THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1315636

Kathey L. Staton, Employee, ... Appellant/Claimant,

vs.

Mohawk Industries, Inc., Employer,
and Liberty Mutual, Carrier, ... Respondents/Defendants.

INITIAL BRIEF OF APPELLANT

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

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STATEMENT OF THE CASE

This is a Workers' Compensation repetitive trauma case that turns on the issue of notice.

On November 14, 2013, the Claimant filed a pro se claim, via Form 50, alleging injury to both hands, (APA No. 12, p. 205).

No Form 51 Answer was filed within thirty (30) days of the claim, and on March 26, 2014, a hearing was scheduled. Claimant appeared at the hearing pro se and, after pre-trial discussions, the Commissioner postponed the hearing to allow the Claimant to obtain counsel. Claimant obtained counsel, and on July 3, 2014, the undersigned filed a hearing request, via Form 50, on Claimant's behalf. (APA No. 12, p. 209).

On August 1, 2014, Defendants filed the first Answer, via Form 51, in the life of the case and denied notice. (APA No. 12, p. 210).

A hearing was scheduled for October 2, 2014 before Commissioner McCaskill. At the call of the case, Defendants stipulated that while they denied the case was compensable, they admitted that if the Commissioner found that adequate notice was given the case would be compensable as to causation and Claimant would be entitled to certain temporary total and temporary partial benefits. (Tr. 10/02/14 pp. 4-5).

The case was tried purely on notice. The Commission issued an Order on January 26, 2015, finding:

> 5. *King vs. International Knife and Saw*, 395 S.C. 437; 718 S.E.2d 227 (SC Ct. App. 2011) is applicable in determining when a claimant must report an injury to the employer after suffering a repetitive trauma injury and states that notice must be made within 90 days of when claimant knew or should have known

> that the repetitive trauma injury was compensable. Compensability is determined when the condition requires medical treatment or interferes with an employee's ability to perform his or her job, whichever occurs first.
> (Decision and Order, 01/26/15, p. 10).
>
> **IT IS FURTHER ORDERED** that the Claimant failed to provide timely notice of her injury, as she began having pain in her wrists in 2012 and sought and received medical treatment in November of 2012 and was diagnosed with carpel tunnel syndrome at that time. Further, the Claimant stated that in 2012 she knew that the pain in her wrists was coming from her work at Mohawk. The Claimant did not provide notice of a work-related injury to her employer until June 28, 2013.
> (Decision and Order, 01/26/15, p. 11).

After timely appeal, the Appellate Panel affirmed in full.

This appeal followed.

STANDARD OF REVIEW

While the Commission's Findings of Fact regarding notice are generally 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.").

STATEMENT OF FACTS

The following facts were established by uncontradicted evidence of the record:

Claimant was hired by Mohawk Industries as a twist operator in 2006. (APA No. 11, pp. 186-190). Her work duties involved repetitive use of her hands. (APA No. 11, pp. 186-190).

On November 20, 2012, Claimant saw her family doctor, Dr. Steven Millen, with the chief complaint of right hand pain. Dr. Millen noted:

> PT states that she is here today because of pain to her right hand up to her elbow that started 2 days ago, described as an intermittent burning, dull pains usually feels number than after the numbness goes away the burning starts back worsened by nothing relieved by getting up walking and sahking(sic) her hands rating 0/10 at present and 8/10 at worse. She has been taking/using hand braces at night and the shaking the hands thing which she feels like does help. Was told about 4 years ago that this was from carpel tunnel syndrome but never went to the specialist.
> (APA No. 1, p. 1).

Dr. Millen diagnosed carpel tunnel syndrome and referred the Claimant to see an orthopaedic surgeon. (APA No. 1, p. 3).

There is no evidence in the record that Dr. Millen told the Claimant that she was suffering from carpal tunnel syndrome, that he told her the carpal tunnel syndrome was related to her work, or that he evaluated or told her anything at all about her left wrist.

In fact, the defense objected to any testimony about what Dr. Millen told the Claimant.

