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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Unpublished Opinion No. 2022-UP-437 (S.C. Ct. App. filed December 7, 2022)

Nicholas B. Thompson, Employee, Respondent,

v.

Bluffton Township Fire District, Employer, and State Accident Fund, Carrier, Petitioner

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RETURN TO PETITION FOR WRIT OF CERTIORARI

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2. Whether the Court of Appeals erred in their application of the substantial evidence standard of review and exceeded their role as an appellate court by substituting their view of the evidence instead of deferring to the S.C. Workers' Compensation Commission as the fact finders?

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STATEMENT OF THE CASE/PROCEDURAL HISTORY

This Petition for Certiorari follows the Court of Appeals reversal of the S.C. Workers' Compensation Commission for a denial of benefits to the Respondent, Nicholas Thompson. In April 2013 Nicholas started work as a Firefighter with the Bluffton Township Fire District. Over about the next four years Nicholas would typically work in shifts of 24 hours on and 48 hours off. His daily duties included tasks such as inspecting the trucks and the gear on the trucks, which include heavy items like ladders and hydraulic tools; washing and waxing the trucks and cleaning equipment; engaging in mandatory physical fitness; completing district tasks such as inspecting hydrants and businesses; completing at least 20 hours of fire training monthly which consisted of physically using his firefighting equipment; and responding to calls such as car accidents, fires, and general calls for assistance, which often required physically lifting people off the ground and other areas.

In 2014 a local chiropractor's office offered for the firefighters to visit their office for treatment. Nicholas went in for chiropractic treatment but was not diagnosed with any injury and did not miss any work. He followed up with another chiropractor in late 2014 for some discomfort in his lower back, but he was not diagnosed with any injury and missed no work. In 2015 Nicholas saw his primary physician for pain in his lower back, but Nicholas again is not diagnosed with any injury and had no work restrictions. In late 2015 Nicholas was referred to Dr. John Batson who diagnosed him with a lower back sprain but again did not impose any work restrictions.

In March or April 2016 Nicholas is involved in a call for assistance which required he help a woman, who weighed about 400 pounds, get up from the ground. After this call, he noticed back pain but continued to work without any restrictions and did not miss work. In July

2016 Nicholas was part of a call for a structure fire at Belfair Plantation that was incredibly physically demanding. Lastly, in October 2016 Hurricane Matthew impacted Bluffton and the surrounding area. For several days Nicholas was engaged in a massive cleanup effort that included, among other things, clearing over one hundred trees from roadways. For the entirety of 2016, Nicholas did not miss any work and continued to work without restrictions.

Finally, in January 2017 Nicholas' back pain started to affect his ability to perform his job. On January 10th, 2017, Nicholas went to his Battalion Chief about his back pain. The Chief had him report to the Personnel Officer to discuss options. The Personnel Officer suggested that he talk with Deputy Chief Cramer who is married to Dr. Cramer, a pain management specialist. Nicholas made an appointment with Dr. Cramer and continued to work without restrictions.

On February 10th, 2017, Nicholas was diagnosed with a back injury for the first time. He saw Dr. Cramer who ordered an MRI. The MRI revealed vertebral disc injuries at two levels, and, at this point, Dr. Cramer issued a light duty work restriction. Dr. Cramer then referred him to a neurologist who saw Nicholas on February 13th, 2017. After this appointment, the doctor recommended spine surgery. On February 22nd, 2017, Nicholas told the Personnel Officer that he wanted to report a claim. On March 30th, 2017, Nicholas filed a Form 50. The Form 50 was amended on April 19th, 2017, and again on May 30th, 2017.

On October 23rd, 2017, a hearing was held in front of a single commissioner, and his decision and order denying the claim was issued on September 19th, 2018. On March 7th, 2019, the full Commission affirmed the denial. On December 7th, 2022, the Court of Appeals reversed the Commission's decision, finding the Commission erred as a matter of law in erroneously interpreting the word "repetitive" and in ruling that Nicholas did not give proper notice of his injury.

