

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

S.C. Supreme Court

Case No. 2009-141286

Ralph Duane King, Jr., ... Respondent,

v.

International Knife and Saw-Florence, ... Employer,
and

Peerless Insurance Company c/o

Montgomery Insurance, ... Petitioners.

APPENDIX

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Attorney for Respondent

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Case Tracking No. 2009-141286

Ralph D. King, Jr., ... Appellant,

v.

International Knife and Saw-Florence,

Employer,

and

Peerless Insurance Company c/o

Montgomery Insurance, ... Respondents.

RECORD ON APPEAL

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APPELLATE PANEL DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 0811652

RALPH DUANE KING, JR.

EMPLOYEE,
CLAIMANT/RESPONDENT

VS.

INTERNATIONAL KNIFE AND SAW -
FLORENCE

EMPLOYER,

AND

PEERLESS INSURANCE COMPANY c/o
MONTGOMERY INSURANCE,

CARRIER,
DEFENDANTS/APPELLANTS

Appellate Panel Review held in Columbia, South
Carolina, on May 26, 2009, per notices timely.
And properly served upon all parties of interest.

Appellate Panel Decision and Order Filed:

APPEARANCES: Claimant/Respondent represented by Stuart W. Snow,
Esquire of Dusenbury, Snow & McGee, PA, of Florence,
South Carolina.

Defendants/Appellants represented by James H. Lichty,
Esquire of McAngus Goudelock & Courie, LLC of Columbia,
South Carolina.

STATEMENT OF THE CASE

The parties were heard by Commissioner David Huffstetler on November 25, 2008, in Florence, South Carolina. On December 31, 2008, he issued the following Order:

Based upon the above findings of fact and conclusions of law, it is ordered that the Defendants shall make the following payments: 1) Weekly compensation to the claimant in the amount of \$406.68 for total disability for the period from May 21, 2008, to the date of this Order, in a lump sum, plus continuing compensation of \$406.68 per week until terminated in accordance with the Act; and 2) Defendants are financially responsible for the medical treatment, medication, evaluative procedures, diagnostic procedures, etc., which the claimant has received and continues to receive for his compensable injuries, including, but not limited to, those performed by Dr. Angus, Dr. Edwards, and Dr. Healy.

The Defendants filed a timely appeal and set forth the reasons, copies of which were furnished to all parties. All parties submitted briefs on the questions presented. Oral arguments were held before the Full Commission on May 26, 2009. All proffered testimony was taken. Such, together with documentary evidence, was delivered to the individual members of the Full Commission and has since been under study and consideration.

By appeal, Defendants respectfully submit the following:

1. The Commissioner erred in finding as fact that the Claimant sustained an injury to his right arm and shoulder on May 15, 2008 as result of a repetitive trauma of hammering steel saw blades with a 6 to 10 pound hammer, error being that such finding is against the preponderance of evidence on the record, is grounded in speculation, and is based upon erroneous legal conclusions.
2. The Commissioner erred in finding as fact that the repetitive activities the Claimant engaged in resulted in a compensable injury under the South Carolina Workers' Compensation Act, error being that such finding is against the preponderance of evidence on the record, is grounded in speculation, and is based upon erroneous legal conclusions.

3. The Commissioner erred in finding as fact that the Claimant timely reported the injury to the Employer, error being that such finding is against the preponderance of evidence on the record, is grounded in speculation, and is based upon erroneous legal conclusions.
4. The Commissioner erred in finding as fact that the right arm and shoulder injury did result in total disability for the period of May 21, 2008, to the present, and continuing, error being that such finding is against the preponderance of evidence on the record, is grounded in speculation, and is based upon erroneous legal conclusions.
5. The Commissioner erred in finding as fact that the right arm and shoulder injury required medical care for the period of May 20, 2008, to the present, and continuing, error being that such finding is against the preponderance of evidence on the record, is grounded in speculation, and is based upon erroneous legal conclusions.
6. The Commissioner erred in finding as fact that the Claimant has not yet reached maximum medical improvement, error being that such finding is against the preponderance of evidence on the record, is grounded in speculation, and is based upon erroneous legal conclusions.
7. The Commissioner erred in finding as fact that further medical care by Dr. Watt is necessary and will tend to reduce the period of disability, error being that such finding is against the preponderance of evidence on the record, is grounded in speculation, and is based upon erroneous legal conclusions.
8. The Commissioner erred in concluding as a matter of law that under S.C. CODE ANN. §42-1-160, the Claimant sustained a repetitive trauma injury by accident arising out of and in the course of his employment, error being that such finding is against the

preponderance of evidence on the record, is grounded in speculation, and is based upon erroneous legal conclusions.

