STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Derrick L. Williams, Commissioner
T. Scott Beck, Commissioner
Andrea C. Roche, Commissioner

WCC File No. 1001856

Theodore Stradford ..... **Appellant.**

v.

Wood Resources, LLC, and National Union Fire Insurance Company of Pittsburgh, PA c/o Chartis Claims, Inc. ..... **Respondent.**

NOTICE OF APPEAL

Theodore Stradford hereby appeals the Decision and Order of the South Carolina Workers' Compensation Commission's Appellate Panel dated March 28, 2012, to the extent it affirms the decision of the single commissioner dated August 29, 2011. Pursuant to S.C. Code Ann. Section 42-17-60 (Supp. 2008), Mr. Stradford states the following grounds for the appeal, as well as the alleged errors of law:

1) The Appellate Panel erred as a matter of law in finding Mr. Stratford "knew his condition was work-related on April 3, 2009, but he did not notify his employer within 90 days of the time he knew it was compensable" because this finding: (a) is wholly inconsistent with the provisions of S.C. Code Ann. Section 42-1-172 (2007), which clearly indicate the establishment of a compensable repetitive trauma "injury" hinges upon a medical diagnosis of injury attributable to the

performance of repetitive work activities; (b) the South Carolina Supreme Court has held that an injured employee is not obliged to engage in self-diagnosis relative to the occurrence of an "injury"; (c) the only reasonable inference which may be gleaned from the evidence contained in the hearing record establishes that while Mr. Stratford sought medical evaluation prior to 2010, no physician offered any diagnosis relative to the presence of an "injury" until early 2010; and (d) neither the controlling legal authorities nor the only reasonable inference which may be gleaned from the evidence contained in the hearing record supports this finding.

2) The Appellate Panel erred as a matter of law in implicitly finding Mr. Stradford was aware he had sustained a compensable repetitive trauma "injury" in April, 2009 when the only reasonable inference which may be gleaned from the evidence contained in the hearing record firmly establishes: (a) no medical examiner diagnosed any type of "injury" until early 2010; (b) the only medical diagnoses offered/obtained prior to that date were not indicative of an "injury"; and (c) these circumstances do not support a finding that he knew he had sustained a repetitive trauma "injury" until early 2010.

3) The Appellate Panel erred as a matter of law in finding Mr. Stradford "knew his condition was work related on April 3, 2009, but he did not notify his employer within 90 days of the time he knew it was compensable" because the only reasonable inference which may be gleaned from the evidence contained in the hearing record: (a) is inconsistent with this finding; and (b) actually establishes Mr. Stratford had not received a medical diagnosis of repetitive trauma "injury" until at least early 2010.

4) The Appellate Panel erred as a matter of law in effectively concluding that the provisions of S.C. Code Ann. Sections 42-1-172 (2007) and 42-15-20 (C) (2007) required Mr. Stradford to diagnose himself when: (a) the plain language of Section 42-1-172 prescribes that the compensability of a repetitive trauma "injury" is purely a medical question; and (b) the Supreme

Court has previously held that an injured employee is not obliged to engage in self-diagnosis as to the present/occurrence of an "injury".

5) The Appellate Panel majority erred as a matter of law in implicitly finding Mr. Stradford knew he had sustained any form of compensable "injury" prior to early 2010 because: (a) (a) the provisions of S.C. Code Ann. Section 42-1-172 (2007) unquestionably indicate the establishment of repetitive trauma "injury" hinges upon a medical diagnosis of injury; (b) the South Carolina Supreme Court has held that an injured employee is not obliged to engage in self-diagnosis relative to the occurrence of an "injury"; (c) while Mr. Stratford sought medical evaluation prior to 2010, no physician offered any diagnosis reflective of an "injury"; and (d) neither the controlling legal authorities nor the only reasonable inference which may be gleaned from the evidence contained in the hearing record supports this finding/conclusion.

