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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE PANEL
The Honorable Mike Campbell, The Honorable Melody L. James
and The Honorable Avery B. Wilkerson, Jr.

WCC No. 1504993
Appellate Case No. 2017-000084

Horace L. Adell, Jr.,	Employee/Claimant/ Respondent,
-v-	
Clean Streak, Inc.,	Employer/ Respondent, and
Builders Mutual Insurance Company,	Carrier/Appellant.

FINAL BRIEF OF APPELLANT

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Columbia, South Carolina

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STATEMENT OF THE CASE

This is an appeal in a worker's compensation case. The hearing before the Single Commissioner was held on February 17, 2016, based upon the issues raised in the Forms 50 and 51 filed by the parties. The matter had previously been scheduled for August 31, 2015, but the Claimant's lawyer withdrew his Form 50.

The Claimant is the sole owner of the Employer, Clean Streak, Inc. Clean Streak, Inc., had its own counsel present at the hearing before the Single Commissioner. Naturally, Clean Streak, Inc. supported the claim that Horace L. Adell, Jr. was injured by accident arising out of and in the course of his employment. The Carrier denies that the Claimant suffered a compensable injury by accident under the Act and asserts that, even if he did, he is not entitled to a

running award of temporary total disability benefits because he admits that he has been working.

At the hearing before the Single Commissioner, the Claimant asserted that he was injured while working at his second home in Myrtle Beach, which he asserts doubled as a new office of the Employer, while lifting two buckets of wax belonging to the Employer. The Carrier asserts that the Claimant himself characterized this so-called "office" as his second home; that Claimant changed his story about how he was injured multiple times; and that the Claimant at times hid and then minimized the fact that he had suffered from back and neck problems for years, treating with doctors and a chiropractor.

The Claimant sought a finding of compensability with regard to his neck injuries, casually-related medical care for that condition and entitlement to temporary total disability benefits from March 25, 2015, to the present and continuing. The Defendants asserted that, even if the Claimant's injuries did occur at work, which they vehemently deny, the evidence shows that the Claimant is and has been continuing to work for Clean Streak, Inc. and that on the advice of others he has deliberately chosen to forego his salary from the business in order to make his claim for temporary total disability benefits. The Carrier also points out that the Claimant admitted that he sought and obtained surgery for his neck injury, which the Carrier maintains was a chronic problem, without notice to or approval from the Carrier.

The Single Commissioner found the claim compensable and ordered as follows:

1. The Defendants shall pay temporary total disability benefits in the amount of $766.05 per week from March 25, 2015, to the present and continuing until further Order of this Commission or agreement of the parties;

2. The Defendants shall pay for charges for the Claimant's causally related medical care from the date of the injury and continuing further Order of this Commission.

Both parties timely filed a Request for Commission Review, and a hearing was held before the Workers' Compensation Commission's Appellate Panel on August 16, 2016. The Carrier appealed the Decision and Order of the Single Commissioner and argued that 1) Claimant did not suffer an injury by accident arising out of and in the course of his employment with Clean Streak, Inc.; 2) even if Claimant suffered a compensable injury, Claimant has not proven by a preponderance of the evidence that he is entitled to temporary total disability benefits; 3) the Commissioner properly excluded a statement from the Claimant's chiropractor because that statement was not a medical record admissible under the Administrative Procedures Act; and 4) the hearing Commissioner improperly awarded payment for medical treatment and surgery when Claimant made no attempt to inform the Carrier of this surgery and obtain prior authorization. Clean Streak, Inc. appealed the hearing Commissioner's finding that a statement from the Claimant's chiropractor was inadmissible.

After oral arguments, the Appellant panel of the Worker's Compensation Commission Affirmed the Order of the Single Commissioner in regard to the Claimant's entitlement to benefits and as a compensable claim, and reversed the Single Commissioner's ruling in regard to the admissibility of the proffered statement of the Claimant's chiropractor.

Claimant now appeals the Decision and Order of the Commission alleging: 1) the Commission erred in finding that Claimant suffered an injury by accident arising out of and in the course of his employment with Clean Streak, Inc.; 2) the Commission erred in finding that Claimant proved by a preponderance of the evidence that he is entitled to temporary total disability benefits; 3) the Commission erred in finding that the statement from the Claimant's chiropractor was admissible under the Administrative Procedures Act; and 4) the Commission erred in awarding payment for medical treatment and surgery when Claimant made no attempt to inform the Carrier of this surgery and obtain prior authorization.

The Claimant has not appealed the Commission's Order.