9. The Commissioner erred in concluding as a matter of law that under S.C. CODE ANN. §42-15-20, the Claimant gave timely notice to the Employer of the accidental injury, error being that such finding is against the preponderance of evidence on the record, is grounded in speculation, and is based upon erroneous legal conclusions.
10. The Commissioner erred in concluding as a matter of law that under S.C. CODE ANN. §42-15-60, the medical treatment, medication, evaluative procedures, diagnostic procedures, etc., which the Claimant has received and continues to receive for his compensable injuries, including, but not limited to, is performed by Dr. Angus, Dr. Watt, Dr. Edwards, and Healy, are reasonable and necessary and tend to lessen the Claimant's period of disability, error being that such finding is against the preponderance of evidence on the record, is grounded in speculation, and is based upon erroneous legal conclusions.
11. The Commissioner erred in concluding as a matter of law that under S.C. CODE ANN. §42-1-120 and S.C. CODE ANN. §42-9-10, the Claimant is entitled to compensation during the period of temporary total disability of May 21, 2008, until terminated in accordance with the Act, error being that such finding is against the preponderance of evidence on the record, is grounded in speculation, and is based upon erroneous legal conclusions.

In appellate review, the Panel shall, pursuant to S.C. CODE ANN. §42-17-50 review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefor, make its own Findings of Fact and Conclusions of Law. The final determination of witness credibility and the weight to be accorded evidence in workers' compensation cases is reserved to the Full Commission. Etheridge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679

(S.C.App 2002). After careful review in the instant case, the Commission reverses the Hearing Commissioner's Order of December 31, 2008, and issues the following Findings of Fact and Conclusions of Law and Final Order as the final determinations of the Commission.

FINDINGS OF FACT

1. The Claimant alleges a repetitive trauma injury to the right shoulder and neck on May 15, 2008.
2. The Claimant was employed as a hammer-man, which involves repetitive hammering of saw blades with hammers.
3. The Claimant has carpal tunnel syndrome of the right hand and right shoulder and arm pain. See report of Nigel Watt, M.D., from September 16, 2008.
4. The Claimant's right carpal tunnel syndrome is a result of the repetitive impact from his work. See report of Nigel Watt, M.D., from September 16, 2008.
5. The Claimant suffered a repetitive trauma injury.
6. The Claimant first noticed this injury a couple of years ago.
7. The Claimant suspected his job was causing the injury when he first noticed it.
8. The Claimant discovered his condition was compensable a couple of years ago.
9. Even had the Claimant not discovered his condition was compensable a couple of years ago, reasonable diligence, i.e., examination by a doctor, could've discovered the condition was compensable.
10. The Claimant was an employee of International Knife and Saw (IKS).
11. The Claimant's last day of employment with IKS was May 21, 2008.
12. The Claimant notified his supervisor of his injury on May 21, 2008.
13. The Claimant did not provide notice of his injury prior to May 21, 2008.

14. The Claimant did not provide notice of his injury within ninety days of the date he discovered, or could've discovered by exercising reasonable diligence, his condition was compensable.
15. The Claimant knew well before he gave notice that he had a work-related problem.
16. The Claimant is barred from receiving benefits because of his failure to satisfy the notice requirement.
17. The decision of the Hearing Commissioner is reversed.

CONCLUSIONS OF LAW

1. That S.C. CODE ANN. §42-1-160 defines injury so as to exclude repetitive trauma injuries. The Claimant did not suffer an injury by accident because his injury was caused by the cumulative effects of repetitive traumatic events.
2. That S.C. CODE ANN. §42-1-172 defines repetitive trauma injuries as injuries which are gradual in onset and caused by the cumulative effects of repetitive traumatic events. The Claimant did suffer repetitive trauma injury because his injury was caused by the cumulative effects of repetitive traumatic events.
3. That S.C. CODE ANN. §42-15-20 defines notice and provides in repetitive trauma claims no compensation shall be payable unless notice is given within ninety days of the date the employee discovered, or could've discovered by exercising reasonable diligence, that his condition is compensable. The Claimant discovered, or could've discovered, his injury was compensable several years before actually providing notice to his employer and no compensation is payable.

