THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED
JUL 07 2015
SC Court of Appeals

Appellate Panel Order

WCC File No. 1222136

Otis Nero, ... Appellant,

South Carolina Department of Transportation, Employer,
and State Accident Fund, Carrier, ... Respondents.

BRIEF OF APPELLANT

STEPHEN J. WUKELA
S.C. BAR NO. 68351
WUKELA LAW FIRM
ATTORNEY FOR APPELLANT
PO BOX 13057
FLORENCE SC 29504
843-669-5634

Other Counsel of Record:

John Gabriel Coggiola, Esquire
Willson Jones Carter & Baxley, PA
4500 Fort Jackson Boulevard
Columbia SC 29209

TABLE OF CONTENTS

Table of Authorities iii

Statement of Issues on Appeal 1

Statement of the Case 2

Arguments:

I. **THE FULL COMMISSION ERRED IN FAILING TO FIND THAT THE EMPLOYER RECEIVED ADEQUATE NOTICE UNDER S.C. CODE §42-15-20** 10

II. **ASSUMING THE CLAIMANT FAILED TO GIVE ADEQUATE NOTICE, THE APPELLATE PANEL ERRED IN FAILING TO FIND THAT THE CLAIMANT HAD DEMONSTRATED REASONABLE EXCUSE AND THAT THE EMPLOYER HAD NOT BEEN UNDULY PREJUDICED THEREBY** 17

A. **The Appellate Panel erred in Failing to Find Reasonable Excuse** 17

B. **The Appellate Panel erred in finding that the employer had suffered prejudice as a result of the absence of formal notice** 22

TABLE OF AUTHORITIES

CASES

Bass v. Kenco Group, 366 S.C. 450 (Ct. App. 2005) 9

Brown v. Greenwood Mills, Inc., 366 S.C. 379, 393 (Ct. App. 2005)(cert. denied) 9

Etheredge v. Monsanto Co., 349 S.C. 451, 454 (Ct. App. 2002) 9,10,11,13,16,26

Gadson v. Mikasa Corp., 368 S.C. 214, 221 (Ct. App. 2006) 8

Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510 (Ct. App. 2000) 8,9

Hanks v. Blair Mills, Inc., 286 S.C. 378 (Ct. App. 1995) 11

Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73 (1950) 8,9

Kiawah Prop. Owners Group v. PSC, 338 S.C. 92 (1999) 25

Lizee v. S.C. Department of Mental Health, 367 S.C. 122 (Ct. App. 2005) 22

Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18 (1992) 21

Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409 (1951) 10,11,23

Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622 (2004) 9

Sanders v. Richardson, 251 S.C. 325 (1968) 12

Shuler v. Gregory Elec., 366 S.C. 435, 440 (Ct. App. 2005) 8

Teigue v. Appleton Co., 221 S.C. 52 (1952) 10,11,12

Watt v. Piedmont Auto, 384 S.C. 203 (Ct. App. 2009) 8

STATUTES

S.C. Code of Laws Ann. §1-23-350 24

S.C. Code of Laws Ann. §1-23-380(A)(5)(d)-(e)(Supp. 2006) 8,9

STATUTES

S.C. Code of Laws Ann. §42-15-20 6,7,10,11,17,25

OTHER

Larson's Workers' Compensation Law, §126.03[1][6](2001) 10

STATEMENT OF ISSUES ON APPEAL

I. **THE FULL COMMISSION ERRED IN FAILING TO FIND THAT THE EMPLOYER RECEIVED ADEQUATE NOTICE UNDER S.C. CODE §42-15-20.**

II. **ASSUMING THE CLAIMANT FAILED TO GIVE ADEQUATE NOTICE, THE APPELLATE PANEL ERRED IN FAILING TO FIND THAT THE CLAIMANT HAD DEMONSTRATED REASONABLE EXCUSE AND THAT THE EMPLOYER HAD NOT BEEN UNDULY PREJUDICED THEREBY.**

A. **The Appellate Panel Erred in Failing to Find Reasonable Excuse**

B. **The Appellate Panel erred in finding that the employer had suffered prejudice as a result of the absence of formal notice.**

STATEMENT OF THE CASE

This is a Workers' Compensation matter. On January 6, 2014, the Claimant filed an Amended Form 50 alleging that on June 20, 2012, while working on a South Carolina Department of Transportation crew using a squeegee board to level cement, Claimant suffered a sudden onset of pain in his neck and shoulders followed thereafter by an episode of syncope, or "passing out."

