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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1602438

Appellate Case No.: 2022-000409

Randy Jordan, Employee, Respondent.

vs.

S.C. Department of Transportation, Employer, and
State Accident Fund, Carrier, Appellants.

RESPONDENT'S INITIAL BRIEF

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1-3

Standard of Review 3-4

Statement of Uncontradicted Facts 4-7

Argument:
 The Commission properly found that the Respondent
 suffered a change of condition pursuant to S.C. Code§42-17-90..... 8-20

Conclusion20

TABLE OF AUTHORITIES

CASES

<u>Lark v. Bi-Lo, Inc.</u> , 276 S.C. 130 (1981).....	3
<u>Hargrove v. Titan Textile Co.</u> , 360 S.C. 276 (Ct. App. 2004).....	3
<u>Gadson v. Mikasa Corp.</u> , 364 S.C. 214, 221 (2006).....	3, 13
<u>Grant v. Grant Textiles</u> , 361 S.C. 188 (Ct. App. 2004).....	3
<u>Sharpe v. Case Produce, Inc.</u> , 336 S.C. 154 (1999).....	3
<u>Pratt v. Morris Roofing, Inc.</u> , 357 S.C. 619 (2004).....	4
<u>Burnette v. City of Greenville</u> , 401 S.C. 417 (Ct. App. 2012).....	12
<u>Potter v. Spartanburg School District</u> , 7 395 S.C. 17, 23 (Ct. App. 2011).....	12
<u>Tucker v. S.C. DOT</u> , 427 SC 299 (2019).....	16, 17, 18

STATUTES

S.C. Code §42-17-90.....	1, 2, 3, 8, 14, 15, 16, 18, 19
S.C. Code §47-17-20.....	2
S.C. Code §42-15-60.....	13

OTHER AUTHORITIES

S.C. Code Regs. R. 67-206 (2012).....	15
S.C. Code Regs. R. 67-207 (Supp. 2019).....	15
S.C. Code Regs. R. 67-209 (2012).....	15, 16
S.C. Code Regs. R. 67-603 (c) (2012).....	14

STATEMENT OF ISSUE ON APPEAL

**DID THE WORKERS' COMPENSATION COMMISSION
PROPERLY FIND THAT THE CLAIMANT SUFFERED A
CHANGE OF CONDITION UNDER S.C. CODE §42-17-90?**

STATEMENT OF THE CASE

This is an admitted accident decided by the Workers' Compensation Commission on the Respondent's Form 50 claiming a change of condition pursuant to S.C. Code §42-17-90. This case arises out of admitted injuries the Respondent sustained to his neck, back, and left ankle on February 4, 2016, when while in the employ of South Carolina Department of Transportation, he was struck by a vehicle.

The Appellants admit that in that accident the Respondent suffered an injury to his back, neck and left ankle. The Appellants provided the Respondent medical treatment for his back, neck, and left ankle. On September 7, 2018, the parties entered into a Form 16A Consent Order and, by agreement, the Respondent was awarded 5% loss of use to the left leg and 10% loss of use to the whole spine (neck and back).

Thereafter, the Respondent alleges to have suffered worsening pain; initially in his left ankle. On June 8, 2019, the Respondent saw orthopaedic, Jason O'Dell complaining of worsening pain in his left ankle. (APA#17, p. 211). Dr. O'Dell referred the Respondent for an MRI of his left ankle and saw him again on July 9, 2019, (APA#17, p. 218), where he performed an injection in the subtalar joint of the left ankle. Respondent alleges that, thereafter, the condition of his left ankle worsened, and he began developing increasing pain in his right hip and his spine as the result of altered gait.

On August 9, 2019, (within one year of the date of Form 16A dated September 7, 2018) Respondent filed a Form 50 claim; alleging a change of condition pursuant to S.C. Code §42-17-20 and requested a hearing.

On September 18, 2019, the Workers' Compensation Commission set a hearing on the Respondent's change of condition claim before the Single Commissioner for October 22, 2019. On September 30, 2019, the Respondent withdrew his hearing request pending additional discovery; given the worsening condition of the Respondent's right hip and spine.

Thereafter, on referral by Dr. O'Dell, the Respondent was treated for his hip and spine by orthopaedic surgeon Dr. Bill Edwards, among others. On December 3rd, 2020 the Respondent deposed Dr. O'Dell, and on December 7th, 2020 the Respondent, again, requested a hearing.

This matter was heard by the Single Commissioner on March 2, 2021. At the hearing, the Respondent sought a finding that his case should be reopened pursuant to S.C. Code §42-17-90, due to the worsening of his condition and that he should be entitled to treatment for his left ankle and spine as recommended by Dr. O'Dell and Dr. Bill Edwards.

