APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1222136

Otis Nero, Respondent CLAIMANT,

vs.

South Carolina Department of Transportation, EMPLOYER,

AND

State Accident Fund , CARRIER, DEFENDANTS/Appellants

Appellate Panel Review held in Columbia, South Carolina, on per notices timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed May 29th, 2015

APPEARANCES:

Respondent Otis Nero, Claimant, of Florence, South Carolina represented by Stephen J. Wukela.

Defendants/Appellants represented by John Gabriel Coggiola, Esquire of Willson Jones Carter & Baxley, P.A. in Columbia, South Carolina.

STATEMENT OF THE CASE

On January 6, 2014, Claimant filed a Form 50 Request for Hearing, alleging injuries to the neck and bilateral shoulders, as a result of pulling cement with a road crew using a large squeegee board on June 20, 2012. Claimant's Form 50 alleges that Claimant suffered an immediate onset of pain in his neck and shoulders, which was subsequently followed by an episode of syncope. On his Form 50, Claimant requested additional medical treatment to his neck and shoulders and TTD benefits for "various dates and times" from 06/20/12 to the present.

On January 9, 2014, Defendants timely filed a Form 51 Answer to Claimant's Request for Hearing. Defendants denied Claimant sustained a compensable injury by accident arising out of and in the course of his employment on the date alleged. Specifically, Defendants argued that Claimant failed to provide the employer with proper notice in accordance with S.C. Code Ann. §42-15-20 and supporting case law, and Claimant lacked sufficient causation to establish a compensable injury by accident.

A hearing was held before Commissioner Aisha Taylor on March 28, 2014. At the hearing, Claimant took the position that while working on June 20, 2014 with a crew laying a large concrete pad, Claimant felt an onset of pain in his back and shoulders, although he admits that he did not report the incident to his supervisors and continued to work. Claimant further alleges that at the end of the work day, he was standing around, talking, and joking with his supervisors at the shed, and he had a sudden syncope episode, causing him to fall to the ground and knocking him unconscious. After Claimant was revived, he instructed his supervisors that he was fine to drive home, but when he reached his house he suffered another syncope episode in the driveway, and he was taken to the E.R. by his wife. In an effort to determine the cause of his syncope episode, Claimant underwent a variety of tests, including a cervical MRI, which identified cervical stenosis. Claimant was referred to a neurosurgeon, Dr. William Naso, who

performed a fusion surgery on August 28, 2012. Claimant alleges that the he suffered an aggravation of pre-existing stenosis that caused the syncope episode and aggravation of his cervical spine.

Defendants' position at the hearing was that Claimant lacked sufficient evidence of causation to satisfy their burden of proving Claimant sustained an injury by accident while pulling the squeegee board, and Claimant failed to prove that that pulling the squeegee board caused the syncope episode and aggravation of Claimant's pre-existing cervical condition, which led to surgery. Further, Defendants took the positon that Claimant failed to provide his employer notice within the required ninety (90) day notice period set forth in S.C. Code Ann. §42-15-20 and supporting case law, and as a result, Claimant's request for benefits should be denied.

On August 5, 2014, Commissioner Taylor issued the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. **I find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Otis Nero being the Claimant, and South Carolina Department of Transportation being the Employer, and the State Accident Fund being the Carrier.**

This finding is based upon stipulation of the parties at the commencement of the hearing.

2. **I find that pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is**
Five Hundred Nineteen and 83/100 ($519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 ($346.57) Dollars.

This is pursuant to the stipulation of the parties at the commencement of the hearing.

3. **I find that pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, I further find, pursuant to S.C. Code §42-9-35 by a preponderance of the evidence, including medical evidence, that the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck, albeit asymptomatic**

until the accident.

This finding is based on the above set out evidence. The preponderance of the medical evidence, including the diagnoses of Dr. Naso and the causation statement of Dr. Richey, forms the basis, in particular, for this conclusion.

