

RECEIVED

APR 08 2019

SC Court of Appeals

APPELLATE PANEL  
DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1622114

NICHOLAS B. THOMPSON,

APPELLANT  
CLAIMANT,

vs.

BLUFFTON TOWNSHIP FIRE DISTRICT,

EMPLOYER,

AND

STATE ACCIDENT FUND,

CARRIER,  
DEFENDANTS/RESPONDENTS

---

Appellate Panel Review held in Columbia, South Carolina,  
on December 18, 2018 per notices timely  
and properly served upon all parties of interest.

Appellate Panel Decision and Order filed

March 7, 2019

---

APPEARANCES:

Claimant/Appellant represented by David H. Berry, Esquire  
of Berry & Carr in Hilton Head, South Carolina

Defendants/Respondents represented by D. Alan Westerlund,  
Jr., Esquire of Willson Jones Carter & Baxley, P.A. in Mount  
Pleasant, South Carolina.

## STATEMENT OF THE CASE

The parties were heard by Commissioner R. Michael Campbell, II, on October 23, 2017, in Conway, South Carolina to determine issues as set forth in the Claimant's Form 50 and the Defendants' Form 51. Specifically, the Claimant alleged injuries to the back, legs, bladder, and bowels as the result of repetitive trauma injury and three injuries by accident which occurred on/before/after June 1, 2016. He requested a finding of compensability; payment of past, present, and ongoing causally-related medical bills; continuing and future medical treatment; a determination of correct average weekly wage and compensation rate; payment of temporary total disability benefits; and all other applicable benefits under the Act. He sought payment of temporary total disability from February 11, 2017 to present and continuing, as well as causally-related medical treatment with Dr. James Lindley, including surgery.

The Defendants denied the Claimant sustained an injury by accident as alleged or sustained a repetitive trauma injury as a result of his employment. They argued that the Claimant failed to report any of the three alleged accidents within 90 days as required by S.C. Code Ann. § 42-15-20(B). When he did report an alleged work-related accident, he only reported an injury due to lifting a heavy patient which allegedly occurred well beyond the 90-day reporting requirement time period, but made no mention of the other two alleged accidents or repetitive trauma. The Defendants denied that the Claimant works in a position which involves repetitive trauma and denied that there is evidence to support a claim of repetitive trauma. The Defendants contended that the Claimant is not entitled to any benefits under the S.C. Workers' Compensation Act and requested a full denial of the claim.

On September 19, 2018, Commissioner Campbell issued the following Order:

**IT IS HEREBY ORDERED** that the Claimant failed to meet his burden of proof for entitlement to benefits under the Act for either an injury by accident or repetitive trauma injury.

**IT IS FURTHER ORDERED** that the Claimant's request for benefits under the Act is denied.

**IT IS FURTHER ORDERED** that the Defendants are not responsible for providing any benefits under the Act.

**IT IS FURTHER ORDERED** that this case is dismissed with prejudice.

No hearing costs are assessed in this instance.

**IT IS SO ORDERED.**

Within the statutory period, the Claimant/Appellant filed a Form 30 Application for Review. Such, together with all documentary evidence, has been delivered by oral argument on December 18, 2018 to the individual members of the Appellate Panel and has since been under study and consideration.

In his Form 30 Application for Review, the Claimant/Appellant presented 14 questions for review. In his Brief to the Appellate Panel, he presented only three questions, those being:

- I. Did the Hearing Commissioner err by holding that the Claimant did not sustain a compensable injury as a result of the three alleged incidents which occurred on/before/after June 1, 2016, or as a result of repetitive trauma?
- II. Did the Hearing Commissioner err in holding that the Claimant failed to provide the Employer with proper notice of an injury by accident or repetitive trauma?
- III. Did the Hearing Commissioner err in holding that the Claimant failed to establish by a preponderance of the evidence that he sustained an aggravation of a pre-existing condition?

At the Appellate Hearing, during oral argument, the Claimant/Appellant dropped his allegation of a compensable injury by accident as a result of the three alleged incidents, conceding "right up front that there is not a timely report of those incidents when they occurred." (Hrng.