By Order of June 1, 2021, the Single Commissioner denied the Respondent's claim for change of condition; finding that the claim was time barred, and that the Claimant had "elected his remedy by treating on his own outside of the confines of the Workers' Compensation Act."

The Respondent filed a Motion for Reconsideration on June 4, 2021; asking the Commission to reconsider its ruling. In particular, the Respondent asked the Commissioner to reconsider his finding that the Respondent had withdrawn his claim by withdrawing his request for hearing. Respondent's motion for Reconsideration also requested that the Single Commissioner

address Respondent's argument that the Appellants had forfeited any statute of limitations defense by failing to raise it in the two Form 51 answers filed by Appellants.

The Commission responded on June 22, 2021 with one sentence ruling finding "Claimant['s] Motion for Reconsideration is hereby denied." The Single Commissioner declined to rule on the Respondent's argument that the Appellants had forfeited their statute of limitations defense by failing to raise it in their Forms 51.

The Respondent then appealed to the South Carolina Workers' Compensation Commission Appellate Panel. By Order of March 2nd, 2022, the Workers' Compensation Commission Appellate Panel reversed the Single Commissioner; finding that the Respondent had suffered a compensable change of condition, pursuant to S.C. Code §42-17-90.

This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act sets forth the standard for judicial review of decisions of the Workers' Compensation Commission, Lark v. Bi-Lo, Inc., 276 S.C. 130 (1981); Hargrove v. Titan Textile Co., 360 S.C. 276 (Ct. App. 2004). Pursuant to this scope of review, the Court may not substitute its judgement for that of the Appellate Panel as to weight of the evidence on questions of fact. Gadson v. Mikasa Corp., 364 S.C. 214, 221 (2006); Grant v. Grant Textiles, 361 S.C. 188 (Ct. App. 2004). The findings of the Commission will be set aside only if unsupported by substantial evidence. Sharpe v. Case Produce, Inc., 336 S.C. 154 (1999). Substantial evidence is, "not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow

reasonable minds to reach the conclusion the administrative agency reached.” Pratt v. Morris Roofing, Inc., 357 S.C. 619 (2004).

STATEMENT OF UNCONTRADICTED FACTS

The Appellate Panel found the following facts which are uncontradicted in the record:

This case arises out of admitted injuries the [Respondent] sustained to his neck, back, and left ankle on February 4th, 2016, when while in the employ of South Carolina Department of Transportation, he was struck by a vehicle.

The [Appellants] admit that, in the accident, the [Respondent] suffered an injury to his back, neck and left ankle. The [Appellants] provided the [Respondent] medical treatment for his back, neck and left ankle. On September 7th, 2018, the parties entered into a Form 16A, and by Agreement the [Respondent] was awarded 5% loss use to the left leg and 10% loss of use to the whole spine (neck and back).

Thereafter, the [Respondent] alleges that he suffered worsening of his condition. On June 8, 2019, the [Respondent] saw orthopaedic, Jason O’Dell, M.D.; complaining of worsening pain in his left ankle. (APA#17, p. 211). Dr. O’Dell referred the Respondent for an MRI of his left ankle and saw him again on July 9, 2019, (APA#17, p. 218), where he performed an injection in the subtalar joint of the left ankle. [Respondent] also alleges that as the condition of the [Respondent’s] left ankle worsened, he began developing increasing pain in his right hip and his low back as the result of altered gait.

On August 9, 2019, (within one year of the date of Form 16 dated September 7, 2018) [Respondent] filed a Form 50 alleging a change of condition. [Respondent] specifically cited in his Form 50 the worsening condition of his left ankle.

On September 18, 2019, the Commission set a hearing on the Respondent’s change of condition Form 50 for October 22, 2019. On September 30, 2019, the [Respondent] withdrew his hearing request pending additional discovery.

[Respondent] continued seeing Dr. O’Dell, and on November 21, 2019 (APA#17, p. 222) Dr. O’Dell noted the pain in his right hip, SI joint, and his difficulty walking and referred him for physical therapy to improve his gait. By January 16, 2020, (APA#17, p. 225), Dr. O’Dell noted that the [Respondent’s] pain

was getting worse in his left lower extremity, and pain in his back and right hip, and referred him for an MRI of his lumbar spine, which was performed on January 29, 2020. On February 13, 2020, [Respondent] again saw Dr. O'Dell (APA#17, p. 234) for left lower extremity pain, lower back pain, and right hip pain. Dr. O'Dell reported that his MRI scan demonstrated broad base bulging at L4-5 and L5-S1. Dr. O'Dell continued the [Respondent's] physical therapy and saw him on April 24, 2020 (APA#17, p. 236) with the same complaints; whereupon Dr. O'Dell reported that [Respondent's] symptoms had gotten worse. Dr. O'Dell ordered "Due to the worsening of his back pain and failure of physical therapy, the patient will be referred to Dr. Johnson for evaluation and treatment." (APA#17, p. 237).