> Q. And did --- what did Dr. Millen tell you?
> A. I don't remember exactly.
> MR. HYLTON: And I would object to the hearsay of what the doctor told her.
> MR. WUKELA: Well, it's to notice. I mean, that's what this is about, but okay.
> MR. HYLTON: I'll let her --- she can testify as to that, not as to the condition.
> MR. WUKELA: I won't ask her if you won't.
> MR. HYLTON: It's up to you.
> MR. WUKELA: All right. Fine.
> (Tr. 10/02/14 p. 26, lines 3-15).

On referral by Dr. Millen, Claimant saw a neurologist, Dr. Kurt Wohlrab on April 2, 2013. (APA No. 2, pp. 13-14). Dr. Wohlrab diagnosed bilateral carpal tunnel syndrome and scheduled an EMG nerve conduction study which was performed on July 3, 2013. (APA No. 4, p. 19). Claimant continued working and notified her supervisor on June 28, 2013 that she was suffering work-related carpal tunnel syndrome. (Tr. 10/02/14 p. 35, lines 10-12; Tr. 05/18/15 p. 20, lines 1-2).

Claimant continued working and, at the direction of the Employer, she went to see Dr. Wallace, the company doctor, at Dillon Internal Medicine, on August 8, 2013. (APA No. 4, p. 27). Dr. Wallace diagnosed carpal tunnel syndrome. (APA No. 4, p. 29). Subsequently, in response to a written inquiry by the Workers' Compensation Carrier on August 13, Dr. Wallace indicated that the Claimant's left hand and wrist symptoms were not related to Claimant's work. (APA No. 4, p. 48).

Claimant left work, for the first time, on November 17, 2013. Subsequently, on December 4, 2013, the Claimant underwent a left carpal tunnel release.

ARGUMENT

I. THE APPELLATE PANEL ERRED IN FINDING THAT THE DEFENDANTS HAD PROPERLY RAISED THE DEFENSE OF NOTICE.

The Workers' Compensation Regulations set out the method of filing a claim with the Workers' Compensation Commission. In particular, R.67-206 provides:

> **R.67-206. Filing a Claim.**
> A. To file a claim, file with the Commission's Claims Department a Form 50, Form 52, or a letter as provided below.
> R.67-206.

It is undisputed that the Claimant met the requirements of R.67-206 when she filed a pro se claim, via Form 50, dated November 22, 2013. (APA No. 12, p. 205). Of note, the Claimant's pro se Form 50 also requested a hearing, (Id.), which is not necessary when filing a claim.

Regulation 67-603 mandates the Employer's response to a claim. It provides: "The employer's representative shall respond to a Form 50 by preparing a Form 51 ..." The regulation goes on to provide:

> C. Failure to file a Form 51 or Form 53 within the period in section B(1) shall be deemed a general denial of liability for the benefits claimed and **the employer and its representative by the failure to respond within the period in section B(1) shall forfeit each special and affirmative defense allowed by the Act including the defenses available in** Sections 42-9-60, **42-15-20**, 42-15-40, and 42-17-90 of the Act.
> R.67-603(C)(emphasis added).

It is undisputed that the Employer failed to file a Form 51, answer, within thirty (30) days of the November 14, 2013 claim. Indeed, the Commission's activity report on

the case indicates that as of January 15, 2014, the Commission recorded that "Form 51 Not Received to Date." (APA No. 13, p. 211).

The plain language of the Regulation provides that:

> ... and the employer and its representative by the failure to respond within the period in section B(1) **shall forfeit** each special and affirmative defense allowed by the Act including the defenses available in ... §42-15-20.
> R.67-603.

The Regulation is unambiguous, mandatory, and does not contain any exceptions or provisos. By the Defendants' own admission, they failed to file an answer within thirty (30) days of the claim. The Regulations require that such a failure "shall" result in the forfeiture of each special and affirmative defense, including notice.