ORDER

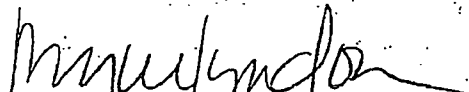
The underlying Order fails to properly distinguish between an injury by accident and a repetitive trauma injury and fails to recognize the appropriate notice requirement for repetitive trauma injuries. The record clearly shows the Claimant suffered a repetitive trauma injury and was aware the injury was work-related more than a year before providing notice to the Employer.

IT IS THEREFORE ORDERED the Order of the Hearing Commissioner is reversed,

IT IS FURTHER ORDERED the Claimant is not entitled to benefits under the Act due to a failure to provide notice.

AND IT IS SO ORDERED!


Commissioner Andrea Pope Roche


Commissioner S. Bryan Lyndon


Commissioner Derrick L. Williams

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 22 day of September, 2009
By Valerie D. Deen

Administrative Assistant to the Commissioner

Stuart W. Snow
James H. Lichty

ORDER
OF
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W. C. C. FILE NO. 0811652

Ralph Duane King, Jr.,	)
	)
Employee-Claimant,	)
	)
-vs-	)
	)
International Knife & Saw/Riggs, LLC,	)
Employer, and Peerless Insurance	)
Company, Carrier,	)
	)
Defendants.	)

HEARING:	Date:	November 25, 2008
	Location:	Florence County, South Carolina
APPEARANCES:	Claimant:	Stuart W. Snow
	Defendants:	James H. Lichty
PURPOSE OF HEARING:	To Determine Issues set forth in Forms 50 and 51.	
COMMISSIONER:	Honorable David W. Huffstetler	
FILED:	December 31, 2008.	

CASE SUMMARY

A. Stipulations: This case involves a Workers' Compensation claim brought pursuant to Title 42 of the South Carolina Code of Laws. Counsel stipulated that the purpose of the hearing was to determine the issues set forth in Forms 50 and 51, and venue was proper herein. Counsel also stipulated that the Claimant's applicable average weekly wage was \$609.98, and his compensable

rate was \$406.68. The parties stipulated that Employee and Employer were subject to the Workers' Compensation Act at the time in question; that the relationship of Employee and Employer existed at the time in question; and that at the time of the injury the Employee was performing services in the course of his employment. Without objection, the Commission's file was made part of the record.

B. APA Submissions: Under the Administrative Procedures Act, the following records were submitted into evidence:

1. Records of Dr. Nigel A. R. Watt and Dr. W. S. Edwards, Jr. of Pee Dee Orthopaedics, dated May 27, 2008 through September 16, 2008.
2. Employer's Job Description and Analysis of Claimant's job.

C. Issues: The only issue in this case is whether timely notice of the injury was given to the Employer under S.C. Code §42-15-20.

EVIDENCE OF THE CASE

The Claimant has been employed by International Knife and Saw as a "hammer man" since April of 1995. The Claimant's job involves repetitive hammering of circular saw blades with six, eight or ten pound hammers. The claimant admitted that for the past several years, he experienced soreness in his arm from performing his job, but nothing to the extent he felt on or about April 17, 2008, when his hammer broke while he was hammering a 40" circular saw blade, resulting in a sharp pain in his right arm and shoulder. Over the course of the following weeks, he continued to experience considerable pain while hammering, but continued to try to perform his job. On May 15, 2008, at the urging of one of his co-workers, Ralph advised his supervisor, Tony Broach, that he had hurt his arm and shoulder, and could not continue to perform his hammering duties. He has not worked since May 21, 2008.