ARGUMENT

1. **The Court of Appeals properly reversed the S.C. Workers' Compensation Commission's denial of benefits because the Respondent submitted substantial evidence of a compensable repetitive trauma injury and the Commission's findings and denial were affected by an error of law.**

S.C. Code Ann § 42-1-172 (A) clearly defines a "repetitive trauma injury" as an "injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." As the Petitioners point out in their pleading, clear and unambiguous statutory language must be applied as written because the statutory language is the best evidence of the legislature's intent. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); Cain v. Nationwide Prop. & Cas. Ins. Co., 378 S.C. 25, 30 661 S.E.2d 349, 352 (2008). The Petitioners' main argument is that Mr. Thompson offered no evidence that his job duties were repetitive, so the Commission properly denied the benefits. However, the plain reading of the definition does not limit compensable repetitive trauma to only jobs with a singular, constant movement, which is what appears the Commission required.

The full Commission's order stated that Mr. Thompson submitted no evidence that his job duties were repetitive in nature. However, the record contains substantial evidence of repetitive job duties, from Mr. Thompson's testimony at the hearing, Captain Reid's testimony at the hearing, and the Firefighter II job description submitted as an APA exhibit.

Mr. Thompson testified that he was initially hired in April 2013, and he worked 24-hour shifts which began at 8 a.m. (Record at 94). He started his day by inspecting the firetrucks, which included picking up, manipulating, and inspecting about 8,000 pounds of equipment (Record at 95) and on a weekly basis washing, waxing, and cleaning the interior of the firetrucks

(Record at 97). He had to complete at least 20 hours of fire training monthly which involved physically using his firefighting gear to include dragging hoses weighing hundreds of pounds, wearing gear over one hundred pounds, and using heavy tools such as ladders and hydraulic equipment (Record at 96-97). He also testified about other routinely performed duties such as inspecting fire hydrants, responding to calls for assistance, which often required physically picking people up from the ground and other areas, and other common calls like car accidents and actual fires (Record at 96-97, 99).

Captain Reid testified on cross-examination that a firefighter frequently uses or trains with, on at least a weekly basis, equipment like hoses, nozzles, pumps, hydrants, ladders, etc. (Record 181) and further agreed that the job description of a firefighter requires frequent lifting, carrying, bending, straining, stretching, pushing, etc. (Record at 182). The official Bluffton Township Firefighter II job description further corroborates Mr. Thompson's testimony by listing various duties which include frequent use of hoses, nozzles, pumps, etc. (Record at 544-546).

Based on the evidence in the record, Mr. Thompson submitted substantial evidence that he engaged in frequent and repetitive activities. The Court of Appeals correctly determined that the Commission erroneously narrowed work duties and activities that qualified for a "repetitive" injury. As the Court of Appeals noted in their opinion, repetitive means more than just engaging in the same exact activity every day. The plain reading of the definition of "repetitive trauma injury" does not limit it to that extent but only requires an injury caused by cumulative effects of repetitive traumatic events. To accept the Petitioners' argument would be to limit repetitive trauma cases only to jobs that require the exact same motion over-and-over again throughout the course of the workday. The reality is the vast majority of jobs are not limited to only a singular

movement, and the Court should not limit repetitive trauma cases to just that very small subset of jobs. As the Court of Appeals wrote in their opinion, South Carolina's general policy is to construe the Workers' Compensation Act in favor of coverage, and reasonable doubts should be resolved in favor of the claimant. Thompson v. Bluffton Township, Op. No. 2022-UP-437 (S.C. Ct. App. filed December 7, 2022) (citing Pierre v. Seaside Farms, Inc., 386 S.C. 534, 541, 689 S.E.2d 615, 618 (Ct. App. 2007). In this case, the Court of Appeals properly resolved that in favor of Mr. Thompson because the Commission erroneously failed to do so.