In response, the Defendants argued, and the Commission found, that the Claimant's pro se Form 50 was "withdrawn" and that:

> 8. The Claimant's position as to notice would be correct had she not withdrawn the Form 50 filed on 11/13/13. She, however, did withdraw that Form 50 and, as such, afforded the Defendants the opportunity to file a timely response – which they did – when she filed a new Form 50 on 07/03/14.
> (Decision and Order, 01/26/15, p. 9).

This finding is unsupported by fact or law.

First, the record contains no evidence that the Claimant withdrew either her claim or her hearing request. The only evidence in the record of what actually occurred during that first hearing on March 27, 2014 is the Workers' Compensation Commission's activity report which indicates "3-27-14 Hearing Postponed." (APA No. 13, p. 211)(emphasis added).

Regulation 67-613 governs "postponement or adjournment of the scheduled hearing" and provides that: "B. A commissioner may postpone a hearing for good cause." It goes on to provide:

> (4) All hearings other than those set pursuant to Section 42-9-260 are postponed only until the following month. If the commissioner cannot hear the case the following month, the hearing will not be reset until the moving party files a written request with the Judicial Department. If the nature of the claim or the relief requested changes, file a new hearing request according to R.67-207 unless R.67-610 applies. R.67-613(B)(4).

Nothing in the Regulations governing postponement indicate that if a postponement occurs the defendants regain the opportunity to raise affirmative defenses to the claim previously forfeited by operation of R.67-603(C).

Defendants offered, and the Commission cited, no evidence that the Claimant withdrew or voluntarily dismissed her claim. Indeed, the defense offers no evidence that the Claimant did anything affirmatively at all during the March 27, 2014 hearing, other than appearing.

Further, Commission Regulations make it clear that filing a claim is a separate action from requesting a hearing. Regulation 67-206 provides the method of filing a claim. Regulation 67-207 provides the method for requesting a hearing. Both acts, of course, involve the filing of a Form 50. However, one may file a claim by Form 50 without requesting a hearing. Similarly, one may withdraw a request for hearing without withdrawing their claim.

Regulation 67-609 governs "Withdrawing a Request for Hearing." It provides:

> (2) When a Form 50 or Form 52 is withdrawn, a notice removing the case from the docket will be filed in the Commission record and copy sent electronically or mailed to parties in R.67-210.
> B. **The notice is without prejudice to the Claimant's right to proceed with his or her claim.**
> R.67-609.(emphasis added).

Thus, pursuant to R.67-609, the Claimant may withdraw their request for hearing without prejudicing their claim and, thus, without restoring to the defense the right to raise defenses forfeited by failing to answer the claim in a timely manner pursuant to R.67-603(C). Regulation 67-609 goes on to explain that:

> C. Withdrawing a Form 50 or Form 52 the second time without good cause may operate as a voluntary dismissal of the claim when the form is withdrawn by a claimant who has once withdrawn a Form 50 or Form 52 based on the same set of facts, and, in the opinion of the commissioner, the form is withdrawn merely for the purpose of delay.
> R.67-609(C).

Thus, while withdrawing a Form 50 hearing request the first time "is without prejudice to the Claimant's right to proceed with his or her claim", repeated withdrawal of a hearing request for the purpose of delay may result in the dismissal of the claim.

There is no evidence that the Claimant's hearing request was withdrawn at all. There is certainly no evidence that it was withdrawn more than once for the purpose of delay, or that the claim was ever dismissed. The only evidence on the issue is contained in the Commission's activity report which indicates "3-27-14 Hearing Postponed". (APA No. 13, p. 211).

In fact, the claim tried before the Commission and decided on January 26, 2015 that is the subject of this appeal, WCC File No. 1315636, (Tr. 10/02/14 p. 1), is the same claim filed pro se by the Claimant on November 22, 2013, WCC File No. 1315636. (APA No. 12, p. 205).

Arguably, if the Claimant filed a claim which was dismissed pursuant to R.67-609(C) for repeatedly withdrawing her hearing requests for the purpose of delay, and that claim was later refiled, the defense might have the opportunity to raise defenses against the new claim which were previously forfeited against the old one. But that is not what occurred here.

