THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL
Commissioner McCaskill, Chair

Appellate Case No. 2013-002416

John Stevenson, Employee, Respondent,

v.

Marathon Abrasive, Inc., Employer, and
Praetorian Insurance Company, Appellants.

INITIAL BRIEF OF APPELLANT

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2. The Appellate Panel of the full Commission erred as a matter of law in finding that Defense counsel was an agent of the employer for purposes of notice under §42-15-20, such error being that Defense Counsel's scope of representation of Employer did not extend beyond the confines of the prior claim and accepting notice of new claims would violate the scope of representation and Rules of Professional Conduct. (Finding of Fact No. 3; Conclusion of Law No. 6)

3. The Appellate Panel of the full Commission erred in finding as an issue of fact, and/or concluding as a matter of law that the Claimant sustained an injury by accident due to repetitive trauma, the error being that such findings and/or conclusions were unsupported by the evidence and clearly erroneous in light of the relevant and probative evidence in the record. (Finding of Fact No's. 1, 2; Conclusion of Law No's. 4, 5)

4. The Appellate Panel of the full Commission erred in finding as an issue of fact, and/or concluding as a matter of law that, if the Claimant failed to provide proper notice under §42-15-20, such failure was excused by the reasonable excuse provision; the error being that the issue of reasonable excuse was not preserved for Appellate Review. (Finding of Fact No. 4; Conclusion of Law No. 6)

5. The Appellate Panel of the full Commission erred in finding as an issue of fact, and/or concluding as a matter of law that, if the Claimant failed to provide proper notice under §42-15-20, such failure was excused by the reasonable excuse provision; the error being that this finding was improper and Appellants were not provided adequate opportunity to respond with evidence of prejudice which ensued from the untimely notice where the issue of reasonable excuse was not before the Appellate Panel. (Finding of Fact No. 4; Conclusion of Law No. 6)

6. The Appellate Panel of the full Commission erred in finding as an issue of fact, and/or concluding as a matter of law that, if the Claimant failed to provide proper notice under §42-15-20, such failure was excused by the reasonable excuse provision; the error being that the Commission's finding of lack of prejudice was conclusory with no evidentiary support and that the Employer was prejudiced by Claimant's failure to timely report an alleged injury. (Finding of Fact No. 4; Conclusion of Law No. 6)

STATEMENT OF THE CASE

The Claimant allegedly sustained an injury to the left shoulder on May 22, 2012. Claimant continued working the same job regular duty from this date until being laid off for lack of work on January 4, 2013. Claimant filed a Form 50 establishing a claim and requesting a Hearing on September 17, 2012. The Appellants' responded with a Form 51 denying the claim and preserving the notice defense within the specified period. Claimant filed a second Form 50 on December 13, 2012 which resulted in the Hearing currently at issue.

The Claimant alleged that he sustained a repetitive trauma injury to the left shoulder from working the chain pull on a grain hopper on May 22, 2012 and that he satisfied the notice requirement by virtue of a letter to the attorney defending his January 2012 claim. The Appellants alleged that after many years working the chain pull, Claimant was moved to a different job over a year before the alleged accident date (March 14, 2011, Tr. at 39). The Appellants asserted that Claimant's job prior to the alleged injury reduced the need to work the hopper from over 40 times per day to 2-3 when he helped fill in while other employees were at lunch. (Tr. at 42). The Appellants maintained that Claimant's job was no longer repetitive for a significant period prior to the alleged injury and Claimant's medical questionnaire only supported a finding of repetitive trauma through a winding motion of the hopper, which had not been a repetitive part of his duties for over a year.

Appellants additionally asserted that Claimant's attorney's letter to Defense counsel on his prior claim does not satisfy §42-15-20 for various reasons, including the fact that Defense counsel was not retained for any subsequent claims until well after the 90-day requirement and that an alternative finding would pose significant ethical issues and conflicts of interest.

Commissioner Wilkerson issued an Order on April 19, 2013 finding that the Claimant did

sustain a repetitive trauma injury to the left shoulder and finding that notice via letter to the Defense counsel on his prior claim was sufficient to satisfy the statute.

Of note, Commissioner Wilkerson found that Claimant satisfied the notice requirement solely by means of the letter to the defense counsel on his January 2012 claim. The single Commissioner recognized the conflicting evidence regarding notice between the Employer and Claimant and chose to make no findings indicating that Claimant provided proper notice to his employer. The issue of notice to the Employer, itself, has not been appealed by either party and is not preserved for review. The issues on appeal are limited to those filed by the Appellants as to whether Defense counsel qualifies as an agent, whether notice to a defense counsel satisfies the notice statute, and whether the Commissioner erred in finding the Claimant's alleged injury constituted a repetitive trauma injury.

Within the specified time, the Appellants counsel submitted a Form 30 Request for Commission Review. The issues for determination as set out by the Appellants were:

> 1. Did the Single Commissioner err in finding that Claimant provided sufficient notice by notifying the Defense counsel representing the Employer on a separate workers compensation claim?
>
> 2. Did the Single Commissioner err in finding that Defense counsel was an agent of the employer for purposes of notice?
>
> 3. Did the Single Commissioner err in finding the Claimant sustained an injury by accident due to repetitive trauma, when the evidence shows Claimant's job duties were not repetitive and Claimant spent little time working the position that his medical expert asserts was the cause of the injury?

The Full Commission held that Claimant's Attorney's communication to the attorney defending his prior claim, rather than his employer, was sufficient notice. Commissioner James dissented on the issue of whether notice could be provided to an attorney relating to a matter for which they have not been retained. The Full Commission further held that, if Claimant did not provide

proper notice, then he made a reasonable excuse and the Appellants were not prejudiced. The Appellants maintain that the issue of "reasonable excuse" was not preserved for review by the Claimant and not properly before the Full Commission. Finally, the Full Commission upheld the Single Commissioner's finding that Claimant's injury constituted a compensable repetitive trauma.

This appeal to the Court of Appeals followed.