Transcript p. 4, ll. 1-3) He withdrew his claim for compensability of the three injuries by accident and argued only for compensability related to repetitive trauma. The Defendants/Respondents argued that the Claimant/Appellant failed to present any evidence to prove that his job is repetitive in nature and failed to satisfy the requirements of S.C. Code Ann. § 42-1-172. They further argued that the Hearing Commissioner found that the Claimant/Appellant's job is not repetitive in nature and that there is no factual or legal basis to reverse that decision. The Defendants/Respondents asked that the September 19, 2018 Decision and Order be affirmed in its entirety.

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. § 42-17-50 (1985), review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusion of Law consistent with or inconsistent with those of the Hearing Commissioner. Based upon a review of the foregoing, the Appellate Panel has determined that the Hearing Commissioner did not err in finding that the Claimant failed to meet his burden of proof for entitlement to benefits under the Act for either injury by accident or repetitive trauma injury and denying the claim in its entirety. The Appellate Panel hereby AFFIRMS the Hearing Commissioner's Decision and Order and enters the following Findings of Fact and Order as its own.

#### **FINDINGS OF FACT**

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Nicholas B. Thompson as Employee-Claimant and Bluffton Township Fire District as Employer and State Accident

Fund as Carrier, Defendants.

2. The Claimant alleges he sustained injuries to his back, legs, bladder, and bowels as the result of repetitive trauma injury and three injuries by accident which occurred on/before/ after June 1, 2016. He alleges that these three specific traumatic work events caused and/or aggravated his low back injury: (1) the Claimant lifted an approximately 400-pound patient in March or April 2016, (2) the Claimant fought a fire on July 9, 2016, and (3) the Claimant performed hurricane clean-up in October 2016.
3. Following an incident in which the Claimant lifted a heavy patient, which he believes occurred in March or April 2016, he did not directly inform his supervisor that he hurt his back at that time. (Hrng. Transcript p. 79, l. 3) He did not complete an incident report that day. (Hrng. Transcript p. 38, l. 7) He did not request medical treatment following the incident. (Hrng. Transcript p. 79, l. 6)
4. Captain Walter Cooler, one of the Claimant's supervisors, testified that the Claimant never came to him to report hurting his back on the call involving a heavy patient. (Defendants' Exhibit J, p. 168) The Claimant never asked Captain Cooler to fill out an incident report. (Defendants' Exhibit J, p. 170)
5. Following a fire which occurred on July 9, 2016, during which the Claimant alleges he injured his back, he did not report an on-the-job injury. (Hrng. Transcript p. 80, l. 22) He did not request medical treatment or complete an injury report. (Hrng. Transcript p. 82, ll. 3-6)
6. After performing cleanup activities following Hurricane Matthew in October 2016, during which he alleges he injured his back, the Claimant did not report that he injured his back on the job. (Hrng. Transcript p. 82, ll. 15-17)
7. The Claimant believed that his back injury was work-related as of October 2016. (Hrng. Transcript. P. 83, l. 9)

8. The Claimant saw Dr. Susan Cramer on February 10, 2017. He completed intake paperwork on which he reported severe low back pain and discomfort, tingling in the right leg, issues in bathroom, weight gain, and numbness/tingling which "just started out of nowhere." (Defendants' APA #6, p. 26)
9. Dr. Cramer's office note dated February 10, 2017 states that the Claimant complained of lower back pain on the right which began a year ago, has been progressively worsening over time, and got acutely worse three months ago, but nothing particularly worsened it. Dr. Cramer's note reflects that the Claimant saw Dr. Batson previously, who suggested he go to physical therapy, but he could not afford it. (Claimant's APA #1, p. 1)
10. A February 10, 2017 lumbar spine MRI revealed a transitional appearance of the L5 vertebral body with near-complete sacralization; moderate central stenosis at L4-5 secondary to diffuse annular bulging, central disc extrusion, and facet arthrosis; mild central stenosis at L5-S1 secondary to right paracentral disc protrusion; mild congenital central stenosis at L1-2, L2-3, and L3-4; severe bilateral lateral recess stenosis at L4-5 with probable bilateral L5 traversing nerve root impingement; and mild bilateral L4-5 foraminal stenosis without exiting nerve root impingement. (Claimant's APA #2, p. 11)
11. Dr. Cramer placed the Claimant on light/sedentary duty only as of February 13, 2017. (Claimant's APA #1, p. 4.)
12. The Claimant saw Dr. Cramer on February 15, 2017 for a right S1 transforaminal epidural steroid injection and a right L5 transforaminal steroid injection and did not report a work-related injury. (Claimant's APA #1, pp. 5-7)
13. On February 28, 2017, the Claimant returned to Dr. Cramer for follow up after the injections. Dr. Cramer's note indicates the Claimant's lower back pain began 8 months ago and was due to lifting a person. The note indicated the injury happened at work. (Claimant's APA #1, p.