Dr. Naso, the treating neurosurgeon, saw the Claimant on June 24, 2012 in the hospital at the request of Dr. Richey. (Claimant's APA No. 1, pp. 10 – 11). This evaluation was performed only four days after the accident. Dr. Naso reviewed an MRI of the cervical spine dated June 24, 2012 which showed:

> On the axial images, C2-3 is unremarkable.
>
> At C3-4 there is mild spinal stenosis with the AP diameter of the canal measuring 9.5 mm. There is moderate narrowing of the right foramen and mild narrowing of the left foramen due to a diffuse disc bulge.
>
> At C4-5 there is moderate narrowing of both foramen and mild spinal stenosis due to a diffuse disc bulge. AP diameter of the canal is 1 cm.
>
> At C5-6 there is mild narrowing of the right foramen. The left foramen is spinal stenosis secondary to diffuse disc bulge. AP diameter of the canal is 9.5 mm.
>
> At C6-7 there is moderate narrowing of both foramen with spinal stenosis. AP diameter of the canal measures 9.5 mm.
>
> At C7-T1 there is moderate spinal stenosis with the AP diameter of the canal measuring 8 mm. There is moderate narrowing of both neural foramen due to a diffuse disc bulge.
>
> IMPRESSION:
> ABNORMALITY AT MULTIPLE LEVELS. MOST SEVERELY INVOLVED IS C7-T1. CLINCIAL CORRELATION RECOMMENDED.
>
> (Claimant's APA No. 1, p. 8).

On June 24, 2012, Dr. Naso noted the Claimant's complaints of syncope and neck pain into both arms, predominantly the right upper extremity, as well as numbness and weakness in both hands. He diagnosed cervical radiculopathy and ordered epidural steroid injections. (APA No. 1, pp. 10 – 11).

The Claimant's uncontradicted testimony was that he had not had any neck pain prior to June 20, 2012. (Hrg. Tr. p. 26, ll. 11 – 13).

Dr. Richey testified unequivocally that the Claimant suffered from a preexisting condition that was aggravated by pulling the squeegee board to level the concrete on June 20, 2012. He testified:

Q. Sure. Do you have an opinion, though, as to whether that activity would have aggravated the condition of his cervical spine?
A. More than likely, certainly.
Q. And is that opinion to a reasonable degree of medical certainty?
A. I think so.

(Dep. Richey, p. 19, ll. 12 – 18).

Q. You've also testified pretty unequivocally that he had preexisting stenosis in that spine before June the 20th, 2012, that he had a arthritic condition?
A. He would have to have.
Q. He would have to have had. And that certainly wasn't caused by the squeegee board or the syncope?
A. Yes, sir.
Q. That was caused -- that was age and years of working?
A. That's my opinion.
Q. Okay. I think I also understood your testimony, that, however, using the squeegee board the way he did that day aggravated that preexisting stenosis?
A. My theory on that is that he had increased pressure, abdominal pressure. It would have increased his backflow in his veins and that might have been just enough to offset his equilibrium in his spinal cord.
Q. Potentially causing that syncope?
A. Adding to it.
Q. Adding to it?
A. Yes.
Q. Given the fact that it's June and he's been working?
A. Correct.
Q. All right. And set aside the syncope, though, also aggravating that preexisting stenosis resulting in the bilateral arm numbness and the aggravation of that condition to the point that Dr. Naso recommended and performed a bilateral fusion?
A. Yes, sir.
Q. Okay. And that's your opinion to a reasonable degree of medical certainty?
A. That's the fact.

(Dep. Richey, p. 54, l. 6 – p. 55, l. 15).

Also, while there appears to be some disagreement between Drs. Richey and Naso as to whether the neck condition directly caused the syncope, it was Dr. Richey's uncontradicted testimony that pulling the squeegee board on the afternoon of June 20, 2012 aggravated the preexisting but previously asymptomatic stenosis in Mr. Nero's neck; causing neck pain and bilateral upper extremity pain.

4. I find that the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy.

This finding is based on the above set out records and testimony. In particular,

both Dr. Richey and Dr. Naso clearly opined that the Claimant was suffering radiculopathy into his upper extremities as a result of his neck condition. Dr. Naso diagnosed cervical radiculopathy and noted:

The patient is a 62-year-old black male who was admitted with syncope but who also has been having neck pain and pain into both arms, predominantly in the right upper extremity with pain radiating to the right shoulder and arm into the middle and ulnar hand.
(Claimant's APA No. 1, p. 10).

The uncontroverted testimony of the Claimant at trial was that he was still having problems with his hands, even subsequent to the two-level fusion. (Hrg. Tr. p. 30, ll. 4 – 6).

5. I find that the Claimant is not at maximum medical improvement and determination of permanency is premature at this time.

This finding is based on the stipulation of the parties at the commencement of the hearing. (Hrg. Tr. p. 17, ll. 2 – 6).

