

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

SCWCC No: 1003122

Zeena Fletcher, Employee, Respondent,

v.

Dick's Sporting Goods, Employer, and Federal Insurance Co., Carrier, Appellants.

APPELLANT'S BRIEF

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. The Commission erred in finding Fletcher could withdraw her Form 50, Change of Condition for the Worse, by Order, and then refile at anytime, since the Statute of Limitations cannot be tolled as set forth in S.C. Code Ann. § 42-17-90(2010).
- II. Fletcher's reliance on Regulation 67-609(B)(2010) is misplaced.
- III. Fletcher's reliance on the Court's Decision in Allen v. Benson Outdoor Adver. Co., 236 S.C. 22, 112 S.E.2d 722 (1960) is also misplaced.

STATEMENT OF THE CASE

On March 13, 2010, Zeena Fletcher (“Fletcher”) slipped and fell at work. Per the Fletcher’s Form 50, she alleged injuring her right knee, left knee, right elbow, back, head, and requested treatment for psychological overlay. Dick’s Sporting Goods (“Dick’s”) provided proper and adequate medical treatment and care.

Following Fletcher’s treatment for her injuries in regard to the March 13, 2010 fall, Dr. Foster, a board certified orthopedic spine specialist, submitted a Form 14B, on November 10, 2010, indicating Fletcher has a zero percent (0%) impairment to the spine and was able to return to work without restriction. Per the Form 14B dated October 14, 2011, of Dr. Satterthwaite, a pain management specialist, it indicates Fletcher sustained ten percent (10%) impairment to her spine and was unable to bend, twist, stoop or squat continuously but was able to walk and stand as tolerated and carry upwards of twenty-five to thirty (25-30) pounds. (R. p. 167) It was further indicated she would need medications, injections and intermittent physical therapy in the future. (R. p. 167) Dr. Tollison, a psychologist, submitted a Form 14B, dated December 12, 2011, indicating Fletcher has five percent (5%) impairment to the psyche and would need treatment for her adjustment disorder associated with pain and lifestyle change related to her on-the-job injury. (R. p. 168) He recommended psychological treatment five to six (5-6) times per year. (R. p. 168) Dr. Posta, a board certified orthopedic specialist, submitted a Form 14B, on October 1, 2010, indicating Fletcher had a four percent (4%) impairment to the right lower extremity and was unable to kneel, bend or crawl. (R. p. 166) He specified Fletcher was not in need of any future medical treatment or care. (R. p. 166)

Once Fletcher reached maximum medical improvement, according to her treating physicians, Dick’s filed a Form 21 To Pay Benefits. (R. p. 166-168) This matter was then

scheduled to be heard before Commissioner Barden on December 22, 2011 at 9:30 a.m. in Greenville, South Carolina. Prior to the hearing, Fletcher and Dick's agreed to enter into a Form 16A settlement. (R. p. 1) Whereby, Fletcher received seven percent (7%) permanent loss of use to her right lower extremity and eighteen percent (18%) permanent loss of use to her spine. (R. p. 1)

Fletcher then filed a Form 50, alleging a change of condition to her spine and right lower extremity. Fletcher alleged she was no longer at maximum medical improvement and sought additional medical treatment and care as well as additional temporary total disability benefits from February 27, 2012 and continuing. Also, Fletcher specifically requested a MRI of the right knee as a result of her alleged change of condition.