[Respondent] saw Dr. Johnson at McLeod Spine Center where he underwent epidural steroid injections at L5-S1 on May 1, 2020, May 15, 2020, and May 29, 2020. Dr. Johnson noted in his first note on May 1, 2020 "Patient has ongoing lumbar radiculopathy right lower extremity. This is progressively getting worse despite physical therapy done a couple months ago." (APA#18, p. 248). After a course of epidural steroid injections did not improve Mr. Jordan's condition, Dr. Johnson referred the [Respondent] to orthopaedic surgeon, Dr. Bill Edwards, who saw him on June 11, 2020 noting "Patient with worsening back pain radiating into both hips right greater than left." (APA#18, p. 256). Dr. Edwards did not recommend any surgery on the [Respondent's] lumbar spine at that point, but referred him back to Dr. Johnson for right facet joint block at L5-S1.

Dr. Edwards did see the [Respondent] again on June 16, 2020, this time concerned about the worsening pain he was having in his cervical spine (also an admitted body part) and the radicular symptoms he was complaining of in his right upper extremity. Dr. Edwards ordered cervical MRI and epidural steroid injections of the cervical spine. Ultimately, on July 23, 2020 Dr. Edwards referred the [Respondent] to Duke for further evaluation of his cervical spine.

The parties took the deposition of Dr. O'Dell on December 3, 2020. Dr. O'Dell testified:

Q. Okay. So now, you know, we had been talking about the ankle and your treatment of the left ankle and now we're talking about the right hip. What's the clinical significance of that?

A. So in somebody who has a lingering issue or potentially a worsening issue I do think that gait related problems can lead to some of these secondary hip or back problems or even knee problems on the other side.

(APA#, p. 12, lines 13- 21).

* * *

Q. I see. Okay. And, you know, as I said at the outset, his back was an admitted injury in the initial accident, his ankle was an admitted injury. **At this, point both his ankle and his back are worsening, is that a fair statement?**

A. **Yes.**

(APA#, p. 14, lines 14-19) (Emphasis added).

* * *

Q. It's still your concern or impression is that this worsening of the back situation is a product of gait?

A. That is my opinion.

(APA#, p. 15, lines 21-24).

He went on to testify:

A. ...his chronic ankle injury is what led to the worsening of his back so to me I think the right thing for him is to continue treatment on the back....

(APA#, p. 18, lines 6-9).

* * *

Q. **...do you have an opinion as to whether his ankle condition worsened after being released by Dr. Daily?**

A. **I think it did, yes.**

(APA#, p. 19, lines 12-14) (Emphasis added).

* * *

Q. ...do you have an opinion as to whether his ankle condition aggravated the condition of his back?

A. I believe that he did.

(APA#, p. 19, lines 19-22).

In conclusion, Dr. O'Dell opined:

Q. **All right. The question I asked, though, was whether the condition of his ankle and the altered gait resulted in the aggravation and a worsening of the condition of his lumbar spine?**

A. **Yes. I think that's what happened.**

Q. **...And was the treatment, the referrals you made to Dr. Johnson and then ultimately from Dr. Johnson to Dr. Edwards, necessary to treat that worsening?**

A. **Yes, it was.**

(APA#, p. 20, line 19-p. 21, line 3) (Emphasis added).

(Appellate Panel Order pp. 2-5).

ARGUMENT

THE COMMISSION PROPERLY FOUND THAT THE RESPONDENT SUFFERED A CHANGE OF CONDITION PURSUANT TO S.C. CODE §42-17-90.

A. The Commission's Finding Of A Change Of Condition Pursuant To S.C. Code §42-17-90 Is Supported By Substantial Evidence; And, Therefore, Should Be Affirmed.

In support of its finding of change in condition the Commission found:

We find that, pursuant to SC Code [§42-17-90, sic] the [Respondent] has suffered a compensable change of condition of those admitted, compensable, injuries.

On September 7, 2018 the parties entered into a Form 16(A) Consent Order in which the [Respondent] was awarded benefits for permanent loss of use of the left leg and whole spine (neck and back).

