

6

ORIGINAL

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

Susan S. Barden, Commissioner  
T. Scott Beck, Commissioner  
Gene McCaskill, Commissioner

WCC File No. 1310882

Appellate Case No. 2016-002296

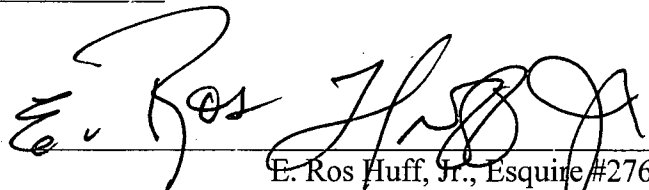
Tyrone Lawrence, Employee/Claimant, Respondent,

v.

Advanced Glassfiber Yarns, Inc., Employer, and Great American Alliance Insurance Co., Carrier, Appellants.

FINAL BRIEF OF APPELLANTS

June 30 2017



E. Ros Huff, Jr., Esquire #2767  
Shelby G. Hapeshis, Esquire #74731  
HUFF AND HAPESHIS, LLC  
Post Office Box 1935  
7244 Woodrow Street  
Irmo, South Carolina 29063  
(803) 252-2232 telephone

Attorneys for Advanced Glassfiber Yarns, Inc.,  
Employer and Great American Alliance Ins.,  
Carrier, Appellants

[Redacted]  
William L. Smith, II  
Chapman, Smith & Arden  
[Redacted]  
Columbia, SC 29211

RECEIVED

JUN 30 2017

SC Court of Appeals

**TABLE OF CONTENTS**

Table of Authorities ..... 3

Statement of Issues on Appeal ..... 4

Statement of the Case..... 4

Arguments

**ARGUMENT I**

**THE CLAIMANT DID NOT MEET HIS BURDEN OF PROVING AND THE PREPONDERANCE OF THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CLAIMANT SUSTAINED A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF HIS COURSE AND SCOPE OF EMPLOYMENT, THUS ENTITLING HIM TO WORKERS COMPENSATION BENEFITS.** 5

**THE SINGLE COMMISSIONER ERRED IN APPOINTING DR. POLETTI AS THE AUTHORIZED TREATING PHYSICIAN, THE ERROR BEING THAT THE DEFENDANTS HAVE THE RIGHT TO CHOSE THE TREATING PHYSICIAN PURSUANT TO MCKINNEY V. KIMBERLY CLARK CORP.** 8

Conclusion ..... 9

TABLE OF AUTHORITIES

**STATUTES**

S.C. Code Ann. Section 42-1-160..... 5

S.C. Code Ann. Section 42-15-60 ..... 8

**CASES**

*Eargle v. South Carolina Electric and Gas*, 205 S.C. 423, 32 S.E.2d 240 (1944).....6

*Jones v. Hampton Pontiac*, 304 S.C. 440, 405 S.E.2d 395  
(1991).....6

*Langdale v. Harris Carpets*, 2011 S.C. App. LEXIS 192 (S.C. Ct. App. July 20,  
2011).....8

*McKinney v. Kimberly Clark Corp*, 658 S.E.2d 112 (App. 2008).....8

*Owings v. Anderson County Sheriff's Department*, 315 S.C. 297, 433 S.E.2d 869  
(1993).....6

## STATEMENT OF ISSUES ON APPEAL

1. Did the Commission err in finding as fact and concluding as a matter of law that the Claimant sustained a compensable injury by accident for the bodily injury?
2. Did the Commission err in finding as fact and concluding as a matter of law that Dr. Poletti is the authorized treating physician?

## STATEMENT OF THE CASE

The claimant contends that he injured his head and neck on August 14, 2013 when a portion of the ceiling fell on him. The defendants denied the claim on the assertion that there was no injury by accident even if an incident occurred. The claimant's attorney filed a Form 50 hearing request. A hearing was held on November 23, 2015. By order dated February 11, 2016, the Commissioner found the claim compensable and ordered payment of temporary total disability benefits as well as medical treatment. The Commissioner also appointed Dr. Poletti as the treating physician. The Defendants appealed that decision on February 23, 2016.

The claimant is 56 years old (R. Vol. I p. 62). He is a high school graduate (R. Vol. I p. 62). He has been employed at AGY for 37 years as an FPO/furnace person operator. His job is to bring hot glass to the melting process (R. Vol. I p. 62).