8.)

14. The Claimant saw Dr. James Lindley at The Neurological Institute of Savannah & Center for Spine on February 16, 2017, for complaints of severe low back pain and radiating right leg pain and paresthesias which began about one year ago. Dr. Lindley discussed options of a minimally invasive decompression and interbody fusion at L4-5 or an L4-5 disc replacement. The Claimant informed Dr. Lindley that he wanted to proceed with the disc replacement. (Claimant's APA #3, pp. 12-14)
15. The Claimant met with Captain Pete Reid on February 22, 2017 and completed an accident report on which he indicated that he injured his back in June 2016, but was unable to provide a specific date of injury. (Defendants' Exhibit D, p. 114) The Claimant did not relate any other calls or back pain related to anything other than a lifting incident when he met with Captain Reid on February 22, 2017. (Hrng. Transcript p. 100, l. 11) The Claimant did not relate his back injury to fighting a fire, cleaning up after Hurricane Matthew, or his repetitive job duties. (Hrng. Transcript p. 101, l. 3)
16. The Claimant's February 22, 2017 meeting with Captain Pete Reid was the first time he reported an on-the-job injury to Bluffton Township Fire District. (Hrng. Transcript p. 90, l. 11; p. 100, l. 14)
17. On July 11, 2017, in a letter for the Claimant, Dr. James Lindley of the Neurological Institute and Center for Spine of Savannah opined to a reasonable degree of medical certainty that there is a direct causal relationship between the Claimant's repetitive day-to-day work duties as a firefighter, three events the Claimant referenced with Bluffton Township Fire District, and his lower back injury with radiation to his legs. Furthermore, Dr. Lindley opined that the Claimant's work duties most probably caused and/or aggravated his lower back injury with radiation into his legs. Dr. Lindley stated that the Claimant has received and continues

to need treatment, including L4-5 disc replacement surgery, which will tend to lessen his period of disability. (Claimant's APA #3, p. 15)

18. On January 18, 2018, Dr. James Lindley provided sworn deposition testimony that he has not seen any accident reports or medical reports which detail the Claimant's three alleged work accidents. (Lindley Depo. Transcript p. 17, l. 18) He has not seen a job description for the Claimant's position. (Lindley Depo. Transcript p. 17, l. 25) He has not seen an ergonomic study related to the repetitive nature of the Claimant's job. (Lindley Depo. Transcript p. 18, ll. 4-5) He has not seen any evidence that proves that the alleged work accidents occurred, and is speculating on the accuracy of the events based on what he and his nurse were told by the Claimant. (Lindley Depo. Transcript p. 43, ll. 20-25)
19. Dr. James Lindley testified that he is not sure if the repetitive nature of the Claimant's job caused his back condition or if the work accidents caused the back condition. (Lindley Depo. Transcript p. 20, ll. 19-20)
20. Dr. James Lindley testified that he believes it is speculative to say that the Claimant's back injury is due to the repetitive nature of his job because "there are multiple factors, so we don't know exactly which factor was the primary reason for the problem or was it multiple factors where there was wear and tear over time." (Lindley Depo. Transcript p. 21, l. 23 to p. 22, l. 2)
21. Dr. James Lindley testified that he cannot state to a reasonable degree of medical certainty that the Claimant's back condition is causally-related to his employment. (Lindley Depo. Transcript p. 22, ll. 13-20; p. 22, ll. 23-25; p. 34, ll. 21-24) Dr. Lindley further testified to a reasonable degree of medical certainty that the Claimant's work duties, repetitive tasks as a part of his job duties, and the three events the Claimant conveyed to him had aggravated his lower back condition, however, he cannot say whether an exacerbation of the Claimant's

back condition is related to repetitive trauma versus the three alleged work accidents versus the general physical nature of his job. (Lindley Depo. Transcript p. 40, ll. 21-22; p. 41, l. 8)