Thereafter, the record reflects that the [Respondent] complained of, and was treated for, worsening pain, initially in his left ankle. In particular, on June 8, 2019, the [Respondent] saw orthopaedic surgeon, Dr. Jason O'Dell complaining of worsening pain in his left ankle. (APA#17, p. 211). Dr. O'Dell referred the [Respondent] for an MRI of his left ankle and saw him again on July 9, 2019, (APA#17, p. 218), where he performed an injection in the subtalar joint of the left ankle. As the condition of the [Respondent's] left ankle worsened, the record reflects that the [Respondent] began developing increasing pain in his right hip and his low back as the result of altered gait.

[Respondent] continued seeing Dr. O'Dell, and on November 21, 2019 (APA#17, p. 222) Dr. O'Dell noted the pain in his right hip, SI joint, and his difficulty walking and referred him for physical therapy to improve his gait. By January 16, 2020, (APA#17, p. 225), Dr. O'Dell noted that the [Respondent's] pain was getting worse in his left lower extremity, noted pain in his back and right hip, and referred him for an MRI of his lumbar spine, which was performed on January 29, 2020. On February 13, 2020, [Respondent] again saw Dr. O'Dell (APA#17, p. 234) for left lower extremity pain, lower back pain, and right hip pain. Dr. O'Dell reported that his MRI scan demonstrated broad base bulging at L4-5 and L5-S1. Dr. O'Dell continued the [Respondent's] physical therapy and saw him back on

April 24, 2020 (APA#17, p. 236) with the same complaints; whereupon Dr. O'Dell reported that [Respondent's] symptoms have gotten worse.

Dr. O'Dell ordered "Due to the worsening of his back pain and failure of physical therapy, the patient will be referred to Dr. Johnson for evaluation and treatment." (APA#17, p. 237). [Respondent] saw Dr. Johnson at McLeod Spine Center where he underwent epidural steroid injections at L5-S1 on May 1, 2020, May 15, 2020, and May 29, 2020. Dr. Johnson noted in his first note on May 1, 2020 "Patient has ongoing lumbar radiculopathy right lower extremity. This is progressively getting worse despite physical therapy done a couple months ago." (APA#18, p. 248).

After a course of epidural steroid injections did not improve Mr. Jordan's condition, Dr. Johnson referred the [Respondent] to orthopaedic surgeon, Dr. Bill Edwards, who saw him on June 11, 2020 noting "Patient with worsening back pain radiating into both hips right greater than left." (APA#18, p. 256). Dr. Edwards did not recommend any surgery on the [Respondent's] lumbar spine at that point, but referred him back to Dr. Johnson for right facet joint block at L5-S1.

Dr. Edwards did see the [Respondent] again on June 16, 2020, this time concerned about the worsening pain he was having in his cervical spine (also an admitted body part) and the radicular symptoms he was complaining of in his right upper extremity. Dr. Edwards ordered cervical MRI and epidural steroid injections of the cervical spine. Ultimately, on July 23, 2020 Dr. Edwards referred the [Respondent] to Duke for further evaluation of his cervical spine.

The parties took the deposition of Dr. O'Dell on December 3, 2020. Dr. O'Dell testified:

Q. Okay. So now, you know, we had been talking about the ankle and your treatment of the left ankle and now we're talking about the right hip. What's the clinical significance of that?

A. So in somebody who has a lingering issue or potentially a worsening issue I do think that gait related problems can lead to some of these secondary hip or back problems or even knee problems on the other side.

(APA#21, p. 12, lines 13- 21).

* * *

Q. I see. Okay. And, you know, as I said at the outset, his back was an admitted injury in the initial accident, his ankle was an admitted injury. **At this, point both his ankle and his back are worsening, is that a fair statement?**

A. Yes.

(APA#21, p. 14, lines 14-19) (Emphasis added).

* * *

Q. It's still your concern or impression is that this worsening of the back situation is a product of gait?

A. That is my opinion.

(APA#21, p. 15, lines 21-24).

He went on to testify:

A. ...his chronic ankle injury is what led to the worsening of his back so to me I think the right thing for him is to continue treatment on the back....

(APA#21, p. 18, line 6-9).

* * *

Q. **...do you have an opinion as to whether his ankle condition worsened after being released by Dr. Daily?**

A. **I think it did, yes.**

(APA#21, p. 19, lines 12-14) (Emphasis added).

* * *

Q. ...do you have an opinion as to whether his ankle condition aggravated the condition of his back?

A. I believe that he did.

(APA#21, p. 19, lines 19-22).

