

**APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO.: 1106689**

Johnny Tucker,
Employee/Claimant,
Appellant

vs.

SC Department of Transportation,
Employer,

and

State Accident Fund,
Carrier,
Defendants,
Respondents.

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SC Court of Appeals

Appellate Panel Review in Columbia, South Carolina set for July 21, 2015 per notices timely and properly served on all parties of interest.

Appellate Panel Decision and Order filed September 11th, 2015.

Appearances:

Claimant/Appellant represented by Preston F. McDaniel, Esquire, of Columbia, South Carolina.

Defendants/Respondents represented by Sarah S. Alphin, Esquire, of Willson Jones Carter & Baxley of Columbia, South Carolina.

STATEMENT OF THE CASE

The parties were heard by Commissioner Gene McCaskill on October 21, 2014 in Hartsville, South Carolina. As a result of said hearing, Commissioner McCaskill issued an Order dated April 14, 2014 from which the Claimant appealed.

The Hearing Commissioner's Decision and Order set forth the following **Findings of Fact**:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Johnny Tucker as Employee-Claimant and South Carolina Department of Transportation as Employer and State Accident Fund as Carrier, Defendants.
2. Claimant suffered a compensable left scapula fracture injury arising out of and within the course and scope of his employment on May 2, 2011.
3. Claimant was awarded 5% permanent partial disability to the left shoulder from his scapular fracture. A properly executed and filed Form 19 shows date of last payment of compensation to be November 28, 2012.
4. Claimant now alleges a change of condition. Claimant filed a Form 50 Request for Hearing alleging a change of condition on July 30, 2014.
5. Defendants deny that there has been a change of condition.
6. Defendants object to this matter coming before the Commission asserting that the Commission does not have jurisdiction to hear this claim as the Form 50 request for a hearing was filed more than 12 months after last payment of compensation as statutorily required by S.C. Code Ann. §42-17-90.
7. The Form 19, which is a part of the Commission file, shows last payment of

compensation was November 28, 2012.

8. Claimant filed a Form 50 Claim Only alleging a change of condition on May 2, 2013. Claimant did not file a Form 50 Request for Hearing until July 30, 2014.

9. Claimant argues, citing the case of Allen vs. Benson, 112 S.E. 2d 722, that when an application is made within twelve months, the Commission is not restricted to holding the hearing in twelve months, and therefore argues that Claimant is not restricted to requesting a hearing during that time frame.

10. It is the Claimant's position, given their filing of claim only for a change of condition for the worse on May 2, 2013, the statute is effectively tolled.

11. S.C. Code Ann. §42-17-90 reads in part, "... on the application of a party in interest on the ground of a change of condition, the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded..." This code section does not use the words, "request a hearing."

12. Within this framework, I must examine what does "application" mean in the context of the Act.

13. In Allen, the Court said in part, "...the application for review must be made within one year after the last payment of compensation."

14. In Allen, the application that was made was a request for a hearing.

15. Black's Law Dictionary (9th edition) defines "application" as a "request or petition."

16. When I consider the language of §42-17-90, the language in Allen, and the definition provided by Black's, I must conclude that "application" must be interpreted to mean a "request" seeking action on the part of the Commission.

17. What Claimant did on May 2, 2013 by filing a Form 50 claim only was to give notice to the Commission. Claimant did not request a hearing until July 30, 2014 after the twelve month window provided for in the Act has run. Notice does not equate to application.

18. Application is a request for action. There is no such request in the Form 50 filing on May 2, 2013. The request for action comes with the filing of a Form 50 hearing request, which was completed on July 30, 2014. This is 18 months after last payment of compensation and therefore does not comply with S.C. Code Ann. §42-17-90.

19. There is no language in S.C. Code Ann. §42-17-90 which provides for the statute to be tolled. Allen does not speak to tolling the statute.

20. S.C. Code Ann. §42-17-90(A) begins with, "On its own motion or on the application of a party in interest on the ground of a change of condition..." A plain reading of this language further supports the conclusion that an application of a party has the same result as a motion of the Commission. Both are an action to resolve a question under the Act. The vehicle for that resolution is a hearing.