STATEMENT OF THE FACTS

The Claimant testified that he is 53 years-old and married to Susan D. Adell who also works in the business of Clean Streak, Inc. (R. p. 165, lines 9-7; Hr'g Tr. 40, Feb. 17, 2016.) Mrs. Adell, however, is also out on disability, so she takes only a "very minimal" salary. (R. p. 210, lines 10-12; Hr'g Tr. 85; See also R. p. 325, line 22-p. 326, line 22; 30(b)(6) Dep. pp. 28-29, Aug. 25, 2015.) Claimant graduated from high school in North Carolina. (R. p. 166, lines 20-25; Hr'g Tr. 41.) He started Clean Streak, Inc. in approximately 1992. Clean Streak, Inc. is a company which provides industrial cleaning services to businesses and other commercial settings, including hospitals. (R. p. 169, line 2-p. 170, line 2; Hr'g Tr. 43-45.) At the time of the accident, Clean Streak, Inc. had 32 to 35 employees all in North Carolina. It recently expanded into South Carolina and, according to the Claimant, now has three employees in this State. (R. p. 170, lines 4-5; Hr'g Tr.

45.) According to Susan Adell, who is Vice President and an officer, Clean Streak, Inc. was substantially more profitable in 2016 than it was in 2015 after Mr. Adell stopped receiving his salary. (R. p. 327, lines 1-25; 30(b)(6) Dep. p. 40.)

Just before this alleged accident occurred, the Claimant and his wife purchased a home in Myrtle Beach, which was in foreclosure. The Claimant testified that he "designated the home as his work location also" (R. p. 171, lines 14-24; Hr'g Tr. 46.), but there is no evidence that the Employer leases the home from the Claimant or otherwise pays rent in any way. Claimant testified he gets all of the Employer's work mail at a post office box in Myrtle Beach and receives only his personal mail at the house. (R. p. 172, lines 2-7; Hr'g Tr. 47.)

The Claimant testified that on the morning of March 24, 2015, he met with a paper supply vendor for about two and half hours. Right after that meeting he had another meeting with a salesman. He did not do any physical work that morning. "That was the only strenuous work I did that morning." (R. p. 174, lines 3-10; Hr'g Tr. 49.) Later, according to the Claimant, he and a part-time worker, Matt Maziarz, were unloading materials out of a trailer and into the garage at his house. (R. p. 177, lines 1-12; Hr'g Tr. 52.) Claimant testified that they unloaded bags of white play sand and, he said, five gallon buckets of wax used in his business. (R. p. 177, line 22-p. 178, line 21; Hr'g Tr. 52-53.) According to the Claimant's testimony at the hearing, he injured himself sometime in the early afternoon when he was moving the wax. The Claimant testified that he picked up two five gallon buckets of wax and turned around and "all the sudden it felt – you know when you straighten your arm out and your arm pops, well, just ten times

that and then it immediately started burning. So I said, 'ouch'." Claimant testified that he felt a pop and burning in the back of his neck. (R. p. 178, line 23-p.179, line 10; Hr'g Tr. 53-54.) The Claimant testified that he continued on with his work during the day. When he quit, he and Matt ordered pizza and he put ice and then hot packs on his neck, laid down and fell asleep. According to the Claimant, "the next thing I know I was waking up screaming and hollering, couldn't hardly breathe and tried to lift my foot up to get out the bed. Couldn't get it. So I just reached over and called my wife and told her there was something bad wrong." (R. p. 180, lines 1-16; Hr'g Tr. 55.) This was apparently in the early morning hours of March 25, 2015. The Claimant then called 911. (R. p. 180, line 16; Hr'g Tr. 55.) The Claimant's wife, Susan Adell, testified he told her that he hurt himself building shelves at their home. (R. p. 323, line 6-p. 324, line 2; 30(b)(6) Dep. pp. 14-15.)

The Claimant's story at the hearing is inconsistent with the documentary evidence in the case and the multiple histories he has given. The Horry County Fire & Rescue (EMS) records reflect a completely different story. They arrived on the scene at approximately 1:00 a.m. on March 25, 2015. According to these EMS records, they found Mr. Adell kneeling against a coffee table in the living room of his home. The EMS record states:

> "Pt stated that he is having extreme neck pain. ***He stated that his pain has been off and on for three months***. He went to the chiropractor and got adjusted recently which helped the pain temporarily. Pain was in his neck and went into both arms. Pt stated that he took pain medicine after he ate dinner. *He also said that he is supposed to take a muscle relaxer at bedtime but did not take any tonight."* (Employer's APA pp. 1-2) (emphasis added).

