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

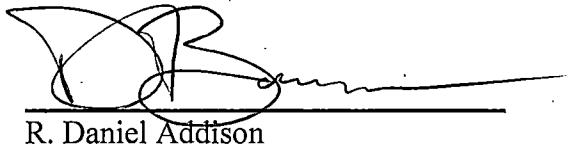
Courtney Forrest, Employee, Respondent,

v.

ADS Waste Holdings, Inc. Employer, and

Arch Insurance Company Carrier, Appellants.

INITIAL REPLY BRIEF OF APPELLANT



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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 Appellants rely on the arguments previously entered in their brief to support their position that the circumstances surrounding Claimant's claims and credibility issues do not support a finding of a compensable injury by accident. The Claimant argued in his Respondent's Brief that the standard in Capers v. Flautt, 305 S.C. 254, 256–57, 407 S.E.2d 660, 661 (Ct. App. 1991) and Cooper v. McDevitt & St. Co., 260 S.C. 463, 196 S.E.2d 833 (1973) should not be considered, on these issues the Appellants would respectfully respond with the following.

As to Cooper v. McDevitt & St. Co., the Respondent correctly cites that the issue of the defense arose at the Full Commission and Counsel indicated, "I'm asserting a credibility defense." (Full Commission Tr. pp. 44, ll. 6-9). While not specifically raised in the initial pleadings or Hearing, the Appellants would show that the fact Claimant met the elements for a Fraud in the Application defense goes to his overall credibility and the weight his testimony should be afforded. Here, the Claimant admitted that he concealed his prior foot and ankle issues (among others) and did not disclose his pre-hire request to the VA for re-evaluation to increase his disability rating. Claimant testified in his deposition that he received a 90% rating from the VA on his re-evaluation and that the final rating came through in May or June 2016. (Dep. pp. 28 ll. 11-12). When asked, "When you interviewed with Michael, had you already been notified you were 90 percent disabled?" He responded, "I don't know when exactly. I – we'd have to pull the paper and see when that occurred." (Dep. pp. 28 ll. 13-16).

As to Capers v. Flautt, this case deals directly with S.C. Code Ann. §42-1-160 (1976). Pursuant to this section, 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)). The Appellants did assert "injury by accident" in their Pre-Hearing Brief dated July 28, 2016 and denied the claim. The Appellants assert that there is not sufficient evidence to support an accident occurring on the job on April 12, 2016. Within that, the Defendants have put considerable focus on arguing the Claimant's pre-existing disability and issues. In the Claimant's deposition alone, his 90% impairment assessment (which was based on pre-April 12, 2016 medical evidence) was addressed five different times. (Dep. pp. 16 ll. 1, 2; pp. 17 ll. 3; pp. 18 ll. 15; pp. 28 ll. 6, 12, 14; pp. 30 ll. 7, 13, 15).

In any worker's compensation claim, the Claimant has the burden to prove an injury 1) by accident, 2) arising out of, and 3) in the course and scope of his employment. S.C. Code Ann. §42-1-160 (1976). Capers simply addresses the "by accident" component and formally acknowledges that, where a Claimant had significant pre-existing weakness/disability which a reasonable person would believe would predispose them to a similar injury (which was addressed throughout the proceedings below), that such new injuries/aggravations would not be considered an "accident" for the purposes of the Act. Furthermore, in the questions presented to the Full Commission, the prior defense

counsel addressed pre-existing disability as the cause of Claimant's condition arguing that he had been rated 90% disabled due to non-disclosed foot and ankle problems. (Appellants' Brief to the Full Commission p. 4). Counsel also argued that there were no medical records sufficient to overcome a finding that "no injury by accident occurred." (Appellants' Brief to the Full Commission p. 4). While admittedly not fleshed out in prior arguments to a high degree, the Appellants have argued against "injury by accident" (which is what Capers addresses) with the same evidence of prior disability.

The Appellants would respectfully submit that an argument of whether Claimant's alleged injury constitutes an "injury by accident" has been preserved. In the alternative, the Capers standard, as with the Cooper v. McDevitt standard, remain relevant for illustrative purposes to highlight Claimant's credibility concerns and the inconsistencies highlighted by the discrepancies between Claimant's testimony, reports to medical professionals, the testimony/statements of Claimant's co-workers, and the surveillance footage.

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.

In reply to the Respondent's arguments that he should be found continually out of work based on the records of Dr. Huncharek at Doctors Express, the Appellants respectfully submit the following.

Claimant testified in his deposition that he went directly to the VA first to address issues with his alleged left ankle injury before anywhere else. (Dep. pp. 43, ll. 20-22). Claimant then was sent to Doctors Express on April 12, 2016, where he was written out of work until April 18, 2016. (APA at

7). Claimant returned to Doctors Express on April 18, 2016 where it was noted that residual swelling to the ankle had decreased. Claimant was noted to "be off work until PT evaluation" and to return once he was seen by physical therapy. (APA at 9). Claimant's work note specifically states, "May not return to work until PT evaluation." (APA at 12). Just as the April 12th note established an end-date for the work excuse (April 18), the April 18 note establishes the end date of the new work excuse as being the date of the physical therapy evaluation. The statement of Dr. Muncharek establishes this clear end date by using language that Claimant cannot return to work **"until"** (establishing that the order is not open-ended) his **physical therapy evaluation** (the qualifying event to close out the period for this particular work note). There are no medical records or opinions from any provider beyond the date of Claimant's physical therapy evaluation that place Claimant out of work.