The Defendants denied the accident and notice. The case was tried before the Single Commissioner on March 28, 2014. As presented during the hearing, the following facts are undisputed:

Undisputed Facts:

On June 20, 2012, the Claimant was working on a South Carolina Department of Transportation road crew of ten to twelve people supervised by lead man Benjamin Durant and supervisor Danny Bostick. (Tr. 03/28/14 p. 12, lines 17-20; Tr. 02/23/15 p. 5, lines 10-12).

Claimant, along with four to five other members of the crew, worked that day pulling a "squeegee board", that is, a 30 foot 2x4, to level freshly poured concrete on a 30 foot by 30 foot concrete pad. (Tr. 03/28/14 p. 12, lines 20-24; Tr. 02/23/15 p. 5, lines 11-12; Dep. Bostick p. 8, line 20 - p. 11, line 24).

The pad was located in the center of a field; there was no shade; it was summertime; and it was very hot. (Dep. Bostick p. 34, lines 10-12; Tr. 03/28/14 p. 13, lines 1, 7).

During the work, Mr. Bostick became concerned that the Claimant appeared overheated, and he temporarily pulled the Claimant off of the squeegee board. (Tr. 03/28/14

p. 12, line 24 - p. 13, line 10).

Specifically, Bostick testified:

Q. ... So on June 20, 2012, did you see him do any of what you describe as straining work?
A. Well, I have — I have stopped him because he was the oldest guy mostly in the crew, and I have younger guys, and I will tell him, give up that squeegee board. Let one of them younger guys get a hold of that board and do it.
Q. Okay.
A. And he will come off of it.
Q. So —
A. Because it's hot.
Q. Well, my question is very specific. On June 20, 2012, the alleged date of injury, did you do any of what you just described?
A. Yes.
Q. Okay. You told him to get off the squeegee board?
A. Yes.
Q. Okay. Now, why did you do that?
A. It's hot, and I know he's an older guy, so if I know I can — we've got other people that can relieve him, I try to take him off of that.
Q. Okay. Did he make any complaints to you about not being able to perform his — his job?
A. No.
Q. Okay. Is it fair to say you did that out of an abundance of caution?
A. Yeah. That's — I try to protect the people, too, at work. As far as doing our job, I also take it personal to try to get them home safely.
Q. Okay. Now, what job did you put him on after you took him off the squeegee board?
A. Basically he just took a break. He got up, wiped the sweat mostly. It was hot. Like I said, it was real hot out there. We was in the center of a field, no trees, no nothing. He's hot.
So when I can — if I see a guy on the field like he's looking weary or like he's trying to get overheated, I try to give them a break.
Q. So did he look weary and overheated?

A. Well, he looked hot to me, you know. Like I said, it was a hot day. It was a hot day, I know. I can remember that much of it. It was real hot, and, like I said, I always try to look out, especially for the — if they're older guys, ladies, whatever.

(Bostick p. 33, line 2 - p. 34, line 21).

Claimant testified that he felt an onset of pain in his neck prior to being taken off the squeegee board. (Tr. 03/28/14, p. 22, lines 11-17). This fact was contested by the Employer; however, it is undisputed that the Claimant did not tell his Employer at that point, or at any time during the notice period, that he suffered pain in his neck while pulling the board. (Tr. 03/28/14, p. 22, lines 18-20; p. 13, lines 10-13; Tr. 02/23/15 p. 23, lines 6-8).

After being given a break by Bostick, Claimant returned to work pulling the squeegee board. (Tr. 02/23/15, p. 5, lines 14-15).

At approximately 3:00 in the afternoon, after finishing their work and cleaning up, though while still on the clock, the crew, including the Claimant, Durant, and Bostick, were standing around the supervisor's truck talking and joking when the Claimant passed out and fell to the ground unconscious; witnessed by Durant and Bostick. (Tr. 03/28/14 p. 13, lines 15-22; Tr. 02/23/15 p. 5, lines 15-19; p. 23, lines 9-10).

The Claimant regained consciousness, got up, told his supervisors he was fine, and drove himself home; where he passed out a second time in his driveway. (Tr. 02/23/15 p. 5, lines 19-21).

His wife immediately took him to the hospital where he was admitted and treated by hospitalist Dr. Robert Richey and neurosurgeon Dr. William Naso. (APA Nos. 2, 3).

