to Dr.

Michal Domeny. Dr. Domeny examined Mr. Forrest's foot and diagnosed him with an ankle sprain noting the left ankle was warm, had continued swelling, had tenderness on palpation, and had abnormal motion. (Respondent's APA 27-28; R. p. ____). For treatment, Dr. Domeny prescribed Mr. Forrest crutches, a cam boot, and physical therapy. (Respondent's APA 28; R. p. ____). Appellants refused to authorize any physical therapy and so Mr. Forrest completed this on his own with little improvement of his condition. (Hrg. Trans. p. 21 l. 1-21; R. p. ____). At a follow-up appointment, because of Mr. Forrest's unimproved condition, Dr. Domeny recommended an MRI. Although this record was unavailable in time for the hearing, Mr. Forrest testified to this referral and its denial by Appellants. (Hrg. Trans. p. 21 l. 19-23; R. p. ____).

Appellants submitted no medical evidence at the hearing in this matter. Accordingly, the objective medical evidence noting injury to Mr. Forrest's left ankle is unrefuted in the record. The objective medical evidence showing injury to Mr. Forrest's left ankle following the April 12, 2016 work incident, coupled with Mr. Forrest's testimony of when and how this condition occurred is substantial evidence that Mr. Forrest suffered a compensable injury on April 12, 2016.

Appellants assert that Mr. Forrest testified he is not willing to return to light duty work for Employer. A careful reading of the transcript reveals this is not accurate. Mr. Forrest testified that while no doctor has released him to work full-duty, he does believe he could perform light duty work. (Hrg. Trans. p. 24 l. 12-18; R. p. __, lines ____). Mr. Forrest further testified that if Employer made light duty work available to him, then he would return, but that no such offer had been made. (Hrg. Trans. pp. 24, l. 21 – 25, l. 3; R.

p. __, line __-p. __, line). Appellants offered no evidence that they ever offered light duty work to Respondent.

Continuing, Appellants assert that Mr. Forrest's testimony as to when the injury occurred is inconsistent, relying on a history from the VA Hospital which states he stepped on a rock the other day. Mr. Forrest explains that because he works the night shift which continues into the early morning hours, although the injury occurred early in the morning, he may have referred to it as the previous day. (Hrg. Trans. p. 27 l. 18-22; R. p. __, lines __). A careful review of the complete record from the VA Hospital shows that Mr. Forrest reported the injury occurred on April 12, 2016. (Respondent's APA 18; R. p. __).

Appellants now raise fraud in the employment application pursuant to *Cooper v. McDevitt & St. Co.*, 196 S.E.2d 833, 260 S.C. 463 (1973) as a defense to this claim, asserting that Mr. Forrest misrepresented his physical condition to the Employer during the hiring process. Not only did Appellants fail to raise this defense on its Form 51, Form 30, or at either hearing, it specifically waived the defense at the hearing before Commissioner Beck. When asked by Commissioner Beck "Are you asserting McDevitt Street Defense?" the employer responded "I'm asserting the credibility defense." (Hrg. Trans. p. 44 l. 6-9; R. p. __, lines __). "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Accordingly, this Court should not consider this ground for appeal.

In response to Appellants' assertion that Mr. Forrest made misrepresentations to the employer and that these go to his credibility this Court has held, "Credibility determinations regarding testimony are a matter for the finder of fact, who has the

opportunity to observe the witnesses, and those determinations are entitled to great deference on appeal.” *Okatie River, L.L.C. v. Se. Site Prep, L.L.C.*, 353 S.C. 327, 338, 577 S.E.2d 468, 474 (Ct. App. 2003). The Single Commissioner, hearing the live testimony in this matter, sat in the best position to judge credibility and should be afforded deference on this finding. Mr. Forrest testified that he told the employer during his interview that he was “no chiparoo”. (Hrg. Trans. p. 32 l. 18-19; R. p. __, lines __). Further, none of Mr. Forrest’s VA disability relates to his left ankle and thus it is irrelevant as to whether he sustained a compensable injury on April 12, 2016, a point raised by the Single Commissioner at the hearing. (Hrg. Trans. p. 35 l. 3-11; R. p. __, lines __).

Appellants further assert that the video submitted is compelling evidence that no fall occurred because it does not show dust on Mr. Forrest’s dark clothing. The video is of poor quality and incorrectly marks both the date and time. (Hrg. Trans. p. 48 l. 23-24; R. p. __, lines __). Notwithstanding, a careful review of the video shows that, although Mr. Forrest was wearing dark clothing, this clothing is covered by a bright reflective vest which makes it impossible to discern whether Mr. Forrest has dust on him or not. Additionally, Appellants’ witness, Michael Stanley, admits during cross examination that the video clearly shows Mr. Forrest walking with a limp after the injury occurred. (Hrg. Trans. p. 52 l. 22-24; R. p. __, lines __).

Appellants next argue that Mr. Forrest’s claim is not an injury by accident as contemplated under S.C. Code Ann. § 42-1-160 (1976), relying on *Capers v. Flautt*, 407 S.E.2d 660, 305 S.C. 254 (Ct. App. 1991) in support of this position. This too is a novel argument not raised by the Appellants at any time prior to the filing of their Initial Brief with this Court. Because this issue was not raised to and ruled upon by the Commission,

Appellants have failed to preserve it for appellate review. Notwithstanding, Appellants' argument is unpersuasive.

In *Capers*, the Respondent had an allergy to soap and applied for work as a dishwasher. In that case, exacerbation of the Respondent's preexisting condition was inevitable. Here, Mr. Forrest had no prior disability to his left ankle and the record is devoid of any evidence that Mr. Forrest knew or should have known that his employment with Advanced would expose him to conditions that would make a fall such as the one he suffered inevitable. Substantial evidence in the record supports the Commission's finding that Mr. Forrest sustained an injury by accident and that Mr. Forrest did not and could not expect to fall in the manner that he did.