There is no mention in the EMS records of any injury as a result of picking up buckets of wax or any other accident. The emergency department records from the Waccamaw Community Hospital reflect the same thing. According to those records, the Claimant presented with "neck pain which he states began about three months ago, but has been exacerbated *tonight*. Patient has seen several physicians concerning this issue and has not had significant relief." (R. p. 64; Claimant's APA p. 2.) Again, there is no mention of any accident occurring earlier in the afternoon. The emergency records also reflect a CT scan obtained which revealed *no acute abnormalities*. (R. p. 65; APA p. 5.) Another note in the emergency room records reflect that Claimant had been seen by a chiropractor and Dr. Smith[1] for three months. (R. p. 66; APA p. 8.) The emergency room records further reflect that Claimant "appears to be anxious unable to sit still. Reports difficulty sitting still, rocking back and forth. States that he has been hurting for two to three months." (R. p. 67; APA p. 34.)

On March 27, 2015, two days after being released from the Waccamaw Medical Center emergency room, the Claimant went to Park Ridge Health Hospital in Hendersonville, North Carolina near his permanent residence. The history in those records reflect that he had been complaining of neck pain for four months. The Park Ridge records reflect that the onset of his neck pain was "chronic" and that there was no specific injury, and that whatever might have occurred was "at home". (R. p. 68; Claimant's APA p. 46.)

[1] Robert Smith, MD, practiced at Forge Mountain Medicine and was Claimant's primary care physician. (Hr'g Tr. 62; 69.)

The Claimant testified that, before this incident which allegedly occurred on March 24, 2015, he had never been diagnosed with any kind of disc problem with his neck. (R. p. 174, lines 20-23; Hr'g Tr. 49.) When asked whether he had ever experienced any intense neck pain with radicular symptoms, the Claimant explained that he had because he is 6'6" tall and the machines used to clean and wax floors are not made for someone his height. (R. p. 174, line 24-p. 176, line 23; Hr'g Tr. 49-51.)

On cross-examination the Claimant admitted he had been seeing a chiropractor three times a week for back and joint pain "for many years" and had been regularly taking muscle relaxers. (R. p. 190, lines 3-12; Hr'g Tr. 65.) He also admitted that the chiropractor had treated the top of his shoulders and the base of his neck. (R. p. 191, lines 4-24; Hr'g Tr. 66.) He further admitted that he had previously seen medical doctors at the Forge Mountain Medical Center for chronic muscle, back and neck pain before this alleged accident. Those records from May 27, 2014 (R. pp. 82-88; See Carrier's APAs at pp. 273-279) reflect he had chronic back pain and joint pain (R. p. 84; APA p. 275) and that he was taking a host of drugs, including Celebrex, Flexeril, Oxycodone, Restoril, Xanax, Prozac and Viagra. (R. pp. 86-87; Carrier's APA pp. 277-278.) On June 6, 2014, he returned to Forge Valley Medical Center and presented with chronic "muscle pain" which had increased in severity. (R. pp. 89-92; APA pp. 280-283.)

The Employer filed a First Report of Injury with the North Carolina Industrial Commission and the Carrier. There is nothing in the record reflecting when that First Report was actually filed. In the report, signed by the Claimant's wife and

dated March 30, 2015, she was asked to describe fully how the injury occurred and what the employee was doing when injured. The response provides: "moving and installing shelving and setting up temporary storage facility for Myrtle Beach expansion." (R. p. 78; Carrier's APA p. 254.) There is no mention of a lifting injury of any sort. When quizzed about what her husband told her on the phone the morning of March 25, 2015, Mrs. Adell testified that the Claimant told her he hurt his neck while "setting up shelves." (R. p. 323, line 4-p. 324, line 2; 30(b)(6) Dep. pp.14-15.)

The Claimant's original Form 50 (filing a claim only) dated May 7, 2015, stated that "the Claimant was working on a storage facility when he ***fell*** injuring his neck/back." On May 18, 2015, the Claimant filed a Form 50 requesting a hearing, stating that the "Claimant was working on a storage facility when he fractured his neck/back. He was carrying a five gallon bucket of wax when he felt a crack/pop in his neck. Claimant put ice on his neck just after this happened. Pain got progressively worse through the evening." Both Form 50s, of course, ask, "To the best of your knowledge, did you have any prior permanent disability?" Despite having chronic back and neck problems for years, the Claimant failed to answer this question in either Form 50. When his Form 50 was re-filed following his earlier withdrawal prior to the hearing he answered, "No."