6) The Appellate Panel erred as a matter of law in implicitly concluding the provisions of S.C. Code Ann. Sections 42-1-172 (2007) and 42-15-20 (C) (2007) oblige an injured employee to provide his employer with notice of symptoms which he may believe to be "work related" because: (a) the plain language of Section 42-1-172 demands medical evidence confirming a repetitive trauma "injury" as a prerequisite to compensability; (b) Section 42-15-20 clearly indicates the notice requirement for this type of injury is not triggered unless/until compensability is "discovered, or could have [been]. . . discovered by exercising reasonable diligence"; and (c) these statutes necessarily require a diagnosis of repetitive trauma "injury" prior to commencement of the 90 day notice period.

7) The Appellate Panel erred as a matter of law in concluding Mr. Stradford was obliged was obliged to provide Defendants with notice of a repetitive trauma "injury" in April, 2009 because: (a) the plain language of S.C. Code Ann. Section 42-1-172 (2007) demands medical evidence confirming a repetitive trauma "injury" as a prerequisite to compensability; (b) Section 42-

15-20 clearly indicates the notice requirement for this type of injury is not triggered unless/until compensability is "discovered, or could have [been]. . . discovered by exercising reasonable diligence"; (c) the South Carolina Supreme Court has held an injured employee is not required to engage in self-diagnosis when attempting to establish the causal relationship of an "injury"; (d) he did not receive a diagnosis of any form of "injury" prior to early 2010; and (e) neither the plain statutory language nor the only reasonable inference which may be gleaned from the evidence supports this conclusion.

8) The Appellate Panel erred as a matter of law in concluding the presence of a medical diagnosis of repetitive trauma "injury" was essentially irrelevant in the context of an injured employee's obligation to provide notice when: (a) the plain language of S.C. Code Ann. Section 42-1-172 (2007) unquestionably confirms that the presence of medical evidence of a causally related "injury" is required for any "condition" of this nature to be compensable; and (b) the only reasonable construction of this statute, as well as S.C. Code Ann. Section 42-15-20 (C) (2007), establishes that the 90 day notice obligation referenced in the latter statute is not triggered until an injured employee has received a medical diagnosis of causally related repetitive trauma "injury".

9) The Appellate Panel erred as a matter of law in failing to conclude that that application of the controlling rules of statutory construction verifies that the 90 day notice requirement contained in S.C. Code Ann. Section 42-15-20 (C) (2007) was not triggered until Mr. Stratford had received medical confirmation of a repetitive trauma "injury" because any contrary application of this element of Section 42-15-20 (C) is wholly inconsistent with the governing rules statutory of construction.

10) The Appellate Panel erred as a matter of law in concluding the mere receipt of medical care by an injured employee resulted in/produced a "compensable" condition within the meaning of S.C. Code Ann. Sections 42-1-172 (2007) and 42-15-20 (C) (2007) because this

determination misconstrues the plain language of Section 42-1-172, which: (a) mandates that the "[c]ompensability of a repetitive trauma injury. . . be determined only" in accordance with its provisions; (b) clearly demands the occurrence, albeit gradual, of an "injury"; (c) hinges "compensability" upon the presence of "medical evidence. . . establish[ing]. . . a direct cause or relationship between the condition under which the work is performed and the "injury"; and (d) prohibits any injury from being "considered a compensable repetitive trauma injury [without the requisite]. . . medical evidence establish[ing]. . . a causal connection. . . between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury."

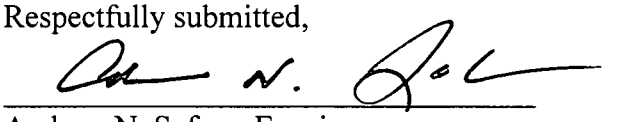
11) The Appellate Panel erred as a matter of law in concluding the simple receipt of medical care renders a claim "compensable" within the meaning of S.C. Code Ann. Section 42-1-172 (2007), to the extent the notice requirement contained in S.C. Code Ann. Section 42-15-20 (C) (2007) is triggered, because this determination clearly overlooks: (a) an unmistakable legislative intent that a "compensable" repetitive trauma injury cannot exist absent medical evidence of industrial causation; (b) this Court's acknowledgement that pain, even "when coupled with the employee's belief that the pain is work related", [does not]. . . equate [to]. . . a compensable condition." King v. International Knife & Saw – Florence, 395 S.C. 437, 718 S.E. 2d 227 (Ct. App. 2011); and (c) the Supreme Court has previously held an employee is not obliged to diagnose himself in connection with the pursuit of a workers' compensation claim. See, McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 414 S.E. 2d 162 (1992).

