

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Appellate Panel Chairman, Commissioner

WCC File No.: 0818219

JOE OSMANSKI, EMPLOYEE,

APPELLANT,

V.

WATKINS & SHEPARD TRUCKING, INC.,
EMPLOYER, AND ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER,

DEFENDANTS,

OF WHOM, ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER, IS THE

RESPONDENT.

FINAL BRIEF OF THE APPELLANT

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SC COURT OF APPEALS

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STATEMENT OF ISSUES ON APPEAL

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STATEMENT OF THE CASE

The Appellant filed a WCC Form No. 50 on March 4, 2009, alleging he sustained a compensable injury during the course and scope of his employment on November 1, 2008. The Respondents filed a WCC Form No. 51 on January 28, 2010, denying the claim was compensable.

A hearing was held before Commissioner Susan S. Barden on April 29, 2010. Commissioner Barden denied the claim for several reasons. On November 29, 2010, the Appellant filed a WCC Form 30 appealing her decision to the Appellate Panel. A review hearing was held on April 18, 2011. By Order dated July 26, 2011, the Appellate Panel affirmed the decision of Commissioner Barden. This appeal follows.

FACTS

The Claimant is forty-five (45) years old and married to his wife of twenty-five (25) years. Together they have nine (9) children. He has worked in heavy manual labor his entire life and supported his family. In 1987, he injured his arms (elbow/left worse than right) while working construction. He had several surgeries that ended with a left elbow replacement. He has very large surgical scars on both of his arms which are clearly visible.

In physical therapy, he was taught proper lifting techniques in dealing with any functional deficits with his left arm. Dr. Larry Chidgey, the Appellant's treating physician, assigned lifting restrictions of ten (10) to fifteen (15) pounds. When deposed, Dr. Chidgey testified that as he gained more strength in his right/dominant arm, he would not be limited to those restrictions as long as he shifted most of the weight to his stronger right arm. Dr. Chidgey went further and stated, "I have a 10 to 15 pound weight restriction on the left arm. I have no weight restriction on the right arm." (R. pp. 304-305). The Appellant was last seen by Dr. Chidgey in 2002. He did not see any doctors for any problems with either of his arms until the accident in this claim in 2008.

In 2006, the Appellant applied for a position as a driver with the Respondent Employer, Watkins Trucking. He traveled to Hickory, North Carolina. He was there for two (2) full days. The Appellant filled out various forms, was physically examined by a company physician (Dr. Albert Osbahr), and given an extensive lifting test, much like a functional capacity evaluation or FCE. The Appellant passed the drug screen and lift test. Dr. Osbahr found that the Appellant had impairment and problems with the use of his left arm, but certified that he could still perform the job. He reported these findings directly

to the Employer. (R. pp. 317-318, Osbahr Depo pp. 16-22). The Appellant was hired and worked for over two (2) years without incident.

The Appellant's job involves mostly pushing and pulling. All of the freight he was hauling was loaded onto the truck before he arrived. The boxes were arranged in the order of his deliveries, so all he had to do was push them towards the back of the trailer. Workers from the delivery sites would be in charge of taking the boxes off the truck and into the store. (R. p. 130).

On November 1, 2008, the Appellant was in Aiken, SC and had just finished making a delivery. He noticed the boxes were stacked in such a way that they might fall over. When he attempted to reposition one of the boxes, it became dislodged and unexpectedly started to fall. He tried to catch it, but the weight came down on his left arm causing his injury. (R. pp. 133-134). The Respondents initially accepted the claim. They paid temporary compensation and provided medical treatment. It was only after surgery was recommended did they produce an unsigned statement they claim to have come from the Appellant. Using this highly questionable form, the Appellants denied the claim on the basis that the Appellant failed to disclose his prior injury.

The source of the alleged false statement comes from a document titled "Post Job Offer Questionnaire" dated October 30, 2006. It asks whether or not the employee who has been offered a job has been injured previously while on the job or otherwise that would prevent him from being able to perform the job. On the form submitted by the Respondents, the answer to this question is "No." Interestingly, this form was not filled out by the Appellant. It has a signature of his name, but it was not the Appellant that

signed it. The Respondent Employer claims that while all of the other paperwork was available at the Hickory, NC facility, they chose to do this one (1) form over the phone.

