THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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SC Court of Appeals

Appellate Case No. 2013-002416

John Stevenson, Employee,
Respondent,

v.

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

INITIAL BRIEF OF RESPONDENT

Andrew W. Creech
Garrett B. Johnson
Elrod Pope Law Firm
P.O. Drawer 11091
Rock Hill, SC 29731
(803) 324-7574
Attorneys for Respondent

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STATEMENT OF THE CASE

Claimant John Stevenson filed a Form 50 requesting a hearing for a repetitive-trauma injury he suffered to his left shoulder. A hearing was held before Commissioner Avery Wilkerson, Jr. on April 13, 2013, at which Defendants contested both whether the injury was compensable and whether Claimant had complied with the notice requirements of S.C. Code Ann. § 42-15-20 (2012). Commissioner Wilkerson found in favor of the Claimant on both these grounds. Defendants appealed to the Full Workers' Compensation Commission, which upheld the single Commissioner's order. Specifically, the Full Commission found that "Claimant did sustain an injury by accident to his left shoulder" and that "Claimant provided proper notice to the employer, his agent, or his representative within the required 90-day time period, and even if proper notice was not given, reasonable excuse existed, with no prejudice to the employer pursuant to § 42-15-20 (B)&(C), as Claimant thought notice had been given pursuant to Claimant's counsel's letter dated June 19, 2012." This appeal ensued.

FACTUAL BACKGROUND

Claimant worked for Marathon Abrasive, a company in the business of making grinding wheels that are used to clean steel, for eight to nine years as a materials handler and fork lift operator. As a materials handler, Claimant was required to lift buckets full of grain rock and dump them into a container called a hopper. The hopper operated on a chain pulley system, and Claimant would pull up and down on the pulley system until the hopper container was higher than his head. Claimant would then send the loaded container down to the next job station. Claimant estimated that each loaded hopper container weighed approximately 100 pounds, and that he would wind up fifty containers

and wind down fifty containers each day. Claimant worked this hopper job for approximately nine years, working five days a week.

In approximately March of 2011, Claimant was moved to a different job. While Claimant was still required to lift heavy bags of grain all day, his duties would rotate, and he only performed the hopper job for an hour or so each work day. In January of 2012, Claimant injured his back in a separate, admitted back claim. Attorney Mark Cauthen was hired by the Employer and Carrier to defend this claim. Claimant missed eight weeks of work due to this injury before returning to work full-time.

Beginning in late April or early May of 2012, Claimant began to experience pain in his left shoulder. Claimant testified that he reported this pain to his supervisor, Tim Kennedy, though Mr. Kennedy at the hearing denied this conversation took place. On June 19, 2012, Claimant's attorney, Andrew W. Creech, wrote to Mark Cauthen, the attorney who was defending Employer and Carrier with regard to Claimant's January 2012 claim, to inform him that Claimant had suffered a work-related injury to his left shoulder. (Exhibit 2). The letter reads as follows:

> Dear Mark:
>
> Please be advised that on May 22, 2012, Mr. Stevenson injured his left shoulder while at work, winding a hopper full of grain. He had hoped his symptoms would improve but they have not. He spoke with Tom Kennedy a couple weeks ago about getting medical treatment for his shoulder, but nothing has been done. Thus please advise if your client plans to send him for medical treatment with regard to his left shoulder.

Sometime thereafter, Claimant's counsel called Attorney Cauthen to again inquire as to whether the Employer/Carrier would provide an evaluation for Claimant's left shoulder. In that conversation, Attorney Cauthen indicated that he would need to contact his client

to see what they wanted to do. On September 5, 2012 Claimant's counsel had not heard from Attorney Cauthen, and followed up with another e-mail (Exhibit 2), quoted below:

> Mark:
>
> I faxed you a letter June 19, 2012 informing you that Mr. Stevenson injured his left shoulder while at work, winding up a hopper full of grain, and requesting that he see a doctor for his ongoing shoulder pain. I believe we thereafter discussed this issue on the phone and you indicated you talked to your client about whether they would see him for an evaluation or not. At present, I never heard back. Please let me know if you are agreeable to letting someone check out his shoulder. I plan to file for a hearing on this issue on the shoulder on Monday. Thanks.