In conclusion, Dr. O'Dell opined:

Q. **All right. The question I asked, though, was whether the condition of his ankle and the**

altered gait resulted in the aggravation and a worsening of the condition of his lumbar spine?

A. Yes. I think that's what happened.

Q. ...And was the treatment, the referrals you made to Dr. Johnson and then ultimately from Dr. Johnson to Dr. Edwards, necessary to treat that worsening?

A. Yes, it was.

(APA#21, p. 20, line 19-p. 21, line 3) (Emphasis added).

In sum, [Respondent] sustained an admitted injury to his back, neck, and, left ankle. The uncontradicted testimony of the record is that the [Respondent's] left ankle has worsened and, as a result, has led to a worsening of the condition of the spine. (Appellate Panel Order, pp. 14-17).

The Commission's finding sets out substantial evidence in support of its conclusion that the Respondent suffered a change of condition.

In sum, as the Commission found, the Respondent entered into a Form 16A Consent Order on September 7th, 2018. He saw orthopaedic surgeon Dr. Jason O'Dell for the first time on June 8th, 2019, nine months later. On that first visit Dr. O'Dell noted the Respondent's complaints of worsening pain in his left ankle. (APA 17 p. 211).

Dr. O'Dell's records, note the worsening of the Respondent's ankle from the date forward, as well as his worsening complaints of his hip and spine pain that Dr. O'Dell related to the Respondent's altered gait. Dr. O'Dell referred the Respondent to Dr. Bill Edwards to treat the Respondent's spine.

Dr. O'Dell testified to the Respondent's worsening condition.

The medical records of Dr. O'Dell and Dr. Bill Edwards, orthopaedic surgeon at McLeod Orthopaedics, and Dr. Bruce Johnson, also of McLeod Spine Center, chronicle the variety of treatments provided by Dr. O'Dell, and Dr. Edwards and his partner, Dr. Bruce Johnson, including injections in his ankle and spine, to treat those worsening conditions.

The Appellants offered the Commission, and this Court, no evidence to contradict those medical records or the testimony of Dr. O'Dell.

Instead, before the Single Commissioner, the Appellants argued, and the Single Commissioner ruled, that Dr. O'Dell's uncontradicted testimony must be disregarded because he was not a surgeon selected and authorized by the Workers' Compensation Insurance Carrier.

The Appellate Panel reversed that ruling; finding:

Testimony of Unauthorized Surgeon

Our Courts have repeatedly held that the Commission may disregard medical evidence only when other competent evidence exists in the record. See Burnette v. City of Greenville, 401 S.C. 417 (Ct. App. 2012) (citing Potter v. Spartanburg School District 7 395 S.C. 17, 23 (Ct. App. 2011)).

Here, the uncontradicted testimony of the record by the [Respondent's] treating, albeit unauthorized, surgeon, Dr. O'Dell, was that he had suffered a change of condition.

In ruling contrary to this testimony, the Commissioner noted that the testimony came from a physician who was not authorized by the Employer/Carrier. Specifically, the Single Commissioner found that the [Respondent] "elected his remedy by treating on his own outside of the confines of the Workers' Compensation Act." (See Order p. 17). Likewise, the [Appellants] argue that "the [Respondent] usurped [Appellant's] rights under the statute to control medical treatment." (Order, p.6)

The Commission cannot disregard the testimony of the [Respondent's] qualified treating surgeon simply because the surgeon was not authorized by the Carrier; i.e. because the [Respondent] "treated on his own" ; particularly where, as here, that surgeon's testimony is uncontradicted in the record.

It is certainly true that S.C. Code §42-15-60 provides that “during any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the Commission for good cause shown.” S.C. code §42-15-60.

S.C. Code §42-15-60 does not, however, prohibit a [Respondent] from treating with physicians and surgeons that are not authorized by the Carrier. Nor does S.C. Code §42-15-60 permit the Commission to disregard the opinions such unauthorized treating providers. See Burnette, 401 S.C. 417 (Commission may disregard medical evidence only when other competent evidence exists in the record).
(Appellant Panel Order, pp.23-24)

The Appellants have now, apparently, abandoned the argument that Dr. O’Dell’s opinions must be disregarded because he was not selected and authorized by Appellants. Nevertheless, they still, effectively, ask this Court to ignore Dr. O’Dell’s testimony, and his records, beginning on June 8th, 2019 (APA 17, p. 211); along with those of Dr. Edwards beginning June 11th, 2020 (APA 18, p. 256); and those of Dr. Johnson beginning May 1st, 2020 (APA 18, p. 247); which chronicle the worsening condition of the Respondent’s ankle, and, consequently, his spine from June 8th, 2019 forward, after the September 7th, 2018 consent order.