As further evidence that the law does not limit repetitive trauma cases to singular movement jobs, our Courts have found repetitive injuries for an HVAC technician who frequently had to lift heating and air conditioning equipment. Thompson v. Bluffton Township, Op. No. 2022-UP-437 (S.C. Ct. App. filed December 7, 2022) (citing Rhame v. Charleston Cnty. Sch. Dist., 415 S.C. 162, 164, 781 S.E.2d 151, 153 (Ct. Ap. 2015); an operating room employee whose job required removing trash bins, moving equipment, and lifting and transporting patients. Thompson v. Bluffton Township, Op. No. 2022-UP-437 (S.C. Ct. App. filed December 7, 2022) (citing White v. Med. Univ. of S.C., 355 S.C. 560, 562, 586 S.E.2d 157, 158, (Ct. App. 2003); and for a "switcher" truck driver who had to climb in and out of his cab and had to hook and unhook trucks as part of his job requirements, among other duties. Brooks v. Benore Logistics Sys., Inc., 437 S.C. 376, 879 S.E.2d 1 (S.C. App. 2022), *cert. granted*.

Based on the evidence in the record, Mr. Thompson submitted substantial evidence of duties that he performed on a daily, near-daily, and weekly basis that occurred over-and-over again. The Court of Appeals and this Court has decided other similar repetitive cases utilizing the term as defined by the legislature. There is no need to further define "repetitive" and the

Court of Appeals properly reversed the Commission because their denial of benefits, despite the substantial evidence submitted, was an error of law.

2. The Court of Appeals did not exceed their authority in analyzing the record and the Commission's findings and the court applied the proper standard when determining there was an error of law.

S.C. Code Ann. § 1-23-380(5) gives the Court of Appeals the authority to reverse or modify an administrative court's decision when substantial rights of the appellant were prejudiced due to, *inter alia*, an error of law or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.

As noted in argument one, Mr. Thompson submitted substantial evidence to the Commission to show he engaged in repetitive activities as required by his job as a firefighter. The Petitioner argues that Dr. Lindley testified that it was speculative to link Mr. Thompson's back injury to his job as a Firefighter, so his claim should fail. Dr. Lindley submitted a statement, included in the record, that there is a direct causal relationship between Mr. Thompson's work duties and his back injury, to a reasonable degree of medical certainty (Record at 476). Further, during his cross-examination he testified that Mr. Thompson had a condition characterized by a degenerative process that occurred at some point in time but was *most likely exacerbated by his work-related activities* (emphasis added) and by the several injuries he sustained on the job, and then gave that opinion to a reasonable degree of medical certainty (Record at 578). Despite the Petitioners attempt to get him to retreat from his submitted statement, Dr. Lindley still clearly linked Mr. Thompson's back injury to his work as a firefighter. S.C. Code Ann. § 42-1-172(B) requires medical evidence establishing a causal connection between the repetitive trauma and the injury, based on a preponderance standard,

before the injury is compensable. Dr. Lindley's statement and deposition testimony provides that link, and the Commissioners erred in determining that Mr. Thompson did not prove a causal connection.

Based on the testimony, documentary evidence, and testimony of Dr. Lindley, there was substantial evidence submitted of Mr. Thompson's repetitive trauma that, to a reasonable degree of medical certainty, aggravated his lower back injury. Because of the improper narrow interpretation of the word "repetitive," the Commissioners' finding that Mr. Thompson failed to prove a causal connection, and the substantial evidence in the record, the Court of Appeals properly reversed the Commission's Order.

3. The Court of Appeals did not err in reversing the S.C. Workers' Compensation Commission's denial of benefits because Respondent timely provided notice as required under S.C. Code Ann. § 42-15-20(C).

S.C. Code Ann. § 42-15-20(C) requires an employee with a repetitive trauma injury give notice within 90 days of discovering that his condition is *compensable* (emphasis added). The 90-day clock does not start on the first day an employee feels pain. The onset of pain, that does not interfere with an employee's ability to do their job, does not start the 90-day time limit to report. King v. Intl Knife, 395 S.C. 437, 718 S.E.2d 227 (S.C. App. 2011).