On August 14, 2013, the claimant contends that a portion of a fluorescent light and ceiling fell on him and hit him on the back of his head and neck. He contends that he injured both shoulders, his head, his neck and lower back. Primarily he complains of problems with the cervical area of his back. There were no witnesses to the accident.

He was taken to Aiken Regional Medical center and was diagnosed with a contusion to the neck (R. Vol. II p. 320). They also conducted an x ray which came back normal (R. Vol. II p.

316). He followed up with Drs. Care and was put on light duty. He worked approximately two weeks of light duty. While on light duty, he traveled to Seattle to see his son play professional football. Once he returned from his trip to Seattle, he received notification that his claim was denied.

He treated on his own at Carolina Musculoskeletal. He received an MRI which showed lumbar degenerative disc disease with mild to moderate degenerative changes (R. Vol. II p. 276). Dr. Ty Carter, after reviewing this MRI in December 2013, stated that the MRI C-spine is w/o evidence of DDD, collapse, herniation or encroachment of the nerve root. (R. Vol. II p. 275) One and a half (1 ½) years later, another MRI done with Dr. Poletti in June of 2015. That MRI showed a large, severe herniated disk and it's at a different level. Dr. Poletti performed surgery on the claimant in June of 2015. He continues to work with the employer. His pain complaints now include lower back pain and pain in the left side of the neck.

## **ARGUMENTS**

### **ARGUMENT I**

**THE CLAIMANT DID NOT MEET HIS BURDEN OF PROVING AND THE PREPONDERANCE OF THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE CLAIMANT SUSTAINED A COMPENSABLE INJURY BY ACCIDENT ARISING OUT OF HIS COURSE AND SCOPE OF EMPLOYMENT, THUS ENTITLING HIM TO WORKERS COMPENSATION BENEFITS.**

In order to be entitled to Workers Compensation benefits, the employee must show he sustained an "injury by accident arising out of and in the course of the employment." S.C. Code Ann. § 42-1-160. The term "arising out of" in the Workers' Compensation Act refers to the origin of the cause of the accident, while the term "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Owings v. Anderson County Sheriff's*

*Department*, 315 S.C. 297, 433 S.E.2d 869 (1993). "An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury." *Id.* Excluded from the Act, however, is an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. *Jones v. Hampton Pontiac*, 304 S.C. 440, 405 S.E.2d 395 (1991) (quoting *Eargle v. South Carolina Electric and Gas*, 205 S.C. 423, 32 S.E.2d 240 (1944)).

The defendants contend that there was no injury by accident because the claimant was not credible and because the accident could not have happened in the way that the claimant described. Further, the defendants contend that any problems with the claimant's back pre-existed this accident and the level of his impairment if any is minimal based on the fact that he has traveled long distances and taken numerous plane trips since this accident. Moreover, defendants contend that the problems with the claimant's back could not have come from the work incident as he had a negative MRI with Dr. Ty Carter within months of the accident. Ty Carter's MRI did show degenerative disc disease. However, it was at a different level in which the surgery was performed. The surgery in which Dr. Poletti performed was based upon an MRI report taken over a year after the accident which showed issues with his back.

The claimant testified at his deposition that he had no prior problems with his neck, arms or low back before August 2013 (R. Vol. I p. 63 lines 12-15). However, the claimant was in a motor vehicle accident on January 27, 2006 and was diagnosed with a cervical strain. The claimant testified that he didn't admit to the motor vehicle accident during the deposition because he

“didn’t remember it.” Yet, the claimant actually litigated the motor vehicle accident and received a settlement for the accident on May 16, 2016.

On February 2, 2006 the claimant saw Dr. Douglas Holford who diagnosed him with a cervical strain as well. The claimant also complained of; back, shoulder and neck pain at that visit. Claimant admitted at the hearing that his statement of no prior problems with these body parts was UNTRUTHFUL. The claimant saw a doctor for back pain as recent as October 29, 2012, wherein he suffered from back spasms while raking the yard. The claimant’s problems with his back date as far back as October 21, 2002, where he suffered from a muscle strain in his lower back.

The claimant also had numerous complaints of head pain or headaches before this accident. On July 1, 2013, he visited the doctor for headaches and right knee pain from playing ball. He returned on July 24, 2013 for complaints of a really bad headache.

Despite the claimant’s pain complaints surrounding this incident, the claimant admits to traveling to Idaho a week after the Seattle trip and flying to Dallas Texas and New Orleans. He testified at his deposition that his wife moved the luggage during his Seattle trip. However, his testimony at the hearing was that he and his wife shared carrying the luggage. The surveillance footage does show the claimant carrying the luggage. The claimant testified at the deposition that while he was in Seattle he had a cervical collar he would wear outside the room. However surveillance footage showed that the claimant never wore his cervical collar. The claimant admitted that the statement with regard to the cervical collar was an UNTRUTHFUL statement also made under oath.