STANDARD OF REVIEW

"The Administrative Procedures Act (APA) provides the standard for judicial review of decisions by the [Appellate Panel]." Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); *accord* Lark v. Bi–Lo, Inc., 276 S.C. 130, 133–34, 276 S.E.2d 304, 306 (1981). Under the APA, this court can reverse or modify a decision of the Appellate Panel if the substantial 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." Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689–90 (2010); S.C.Code Ann. § 1–23–380(5)(d), (e) (Supp.2012).

The Administrative Procedures Act, relied upon by Appellants, was originally enacted in 1977. It purports to provide uniform procedures before State Boards and Commissions and for judicial review after the exhaustion of administrative remedies. Section 1-23-380(g) concerns the scope of judicial review and provides:

> (g) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on the questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative

findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Lark v. Bi-Lo, Inc., 276 S.C. 130, 132-33, 276 S.E.2d 304, 305 (1981).

Generally, an injured employee must give his employer notice of the accident upon "the occurrence of an accident, or as soon thereafter as practicable," but he must do so within ninety days after the accident. S.C.Code Ann. § 42–15–20 (Supp.2012)." Etheredge v. Monsanto Co., 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct.App.2002), citing Mintz v. Fiske–Carter Constr. Co., 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951).

The Etheredge court recognized the basic information a claimant must convey in giving such notice: "For adequate notice, there must be "some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating **to a reasonably conscientious manager** that the case might involve a potential compensation claim." Larson's Workers' Compensation Law § 126.03[1][b] (2001) (emphasis added) (footnotes omitted). "Generally, in order that the knowledge be imputed to the employer, the person receiving it must be in some supervisory or representative capacity, such as foreman, supervisor ... physician, or nurse." Id. at § 126.03[2][a] (footnotes omitted). Id. at 457, 562 S.E.2d at 682." Hartzell v.

Palmetto Collision, LLC, 406 S.C. 233, 750 S.E.2d 97, 104-05 (Ct. App. 2013), reh'g denied (Nov. 14, 2013).

The notice requirement protects the employer by enabling him to "investigate the facts and question witnesses while their memories are unfaded, and ... to furnish medical care [to] the employee in order to minimize the disability and conseque[n]t liability upon the employer." Mintz, 218 S.C. at 414, 63 S.E.2d at 52. "The claimant bears the burden of proving compliance with these notice requirements." Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct.App.2005).

ARGUMENT

I. THE FULL COMMISSION ERRED IN FINDING THAT CLAIMANT PROVIDED SUFFICIENT NOTICE BY NOTIFYING THE DEFENSE COUNSEL REPRESENTING THE EMPLOYER ON A SEPARATE WORKERS COMPENSATION CLAIM

A. NOTICE

The overarching issue in this claim is whether the Claimant provided proper notice to the Employer within 90 days of his alleged injury. The single Commissioner found that Claimant's Attorney's letter to Defense counsel for Claimant's prior claim was sufficient to put the employer on notice of the injury, holding that the Defense counsel qualified as an agent for the Employer. The Appellants disagree that any relationship existed that would allow Defense Counsel to act on behalf of the Employer on any matters other than those for which he had been specifically retained.

Section 42-15-20 provides that:

> (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the employer, his agent, or representative, had

knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.

(B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.

(C) In the case of repetitive trauma, notice must be given by the employee within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

As of the correspondence dated June 19, 2012, (which was the only notice within 90 days for the new injury), Appellants counsel, undersigned, was: (a) previously unaware of the alleged second injury to the left shoulder; (b) had not yet been retained by the carrier to represent its interests for the subsequent date of injury; and (c) was unaware if the Carrier, Praetorian Insurance Company, was even the carrier for the Defendant Employer on the second alleged date of accident.

The rights of parties in association with a claim for benefits under worker's compensation arise on the date of accident. (*See generally* Sellers v. Daniel Construction Co., 285 S.C. 484, 330 S.E.2d 305 (1985)). Attorney Cauthen was not the authorized agent of the Employer or the Insurance Carrier for any subsequent claims made by Claimant either on the date of accident or for a period of ninety days afterward.

Attorney Cauthen was representing the Employer and Carrier regarding Claimant's admitted prior claim. Therefore, the question becomes whether notice to an attorney involved in one claim is sufficient to satisfy the notice requirements of an entirely separate claim.

B. WHAT IS THE MEANING OF "AGENT" UNDER §42-15-20

It is well settled in South Carolina case law that an employee can satisfy notice requirements by reporting an injury to their supervisor, a foreman, a company nurse, and other actual employees of a company that act in some capacity as a manager or with workers' compensation claims processing. See for example Buggs v. U.S. Rubber, 201 SC 281, 22 SE2d 881 (1942); Etheredge v. Monsanto Co., 349 SC 451, 562 SE2d 679 (Ct. App. 2002).

While the Act and case law does not specify in great detail a specific method of giving notice, it favors a method where the **employer** is "actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability." Hanks v. Blair Mills, Inc., 286 SC 378, 335 SE2d 91 (Ct. App. 1985).

Allowing an Employee or their representative to provide notice by way of an entity that represents or has represented their Employer in another matter is not an effective method of providing notice, it can create undue delay, and creates additional points of potential communication breakdown; all of which prejudice the Employer's interest in pursuing an expedient investigation and medical treatment to minimize his own liability.

The Etheredge court recognized the logic that notice should be provided directly to an employer or someone with a logical role to address new claims of injury: "For adequate notice, there must be "some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating **to a reasonably conscientious manager** that the case might involve a potential compensation claim." Larson's Workers' Compensation Law § 126.03[1][b] (2001) (emphasis added) (footnotes omitted). "Generally, in order that the knowledge be imputed to the employer, the person receiving it must be in some supervisory or representative capacity, such as

foreman, supervisor ... physician, or nurse." Id. at § 126.03[2][a] (footnotes omitted). Id. at 457, 562 S.E.2d at 682." Etheredge v. Monsantor Co., 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002); see also Hartzell v. Palmetto Collision, LLC, 406 S.C. 233, 750 S.E.2d 97, 104-05 (Ct. App. 2013), reh'g denied (Nov. 14, 2013). The Court lists company doctors or nurses as potential agents/representatives due to their inherent nature as medical professionals assessing employees. The Court's interpretation does not support a legislative intent to place an independent attorney who happens to represent a business on one separate claim in the position to act as an agent or representative for notice of new claims.

