

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel

WCC FILE # 0906951

Bernard D. Lee,

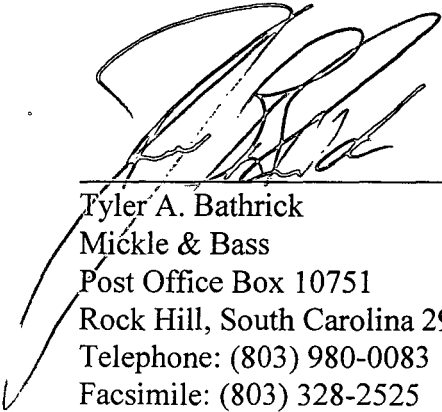
Claimant/Respondent,

v.

Bondex Inc., Employer, and
Great American Alliance
Insurance Co, Carrier,

Defendants/Appellant.

FINAL BRIEF OF RESPONDENT



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SC COURT OF APPEALS

September 10, 2012

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STATEMENT OF ISSUES ON APPEAL

1. IS THE SOUTH CAROLINA WORKERS' COMPENSATION APPELLATE PANEL'S FINDING THAT CLAIMANT SUSTAINED A WORK RELATED ACCIDENT SUPPORTED BY SUBSTANTIAL EVIDENCE?

2. IS THE SOUTH CAROLINA WORKER'S COMPENATION APPELLATE PANEL'S FINDING THAT CLAIMANT'S LEFT SHOULDER COMPLAINTS ARE CAUSALLY RELATED TO HIS JUNE 2, 2009 WORK RELATED INJURY SUPPORTED BY SUBSTANTIAL EVIDENCE?

3. IS THE SOUTH CAROLINA WORKERS' COMPENSATION APPELLATE PANEL'S FINDING THAT CLAIMANT IS ENTITLED TO TEMPORARY COMPENSATION SUPPORTED BY SUBSTANTIAL EVIDENCE?

4. ARE THE ISSUES RAISED IN SECTION III OF DEFENDANTS BRIEF INTERLOCUTORY?

STATEMENT OF CASE

On June 2, 2009 claimant, Bernard Lee, sustained an injury by accident during the course and scope of his employment with Southern Felt (dba Bondex) while lifting/maneuvering a large industrial hood into place. Mr. Lee alleged injuries to his neck, left shoulder, and back. Mr. Lee reported the accident to his supervisor, an accident report was completed, and he presented to University Hospital for emergency medical treatment. The defendants initially admitted the claim and began providing medical treatment through their designated and authorized company doctor(s), Jeffrey Broder of North Augusta Urgent Care and James Bethea of Columbia Orthopaedic Specialists.

On July 29, 2009 the defendants canceled Mr. Lee's follow up appointment with Dr. Bethea and refused to provide additional workers' compensation benefits. On July 30, 2009 claimant filed a Form 50 requesting the following benefits: a) a finding of compensability with regard to the neck, left shoulder, left arm, and whole back; b) payment of all temporary compensation owed through the present and continuing; c) future medical treatment to affected body parts; and d) payment of all causally related medical treatment received to date. In response, the defendants filed a Form 51 admitting that an incident occurred, but denying the nature and extent of claimant's injuries. A hearing was scheduled before Commissioner Lyndon on November 3, 2009. After a lengthy pre-trial hearing both parties entered into a consent order in which the defendants agreed to provide Mr. Lee with a lump sum payment of \$5,000.00 (Five Thousand Dollars), MRI(s), and follow up treatment with Dr. Ty Carter of Carolina Musculoskeletal. Initially the defendants failed to comply with the Order and on December 23, 2009 claimant filed a Form 40 and Motion for penalties. Prior to the call of the Motion Hearing the defendants authorized the MRI and medical treatment with Dr. Carter.

On January 25, 2010 Mr. Lee presented to Dr. Carter who recommended continued medical treatment to the left shoulder through Dr. Timothy Shannon, another orthopaedic in his practice. The defendants refused to provide the medical treatment recommended by Dr. Carter. As a result, Mr. Lee sought his own medical treatment through Dr(s) Al Souidi and Shannon.

