

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

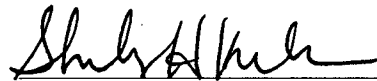
WCC File No. 0906951

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

v.

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

Reply Brief of Appellant



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ARGUMENTS

I. The Appellate Panel erred in determining that Claimant sustained 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 Substantial evidence in the record reflects that the Respondent did not sustain a work related accident. Contrary to Respondent's assertion, the Form 51's filed by the defendants, the consent order entered into by the parties, the medical evidence and hearing testimony, **do not** support a finding of compensability of this claim. Appellants submit that not only was the substantial evidence of an injury by accident not met in the record, there was no evidence of the accident. As such, the appellate panel committed an error of law.

A. The Accident Report, 12A, Form 51s and statements made by witnesses are not an admittance of an accident by Appellants.

Respondent asserts that the accident report filled out by the claimant's supervisor, Lowell Simpkins, is evidence of the appellants acceptance of a accident. This is not true.

Mr. Simpkins states the following in his report:

Employee STATED he was starting to install the front top door on the #3 machine by lifting it with his hand and shoulder. **He SAID** he guesses he was pushing too 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. (R. Vol. II, p. 539)

This statement by Mr. Simpkins as illustrated above is nothing more than a recitation of what the claimant told him. As stated in Appellants Brief and by the Hearing Commissioner, the claimant's testimony is not credible. Therefore, the statements of the claimant himself to his supervisor cannot be evidence of the appellant's admittance of a claim.

Respondent also contends that the simple act of Mr. Simpkins giving Mr. Lee Goody's Powder and Biofreeze, and sending Mr. Lee to the hospital, is evidence that the Appellants admit this claim. This is simply not true. Mr. Simpkins was responding to his employee's complaints to him, and there was no way to know what type of injury, if any, the claimant sustained that day. In fact, upon the claimant's arrival at the University Hospital ER, they could find no injury. Therefore, this argument is without merit.

Respondent tries to state that because the 12A/First Report of Injury references that the claimant **stated** he had pain in the left shoulder and neck, the 12A is evidence of an injury. However, the 12A, simply regurgitates what the claimant **told** the person who was filling out the form. (R. Vol. II, p.690). This has no bearing on whether the person filling out the 12A, much less the employer, admitted an injury by accident. Indeed we are before this Honorable Court because appellant has vehemently denied this claim.

Respondent next contends that the Form 51's filed out on March 1, 2010 and April 31, 2009 are evidence that Appellants admit the accident. In both Form 51's, the Appellants state that they "admit an INCIDENT, but deny an injury, and demand proof as to nature and extent of injuries." (R. Vol. I. p. 68; p. 72). These statements are not evidence of Appellants admitting an injury, but rather they are statements that outright deny that an accident or injury occurred. It is clear that an incident is not an "injury" or an "injury by accident" which have specific and distinct meanings under SC Code Ann. Section 42-1-160 (1976, amended).

The Respondent next contends that the portion of the order on appeal referring to the Appellants agreeing to provide a lump sum payment of \$5,000 is also evidence that the appellants admit this claim. This is without merit. Appellants have the right to

investigate a claim and the payment of \$5,000 during the investigation is not an admittance of an accident. Contrary to Respondent's assertions, the items as discussed above, are not substantial evidence that the Respondent suffered an injury by accident and as such, the Appellate Panel's decision must be reversed.

B. The medical evidence does not indicate that Mr. Lee sustained an injury by accident.

Respondents cite numerous excerpts from the medical records as evidence that the claimant suffered an injury by accident. However, all of the medical reports were based upon testimony that the claimant gave to the doctors about his incident.

The Respondent's attorney first strings together citations from doctor's visits where the claimant states that he was hurt. For example, Respondents believe that the June 3, 2009 medical visit should be evidence of the injury because the ER notes state that the patient was injured by a machine hood that fell on his shoulder. These excerpts are nothing but the statements given by the claimant himself to the physicians and have no bearing on medical evidence of an injury. In fact, on the date of the ER visit, the doctor's report states that there was no physical finding of an injury. (R. Vol. I, p. 91 lines. 20-22) (R. Vol. II p. 542). The finding of "no injury" after an examination on the day of the accident **IS** medical evidence.

Respondents also rely upon the processing forms for the claimant's June 5, 2009 visit with Dr. Broder as evidence of an injury at work. However, the doctor in his report, is simply repeating what the claimant told him and is not true medical evidence.

Moreover, the fact that the employer authorized physical therapy and an MRI of the left shoulder has nothing to do with admittance of the claim as the employer may authorize such treatment while they are conducting their investigation of the claim.

The true medical **evidence** shows that Respondent did not suffer an injury by accident. X-rays were taken of the Claimant's left shoulder which all three views were unremarkable (R. Vol. I., p. 42; R. Vol. II, pp. 542-543). The medical note on the day of the Respondent's ER visit 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, pp. 542-543). 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 and that the medical evidence clearly does not support the finding of an injury by accident.