Claimant spoke with his supervisors while in the hospital and they were aware he was

in the hospital and ultimately aware that he underwent cervical spine surgery at the hands of Dr. Naso. (Tr. 02/23/15 p. 21, lines 16-20).

Plaintiff never returned to work thereafter. (Dep. Bostick p. 43, lines 11-12).

Single Commission Determination:

The Claimant argued at trial that he suffered a cervical spine and upper extremity injury while pulling the squeegee board, which caused him to pass out. Claimant argued that he was entitled to treatment at the hands of Dr. Richey and Dr. Naso; and that he was entitled to temporary total disability from the date of the accident and continuing.

The Defendants denied the claim on notice and causation.

The Commission awarded the case, finding causation based upon the testimony of Dr. Richey who testified on March 12, 2014, at deposition, that Claimant's pulling of the squeegee board aggravated the pre-existing, albeit previously asymptomatic, condition of his cervical spine and, along with the stress of working in the heat, caused his syncope. (08/05/14 Order, Finding of Fact No. 3, pp. 20-23).

As to notice, the Single Commissioner found:

> 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.
> (08/05/14 Order, Finding of Fact No. 6, p. 24).

Appellate Panel Determination:

The Defendants appealed to the Appellate Panel of the Workers' Compensation Commission. The Appellate Panel did not make any finding reversing the Single Commissioner's finding as to accident or causation.

The Appellate Panel did, however, find that the Claimant failed to prove adequate notice or reasonable excuse pursuant to South Carolina Code §42-15-20. In relevant part, the Commission found:

> 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 supervisor 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 them at the shed after the conclusion of the work day.

11. We find that Claimant assured the employer that he 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 the Defendants caused by Claimant's failure to provide timely notice, Claimant's request for benefits is denied.
> (App. Pan. Order 05/29/15, pp. 16-18).

This appeal followed.

STANDARD OF REVIEW

While the Commission's Findings of Fact regarding notice are generaelly reviewed under the substantial evidence standard of review, see Watt v. Piedmont Auto, 384 S.C. 203 (Ct. App. 2009); where, as here, the pertinent facts are undisputed, the question of compensability becomes a question of law. See Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510 (Ct. App. 2000); Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73 (1950).

Judicial review of the Workers' Compensation Commission Appellate Panel's factual findings is generally governed by the substantial evidence standard. See Gadson v. Mikasa Corp., 368 S.C. 214, 221 (Ct. App. 2006). In particular, the Appellate Panel's factual findings must be affirmed if supported by substantial evidence in the record. See Shuler v. Gregory Elec., 366 S.C. 435, 440 (Ct. App. 2005). That is, a reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. §1-23-380(A)(5)(d)-(e)(Supp. 2006); see also Shuler v. Gregory Elec., 366 S.C. 435, 440 (Ct. App. 2005). However, a reviewing court may reverse or modify a decision of the Appellate Panel if the findings, inferences, conclusions, or decisions of the panel are "clearly erroneous in view of the reliable, probative and substantial

evidence on the whole record." S.C. Code Ann. §1-23-380(A)(5)(e)(Supp. 2006); See also Bass v. Kenco Group, 366 S.C. 450 (Ct. App. 2005).

It is not within the appellate court's province to reverse the Appellate Panel's factual findings if they are supported by substantial evidence. See, Etheredge v. Monsanto Co., 349 S.C. 451, 454 (Ct. App. 2002). 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 the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 622 (2004).

Thus, where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive. Brown v. Greenwood Mills, Inc., 366 S.C. 379, 393 (Ct. App. 2005)(cert. denied).

However, if the evidence is undisputed, the appellate court may rule as a matter of law. See, Gibson v. Spartanburg Sch. Dist. #3, 338 S.C. 510, 518 (Ct. App. 2000)(finding "where, as here, the facts are undisputed, the question of whether an accident is compensable is a question of law"). See also, Jordan v. Dixie Chevrolet, Inc., 218 S.C. 73 (1950)(finding "upon admitted or established facts the question of whether an accident is compensable is a question of law and this is not an invasion of the fact finding field of the commission on the part of the court.").

ARGUMENT

I. THE FULL COMMISSION ERRED IN FAILING TO FIND THAT THE EMPLOYER RECEIVED ADEQUATE NOTICE UNDER S.C. CODE §42-15-20.

South Carolina Code §42-15-20 requires that:

> (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to the giving of such notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.
>
> (B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been prejudiced thereby.
> S.C. Code Ann. §42-15-20 (Supp. 2014).