As no response was received from Attorney Cauthen, counsel for Claimant filed a Form 50 requesting a hearing on September 17, 2012.

Several days later, Claimant visited his family physician, Dr. Malik Ashe. Dr. Ashe noted that Mr. Stevenson was complaining of left shoulder pain, and that "patient believes the pain occurred from heavy lifting and pulling at his job." Dr. Ashe diagnosed Claimant with "shoulder pain secondary to rotator cuff tendonitis," recommended light-duty work restrictions, and recommended physical therapy (Claimant's APA pg. 5). On December 11, 2012 Dr. Ashe answered a medical questionnaire stating that, most probably and to a reasonable degree of medical certainty: 1) Mr. Stevenson injured or aggravated his left shoulder winding the hopper full of grain, 2) The winding motion required to lift the hopper constituted repetitive trauma, 3) This repetitive motion contributed to Mr. Stevenson's left shoulder pain, and 4) Mr. Stevenson would need additional treatment for his left shoulder.

Claimant gave Dr. Ashe's light-duty note to Gary Protracker at Marathon Abrasive, but no light-duty work was ever provided. Instead, Claimant returned to his

normal, heavy, repetitive duties until January 4, 2013, at which point he was laid off due to business being slow.

STANDARD OF REVIEW

The Administrative Procedures Act governs the Appellate Court's review of the Full Commission's decision. Shealy v. Aiken County, 341 S.C. 448, 454, 535 S.E.2d 438, 442 (2000). The decision of the Full Commission may only be reversed or modified if the Defendants' "substantial rights 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." Id. Substantial evidence is such as would allow "reasonable minds to reach the conclusion the Full Commission reached." Id. at 455, 535 S.E.2d at 442. "The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010).

With regard to factual matters, "the Full Commission is the ultimate fact finder." Shealy at 455, 535 S.E.2d at 442. "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Id. It is not the responsibility of the Court of Appeals to weigh the evidence found by the Full Commission. Id.

ARGUMENT

I. THE FULL COMMISSION'S DECISION THAT CLAIMANT COMPLIED WITH § 42-15-20 IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The Full Commission ruled that Claimant complied with the notice requirements of S.C. Code Ann. § 42-15-20 (2012), "Notice to employer of accident or repetitive trauma." That statute 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 employer, his agent or representative had knowledge of the accident or that the third 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.

Section 42-15-20(C) adds that, in the case of injuries involving repetitive trauma, such notice must be given within 90 days "of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable." Claimant fulfilled his responsibilities under this statute because his representative provided notice of Claimant's left shoulder injury to Employer's representative within the mandated 90-day period.

Neither party disputes that Attorney Cauthen was representing Employer—albeit on another Workers' Compensation claim involving Claimant—as of June 19, 2012, when Claimant's attorney sent Attorney Cauthen a letter advising him of Claimant's left shoulder injury. Appellants freely admit as much in their brief, using the phrase "representing the Employer" numerous times. (App. Brief, pp. 7, 10, 13, 14, 15.) No case law exists defining "representative," thus its plain and ordinary meaning must be used in interpreting the statute. See Durham v. United Cos. Fin. Corp., 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998). That meaning is, quite simply, "a person who represents others." Appellants have already conceded in their brief that Attorney

Cauthen was representing Employer at the time notice was provided, thus the requirements of the statute have been met.