On February 16, 2010 claimant filed a Form 50 requesting the following benefits: a) a finding of compensability with regard to the neck, left shoulder, left arm, and whole back; b) payment of all temporary compensation owed through the present and continuing; c) future medical treatment to affected body parts; and d) payment of all causally related medical treatment received to date. In response, the defendants filed a Form 51 admitting an incident, but denying nature and extent of claimant's injuries.

A Hearing on claimant's Form 50 and defendants' Form 51 was scheduled for August 12, 2010 before the Honorable Avery Wilkerson. After a pre-trial of the case, the Commissioner urged the parties to secure an MRI with contrast to further delineate claimant's medical condition and treatment options. The defendants agreed to provide the MRI with contrast and the hearing was rescheduled to August 23, 2010. On August 20, 2010 a telephone conference was scheduled by Commissioner Wilkerson to review the status of the completion of the MRI, per his instructions. The defendants advised the Commission that the MRI had not yet been performed. The Commissioner Ordered the defendants to provide the MRI with contrast and the Hearing was rescheduled again for September 7, 2010. On September 1, 2010 (12 days after the MRI with contrast was ordered by the Commissioner and 6 days before the hearing) claimant underwent the MRI with contrast. Claimant received the MRI report from the defendants' attorney at the hearing. The MRI with contrast revealed a left labral tear.

On September 7, 2010 the Hearing was once again scheduled before Commissioner

Wilkerson. Claimant was represented by Ann McCrowey Mickle of Mickle & Bass, LLC. The defendants were represented by E. Ros Huff of the Huff Law Firm. At the call of the case claimant requested the following benefits: a) a finding of compensability with regard to the neck, left shoulder, left arm, whole back, and right arm/shoulder due to overuse; b) payment of all temporary compensation owed through the present and continuing; c) future medical treatment to affected body parts; and d) payment of all causally related medical treatment received to date. In response the defendants denied claimant sustained a compensable injury by accident. The defendants further requested the record be left open, in accordance with Section 42-17-30 of the South Carolina Code, to depose the radiologist who performed the MRI with contrast on the issue of causation. The Single Commissioner granted defendants motion to leave the record open. In response claimant requested the record be left open so Dr(s) Carter and Shannon could review the MRI and provide a similar opinion. In response the defendants requested the record be left open for their IME doctors to review the MRI with contrast and provide an opinion on causation. Both requests were granted.

Medical questionnaires were submitted from Dr(s) Bethea, Carter, Thomas, Robinson, Thesing, and Westerkam. The defendants elected not to depose the radiologist but relied on his questionnaire response.

The record was opened and testimony was taken from claimant and Mr. Lowell Simkpins, a witness for the defendants. The employer's representative was designated as Janice Napier, of the Bondex Human Resources Department. On December 31, 2010 the Commissioner Wilkerson issued his Order denying the compensability of the claim.

Within the statutory period, the claimant file a Form 30 "Application for Review." A Full Commission Appellate Review was set for May 16, 2011 before Commissioners Williams,

Huffstetler and Roche. On October 12, 2011 the Full Commission issued its Decision and Order reversing the Order of the Single Commissioner. The Full Commission found as follows: a) Claimant 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; b) Claimant's neck/left shoulder pain and labral tear are causally related to his June 2, 2009 work related injury; c) Claimant is in need of medical evaluation/treatment for his neck, left shoulder/upper extremity consistent with Section 42-15-60 of the South Carolina Code; d) Claimant is entitled to temporary total compensation from August 18, 2009 through the present and continuing (minus a \$5,000.00 credit already paid by the defendants) in accordance with Section 42-9-10 of the South Carolina Code; and e) Defendants are responsible for payment/reimbursement of all causally related medical treatment associated with claimant's June 2, 2009 work related injury. The Defendants elected to Appeal to the Court of Appeals.