6. I find that pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.

The Courts have consistently held that the purpose of the notice provision, S.C. Code §42-15-20 and its predecessors, is twofold: First, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded; and second, it affords the employer the opportunity to furnish medical care to the employee in order to minimize the disability and consequent liability to the employer. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).

The Courts have also held that the notice section should be liberally construed in favor of claimants, but that there are limitations upon the rule and the statutory requirements cannot be disregarded altogether. (Id.) (See also Hartzell v. Palmetto Collision, LLC, 406 S.C. 233 (S.C. App. 2013)).

The Claimant bears the burden of proving either notice or reasonable excuse. (See Lizee v. S.C. Department of Mental Health, 367 S.C. 122 (S.C. App. 2005). However, once reasonable excuse has been shown, it is the employer's burden to show prejudice resulting from the absence of formal notice. (See Lizee v. S.C. Department of Mental Health, 367 S.C. 122 (S.C. App. 2005)).

Here, I find that the employer had actual knowledge and informal notice of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and; therefore, trigger investigation of the accident and treatment of the injury. The Claimant's supervisors were present during the incident of syncope which ultimately led the Claimant to the hospital on the same day. The employer was also aware that the Claimant remained in the hospital and was treated by a neurosurgeon, who performed two-level fusion shortly thereafter. (See Plaintiff's Exhibits 1 – 5).

The Claimant demonstrated reasonable excuse for not formally reporting the work injury because his supervisors were present and, as the Claimant testified, he had spoken with them both while in the hospital. (Hrg. Tr. p. 29, l. 21 – p. 30, l. 3) Moreover, the Claimant subsequently provided the employer with documents describing his condition including Plaintiff's Exhibit 1, which is a Family Medical Leave Act form from his family doctor, Dr. Richey, dated July 9, 2012, just under three weeks after the accident. The FMLA form indicates the Claimant's condition is "neck and syncope" and further indicates that the Claimant "has to have neck surgery." (Plaintiff's Exhibit 1).

Claimant's supervisor, Mr. Bostick, testified that he did not receive Claimant's Exhibit 1, nor would he have in the normal course of business. Instead, as was customary, Plaintiff gave the form to the Human Resources office. (Dep. Bostick, pp. 16 – 29). Mr. Bostick testified that if he had been aware of the contents of Exhibit 1, it would have caused him to do further investigation into the accident. He testified:

Q. And let me ask you one more thing. Listen, Mr. Bostick, I know you didn't have this document, [Plaintiff's Trial Exhibit 1]. You've already told me that.
A. Right.
Q. Okay. But if you had that, if Nero had brought it to you -- okay. Now, you knew he had been out of work since that day he laid out and that his note said that he had to have neck surgery. Would that have triggered you to do an investigation?
A. Well, I would have went to the safety coordination.
Q. Okay. Okay. Which is what you're --
A. -- suppose to do.
Q. -- supposed to do?
A. Yeah.

(Dep. Bostick, p. 28, l. 23 – p. 29, l. 12).

Q. Okay. The day he passed out, you didn't feel like you needed to fill out any Form 12B because you didn't know why he passed out, and he said he was all right.
A. Exactly.
Q. But you didn't -- he didn't come back?
A. He never came back.
Q. You didn't know why he didn't come back?
A. No.

Q. Okay. If he had, on July the 9th, 2012, brought you [Plaintiff's Trial Exhibit 1] and it said he was out since June the 20th, 2012, and he had to have neck surgery, would that have triggered you to do an investigation, to fill out a Form 12B?

A. Well, I would have went in the office and got with Eric and Al Griggs. Al is our safety coordinator. Eric is our boss. And we would have went to investigating what we need to be doing in a situation like that, you know.

Q. Okay. You would have considered that an indication there was a possible work-related injury that we need to investigate?

A. I didn't know what it -- it would have -- could have been, you know. I wouldn't have known until we got [Plaintiff's Trial Exhibit 1]. Then they would have start their process of investigating how they go about notifying who they need to notify and do their thing, because certain parts we'll get out of the stage of it, when it gets - - starts going up, you know, because I don't do the safety part of it. They'll get to the safety coordinator. We got on in the district. It goes to Columbia. It goes on to do their thing.