Dick's denied the Claimant sustained a change of condition for the worse to her spine. Rather, Dick's argued Fletcher clearly sustained an intervening accident that broke the causal connection from her initial work-related injury of March 13, 2010. Dick's also denied Fletcher sustained a change of condition for the worse to her right lower extremity. Therefore, she was not entitled to any additional treatment not already specified on the Form 16A settlement. (R. p. 1)

This matter came before Commissioner Beck pursuant to Fletcher's Form 50, alleging a change of condition for the worse to her right lower extremity and spine, as a result of her injury of March 13, 2010. (R. p. 2) The Single Commissioner held as follows: 1) Fletcher suffered a change of condition to her spine, but this did not preclude a later finding that Fletcher did return to baseline status; 2) Fletcher is entitled to causally related medical care and treatment to her spine; 3) Fletcher is entitled to temporary total disability benefits from February 27, 2012 and

continuing; 4) Fletcher is not at maximum medical improvement; and 5) Fletcher's request for an MRI to the right knee was denied as it was not contemplated on the Form 16A. (R. p. 2, 11-13)

From Single Commissioner's Order dated October 12, 2012, Dick's appealed. (R. p. 24)

Dick's alleged the following errors:

- 1) Whether the Single Commissioner erred in finding Dr. Satterthwaite opined the Claimant sustained a change of condition for the worse in regard to her back since February 17, 2012?
- 2) Whether the Single Commissioner erred in finding the greater weight of the evidence shows the Claimant's current condition is a progression of and related to her original injury by accident sustained on March 13, 2010 and that she did not sustain an intervening accident?
- 3) Whether the Single Commissioner erred in finding the Claimant is temporarily totally disabled because of a change of condition for the worse?
- 4) Whether the Single Commissioner erred in finding the Claimant is entitled to medical treatment in regard to the alleged change of condition for the worse?
- 5) Whether the Single Commissioner erred in failing to find the Claimant is at maximum medical improvement in regard to her initial injury of March 13, 2010?
- 6) Whether the Single Commissioner erred in failing to find there is a intervening accident cutting off the causal connection for any need of additional medical treatment and/or temporary disability benefits related to the March 13, 2010 injury?
- 7) Whether the Single Commissioner failed to find that Dr. Satterthwaite opined the Claimant did in fact sustain an aggravation of her pre-existing condition that is a new injury by accident?

(R. p. 24) On February 19, 2013, an Appellant Panel Review was held in Columbia, South Carolina. The Full Commission affirming the Single Commissioner's Decision and Order. While this matter was pending for review before the Full Commission, Fletcher filed another Form 50 alleging a change of condition to the right lower extremity. A hearing was held on February 5, 2013 before Commissioner Barden. (R. p. 14) An extensive Pre-Hearing conference was held. (R. p. 14-15) Although, there is not an available transcript.

During the Pre-Hearing Conference, Dick's argued that Fletcher could not prevail on a change of condition for the worse based upon the medical evidence. Commissioner Barden indicated to Fletcher's attorney that Fletcher's testimony may be compelling enough to meet her burden of proof. However, Commissioner Barden stressed, after having listened to arguments by both Dick's and Fletcher, as well as reviewing the medical evidence, that Fletcher had not made a compelling argument for a finding that she sustained a change of condition for the worse. (R. p. 14, lines 3-6) Then, as the Single Commissioner's Order dated March 12, 2013, indicates, the Commissioner suggested Fletcher withdraw her Form 50, not move forward with the hearing, and obtain additional diagnostic evidence. (R. p. 14, lines 6-7) The Single Commissioner did not retain jurisdiction over the matter despite Fletcher's request.

At the Pre-Hearing Conference, Dick's argued that Fletcher needed to move forward with the hearing, since Fletcher's one (1) year filing for a change of condition for the worse would expire on February 21, 2013.¹ Nonetheless, the Fletcher withdrew her Form 50. (R. p. 14, lines 8-9) The Order specifically states, "The undersigned discussed postponement in the case Claimant's attorney wanted to obtain additional diagnostic evidence. At that point, Defense Counsel objected to the case being postponed. Claimant's counsel then withdrew the hearing

¹ One (1) year from the last date of payment of compensation as indicated on the Form 19.

request.” (Emphasis added) (R. p. 14, lines 6-9) From the Single Commissioner’s Order dated March 12, 2013, Dick’s appealed. (R. p. 14-15)

Per the Form 30 dated March 18, 2013, the Defendants requested a review based on the following grounds:

1. Whether the Single Commissioner can, by Order, extend the time limits as set forth by S.C. Code Ann. Section 42-17-90?
2. Whether the Single Commissioner erred in failing to find that in the event the Claimant withdrew her Form 50 that the claim would be barred by S.C. Code Ann. Section 42-17-90?
3. Whether the Claimant has failed to prove she sustained a change of condition for the worse within one (1) year of the last date of payment of compensation to the Claimant?
4. Whether the Single Commissioner erred in failing to find in accordance with S.C. Code Ann. Section 42-17-90 that "the review must not be made after twelve (12) months from the date of the last payment of compensation pursuant to an award provided by this title."?

(R. p. 38) The Appellate Panel Review Hearing was held in Columbia, South Carolina on June 18, 2013. (R. p. 16) The Commission did affirm the Single Commissioner’s Order on September 19, 2013. (R. p. 16-23) From that Order Dick’s appeals.

STATEMENT OF FACTS

On March 13, 2010, Fletcher slipped and fell at work. Per Fletcher's Form 50, she alleged injuring her right knee, left knee, right elbow, back, head, and requested treatment for psychological overlay. Following the incident, Fletcher was seen at AnMed, where x-rays were conducted of her right knee, cervical spine and lumbar spine.

Fletcher reported injuring her right knee and informed the physician that she did not strike her head or pass out. She was provided with Vicodin and an ACE bandage for her right knee. She was also provided with physical therapy at Upstate Physical Therapy. Fletcher continued to complain of pain in her right knee, so she was referred to Dr. Clemow at Blue Ridge Orthopedics. An MRI was conducted on May 10, 2010 that did not reveal a PCL or meniscal tear, although the visual acuity of the ACL was suspect. Fletcher was then referred for a second opinion with Dr. Posta on July 21, 2010.

Dr. Posta recommended an MRI of the right knee be re-conducted to rule out the possibility of a torn ACL. The subsequent MRI revealed osteoarthritic changes, and no tears of the ACL were present. Dr. Posta indicated she has a four percent (4%) permanent impairment to the right lower extremity and should not be performing kneeling, bending or crawling. (R. p. 166) He also did indicate on the Form 14B that she was not in need of any further medical treatment or care. (R. p. 166)

Fletcher was also seen by Dr. Foster for her lower back complaints. Dr. Foster reviewed the x-rays of the her lumbar spine as well as the MRI that was conducted, which he opined demonstrated degenerative disc disease at L2-the sacrum, and the MRI was negative for any acute injuries. Dr. Foster referred her to Sports Spine Industrial, where a Functional Capacity

Evaluation was conducted. (R. p. 137-42) Fletcher's job demand summary was reviewed, and her position was placed in the light-duty category. (R. p. 137, line 5-7) The Functional Capacity Evaluation indicated Fletcher could perform sedentary to light-duty. (R. p. 137, line 7)

Dick's did refer Fletcher to Dr. Satterthwaite, based on recommendations by Dr. Posta, following a questionnaire submitted by Fletcher. Fletcher was seen initially seen by Dr. Satterthwaite on February 17, 2011. She was complaining of constant pain, which she would rate as a six (6) in her lumbar spine and complained that her right knee becomes aggravated by bending, twisting, lifting, carrying, standing, stooping or crawling. Dr. Satterthwaite placed her on Ultram for the pain/spasms she was experiencing in the lumbar spine. He also indicated she should begin physical therapy, due to her de-conditioning. He further indicated that facet injections should be conducted at L3-L4, L4-L5 and L5-S1, and she be referred to Dr. Tollison for possible situational depression. She underwent the facet injection on March 9, 2011 at L3-L4, L4-L5 and L5-S1. She also underwent physical therapy on March 14, 2011, March 16, 2011, March 21, 2011, March 28, 2011, March 31, 2011, April 4, 2011, April 7, 2011 and April 15, 2011.