Appellants claim that the Commission erred in this finding, basing their contentions primarily on the argument that Attorney Cauthen was not an agent of Employer on June 19, 2012. Indeed, after briefly discussing the statute, Appellants spend an entire 11 pages pondering, "What is the meaning of 'agent' under § 42-15-20" and then arguing that "It would not be reasonable to characterize an attorney as an agent for a claim where he has not been retained." (App. Brief, pp. 8, 11). Appellants' argument fails because they improperly conflate the terms "representative" and "agent." In writing the statute, the Legislature did not require that "an agent only," or "a representative serving as an agent," or "an agent and representative" have knowledge of the claimant's injury. Instead, they wrote that "an agent or representative" must have knowledge of the injury. S.C. Code Ann. § 42-15-20(A) (2012)(emphasis added). This Court must construe the statute to give effect to all its terms. See Breeden v. TCW, Inc./Tenn. Express, 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003); quoting Nexsen v. Ward, 96 S.C. 313, 80 S.E. 599 (1914)("We must construe a statute to give effect to all of its provisions. Every word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction.") The use of the word "or" in § 42-15-20 creates a clear distinction between the terms "representative" and "agent," one which Appellants almost wholly overlook and which renders the discussion of the meaning of "agent" irrelevant.

Neither does the statute utilize phrases like "authorized representative of the Company for purposes of receiving notice on workers' compensation claims" such as

Appellants use in their brief. (App. Brief, p. 10). While such an interpretation of the term would be helpful to Appellants, it hardly aligns with the plain language of the statute. Again, had the Legislature intended such a reading, they easily could have added the language Appellants suggest to the statute. They did not, and so the Full Commission acted appropriately in finding that "there is a presumption that the McKay Firm was and is the agent and/or representative of Marathon Abrasive when the notification letter of June 19, 2012 was sent, satisfying the notice requirement set forth in 42-15-20." The Commission's Order is supported by substantial evidence and the plain meaning of the statute, and should be upheld by this Court.

II. THE FULL COMMISSION ACTED APPROPRIATELY IN CONSIDERING WHETHER CLAIMANT HAD REASONABLE EXCUSE TO BELIEVE NOTICE WAS PROPERLY GIVEN AND IN FINDING THAT REASONABLE EXCUSE EXISTED.

Sections 42-15-20(B) and (C) allow claimants to recover Workers' Compensation benefits even if proper notice has not been provided to the employer, so long as "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." The term "reasonable excuse" is not further defined by case law, so again the plain and ordinary language of the statute must be applied. See Durham, 331 S.C. 600, 503 S.E.2d 465 (1998). These notice requirements are to be liberally construed in favor of the claimant. Etheredge v. Monsanto Co., 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct.App.2002). In their Order of October 8, 2013, the Full Commission found that, even if Claimant did not comply with the notice requirements of § 42-15-20, he had reasonable excuse for the notice to be given beyond 90 days.

Appellants claim that the Full Commission erred not only in finding that reasonable excuse existed, but in considering the matter at all, as "Claimant did not preserve the issue through an appeal of the single Commissioner's order." (Appellants' Brief at p: 21). This is a curious contention, given that Claimant received a fully favorable decision from the single Commissioner. That decision found that "Under § 42-15-20, Claimant provided proper notice to the employer, his agent, or his representative within the required 90-day time period." The statutory language, which provides that notice must be provided unless reasonable excuse exists, makes its quite clear that reasonable excuse is a alternative position, a point for the claimant to argue only if he fails in showing proper notice. It is inconceivable that Claimant would have or should have appealed a favorable finding on the primary issue so as to argue that he should win on the alternative clause instead.

Moreover, notice and reasonable excuse are part-and-parcel with one another. They appear in the same sentence of the same subsection of the same statute, separated by not so much as a period. Even a cursory examination of the statute should have revealed to Appellants that reasonable excuse is an integral part of determining whether Claimant is able to recover benefits under § 42-15-20. Any lack of preparation in arguing this point to the Commission was due to an equal lack of diligence. Commissioner Wilkerson's order found that Claimant had complied with § 42-15-20; the Full Commission's findings regarding reasonable excuse were predicated on that exact same statute. It was thus appropriate for the Full Commission to consider reasonable excuse in issuing their order.