The Defendants refused to comply with the Full Commission Order and on December 12, 2011 claimant filed a Motion for Order and Rule to Show Cause. A hearing was scheduled before Commissioner Barden on March 15, 2012. On April 2, 2012 Commissioner Barden granted claimant's motion and ordered the Defendants to provide the following: a) temporary compensation from October 12, 2011 through the present and continuing and b) a 10% penalty on any payments due from October 12, 2011 through the issuance of the first retroactive unpaid temporary total disability payment received by claimant's counsel. Within the statutory period, the defendants filed a Form 30 "Application for Review." To date, the Defendants have not provided claimant with temporary compensation. Additionally, the defendants are impeding/slowing claimant's right to medical treatment. On April 24, 2012 Commissioner Lyndon quashed Defendants' request for a fourth independent medical evaluation.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel of the Workers' Compensation Commission. Fredrick v. Wellman, Inc., 385 S.C. 8, 15-16, 682 S.E.2d 516, 519 (Ct. App. 2009). Under the scope of review established in the APA, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse or modify the Appellate Panel's decision if the appellant's substantial rights 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." S.C. Code Ann. § 1-23-380(5) (Supp. 2010); Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). Our Supreme Court has defined substantial evidence as evidence that, in viewing the record as a whole, would allow reasonable minds to reach the same conclusion that the Appellate Panel reached. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm'n, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984).

ARGUMENTS

I. THE SOUTH CAROLINA WORKERS' COMPENSATION APPELLATE PANEL'S FINDING THAT CLAIMANT SUSTAINED A WORK RELATED ACCIDENT IS SUPPROTED BY SUBSTANTIAL EVIDENCE.

Substantial evidence, including accident reports, Form 51(s) filed by the Defendants, consent orders, medical evidence and hearing testimony indicates that on June 2, 2009 claimant sustained an injury by accident during the course and scope of his employment at Bondex.

A. The Defendants have repeatedly admitted that on June 2, 2009 Claimant sustained an injury/incident during the course and scope of his employment with Bondex.

On June 2, 2009 Claimant's supervisor, Lowell Simpkins, completed an accident report which states: (R. Vol. I, p. 539).

Employee stated he was trying to install the front top door on the #3 card machine by lifting it with his hands and shoulder. He said he guess he was pushing to hard on the door and he said he damaged his left shoulder and neck. He stated he was in a lot of pain with pain going down his back.

Mr. Simpkins indicated that Mr. Lee took Goody Powder and applied biofreeze, a pain relieving gel. Additionally, Mr. Simpkins noted, "Sent to University Hospital ER." (R. Vol. II, p. 539).

On June 3, 2009 the employer completed a Form 12(A) indicating that Claimant's injury/illness/exposure occurred on Employer's premises while installing a door on a machine. The 12(A) references pain in the left shoulder and neck. (R. Vol. II, p. 690).

On June 30, 2009 Claimant filed a Form 50 alleging injuries to the neck, left shoulder, left arm, and whole back. (R. Vol. I, p. 73). On August 31, 2009 the Defendants filed a Form 51 stating as follows: "Admit an incident but deny injury and demand proof as to nature and extent of injuries." (R. Vol. I, p. 72).

On November 30, 2009 the Defendants entered into a Consent Order agreeing to provide

Claimant with a lump sum payment of \$5,000.00. (R. Vol. I, p. 57). The Defendants are presently arguing that this \$5,000.00 payment is back owed temporary compensation. (See April 13, 2012 Form 30 filed by Defendants). Additionally, the Defendants agreed to send Claimant for an MRI and follow up treatment with Dr. Ty Carter. (R. Vol. I, p. 57).

On February 16, 2010 Claimant filed another Form 50. (R. Vol. I, p. 69). On March 17, 2010 the Defendants filed another Form 51 which states, "Admit an incident but deny injury and demand proof as to nature and extent of injuries." (R. Vol. I, p. 68).

Substantial evidence including the accident reports, money provided from Defendants to Claimant, and the forms completed by the Defendants indicate that Mr. Lee sustained an injury by accident during the course and scope of his employment with Bondex.