The Claimant was initially seen by his family doctor, Joslyn Angus, on May 20, 2008. Dr. Angus prescribed medication and referred him to Dr. Nigel A.R. Watt of Pee Dee Orthopaedic, who ordered cervical and right shoulder MRI's, and referred him to his partner, Dr. W.S. Edwards. Dr. Edwards ordered occupational therapy and referred him for electrodiagnostic studies by Dr. Healy. Following completion of those studies, Dr. Edwards diagnosed him with impingement syndrome of the right shoulder, and both Dr. Edwards and Dr. Watt diagnosed the Claimant with carpal tunnel syndrome of the right wrist. By report of September 16, 2008 (APA p. 16), Dr. Watt recommended right carpal decompression surgery, reporting that the Claimant's "right carpal tunnel syndrome is as a result of the repetitive impact from his work. He remains temporarily disabled from his work at present. He has not reached maximum improvement."

APPLICABLE LAW

The Employer contends that, because the Claimant admittedly suffered soreness in his right arm for several years prior to May of 2008, he did not provide timely notice of his job injury.

Pursuant to S.C. Code §42-15-20(C) (eff. 7/1/07):

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.

The statutory definition of timely notice for repetitive trauma injuries is consistent with the judicial definition previously announced in Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (App. 2005), which held that "[n]otice begins to run when the employee becomes disabled and could discover with reasonable diligence his condition is compensable." It is undisputed herein that the Claimant did not become disabled until May 21, 2008, and that the Employer received notice of the injury on

or before that date. Although the claimant admittedly suffered soreness in his right arm for several years prior to May of 2008, the soreness did not prevent him from performing his job duties. Moreover, the Claimant was not even diagnosed with the repetitive trauma injury of carpal tunnel syndrome until August of 2008. The Claimant can hardly be required to discover his condition is compensable before he has become disabled and before his condition has been diagnosed as work-related. Consequently, the Claimant provided timely notice of his job injury.

FINDINGS OF FACT

Based upon the evidence received, I find that:

1) On May 15, 2008, the claimant sustained an injury to his right arm and shoulder arising out of and in the course of his employment with International Knife and Saw as a result of the repetitive trauma of hammering steel saw blades with six to ten-pound hammers. The repetitive activities he engaged in resulted in a compensable injury under the S.C. Workers' Compensation Act, the claimant's testimony as to the activities and the progression of his symptoms is credible, and the medical evidence establishes a direct causal relationship between the condition under which the work was performed and the injury. S.C. Code §42-1-172(D).

2) The average weekly wage of the Claimant is \$609.98 and the weekly compensation rate is \$406.68.

3) The Claimant timely reported the injury to the Employer.

4) The right arm and shoulder injury did result in total disability for the period from May 21, 2008 to the present; and compensation was not paid for any portion of said period.

5) The right arm and shoulder injury required medical care for the period from May 20, 2008 to the present; the Claimant has not yet reached maximum medical healing, and further medical care

by Dr. Watt is necessary and will tend to reduce the period of disability.

CONCLUSIONS OF LAW

Accordingly, as provided in S.C. Code §42-17-40, it is the determination of this Commissioner that:

1) Under §41-1-160, the Claimant did sustain a repetitive trauma injury by accident arising out of and in the course of his employment.

2) Under §42-15-20, the Claimant gave timely notice to the Employer of the accidental injury.

3) Under §42-15-60, the medical treatment, medication, evaluative procedures, diagnostic procedures, etc., which the Claimant has received and continues to receive for his compensable injuries, including, but not limited to, those performed by Dr. Angus, Dr. Watt, Dr. Edwards, and Dr. Healy, are reasonable and necessary and tend to lessen his period of disability.

4) Under §42-1-120 and §42-9-10, the Claimant is entitled to compensation during the period of temporary total disability from May 21, 2008 until terminated in accordance with the Act.

4) The Claimant's entitlement to compensation for permanent total disability under §42-9-10, permanent partial disability under §42-9-20, or for specific disability under §42-9-30, is reserved for future determination.

ORDER

Based upon the above findings of fact and conclusions of law, it is ordered that the Defendants shall make the following payments:

1) Weekly compensation to the claimant in the amount of \$406.68 for total disability for the

period from May 21, 2008 to the date of this Order, in a lump sum, plus continuing compensation of \$406.68 per week until terminated in accordance with the Act.