Appellants further argue that the Full Commission lacked substantial evidence to find that the letter sent by Claimant's counsel to Attorney Cauthen constituted reasonable excuse for not reporting his injury to a supervisor. In so doing, Appellants compare the instant case with that of Hartzell v. Palmetto Collision, LLC, 406 S.C. 233, 750 S.E.2d 97 (Ct.App.2013). In Hartzell, the claimant allegedly suffered an on-the-job injury to his back, which he claimed to have reported to his supervisor by saying, "I was pretty sore, I must have hurt myself." Id. at 237, 750 S.E.2d at 99. The Court of Appeals found that this statement did not satisfy § 42-15-20, ostensibly because "the record does not contain substantial evidence that Claimant notified Employer of any facts connecting [his] injury . . . with [his] employment." Id. at 104 (internal quotation marks omitted). Of course, the issue of whether Claimant provided Employer with facts establishing a causal connection between his injury and his job is not before the Court today. Setting aside that difference, there is an even more obvious distinction between the two cases, indeed the one that was central to the Full Commission's order: the letter sent by Claimant's counsel to Attorney Cauthen.

In their discussion of reasonable excuse, Appellants summarily dismiss this letter, stating that "The reasons why this action is not sufficient are outlined above." (App. Brief, p. 22). The rest of this section deals solely with Claimant's actions, in particular his conversation with his supervisor concerning the injury and his alleged knowledge of the Workers' Compensation system. These reasons why the letter should not avail him, presumably, are those discussed earlier, that it fails to meet the notice requirements of § 42-15-20. What Appellants fail either to recognize or acknowledge is that notice and reasonable excuse are two different inquiries, clearly divorced by the language of the

statute. To adopt Appellants' line of argument would be to render the "reasonable excuse" clause of § 42-15-20 wholly ineffective: "If an action does not provide proper notice, it cannot serve as reasonable excuse; an action can only be considered reasonable excuse if it complies with the notice requirements." Such a reading would be contrary to all rules and principles of statutory construction in South Carolina. See Breeden at 120, 584 S.E.2d at 383("Every word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction.")

Given the facts and circumstances of this case, Claimant had reasonable excuse to believe that his counsel's letter to Attorney Cauthen satisfied the notice requirements of § 42-15-20. Claimant's actions, cited by Appellants in their brief, only serve to confirm that he believed that notice had been provided: despite ample opportunities, he reported his left shoulder injury only to Tim Kennedy. Why? Because he believed that the notice provided by his attorney would suffice. While Appellants go on to cite a great deal of case law explaining the exact purpose and requirements of said notice, it is not reasonable to expect Claimant to know or understand all of these holdings. What is reasonable is for Claimant to believe that his counsel's letter—which was sent to the same attorney who was already representing the same employer on the same type of on-the-job injury Claimant had suffered a few months prior—would fulfill his obligations under the statute. Claimant thus had reasonable excuse for not providing additional notice of his injury to Employer. The Full Commission's decision and order on this point is supported by substantial evidence and must be upheld.

The final element of § 42-15-20 is that the delay in receiving notice did not "unduly prejudice" the employer. The burden of showing any such prejudice lies with

Employer. See Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 129, 623 S.E.2d 860, 864 (Ct.App.2005). In this case, there is no prejudice because there was no, or minimal, delay. Employer's representative had notice of the injury as of June 12, 2012, within 30 days of its discovery. If he chose not to pass on this knowledge to Employer, the fault lies with him, not Claimant. Additionally, when Claimant did see Dr. Ashe and received a light duty note, which he gave to his supervisor, he was not given light duty work, nor were his day-to-day tasks altered or lessened in any way. There is no reason to believe, as Appellants contend in their brief, that Employer would "plac[e] Claimant in a light duty job" or "monitor his activity to avoid further injury" had they received notice sooner. Employer's own actions belie the argument. (App. Brief, p. 27). Once again, therefore, the Full Commission's order should be upheld as it was based on substantial evidence.

III. THE FULL COMMISSION'S FINDING THAT CLAIMANT SUFFERED AN INJURY BY ACCIDENT DUE TO REPETITIVE TRAUMA IS BASED ON A PREPONDERANCE OF THE EVIDENCE.

Appellants' final argument is that the Full Commission incorrectly found that Claimant suffered a compensable repetitive-trauma injury per § 42-1-172. That section defines a "repetitive trauma injury" as one that "is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C. Code Ann. § 42-1-172(A) (2012). A repetitive trauma injury may only be shown "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." S.C. Code Ann. § 42-1-172(D) (2012). With this section, as with other aspects of the Workers' Compensation laws, the Courts should take

a liberal approach in favor of coverage. See Schurlknight v. City of N. Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002).