B. All of the medical evidence indicates that on June 2, 2009 Mr. Lee sustained an injury by accident during the course and scope of his employment at Bondex.

All of the medical evidence indicates that Claimant sustained an injury by accident during the course and scope of his employment at Bondex. On June 3, 2009 Mr. Lee presented to the University Health Care System Emergency Room. The "Clinician History of Present Illness" states, "...Patient was injured by machine hood fell on his shoulder. No history to suggest any head injury. The patient states that this problem is job related." (R. Vol. II, p. 541). Additionally, the triage nurse indicated job injury, the registrar verified workers' compensation and ascertained a contact person, Albert Martin. (R. Vol. II, p. 544).

On June 5, 2009 Dr. Broder noted, "Injured left arm Wednesday at work." (R. Vol. II, p. 548). All of Dr. Broder's processing forms indicate that Mr. Lee sustained an on the job injury. (R. Vol. II, p. 549, p. 553, p. 555, p. 557, p. 558). Additionally, Dr. Broder's paperwork indicates that the Employer authorized physical therapy (R. Vol. II, p.551), an MRI of the left

shoulder (R. Vol. II, p.556), and additional medical treatment through an orthopaedic (R. Vol. II, p. 558).

On June 17, 2009 Ms. Bolton, PT, of Sport Plus Physical Therapy indicated that on June 2, 2009 a 700 lb hood fell between Mr. Lee's neck and left shoulder. (R. Vol. II, p. 561). On July 16, 2009 Dr. Bethea noted, "This is a 29 year old male who states that he was involved in an accident at work on June 2, 2009 in which he injured his left shoulder, but also neck and lower back." (R. Vol. II, pp. 574-575). On July 28, 2009 the treating physician at Aiken Regional Medical Center noted pain in Mr. Lee's neck, back and shoulders following a work related injury after an 800 lb machine fell on his shoulder. (R. Vol. II, pp. 585-593). On August 6, 2009 Dr. Al-Soudi indicated, "Hurt at work." (R. Vol. II, p. 597). On August 18, 2009 Dr. Shannon noted, "He states that he and other people were attempting to lift a metal hood by forklift when it came down and the lip of the hood struck him on the left side of his neck and superior aspect of his shoulder." (R. Vol. II, p. 610). On January 25, 2010 Dr. Carter noted, "...he was involved in a work related accident on June 2, 2009." (R. Vol. II, p. 632). On June 10, 2010 Dr. Westerkam noted, "There was some indication that the hood struck the patient's left shoulder and neck. (R. Vol. II, p. 635). On July 20, 2010 Dr. Robinson noted, "Work related injury." (R. Vol. II, p. 638).

The medical records of ten (10) different providers indicate that Mr. Lee sustained an injury by accident during the course and scope and scope of his employment with Bondex. No other injury, or explanation for Mr. Lee's complaints are noted in the medical records. All of the medical evidence indicates that Mr. Lee sustained an injury by accident during the course and scope of his employment with Bondex while lifting/maneuvering a large industrial hood into place.

C. **The Hearing Testimony indicates that on June 2, 2009 Mr. Lee sustained an injury by accident during the course and scope of his employment with Bondex.**

The Hearing Testimony indicates that on June 2, 2009 Mr. Lee sustained an injury by accident during the course and scope of his employment with Bondex.

Mr. Lee testified that on June 2, 2009 he and three other employees were attempting to lift the hood of a machine when the hood fell on his left shoulder and neck. (R. Vol. I, p. 157, lines 18-25; p. 160, lines 8-20). Immediately after the accident Mr. Lee advised his supervisor that he was experiencing pain in his left shoulder. (R. Vol. I, p. 163, lines 7-10) The employer provided Mr. Lee with biofreeze and goody powder and Mr. Lee attempted, but was unable, to work through his pain. (R. Vol. I, p. 164, lines 14-25; p. 165, lines 1-5). Mr. Lee reported his pain to his supervisor a second time, completed an accident report, and sought emergency medical treatment. (R. Vol. I, p. 165, lines 1-24).