"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." Herndon v. Morgan Mills, Inc., 246 S.C. 201, 210, 143 S.E.2d 376, 381 (1965).

The Order of the Commission implies an ongoing restriction from work that is not supported by the plain language of the work notes. The work notes provided by Doctors Express provide a bright line cut off for their excuse from work. The medical provider wrote Claimant out of work only "until PT evaluation." The record is clear that a physical therapy evaluation took place at a minimum by May 13, 2016, at which point the only condition indicated in the work notes had been

satisfied. By issuing an Order awarding ongoing weekly benefits, the Commission is replacing the order of the medical provider with their own opinion that is not consistent with plain language of the medical provider. If the doctor had serious concerns with Claimant's long term ability to return to work from an ankle strain/sprain, he could have written a more open-ended order that required the Claimant to remain out of work until reassessed by their own clinic (Dr. Huncharek used exactly that language in his April 12, 2016 out of work note). If he intended an open-ended period out of work, Dr. Huncharek could have required that Claimant remain out of work until released by a future work note or some similar language; however, Dr. Huncharek did not leave work status open-ended, he only wrote Claimant out of work until a physical therapy evaluation took place.

As this was a denied claim, "A claimant has the burden of proving facts sufficient to allow recovery under the Workers' Compensation Act." Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007). Furthermore, "The difficulty in proving a fact in a compensation case does not relieve the party on whom the burden rests of proving it, and does not shift the burden to the other party." Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965). In the instant case, Claimant did not produce any medical evidence subsequent to Dr. Huncharek's note or subsequent to the May 13, 2016 physical therapy evaluation to support further recovery of ongoing temporary total disability benefits.

Once the physical therapy evaluation had taken place, further future work status notes and orders would have been incumbent upon another medical provider to place and for the Claimant to obtain and produce to the Commission as evidence. The physical therapist could have commented with work status recommendations, the Claimant could have returned to Dr. Huncharek for further assessment, the Claimant could have requested his VA doctor address work status, or any number of

other options; however, Claimant produced no records from the physical therapist addressing work status, nothing from Doctors Express, and nothing from his VA doctor. The Claimant alleges he was denied access to return to Doctors Express; however, no records were submitted in the record to support Dr. Huncharek refusing to see him. Moreover, the Claimant went to the VA on his own for treatment on April 12, 2016 and had additional follow up on April 18, 2016 and April 20, 2016. (APA at 18-19). Claimant's physician at the VA provided a work note placing him out of work April 12 to April 15, 2016. (APA at 21, 24). From the Claimant's submitted records we know that, at a minimum, he returned on April 18 and April 20, then began physical therapy on May 13, had a medical appointments set for May 24, June 14, and July 12, and had physical therapy appointments on June 3, June 10, June 17, June 24, and July 6; however, Claimant produced no further work notes from any subsequent follow up at the VA into evidence. (APA at 31-33) Given the fact that Claimant had received a prior work note from the VA and was receiving ongoing physical therapy and treatment there, there is little evidence that one of his medical providers could not have written a new note had Claimant needed to remain out of work.

The Commission's Order necessarily creates a medical opinion where none exists in the APA evidence. There is no conflicting medical evidence to weigh in this situation, the notion of a new period for Claimant to be written out of work beyond the date of the physical therapy evaluation is created whole-cloth by the Commission's Order. It is the Commission's role to determine issues where evidence conflicts, it is not the Commission's prerogative to substitute their opinion for those issued by medical experts or to create a medical opinion where no opinion exists in the evidence.

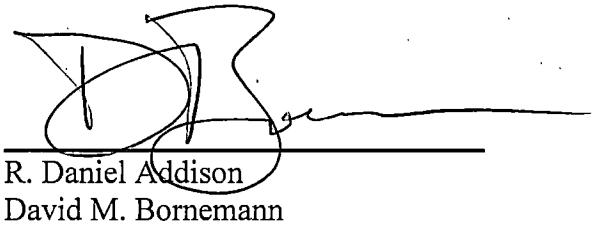
Based on the above, the Defendants would respectfully request the Court of Appeals reverse the decision of the Appellate Panel that Claimant was entitled to a running award of weekly benefits

at any point beyond May 13, 2016.

CONCLUSION

For the reasons stated, the Appellants respectfully submit that this Court should reverse the judgment of the Appellate Panel of the South Carolina Workers' Compensation Commission as to compensability. In the alternative, should the Court determine the claim remains compensable, the Appellants request the Court reverse the finding of an open-ended period of entitlement to temporary total disability benefits in light of the fact no evidence exists placing Claimant out of work beyond May 13, 2016 and Claimant has not met his burden to prove otherwise.

Respectfully submitted,



June 6, 2018

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ADS Waste Holdings, Inc., ... Employer/Appellant,

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Arch Insurance Company, ... Carrier/Appellant.

PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellant, by depositing a copy of it in the United States Mail, postage prepaid, on June 6, 2018, addressed to the attorney of record, Christopher J. Archer, 2519 Devine Street, Suite A, Columbia, SC 29205-1846.

June 6, 2018

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June 6, 2018

VIA HAND DELIVERY
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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 Reply Brief of Appellant 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.