The Regulations are clear that where a hearing is cancelled, either because of postponement pursuant to R.67-613, or withdrawal of a request for hearing on the first occasion pursuant to R.67-609, the cancellation or postponement of the hearing does not in any way prejudice the Claimant's rights to proceed with his or her claim; thus, such a hearing cancellation or postponement does not revive for the defense the opportunity to raise defenses previously forfeited pursuant to R.67-603(C), as a result of their failure to answer the claim. The Commission erred in finding to the contrary.

II. THE SINGLE COMMISSIONER ERRED IN FINDING THAT THE CLAIMANT DISCOVERED, OR COULD HAVE DISCOVERED BY EXERCISE OF REASONABLE DILIGENCE, THAT HER ACCIDENT WAS COMPENSABLE UPON HER TREATMENT WITH HER FAMILY DOCTOR ON OR ABOUT NOVEMBER 20, 2012, AND THAT CLAIMANT WAS OBLIGATED TO GIVE NOTICE WITHIN NINETY (90) DAYS OF THAT DATE TO THE EMPLOYER.

The record contains no evidence that the Claimant was told by her doctor that she

had carpel tunnel syndrome on November 20, 2012. Even if she had been notified of her carpel tunnel diagnosis on that date, no physician opined that her condition was work-related, and thus compensable, until after the claim was filed.

Therefore, even if Defendants had timely raised notice, the Claimant has given adequate notice.

S.C. Code §42-15-20(C) requires that:

> (C) In the case of repetitive trauma, notice must be given by the employee **within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable**, 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 unduly prejudiced thereby.
> S.C. Code §42-15-20(C)(emphasis added).

S.C. Code §42-1-172(B) defines "compensable repetitive trauma":

> (B) An injury is **not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury.**
> S.C. Code §42-1-172 (B)(emphasis added).

Therefore, by statute, a repetitive trauma injury is not considered "compensable", triggering S.C. Code §42-15-20(C), until the Commission makes "a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence..."

Of course, no commissioner had made any finding of fact at all in this case until the Order of January 26, 2015; thus, under a plain reading of the statutes, the obligation to

provide notice is not triggered until after an order is signed.

Defendants argue that such a result would be absurd, making the notice requirement meaningless. It is certainly true that our Supreme Court has held that "In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature," Lancaster Cnty. Br Ass'n v. S.C. Commission on Indigent Defense, 380 S.C. 219, 222 (2008). However, the Court has also been clear that:

> Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Media Gen. Communs., Inc. v. S.C. Dep't of Revenue, [388 S.C. 138] 148, [694 S.E.2d 525] 530 (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). If a statute's "terms are clear and unambiguous, they must be taken and understood in their plain, ordinary and popular sense, unless it fairly appears from the context that the Legislature intended to use such terms in a technical or peculiar sense." Id. (citation omitted).
>
> What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. (quoting Norman J. Singer, *Sutherland Statutory Construction* §46.03, at 94 (5th Ed. 1992)).
>
> Lambries v. Saluda County Council, 409 S.C. 1, 10-11, (2014).

Thus, while the defense urges this Court to construe and interpret the statute to avoid an absurd result, they fail to note that where the statutory language is unambiguous, "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Lambries v. Saluda County Council, 409 S.C. 1, 10-11, (2014)(quoting Media Gen. 388 S.C. 138, 148).

Here, there is no ambiguity. The legislature used terms that it defined specifically and clearly. The legislature tied the trigger of the notice requirement to the term of art: "compensable." S.C. Code §42-15-20(C). The General Assembly, at the same time, defined that term, "compensable", in the context of repetitive trauma; providing that a repetitive trauma injury "is not considered a compensable repetitive trauma injury, unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence ..." S.C. Code §42-1-172(B).

The legislature went even further to define the term "medical evidence" as "expert opinion or testimony stated to a reasonable degree of medical certainty..." S.C. Code 42-1-172(C).