The Respondent Employer had the Appellant at their office in Hickory, NC for two (2) days. He filled out the application along with numerous other forms, took the drug test, took the lift test and submitted to their physical examination, but for some reason they claim this one document was completed over the telephone from Missoula where an interviewer asked the questions and noted the Appellant's responses. The Appellant testified he does not recall answering these questions for anyone over the phone. (R. pp. 130-131). Although the Employer's witness, Matthew Grandy, stated this was the normal procedure, the form itself indicates otherwise. When looking at the bottom of the form, it contains the statement, "Please fax this immediately to Debi Hould and Janice Peterson in the Missoula Safety Department." (R. p. 384). Instead, the Respondent Employer claims someone in Missoula called the Appellant and completed the form over the phone.

The Appellant challenged the relevance and weight afforded to this document because it was apparent that the Respondents did not plan on presenting the person who completed the form as a witness. The Respondents already knew the Appellant would testify that he did not recall answering these questions for anyone. (R. p. 208, lines 10-22).

ARGUMENT

I. THE COMMISSION DECIDED THIS CLAIM USING THE WRONG LEGAL STANDARD.

GENERAL DEFINITIONS

A. **Fraud in the Application:** “The general rule is that the following factors must be present before a false statement in an employment application will bar benefits: 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. Cooper v. McDevitt & Street, 260 SC 463.

B. **Any action or defense for Fraud requires:** 1. A representation. 2. Its falsity. 3. Its materiality. 4. The speaker’s knowledge of its falsity. 5. His intent that it should be acted upon by the person. 6. The hearer’s ignorance of its falsity. 7. His reliance on its truth. 8. His right to rely thereon. 9. His consequent and proximate injury. Outlaw v. Calhoun Life, 236 SC 272. The standards for providing fraud are the same whether raised as a cause of action or as a defense. Hansen v. DHL Laboratories, 3316 SC 505. Fraud is never presumed and must be proven by clear and convincing evidence. Byars v. Cherokee County, 237 SC 548.

Due to the harsh consequences of a finding of fraud or either a plaintiff or a defendant, the burden of proof goes beyond a preponderance of the evidence. A fundamental principle for alleging fraud is that it must be proven by clear and convincing evidence. Byars v. Cherokee County, 237 SC 548. The Order in this case contains an error of law in failing to satisfy, acknowledge or even mention the requirement for clear

and convincing evidence. This issue was raised to the Appellate Commission, but they refused to rule on or address this standard. (R. pp. 78-79). The Respondents argued before the Appellate Panel that the reason the Hearing Commissioner did not address the clear and convincing standard was because the Appellant never told her that was the correct legal standard. With all due respect, it is not an injured worker's job to tell a Hearing Commissioner which legal standard applies. The Respondents' argument is much like saying a workers' compensation decision based upon proof beyond a reasonable doubt is not appealable if the injured worker never told the Hearing Commissioner the standard should be preponderance of the evidence. Either way, the error was raised to the Appellate Panel, but it was completely ignored and never addressed in its Order. The Appellant contends the Commission committed an error of law in using the wrong legal standard.

II. THE RESPONDENTS CANNOT CLAIM RELIANCE ON A FACT THEY KNEW NOT TO BE TRUE.

In order to prevail on a *McDevitt Street* defense, the employer must have relied upon the false representation and this reliance must have been a substantial factor in the hiring. Cooper v. McDevitt & Street, 260 SC 463. Fundamental to any claim or defense involving an allegation of fraud is the hearer's ignorance of the statement's falsity. Outlaw v. Calhoun Life, 236 SC 272. In other words, you can't claim reliance on a fact you know not to be true. The Respondents claim the Appellant failed to disclose information regarding his physical condition. If the evidence in the records contained only the Appellant's responses to their questions, we certainly see the logic in their position. However, the Respondent Employer's own doctor reported to them that the Appellant had both impairment and a loss of function in his left arm. Matthew Grandy,

the Respondent Employer's witness, testified that Dr. Osbahr's findings of impairment and decreased supination would be serious enough that someone should have followed up with the doctor or the Appellant. (R. p. 276, Grandy Dep, p. 35, lines 14-23). He testified that nothing was preventing the Respondent Employer from following up on this information. (R. p. 276, Grandy Dep, p. 35, lines 8-13). Dr. Osbahr testified that the Respondent Employer never called him to follow up on his notation and finding that the Appellant had impairment and problems moving his left arm. He further testified, that had the Respondent Employer called him to ask about it, he would have spoken with them and done his best to answer their questions. (R. p. 317, Osbahr Dep, pp. 16-17).

