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.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

COURT RULES

SECONDARY SOURCES

ARGUMENT

I. THE RESPONDENT DID NOT PROVIDE ADEQUATE NOTICE OF HIS ALLEGED INJURY

Respondent asserts that a letter from his counsel to the attorney on his prior workers' compensation claim is sufficient to meet the notice requirement of the Workers' Compensation Act. Respondent also cites an alleged phone call and includes statements allegedly made by Attorney Cauthen during the alleged phone call. (Respondent's Initial Brief at 2, 3). Appellants object to consideration of any statement related to the alleged phone call as inadmissible hearsay and outside the Record on Appeal. Attorney Cauthen was not listed as a witness by the Claimant, was not asked to provide deposition testimony regarding the alleged phone call, and the alleged phone call was not considered by the Single Commissioner or the Appellate Panel, nor was it included in any Orders of the Commission.

The Respondent argues that, while Attorney Cauthen was not an agent, Defense Counsel should be considered a "representative" for purposes of the notice statute, S.C. Code Ann. §42-15-20 (Supp. 2012). The Respondent then implies that this means notice should be perfected by providing it to anyone who fits the definition of "a person who represents others." (Initial Brief of Respondent at 5). They also assert that "No case law exists defining 'representative'" therefore the broad definition must apply. (Initial Brief of Respondent at 5). The Claimant's assertions in this regard are incorrect. The Appellants did not neglect to address "representative" because case law shows that the term "representative" applies to direct employees of the employer, which Attorney Cauthen was not.

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).

In fact multiple cases have addressed the definition and qualifications one must have to be classified as an employer's representative. "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) (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 employees of the company themselves with a duty of care that is not limited to a specific task or claim, but generally applies to all other 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 and there is no case law to support such a contention.

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 S.C. 122, 623 S.E.2d 860 (Ct. App. 2005).

As stated in Lizee, the statute requires "that notice be sufficient to put a "reasonably conscientious supervisor" on notice" and "recognizes the fact that those charged with managing and supervising employees bear the responsibility of taking action" Lizee v. S. Carolina Dep't of Mental Health, 367 S.C. 122, 129, 623 S.E.2d 860, 864 (Ct. App. 2005).

Here, Attorney Cauthen had no supervisory capacity over the Claimant, no continuing working relationship with the Employer, and no authority from the employer to take notice of new claims. The court in Lizee stated, "The record before us is devoid of any evidence that notice was provided to any supervisor or other person of comparable standing at the Department." Lizee v. S. Carolina Dep't of Mental Health, 367 S.C. 122, 129, 623 S.E.2d 860, 864 (Ct. App. 2005). Similarly, in the instant case, the record is devoid of any evidence Attorney Cauthen served in such a capacity as well.

The regulation concerning instructions to employees on how to report on-the-job injuries is also instructive on the meaning of "representative or agent." 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. 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.

Aside from case law and regulations, forcing a construction including defense counsel as a "representative or agent" for notice would create a new agency situation where none existed nor was intended. This would create a situation where defense attorneys would be acting in an unauthorized legal capacity to satisfy this interpretation of the notice statute, but would be violating the express language in the South Carolina Rules of Professional Conduct (SCRPC) Rule 1.2(A).

Such an interpretation would also run counter to the SCRPC Rule 1.7 which prohibits concurrent conflicts. If the Claimant is allowed to provide notice to a defense counsel and the Employer then retains a different counsel for the new claim, the original defense counsel is put in a situation where he has a duty to represent the Claimant to provide notice of injury to an Employer on one claim while actively representing the Employer's interests on a prior claim.

The Rules of Professional Conduct, SCRPC Rule 3.7, also prohibit a lawyer from handling a matter where he is likely to be called as a witness. This would result in attorneys being forced to recuse themselves on cases where notice becomes an issue and could be used as a tool strategically by a claimant's attorney to encourage their client to report a claim to a defense counsel as a means of keeping them from being assigned to the claim.

The problems listed above could create additional malpractice liability for a defense counsel taking action as a "representative" 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 would increase 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.

If you could get past the malpractice issues inherent in accepting notice without authority to do so, where would the unretained attorney's duties as a "representative" end with regard to the new claim? They have not been retained for the new claim and have no method of receiving compensation for actions on a new claim, but if they are legally deemed a "representative" would this status stop at the notice stage or would a claimant be entitled to rely on them for future issues? Such an arrangement would not be legally expedient or sound for any parties involved.

Broadening the scope of notice in the way prompted by the Respondent would produce a result not contemplated by the legislature. Therefore, for this reason and the reasons outlined above, the Appellants respectfully request the Court reverse the Order of the Full Commission and refuse to broaden the notice requirement to include legal counsel who have not been retained to defend a claim.