Thus, each term is unambiguously defined. Statutory interpretation has no place. By statutory definition, the notice requirement is triggered by "compensability." An injury is not considered "compensable" in the repetitive trauma context, by statutory definition, until a commissioner makes a finding of fact establishing a causal connection supported by medical evidence in the form of expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed and qualified medical physician.

The Defendants may argue that the definitions in §42-1-172 establish the standard for the employee to receive benefits for repetitive trauma, not to the standard by which the notice requirement of §42-15-20 is triggered in such a claim. Even setting aside, for a moment, the fact that the particular language at issue in §42-15-20 and §42-1-172 were adopted on the same date by 2007 Act No. 111; and also setting aside the fact that the two

sections use the same term of art: "compensable"; and also setting aside the inequity of holding that knowledge of some set of facts would be sufficient to trigger an employee's requirement to give notice of a compensable claim, while insufficient to support that same claimant's entitlement to benefits for such a claim; this Court's decision in King v. Int'l Knife and Saw, 375 S.C. 437 (Ct. App. 2011), relied upon by the Defendants and the commission, stands for the proposition that:

> ... a work-related repetitive injury does not become compensable, and the ninety-day reporting clock does not start, until the injured employee discovers or should discover he qualifies to receive benefits for medical care, treatment, or disability due to his condition.
>
> King at 444(emphasis added).

Thus, pursuant to King, a claimant's §42-15-20 obligation to give notice is triggered by his knowledge that he "qualifies to receive benefits." The claimant's entitlement to benefits for repetitive trauma are set out explicitly by §42-1-172.

Even assuming that this Court finds that §42-1-172's definition of "compensable repetitive trauma" as requiring a commissioner's finding of fact of causal connection established by medical evidence stated to a reasonable degree of medical certainty is ambiguous, and the Court interprets it to avoid the result that the notice requirement is not triggered until the Order is signed, we are still left with the unavoidable conclusion that by operation of §42-1-172, the claimant's entitlement to benefits (her knowledge of which triggers the notice clock) requires "evidence of a causal connection that is established by medical evidence."

Said differently, if the notice requirement is not triggered by the commissioner's finding of fact of a causal connection established by medical evidence, the trigger must require, at least, the claimant's knowledge of such medical evidence establishing a causal connection as would support such a finding.

Here, the first time any physician indicated anywhere in the record that there was a causal connection between the job and claimant's injury was when Dr. Wallace filled out the Long Term Disability Form on February 9, 2014, (APA No. 4, pp. 000092-000093), well after the Employee gave notice on June 28, 2013. (Tr. 10/02/14 p. 35, lines 10-12; Tr. 05/18/15 p. 20, lines 1-2).

The next time any physician indicated that the Claimant's condition was work related was in the depositions of Dr. Matthew Welsch and Dr. Robert Moore; which were taken on June 23, 2014 and July 2, 2014, respectively. (APA No. 16, Dep. Welsch, p. 44, line 24 - p. 45, line 3; APA No. 17, Dep. Moore, p. 15, line 24 - p. 16, line 5).

Thus, the employer had notice of the claim even before the Claimant knew, or should have known, that she was entitled to benefits, i.e. that a doctor had indicated a causal connection between the work and the injury.

The Single Commissioner found, citing King v. International Knife & Saw, 375 S.C. 437 (Ct. App. 2011), that notice must be given within ninety (90) days of when claimant knew, or should have known, that the repetitive trauma injury was compensable, and that compensability is determined when the condition requires medical treatment or the injury interferes with the ability to work, whichever occurs first.

The Commission went on to find that:

> **IT IS FURTHER ORDERED** that the Claimant failed to provide timely notice of her injury, as she began having pain in her wrists in 2012 and sought and received medical treatment in November of 2012 and was diagnosed with carpel tunnel syndrome at that time. Further, the Claimant stated that in 2012 she knew that the pain in her wrists was coming from her work at Mohawk. The Claimant did not provide notice of a work-related injury to her employer until June 28, 2013.
> (Decision and Order, 01/26/15, p. 11).