The Claimant's story evolved dramatically over time, to the date of the hearing. At no time contemporaneously with the accident did the Claimant report having picked up two five-gallon buckets of wax, as he testified at the hearing. Further, the Claimant testified that he had never had any problems with his neck

before, but the EMS and emergency room records of March 25, 2015 and March 27, 2015 are replete with references to his serious ongoing neck problems for which he was receiving medical treatment and taking medications. The evolution of the Claimant's story begins shortly afterward, as reflected in the medical records of Carolina Spine and Neurosurgery on April 2, 2015. There, the Claimant stated he had no prior history of neck problems and that the accident occurred while he was "building shelves and (sic) burring (sic) of new supplies at he (sic) and his wife's new business and (sic) Myrtle Beach." (R. p. 69; Claimant's APA p. 55.) The March 30, 2015, records of Forge Mountain Medical Center, an affiliate of Park Ridge Heath, reflect that the Claimant was there with his wife and they reported that he complained of: "acute severe neck pain that started while he was in Myrtle Beach working on his second home five days ago. He was lifting *a sixty pound bag of dirt*, had instant pain, and actually caused the patient to scream in pain. The Claimant further reported previous neck pain for about three months, which he said was exacerbated after picking up the bag of dirt."

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act governs judicial review of a decision by the Appellate Panel. Carolinas Recycling Grp. v. S.C. Second Injury Fund, 398 S.C. 480, 483, 730 S.E.2d 324, 326 (Ct. App. 2012). Under the scope of review established in the APA, this Court may reverse or modify the Appellate Panel's decision if the substantive 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 on the whole

record; or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." S.C. Code Ann. § 1-23-380(5)(e-f). This Court may not substitute its judgment for that of the Commission on the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stephen v. Avins Const. Co., 324 S.C. 334, 337, 478 S.E.2d 74, 76 (Ct. App. 1996). Instead, review of issues of fact is limited to determining whether the findings are supported by substantial evidence in the record. Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004). Substantial evidence is evidence that would allow reasonable minds to reach the same conclusion as the appellate panel. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). An appellate court can reverse or modify the Appellate Panel's decision if the decision is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005).

ARGUMENT

1. The South Carolina Worker's Commission erred in finding that Claimant suffered an injury arising out of and in the course of his employment with Clean Streak, Inc.

The Appellate Panel's finding that Claimant suffered an injury arising out of and in the course of his employment with Clean Streak is not supported by substantial evidence in the record. In view of the reliable, probative, and substantial evidence in the record, the Appellate Panel's finding is clearly erroneous. It is difficult to find reliable, probative, and substantial evidence to

support a Claimant's Claim when a Claimant's story evolves so dramatically over the course of the claim. The most credible medical history tends to be that which is given contemporaneously with an event. In this case, Mr. Adell woke up in the middle of the night with excruciating neck pain according to him and the EMS records. He told the EMS attendant and the doctors in the emergency room at Waccamaw Medical Center that he had been having significant neck pains for three to four months. Nowhere in those records does he describe any acute injury by accident. Nowhere in those records does Claimant say that he hurt his neck while lifting two five gallon buckets of wax, or while lifting a sixty pound bag of dirt, or from a fall, or while building shelving, or that any incident at all occurred while he was working for Clean Streak, Inc. Indeed, the medical evidence reflects that Claimant had chronic, long-term problems with his neck and back for which he had been treated for years.

The record is devoid of substantial evidence that shows the Claimant suffered an injury by accident arising out of and in the course of his employment with Clean Streak, Inc. Further, there is no medical evidence to support a claim for the exacerbation of a pre-existing condition under SC Code § 42-9-35, nor does Claimant make such a claim.

2. Even if Claimant suffered a compensable injury, the South Carolina Workers' Compensation Appellate Panel's decision erred in awarding the Claimant temporary total disability benefits.

Total disability, whether temporary or permanent, is defined as "the incapacity for work." South Carolina Code § 42-9-10. An employee who is capable of performing other work that is continuously available to him will not be deemed

totally disabled because he is unable to resume the duties of the particular occupation in which he was engaged at the time of his injury. *Wynn vs. Peoples Natural Gas Company*, 238 S.C. 1,118 S.E. 2d 812 (1961).

Even if Claimant suffered a compensable injury, the Appellate Panel's decision to award temporary total disability benefits is not supported by substantial evidence. The record is replete with evidence that Claimant is able to work, and the only reasonable inference to be drawn from the substantial evidence in the record is that Claimant is not entitled to temporary total disability benefits. The Claimant never quit working following the alleged accident, he just quit paying himself a salary. He stated that this was on the advice of his "bookkeeper." (Hr'g Tr. 84.) The Claimant did eventually have neck surgery for his long-suffered pain. This occurred in April 2015. The Claimant admitted that he never sought authorization from the Carrier for such surgery. (Hr'g Tr. 82.) After his surgery, he went back to work in the office and continued to throughout his claim. On cross-examination, the Claimant remarkably attempted to evade these questions.