Q. Yeah. But you didn't have [Plaintiff's Trial Exhibit 1]

A. No. It wouldn't have come to me. If he would have brought -- unless he would have come on the yard and brought it to me personally, it wouldn't have come to me because they're supposed to go through the office.

Q. But if it had --

A. We would have went back in the office.

Q. And you have said let's -- let's go through this work-related injury paperwork?

A. Yeah. We would have talked to the people we needed to talk to, to get it - - get that -- get it solved, whatever is going on.

(p. 43, l. 6 – p. 44, l. 25) (emphasis added).

The Claimant's lead man, Mr. Durant, was also present during the incident of syncope and he testified that he was required to report all accidents, (Dep. Durant p. 42, l. 1 – p. 43, l. 8), but that he did not report the Claimant's syncope to his supervisor because his supervisor was present. He testified:

Q. I'm looking at this instructions you guys got about injuries on the job. As the lead man, do you get to choose -- you have some discretion in choosing what injuries to report and what injuries not to report?

A. Do we get -- no. I don't care if it's -- if it -- whatever it is, it is, if it's small or whatever else.

Q. I mean, a guy hurts his thumb, you've got to report it?

A. If you hurt your thumb and you feel like you need medical attention, you need to go report it.

* * *

Q. But do you have any responsibility as the lead man to report injuries?

A. Do I have any? Yes, if it happens right here with me, I have a

responsibility to report it.

Q. What if I say, look here, lead man, it's just my thumb. Don't worry about it. I don't want to report it.

A. Well --

Q. Can you say, no, we're not going to tell the supervisor?

A. No. I'm not going to do that because there's too much that come back and bite you.

Q. All right. Well, let me ask you, when he passed out that day, did you tell your supervisor about it?

A. He was right there.

(Dep. Durant, p. 44, l. 18 – p. 47, l. 12) (emphasis added).

Q. Safe to say, after that day, when you knew that Nero had passed out, you felt like that it had been reported wherever it needed to be reported on the count of the fact that your supervisor was standing right there?

A. Well, not only that, I mean, being real, it probably done got back to whoever it need to get back to when he was out of work.

(Dep. Durant p. 49, l. 14-21).

Thus, the lead man, Mr. Durant, like the Claimant, believed the incident had been adequately reported because of the presence of their respective supervisor.

The Plaintiff's Exhibits 2 – 4 contain out-of-work slips from the Claimant's treating neurosurgeon, Dr. Naso, to the employer indicating he was unable to work due to cervical radiculopathy. Indeed, Plaintiff's Exhibit 5 contains a letter written by the employer to Dr. Naso acknowledging that they were aware that Dr. Naso was treating the Claimant and asking Dr. Naso his opinions as to the Claimant's ability to return to work.

Thus, the employer was obviously aware the Claimant had an incident where he passed out after pulling the squeegee board; that he had not returned to work, and that, instead, he had been taken to the hospital where he was treated by his family doctor and a neurosurgeon, who diagnosed cervical stenosis and recommended, and ultimately performed, neck surgery.

The Claimant's lead man testified that he did not fill out a formal report of incident after the Claimant's passing out episode because his supervisor was present and he believed that was sufficient. It is certainly reasonable for Mr. Nero to have believed the same thing.

Claimant's crew supervisor, Danny Bostick, testified that if he had been aware of the details that the Human Resources department received in the form of the FMLA form contained in Plaintiff's Trial Exhibit 1, he would have further investigated the incident.

On cross examination, the Defendants explored the fact that the Claimant had a prior workers' compensation injury on the job. However, the testimony revealed that during that prior incident, like this one, his employer was present and therefore no more

formal mode of notice was required. (Hrg. Tr. p. 27, l. 18 – p. 29, l. 9).

Thus, the undersigned finds that the employer had sufficient actual knowledge and informal notice of the pertinent facts surrounding Mr. Nero's injury to indicate the possibility of a compensable injury, and, therefore to trigger them to do an investigation of Claimant's injury and to direct Claimant's medical treatment. The undersigned further finds that given the Claimant's knowledge that the employer had been present during his passing out episode and was aware of his subsequent treatment, it was reasonable for the Claimant to conclude that no more formal reporting was required.