21. S.C. Code Ann. §42-17-90(B) and (C), while dealing with repetitive trauma and occupational disease, mirror the mechanism found in (A) for the timing related to review. Those sections do, however, contain different language not found in (A). *Any filing not made within this one-year period shall be considered untimely and shall not be reviewed.* This language does not appear in (A) which is the applicable section to this case. That being said, sections (B) and (C) must be read in context, and the first sentence of (B) and (C) like the first sentence of (A) require a motion or application.

22. S.C. Code Ann. §42-17-90(A) is clear in its intent. While the Commission does not

have to hold a hearing in the case within twelve months from the date of the last payment of compensation, Claimant must have sought a hearing during that statutorily established timeframe; otherwise, the time period in which the party can file for a change of condition is concluded.

23. In Wallace v. Campbell Limestone Co., 198 S.C. 196, 17 S.E.2d 309 (S.C. 1941), the court wrote, "The conclusiveness of this provision is inescapable."

24. Based on my review, I must conclude that for the application or request for hearing to have been timely, a request for hearing would have to have been filed on or before November 28, 2013.

25. As Claimant's application for a change of condition was not timely, the claim is dismissed with prejudice.

The Hearing Commissioner's Decision and Order also set forth the following

Conclusions of Law:

1. Under S.C. Code Ann. §42-1-130, Claimant was a covered employee at the time in question; and under § 42-1-140, Defendant/Employer was a covered employer under the Act.

2. Under S.C. Code Ann. §42-17-90 and other-applicable law, an application for review of change of condition requires a hearing request to be made. A claim only filing is not sufficient as "application" means Claimant must request the Commission to take some action as opposed to simply giving the Commission notice of a claim.

3. Under S.C. Code Ann. §42-17-90 and other applicable law, Claimant failed to file for a change of condition for the worse within the statutorily required time period. Therefore, Claimant's request for benefits for a change of condition is hereby denied and dismissed with

prejudice.

Within the statutory period, Counsel for the Claimant filed an Application for Review in the case setting forth the following assignments of error:

1. That the Claimant would request a review pursuant to S.C. Code §42-17-50 by the Full Commission of the Findings of Fact, Conclusions of Law and Decision rendered in this matter based upon a review of the evidence, the position and the legal precedents cited to the Commission and the entire Record before the Hearing Commissioner for decision.
2. That the Hearing Commissioner erred as a matter of law by denying the claim for a Change of Condition because the Claimant did not timely file for a Change of Condition with the Commission not on the basis that the Claimant did not file or claim for a Change of Condition with the Commission within one (1) year pursuant to Statute and Regulation but that the Claimant did not request a Hearing on the claim of a Change of Condition within one (1) years this was error because the allegation that the Change of Condition was not timely filed is an affirmative defense which must be plead pursuant to statute and Commission Regulation and it was not plead in the responsive Form 51 in this case.
3. That the Hearing Commissioner erred as a matter of law by denying the Claimant a Hearing on his claim for a Change of Condition on the basis that although the Claimant had timely filed a Claim alleging a Change of Condition had occurred well within the twelve (12) months of the last payment of compensation, the Claimant did not file for a Hearing on that claim until after the twelve (12) months following the last payment of compensation.

4. That the Hearing Commissioner erred as a matter of law by denying the claim for a Change of Condition where South Carolina Workers' Compensation Reg. 67-206 after the claim for a Change of Condition was filed requires that employer's representative "shall immediately contact the Claimant", and where Reg. 67-601 provides that the, "Commission will not set a Hearing until a conflict arises," and where the undisputed evidence is that the Claimant on four (4) separate occasions contacted counsel for the Defendants and/or the adjuster for the Defendants beginning on March 18, 2013 and continued through at least July 26, 2013 and where there is no evidence that the Defendants ever notified counsel or Claimant of a conflict, the Defendants are estopped and/or have waived the affirmative defense of not timely filing for a Change of Condition under S.C. Code §42-17-90.
5. That the Hearing Commissioner erred as a matter of law by denying the claim for a Change of Condition where S.C. Code §42-17-90, our Change of Condition statute is very clear that the Claimant must file an application alleging a Change of Condition which the Commission refers to in its own regulations as, "a claim" involving a Change of Condition (Reg. 67-602B) within one (1) year of the last date of the payment of compensation, the Commissioner's Decision requiring that the Claimant must not only file an application by filing a claim but must file for a Hearing to meet the requirements of the Act, denies the Claimant due process of law under federal and state law. The Commission, not the parties, has bifurcated the, "application process" under its regulations.
6. That the Hearing Commissioner erred as a matter of law by failing to make a

Decision and make Findings of Fact and Conclusions of Law on the application for benefits based on an undiagnosed condition. Where the Form 50 Request for Hearing alleged both a Change of Condition for the worse and also an undiagnosed condition.