The Single Commissioner's finding that the Claimant knew, or should have known, that she qualified to receive benefits under the Act relied, in part, on the fact that "... the Claimant stated that in 2012 she knew that the pain in her wrists was coming from her work at Mohawk." (Decision and Order, 01/26/15, p. 11; see also Tr. 10/02/14 p. 34, lines 1-4).

However, the Court of Appeals in King found that a claimant's belief that their pain was work-related was not sufficient to trigger the injured employee's obligation to report. See, King, at 443-445.

In particular, the Court of Appeals in King found:

> Employer focuses its arguments on *section §42-15-20(C)'s* use of the word "condition", contending any occurrence of pain when coupled with the employee's belief that the pain is work-related, triggers the employee's reporting obligation under *section §42-15-20(C)*. In short, Employer urges us to equate pain with compensable condition. We decline to do so.
>
> King at 443-444.

The Court went on to note that:

> [the claimant] further admitted that he believed his arm ached because he worked "slinging a hammer all day". However, a mere work-related ache does not constitute a

> compensable condition, regardless of whether the employee later develops an injury. The Act requires an injured employee to be diligent, not prescient.
>
> King at 445.

To the contrary. The Court in King held that:

> ... **the ninety-day reporting clock does not start, until the injured employee discovers, or should discover, he qualifies to receive benefits** for medical care, treatment, or disability due to his condition".
>
> King at 444(emphasis added).

In order to be "qualified to receive benefits," S.C. Code §42-1-172(B) requires that a Claimant present a preponderance of the evidence establishing a causal connection "by medical evidence between the respective activities that occurred while the employee was engaged in the regular duties of employment and the injury." S.C. Code §42-1-172(B). That is, an employee cannot discover that they are qualified to receive benefits until a doctor states that they suffer a condition caused by work.

The Defendants point to, and the Commission relied on, the Claimant's November 20, 2012 visit with her family doctor, Dr. Steven Millen to establish the Claimant's knowledge of a compensable condition, triggering the reporting clock. While Dr. Millen's note indicates a diagnosis of carpal tunnel syndrome in her right hand and refers her to orthopaedic surgeon Dr. Robert Moore, the note contains no mention of a diagnosis to her left hand.

Moreover, the note does not indicate a diagnosis of carpal tunnel syndrome related to her work. Further, there is no evidence in the record that supports a finding that any diagnosis, much less any causal connection, was ever communicated to the Claimant on

November 20, 2012.

In sum, the November 20, 2012 note offers no evidence that the doctor communicated to the Claimant that she had bilateral carpal tunnel syndrome related to her work. (APA No. 1, pp. 1-3). In fact, the hearing record contains no evidence that he did.

Claimant's counsel asked the Claimant about what Dr. Millen told her and the defense objected. (Tr. 10/02/14 p. 26, lines 6-7). Claimant's counsel responded: "I won't ask her if you won't," (Tr. 10/02/14 p. 26, lines 12-13), and no further testimony whatsoever was elicited about what Dr. Millen told the Claimant about the diagnosis of her condition or its cause.

The next record of Claimant seeing any physician was on April 2, 2013, when Claimant saw Dr. Kurt Wohlrab on referral by Dr. Millen. (APA No. 2, pp. 13-14). Dr. Wohlrab diagnosed bilateral carpal tunnel syndrome and referred Claimant for nerve conduction studies which she underwent on July 3, 2013, and which confirmed carpal tunnel syndrome. (APA No. 2, p. 19). Even then, Dr. Wohlrab's record does not indicate the Claimant was told by Dr. Wohlrab that her condition was work-related.

Indeed, after the First Report of Injury the Carrier referred the Claimant to the company doctor, Dr. James Wallace. (APA No. 4, p. 27). After he evaluated the Claimant, Dr. Wallace filled out a form for the Workers' Compensation Carrier on August 22, 2013 indicating that while the Claimant had carpal tunnel syndrome it was <u>not</u> related to work. (APA No. 4, p. 48). Dr. Wallace's records indicate that the Claimant received a letter on or about September 18, 2013, from the Workers' Compensation Carrier stating that Dr. Wallace's noted her injury was not related to work. (APA No. 4, p. 56).