7. I find that the Defendants were not prejudiced by the late formal reporting of the injury.

Once reasonable excuse has been established, it is the employer's burden to demonstrate prejudice from the absence of formal notice. (See Lizee v. S.C. Department of Mental Health, 367 S.C. 122 (S.C. App. 2005)). Again, in evaluating prejudice, the Commission is cognizant that the purpose of the notice requirement is to afford the employer the ability to investigate the facts of a claim while the witnesses memories are unfaded; and secondly, to afford the employer the opportunity to furnish medical care to minimize disability. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).

Here, the Claimant's supervisors witnessed the syncopal episode and were able to testify with clarity as to their recollections. The Claimant received treatment at the hospital the day of the accident and remained in the hospital to see a neurosurgeon, who diagnosed the Claimant with cervical radiculopathy after reviewing an MRI of his cervical spine performed within four days of the accident. After conservative care, the neurosurgeon ultimately performed surgery on August 28, 2012, approximately two months after the accident.

The evidence of the record reveals that the employer was aware that the Claimant was in the hospital and that he was being treated by a neurosurgeon for cervical radiculopathy. (See Plaintiff's Exhibits 1 – 5). In fact, the employer wrote the neurosurgeon for his views as to the Claimant's work ability in November, 2012. (Plaintiff's Exhibit 5).

The only suggestion of prejudice that the employer makes is that they were not able to send Claimant to a physician of their choice to explore a treatment alternative to surgery. (Hrg. Tr. p. 11, l. 24 – p. 12, l. 4).

However, it is undisputed that the employer was aware, as early as July 9, 2012, just three weeks after the accident, that the Claimant's family doctor, Dr. Richey, believed that the Claimant required neck surgery. (Plaintiff's Exhibit 1). Similarly, by July 12, 2012, by virtue of Claimant's Exhibit 2, the employer was aware that the Claimant was being treated for cervical radiculopathy by Florence Neurosurgery & Spine.

The records of Dr. Naso at Florence Neurosurgery & Spine reveal that he

recommended, and Claimant underwent, conservative treatment including a series of epidural steroid injections and physical therapy before Dr. Naso recommended and performed surgery. (Claimant's APA No. 2). At no point, did the employer indicate any dissatisfaction with the treatment the Claimant was receiving. Indeed, the employer wrote Dr. Naso in November, 2012 to obtain his opinions as to the Claimant's work ability. (Plaintiff's Exhibit 5).

The Defendants have offered no evidence to support a conclusion that they were prejudiced in any way by the absence of more formal notice of the Claimant's injuries. Indeed it would seem that the Claimant's medical treatment was prompt and comprehensive. Moreover, the employer's investigation of the accident was unimpaired, given the fact that two of Claimant's supervisors actually witnessed the pertinent facts, and recalled them with clarity.

The employer has suffered no prejudice.

8. I find that the Claimant is totally disabled and entitled to benefits pursuant to S.C. Code §42-9-10 for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 ($346.57) Dollars until further Order of this Commission.

This finding is based on the above set out records and testimony. In particular, Dr. Richey's uncontroverted statement in Claimant's Exhibit 1 indicates that he expects that the Claimant will be incapacitated due to his medical condition from June 20, 2012, indefinitely. Also, Claimant's Exhibits 2 and 3 contain out-of-work slips from Dr. Richey and Dr. Kline of Florence Neurosurgery & Spine.

9. I find that pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed by Dr. Naso on August 28, 2012.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Laws, 1976, as amended, §42-17-40, it is the determination of this Commissioner:

1. **Pursuant to S.C. Code §42-1-130, the Claimant was a covered Employee at the time in question; and under S.C. Code §42-1-140, the Defendant-Employer was a covered Employer under the Act.**

2. **Pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 ($519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 ($346.57) Dollars.**

3. **Pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, that pursuant to S.C. Code §42-9-35 the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck; albeit asymptomatic until the accident.**

4. **Pursuant to Singleton v. Young Lumber Co., 236 S.C. 454 (1960) and its progeny the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy.**

5. **The Claimant is not at maximum medical improvement and determination of permanency is premature at this time.**

6. **Pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery.**

7. **Pursuant to S.C. Code §42-15-20, the Defendants were not prejudiced by the late reporting of the injury.**

8. **Pursuant to S.C. Code §42-9-10, the Claimant is totally disabled and entitled to benefits for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 ($346.57) Dollars until further Order of this Commission.**

9. **Pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012.**

ORDER

IT IS, THEREFORE, ORDERED that the Form 50 regarding the injury of June 20, 2012 under workers' compensation file no. 1222136 is found to be a compensable accident.

