THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SC WORKERS COMPENSATION COMMISSION

Appellate Panel:
Commissioner Andrea Pope Roche
Commissioner Derrick L. Williams
Commissioner David W. Huffstetler

WCC File No. 0906951

Bernard D. Lee,,..... Respondent,

v.

Bondex Inc. and Great American Alliance Insurance Company, ...Appellants.

Brief of Appellant

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RECEIVED
AUG 20 2012
SC Court of Appeals

August 20, 2012

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STATEMENT OF ISSUES ON APPEAL

I. Did the South Carolina Workers Compensation Commission Appellate Panel err in determining that Claimant did sustain a work related accident when the substantial evidence supports the denial of an injury by accident and it was an error of law?

II. Did the South Carolina Workers Compensation Commission Appellate Panel Appellate Panel err in determining that the Claimant is entitled to Temporary Total Disability Benefits when the substantial evidence does not support such a finding and it was an error of law?

III. Did the South Carolina Workers Compensation Commission Appellate Panel err in determining to hold in abeyance all other injuries when all injuries were before the SCWCC and it was an error of law?

STATEMENT OF THE CASE

Claimant contends that on June 2, 2009 he sustained injuries arising out of the course and scope of his employment with Bondex. Claimant contends that he injured his left shoulder, neck, back and also his right arm due to overuse. The Claimant's position is that he has not reached maximum medical improvement and he seeks all causally related medical benefits, past, present and future, mileage and prescription benefits. In addition, the Claimant seeks temporary total disability from the last date he worked, August 18, 2009 and continuing. The Claimant also seeks approval for medical treatment with Dr. Ty Carter and Dr. Shannon for his injuries.

The Defendants deny that the Claimant suffered from a compensable injury by accident. A hearing was held September 7, 2010 before The Honorable Avery B. Wilkerson, Jr. (Hearing Commissioner), and Commissioner Wilkerson held that, "I find the claimant not to be credible." (R. Vol. I, p. 48). I find Lowell Simpkins to be very credible. (R. Vol. I, p. 49). The Commissioner further stated that "based on the greater weight of the evidence, I deny the tear in the shoulder, as it could not have happen as described." (R. Vol. I, p. 49). The Claimant's attorney appealed this decision by Form 30 dated January 12, 2011 (R. Vol. I. p. 62-63). After a hearing before the Appellate Panel on September 7, 2010, an Order was issued on October 12, 2011 reversing the Single Commissioner's decision and holding that the claimant's injury was compensable. It is this Order which is subject to the Appellant's November 9, 2011 appeal to this court.

ARGUMENTS

I. The Appellate Panel erred in determining that Claimant did sustain a work related accident when the substantial evidence supports the denial of an injury by accident and it was also an error of law.

The Appellate Panel, in its order, reversed the Hearing Commissioners Order and found that "the clamant has sustained a compensable injury by accident to his neck, left shoulder/upper extremity consistent with Section 42-1-160 of the South Carolina Code." The Order goes on to state that "we further conclude that the claimant's neck/ left shoulder pain and labral tear are causally related to his June 2, 2009 work related injury." (R. Vol. I, p. 29). The Appellant panel found as a fact that the **lay testimony** and **evidentiary submissions** support the claimant's report of a work related accident producing injuries to the claimant's neck and left shoulder/arm. (R. Vol. I p. 25). However, this finding is clearly erroneous in light of the substantial evidence in this matter.

The South Carolina's Administrative Procedures Act (APA) establishes the standard for judicial review of workers' compensation decisions. Brunson v. Am. Koyo Bearings, 395 S.C. 450 (S.C. Ct. App. 2011). Under the APA, the court can reverse or modify the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission when 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 considering the record as a whole. Id. Defendants first submit that the Appellate Panel's determination of compensability is a matter of law. When the evidence is susceptible of but one reasonable inference, the question becomes a

matter of law. Pack v. S.C. DOT, 381 S.C. 526 (S.C. Ct. App. 2009). Alternatively, the defendants would assert that the Record is devoid of substantial evidence. "Substantial evidence" is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow **reasonable minds** to reach the conclusion that the administrative agency reached or must have reached in order to justify its action. Gattis v. Murrells Inlet VFW # 10420, 353 S.C. 100 (S.C. Ct. App. 2003). Upon review of the Record as a whole in this matter, the Appellate Panel's determination that claimant suffered a compensable injury by accident arising out of the course and scope of his employment, when with one hand/arm, the claimant lifted a machine/hood weighing between 500-2000 pounds, is not supported by the substantial evidence. For the substantial evidence to support the compensability of this accident, there has to be evidence to show that the accident happened in the way that the claimant described. Moreover, upon review of the evidence, no **reasonable mind** could reach the same conclusion as the Appellate Panel.