Another recent case strengthened the premise that an employee must report their injury to a supervisor, or someone else in a supervisory capacity of their department. In Lizee v. SC Dept. of Mental Health, Claimant "failed to provide proper notice of her injury to her state employer, although she notified a health counselor for the Department; **[Claimant] did not notify her supervisor**, and counselor did not serve in any supervisory capacity over nurse but rather usually worked at another mental health facility and was working with nurse on a temporary or "fill-in" basis on the day of the accident."[emphasis added] Lizee, 367 SC 122, 623 SE2d 860 (Ct. App. 2005).

While no case law specifically addresses the issue of notice to an unretained attorney, the Commission has granted some clarification through its power to establish regulations S.C. Code Ann. Regs. 67-301 [Posting Notice] states as follows:

> "B. The notice shall state, substantially, the following:
>
> We are operating under and subject to the Workers' Compensation Act of South Carolina. In case of accidental injury or death to an employee, the injured employee, or someone acting on his or her behalf, **shall give immediate notice to the employer or general authorized agent**. Failure to give immediate notice may be the cause of serious delay in the payment of compensation to the injured

> employee or his or her beneficiaries and may result in failure to receive any compensation benefits whatsoever."

At no point in time did the Employer authorize its attorney on Claimant's prior workers' compensation claim to serve as a **general or authorized** agent of the Employer. Furthermore, at no point in time did the Employer authorize its attorney on Claimant's prior workers' compensation claim to serve as an authorized representative of the Company for purposes of receiving notice on workers' compensation claims. It would not make sense for any company to authorize such a person to act as a representative for notice purposes because 1) a company could change insurance carriers before a subsequent injury, 2) a carrier could choose to send a subsequent claim to different attorney, and/or 3) it would delay the company's ability to quickly respond to an alleged accident.

The single Commissioner reasoned, since Defense counsel was representing the Employer on a prior claim at the time of the letter and since Defense counsel now represents the Employer on the current claim, that there is a "presumption" that Defense counsel was the agent or representative of Employer for notice purposes in June 2012. The problem with this logic is: the fact Defense counsel currently represents Employer on this claim is irrelevant. Defense counsel only represented the Employer with regard to the prior claim and had no authority to handle matters outside of the January 2012 claim. Defense counsel was not retained on the May 2012 claim until October 1, 2012. Defense counsel had no authority, express or implied, to act on behalf of the Appellants for over three months after receiving the letter purporting to provide notice. If the fact Defense counsel eventually was retained on the new claim was relevant to a notice defense, the Employer could have easily selected another firm to represent them when they were eventually put on notice by receipt of a Form 50 in September 2012.

C. IT WOULD NOT BE REASONABLE TO CHARACTERIZE AN ATTORNEY AS AN AGENT FOR A CLAIM WHERE HE HAS NOT BEEN RETAINED BY AN EMPLOYER OR CARRIER

a) Doing so would create an agency relationship without the attorney actually being retained by the Carrier or Employer for the claim

Agency is the fiduciary relationship that results when two persons agree that one (the agent) will act on behalf of and under the control of the other (the principal). Accordingly, the three essential elements of agency are: 1) consent, 2) control and, 3) "on behalf of" – exclusivity in the subject matter of the relationship. See Restatement (Third) of Agency §1.01 (2006); see also South Carolina Bar Review Course: Agency and Partnership, Martin C. McWilliams, Jr. (2006). Beyond this, agents are classified in two categories, general or special agents. General agents are agents who have a continuity of service and do not have a requirement to seek new authority to act on behalf of the principal on each new matter. A special agent is authorized to conduct a single transaction or task but does not involve an implied continuity of service. **Special agents normally cannot bind the principal outside the scope of actual or apparent authority, and third parties are generally under a duty to ascertain the extent of the agent's authority.** South Carolina Bar Review Course: Agency and Partnership, Martin C. McWilliams, Jr. (2006); see also Perry v. Miller, 108 SC 317, 94 SE 488 (1917).

The attorney for the Appellants in Claimant's prior claim is retained on a case by case basis and maintains no "continuity of service" with the Employer independent of the insurance carrier. Likewise, the attorney maintains no "continuity of service" with the insurance carrier which would impose an exclusivity in performing their workers' compensation legal work or presuppose that any particular new matter would be referred for his handling. The relationship between the attorney and the Employer and Carrier is such that he maintains no right or duty to

investigate or act on their behalf until retained to do so at their discretion and pleasure.

The first key element to determine whether a special agency relationship existed which would allow Claimant to provide notice of a new claim to the attorney defending his prior claim is consent. Agents can only bind their principals to the extent they are so authorized. "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement (Third) of Agency §2.01 (2006). Did the defense attorney for the Employer on Claimant's first claim have any actual authority to act on behalf of the Employer with regard new claims of the Claimant or any other employee?

At the time of the Claimant's Attorney's letter, the attorney for the Appellants on Claimant's prior claim had no authority to act or receive notice on behalf of the Carrier or Employer for any other matters of any kind. His representation was limited as a special agent of the Employer to direct its legal defense limited to Claimant's initial claim. The Claimant's Attorney has no authority to expand the scope of the defense attorney's authority. Despite receiving the letter, the defense attorney still has not been retained nor given any authority to defend the new claim. He cannot file for a Hearing, investigate, take depositions, subpoena records, manage medical treatment or any other functions related to a common workers' compensation claim until approached to do so and retained by the Employer and/or Carrier.