Therefore, not only is the record devoid of any evidence that any physician told Claimant that she suffered work-related carpal tunnel prior to the July 3, 2013 First Report filed by the Employer, in September of 2013 the company doctor had advised her that her condition was not work-related.

Of course, Claimant subsequently saw orthopaedists Dr. Robert Moore and Dr. Matthew Welsch and in deposition they testified that the Claimant's bilateral carpal tunnel syndrome was work-related, and, thereafter, the Carrier admitted so at the hearing.

However, there is no evidence in the record that any physician told the Claimant that she had work-related carpal tunnel syndrome prior to her making a First Report of Injury. Pursuant to King, the fact that the Claimant believed her pain was work-related is not sufficient to trigger the Claimant's reporting obligation. The Commission erred in so finding.

III. THE SINGLE COMMISSIONER ERRED IN FAILING TO FIND AS A MATTER OF FACT AND CONCLUSION OF LAW THAT THE CLAIMANT ADEQUATELY GAVE NOTICE WITHIN NINETY (90) DAYS OF THE DATE OF LAST INJURIOUS EXPOSURE, i.e. NOVEMBER 17, 2013.

It is undisputed in the record that the Claimant continued to work for the Employer and used her hands repetitively up until November 17, 2013. In Schurlknight v. City of North Charleston, 353 S.C. 175 (2002), the Supreme Court held that the date of injury for the purpose of reporting repetitive trauma claims was the "last date of injurious exposure, not the date of discovery." Schurlknight. There, the Supreme Court noted that application

of the discovery rule would prejudice a Claimant who discovers symptoms of repetitive trauma injury but continues to work. The Court held that in cases where the Claimant discovers a repetitive trauma injury but continues to work, the limitations periods were triggered by the last date of injurious exposure; premised on the recognition that the injuries were caused by trauma repetitively until the trauma ends. Schurlnight at 178, 195.

The Defendants will argue that §42-15-20(C), passed by the legislature in 2007 after Schurlknight was decided, provides "in the case of repetitive trauma, notice must be given by the employee within ninety days of the date the employee discovered, or could have discovered by exercise of reasonable diligence, that the claim is compensable ...", and that §42-15-20(C) overrules Schurlknight.

However, as discussed above, §42-15-20(C) triggers the notice clock upon the discovery "that the claim is compensable."

S.C. §42-1-100 defines the term "compensation" as "monetary allowance payable to employee or his dependents."

Therefore, the notice provision in repetitive trauma cases is not triggered until Claimant knows he is entitled to payment of monetary benefits. This entitlement does not arise, of course, until the Claimant is disabled from working. Here, that did not occur until November 17, 2013. Up until that point, Claimant was working and continuing to suffer injury caused by trauma.

CONCLUSION

For the foregoing reasons, Claimant respectfully submits the Order of the Commission should be reversed.

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

September 15th 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1315636

Kathey L. Staton, Employee, ...Appellant,

vs.

Mohawk Industries, Inc., Employer,
and Liberty Mutual, Carrier, ...Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant on Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on September 15, 2015, addressed to their attorneys of record, J. Brandon Hylton, Esquire, Attorney at Law, PO Box 7489, Florence SC 29202, and Helen F. Hiser, Esquire, Attorney at Law, PO Box 650007, Mt. Pleasant SC 29465.

WUKELA LAW FIRM

BY: _____
STEPHEN J. WUKELA
SC 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
Katherine M. Gordon

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

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

September 15, 2015

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

Re: Kathy L. Staton v. Mohawk Industries, Inc., et al
Appellate Case No. 2015-001675

Dear Ms. Kitchings:

Enclosed please find for filing in the above case the following:

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

By copy of this letter, I am serving counsel for Respondents with the above.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM

STEPHEN J. WUKELA

SJW:jpb

Enclosures

cc: J. Brandon Hylton, Esquire
Helen F. Hiser, Esquire

First Class Mail

RECEIVED
SEP 16 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