Testimonial Evidence

The claimant has the burden of proving his entitlement to benefits by the greater weight of the evidence. Hill v. Jones, 255 S.C. 219, 178 S.E.29, 142 (1970). However, the claimant in this matter has not done so, because as the Hearing Commissioner determined, the accident could not have happened in the way that the Claimant described. (R. Vol. I, p. 48). The Appellants would submit that no reasonable mind would reach the same conclusion at the Workers Compensation Appellate Panel, because to do so, they would have to throw logic out of the window and believe that one man lifted an enormous machine with one hand while sustaining these injuries.

The Claimant testified that at the time of the injury he was lifting between 800-1500 pound hood up on the machine. (R. Vol. I p. 142, line 18). The claimant, in his description of the accident, states that he was on the ladder with the piece of equipment on him and with one hand and picked it off of his body with superhuman strength. (R. Vol. I p. 88, lines 17-19) (R. Vol. I p. 161, lines 20-23). The hearing commissioner asked him if he did this with one hand and he said yes. (R. Vol. I p. 88, lines 17-19). The Claimant at one point states that a piece of equipment fell on him. However, his Form 50 states that the injury occurred while he was lifting a piece of equipment. (R. Vol. p 70; p.74) At another point, he states that all of the forklift was holding the weight. However, he also said the forklift was not holding the weight. (R. Vol. I p. 208 lines 6-18). He states that him and three men were shimmying the forklift and lifting it and moving it and that all of the weight was off of the forklift. The claimant further testified that three men were standing within 20 or 30 feet of him. However, those men did not hear any screams (R. Vol. I p. 88, lines 5-7; p. 91, lines 4-5). The Appellants would submit that a reasonable mind would believe that if the Appellant was hit by a machine of that size, that he would have at least screamed. The testimonial evidence from the claimant simply does not support the Appellate Panel's determination of compensability.

The testimonial evidence from the claimant's supervisor, Lowell Simpkins, also does not support the Appellate Panel Order. Lowell Simpkins, the claimant's supervisor who was there during the accident testified that "on June 2nd, he was driving a forklift to lift a hood up." (R. Vol. II p. 241 lines 2-25). **Mr. Simpkins stated that no one was required to lift the hood, that the forklift does all of the lifting and putting it in**

place. He further said that the hood never fell off of the forklift. (R. Vol. II p. 242, lines 5-11). Mr. Simpkins said that he lowered the hood in place and they wiggled the arms to get it to go into the groove to let the bolts go through. He did not hear the Claimant scream or yell. (R. Vol. II p. 242, lines 19-24). Mr. Simpkins said that the Claimant did not tell him that a hood he was working on that night fell on him between his neck and his shoulder and pinned him against a machine. (R. Vol. II p. 246, lines 15-21).

Mr. Simpkins testified on cross examination that the forklift they were using that night was leaking hydraulic fluid, and that as a result of the fluid leaking the forklift would come down. But he would put on the gas and it would make the forklift stay up. (R. Vol. II p. 249, lines 4-20). Mr. Simpkins testified that on the date of the accident, they were putting a machine back together. (R. Vol. II p. 257, lines 17-25). The Claimant should be guiding the hood with the rope and his eyes. (R. Vol. II p. 259, lines 1-16). Mr. Simpkins said that the forklift was working at the time of the accident. (R. Vol. II p. 260, line2).

The hood is over five hundred pounds, you wouldn't have been able to lift it. (R. Vol. II p. 261, lines 2-17). There were three guys there to guide it in place. (R. Vol. II p. 261, lines 21 – 23). He said that you have one person on each side and one person mainly just looking, and you have one man holding the rope on each side so that when he slings it in place they have it in the place where they want to and he lowers the frame down into the slots. (R. Vol. II p. 262 lines 21-25; p. 263 lines 1-3).

Medical Evidence

The Appellate Panel also found as a fact that "we find the claimant's left labral tear is causally related to his June 2, 2009 work related injury by accident." They further

state that "this finding is based on the claimant's testimony and a preponderance of the medical evidence." (R. Vol. I p. 27).

Neither the medical evidence nor the testimonial evidence support this accident or injury. In deciding whether substantial evidence supports a finding of causation, it is appropriate to consider both the lay and expert evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154 (S.C. 1999) As discussed above, the lay testimony of Mr. Simpkins does not support the Appellate Panel Order. Moreover, the claimant's own testimony does not support the order. The Claimant said that on the day the accident he did not have any abrasions or cuts on his shoulder. (R. Vol. I p. 218, line 4). The claimant visited the physician on the day of the accident and the doctor's report states that there was no physical finding. (R. Vol. I p. 91 lns. 20-22).