The second key element in this analysis is control. The elements to show a person has actual authority to act as an agent is similar the standards applied to establish whether a Claimant was acting as an employee vs. as an independent contractor. South Carolina Bar Review Course: Agency and Partnership, Martin C. McWilliams, Jr. (2006); see also Restatement (Third) of

Agency §7.07 (2006). Both analyze the same four factors to determine whether the subject can be classified as a servant of the employer for the purposes of a certain task. In South Carolina we take into account: 1) direct evidence of the right or exercise of control, 2) the method of payment, 3) the furnishing of equipment, and 4) the right to fire. South Carolina Workers' Compensation Commission v. Ray Covington Realtors, Inc., 318 SC 546, 459 SE2d 302 (1995); see also South Carolina Bar Review Course: Agency and Partnership, Martin C. McWilliams, Jr. (2006); Kilgore Group v. South Carolina Employment Security Comm., 313 SC 65, 437 SE2d 48, 50 (1993); Restatement (Second) of Agency § 220 (1958) (setting forth additional factors indicating a master-servant relationship). Obviously the Employer would not provide equipment to an attorney, but some elaboration can help illustrate the lack of an employment/agent/representative relationship between the Employer and Defense counsel at the time of the alleged notice.

Counsel for Appellants was retained by the Employer and Carrier to represent them on the current claim as evidenced by his letter of representation to the Workers' Compensation Commission dated October 1, 2012. Prior to that date, neither the Employer nor Carrier could exercise any control over Counsel because an offer to retain him had not been made nor accepted until that date. Any action taken by the defense attorney prior to a retainer agreement would specifically be outside of Employer's control.

Similarly, since the Defense attorney had no retainer agreement with the Employer on Claimant's new claim, had no file set up, and no authority to handle any new claims there was no way to satisfy the "method of payment" factor. Any actions taken by defense counsel on behalf of the Employer on such a claim would not only be outside of his authority, but also would result in no method to be compensated for performing such actions. Payment of compensation is a

specific duty owed by a principal to an agent. See §41-10-40, §41-10-80. If there is no agreement for payment and no agreement to perform the actions of an agent, there is no agency relationship.

The Employer also had no "right to fire" the Defense attorney with regard to Claimant's current claim because he was not employed by either the Employer or the Carrier to assist with the current claim until October 1, 2012, after the Claimant filed his request for Hearing.

The third key element to show an agency relationship is the "on behalf of" test to show exclusivity in the subject matter of the relationship. While it is true that Defense counsel represented the Employer and Carrier on Claimant's prior claim, there is no exclusivity in the subject matter of their relationship that would apply to other claims. Just because Defense counsel represented Appellants on the first claim does not guarantee he would be selected to represent them on the second claim or that he would accept such representation if offered. Additionally, the Defense counsel is not a corporate lawyer for the Employer and would have no automatic or contractual duty to process or handle future workers' compensation claims as they came in. The Employer is free of any restrictions against retaining alternate counsel for future claims and there is no exclusive agreement to handle any certain type of claims on behalf of the Carrier. In fact, at the time of the Claimant's letter, Defense counsel had no evidence as to whether the Employer continued to be insured with the same provider, which would have created a conflict prohibiting him from representing the Employer on the subsequent claim.

b) Doing so would impose a duty to act in an unauthorized legal capacity against the South Carolina Rules of Professional Conduct

Expanding the notice requirement beyond provision of notice or a designee intended to receive notice would produce a scenario where attorneys are essentially required to act as an

agent for an Employer even though unauthorized to do so. Such unauthorized actions run afoul of the guidelines contained in the South Carolina Rules of Professional Conduct.

Rule 1.2 (A) of the South Carolina Rules of Professional Conduct states:

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. **A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.** A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

[emphasis added]. At no time during the ninety days following Claimant's alleged accident was Defense counsel retained to represent the Employer or Carrier with regard to Claimant's current claim. Likewise, there is no agreement between the Defense counsel and the Employer or Carrier granting him authority to take action in any claims or other matters aside from those to which he had been specifically retained. Defense counsel had zero authority, express or implied, to act as a representative or agent for the Appellants with regard to the current claim until well after the 90 day notice period expired. Within the 90 day timeframe, acting as a representative or agent of the Employer or Carrier with regard to any matters outside the scope of representation on the prior claim would be a violation of the South Carolina Rules of Professional Conduct.

It is important to remember in this context, while the attorney represented the Employer in a prior matter related to this Claimant, the Employer may not have intended to use the same counsel for a future matter. Placing an attorney as an avenue for notice where none has been given to the Employer imposes a lawyer-client relationship on the Employer and Carrier without the consent of any of the parties and possibly where none had been intended.

The goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd. Ray Bell Constr.

Co. v. School Dist. of Greenville Co., 331 SC 19, 501 SE2d 725 (1998); Hodges v. Rainey, 341 SC 79, 91, 533 SE2d 578, 584 (2000). The legislature would not have intended a lawyer representing the Employer in another matter to qualify as an agent or representative of the Employer for notice purposes on matters for which he had not been retained. To hold otherwise would constitute a judicial imposition of a duty to represent an interest for which the lawyer had not been retained and would violate the Rules of Professional Conduct. A mandate to violate the Rules of Professional Conduct produces the very type of absurd result that the Courts have so consistently interpreted statutes to avoid.

Furthermore, aside from the fact the attorney had not yet been retained or authorized to act on behalf of the employer for a subsequent claim, it would not make sense for any employer to authorize such a person to act as a representative for notice purposes because 1) a company could change insurance carriers before a subsequent injury, 2) a carrier could choose to send a subsequent claim to different attorney, 3) it may create a witness out of their legal counsel, and 4) it would delay the company's ability to quickly respond to an alleged accident. Each of these issues carries with it their own set of problems with the Rules of Professional Conduct.