On March 28, 2011, Fletcher reported having improvement in her back pain following the injections and the physical therapy. It was noted that she continues to work full-duty at her regular employ. Due to the success of the facet injections, Dr. Satterthwaite was planning to perform a medial branch injection, possibly to be followed by a radiofrequency rhizotomy. Fletcher returned to Dr. Satterthwaite's office on April 25, 2011. She indicated the Ultram was upsetting her stomach, so she was switched to Lortab. It was also recommended she undergo medial branch blocks at L3-L4 through L5-S1. On May 27, 2011, she indicated improvement in her lower back pain following the injections. In fact, since the injections she has had decreased

pain, increased range of motion, improved sleeping patterns and self-reported improved quality of life. Fletcher was scheduled to return in two (2) months. Her medications were refilled, and she was instructed to continue physical therapy. On September 22, 2011, Dr. Satterthwaite placed Fletcher at maximum medical improvement. (R. p. 167)

On March 16, 2011, she was seen by Dr. Tollison and was diagnosed with situational depression. Dr. Tollison prescribed Pristiq. Dr. Tollison's note of April 4, 2011 indicates she was feeling "much better" and noted that her family members as well as her co-workers have noticed a difference in her attitude. She was scheduled to follow-up in one (1) month's time.

On May 17, 2011, Fletcher was again seen by Dr. Tollison. She noted that she did receive benefit from the bi-lateral L3, L4, L5 and S1 medial nerve facet blocks. She also noted that Pristiq was helping her mood. Dr. Tollison noted she was cognitively intact. He further noted at the July 29, 2011 appointment that she was continuing to do well on Pristiq and was to follow up in six (6) weeks. On November 28, 2011, Dr. Tollison also placed Fletcher at maximum medical improvement. (R. p. 168)

As stated previously, Fletcher and Dick's entered into a Form 16A settlement on February 8, 2012. (R. p. 1) Thereafter, she filed a Form 50 alleging a change of condition for the worse. At that hearing, held on September 5, 2012, Fletcher testified she is currently fifty-three (53) years old, has a twelfth (12th) grade education and has worked for Dick's Sporting Goods for four (4) years. She admittedly had an injury to her lower back and right knee on March 13, 2010.

Fletcher returned to work on a permanent basis on August 14, 2010. She continued to work at Dick's Sporting Goods, under Dr. Satterthwaite's work restrictions, from August of 2010

until February of 2011. Upon returning to work initially, Fletcher indicated she was physically able to perform all functions of her position with some exception. She alleged she was incapable of bending below the waist to stock merchandise, lift more than fifteen to twenty (15-20) pounds, would experience pain upon lifting objects more than ten to fifteen (10-15) pounds, and experienced lower back pain upon sweeping. Otherwise, she was physically able to perform all aspects of her position. Fletcher testified she intended to continue to work, until her episode in February of 2012.

On a Wednesday in February of 2012, Fletcher was admittedly off work and was shopping with her daughter. She started feeling sick and vomited on a retail counter. She remained home on bed rest for four (4) days before going to the hospital. (R. p. 158, line 9) She admittedly was experiencing numerous episodes of vomiting and dry heaving before her hospitalization. (R. p. 153, line 10) She eventually called EMS. On February 17, 2012, at the Emergency Room, she reported vomiting on at least twelve (12) episodes over approximately twenty (20) hour period. (R. p. 153, line 10) She was hospitalized until February 21, 2012. (R. p. 161, line 5) On February 27, 2012, Fletcher reported to Dr. Satterthwaite, "vomited so hard felt a pop in [my] back ... Some immediate leg numbness ... Now with significant spasms and back pain ... Off of work this week due to spasms." (R. p. 61, lines 6-10) Also, Dr. Satterthwaite noted, on June 13, 2012, that she "is having an exacerbation of her symptoms from the original injury." (R. p. 93, line 16-17) Since that time, Fletcher has not worked and continues to treat with Dr. Satterthwaite and Dr. Tollison.