Petitioners cite to chiropractic treatment that Mr. Thompson received in 2014 and treatment from his primary care provider in 2015, but he never missed any work and was never placed on any light-duty restrictions until after seeing Dr. Cramer on February 10th, 2017. On February 22nd, 2017, Mr. Thompson reported to the Personnel Officer, Captain Reid, that his mother urged him to report a Workers' Compensation claim. On March 30th, 2017, Mr. Thompson filed his initial Form 50. There is not a specific way in which "notice" must be

provided to an employer. This Court ruled in Bass v. Isochem that "notice" under S.C. Code Ann. 42-15-20 should be *liberally* (emphasis added) construed in favor of claimants, and notice is adequate when there is some knowledge of accompanying facts connecting the injury or illness with the employment and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim. Bass v. Isochem, 617 S.E.2d 369, 379, 365 S.C. 454 (S.C. 2005). Nicholas spoke to his Chief about his back pain on January 10th, 2017, and the Chief sent him to the Personnel Officer. The Personnel Officer recommended he talk to Chief Cramer, who could help him make an appointment with his spouse, a pain management doctor. On February 22nd, 2017, Nicholas met with the Personnel Officer again to discuss making a Workers' Compensation claim and filed a Form 50 on March 30th, 2017. Up until his light-duty restriction ordered by Dr. Cramer on February 10th, 2017, Nicholas was not missing work and was working without restrictions. Clearly, his employer was aware of the potential compensation claim based on his meeting with the Chief and Personnel Officer in January 2017, and the Form 50 file on March 30th, 2017, and notice was provided well within 90 days.

The Commission erred, as a matter of law, by ruling that Mr. Thompson did not timely report his injury. As such, the Court of Appeals properly reversed their decision.

4. The Court of Appeals did not err in not addressing Petitioners' argument that Respondent cannot prove entitlement to benefits for a repetitive trauma injury due to an aggravation of a pre-existing condition.

Petitioner argues in this Petition for Certiorari that the Court of Appeals failed to address their argument that aggravation of a pre-existing condition cannot qualify as a repetitive trauma injury. However, Petitioners presented only two issues to the Court of Appeals, and neither argued that aggravation of a pre-existing condition does not qualify as a repetitive trauma injury.

The Court of Appeals addressed both issues presented in the briefs, and, respectfully, this issue should not be addressed by this Court.

Nevertheless, S.C. Code Ann. § 42-1-172 defines a "repetitive trauma injury" as gradual in onset and caused by the cumulative effect of repetitive traumatic events. Petitioners argue that a pre-existing injury cannot be aggravated to the point of a compensable claim. The evidence in the record shows that Mr. Thompson was not injured at the time he was hired by Bluffton Township and only developed his injury over the years he worked as a firefighter. As such, this argument is without merit and should not be an issue that is granted certiorari by this Court.

CONCLUSION

For the reasons set forth above, Respondent argues the Court of Appeals properly reversed the Commission because they erred, as a matter of law, in determining Mr. Thompson's job duties were not repetitive, that Mr. Thompson did not submit medical evidence proving a causal connection, and that Mr. Thompson did not provide timely notice. As such, the Court of Appeal properly exercised their authority under S.C. Code Ann. § 1-23-380. Further, the word "repetitive" does not need further clarification or interpretation, as this Court and the Court of Appeals has had no difficulty in deciding prior repetitive trauma cases in previous decisions. Additionally, the Court of Appeals decision does not conflict with prior case law holding the S.C. Workers' Compensation Commission as the fact finder because the Court of Appeals reversed based on an error of law, which is authority provided to that court under S.C. Code Ann. § 1-23-380. Lastly, there is not a novel question of law and the Court of Appeals decision is not in conflict with prior decisions of this Court, so, respectfully, Certiorari should be denied.

Respectfully submitted,

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