As a matter of policy, judicially expanding the notice statute to include defense attorneys would create a potential for frequent violation of Rules of Professional Conduct relating to conflicts of interest. Frequently, an employer may have a claim with an employee and subsequently either be dropped by the initial carrier or seek out an alternate insurer on their own. In such cases where a claimant sustains a subsequent injury with the same employer but under a different insurance carrier, it creates an impermissible conflict of interest. Allowing an attorney on a claim to serve as an avenue for notice when an entirely different insurance provider is covering the new risk puts the new carrier in the unenviable position of having important notice

issues being controlled by a party whose interests are adverse to your own. Essentially, the attorney for the first claim would have every incentive to weaken the potential notice defense of a subsequent carrier in cases where it may limit liability on the claim they are handling.

Rule 1.7 of the South Carolina Rules of Professional Conduct holds:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. **A concurrent conflict of interest exists if:**
>
> **(1) the representation of one client will be directly adverse to another client**; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

[emphasis added]. Expanding the notice requirement to allow notice to defense attorneys opens the door for serious conflicts of interest. Such a ruling would effectively go beyond scope of authority issues and produce situations where counsel for a prior claim would have a directly adverse interest in bolstering a notice defense for a claimant against subsequent insurance carriers.

Finally, judicially recognizing a claimant's notice to a defense attorney creates an additional ethical dilemma in that it essentially turns the defense counsel into a witness for the claimant. South Carolina Rule of Professional Conduct 3.7 states:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.

If notice to an attorney is held to be valid, it would mean that any time notice is a contested issue the attorney would have to recuse themselves. This could be used strategically by opposing parties to gain advantage and could create undesirable delay in processing of claims due to necessity to obtain alternate counsel (as well as the prejudice to the Employer based on the increased cost of bringing new counsel up to speed).

Recognizing communication to defense counsel as notice of a claim unavoidably converts an Employer's legal counsel into a witness and creates a conflict of interest. It would produce an absurd result to assume this was the intention of the legislature when creating §42-15-20 requiring notice be provided to an employer, their agent, or their representative.

c) Doing so would expose the attorney to potential legal malpractice liability on new claims without the benefit of a retainer agreement to take on such risk

Willful conduct or actions by a defense counsel on a matter for which he has not been retained or been granted authority can open up issues of potential malpractice liability. The threat of legal malpractice increases dramatically in situations where a change in insurance provider occurs prior to a second workers' compensation claim. Holding an attorney on an adverse claim responsible for an issue as important as notice, where there is no guarantee he would represent any of the parties on a subsequent claim (particularly where a second carrier is on the subsequent risk), creates potential high-dollar conflicts of interest that could result in personal liability to an attorney.

d) By its very definition, notice cannot be provided to an unretained entity

In any workers' compensation claim (with a possible exception for corporate counsel), a claim is not referred to legal counsel until after it has been reported to the Employer and Carrier. An attorney cannot unilaterally begin defending a claim without approval and an agreement to

perform the legal work required on a claim. By this simple fact, **a defense attorney cannot be the agent or representative of an employer until there is an agreement with the Employer to retain them on a certain claim**. Even if the attorney conveyed the alleged notice to the Employer, it would not satisfy the statute due to hearsay. An unassociated third party informing the Employer that the Claimant's attorney told him that the Claimant was alleging a new injury could not satisfy the statutory requirement that the Claimant notify the Employer of an alleged accident.

e) Where would the duty end?

If an attorney on one claim is held to be responsible as an agent on a subsequent claim that they have not been retained to represent, where does their responsibility as a messenger for the Employer/Carrier end? If notice is deemed satisfied because it was provided to an attorney on a prior claim, the same argument could apply for every complaint the Claimant makes following an alleged injury.

For example, the same argument could apply if a Claimant has an issue over medical care and notify the attorney defending their prior claim. Would the Defense attorney be expected to bear these burdens of managing a claim they have not been retained on, will not be paid for, and on a claim that could possibly not even have the same carrier (which present numerous other issues related to ethical considerations and potential conflicts of interest)? If so, in this example, it would mean the Employer could be held liable for unauthorized care because of a letter to an attorney unauthorized to represent them on a subsequent claim.

Broadening the scope of notice in such a way would produce a ridiculous result not contemplated by the legislature. Therefore, for this reason and the reasons outlined above, the Appellants respectfully request the Full Commission reverse the Order of the Single

Commissioner and refuse to broaden the notice requirement to include legal counsel who have not been retained to defend a claim.

II. THE FULL COMMISSION ERRED IN CONSIDERING THE ISSUE OF REASONABLE EXCUSE; SUCH ERROR BEING THAT THIS ISSUE WAS NOT ADDRESSED BY THE SINGLE COMMISSIONER'S ORDER AND WAS NOT PRESERVED BY THE CLAIMANT FOR CONSIDERATION BY THE APPELLATE PANEL, WHICH PREJUDICED THE APPELLANTS' ABILITY TO RESPOND TO THE ISSUE.

A. THE ISSUE OF REASONABLE EXCUSE WAS NOT ADDRESSED BY THE SINGLE COMMISSIONER'S ORDER AND WAS NOT PRESERVED AS AN ISSUE FOR APPEAL TO THE FULL COMMISSION; THEREFORE A RULING BY THE FULL COMMISSION IS IMPROPER

The Single Commissioner issued an Order on April 19, 2013 holding Defense Counsel to be an agent or representative of the Employer at the time of the Claimant's alleged accident. Thereafter, the Defendants appealed the Order on the issues of 1) whether Claimant provided sufficient actual notice, 2) whether Defense Counsel was an agent of the Employer for purposes of receiving notice on new claims, and 3) whether Claimant's alleged injury constitutes a repetitive trauma. The Single Commissioner did not issue a finding or conclusion regarding "reasonable excuse." The Claimant did not plead reasonable excuse on his Form 50 Hearing Request or his Form 58 Pre-Hearing Brief. Importantly, Claimant did not appeal the Single Commissioner's Order to preserve a "reasonable excuse" argument.

It is well settled that "The claimant bears the burden of proving compliance with these notice requirements." Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct.App.2005). At the Single Commissioner level, the Claimant did not meet his burden of proving notice to his employer. Furthermore, Claimant did not properly raise the issue of "reasonable excuse" which fails to meet his burden of proof on its face. Thereafter, Claimant did not raise the issue of "reasonable excuse" on appeal; therefore, the lack of such a finding became the law of the case.