Appellants ask this Court, in spite of that uncontradicted evidence, to find that the worsening of the Respondent’s ankle and spine all occurred before the Form 16A consent order of September 7th, 2018, and that his condition did not worsen after September 7th, 2018.

Respectfully, even if this Court were inclined to reach that factual conclusion, such factual findings are the province of the Commission, and this Court should not substitute its own factual findings in place of the Commission’s; where, as here, the Commission’s findings are supported by substantial evidence. See, Gadson v. Mikasa Corp., 364 S.C. 214, 221 (2006).

B. The Respondent's Claim For Change Of Condition Was Timely Filed.

1. The Appellants Waived Their Argument As To Timeliness Of The Respondent's Claim For Change Of Condition By Not Raising Such Affirmative Defense In Their Two Separate Answers.

The Appellate Panel properly found:

Finally, even assuming that the claim was untimely filed, the statute of limitations was not raised in either of the [Respondents'] Forms 51 dated August 27, 2019 or January 5, 2021.

The Statute of Limitations set out in §42-17-90 is an affirmative defense which must be raised in [Respondents'] Form 51 answer. See R.67-603(c). A Statute of Limitations defense under §42-17-90 not raised in a Form 51 is forfeited. See R.67-603(c).

2. Respondent Timely Filed His Claim For Change For Condition On August 9th, 2019 Within One Year Of The Form 16A Of September 7th, 2018, As Required By S.C. Code §42-17-90.

Before the Single Commissioner, the Appellants successfully argued that, by withdrawing his hearing request after filing the claim for change of condition on August 9th, 2019, the Respondent effectively withdrew his claim; rendering the second hearing request untimely.

The Appellate Panel reversed, explaining:

Secondly, we find that the claim met the time requirements of S.C Code §42-17-90. As the Commission's file reflects, the claim was timely filed on August 9, 2019, within one year of the date of the Form 16 dated September 7, 2018. The [Respondent's] did not withdraw his claim.

By email of September 30, 2019, the [Respondent's] counsel wrote the Commission "I am withdrawing my hearing request pending additional discovery. Please return the case to the general files." (Emphasis added). It is based on this email that the Single Commissioner found:

1. On September 30, 2019, [Respondent] withdrew his Form 50 alleging a change of condition and requesting a hearing, and requested that the claim be returned to general files. (Ord., p. 15).

* * *

2. Because the [Respondent] withdrew his request for additional medical treatment by withdrawing his Form 50 asserting a change in condition and requesting a hearing on September 30, 2019, as well as continuing to treat with Dr. O'Dell, I find as a matter of Fact that the [Respondent] has elected his remedy. (Ord., p. 15).

Respectfully, we find that the [Respondent] did not withdraw his claim for a change of condition. He, instead, withdrew only his hearing request.

Though both “claims” and “hearing requests” are procedurally accomplished by filing a Form 50, Commission Regulations distinguish between filing a claim and requesting a hearing. R.67-206 is titled “**Filing a Claim.**” Whereas, R.67-207 is titled “**Requesting a Hearing, Claimant.**”

R.67-609 titled: “**Withdrawing a Request for Hearing.**” provides that a claimant may withdraw a request for hearing by writing the Commission’s Judicial Department and the Commission shall file a notice removing the case from the docket.

Such is precisely what the [Respondent] did by email of September 30, 2019.

R. 67-609 goes on to specifically provide that, “The notice is **without prejudice to the Claimant’s right to proceed with his or her claim.**” (emphasis added).

Ultimately, S.C. Code §42-17-90 governs the timeliness of a claim for change of condition and would supersede Commission regulation were there a conflict between the two.

S.C. Code §42-17-90 requires that “on the application of a party in interest on the ground of a change in condition, the Commission may review an award... the review must not be made after twelve months from the date of the last payment of compensation...” S.C. Code §42-17-90(A)

Our Supreme Court has construed this language in the case of Tucker v. S.C. DOT, 427 SC 299 (2019). There, the Court found that the Court of Appeals properly reversed a Commission decision finding that an employee's claim was untimely under §42-17-90. The Claimant in Tucker had filed a Form 50 seeking a change of condition within one year, but had not requested a hearing. More than a year after the last payment of compensation, the Claimant filed a second Form 50; requesting a hearing. The Commission found the claim untimely. The Court of Appels reversed.