12) The Appellate Panel erred as a matter of law in affirming the single commissioner's ruling that Mr. Stradford did not satisfy the notice requirement embodied in S.C. Code Ann. Section 42-15-20 (C) (2007) because this notice obligation cannot be triggered by either an employee's mere belief that his pain is work related or receipt of medical care for non-disabling pain, but instead

envisions: (a) the occurrence of an actual "injury" which impairs the employee's ability to engage "in the regular duties of his employment"; and (b) receipt of medical confirmation as to the causal relationship between this "injury" and his performance of repetitive work activities.

13) The Appellate Panel erred as a matter of law in failing to conclude Mr. Stradford satisfied the notice requirement of S.C. Code Ann. Section 42-15-20 (C) (2007) because: (a) S.C. Code Ann. Section 42-1-172 (2007) requires not only the occurrence of an "injury", but also medical evidence of causal relationship between the "injury" and the performance of repetitive work activities, in order to be "compensable"; (b) the only reasonable inference which may be gleaned from the evidence contained in the hearing record clearly establishes these factors did not manifest themselves until late January, 2010; and (c) his unquestioned provision of notice within the requisite time period following confirmation of the presence of an injury and medical causation satisfied the requirements of Section 42-15-20 (C) as a matter of law.

Respectfully submitted,



Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211

and

Francis G. Delleney, Jr., Esquire
Hamilton, Delleney & Grier, P.A.
Post Office Box 808
Chester, South Carolina 29706
Attorneys for Appellant

April 25, 2012

OTHER COUNSEL OF RECORD:

James H. Lichty, Esquire
McAngus, Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211-2519
Attorney for Respondents

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Derrick L. Williams, Commissioner
T. Scott Beck, Commissioner
Andrea C. Roche, Commissioner

WCC File No. 1001856

Theodore Stradford ..... **Appellant.**

v.

Wood Resources, LLC, and National Union Fire Insurance Company of Pittsburgh, PA c/o Chartis Claims, Inc. ..... **Respondent.**

CERTIFICATE OF SERVICE

I, Roxanne R. Moorer, legal assistant for Andrew N. Safran, Esquire, Attorney for Appellant, do hereby certify that on the 26th day of April, 2012, I caused to be filed, via hand delivery, the original and three (3) copies of the Appellant's Notice of Appeal with the Clerk of the South Carolina Court of Appeals. One (1) copy of the Appellant's Notice of Appeal was furnished to counsel for Respondents via first class mail at the following addresses:

James H. Lichty, Esquire
McAngus, Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211-2519

Roxanne R. Moorer
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

April 26, 2012

ANDREW N. SAFRAN, LLC
ATTORNEY AT LAW
1400 PICKENS STREET, SUITE 104
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE 803 256 6689
FACSIMILE 803 799 1003

MAILING ADDRESS:
POST OFFICE BOX 12089
COLUMBIA, SOUTH CAROLINA 29211

April 26, 2012

HAND DELIVERED
The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Theodore Stradford v. Wood Resources, LLC and National Union Fire Insurance Company of Pittsburgh, PA
WCC File No.: 1001856

Dear Ms. Kitchings:

Enclosed please find an original and three copies of a Notice of Appeal, which Greg Delleney and I are filing on behalf of Ms. Theodore Stradford relative to the above-captioned matter. Additionally, I have: (a) attached copies of the Order from which this appeal arises; and (b) enclosed our firm's check in the amount of $100.00 in satisfaction of your filing fee. At this time, I would greatly appreciate your filing these documents and returning three clocked copies to my courier.