Section 42-17-50 provides that a party may file an application for review of the single Workers' Compensation commissioner's ruling; however, only issues within the application for review are preserved for the full Commission. Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114, (Ct. App. 1995) rehearing denied, certiorari denied. All findings of fact and law by the hearing commissioner become and are the law of the case, except only those within the scope of the exception and the notice given to the parties by the Commission. Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940).

The issue of "reasonable excuse" was not preserved within the Defendants' application for Full Commission review. Claimant did not preserve the issue through an appeal of the single Commissioner's Order. Therefore, the issue of "reasonable excuse" was not properly before the Full Commission and issuing a finding on a new, unappealed issue exceeded the scope of review.

Furthermore, allowing arguments on issues outside of the scope of appeal unduly prejudiced the Appellants ability to prepare and properly defend the issue. The Defendants placed their objection to Claimant's "reasonable excuse" arguments at the start of oral arguments before the Full Commission. (Appellate Panel Tr. at 4). Despite Appellants' objection, the Full Commission instructed Claimant's Attorney to focus on a "reasonable excuse" argument shortly into his rebuttal. (Appellate Panel Tr. at 10-11).

If a claimant meets his burden of proving a reasonable excuse, the burden falls on the employer to prove they were prejudiced by the delay. The Full Commission points this out in their Finding of Fact #4, "It is not the worker's compensation claimant's burden to show the absence of prejudice by lack of timely notice to employer of a claim, but it is the employer's burden to prove the presence of prejudice." citing Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct.App.2005). Unfortunately, the issue of "reasonable excuse"

was not addressed at the lower level and not preserved for appellate review; therefore, how can an employer defend against an issue not on appeal? The Employer cannot reasonably be expected to prepare an adequate defense proving prejudice where they are not on notice that the issue will be considered *de novo* on appeal.

The Full Commission failed to support their finding of lack of prejudice with any evidence or cite to the arguments made by Defendants (despite an inability to prepare) to show that Defendants were, in fact, prejudiced.

Therefore, the Appellants would respectfully show that the Full Commission's consideration of the Claimant's "reasonable excuse" argument was prejudicial and exceeded the scope of review.

B. THE CLAIMANT DID NOT HAVE A REASONABLE EXCUSE FOR FAILING TO PROVIDE PROPER NOTICE WHERE HE WAS REPRESENTED BY AN ATTORNEY AND HAD EXPERIENCE PROVIDING PROPER NOTICE IN TWO PRIOR CLAIMS

The Full Commission held that Claimant properly relied on his attorney's letter dated June 19, 2012. In effect, this means the Commission found that Claimant had a reasonable excuse because he thought his attorney sending a letter to the independent attorney on his prior claim was sufficient. The reasons why this action is not sufficient are outlined above; however, the Claimant also cannot meet his burden to prove the excuse is reasonable given his experience in the workers' compensation system and months of continuing employment without reporting the alleged injury to his employer.

Generally, an injured employee must give his employer notice of the accident upon "the occurrence of an accident, or as soon thereafter as practicable," but he must do so within ninety days after the accident. S.C. Code Ann. § 42–15–20 (Supp.2012)." Etheredge v. Monsanto Co., 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct.App.2002), citing Mintz v. Fiske–Carter Constr. Co.,

218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951).

The Etheredge court recognized the basic information a claimant must convey in giving such notice: "For adequate notice, there must be "some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating **to a reasonably conscientious manager** that the case might involve a potential compensation claim." Larson's Workers' Compensation Law § 126.03[1][b] (2001) (emphasis added) (footnotes omitted). "Generally, in order that the knowledge be imputed to the employer, the person receiving it must be in some supervisory or representative capacity, such as foreman, supervisor ... physician, or nurse." Id. at § 126.03[2][a] (footnotes omitted). Id. at 457, 562 S.E.2d at 682." Hartzell v. Palmetto Collision, LLC, 406 S.C. 233, 750 S.E.2d 97, 104-05 (Ct. App. 2013), reh'g denied (Nov. 14, 2013).

The notice requirement protects the employer by enabling him to "investigate the facts and question witnesses while their memories are unfaded, and ... to furnish medical care [to] the employee in order to minimize the disability and conseque[n]t liability upon the employer." *Mintz,* 218 S.C. at 414, 63 S.E.2d at 52. "The claimant bears the burden of proving compliance with these notice requirements." Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 127, 623 S.E.2d 860, 863 (Ct.App.2005).

The Claimant alleges an injury dated May 22, 2012, but did not file a Form 50 establishing a claim until September 17, 2012. It is important to remember that Claimant continued to work regular duty for the Employer following the time of the alleged injury through January 2013. (Tr. at 33). Throughout this timeframe, Claimant had a multitude of opportunities to inform his employer directly but, instead, apparently conveyed his allegation to his attorney who then wrote a letter to the Defense counsel for Claimant's prior claim. Claimant's conduct

with his alleged new injury is contrary to his prior injury with the same employer where Claimant reported his claim properly and directly to his supervisor, Tim Kennedy. Tim Kennedy attested to the fact he received notice of Claimant's previous back injury and reported it up the chain to process the claim as he does with other employees' reports of injury. (Tr. at 36-38). Claimant alleged that he told Mr. Kennedy on one occasion that he thought his shoulder was injured and Mr. Kennedy did not respond verbally or physically. (Tr. at 26). However, Mr. Kennedy testified that Claimant never reported a work-related injury to his shoulder. (Tr. at 38-39). Mr. Kennedy did confirm that he eventually found out about Claimant's alleged injury but it was not until late 2012. (Tr. at 38-39). Claimant also admitted that, despite continuing to work regular duty for the employer, he never attempted to report or discuss his alleged injury with anyone else working for the company. (Tr. at 33-34).