IT IS FURTHER ORDERED that the Employer, South Carolina Department of Transportation, and their Carrier, State Accident Fund, shall pay all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012.

IT IS FURTHER ORDERED that the Employer/Carrier shall pay the Claimant benefits at the weekly compensation rate of Three Hundred Forty-Six and 57/100 ($346.57) Dollars from June 20, 2012 until the date of this Order and continuing until further Order of this Commission.

No hearing costs are assessed in this instance.

Following receipt of the executed Decision and Order, counsel for Defendants filed an **Application for Review** in the case setting forth the following **Assignments of Error**:

1. Whether the Hearing Commissioner erred in Finding of Fact No. 3 that pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, further finding, that pursuant to S.C. Code §42-9-35 by a preponderance of the evidence, including medical evidence, that the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck, albeit asymptomatic until the accident, when such a Finding is against the greater weight of the evidence in the record.

2. Whether the Hearing Commissioner erred in Finding of Fact No. 4 that the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy, when such a Finding is against the greater weight of the evidence in the record.

3. Whether the Hearing Commissioner erred in Finding of Fact No. 5. that the Claimant is not at maximum medical improvement and determination of permanency is premature at this time, when such a Finding is against the greater weight of the evidence in the record.

4. Whether the Hearing Commissioner erred in Finding of Fact No. 6 that pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck

surgery, when such a Finding is against the greater weight of the evidence in the record.

5. Whether the Hearing Commissioner erred in Finding of Fact No. 7 that the Defendants were not prejudiced by the late formal reporting of the injury, when such a Finding is against the greater weight of the evidence in the record.

6. Whether the Hearing Commissioner erred in Finding of Fact No. 8 that the Claimant is totally disabled and entitled to benefits pursuant to S.C. Code §42-9-10 for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 ($346.57) Dollars until further Order of this Commission, when such a Finding is against the greater weight of the evidence in the record.

7. Whether the Hearing Commissioner erred in Finding of Fact No. 9 that pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed by Dr. Naso on August 28, 2012, when such a Finding is against the greater weight of the evidence in the record.

8. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-1-160, the Claimant sustained a compensable injury by accident to his neck out of and in the course of his employment on June 20, 2012 while pulling a squeegee board leveling concrete; and, that pursuant to S.C. Code §42-9-35 the accident aggravated the preexisting cervical disc disease condition that was present in the Claimant's neck; albeit asymptomatic until the accident, when such conclusion is against the greater rule of the evidence in the record.

9. Whether the Hearing Commissioner erred in Concluding that Pursuant to Singleton v. Young Lumber Co., 236 S.C. 454 (1960) and its progeny the Claimant's neck injury affected both shoulders and arms in the form of radiculopathy, when such conclusion is against the greater rule of the evidence in the record.

10. Whether the Hearing Commissioner erred in Concluding that The Claimant is not at maximum medical improvement and determination of permanency is premature at this time, when such conclusion is against the greater rule of the evidence in the record, when such conclusion is against the greater rule of the evidence in the record.

11. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-15-20 the Claimant had a reasonable excuse for not formally reporting his work injury due to the fact that his lead man, Mr. Durant, and the crew supervisor, Mr. Bostick, were both present and had knowledge of the pertinent facts surrounding the accident sufficient to indicate the possibility of a compensable

injury and followed up with the Claimant after the accident; moreover, the Department of Transportation was aware that the Claimant had not returned since his syncopal episode on June 20, 2012 and they were further aware that he had been hospitalized and had ultimately been treated by a neurosurgeon and undergone neck surgery, when such conclusion is against the greater rule of the evidence in the record.

12. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-15-20, the Defendants were not prejudiced by the late reporting of the injury, when such conclusion is against the greater rule of the evidence in the record.

13. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-9-10, the Claimant is totally disabled and entitled to benefits for the period beginning June 20, 2012 to the date of this Order and continuing in the weekly amount of Three Hundred Forty-Six and 57/100 ($346.57) Dollars until further Order of this Commission, when such conclusion is against the greater rule of the evidence in the record.

14. Whether the Hearing Commissioner erred in Concluding that Pursuant to S.C. Code §42-15-60 the Employer is required to furnish adequate and proper medical care and shall pay for all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including the medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012, when such conclusion is against the greater rule of the evidence in the record.