Claimant met his burden on showing a repetitive trauma both through his own testimony and that of his treating physician, Dr. Malik Ashe. In response to a medical questionnaire, Dr. Ashe opined, in relevant part, that Claimant injured or aggravated his left shoulder by winding the hopper full of grain, that this winding constituted repetitive trauma, and that this repetitive trauma contributed to Claimant's left shoulder pain. The Full Commission found that this evidence was sufficient to show that Claimant suffered a repetitive trauma injury. Appellants object, primarily on the grounds that Claimant had changed jobs a year prior to discovering his injury and this new job was "if anything... more varied and less repetitive." (App. Brief at p. 30).

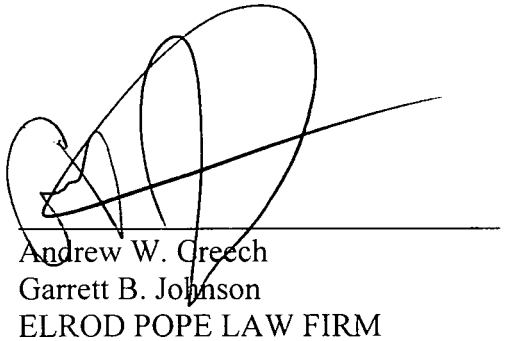
While that may be true, "less repetitive" is not the same as "not repetitive." Claimant testified that even after changing jobs, he was still required to rotate positions, and performed the hopper job an hour a day. Claimant's supervisor agreed that Claimant would have to rotate jobs and fill in for co-workers who missed work. Dr. Ashe understood the extent and nature of Claimant's duties, and accounted for them in his opinion regarding causation. Appellants have offered no medical evidence of their own to refute his opinion. The record thus clearly shows that the Full Commission's finding that Claimant suffered a repetitive trauma injury is supported by a preponderance of the evidence.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Court of Appeals AFFIRM the Full Commission's order on all points. Claimant complied with

the notice requirements of § 42-15-20, had reasonable excuse to believe that they had been satisfied, and any delay in notice did not prejudice Employer. Claimant likewise showed by a preponderance of the evidence, including appropriate medical testimony, that he suffered a compensable injury by repetitive trauma resulting from his on-the-job duties.

Respectfully submitted,



Andrew W. Creech
Garrett B. Johnson
ELROD POPE LAW FIRM
212 E. Black Street
P.O. Box 11091
Rock Hill, SC 29730
Attorney for Claimant

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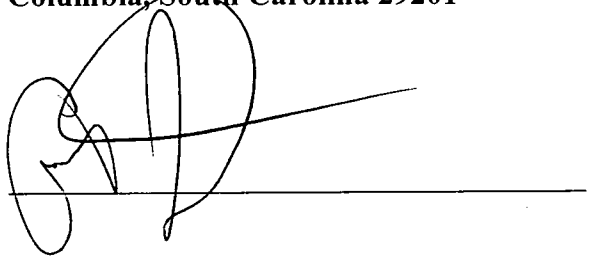
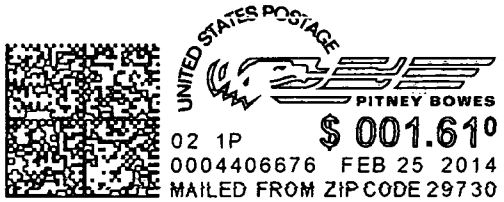
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Respondents' Initial Brief has been served upon opposing counsel by mailing a copy properly addressed with sufficient postage affixed thereto this 25 day of February 2014.

Mark D. Cauthen
McKay, Cauthen, Settana, & Stubley, P.A.
P.O. Box 7217
Columbia, South Carolina 29201





ELROD·POPE
— LAW FIRM —

212 East Black Street • PO Box 11091 • Rock Hill, SC 29731

SHIP TO:

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201