It is well-established that:

> 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.'
> Etheredge v. Monsanto Co., 349 S.C. 451, 457 (Ct. App. 2002)(quoting Larson's Workers' Compensation Law, §126.03[1][6](2001)(footnotes omitted)).

In Etheredge v. Monsanto Co., this Court explained:

> 'The object [of providing timely notice under §42-15-20]

> being that an employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability.' [citing Hanks v. Blair Mills, Inc., 286 S.C. 378 (Ct. App. 1995), which, in turn, cited Teigue v. Appleton Co., 221 S.C. 52 (1952)].
>
> The provisions of §42-15-20 regarding notice should be liberally construed in favor of claimants. Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409 (1951). In Mintz our Supreme Court held:
>
> It is concluded there, upon many authorities, that the provision for notice should be liberally construed in favor of claimants, but there are limitations upon that rule and the statutory requirement cannot be disregarding altogether. Its purpose is at least 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 opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability upon the employer.
> Etheredge at 458.

The Court held:

> We conclude that notice is adequate when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim.
> Id. at 459.

Thus, to establish adequate notice under South Carolina Code §42-15-20, it is not necessary that the employee prove his claim, or even state his claim with specificity. Instead, the employer need only have "some knowledge of accompanying facts connecting the injury or illness with the employment" sufficient to alert the employer that the "case might involve a potential compensation claim" so that the employer may investigate the case while memories are unfaded and furnish medical care in order to minimize the claimant's

disability.

The Employer argued, and the Panel cited, Sanders v. Richardson, 251 S.C. 325 (1968), in support of their conclusion that the claimant failed to provide adequate notice. In Sanders the Supreme Court found that the fact that the claimant told the employer, "I feel like I'm kind of hurting ... I've got a kind of hurting in my side and in my back ... I got a knot on my side ..." was insufficient to provide notice of an injury suffered while lifting a heavy bag of mortar. Sanders at 327-328.

The Court, citing the similar case of Teigue v. Appleton Co., 221 S.C. 52 (1952), found that the claimant's comments "would make the employer aware of the fact that the respondent was having some physical difficulty while at work but the 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." Id.

Here, however, the Employer had far more knowledge than the employer in Sanders. While it is undisputed that the Claimant did not tell the Employer, within ninety (90) days of the incident, that he suffered pain in his neck while pulling a squeegee board, it is also undisputed that the Employer was aware that the Claimant had been working all day in the heat pulling the squeegee board, that the supervisor had pulled him from that work during the day due to fatigue, that at the conclusion of the day the Claimant lost consciousness and fell to the ground in the presence of his supervisors, that the Claimant was, that day, admitted to the hospital where he was treated by a neurosurgeon who diagnosed cervical stenosis and, shortly thereafter, performed neck surgery, and that the Claimant had not returned to work

thereafter.

The Employer argues that based on those facts the Employer could not know that the Claimant's neck condition had been aggravated by the pulling of the squeegee board, causing him to pass out. Certainly, given the Employer's knowledge at that time, it was equally likely from the Employer's perspective that the Claimant passed out from heat prostration, or that the Claimant's passing out and falling to the ground itself caused him a neck injury.

However, it is not necessary that the Claimant prove his claim to provide adequate notice. It is not even necessary that the Claimant even make his claim to provide notice. Instead, what Etheredge requires is:

> ... some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim.
> Etheredge, at 459.(emphasis added).

While the Employer may not have been aware of the precise mechanism of the Claimant's injury, they had sufficient knowledge to alert them that the Claimant's condition might potentially be connected to work, given the day's events. The fall (they were aware of) may have injured his neck necessitating the surgery (of which they were aware), the Claimant pulling the squeegee board in the heat and getting overheated (of which they were aware) might have caused the passing out (of which they were aware).

Ultimately, after investigation, the testimony of Dr. Richey revealed that pulling the squeegee board in the heat aggravated the Claimant's pre-existing, though previously asymptomatic, neck condition and that aggravation, along with getting overheated, caused him to pass out.

What is important for notice, though, is not the precise mechanism of injury that the investigation ultimately uncovers, but, rather, that the employer has sufficient knowledge of a potential work connection to trigger an investigation in the first place.