15. Whether the Hearing Commissioner erred in ordering that the Form 50 regarding the injury of June 20, 2012 under workers' compensation file no. 1222136 is found to be a compensable accident, when such an Order is against the preponderance of evidence in the record.

16. Whether the Hearing Commissioner erred in ordering that the Defendants shall pay all medical treatment rendered to the Claimant related to this accident from the date of injury, June 20, 2012, to the date of this Order and continuing for such additional time as such treatment will tend to lessen the Claimant's period of disability; including medical treatment rendered by Carolinas Hospital System, Dr. Robert Richey, Dr. William Naso, and the surgery performed on August 28, 2012,when such an Order is against the preponderance of evidence in the record.

17. Whether the Hearing Commissioner erred in ordering that the Defendants shall pay the Claimant benefits at the weekly compensation rate of Three Hundred Forty-Six and 57/100 ($346.57) Dollars from June 20, 2012 until the date of this Order and continuing until further Order of this Commission, when such an Order is against the preponderance of evidence in the record.

Copies of the above assignments of error were furnished to all interested parties prior to oral argument presented before the Appellate Panel on February 23, 2015.

Pursuant to S.C. Code Ann. § 42-17-50 (1985), the Appellate Panel reviewed the Award and weighed the evidence in the record as presented at the initial hearing. The Panel also considered all issues raised in the briefs of both parties.

After careful review in the present case, the Appellate Panel of the South Carolina Workers' Compensation Commission has determined the Order of the Hearing Commissioner is hereby **REVERSED**.

FINDINGS OF FACT

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, **WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACTS:**

1. We find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Otis Nero being the Claimant, and South Carolina Department of Transportation being the Employer, and the State Accident Fund being the Carrier.

2. We find that pursuant to S.C. Code §42-1-40, the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 ($519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 ($346.57) Dollars.

3. We find that the Claimant alleges he sustained an injury by accident to his back (Cervical spine), affecting both shoulders and arms in the form of radiculopathy, on June 20, 2012 while pulling a large squeegee board over concrete with a road crew.

4. We find that Claimant admits he did not report the alleged incident pulling the squeegee to his supervisors, and he continued to work for the remainder of his shift.

5. We find that the knowledge the employer had that anything was wrong with Claimant on June 20, 2012, was when he suddenly passed out at the shed while talking, laughing, and joking with his supervisors and other employees after the conclusion of their work shift.

6. We find that Claimant admitted to having other previous dizzy spells on the job. (Hr. Tr., p. 34).

7. We find that none of medical records of Dr. Richey or Dr. Naso make any mention of an incident pulling a squeegee board, and instead the records consistently reference a mechanism of injury as Claimant passing out while talking to his boss.

8. We find that on June 28, 2014, Claimant's handwritten answers on a "Patient Health Questionnaire" stated that his problems were not related to a job and this was not a worker's compensation injury.

9. We find that there is conflicting medical evidence regarding whether Claimant's alleged incident pulling the squeegee board caused the subsequent syncope episode. Specifically, Claimant's family doctor, Dr. Richey, testified that he had a "hypothesis" that "the cause of the syncope had to do with his spinal canal stenosis and a reflex mechanism." On the other hand, Dr. Naso, the neurosurgeon who performed Claimant's surgery, stated, "I do not think his syncope is related to his spinal pathology."

10. We find that the only actual or informal notice the employer had of an injury was that Claimant, who previously suffered from dizzy spells on the job, passed out in front of his supervisors at the shed after the conclusion of the work day.

11. We find that Claimant assured the employer that he was fine to return home, and he suffered a second syncope episode in his driveway, and he was taken to the hospital by his wife.

12. We find that Claimant spoke with both Mr. Durant and Mr. Bostick while he was in the hospital, and although he informed them he was having neck surgery, Claimant never reported any work related accident.

13. We find that Claimant submitted FMLA paperwork to his employer, describing his condition as "several years – neck and syncope," but again Claimant made no mention of a work accident to his employer at that time.

14. We find that pursuant to S.C. Code §42-15-20, Claimant failed to provide Defendants the required ninety (90) day notice of his accident so as to be entitled to benefits under the Act.

15. We find that pursuant to S.C. Code Ann. §42-15-20, Claimant failed to provide a reasonable excuse made to the satisfaction of the Commission for failure to provide timely notice as required by the statute. Although Claimant's supervisors witnessed Claimant's syncope episode, Claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork to the Human Resources Department indicating that his problems lasted for several years instead of requesting workers' compensation.