C. The Hearing Testimony does not support a finding of an injury by accident.

Respondents assert that Mr. Lee's testimony as well as the testimony of Mr. Simpkins, support an injury by accident. However, Mr. Lee's own testimony of how the incident occurred changed numerous times.

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, lines 18-21). 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 13-15) (R. Vol. I, p. 161). The Hearing Commissioner asked him if he did this with one hand and he said "yes." (R. Vol. I, p. 88). 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. I; 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). 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). It is clear that the substantial evidence does not support the appellate panel's finding.

Respondents argue that Mr. Simpkins testimony was consistent with the claimant's and therefore the claimant's testimony should be believed. This is not true. Lowell Simpkins, 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. (R. Vol. II, p. 242 lines 5-11). Further, Mr. Simpkins testified that the hood never fell off of the forklift. (R. Vol. II, p. 242 lines 9-11). This is in direct contradiction to Mr. Lee's testimony that the hood of a machine FELL on his left shoulder and neck (R. Vol. I, p. 160, lines 18-19). Mr. Simpkins also states that "the hood is over five hundred pounds, you wouldn't have been able to lift it." (R. Vol. II, p. 261 lines 2 – 17). Mr. Simpkins' testimony does not support the appellate panel's finding as asserted by the Respondent.

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, not a finding that there was a work related accident. (R. Vol. I, p. 25). However, this finding is clearly erroneous in light of the substantial evidence in this matter.

II. The Substantial Evidence does not support a finding that the left shoulder injury was causally related.

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

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

Subsequent to the Claimant's medical treatment with various medical providers, both counsel for the Claimant and Appellants provided them with medical questionnaires to address causation. These questionnaires do not support the Appellate 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. I p. 107; pp. 109-110) (R. Vol. 2 p. 299). While Respondent's attorney tries to discredit Dr. Bethea's opinion because Dr. Bethea "practices outside of Columbia," the location of his practice has no relevance upon his medical opinion. Respondent further tries to discredit Dr. Bethea's opinion on the basis that he is regularly used by insurance companies and is a well known "ringer." These inflammatory statements regarding Dr. Bethea, are baseless and should have no effect upon his medical opinion rendered in this matter.

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). Respondent tries to discredit Dr. Westerkam's opinion on the basis that his independent medical examination was taken under "questionable circumstances." Ironically,

Respondent does not cite what circumstances of that IME would be questionable and this should have no bearing on Dr. Westerkam's medical opinion. Respondent also tries to discredit Dr. Westerkam's opinion on the basis that he is not an orthopaedist. However, Respondent also relies upon questionnaires from doctors that are not orthopaedists.

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). Respondent also tries to discredit Thesing's opinion on the basis that he is not an orthopaedist. Again, it is disingenuous at best for the Respondent to rely upon medical opinions from physicians that aren't orthopaedists, yet say that Appellants should not be allowed to.

III. 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). Respondent in his brief asserts that this work note alone is enough to qualify him for temporary total disability benefits.

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 market 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 effect before the Hearing Commissioner and no 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). Because the Claimant did not meet his burden of proving his entitlement to benefits, the appellate panel decision must be reversed.

IV. 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.

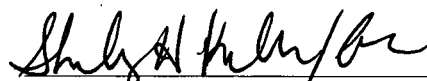
The Appellate panel, in its order, stated “we find that the claimant submitted evidence of injuries to other body parts however, we elect to hold all other injuries alleged by claimant (low back and right shoulder/arm) in abeyance pending further

review.” (R. Vol. I, p. 30). However, the Appellate Panel fails to state any reason why any further review would be necessary. Respondent contends that this issue is interlocutory because the Commission held these injuries in abeyance. Respondent relies on Long v. Seal Air Corp. to argue that review is limited to final decisions. See Long v. Seal Air Corp., 391 S.C. 483, 486, 706 (Ct App. 2011). Appellants submit that there was a final decision made as to holding the issue of the low back and right shoulder complaints in abeyance and this was 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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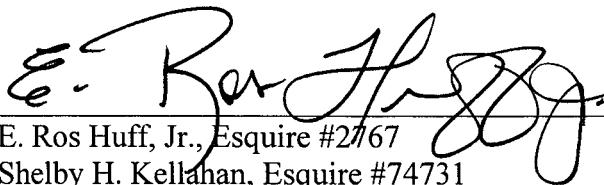
v.

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

CERTIFICATE OF COUNSEL

In compliance with Rule 211, the Appellant's Final Reply 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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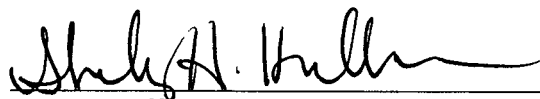
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PROOF OF SERVICE

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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