In this regard, given the Appellate Panel's remand of this claim for hearing before the single commissioner on two other disputed points, we are uncertain as to whether the issues raised through our Notice of Appeal are currently ripe for consideration by the Court. However, out of an abundance of caution, we have perfected the appeal, but will soon be filing a Motion to Stay pending clarification of the appealability issue by the Supreme Court in Bone v. U.S. Food Service, which was heard several months ago.

By copy of this letter, I am serving a copy of this Notice, with attachments, on Jim Lichty, attorney for Respondent. As always, in the event he has any questions or comments concerning this matter, I invite him to contact me.

Thank you for your cooperation.

With kindest regards, I am

Very truly yours,

Andrew N. Safran

ANS/rrm

Enclosures

cc: James H. Lichty, Esquire
The Honorable Virginia L. Crocker
Francis G. Delleney, Jr., Esquire

APPELLATE PANEL DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 1001856

THEODORE STRADFORD, EMPLOYEE, CLAIMANT/APPELLANT

VS.

WOOD RESOURCES, LLC., EMPLOYER,

AND

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PA C/O CHARTIS CLAIMS, INC. CARRIER,

DEFENDANTS/RESPONDENTS

Appellate Panel Review held in Rock Hill, South Carolina, on August 25, 2011, 2009, per notices timely And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

3-28-12

APPEARANCES: Claimant/Appellant represented by Andrew N. Safran, Esquire of Safran Law Offices of Columbia, South Carolina and F. Greg Delleney, Jr., Esquire of Hamilton, Delleney & Grier, PA, of Chester, South Carolina.

Defendants/Respondents represented by James H. Lichty, Esquire of McAngus Goudelock & Courie, LLC of Columbia, South Carolina.

This matter came before the Single Commissioner on August 25, 2011, to determine the issues raised on the Forms 50 and 51 filed by the parties. On August 29, 2011, the Single Commissioner entered the following Findings of Fact:

1. All parties to this hearing are subject to and governed by the provisions of the South Carolina Workers' Compensation Act, as amended.

2. The average weekly wage is $724.53 with a compensation rate of $483.26 per week.

3. The Claimant suffered injuries to his right shoulder and back due to repetitive work with the Employer. He met the requirement of providing a medical report that ties his condition to repetitive trauma on the job through the questionnaire from Dr. Lehman, and the Defense offered no medical report to refute that.

4. The Claimant was disabled from work, due to this repetitive trauma injury, from January 29, 2010 until October 28, 2010.

5. The Claimant reached maximum benefit of medical treatment on October 28, 2010.

6. The Claimant suffered permanent partial disability, due to this repetitive trauma injury, of 25% to the right shoulder and 15% to the back.

7. The Claimant knew his condition was work-related on April 3, 2009, but he did not notify his employer within 90 days of the time he knew it was compensable.

In the Order filed August 29, 2011, the Single Commissioner also entered the following Conclusions of Law:

1. Section 42-1-182 defines repetitive trauma injuries.
2. Section 42-15-60 governs medical treatment.
3. Section 42-9-10 governs compensation for periods of total disability.
4. Section 42-9-20 governs compensation for periods of partial disability.

5. Section 42-9-30 governs compensation for permanent partial disability to those body parts identified therein.

6. The case law noted above is incorporated here.

Of note, the case law incorporated by reference in the Single Commissioner's Conclusion of Law No. 6 is as follows:

1. Hamm v. South Carolina Public Service Com'n, 287 S.C. 180, 336 S.E.2d 470 (S.C. 1985).

2. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (S.C.App. 2005).

3. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (S.C. 1992).

The Claimant's attorney timely appealed the decision of the Single Commissioner by filing a Form 30, which identified various exceptions, on September 12, 2011. Briefs from both Appellant and Respondent were received by an Appellate Panel of the Commission and considered, along with oral arguments presented by the parties on January 18, 2012. Having heard the arguments of the parties and reviewing the evidence of record, the Appellate Panel hereby enters the following Findings of Fact:

1. All parties to this hearing are subject to and governed by the provisions of the South Carolina Workers' Compensation Act, as amended.