The Employer's undisputed knowledge was, as a matter of law, sufficient to trigger a reasonably conscientious supervisor to investigate what had occurred on the job that day, its cause, and its consequence.

Indeed, Claimant's actual supervisor, Mr. Bostick, was questioned directly in that regard.

In particular, the Employer admits that on July 9, 2012, just under three (3) weeks after the accident, the Claimant provided the Employer's Human Resources Department with a Family Medical Leave form from his family doctor, Dr. Richey, dated July 9, 2012, which was admitted as Claimant's Exhibit 1 at trial. (Tr. 02/23/15 p. 6, lines 3-7; p. 21, lines 21-25). The FMLA form indicates the Claimant's condition is "neck and syncope" and further indicates that the Claimant "has to have neck surgery." (Cl. Exh. 1).

Claimant's supervisor, Mr. Bostick, testified that he did not receive Claimant's Exhibit 1, nor would he have expected to in the normal course of business. Instead, as was customary, Claimant 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, such knowledge would have caused him to do further investigation into the accident. (Dep. Bostick, pp. 43-49). In particular, Bostick 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, line 23 – p. 29, line 12).

* * *

Q. This form [Exhibit 1] says Approximate date condition commenced, and it says, Neck and syncope. Do you know what syncope is?

A. Not sure.

Q. Syncope is passing out.

A. Okay.

Q. And then it goes on down here at the bottom — and I'm looking at Page 2 — has to have neck surgery. You didn't know any of that on June the 20th when he passed out?

A. No.

Q. Okay. You didn't know it on July the 9th, when this form was delivered to the DOT?

A. No.

Q. Okay. But if you had known that, it would have caused you to — to be on notice that you needed to do an investigation?

A. Yeah.

(Dep. Bostick, p. 48, line 20 - p. 49, line 12).

Thus, the notice standard requires knowledge of facts "signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim," and therefore, triggering the need for an investigation. Claimant's own supervisor, Bostick, admitted that if he had seen the FMLA form that Claimant delivered to Human Resources

he would have been on notice that he needed to do an investigation:

> **Q. Okay. You didn't know it on July the 9th, when this form was delivered to the DOT?**
> **A. No.**
> **Q. Okay. But if you had known that, it would have caused you to — to be on notice that you needed to do an investigation?**
> **A. Yeah.**
> (Dep. Bostick p. 49, lines 6-12)(emphasis added).

In sum, it is undisputed that the Claimant did not notify the Employer that he had pain in his neck while pulling the squeegee board within ninety (90) days. However, the Employer was aware that he passed out and fell to the ground after pulling the squeegee board during the heat of the day, that he was hospitalized later that day, and required neck surgery shortly thereafter.

On that knowledge it was, admittedly, equally possible Claimant had suffered from heat prostration causing him to fall, or that the fall caused him to have a neck injury, or that he had hurt his neck while pulling the squeegee board causing him to pass out, or some combination thereof. The Employer's knowledge of those facts did not prove, or even make, Claimant's claim. That knowledge was sufficient to make the Employer aware that the case might involve a potential compensation claim; alerting them to the need for investigation.

Pursuant to Etheredge, that was adequate notice as a matter of law.

II. ASSUMING THE CLAIMANT FAILED TO GIVE ADEQUATE NOTICE, THE APPELLATE PANEL ERRED IN FAILING TO FIND THAT THE CLAIMANT HAD DEMONSTRATED REASONABLE EXCUSE AND THAT THE EMPLOYER HAD NOT BEEN UNDULY PREJUDICED THEREBY.

A. The Appellate Panel Erred in Failing to Find Reasonable Excuse

The Single Commissioner found:

> **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 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, line 21 – p. 30, line 3).**

The Single Commissioner went on to find:

> 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, line 1 – p. 43, line 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, line 18 – p. 47, line 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.
(Comm. Order 08/05/14, pp. 24-28)(emphasis added).

Essentially the Claimant's excuse for not filling out a formal report of the incident was that his supervisor was present when it occurred, he had talked to him while in the hospital, and the supervisor was aware of his treatment. In fact, this is precisely the same excuse that his lead man, Mr. Durant, gave for not reporting the incident to his supervisor, Mr. Bostick. "He was right there." (Dep. Durant p. 47, line 12).

In reversing the Single Commissioner's finding of reasonable excuse, the Appellate Panel found:

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.
(App. Pan. Order 05/29/15).