The claimant repeatedly testified that he had never left the country. However, Dr. Ty Carter on November 17, 2014 notes that “Claimant had been traveling quite a bit and even went to London, England for a football game; is doing much better from the injections in neck and low back.” (R. Vol. II p. 267).

This panel has the ability to review all of the evidence and make its own finding that this claim is not compensable. “Where the evidence is conflicting over a factual issue, the findings of the appellate panel are conclusive. In workers' compensation cases, the appellate panel is the ultimate finder of fact.” *Langdale v. Harris Carpets*, 2011 S.C. App. LEXIS 192 (S.C. Ct. App. July 20, 2011). “The final determination of witness credibility and the weight to be accorded evidence is reserved to the appellate panel.” *Id.* We respectfully request that the appellate panel review this factual evidence and make the finding that based upon the medical reports and testimony that the Claimant did not meet his burden of proving that he is entitled to benefits under the workers compensation act and that his benefits should be denied.

## ARGUMENT II.

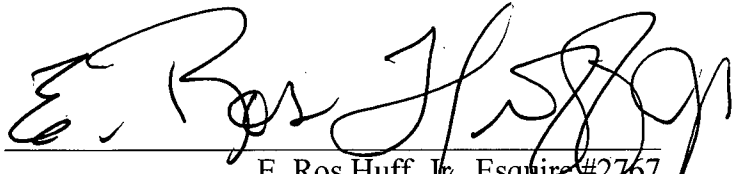
### **THE SINGLE COMMISSIONER ERRED IN APPOINTING DR. POLETTI AS THE AUTHORIZED TREATING PHYSICIAN, THE ERROR BEING THAT THE DEFENDANTS HAVE THE RIGHT TO CHOSE THE TREATING PHYSICIAN PURSUANT TO MCKINNEY V. KIMBERLY CLARK CORP.**

The Single Commissioner committed an error of law when he appointed Dr. Poletti as the authorized treating physician. There was no basis for this appointment because this is not a situation under 42-15-60 that calls for the Commission to appoint a treating physician because this is a denied case. Pursuant to *McKinney v. Kimberly Clark Corp*, 658 S.E.2d 112 (App. 2008), the defendants have the right to choose the physician. Therefore, the hearing commissioner committed error.

**CONCLUSION**

Based on the above cited arguments, the Defendants would respectfully request that the Order of South Carolina Workers Compensation Appellate Panel be reversed in its entirety.

Respectfully Submitted,



E. Ros Huff, Jr., Esquire #2767

Shelby G. Hapeshis, Esquire #74731

HUFF AND HAPESHIS, LLC

Post Office Box 1935

7244 Woodrow Street

Irmo, South Carolina 29063

(803) 252-2232 telephone

Attorneys for Advanced Glassfiber Yarns, Inc.,

Employer and Great American Alliance Ins.,

Carrier, Appellants

June 30 2017

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

Susan S. Barden, Commissioner  
T. Scott Beck, Commissioner  
Gene McCaskill, Commissioner

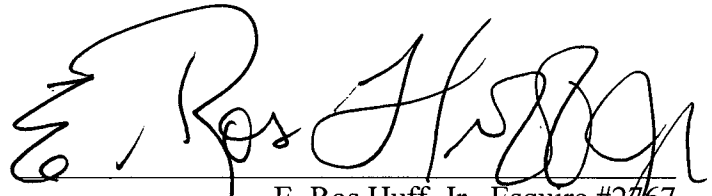
WCC File No. 1310882  
Appellate Case No. 2016-002296

Tyrone Lawrence, Employee/Claimant, Respondent,  
v.  
Advanced Glassfiber Yarns, Inc., Employer and Great American Alliance Ins., Carrier,  
Appellants.

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.

June 30 2017



E. Ros Huff, Jr., Esquire #27767  
Shelby G. Hapeshis, Esquire #76731  
HUFF AND HAPESHIS, LLC  
Post Office Box 1935  
7244 Woodrow Street  
Irmo, South Carolina 29063  
(803) 252-2232 telephone

Attorneys for Advanced Glassfiber Yarns, Inc.,  
Employer and Great American Alliance Ins.,  
Carrier, Appellants

**RECEIVED**

JUN 30 2017

SC Court of Appeals