Mr. Simpkins was operating the fork lift when Mr. Lee was injured. Mr. Simpkins testified that the fork lift was used to lift the hood and Mr. Lee wiggled/guided the hood into place. (R. Vol. II, p. 242, lines 1-25).

The testimony of Mr. Simpkins and Mr. Lee differ with regard to the exact time the accident was reported, medication provided following the accident, and the forklifts level of involvement in lifting the hood. However, Mr. Simpkins testimony regarding how the injury occurred does not contradict the testimony of Mr. Lee. Mr. Simpkins did not testify that: a) Mr. Lee never attempted to lift the hood to wiggle it into place; b) Mr. Lee was never struck by the hood; and c) Mr. Lee did not injure his shoulder at work. Most importantly, Mr. Simpkins never testified that Mr. Lee did not sustain an injury during the course and scope of his employment.

The Hearing Testimony indicates that on June 2, 2009 Mr. Lee sustained an injury by

accident during the course and scope of his employment with Bondex.

D. Conclusion/Summary

Substantial evidence indicates that on June 2, 2009 Mr. Lee sustained an injury by accident during the course and scope of his employment with Bondex. Two accident reports completed by the Defendants indicate that Mr. Lee sustained an injury by accident. The Defendants Form 51(s) admit that an incident occurred on June 2, 2009. The Defendants provided Claimant with medical treatment and a lump sum payment of \$5,000.00. Additionally, all of the medical evidence (from 10 different medical providers) indicates that Claimant was injured at work. Finally, Mr. Lee's uncontroverted testimony indicates that he was injured on June 2, 2009 during the course and scope of his employment. Mr. Simpkins never testified that Mr. Lee was not injured during the course and scope of employment. As a result, Claimant respectfully requests that the Court of Appeals affirm the Order of the Full Commission.

II. SUBSTANTIAL EVIDENCE INDICATES THAT CLAIMANT'S LEFT SHOULDER COMPLAINTS ARE CAUSALLY RELATED TO HIS JUNE 2, 2009 WORK RELATED INJURY.

On September 7, 2010 (the date of the Hearing) only one physician, Dr. Shannon, had addressed the causation of Mr. Lee's left shoulder pain. On October 15, 2009 Dr. Shannon noted as follows: (R. Vol. II, p. 619).

It is my opinion, "most probably and to a reasonable degree of medical certainty" (greater than 50% probability) that Mr. Lee suffers from neck pain, left shoulder pain, and low back pain as a direct result of his work accident of June 2, 2009.

At the call of the September 7, 2010 Hearing the Defendants requested the record remain open for the deposition of Claimant's authorized treating radiologist. The Single Commissioner granted Defendants motion to leave the record open. In response, Claimant requested the record

be left open so Dr(s) Carter and Shannon could review an updated MRI and provide an opinion regarding causation of Claimant's left labral tear. In response, the Defendants requested the record be left open for their IME doctors to review the MRI with contrast and provide an opinion on causation. The Single Commissioner agreed to hold the record open. (R. Vol. I, pp. 116-122).

A. Medical evidence indicating that Mr. Lee's left labral tear is causally related to the June 2, 2009 work related injury.

Dr. Charles Thomas - "Authorized" - On September 20, 2010 Dr. Charles Thomas opined as follows: (R. Vol. II, p. 283).

It is my expert medical opinion most probably and to a reasonable degree of medical certainty (greater than 50% probability) that the findings on the September 2, 2010 MRI arthrogram with contrast (a superior labral tear, anterior to posterior without detachment of the labrum) are consistent with Mr. Lee's left shoulder complaints of the last year and the mechanism of his June 2, 2009 work related injury.

Dr. Thomas practices with Village Orthopaedic Surgery in Greenville, South Carolina. He is board certified in orthopaedic surgery. On October 22, 2009 Dr. Thomas performed an independent medical evaluation at Defendants request. Mr. Lee traveled from Graniteville, SC to Greenville, SC (111 miles) to attend Defendants independent medical evaluation.