The Supreme Court affirmed the Court. of Appels and distinguished "claims" from "hearing requests." The Supreme Court held that a Form 50 claim, even without a hearing request, meets the §42-17-90 requirement of an "application for review" within one year. The Supreme Court held "the filing of a Form 50 to initiate a claim for a change of condition is the event that must occur within twelve months of the last payment of compensation to meet the timing requirement of subsection §42-17-90(A)" Tucker, at 303.

Thus, pursuant to Tucker, the Claimant's filing of a Form 50 on August 9, 2019 to initiate a claim for a change of condition was the event that must occur within twelve months of the Form 16(A) of September 18, 2018, and it, therefore, met the timing requirement of §42-17-90.

The [Appellants] seek to distinguish Tucker from this case on the basis that, here, the [Respondent] withdrew his "request for hearing." We find that the [Respondent's] withdrawal of his hearing request had no effect on the timely filing of his claim. Tucker distinguished "claims" from "hearing requests" and held that the Claimant need only file a "claim" within one year. See Tucker, at 303. The Supreme Court's interpretation of S.C. Code §42-17-90 is, therefore, in accord with Commission Regulations.

Moreover, Commission Regulation R.67-609 titled "withdrawing a request for hearing" specifically provides that withdrawal of a hearing request "is without prejudice to the Claimant's right to proceed with his or her claim." R.67-609 (emphasis added).

(Appellate Panel Order, p. 18-21).

The Appellants have now, apparently, abandoned that argument; but contend, instead, that the Respondent "improperly delayed" in requesting a hearing the second time, and that the second hearing request should be found untimely because of "improper delay".

The Appellate Panel addressed this argument as well, finding:

Finally, the [Appellants] argue that the [Respondent] “withdrew the Form 50 requesting a hearing... to intentionally delay a hearing in the hope that evidence would later develop to support a change of condition claim.” (Order p.13).

As the Tucker Court noted, “the fact that a Claimant does not request a hearing does not mean the claim will sit unattended... if the parties reasonably need time to prepare, or to negotiate in good faith, the assigned Commissioner-or an Appellant Panel on review-should allow it... if an employer suspects [the Claimant is intentionally delaying a hearing in hopes that evidence will later develop]... the employer may request a hearing or in some other fashion seek to protect its interest.” Tucker at 303-304.

Here, the employer made no effort to request a hearing or to speed the determination of the claim for change of condition.

Moreover, we find no evidence of improper delay by the [Respondent].

The 16A was signed on September 18, 2018. By June 8, 2019, the record reflects that the [Respondent] was treated for worsening ankle pain. (APA#17, p.211 (O’Dell, June 8, 2019 note)). Within two months thereafter, on August 9, 2019, (APA#17, P.222), the [Respondent] filed a Form 50 filing a claim for change of condition and requesting a hearing. However, when the [Respondent] began to suffer and complain of worsening spinal pain as well, he withdrew his hearing request, on September 30, 2019, to allow for additional discovery.

Indeed, by November 2019 Dr. O’Dell, who treated the [Respondent] ankle, noted his spinal complaints; which Dr. O’Dell ultimately related to altered gait from his worsening ankle condition (APA#21, p.12-20). Dr. O’Dell referred the [Respondent] to a spine specialist, where he was treated regularly through 2000. (Id.; see Also APA 18).

At no point during this treatment did the employer depose the [Respondent] to learn about his complaints and treatment; nor did they seek a hearing to adjudicate his claim for a change of condition.

On December 3, 2020 the [Respondent] deposed Dr. O'Dell, who recited this treatment history and testified that the [Respondent's] worsening ankle caused altered gait which caused worsening pain in the [Respondent's] spine. (see Dep. O'Dell P.12-20). On December 7, 2020 the [Respondent] requested a hearing which was conducted on March 2, 2021.

As the Supreme Court described in Tucker, the Commission, by regulation, deliberately separated the procedure for filing a claim from that for requesting a hearing; precisely "to eliminate setting claims for adjudication prematurely." Tucker, at 302, FN2.

It is evident from the medical evidence that between the filing of the first Form 50 of August 9, 2019 and second Form 50 requesting a hearing on December 7, 2020, the worsening condition of the [Respondent's] ankle caused an altered gait, which caused a worsening of the [Respondent's] spine. (see Depo. O'Dell p. 12-20). This deterioration of the condition of the admitted body parts is well documented in the [Respondent's] treatment notes for that period. (see APA 17-18).

Given that developing condition, it would have been premature for the Commission to determine the claim when it was first set for hearing. Moreover, if the [Appellants] believed that the hearing was being delayed improperly, they could have moved, themselves, that the Commission set a hearing; they did not. We find nothing improper or dilatory in the timing of the adjudication of the claim.