Claimant's conduct is similar to the conduct of the claimant in the recent case of Hartzell v. Palmetto Collission, LLC, which held in pertinent part:

> We find the Appellate Panel's determination that Claimant provided Employer with adequate notice he had suffered a work-related injury is not supported by substantial evidence in the record, and we reverse. In particular, the record does not contain substantial evidence that Claimant notified Employer of any "facts connecting [his] injury ... with [his] employment." *See* Etheredge, 349 S.C. at 457, 562 S.E.2d at 682 (recognizing adequate notice supplies "facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might ***105** involve a potential compensation claim" (citation and quotation marks omitted)).
>
> The only evidence in the record of the notice Claimant asserts is the testimony of Claimant and Stallings. Claimant testified: "The next day I said something to [Stallings] that I was pretty sore, I must have hurt myself." Claimant further testified he and Stallings "talked about" his back hurting during his last couple of weeks with Employer, but he did not indicate whether their conversation in any way connected the injury with his work for Employer. Stallings denied learning of the injury before receiving Claimant's Form 50 but also admitted he simply did not remember Claimant reporting an injury.

> While these facts establish Claimant reported *an* injury to Employer, they are devoid of any reference to an alleged connection between Claimant's injury and his employment. In fact, the only reference in the record to Claimant asserting to Employer a connection between his injury and his work lies in a question Employer's attorney posed to Claimant at the hearing before the single commissioner: "And you said you had some discussion, you said you mentioned that your back was sore from working one day is that what you told [Stallings]?" We find this question, although answered affirmatively by Claimant, does not constitute substantial evidence in view of the entire record. *See* Hill, 373 S.C. at 436, 645 S.E.2d at 431 ("Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached."). Accordingly, the Appellate Panel erred by entering a finding that was not supported by substantial evidence in the record.

Hartzell v. Palmetto Collision, LLC, 406 S.C. 233, 750 S.E.2d 97, 104-05 (S.C. Ct. App. 2013), reh'g denied (Nov. 14, 2013). Similar to Hartzell, Claimant admits that he only mentioned a possible shoulder injury to his supervisor on one occasion (despite continuing to work for several months) and that his supervisor did not respond verbally or physically to acknowledge the alleged report. Claimant's supervisor denies that a report ever took place and the evidence shows that he would have written up the accident, if he did have notice, like he did with the Claimant's prior back injury. Claimant's conduct in failing to report his alleged injury to his supervisor does not support a finding of reasonable excuse.

Furthermore, this was Claimant's third workers' compensation claim. (Tr. at 27). In his prior claim, he provided notice to multiple supervisors including Mr. Kennedy and Kevin Crocket (the prior injury occurred approximately four months before the current matter). Claimant's prior injury was properly noticed, well-known to Claimant's supervisors, and was admitted for compensability. Claimant testified that he tried to go to the doctor after allegedly reporting the injury to Tim Kennedy but was turned away. (Tr. at 32-33). However, Claimant admits that he worked full duty (with the exception of a few weeks) through filing for a Hearing on September 17, 2012 and never reported the injury to anyone else, never had any further

discussions with Tim Kennedy, and never requested authorization of a doctor's appointment or any other type of treatment. (Tr. at 33-34). Mr. Kennedy testified that, between May 2012 and October 2012, Claimant never requested medical treatment from him related to the alleged shoulder injury. (Tr. at 43).

Claimant was familiar with the workers' compensation system and had plentiful opportunity to provide proper notice of the current claim, but for whatever reason did not provide such notice. The interpretation of the notice statute should not be expanded to an extreme degree to accommodate a represented Claimant with prior experience reporting claims that had ample opportunity to report his current claim through the proper protocol.

C. THE FULL COMMISSION ERRED IN FINDING THAT EMPLOYER WAS NOT PREJUDICED BY CLAIMANT'S FAILURE TO PROVIDE PROPER NOTICE

To avoid dismissal for failure to provide notice within 90-days, §42-15-20(B) holds that an employee must show that they had a reasonable excuse and that the Employer was not prejudiced by the delay. It appears that the Full Commission did not adequately assess whether Appellants were prejudiced by the failure to provide notice; in fact, a finding regarding lack of prejudice was not even included in the Full Commission's Order instructions. (Order Instructions dated August 27, 2013)

By statute, and particularly where Claimant is represented by Counsel, improper notice should not be excused where it is prejudicial to the Employer and Carrier. In this case, the Claimant admits that Employer did not respond to his alleged report and admits that he never mentioned an alleged shoulder injury to anyone else despite continuing to work for several months.

The notice requirement is intended to protect the employer by enabling him to "investigate the facts and question witnesses while their memories are unfaded, and ... to furnish

medical care [to] the employee in order to minimize the disability and conseque[n]t liability upon the employer." Mintz, 218 S.C. at 414, 63 S.E.2d at 52. As such, the Employer was prejudiced each new day as they continued to work Claimant, between May 22, 2012 (alleged injury) and September 17, 2012 (filing Form 50), without any institutional knowledge of a potential shoulder injury. During this time, the Employer could have been providing medical treatment or placing Claimant in a light duty job that would not risk aggravating his shoulder. During these months Claimant presumably continued to work and lift and engage in substantial physical activity without mentioning the injury or discussing the issues with his supervisor (like he had done in his prior claims). Each new day of work, the Employer lost time to assess the shoulder early and potentially reduce exposure to future medical costs. Each new day of work exposed the Claimant to lifting and physical activity (activity consistent with work Claimant testified caused his alleged injury) without the Employer's ability to monitor his activity to avoid further injury.

Based on the foregoing, the Appellants respectfully submit that Employer was prejudiced and the failure of the Full Commission to find such prejudice constitutes reversible error.