Fletcher filed a Form 50, alleging a change of condition to her spine and right lower extremity. Fletcher alleged she was no longer at maximum medical improvement and sought additional medical treatment and care as well as additional temporary total disability benefits

from February 27, 2012 and continuing. Also, Fletcher specifically requested a MRI of the right knee as a result of her alleged change of condition.

Dick's denied Fletcher sustained a change of condition for the worse to her spine or right knee. Rather, Dick's argued Fletcher clearly sustained an intervening accident that broke the causal connection from her initial work-related injury of March 13, 2010. Dick's also denied Fletcher sustained a change of condition for the worse to her right lower extremity. Therefore, she was not entitled to any additional treatment not already specified on the Form 16A settlement. (R. p. 1)

This matter then came before Commissioner Beck pursuant to Fletcher's Form 50, alleging a change of condition for the worse to her right lower extremity and spine, as a result of her injury on March 13, 2010. (R. p. 2) The Single Commissioner held as follows: 1) Fletcher suffered a change of condition to her spine, but this did not preclude a later finding that Fletcher did return to baseline status; 2) Fletcher is entitled to causally related medical care and treatment to her spine; 3) Fletcher is entitled to temporary total disability benefits from February 27, 2012 and continuing; 4) Fletcher is not at maximum medical improvement; and 5) Fletcher's request for an MRI to the right knee was denied as it was not contemplated on the Form 16A. (R. p. 2, 11-13)

From the Single Commissioner's Order dated October 12, 2012, Dick's appealed. (R. p. 24) On February 19, 2013, an Appellant Panel Review was held in Columbia, South Carolina. The Full Commission affirming the Single Commissioner's Decision and Order. While this matter was pending for review before the Full Commission, Fletcher filed another Form 50

alleging a second change of condition to the right lower extremity. This is the Form 50 pertaining to this appeal.

A hearing was held on February 5, 2013 before Commissioner Barden. (R. p. 14) An extensive Pre-Hearing conference was held. (R. p. 14-15) During the Pre-Hearing Conference, Dick's argued that Fletcher could not prevail on a change of condition for the worse based upon the medical evidence. Commissioner Barden indicated to Fletcher's attorney that Fletcher's testimony may be compelling enough to meet her burden of proof. However, Commissioner Barden stressed, after having listened to arguments by both Dick's and Fletcher, as well as reviewing the medical evidence, that Fletcher had not made a compelling argument for a finding that she sustained a change of condition for the worse. Then, as the Single Commissioner's Order dated March 12, 2013, indicates, the Commissioner suggested Fletcher withdraw her Form 50, not move forward with the hearing, and obtain additional diagnostic evidence. (R. p. 14, lines 6-7) The Single Commissioner did not retain jurisdiction over the matter despite Fletcher's request.

At the Pre-Hearing Conference Dick's argued that Fletcher needed to move forward with the hearing, since Fletcher's one (1) year filing for a change of condition for the worse would expire on February 21, 2013, according to the Form 19. Nonetheless, Fletcher withdrew her Form 50. (R. p. 14, line 8-9) The Order specifically states, "The undersigned discussed postponement in the case Claimant's attorney wanted to obtain additional diagnostic evidence. At that point, Defense Counsel objected to the case being postponed. Claimant's counsel then withdrew the hearing request." (Emphasis added) (R. p. 14, lines 6-9) From the Single Commissioner's Order dated March 12, 2013, the Dick's appealed. (R. p. 14-15)

Per the Form 30, dated March 18, 2013, Dick's requested a review based on the following grounds:

1. Whether the Single Commissioner can, by Order, extend the time limits as set forth by S.C. Code Ann. Section 42-17-90?
2. Whether the Single Commissioner erred in failing to find that in the event the Claimant withdrew her Form 50 that the claim would be barred by S.C. Code Ann. Section 42-17-90?
3. Whether the Claimant has failed to prove she sustained a change of condition for the worse within one [1] year of the last date of payment of compensation to the Claimant?
4. Whether the Single Commissioner erred in failing to find in accordance with S.C. Code Ann. Section 42-17-90 that "the review must not be made after twelve (12) months from the date of the last payment of compensation pursuant to an award provided by this title."?