In essence, in evaluating reasonable excuse, the Appellate Panel just reiterated their

finding that notice was inadequate because "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." (App. Pan. Order 05/29/15, p. 18).

Again, as the Claimant argues above, the Appellate Panel misapprehends what the law requires of adequate notice. That is, it was only necessary for the Employer to have knowledge of the accompanying facts connecting the accident with the employment to indicate that the case might involve a potential workers' compensation claim. The Employer's knowledge that the Claimant passed out and fell to the ground after working in the heat all day, was hospitalized, and underwent neck surgery, was sufficient to prompt a reasonable employer to investigate whether there might be a potential workers' compensation claim.

Again, the Employer admits knowledge of the facts sufficient to suggest the potential that the Claimant could have suffered from heat prostration, the fall could have caused him a neck injury, pulling the squeegee board could have caused him a neck injury. This knowledge, as Claimant's supervisors both admitted, were sufficient to trigger further investigation. It is not necessary that Claimant prove or set out with specificity the basis of his claim to provide notice sufficient to trigger an investigation by the Employer.

However, what was at issue in the Panel's Finding No. 15 was not the adequacy of notice, but whether the Claimant had a reasonable excuse for not providing more formal notice.

Even assuming that the notice was inadequate, the Claimant reasonably believed that the notice was adequate because the supervisors were present and aware of his treatment; the

same excuse his lead man gave for not filing a report himself.

The Commission made no explanation in its Order as to why that excuse was not reasonable.

Instead, the Commission focused on the fact that the Claimant did not tell the Employer that he hurt his neck while pulling the squeegee board, which ultimately caused him to pass out. However, the Commission does not make any finding as to when the Claimant himself learned of that causal connection.

Certainly the Claimant must be excused for failing to notify the Employer of the specific mechanism of his injury before he discovered it himself. See Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18 (1992)(finding that the statute of limitations runs from the date the claimant knew, or should have known by the exercise of reasonable diligence, that a cause of action exists; and that claimant who had only a high school education, reasonably relied upon an initial diagnosis by an emergency room physician of her knee injury as a sprain and her continuing problems as arthritis such that the statute of limitations did not begin to run until over two years after the accident at which point an orthopaedic surgeon diagnosed her torn medial meniscus).

Indeed, as the Appellate Panel found:

> 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.
> (App. Pan. Order 05/29/15, p. 17).

The Claimant is not sophisticated. He is unable to read a newspaper and left school in the ninth grade for work in order to take care of his family. (Tr. 03/28/14 p. 17, lines 14-24).

No physician advised the Claimant of the precise causal link until Dr. Robert Richey testified in his deposition on March 12, 2014. There, Dr. Richey testified that the Claimant suffered from a pre-existing condition of his cervical spine that was aggravated by pulling the squeegee board, and that, along with working in the heat, caused the syncope. (Dep. Richey, p. 19, ll. 12 – 18; p. 54 line 6 - p. 55, line 15). Whether the heat caused the syncope, or the fall caused the neck condition, or the neck and the heat caused the fall, was not revealed until investigation produced Dr. Richey's deposition testimony.

Still, irrespective of how the ultimate causal connection played out after investigation, the Claimant reasonably believed, as did his lead man, that the Employer's presence at the syncopal episode and their knowledge of his treatment gave the Employer adequate notice to trigger their investigation of the case.

B. <u>The Appellate Panel erred in finding that the employer had suffered prejudice as a result of the absence of formal notice</u>.

The Single Commissioner found:

> **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 <u>Lizee v. S.C. Department of Mental Health</u>, 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, line 24 – p. 12, line 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.
> (Comm. Order 08/05/14, pp. 29-31).

The Appellate Panel reversed finding:

> 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 the Defendants caused by Claimant's failure to provide timely notice, Claimant's request for benefits is denied.
> (App. Pan. Order 05/29/15, p. 18).

South Carolina Code §1-23-350 requires that findings of fact "be accompanied by a concise and explicit statement of the underlying facts supporting the findings." Our courts

have consistently held that findings of fact must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence in the record and whether the law has been properly applied. See, Kiawah Prop. Owners Group v. PSC, 338 S.C. 92 (1999).

The Appellate Panel's finding states no facts supporting its conclusion that the Employer's investigation of the events was impaired.