The defendants submit that the medical evidence is not even necessary in this matter to show that the Appellate Panel's finding is erroneous. However, the defendants would argue that if the court does look toward the medical evidence, that it shows that the claimant did not suffer an injury by accident. Medical testimony should not be held conclusive irrespective of other evidence. See Tiller v. National Health Care Ctr., 334 S.C. 333, 513 S.E.2d 843 (1999). Expert medical testimony is designed to aid the South Carolina Workers' Compensation Commission in coming to the correct conclusion; therefore the Commission determines the weight and credit to be given to expert testimony. Id.

The Claimant went to the University Hospital on June 3, 2009, the day after the June 2, 2009 accident. (R. Vol. I p. 42; R. Vol. II p. 542) The Claimant complained that a hood from a machine **fell** and hit his left shoulder. (R. Vol. I p. 42; R. Vol. II p. 542). X-

rays were taken of the Claimant's left shoulder which all three views were unremarkable (R. Vol. I p. 42; R. Vol. II p. 542). The medical note also indicated that upon examination, the skin over the neck is intact **WITHOUT EVIDENCE OF LACERATION OR SIGNIFICANT ABRASION**. (R. Vol. I p. 42; R. Vol. II p. 542). Appellants would again submit that a reasonable mind would not come to the same conclusion as the Appellate Panel that the accident happened in the way that it was described.

Subsequent to the Claimant's medical treatment with various medical providers, both counsel for the Claimant and Defendants provided them with medical questionnaires to address causation. These questionnaires do not support the Panel's order.

Dr. James Bethea opined on September 15, 2010 that based upon the treatment/evaluation he provided and upon review of any medical records, that to a reasonable degree of medical certainty the most probably cause, greater than 50%, of the tear in the Claimant's left shoulder shown on the MR arthrogram of September 2, 2010 was **not** caused by the event of June 2, 2009. (R. Vol. II p. 299).

Dr. W. Daniel Westerkam opined on September 9, 2010 that based upon the treatment/evaluation he provided and upon review of any medical records, that to a reasonable degree of medical certainty the most probably cause, greater than 50%, of the tear in the Claimant's left shoulder shown on the MR arthrogram of September 2, 2010 was **not** caused by the event of June 2, 2009. (R. Vol. I p. 45) (R. Vol. II p. 298).

Dr. James A. Thesing opined on September 14, 2010 that based upon the treatment/evaluation he provided and upon review of any medical records, that to a reasonable degree of medical certainty the most probably cause, greater than 50%, of the

tear in the Claimant's left shoulder shown on the MR arthrogram of September 2, 2010 was **not** caused by the event of June 2, 2009. (R. Vol. II p. 300)

While it is true that other physicians gave medical opinions that the Claimant's left shoulder problems were related to an injury by accident, their opinions are based upon the premise that there was an accidental event. As discussed previously, the evidence does not support a finding of a work related accident. The Hearing Commissioner stated in his order that three doctors state no to a reasonable degree of medical certainty- Thesing, Bethea, and Westerkam. Three doctors oppose that opinion- Carter, Thesing and Thomas. (R. Vol. I p. 48-49) The Hearing Commissioner further stated that the physical facts showed that there was no visual injury to the Claimants shoulder/neck area when examined at the emergency room and that all test that were performed indicated that there no physical injury. (R. Vol. I p. 42;) (R. Vol. II p. 542). In compensation proceedings a medical opinion which conflicts with the physical facts will not be permitted to control the determination of a factional controversy, Poston v. Southeastern Construction Co. 208 S.C. 35, 36 S.E. 2d 858.

The Hearing Commissioner sat in the hearing for 2 and ½ hours. He stated that the accident could not have happened in the way that it happened. (R. Vol. I p. 86-87). Because the Substantial Evidence, including the testimonial and medical evidence do not support a compensable injury, the Order of the Appellate Panel must be reversed.

II. **The Appellate Panel erred in determining that the Claimant is entitled to Temporary Total Disability Benefits when the substantial evidence does not support such a finding and it was also an error of law.**

The Appellate Panel found that the "claimant is entitled to temporary compensation from August 18, 2009 through the present and continuing (minus a credit for the $5,000

already paid by the defendants) in accordance with the act." (R. Vol. I p. 28). However, they based this finding solely upon the fact that the "claimant provided his employer with Dr. Shannon's August 18, 2009 work note and was not offered light duty work." (R. Vol. I p. 28).

Not only does the substantial evidence not support the appellate panel's finding that the claimant is entitled to temporary total disability benefits, Appellants would also argue that no evidence was presented to support the finding of fact by the appellate panel. Therefore, the Appellate Panel erred as a matter of law. See Lorrick v. S.C. Electric and Gas Co., 245 S.C. 513, 141 S.E.2d 662 (1965).

Alternatively, Appellants submit that if the Court does find evidence to support temporary total disability, that evidence was not supported by substantial evidence, and was clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. S.C. Code Ann. Section 1-23-380 (A)(6) (a-f) (1976, as amended).