In total, substantial evidence in this case supports a finding that Mr. Forrest sustained a compensable injury to his left ankle in the course and scope of his employment on April 12, 2016.

II. THE WORKERS' COMPENSATION COMMISSION'S DECISION AND ORDER FINDING MR. FORREST WAS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS FROM THE DATE OF THE INJURY TO THE PRESENT AND CONTINUING IS SUPPORTED BY THE SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD AS A WHOLE.

"When the incapacity for work resulting from an injury is total, the employer shall pay, or cease to be paid. . . to the injured employee during the total disability a weekly compensation . . ." S.C. Code Ann. § 42-9-10(A). This statutory benefit is commonly referred to as temporary total disability. In this matter, both physicians who treated Mr. Forrest for this work injury, including the authorized treating physician, Dr. Michael Huncharek, wrote Mr. Forrest out of work pending further evaluations. Specifically, the authorized treating physician wrote Mr. Forrest out of work pending a physical therapy

evaluation. The Employer has refused to authorize not only the evaluation ordered by their own doctor, but has also refused any other medical treatment. The most recent work status note places Mr. Forrest out of work and no physician has lifted this restriction.

Appellants assert that Mr. Forrest ignored instruction to return to the doctor following his physical therapy evaluation. Mr. Forrest submitted this medical record to Appellants who neither authorized the physical therapy nor any follow-up appointment with the authorized treating physician. (Hrg. Trans. p. 20 l. 9-25; R. p. __, lines __). Appellants refused to authorize the treatment recommended by their own doctor and now seek to use that as justification for terminating temporary total disability benefits.

In a claim for benefits under the Workers' Compensation Act, an employer who denies a claim and refuses benefits assumes the risk of a Commissioner finding the claim compensable. Further, the employer may maintain its denial despite providing treatment. In this case, nothing has prevented Employer from sending Mr. Forrest to a doctor for an opinion as to his work status. They have refused to do so, and thus, they are bound by the most recent medical note. Again the most recent medical note in this case, provided by the authorized treating physician, places Mr. Forrest out of work pending further evaluation. The record in this matter is completely devoid of any medical note lifting the work restriction on Mr. Forrest and the Single Commissioner, as affirmed by the Full Commission, correctly awarded Mr. Forrest temporary total disability benefits from the date of the injury to the present and continuing. Accordingly, as set forth above, substantial evidence in the record supports the finding that Mr. Forrest is entitled to temporary total disability benefits from the date of the injury to the present and continuing.

CONCLUSION

Substantial evidence in this matter supports the finding that Respondent suffered a compensable injury to his left ankle on April 12, 2016. The authorized treating physician placed Respondent out of work and no physician has lifted this restriction. As a result, substantial evidence exists in the record to support the finding that Mr. Forrest is entitled to temporary total disability benefits from the date of the injury to the present and continuing. Accordingly, the Respondent respectfully submits that the Commission's Decision and Order for this matter should be affirmed.

Respectfully Submitted,

GOODWYN LAW FIRM, LLC



Christopher J. Archer
2519 Devine Street, Suite A
Columbia, SC 29205
CArcher@Goodwynlaw.com
(803) 251-4517
(803) 251-4527
Attorney for Respondent

Columbia, South Carolina
May 7, 2018

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PROOF OF SERVICE

I certify that I have served a copy of the **Initial Brief of Respondent and Designation of Matter** on R. Daniel Addison, Esquire and David M. Bornemann, Esquire, Counsel for Appellants, at the address below by depositing a copy of same in the United States Mail, postage prepaid, on April 4, 2018.

R. Daniel Addison, Esquire
David M. Bornemann, Esquire
Hedrick Gardner Kincheloe & Garofalo LLP
1301 Gervais Street, Suite 1900
Columbia, SC 29201

- signature page to follow -

Respectfully submitted,



Christopher J. Archer, Esquire
Goodwyn Law Firm, LLC
2519 Devine Street, Suite A
Columbia, SC 29205
803-251-4517
Attorney for Employee/Respondent
SC Bar No.: 101662

Columbia, South Carolina
May 7, 2018

GOODWYN LAW FIRM, LLC

T. Jeff Goodwyn, Jr.*
Christopher J. Archer

Special Counsel:
Rachel G. Peavy

*Also Licensed in Georgia

Reply to:
2519 Devine Street
Suite A
Columbia, South Carolina 29205

111-B Congress Street
Winnsboro, South Carolina 29180

Tel. (803) 251-4517 (Columbia)
Fax (803) 251-4527

Tel. (803) 635-1920 (Winnsboro)
Fax (803) 635-2100

Email: CArcher@Goodwynlaw.com
Web: www.GoodwynLaw.com

May 7, 2018

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

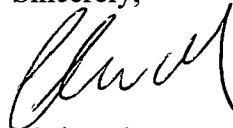
RE: *Courtney Forrest v. ADS Waste Holdings, Inc. and Arch Insurance Company*
WCC File No.: 1604067
Appellate Case No.: 2017-002069
DOI: April 12, 2016
Our File No.: 7000-0140

Dear Ms. Kitchings:

Enclosed for filing is the Initial Brief of Respondent, Designation of Matter, and Proof of Service in the above matter.

By copy of this letter to opposing counsel, I am serving him with a copy of the same.

Sincerely,



Christopher J. Archer

CJA
Enclosures

cc: R. Daniel Addison, Esquire
David M. Bornemann, Esquire

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SC Court of Appeals