The Respondents cannot claim ignorance and reliance on a fact that they knew to be false. The hearer's ignorance of the statement's falsity is an essential element of reliance. In fact, the Commission's Order states, "[The Respondent Employer] never had the opportunity to explore the full extent of the [Respondent's] condition because it was concealed." (R. p. 20). This is in direct contradiction to the Respondent Employer's own witness who admitted that upon reading Dr. Osbahr's findings, they should have followed up with either Dr. Osbahr or the Appellant. (R. p. 276, Grandy Dep, p. 35, lines 8-13). That is to say, they had enough information about the Appellant's physical condition to know they needed to know more. All they had to do was ask either Dr. Osbahr or the Appellant. Had they done what they admitted they should have done, they could have asked for specific restrictions, the nature of any surgeries, or anything else they needed to know. Instead, they chose not to follow up or ask anyone for any additional information. Therefore, the Respondents did not meet their burden of proving reliance because their own witness admitted they knew the Appellants' responses were incorrect.

III. THE APPELLANTS ACCIDENT WAS UNEXPECTED.

The claim was further denied on the basis that this occurrence was not an accident. Under our established case law, the word “accident” is defined under the Act as an “unlooked for and untoward event which is not expected or designed by the person who suffered the injury.” Radcliffe v. Southern Aviation School, 209 SC 411, Capers v. Flautt, 305 SC 254. Judging if the injury was unexpected is determined from considering the injured worker’s point of view. Pee v. AVM, 352 SC 167.

The Appellant’s usual job was described as mostly pushing and pulling. He did not have to load any of the freight he was hauling. He only pushed the boxes to the end of the trailer so they could be off loaded by the customers’ workers. Since the boxes were arranged in the order of his deliveries, all he had to do was push them towards the back of the trailer. (R. p. 130). The accident happened when a box he was shifting became dislodged and fell onto his weaker arm.

Dr Chidgey, the Appellant’s treating doctor for his prior injury, testified that as the Claimant gained more strength in his right/dominant arm, he would not be limited to those restrictions as long as he shifted most of the weight to his stronger right arm. He went further and stated, “I have a 10 to 15 pound weight restriction on the left arm. I have no weight restriction on the right arm.” (R. pp. 304-305).

The Commission failed to consider the fact that prior to accepting employment, he was certified by the Employer’s doctor as able to perform the job. He had passed the Employer’s extensive testing designed to mirror the actual requirements of the job and was again certified as being physically able to perform all of the essential functions of the job. His treating doctor testified that as long as he used his right/dominant arm for most

of the lifting and used his left arm as a guide, he would not have violated his restrictions. (R. p. 305).

The Appellant's treating physician opined that but for the "unusual event of the heavy weight falling unexpectedly on his left arm, damaging the joint replacement itself, Mr. Osmanski would have undoubtedly been able to continue his work activities for the employer, as he did so for the two years prior to this work-related injury on or about November 1, 2008." (R. p. 332). In light of the foregoing, the Appellant contends the Commission erred as a matter of law in misapplying the standard for an accident and failing to base the ruling on evidence from the Appellant's point of view.

IV. THE COMMISSION'S ANALYSIS VIOLATES THE SOUTH CAROLINA WORKERS' COMPENSATION ACT.

S.C. Code Ann Section 42-9-35(D), Evidence of Preexisting Injury or Condition, provides, "[t]he provisions of this section apply whether or not the employer knows of the preexisting permanent disability". The language of this provision is unambiguous and makes it clear that aggravation of pre-existing injuries are compensable under the Act "whether or not the employer knows of the preexisting permanent disability." "Where a statute is clear and unambiguous, [the Supreme Court] has held that it will be literally applied." Citizens for Lee County v. Lee County, 308 S.C. 23, 416 S.E.2d 641 (1992); see also Bagwell v. Ernest Burwell, Inc., 227 S.C. 168, 87 S.E.2d 583, 585 (1955). The Act makes clear that aggravated pre-existing injuries are within the class of injuries to be protected thereby.