(R. p. 38) The Appellate Panel Review Hearing was held in Columbia, South Carolina on June 18, 2013. (R. p. 16) The Commission did affirm the Single Commissioner's Order on September 9, 2013. (R. p. 16-23) From that Order Dick's appeals.

STANDARD OF REVIEW

The standard of review in workers' compensation cases is clear, in that a court may overturn a conclusion of the South Carolina Workers' Compensation Commission if that conclusion is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304, 306 (1981). See also Rodney v. Michelin Tire Corp., 320 S.C. 515, 466 S.E.2d 357 (1996); S.C.Code Ann. § 1-23-380(2009).

The test is whether the decision of the Commission is supported by substantial evidence. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify the action.

Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct App. 1995). The Appellate Court is prohibited from overturning findings of fact of the Commission, unless there is no reasonable probability that the facts could be as related by the witness upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534 S.E.2d 87 (Ct. App. 1984). The Appellate Court is not permitted to re-weigh the evidence and to substitute its own findings of fact for those of the Commission. Brown v. Jordan Oil Co., 291 S.C. 272, 353 S.E.2d 280 (1987).

Thus, "review is limited to deciding whether the Commission's decision is unsupported by substantial evidence or is controlled by some error of law." Rodriguez v. Romero, 363 S.C. 80, 84, 610 S.E.2d 488, 490 (2005) citing Hendricks v. Pickens County, 335 S.C. 405, 411, 517 S.E.2d 698, 701 (Ct. App. 1999). In an appeal from the Commission, the Court of Appeals is

free to reverse where the decision is affected by an error of law. Pratt v. Morris Roofing, Inc.,
577 S.E.2d 475 (S.C. App. 2003)

ARGUMENT

- I. **The Commission erred in finding Fletcher could withdraw her Form 50, Change of Condition for the Worse, by Order, and then refile at anytime, since the Statute of Limitations cannot be tolled as set forth in S.C.Code Ann. § 42-17-90(2010).**

The Commission's decision is affected by an error of law. The Workers' Compensation Commission does not have jurisdiction to hear a claim for a change of condition for the worse in the event an application for review has not been made within a one (1) year period since the date of last payment of compensation. Allen v. Benson Outdoor Co., 236 S.C. 22, (1960). The conclusiveness of this provision is inescapable. Wallace v. Campbell Limestone Co., 198 S.C. 196, (1941).

S.C.Code Ann. § 42-17-90(2010) states,

On its own motion or on the application of a party in interest on the ground of a change in condition, the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation. An award is subject to the maximum or minimum provided in this title, and the commission immediately shall send to the parties a copy of the order changing the award. The review does not affect the award as regards any monies paid and the review must not be made after twelve months from the the date of the last payment of compensation pursuant to an award provided by this title.

The "review" is the Form 50 filing a claim for a change of condition. The Court has made it clear that the hearing need not take place within the twelve (12) months from the payment of the last date of compensation, as long as the claimant has filed an application for review within the twelve (12) month period. See Allen v. Benson Outdoor Co., 236 S.C. 22,

(1960). Allen did not deal with the situation at hand where there is not a Form 50, application for review, pending before the Commission, since it was withdrawn by Fletcher.

Logic only dictates that an application for review needs to be filed within the twelve (12) month period and may not be later withdrawn and then attempt to refile a Form 50 outside the twelve (12) month Statute of Limitations. The Form 50, application for review, could have been withdrawn within the twelve (12) month and refiled within the twelve (12) month Statute of Limitations. See S.C.Code 67-609(B)(2010) (Discussed more thoroughly in Argument II) Then Dick's would have no argument. However, the Court has held the Commission cannot on its own motion re-open a final award due to a change of condition more than twelve (12) months from the date of last payment of compensation pursuant to an award. Creech v. Ducane Co., 320 S.C. 559 (Ct. App. 1995).