(Appellate Panel of March 2nd, 2022, pp. 21-23) (emphasis added)

The Appellants argue, repeatedly, that "there is no mechanism under the South Carolina Workers' Compensation Act allowing the Defendants to seek a hearing where the Claimant is not pursuing his Claim...". (see Appellants' Brief p. 1; note 1, p. 12).

This is not the case.

As the Commission noted, S.C. Code §42-17-90(A) provides that "on its own motion or on the application of a party in interest on the ground of a change of condition, the Commission may review an award". S.C. Code §42-17-90(A) (emphasis added). (see Appellant Panel Order, p. 26).

The Appellants are “parties in interest”; yet they made no effort to make an such application for a hearing.

Appellants did not depose the Respondent, or his physician.

Appellants did not instruct the Respondent, as they were entitled to, to submit to any examination by an authorized treating physician designated by the Appellants.

As the Commission found:

Further, as set out above, we find nothing improper or dilatory in the adjudication of this claim. Moreover, if the [Appellants] believed that the hearing was being delayed improperly, they could have moved, themselves, that the Commission set a hearing; they did not. (see §42-17-90(A) (“on its own motion or on the application of any party in interest on the ground of a change in condition, the Commission may review an award...”)) (emphasis added)

Even if the [Respondent] had unreasonably delayed in requesting a hearing, the Employer can establish no prejudice. The law, §42-17-90(A), provides an adequate remedy: the Employer may request, or the Commission on its own motion may set, a hearing to determine whether there has been a change of condition. (Appellant Panel Order, March 2nd, 2022. p. 26).

3. The Doctrine of Election of Remedy, Res Judicata, and Laches Have No Application To This Case.

The Appellants argued, and the Single Commissioner found, that the Respondent’s change of condition claim was barred by the doctrines of election of remedy, res judicata, and laches.

The Appellant Panel reversed; finding the doctrines of election of remedies, res judicata, and laches have no application in this case. (Appellate Panel Order pp. 17-18, 24-26)

Appellants have now, apparently, abandoned those arguments; having not raised them in their Brief. However, in the event that the Appellants attempt to revive those arguments, the

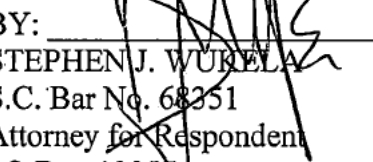
Respondent would argue that the Appellate Panel properly found that they have no application here, and would rely on the logic of the Appellate Panel in support.

CONCLUSION

For the foregoing reasons, the Order of the Appellate Panel should be AFFIRMED.

Respectfully submitted,

WUKELA LAW FIRM

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June 22nd, 2022

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JUN 24 2022

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC File No. 1602438

SC Court of Appeals

Appellate Case No.: 2022-000409

Randy Jordan, Employee, Respondent,

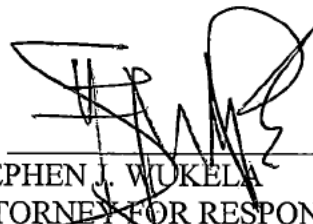
vs.

SC Department of Transportation, Employer, and
South Carolina State Accident Fund, Carrier, Appellants.

**PROOF OF SERVICE OF RESPONDENT'S
INITIAL BRIEF**

I certify that I have served the Respondent's Initial Brief on the Appellants by depositing a copy of it in the United States Mail, postage prepaid, on June 22nd, 2022 addressed to Sarah Verstraten, 945 Houston Northcutt Boulevard, Mount Pleasant, SC 29464; Timothy B. Killen, 945 Houston Northcutt Boulevard, Mount Pleasant, SC 29464; Erin Farthing, PO Box 1166, Lexington, SC 29071.

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June 22, 2022

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JUN 24 2022

SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Randy Jordan v. S.C. Department of Transportation
Appellate Case No.: 2022-000409

Dear Ms. Kitchings:

Enclosed for filing please find the original Respondent's Initial Brief and Respondent's Designation of Matter to be included in the Record on Appeal in the above case.

By copy of this letter, I am serving Sarah Verstraten, 945 Houston Northcutt Boulevard, Mount Pleasant, SC 29464; Timothy B. Killen, 945 Houston Northcutt Boulevard, Mount Pleasant, SC 29464; Erin Farthing, PO Box 1166, Lexington, SC 29071.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM


STEPHEN J. WUKELA

SJW:kmc

Enclosures

cc: Ms. Sarah Verstraten
Mr. Timothy B. Killen
Ms. Erin Farthing



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