16. We find that pursuant to S.C. Code Ann. §42-15-20, Defendants suffered a prejudice as a result of Claimant's failure to provide timely notice. Defendants were unable to fully investigate whether Claimant's alleged squeegee accident caused syncope episode, or whether the alleged squeegee accident or the syncope fall caused the aggravation of his cervical condition. As a result of the prejudice against Defendants caused by Claimant's failure to provide timely notice, Claimant's request for benefits is denied.

CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, **WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:**

1. **Pursuant to S.C. Code §42-1-130, the Claimant was a covered Employee at the time in question; and under S.C. Code §42-1-140, the Defendant-Employer was a covered Employer under the Act.**

2. **Pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Five Hundred Nineteen and 83/100 ($519.83) Dollars a week resulting in a compensation rate of Three Hundred Forty-Six and 57/100 ($346.57) Dollars.**

3. **Pursuant to S.C. Code §42-15-20 and supporting case law, Claimant failed to provide Defendants with proper Notice as required by S.C. Code Ann. §42-15-20, so as to afford protection of the defendant employer in order that he may investigate the facts and question witnesses while their memories are unfaded; and second, it may afford the employer the opportunity to furnish medical care to the employee in order to minimize the disability and consequent liability to the employer. (See, e.g., Mintz vs. Fiske-Carter Construction Company, 218 S.C. 409 (1951)).**

4. **Pursuant to Sanders v. Richardson, "an employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted in a compensable injury," so the Defendant Employer's witness of the syncope episode itself does not constitute either actual or informal notice. 251 S.C. 325, 162 S.E.2nd 257 (1968).**

5. Pursuant to Cranford v. Hutchison Construction, "Where the medical evidence conflicts, the findings of fact of the [Appellate Panel] are conclusive." 399 S.C. 65, 731 S.E.2nd 303 (S.C. Ct.App., 2012)(*see* Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 338, 513 S.E.2d 843, 845 (1999)).

6. Pursuant to S.C. Code Ann. §42-15-20(B) and supporting case law, Claimant failed to provide a reasonable excuse to the satisfaction of the Commission for his failure to report a work accident to Defendants within the ninety (90) notice period, and therefore no compensation is payable.

7. Pursuant to S.C. Code §42-15-20 and supporting case law, Defendants were prejudiced by Claimant's failure to timely report his alleged June 20, 2012 work accident within the ninety (90) day period required.

8. Pursuant to S.C. Code Ann. §42-15-20 and supporting case law, Claimant's failure to provide timely notice or a reasonable excuse to the Commission for failure to provide notice, bars Claimant's entitlement to benefits, including medical benefits and/or compensation, under the Workers' Compensation Act as a result of his alleged June 20, 212 accident.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS, THEREFORE, ORDERED that Claimant's request for benefits as a result of his alleged accident on June 20, 2012 is **DENIED**. Claimant failed to provide Defendants the required ninety (90) day notice of an alleged work accident as required by S.C. Code Ann. §42-15-20, and Claimant further failed to provide a reasonable excuse made to the satisfaction of the commission for not giving timely notice. As a result, Defendants were prejudiced by Claimant's

Claimant's failure to provide timely notice, and Claimant is not entitled to any benefits under the Act.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

FOR THE FULL COMMISSION
Susan S. Barden, Commissioner

WE CONCUR:

T. Scott Beck, Commissioner

Avery B. Wilkerson, Jr., Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on May 29, 2015

Stephen J. Wukela

From:	appeals@wcc.sc.gov
Sent:	Friday, May 29, 2015 10:35 AM
To:	EFARTHING@SAF.SC.GOV; JGCOGGIOLA@WJLAW.NET; JMURRAY@SAF.SC.GOV; JTWILLIAMS@WJLAW.NET; KLCHILDERS@WJLAW.NET; LLLEPPERT@WJLAW.NET; STEPHEN@WUKELALAW.COM; APPEALS@WCC.SC.GOV
Subject:	Full Commission Order - WCC#:1222136 - NERO
Attachments:	R08 ORD - SCWCC Order PDF - 05_29_2015 - WCC #_ 1222136.PDF

Attached is the Full Commission Order for WCC#: 1222136

R08 ORD - Full Commission Order - 5/29/2015 - ORDER#: 53482 - WCC #: 1222136