> Q. All I've asked is did you go back into the office and work some after this – after the surgery?
>
> The Court: That's either a yes or a no.
>
> A. Yes, I did.
>
> Q. And you continue to go into the office and work some, don't you?
>
> A. No, sir.
>
> Q. Okay.
>
> A. Sir, I need to clarify that.

Q. Please do.

A. I can only be on my feet two to three hours a day.

Q. Okay.

A. I can only sit at my desk and I can answer the phone and I can sign payroll checks. That is the extent of what I can do. If there is a job that needs to be estimated, someone has to go with me --

Q. Okay.

A. --and do that. She made that very clear that is the only capacity and that was so the business could still run.

Q. Okay. And so you go in and you sign checks --

A. I'm sorry.

Q. --and do paperwork and then you do some estimating with help from somebody else. What else do you do?

A. There's nothing else I can do. I'll take a meeting. I'll take a meeting. I can take a meeting.

Q. Okay. And who would you meet with? Vendors and advertising people like the man who came in earlier?

A. Yeah. Heads of departments in hospitals, people like that.

Q. Okay. So you're selling if you will? You're selling your company?

A. No. These are what we call quality control meetings.

Q. Okay. I'm with you. And would that be in Myrtle Beach as well as Asheville?

A. Yes, sir.

Q. Okay. So you're traveling down to Myrtle Beach and meeting with these people you just described as well as in Asheville; correct?

A. Yes, sir.

Q. Okay. And when a decision needs to be made about the company --hiring, firing, anything like that --you make those decisions, don't you?

A. No, sir.

Q. So you don't have anything to do with those decisions?

A. I did not say --I did not say that. I answered the question you asked me.

Q. Okay. So are you consulted? Do you get involved in the business decisions of the company?

A. I am consulted.

(R. p. 212, line 7- p. 214, line 14; Hr'g Tr. p. 87, l. 12 – Hr'g Tr. p. 89, l. 14).

So, the evidence shows that Claimant has continued to go into the office where he answers the phone; signs payroll checks; does paperwork; prepares job estimates; meets with vendors, advertising people, heads of departments in hospitals and "people like that"; attends quality control meetings; and actually travels between Asheville and Myrtle Beach for such meetings, staying a week or more on each visit. He also is involved in the business decisions in the company. These are precisely the same things he did before the alleged injury. In fact, his company has continued to grow such that he now has three employees in South Carolina. He stays at his second home in Myrtle Beach, where he alleges this work accident occurred, six or seven days at a time, traveling back and forth to Asheville. (R. p. 215, line 15-p. 216, line 4; Hr'g Tr. 90-91.) His business is more profitable than ever.

There is no substantial evidence in the record to support the finding that the Claimant is unable to work. Rather, substantial evidence in the records supports

the finding that not only is the Claimant able to perform work, he is working. Therefore, the only reasonable inference to be drawn is that the South Carolina Compensation Appellate Panel erred in finding that Claimant is entitled to temporary total disability benefits because there is no substantial evidence that shows that the Claimant is unable to work.

3. The South Carolina Workers' Compensation Appellate Panel erred in admitting a statement from the Claimant's chiropractor because that statement was not a medical record admissible under the Administrative Procedures Act.

The Administrative Procedures Act Administrative Procedure Act (APA), requires exclusion of irrelevant, immaterial or unduly repetitious evidence in contested cases. S.C. Code Ann. § 1-23-330. The Claimant proffered a statement from a chiropractor in North Carolina characterizing his years of treatment of the Claimant. However, the Claimant failed to proffer the actual records of the chiropractor to show what, exactly, the chiropractor had been treating the Claimant for. The Claimant testified that he had been treated "for many years" by the chiropractor for muscle and joint pains, including treatment for his shoulders and neck. However, instead of offering the chiropractor's records as evidence, the Claimant simply submitted a statement from the chiropractor characterizing his years of treatment of Claimant as merely "maintenance." A bald statement characterizing the records, without the records themselves, was properly excluded by the hearing Commissioner. Based upon the Claimant's failure to submit his chiropractor's actual records, this Court should find the negative inference that the records show years of treatment to the Claimant's neck, consistent with the Claimants' testimony, and this Court should reverse the Appellate Panel's

admission of this statement. The admission of this statement without the medical records to corroborate is harmful and prejudicial.

CONCLUSION

The Appellate Panel's Decision and Order as respects is against the substantial weight of the evidence. Because the Appellate Panel so erred, the Appellate Panel's Decision and Order should be reversed accordingly.

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR, by containing all material proposed to be included by any of the parties.

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