II. THE RESPONDENT DID NOT PRESERVE "REASONABLE EXCUSE" ON APPEAL AND, IN THE ALTERNATIVE, "REASONABLE EXCUSE" FAILS ON ITS OWN MERITS

The Respondent argues that the issue of reasonable excuse was "part and parcel" with this issue of notice and should have been fair game to argue before the Full Commission. The Respondent also asserts that it was "inconceivable" that the Claimant would have thought to appeal the failure of the Commissioner to enter a finding on "reasonable excuse."

The Claimant's assertion that he had no reason to appeal the point regarding "reasonable excuse" falls flat. The Claimant was well aware of the issue and specifically asked the Single Commissioner to address the issue in his Order. Respondent's Attorney indicated in an email dated April 5, 2013, "I agree, Commissioner Wilkerson did not specifically order a finding of reasonable excuse – however – I do think that finding is implicit and consistent with his overall ruling." Respondent then submitted two versions of his proposed Order to the Single Commissioner for consideration. The Respondent submitted the two proposed Orders on April 9, 2013 and noted Claimant's position that a finding of "reasonable excuse" was "implicit in Commissioner Wilkerson's decision" and noting Appellant's objection to inclusion of the finding. Having considered the parties' positions, the Single Commissioner purposely withheld a finding that Claimant had reasonable excuse to believe notice was provided.

The issue of "reasonable excuse" was expressly laid before the Single Commissioner following the initial Hearing and the Commissioner purposefully and knowingly declined to include such a finding in his Order. The Claimant was essentially overruled on this issue and made no effort to preserve the issue on appeal thereafter. In addition to filing the issue as an appeal, the Claimant's Attorney could have filed a Motion to Alter or Amend the Single Commissioner's ruling. While Respondent alleges it is "inconceivable" for a claimant to appeal

from a favorable order, neither a Motion to Alter or Amend nor a narrowly crafted ground for appeal to preserve the issue would result in the Claimant risking reversal of other favorable findings. Furthermore, the issue of "reasonable excuse" was not preserved under the Appellants' Grounds for Appeal (Form 30) and, therefore, was not appropriately under consideration by the Full Commission.

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.

The Full Commission allowing arguments on "reasonable excuse" unduly prejudiced the Appellants and did not allow proper notice for them to properly defend the issue. If, despite Claimant's failure to preserve the issue, "reasonable excuse" was deemed to still be a legally viable argument, the Full Commission should have remanded the issue for further findings by the Single Commissioner since he did not include a finding in this regard and it was not an issue presented to the Full Commission on appeal.

Furthermore, the Respondent argues the Claimant was justified in his reliance on his attorney's letter to Attorney Cauthen as notice, therefore he was justified to continue working the same job for several months without telling his supervisor or requesting medical evaluation. The Claimant's reliance on notifying an attorney who was involved on one claim about the presence of another claim might be compelling if he was *pro se* (although it does not explain why he concealed the injury from his actual employer for months even though he had freely discussed his prior back claim with his supervisor when it occurred). However, Claimant was represented by counsel and counsel should know that §42-15-20 requires notice to the employer, or

representatives or agents of that employer. The Claimant's reliance on erroneous advice from his counsel does not constitute a "reasonable excuse" to then hold the Employer liable. This would amount to holding the Employer liable for the Claimant's attorney's mistake, which would be unreasonable and highly prejudicial.

Even if "reasonable excuse" was properly in front of the Full Commission and even if the Claimant were able to show he reasonably relied on the letter to Attorney Cauthen, pursuant to §42-15-20 **"reasonable excuse" only sidesteps the notice requirement if the Employer has not been prejudiced by the delay.** The clear and convincing evidence shows that The Employer was very much prejudiced by the Claimant's conduct and failure to report the injury to his employer.

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, during which time he continued to work regular duty; the same work that he alleges caused a repetitive trauma. (Tr. at 33). By the very nature of a repetitive trauma injury, the Claimant was continuing to worsen and aggravate his shoulder condition. Instead of blindly allowing the Claimant to continue the same work that he claims injured his shoulder for four months, the Employer could have placed him in a different job to minimize their liability. The Employer also could have sought medical evaluation and treatment

which could have reduced the length and cost of treatment.

III. THE RESPONDENT CANNOT SHOW THAT HIS INJURY MEETS THE DEFINITION OF REPETITIVE TRAUMA WHERE THE REPETITIVE NATURE OF HIS JOB WAS NO LONGER PRESENT AT THE TIME OF HIS INJURY

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.

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).

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, particularly where the "repetitive" task is only an occasional task for an extended period of time prior to the alleged injury.

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.

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Commissioner McCaskill, Chair

Case No.: 2013-002416

John Stevenson, Employer,.....Respondent.

v.

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

PROOF OF SERVICE

I certify that I have served the Appellant's Reply Brief and Amended Designation of Matter to be included in the Record on Appeal upon counsel for the Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on March 20, 2014 addressed to Andrew W. Creech, Esquire and Garrett B. Johnson, Esquire of Elrod Pope Law Firm, Post Office Box 11091, Rock Hill, South Carolina 29731.

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