2. The average weekly wage is $724.53 with a compensation rate of $483.26 per week.

3. The Claimant suffered injuries to his right shoulder and back due to repetitive work with the Employer. He met the requirement of providing a medical report that ties his condition to repetitive trauma on the job through the questionnaire from Dr. Lehman, and the Defense offered no medical report to refute that.

4. The Claimant was disabled from work, due to this repetitive trauma injury, from January 29, 2010 until October 28, 2010.

5. The Claimant reached maximum medical improvement for injuries to the right shoulder and back on October 28, 2010.

6. The Claimant knew his condition was work-related on April 3, 2009, but he did not notify his employer within 90 days of the time he knew it was compensable.

7. The Single Commissioner did not enter any specific finding as to the reasonableness of Claimant's delay in providing notice.

8. The Single Commissioner did not enter any specific finding as to whether the Employer had been unduly prejudiced by the delay in receipt of notice.

Having heard the arguments of the parties and reviewing the evidence of record, the Appellate Panel hereby enters the following Conclusions of Law:

1. Section 42-1-182 defines repetitive trauma injuries.

2. Section 42-15-20 governs notice to employer of accident or repetitive trauma.

3. Section 42-15-60 governs medical treatment.

4. Section 42-9-10 governs compensation for periods of total disability.

5. Hamm v. South Carolina Public Service Com'n, 287 S.C. 180, 336 S.E.2d 470 (S.C. 1985), rejects an interpretation of a statute when it leads to an absurd result not possibly intended by the legislature.

6. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (S.C.App. 2005), addressed the notice requirement for repetitive trauma injuries prior to legislative amendments to the Workers' Compensation Act in 2007.

7. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (S.C. 1992), applies the discovery rule to toll the statute of limitations in workers' compensation claims.

8. King v. International Knife & Saw-Florence, 4895 (SCCA), requires a repetitive trauma condition to either require medical care or interfere with the ability to perform a job before it is compensable for the purpose of providing notice to the employer.

9. Section 42-15-20 (C) similarly provides that failure to comply with the ninety day notice requirement does not warrant denial of the underlying claim where: (a) "reasonable excuse is made to the satisfaction of the commission for not giving timely notice"; and (b) "the commission is satisfied that the employer has not been unduly prejudiced thereby."

10. "With respect to prejudice, the law of this State is settled that the burden is upon the employer to prove prejudice." Dawkins v. Capitol Construction Company, 252 S.C. 536, 167 S.E. 2d 439, 440 (1969); Lizee v. South Carolina Department of Mental Health, 367 S.C. 122, 623 S.E. 2d 860, 864 (Ct. App. 2005).

11. A ruling of this nature must have an evidentiary basis. See, Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E. 2d 320, 322 (1995). Consequently, the Panel concludes the issues of reasonable excuse and undue prejudice per Section 42-15-20 (C) must be remanded to the jurisdictional commissioner for the purposes of: (a) conducting a de novo hearing relative to these issues; and (b) entry of specific factual findings and legal conclusions on these points.

Accordingly, and based on the above-referenced Findings of Fact and Conclusions of Law, the Appellate Panel hereby

AFFIRMS, with amendments, the denial of benefits to the Claimant on the basis he failed to provide notice of an injury by accident as required by applicable statutory and case law, and

REMANDS, the matter to the Jurisdictional Commissioner for determinations as to the

issues of reasonable excuse and prejudice per Section 42-15-60 (C).

AND IT IS SO ORDERED!

Commissioner T. Scott Beck
For the Appellate Panel

WE CONCUR:

Commissioner Derrick L. Williams

Commissioner Andrea C. Roche

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail and addressed to the attorney or attorneys for said parties.

This 26 day of March, 2012
By Valerie D Dellers
Administrative Assistant to the Commissioner

James H. Lichty
Francis G. DeHoney Jr.
Andrew Safran