In this instance, Fletcher withdrew her application for review at the hearing held on February 5, 2013. She had until February 21, 2013 in order to refile her Form 50 application for review. This was not done. In fact, Fletcher has yet to file another application for review. This is the reason why the Commission does not have the ability to toll the Statute of Limitations as set forth in S.C.Code Ann. § 42-17-90(2010). Here, according to the Commission's ruling, it has the applicable affect of allowing Fletcher to file for an application for review at any time in the future. A hearing could be held five (5) years down the road. This is not what the Legislature intended.

The Court in Wallace v. Campbell Limestone Co., 198 S.C. 196 (1941), held that the "limitations written in the Act and the wisdom of them is manifest when reflection is had on the difficulties which would be faced by Employers and Insurance Carriers in resisting long delay

demands.” The Court cited Hamilton v. Little, 197 S.C. 434 (1941) holding, “the ostensible purpose or rationale underlying the Statute of Limitations is to prevent the obvious difficulties that would be faced by the Employers and their Insurance Carriers if it were not enforced.”

Similarly, the Court has held in regard to the two (2) year Statute of Limitations in S.C.Code. Ann. § 42-15-40(2010) that a claim is barred unless a claimant files a claim within this period. Again, a claim must be filed within the two (2) year period, but a hearing need not be held within the two (2) years. The Statute can only be tolled during the “reliance period,” which is the period during which an employee is induced by the employer to believe that his or her claim is compensable and will be taken care of without the employee filing a claim. Hopkins v. Floyd’s Wholesale, 299 S.C. 127 (S.C. 1989). However, the claimant must file a claim within a reasonable time following the reliance period. See Hopkins. The reliance also extends to payments of compensation by the employer. The two (2) year Statute begins to run on the last compensation payment to the employee. Hopkins v. Floyd’s Wholesale, 295 S.C. 154 (S.C. App. 1988).

The Court has held, the language used in this section [S.C.Code Ann. § 42-15-40(2010)] is plain and unambiguous, and the Court is not at liberty by judicial construction to add to or amend this section so as to excuse an employee from complying with the mandatory requirement. Kirby v. Holliday Laundry & Dry Cleaners, 230 S.C. 412 (S.C. 1957). The Court further held, while the Statute of Limitation section should be given a liberal construction, the Court is not justified in so construing it as to do violence to a specific requirement of the Compensation Act. Such Statutes apply with full force to the most meritorious claims. Ashe v. Rock Will Hardware Co., 219 S.C. 159 (S.C. 1951)

II. Fletcher's reliance on S.C.Code Reg. 67-609(B)(2010) is misplaced.

Fletcher intends to argue that S.C.Code Reg. 67-609(B)(2010) allows a claimant the right to proceed with a claim when a Form 50, application for review, was once filed, within the twelve (12) month Statute of Limitations requirement, as set forth in S.C.Code Ann. § 42-17-90(2010), then withdrawn. Essentially, it is Fletcher's argument that after the Form 50 was filed, then withdrawn, it tolls the Statute of Limitations, and she can later file outside of the one (1) year Statute of Limitations period.

S.C.Code Reg. 67-609(A) allows a "claimant [to] withdraw a Form 50 . . . once as a matter of right with leave to renew." S.C.Code Reg. 67-609(B)(2010) states, "The notice is without prejudice to the claimant's right to proceed with his or her claim." S.C.Code Reg. 67-609(2010) states, "Withdrawing a Form 50 . . . the second time without good cause may operate as a voluntary dismissal of the claim when the form is withdrawn by a claimant who has once withdrawn a Form 50 . . . based on the same set of facts, and, in the opinion of the Commissioner, the form is withdrawn merely for the purpose of delay.