The Commission relied on caselaw for the general premise that *McDevitt* applications/contracts are not enforceable, which is inapplicable here. Under the rules of statutory construction, a specific statute controls over a more general one. I'ON, LLC, v.

Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716, 719 (2000); State Farm Fire and Casualty Co. v. Barrett, 340 S.C. 1, 530 S.E.2d 132, 1135 (Ct. App. 2000). Further, legislation enacted for a specific purpose, like the South Carolina Workers' Compensation Act, supplants the general law that would otherwise apply. Cf. Abba Equipment, Inc. v. Thomason, 335 S.C. 477, 517 S.E.2d 235, 241 (Ct. App. 1999).

Accordingly, the South Carolina legislature specifically provided employees with aggravation of preexisting conditions/disabilities are entitled to workers' compensation benefits regardless of "whether or not the employer knows of the preexisting permanent disability." S.C. Code Ann. Section 42-9-35. In construing this statute, the Court must presume that the Legislature did not intend to perform a futile thing and avoid a construction that would read a provision out of statute. Steinke v. South Carolina Dept. of Labor, Licensing, and Regulation, 336 S.C. 373, 520 S.E.2d 142, 153 (1999).

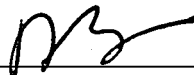
Additionally, our state's "policy is to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act." Spivey v. D.G. construction Company, 321 S.C. 19, 467 S.E.2d 117, 119 (Ct. App. 1996). In order to give effect to this specific statute, this Court should enforce the specific language of S.C. Code Ann. Section 42-9-35 over general contract law/caselaw and find that an employee with an undisclosed preexisting injury/condition/impairment is covered under the South Carolina Workers' Compensation Act.

CONCLUSION

The Appellant requests an Order declaring the correct legal standard to be by clear and convincing evidence. The Appellant contend the claim need not be remanded to the Commission to decide the case under the correct legal standard because

as a matter of law, the Respondents failed to prove reliance, which is essential to that defense. Additionally, the Appellant requests a ruling that the Appellants' accident was just that, an accident under our legal definition thereof. Lastly, the Appellant requests a ruling declaring the fraud in the application defense illegal as it violates S.C. Code Ann. Section 42-9-35.

Respectfully Submitted



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6 day of July, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Avery B. Wilkerson, Appellate Panel Chairman, Commissioner

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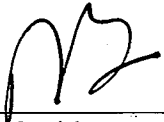
DEFENDANTS,

OF WHOM, ZURICH NORTH AMERICAN
INSURANCE COMPANY, CARRIER, IS THE

RESPONDENT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of the Appellant complies with Rule 211(b) SCACR. The undersigned further certifies that the Final Brief of the Appellant complies with the South Carolina Supreme Court's August 13, 2007 Order regarding Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Findings.



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July 6, 2012

THE STATE OF SOUTH CAROLINA
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Avery B. Wilkerson, Appellate Panel Chairman, Commissioner

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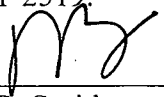
DEFENDANTS,

OF WHOM, ZURICH NORTH AMERICAN
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RESPONDENT.

PROOF OF SERVICE

I certify that I have served the Final Brief of the Appellant and the Appellant's Final Reply Brief by depositing a copy of it in the United States Mail, postage prepaid, on July 6, 2012, addressed to the attorney of record, Jason Lockhart, Esquire, McAngus, Goudelock & Courie, LLC, P.O. Box 12519, Columbia, SC 29211-2519.


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July 6, 2012

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The Honorable Tanya Gee
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RE: Joe A. Osmanski v. Watkins & Shepard Trucking, Inc., and Zurich North
American Insurance Company
Case No.: 2011196087
SCWCC File No.: 0818219


Dear Ms. Gee:

Enclosed please find the original, unbound documents as follows: (1) Appellant's Final Reply Brief and (2) Final Brief of the Appellant in the above-referenced matter, together with fifteen (15) bound copies of each. I have also included a Proof of Service and ask that you file-stamp this document and return to me in the self-addressed, stamped envelope enclosed for your convenience.

By copy of this letter to Jason Lockhart, we are hereby serving the Defendants/Respondents with a copy of same.

With kind regards, I am

Sincerely,


Kevin B. Smith

KBS/jhd

Enclosures

cc: Joe Osmanski
Jason Lockhart, Esquire
David T. Pearlman, Esquire
Paula Amick, Esquire