III. THE FULL COMMISSION ERRED IN FINDING THE CLAIMANT SUSTAINED AN INJURY BY ACCIDENT DUE TO REPETITIVE TRAUMA, WHEN THE EVIDENCE SHOWS CLAIMANT'S JOB DUTIES WERE NOT REPETITIVE AND CLAIMANT SPENT LITTLE TIME WORKING THE POSITION THAT HIS MEDICAL EXPERT ASSERTS WAS THE CAUSE OF THE INJURY

The Claimant testified that he sustained a repetitive trauma injury by operating the "chain pull" which worked on a pulley system to lift and lower a grain hopper. Claimant did work this device for approximately seven years; however, over a year prior to the alleged injury due to repetitive motion (March 14, 2011, Tr. at 39), Claimant was moved to a different job. The Claimant's job prior to the alleged injury reduced the need to raise and lower the hopper from 40-50 times per day to 2-3 when he helped fill in while other employees were at lunch. (Tr. at

42).

Pursuant to §42-1-172, "repetitive trauma injury" means an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events. A repetitive injury is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury.

In the instant case, the Claimant submitted medical evidence specifying that Claimant injured or aggravated his shoulder condition "while winding a hopper full of grain." The doctor agreed that the winding motion required to lift the hopper full of grain constituted a repetitive motion.

Indeed, at one point Claimant's job was repetitive. Claimant testified that he would work the chain pull approximately 100 times per day for seven years (matching up to Mr. Kennedy's testimony, it appears to be roughly 50 lift/lower cycles per day). (Tr. at 15, 40, see also pg. 23 Claimant worked hopper approximately seven of nine total years at Employer). However, Claimant admittedly moved to a different job in March 2011 that Mr. Kennedy described as requiring only 2-3 lift/lower cycles when he filled in for other employees on an occasional basis when they needed a break. (Tr. at 24, 42). While a full hopper weighs between 80-100 pounds (Tr. at 45), however, Mr. Kennedy testified that it was not considered a heavy job. (Tr. at 45). He described that the chains are on a pulley system that greatly reduces the effective amount of force required to lift the hopper. (Tr. at 51).

After March 2011, Claimant shifted to a Material Handler. A Material Handler does not require winding or the same type of motions as working the pull chain for the hopper. The Claimant's new job required cutting bags open and running them to a tube that pours the material

into a barrel. (Tr. at 40). Claimant did not go back to the job winding the hopper on a day-to-day basis, but Mr. Kennedy described it as possibly having to rotate to fill in when someone is out. (Tr. at 41). Mr. Kennedy described his new job as heavy or light depending on whether the employee used equipment to lift the approximately 55 pound bags or lifted them manually. (Tr. at 43, 44, 46). If lifting manually, he described being able to cut the bag and let about half of it pour out before lifting the bag of the half-full bag to pour the rest of the grain. (Tr. at 46). Claimant's supervisor testified that Claimant primarily worked the grain bags the proper way, by lifting them with the fork lift and allowing gravity to do most of the work pouring the grain bags. (Tr. at 52). Claimant countered that sometimes a forklift would not be available and he may have to manually lift some bags. (Tr. at 53).

Claimant testified that his left shoulder began hurting a few weeks before May 22, 2012 and that it was hurting when he went to the doctor on April 3, 2012 for his back injury, but that he did not say anything to the doctor about it. (Tr. at 24-26). By this time, he had been off the winding job for over one year. The winding job is the only job the Claimant has any medical evidence to support an injury being traceable to repetitive activity at work.

Claimant did assert that lifting grain bags and pouring them contributed to his condition; however, this task involves a different motion than the activity attested to by his physician. Additionally, the testimony regarding Claimant's new job was that it could be done multiple ways including the utilization of a fork lift to allow gravity to control pouring the bags.

Tying an alleged repetitive trauma to an activity that ceased to be repetitive over one year prior does not fit the definition of "repetitive trauma injury." These injuries are meant to compensate employees when they are engaged in specific motions for extended periods of time on a day-to-day basis. Taking an employee with a history of repetitive work but only brief an

occasional exposure to the conditions for over a year prior to his physical complaints, opens the door to a multitude of potential other causes. If the employment was not repetitive in the meantime, the Claimant's complaints could have arisen through natural degeneration with age, or due to a history of work, lifting, or other trauma outside of the workplace.

The Claimant's medical evidence does not tie anything from his Material Handler job to the accident. Even if it did, there is evidence on record that the Material Handler job varied between pouring bags off of a fork lift, occasional lifting when forklifts were not available, and occasional filling in winding the hopper. If anything the Claimant's job became more varied and less repetitive. The repetitive trauma statute was not intended to be a "catch-all" for the natural effects of aging. There are too many other factors outside of people's work lives to attribute every eventual breakdown or pain encountered at work as a direct cause of the employment. A typical claim might come from an assembly line job involving the same motion over and over and a history of increasing pain day-to-day and worsening pain over the course of shifts. An atypical history would line up with the Claimant's testimony that he had been involved in a job other than what aggravates his shoulder (winding the hopper) for over a year before he began hurting and that he only occasionally engaged in the aggravating activity.

The Appellants' respectfully request the Court of Appeals reverse the findings of the Appellate Panel of the Workers' Compensation Commission's holding that Claimant sustained a compensable injury. The Claimant's job was no longer repetitive for a significant period prior to the alleged injury and Claimant's medical questionnaire only supported a finding of repetitive trauma through a winding motion of the hopper, which had not been a repetitive part of his duties for over a year.

CONCLUSION

Based upon the foregoing, the Appellants respectfully request that the Appellate Panel of the Workers' Compensation Commission's Decision and Order of October 8, 2013 be reversed on the grounds that correspondence to a defense attorney handling a prior claim is not sufficient where the attorney has no continuity of authority to act on behalf of the Employer beyond the cases for which he has been specifically retained. The Appellants' would request the Appellate Panel's findings regarding reasonable excuse for Claimant's failure to provide notice be reversed as the issue was not preserved and Claimant could not meet the burden to show he proved a reasonable excuse nor that the Defendants were not prejudiced by his conduct. In the alternative, the Appellants request the Court of Appeals reverse the Appellate Panel of the Workers' Compensation Commission's decision due to a failure to prove a repetitive trauma injury by a preponderance of the evidence.

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December 27, 2013