To show that one is entitled to temporary total disability benefits, one must prove that "the incapacity for work resulting from an injury is **total**." S.C. Code Ann. Section 42-9-10 (1976, as amended). South Carolina Cases have held compensation for **total** disability "is based on loss of earning capacity." See Bateman v. Town and Country Furniture Co., 287 S.C. 158, 159, 336 S.E. 2d 890, 891 (Ct. App. 1985). The employee bears the burden of proving the generally acceptable test of **total** disability which is "that he was unable to perform services other than those that were so limited in quality, dependability, or quantity that a reasonably stable marked for them did not exist." See Coleman v. Quality Concrete Products, 245 S.C. 625, 630, 142 S.E.3d 43, 45 (1965). There was no testimony to this affect before the Hearing Commissioner and not additional testimony was taken

before the Appellate Panel. Moreover, the Order is devoid of any reference to earning capacity. The Order simply has a conclusory statement that the claimant is entitled to these benefits. The claimant's attorney, during the Appellate Panel Hearing, only mentions temporary total disability one time, which was on her reply, she simply states "we are also asking for temporary total from August 19, 2009 to present." (R. Vol. I p. 94 lines 12-16).

The Appellate Panel does state in its order that the claimant was not offered work by the employer. However, this determination is not conclusory of entitlement of benefits. Moreover, the substantial evidence does not support the Appellate Panel's finding. Mr. Simpkins testified that he offered the Claimant light duty, which consisted of him running the front end. Mr. Simpkins would put up bales, open the bales, and all the Claimant would do is push the fiber onto the tables. (R. Vol. II p. 238, lines 9-14). Mr. Simpkins said that the Claimant complained of his arm hurting, so he asked the Claimant to take off old labels and put new labels on the pallets. The Claimant said that his arm was hurting and he couldn't do that. (R. Vol. II p. 238, lines 16-25). Mr. Simpkins identified the fiber that the Claimant was asked to work with. He assigned the Claimant to do the fiber job of loading the tables up out of the bales of this type of fiber. Mr. Simpkins testified that he drove the forklift to bring the Claimant the bales. (R. Vol. II p. 239, lines 11-25). Mr. Simpkins stated that he cut the wire off of the bales and that this fiber did not have to be wet down. He further stated that he did not assign the Claimant with work that required him to wet fiber down because they weren't running anything but this type of fiber as identified at the hearing. (R. Vol. II p. 240, lines 1-17). Mr. Simpkins identified the fiber that they use to make products at the plant. He also indicated that they use other kinds of

finger, polyester, lomax and kermel. (R. Vol. II p. 256, lines 13-21). Mr. Simpkins said that Mr. Lee was working with polyester type fiber while he was on light duty. (R. Vol. II p. 257, lines 7-11).

Defendants submit that because claimant failed to present evidence of loss of earning capacity and the record is devoid of the Appellate Panel's reliance on any evidence to the same, the Appellate Panel committed an error of law. The Administrative Procedures Act mandates that the commission take the evidence, judge the credibility and weight of that evidence, and from that judgment determine the facts in the case. However, when the record is devoid of any evidence, it is an error of law. Therefore, the Appellate Panel's decision must be reversed.

III. **The South Carolina Workers Compensation Commission Appellate Panel erred in determining to hold in abeyance all other injuries when all injuries were before the SCWCC and it was an error of law.**

The Appellate panel, in its order, stated "we find that the claimant submitted evidence of injuries to other body parts however, we elect to hold all other injuries alleged by claimant (low back and right shoulder/arm) in abeyance pending further review." (R. Vol. I p. 29). This determination was an error of law. If other body parts may be involved, it is error not to make a determination with regard to those body parts so that medicals can be provided to lessen the disability. As the Court in Keeter v. Clifton Mfg. Co. states, "the Commission could not, by undertaking to retain jurisdiction for 300 weeks pending future developments, circumvent the limitation of 12 months within which an award may be reviewed for change in conditions." Keeter v. Clifton Mfg. Co., 225 S.C. 389, 82 S.E.2d 520 (1954). See also; Clark v. Aiken County Gov't, 366 S.C. 102, 620 S.E. 2d 99 (Ct. App. 2005).

CONCLUSION

It is respectfully requested that the finding of this claim as compensable and that the claimant is entitled to temporary total disability benefits by the Appellate Panel, be reversed.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

In compliance with Rule 211, the Appellant's Final Brief is identical to the brief previously served under Rule 208 with the exception that it now contains references to the record.

October 1, 2012

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PROOF OF SERVICE

I certify that I have served the Final Brief and Final Reply Brief on Bernard Lee by depositing a copy of the same in the United States Mail, postage prepaid, on August 20, 2012, addressed to his attorney of record Ann M. Mickle, Esquire at Mickle & Bass, LLC, 930 Oakland Avenue, PO Box 10751, Rock Hill, SC 29731

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