The Appellate Panel's finding fails to address the fact that the Claimant's supervisors were present when he passed out, that they were aware of his treatment, and by whom it was being provided. The Panel's finding does not consider the fact that the Claimant's supervisors testified in deposition with clarity as to their recollection of the facts.

The Employer offered no evidence in the record, and the Appellate Panel finding cites no evidence, indicating what further investigation the Employer was unable to do because of the absence of more formal notice.

The Panel fails to explain the factual basis for their finding that "Defendants were unable to fully investigate ... whether ... the syncope[sic] fall caused an aggravation of his cervical condition." The Panel fails to state any evidence explaining why, for example, the Employer was unable to contact Dr. Richey (of whose treatment they were aware) to investigate whether the fall (which they witnessed) caused the neck injury (of which they were aware). Had they done so, Dr. Richey would have, presumably, testified (as he did later) that the fall did not cause the neck problems but, rather, the neck problems caused the fall.

The object of providing timely notice under §42-15-20 is to put the employer on notice of a potential claim so they can investigate it and furnish medical care for the

employee in order to minimize the disability and their own liability. See Etheredge at 381.

The Employer offers, and the Commission cited, no evidence establishing what further investigation it would have done, or what further medical treatment it would have provided, had it received timely formal notice. Therefore, even if the Employer did not receive adequate notice pursuant to the statute, the Claimant has demonstrated reasonable excuse and the Employer has demonstrated no prejudice.

CONCLUSION

For the foregoing reasons, Claimant respectfully requests that the Appellate Panel Order be reversed and the Single Commission Order be reinstated.

Respectfully submitted,

WUKELA LAW FIRM

BY: _____
STEPHEN J. WUKELA
S.C. BAR NO. 68351
ATTORNEY FOR APPELLANT
PO BOX 13057
FLORENCE SC 29504
(843)669-5634

Florence, South Carolina

July 2nd, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
JUL 07 2015
SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1222136

Otis Nero, ... Appellant,

vs.

SC Department of Transportation, Employer,
and State Accident Fund, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I have served the Brief of Appellant on Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on July 2, 2015, addressed to their attorney of record, John Gabriel Coggiola, Esquire, Willson, Jones, Carter & Baxley, PA, 4500 Fort Jackson Boulevard, Columbia SC, 29209.

WUKELA LAW FIRM

BY: _____
STEPHEN J. WUKELA
S.C. BAR NO. 68351
ATTORNEY FOR APPELLANT
PO BOX 13057
FLORENCE SC 29504
843-669-5634

WUKELA LAW FIRM

Steve Wukela, Jr.
Benjamin D. Moore
Christi B. McDaniel
Stephen J. Wukela
Patrick J. McLaughlin
Pheobe A. Clark
Frank C. Swaggard
Jason B. Turnblad
E. Katherine Moore

403 Second Loop Road
P.O. Box 13057
Florence, SC 29504-3057

(843) 669-5634
FAX (843) 669-5150

July 2, 2015

RECEIVED
JUL 07 2015
SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211

Re: Otis Nero v. South Carolina Department of Transportation, et al
WCC File No. 1222136
Appellate Case No. 2015-001277

Dear Ms. Kitchings:

With regard to the above, please find enclosed for filing in your office the following:

1. Initial Brief of Appellant and Certificate of Service;
2. Appellant's Designation of Matter to be Included in the Record on Appeal and Certificate of Service.

By copy of this letter, I am serving counsel for Defendants, John Gabriel Coggiola, Esquire, with a copy of the Initial Brief of Appellant and the Appellant's Designation of Matter to be Included in the Record on Appeal.

With kind regards, I am

Yours truly,

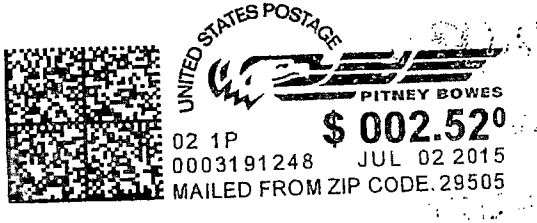
WUKELA LAW FIRM

STEPHEN J. WUKELA

SJW:jpb

Enclosures

cc: John Gabriel Coggiola, Esquire



First Class Mail

RECEIVED
JUL 07 2015
SC Court of Appeals

WUKELA LAW FIRM
403 SECOND LOOP ROAD
P.O. BOX 13057
FLORENCE, SC 29504

To:

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211