22. Greater weight is placed on Dr. James Lindley's sworn deposition testimony than on the July 11, 2017 statement that he signed. Dr. Lindley was questioned by counsel for both the Defendants and the Claimant, and was unable to state to a reasonable degree of medical certainty that the Claimant's back condition is causally-related to his employment.
23. Based on the sworn testimony of the Claimant, Captain Walter Cooler, and Captain Pete Reid, it is hereby found that the Claimant did not properly report his alleged work accidents as required by S.C. Code Ann. § 42-15-20.
24. The Claimant failed to provide his employer with notice of an accident or injury within 90 days of the incident in which he lifted a heavy patient which he believes occurred in March or April 2016, fought a fire on July 9, 2016, or performed cleanup following Hurricane Matthew in October 2016. This finding is based upon the greater weight of the evidence, including the sworn testimony of the Claimant, Captain Walter Cooler, and Captain Pete Reid. The Claimant admitted that February 22, 2017 was the first time he reported an on-the-job to Bluffton Township Fire District. At that time, he only related a lifting incident, but did not report any other accidents or that he felt his injury was related to repetitive trauma. February 22, 2017 was well outside 90 days after the lifting incident, which the Claimant believes occurred in March or April 2016.
25. The Claimant failed to prove a repetitive trauma injury, as the greater weight of the evidence supports a finding that the Claimant's job duties are not repetitive in nature. The Claimant described a variety of physical job duties, but submitted no evidence which proves that they are repetitive in nature. The Claimant's job description includes reference to performing a variety of physical activities, none of which are performed on a constant or repetitive basis.

(Claimant's Exhibit J, pp. 65-67) Captain Pete Reid cannot state any repetitive duties which a firefighter is required to perform. (Hrng. Transcript p. 111, l. 9)

26. With only the Claimant's subjective complaints, and based on the sworn deposition testimony of Dr. James Lindley, it is hereby found that the Claimant did not meet his burden of proof that he sustained a causally-related repetitive trauma injury or otherwise injury/aggravation to his lower back or any other body part arising out of and in the course and scope of his employment. This finding is based upon the greater weight of the evidence, including the sworn testimony of the Claimant, Captain Walter Cooler, Captain Pete Reid, and Dr. James Lindley.
27. The Claimant's request for benefits under the S.C. Workers' Compensation Act is hereby denied. This finding is based upon the greater weight of the evidence, including the sworn testimony of the Claimant, Captain Walter Cooler, Captain Pete Reid, and Dr. James Lindley.

#### CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. Under § 42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.
2. Under § 42-1-160, the Claimant did not sustain a compensable injury to any part of his body as a result of the three alleged accidents which occurred on/before/after June 1, 2016.
3. Under § 42-1-172, the Claimant did not sustain a compensable repetitive trauma injury, as he failed to prove a direct causal relationship between the condition under which his work was performed and his injury.
4. Under § 42-15-20, the Claimant failed to provide the Employer with proper notice of an injury

by accident or repetitive trauma injury.

5. Under § 42-9-35, the Claimant failed to establish by a preponderance of the evidence that he sustained an aggravation of a pre-existing condition.
6. Under § 42-15-60, the Claimant is not entitled to, and the Defendants are not responsible for, any medical treatment.

**ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law,

**IT IS HEREBY ORDERED** that the Claimant failed to meet his burden of proof for entitlement to benefits under the Act for either an injury by accident or repetitive trauma injury.

**IT IS FURTHER ORDERED** that the Claimant's request for benefits under the Act is denied.

**IT IS FURTHER ORDERED** that the Defendants are not responsible for providing any benefits under the Act.

**IT IS FURTHER ORDERED** that this case is dismissed with prejudice.

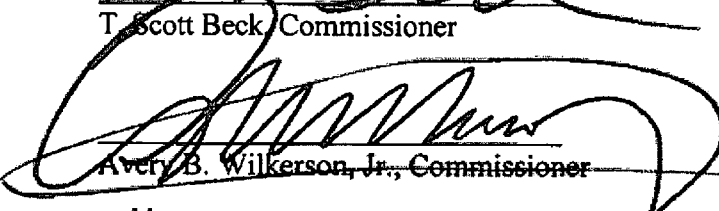
No hearing costs are assessed in this instance.

**IT IS SO ORDERED.**

SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION

  
\_\_\_\_\_  
Susan S. Barden, Commissioner

  
\_\_\_\_\_  
T. Scott Beck, Commissioner

  
\_\_\_\_\_  
Avery B. Wilkerson, Jr., Commissioner

WE CONCUR:

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

***By Eugenia Hollmon on March 7, 2019***