7. The Hearing Commissioner erred as a matter of law by failing to apply the fundamental construction principle applied to the Act, that the Act and its provision shall be liberally construed in favor of benefits to the injured worker.

Copies of the above assignments of error were furnished to all interested parties prior to oral argument scheduled before the Appellate Panel on July 21, 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 brief of the Appellant and Respondents.

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 **AFFIRMED IN FULL**. The Findings of Fact and Conclusions of Law found in the Hearing Commissioner's Decision and Order, and as specified above, are hereby **AFFIRMED IN FULL**.

FINDINGS OF FACT

IT IS FOUND AS A FACT:

1. That Employee, Employer, and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Johnny Tucker as Employee-Claimant and South Carolina Department of Transportation as

Employer and State Accident Fund as Carrier, Defendants.

2. Claimant suffered a compensable left scapula fracture injury arising out of and within the course and scope of his employment on May 2, 2011.
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24. Based on our review, we must conclude that for the application or request for hearing to have been timely, a request for hearing would have to have been filed on or before November 28, 2013.

25. As Claimant's application for a change of condition was not timely, the claim is dismissed with prejudice.

CONCLUSIONS OF LAW

Accordingly, as provided in §42-17-40, SC Code Ann. (1976), as amended, it is the determination of this Commission that:

1. Under S.C. Code Ann §42-1-130, Claimant was a covered employee at the time in question; and under §42-1-140, Defendant/Employer was a covered employer under the Act.

2. Under S.C. Code Ann. §42-17-90 and other applicable law, an application for review of change of condition requires a hearing request to be made. A claim only filing is not sufficient as "application" means Claimant must request the Commission to take some action as opposed to simply giving the Commission notice of a claim.

3. Under S.C. Code Ann. §42-17-90 and other applicable law, Claimant failed to file for a change of condition for the worse within the statutorily required time period. Therefore, Claimant's request for benefits for a change of condition is hereby denied and dismissed with prejudice.

ORDER

The Order of the Single Commissioner from which this appeal has been taken is hereby
AFFIRMED IN FULL

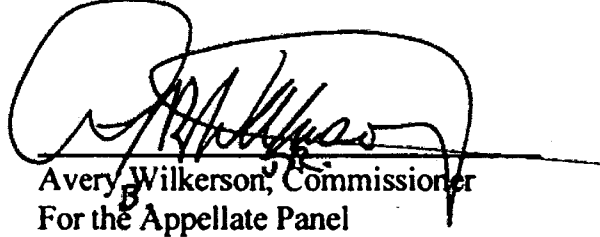
IT IS HEREBY ORDERED the Claimant did not timely file for a change of condition with the Commission.

IT IS FURTHER ORDERED the claim is dismissed with prejudice.

No hearing costs are assessed in this instance.

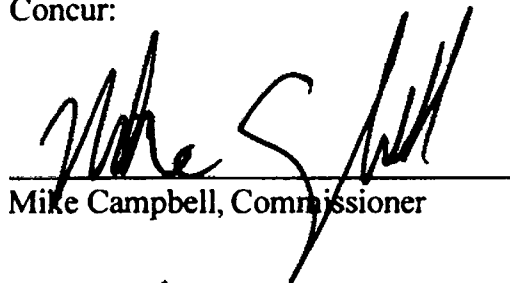
IT IS SO ORDERED.

**SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION**

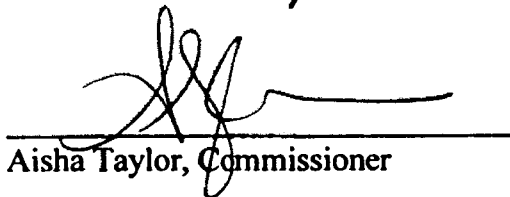


Avery Wilkerson, Commissioner
For the Appellate Panel

Concur:



Mike Campbell, Commissioner



Aisha Taylor, 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 September 11, 2015