Dr. Ty Carter - "Authorized" - On September 17, 2010 Dr. Carter opined as follows: (R. Vol. II, p. 287).

It is my expert medical opinion most probably and to a reasonable degree of medical certainty (greater than 50% probability) that the findings on the September 2, 2010 MRI arthrogram with contrast (a superior labral tear, anterior to posterior without detachment of the labrum) are consistent with Mr. Lee's left shoulder complaints of the last year and the mechanism of his June 2, 2009 work related injury.

Additionally, Dr. Carter indicated that an open MRI is a more detailed/thorough imaging procedure more likely to reveal abnormalities in the shoulder. (R. Vol. II, p. 287). Dr. Carter is an orthopaedic surgeon practicing with the Carolina Musculoskeletal Institute in Aiken, SC. On December 8, 2009 the Defendants entered into a Consent Order agreeing to provide medical treatment through Dr. Carter. (R. Vol. I, p. 57).

Dr. Timothy Shannon – “Authorized” – As previously indicated, on October 15, 2009 Dr. Shannon noted as follows: (R. Vol. II, p. 619).

It is my opinion, “most probably and to a reasonable degree of medical certainty” (greater than 50% probability) that Mr. Lee suffers from neck pain, left shoulder pain, and low back pain as a direct result of his work accident of June 2, 2009.

Dr. Shannon is Board Certified in Orthopaedic Surgery. Dr. Carter (the treating physician agreed to by the Defendants) referred Mr. Lee to Dr. Shannon for additional medical treatment to the left shoulder. (R. Vol. II, p. 632).

Dr. William Robinson – On September 16, 2010 Dr. Robinson opined as follows: (R. Vol. II, p. 290).

It is my expert medical opinion most probably and to a reasonable degree of medical certainty (greater than 50% probability) that the findings on the September 2, 2010 MRI arthrogram with contrast (a superior labral tear, anterior to posterior without detachment of the labrum) are consistent with Mr. Lee’s left shoulder complaints of the last year and the mechanism of his June 2, 2009 work related injury.

Additionally, Dr. Robinson indicated that an open MRI is a more detailed/thorough imaging procedure more likely to reveal abnormalities in the shoulder. (R. Vol. II, p. 290).

Dr. James A. Thesing – On September 21, 2010 Dr. Thesing opined as follows:

(R. Vol. II, p. 294).

On September 13, 2010 the Defendants forwarded a questionnaire to my attention regarding whether or not the tear in Mr. Lee's left shoulder (shown in the MR arthrogram of September 2, 2010) is causally related to Mr. Lee's June 2, 2009 work related injury. I have only provided medical treatment in the form of an arthrographic injection and MR arthrogram. As a result, I will defer to Mr. Lee's treating physicians regarding the **causation** of the tear in Mr. Lee's left shoulder.

Additionally, Dr. Thesing indicated that an Open MRI is a more detailed/thorough imaging procedure more likely to reveal abnormalities in the shoulder. (R. Vol. II, p. 294).

B. Medical evidence indicating that Mr. Lee's left labral tear is not causally related to the June 2, 2009 work related injury.

Dr. W. Daniel Westerkam – On September 9, 2010 Dr. Westerkam opined as follows: (R. Vol. II, p. 298).

Based upon treatment/evaluation you provided an upon review of any medical records, can you state to a reasonable degree of medical certainty that the most probable cause (greater than 50%) of the tear in the Claimant's left shoulder shown in the MR arthrogram of September 2, 2010 was caused by the event of June 2, 2009. –NO

Dr. Westerkam is a pain management physician practicing out of Columbia, SC. (60 miles from Claimant's home in Graniteville, SC). On June 15, 2010 Dr. Westerkam performed an independent medical evaluation at the Defendants request and under questionable circumstances. A Hearing on Claimant's Form 50 and Defendants Form 51 was originally scheduled for June 17, 2010 in North Augusta, South Carolina. The Hearing was reset to August 12, 2010 due to attorney conflict. The reset provided Claimant with fifteen days notice and Dr. Westerkam's report was submitted into evidence. Dr. Westerkam is not an orthopaedic, he specializes in pain management.