The clear reading of the statute is merely to allow a claimant to be able to withdraw his or her Form 50 as a matter of right and indicates withdrawing a Form 50 a second time is not a matter of right and will be scrutinized by the Commission. The Statute never mentions the ability to toll the Statute of Limitations in S.C.Code Ann. § 42-17-90(2010) or the Statute of Limitations in S.C.Code Ann § 42-15-40(2010).

III. Fletcher's reliance on the Court's Decision in Allen v. Benson Outdoor Adver. Co., 236 S.C. 22, 112 S.E.2d 722 (1960) is also misplaced.

S.C.Code Ann. § 42-17-90(A)(2010) provides, "[T]he review must not be made after twelve (12) months from the date of the last payment of compensation pursuant to an award provided by this title." The Court has held that this provision allows a change of condition claim to proceed as long as the application for review was filed within the one (1) year period, and the actual hearing on the issue need not be heard during the one (1) year period. Allen v. Benson outdoor Adver. Co., 236 S.C. 22, 112 S. E.2d 722 (1960). The Court quoted Wilkins V. State Comp. Comm'r, 198 S.E. 871 (W.Va. 1938) held,

The filing of a claim for further compensation within the statutory period and partial but not complete development thereof within such period, with loss of jurisdiction by the commissioner during the progress of the case, would be an absurd result which the legislature certainly did not have in mind, and we feel warranted in holding that the statute in question should be given a construction which permits the commissioner to hear and pass upon any application in writing for further adjustment of a claim, *if filed within the statutory period applicable to the nature of the claim filed.*

Allen, 112 S.E.2d at 726. (Emphasis Added) The holding in Allen is clear, but is not applicable to the case at bar, since there is not a claim filed within the twelve (12) month period. The Court indicated, "if filed within the statutory period applicable to the nature of the claim filed." Allen, 112 S.E.2d at 726. Fletcher's Form 50, application for review, was withdrawn by Fletcher and has yet to be refiled. Any reliance Fletcher places on Allen in her argument is misplaced. Dick's is not arguing that a hearing need take place within the twelve (12) month Statute of Limitations period, only that an application for review, Form 50, needs to be filed with the Commission within the one (1) year period allotted. Here, the Form 50 was withdrawn and a Form 50, application for review, has yet to be refiled.

CONCLUSION

For the reasons set forth, Dick's requests the South Carolina Court of Appeals to reverse the South Carolina Workers' Compensation Commission's Decision and Order dated September 19, 2013. Dick's respectfully requests that the South Carolina Court of Appeals hold the Commission does not have the power to toll the Statute of Limitations, as set forth in, S.C.Code Ann. § 42-17-90(2010) by Order of the Commission.

Respectfully submitted,

BY: 

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC Number: 1003122

Zeena Fletcher, Employee, Respondent,


v.

Dick's Sporting Goods, Employer, and Federal Insurance Co., Carrier, Appellants.

PROOF OF SERVICE

I certify that I have served the Respondent's BRIEF OF APPELLANT to Respondent/Appellant by depositing a copy of this document in the United States mail, first class postage prepaid, on May 9th, 2014 to Zeena Fletcher's Counsel of record Kathryn Williams, Esquire, Kathryn Williams, P.A., P.O. Box 10693, Greenville, South Carolina 29603.

This 9th day of May, 2014



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Attorney for Defendant

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC Number: 1003122

Zeena Fletcher, Employee, Respondent,


v.

Dick's Sporting Goods, Employer, and Federal Insurance Co., Carrier, Appellants.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that The Respondent's Appendix to the Record on Appeal complies with the August 13, 2007 Order of the South Carolina Supreme Court.

This 9th day of May, 2014



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC Number: 1003122

Zeena Fletcher, Employee, Respondent,


v.

Dick's Sporting Goods, Employer, and Federal Insurance Co., Carrier, Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Appendix to the Record on Appeal complies with Rule 209(c) and does not contain matter which is irrelevant to the appeal.

This 9th day of May, 2014



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