Dr. James Bethea – On September 15, 2010 Dr. Bethea indicated as follows: (R. Vol. II, p. 299).

Based upon treatment/evaluation you provided an upon review of any medical records, can you state to a reasonable degree of medical certainty that the most probable cause (greater than 50%) of the tear in the Claimant's left shoulder shown in the MR arthrogram of September 2, 2010 was caused by the event of June 2, 2009. –NO

Dr. Bethea is an orthopaedic practicing out of Columbia, South Carolina. (60 miles from Claimant's home in Graniteville, SC). He is regularly used by insurance companies and is a well known "ringer."

Dr. James Thesing – On September 14, 2010 Dr. Thesing indicated as follows: (R. Vol. II, p. 300).

Based upon treatment/evaluation you provided an upon review of any medical records, can you state to a reasonable degree of medical certainty that the most probable cause (greater than 50%) of the tear in the Claimant's left shoulder shown in the MR arthrogram of September 2, 2010 was caused by the event of June 2, 2009. – NO

Dr. Thesing is not an orthopaedic. He is a radiologist. Additionally, on September 21, 2010 he indicated that he would defer to Mr. Lee's treating physicians regarding causation. (R. Vol. II, p. 294).

C. Conclusion

The substantial medical evidence indicates that Claimant's left labral tear and neck pain is causally related to his June 2, 2009 injury. The two neutral/agreed upon orthopaedics, Dr(s) Shannon and Carter indicated that Claimant's left shoulder complaints are causally related to his June 2, 2009 work related injury. Dr. Robinson also indicated Mr. Lee's left shoulder

complaints are causally related to his June 2, 2009 work related injury. Additionally, Dr. Thomas, one of the Defendants hand-picked orthopaedics, indicated that Mr. Lee's left shoulder complaints are causally related to his June 2, 2009 injury.

The Defendants rely on the opinions of Dr. Bethea and Dr. Westerkam. Both Dr. Bethea and Dr. Westerkam were selected by the Defendants. Dr. Bethea is well known throughout the workers' compensation community. Dr. Westerkam is a pain management specialist selected by the Defendants to perform an IME.

Additionally, a preponderance of the medical evidence indicates that an open MRI, which Mr. Lee finally received on September 6, 2010, is a more detailed/thorough imaging procedure more likely to reveal abnormalities in the shoulder. An open MRI is more likely to reveal a labral tear than a closed MRI.

Substantial evidence indicates Claimant's left shoulder injury is causally related to his June 2, 2009 work related injury. As a result, Claimant respectfully requests the Court of Appeals affirm the Single Commissioner's Order and find that the left labral tear is causally related to Claimant's June 2, 2009 work related injury.

III. SUBSTANTIAL EVIDENCE INDICATES THAT CLAIMANT IS ENTITLED TO TEMPORARY COMPENSATION.

Substantial evidence indicates that Mr. Lee is entitled to temporary compensation from his last date of light duty work, August 18, 2009, through the present and continuing. (R. Vol. I, p. 190, lines 15-25; p. 191, lines 1-6).

The Workers' Compensation Act "requires employers to pay temporary total disability to an employee who has 'been out of work due to a reported work related injury' for eight days."

Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct.App.2006), *quoting* S.C. Code § 42-9-260(A) (Supp. 2006). When the injured worker is under work restrictions, the employer must either offer suitable employment within the injured worker's capacity or pay temporary total disability compensation.

On August 18, 2009 Dr. Shannon restricted Mr. Lee from engaging in the following activities: a) operation of hazardous equipment; b) occasional lifting less than 20 lbs; c) occasional crawling; d) frequent bending, stooping, squatting, crouching, overhead left shoulder work, operation of an automobile, and lifting less than 10 lbs; e) and continuous pushing or pulling. (R. Vol. II, p. 614). Mr. Lee provided Ms. Napier, human resources for Bodex, with the work slip. Ms. Napier indicated that she needed to follow up with Jay Nicholson, the vice president of Bondex, before Mr. Lee would be permitted to return to work. That evening Ms. Napier contacted Mr. Lee and advised him that no work was available within his restrictions. (R. Vol. I, p. 179, lines 1-25; p. 180, lines 1-16).

The Defendants listed Janice Napier and Jay Nicholson as witnesses but failed to call them to testify. Davis v. By-Pass Auto Parts, Inc. (403 SE 2d 133, 304 SC 75) states, "The Commission could properly rely upon the presumption that the unexplained failure to call a material witness under a party's control raises adverse inferences." The Defendants did not call Ms. Napier or Mr. Nicholson as witnesses. Thus the inference is that their testimony would be adverse to the position taken by the Defendants.

Mr. Lee was placed on light duty work. It is uncontroverted that he provided his employer with the work note and was not offered light duty work. As a result, claimant respectfully requests the Court of Appeals affirm the Full Commission Order and award temporary compensation from August 18, 2009 through the present and continuing.

The Defendants reliance on Coleman v. Quality Concrete Products and Bateman v. Town and Country Furniture Co., is misguided. In Coleman and Batemen claimant was awarded compensation for total disability beyond the date of his discharge (maximum medical improvement) by the treating physician. In the present instance, claimant has not been discharged by the treating physician. Claimant is not presently seeking total and permanent disability. Claimant is seeking temporary total disability as he has been out of work due to a reported work related injury for eight days.

IV. THE ISSUES RAISED IN SECTION III OF DEFENDANTS' BRIEF ARE INTERLOCUTORY.

The Appellate Panel's order states, "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." (Order of Appellate Panel p. 29). The Defendants allege that it was an error of law for the Appellate Panel to not make a final decision with regard to the low back and right shoulder/arm.

The issues raised in Section III of Defendants Brief are interlocutory. Appeals from the Workers' Compensation Commission are governed by Section 1-23-380 of the South Carolina Code (Supp. 2010). See Long v. Seal Air Corp., 391 S.C. 483, 486, 706 (Ct. App. 2011). Section 1-23-380 limits review to "a final decision...." See Long, 391 S.C. at 486, 706 S.E. 2d at 35-36.

The Appellate Panel's October 12, 2011 order left the low back and right shoulder/arm in abeyance. The Appellate Panel did not finally decide whether Mr. Lee sustained injuries to his low back and right shoulder/arm. Accordingly, Section III of Defendants' brief addresses issues

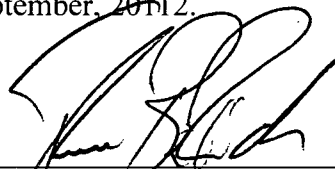
not involving “a final decision,” and claimant requests this portion of Defendants’ appeal be dismissed.

However, if Section III of Defendants brief is permitted to be argued. Claimant maintains a preponderance of the evidence indicates claimant’s low back and right shoulder complaints are causally related to his injury.

CONCLUSION

The October 12, 2011 order from the Workers’ Compensation Commission Appellate Panel is supported by substantial evidence and does not contain any errors of law. Accordingly, claimant respectfully requests the Court of Appeals fully affirm the ruling of the Full Commission.

Respectfully submitted, this, the 10th of September, 2012.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0906951

Bernard D. Lee, Respondent,

v.

Bondex Inc. and Great American Ins. Co., Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief complies with Rule 211 (b), SCACR. September 17
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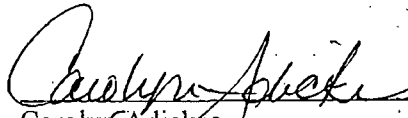
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PROOF OF SERVICE

I certify that I have served Respondent's Final Brief on the parties in the above referenced claim by depositing a copy of it in the United States Mail to their respective attorneys of record, postage prepaid, on September 10 2012 addressed as follows:

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