2) Defendants are financially responsible for the medical treatment, medication, evaluative procedures, diagnostic procedures, etc., which the Claimant has received and continues to receive for his compensable injuries, including, but not limited to, those performed by Dr. Angus, Dr. Watt, Dr. Edwards, and Dr. Healy.

AND IT IS SO ORDERED THIS 31 DAY OF DECEMBER, 2008.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION


David W. Huffstetler,
Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 31 day of December, 2008

By Keller Kinsler
Administrative Assistant to the Commissioner

SS:
JK

South Carolina Workers' Compensation Commission
1612 Marion Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



Original File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Ralph Duane King, Jr. SSN: _____ Employer's Name: International Knife & Saw/Riggs, LLC
Address: _____ Address: 1435 N. Cashua
City: _____ State: SC Zip: 29505 City: Florence State: SC Zip: 29501
Home Phone: (843) 669 - 6273 Work Phone: () - Insurance Carrier: Peerless Insurance Co.
Preparer's Name: Stuart W. Snow Law Firm: Dusenbury, Snow & McGee Preparer's Phone #: (843) 669 - 6481

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: May 15, 2008

☒ Injury ☐ Illness ☒ Repetitive Trauma

- 1a. The claimant sustained an injury to right shoulder and neck (Part(s) of Body Injured) on May 15, 2008 (Month/Day/Year) in Florence county, state of South Carolina.
- 1b. Body part(s) affected are: right shoulder, neck
Briefly describe how the accident occurred. Claimant has been hammering saw blades with 8 & 10 lb. Hammers since 4/95; around 4/17/08, hammer broke while hammering blade, felt sharp pain in shoulder, but continued trying to work until 5/15/08.
2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on 5/15/08 (Month/Day/Year) in the following manner:
At urging of co-worker, Charles Kilgore, claimant notified supervisor, Tony Broach, that he had hurt his shoulder hammering blade.
- ☒ 6. Due to injury, the claimant is in need of (check one):
☒ (a) medical examination and treatment for: impingement of right shoulder
☒ (b) additional medical examination and treatment for: cervicalgia
- ☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
May 15, 2008 to present and ongoing until MMI.
- ☒ 8. Due to the injury, the claimant has permanent disability of the following nature and extent (check one):
☒ (1) General Disability: ☐ Total ☒ (2) Specific Disability: ☐ Total ☒ Partial
☒ (3) Wage Loss ☒ Partial
- ☐ 9. Due to the injury, the claimant has a serious bodily disfigurement consisting of: _____
- 10a. At the time of the injury, the claimant was paid weekly wages of \$495.20, and demands accounting of days worked and wages earned as provided by law.
- 10b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident:
none
- 11a. Further grounds or unusual aspects of claim: _____
- 11b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident:
Joslyn L. Angus, Jr., MD, 305 E. Cheves, Ste. 160, Florence, SC 29506; Nigel A.R. Watt, MD/W.S. Edwards, MD, 901 E. Cheves, Ste. 100, Florence, SC 29506
- 11c. To the best of your knowledge, did you have any prior permanent disability? No If yes, describe: _____
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- ☐ 13a. I am filing a claim. I am not requesting a hearing at this time.
- ☒ 13b. I am requesting a hearing. A \$25 fee is required.
14. Estimated time needed for hearing: 45 minutes

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature
Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

Claimant's Attorney
Title

DusSnow@aol.com
Email

5/17/08
Date

WCC Form # 50
Revised 9/07

50

Employee's Notice of Claim and/or
Request for Hearing

SC Workers' Compensation Commission
1612 Marion Street
Post Office Box 1715
Columbia, South Carolina 29202-1715



WCC File #: 0811652
Carrier File #: 103336760
Carrier Code #:
Employer FEIN #:

Ralph Duane King, Jr. Claimant's Name		International Knife and Saw - Florence Employer's Name	
SSN		1435 North Cashua Drive Employer's Address	
Florence, South Carolina 29505 City State Zip		Florence, South Carolina 29501-0535 City State Zip	
Home Phone #	Work Phone #	Peerless Insurance Company c/o Montgomery Insurance Insurance Carrier	
James H. Lichty	McAngus Goudelock & Courie	(803) 227-2288 Phone Number	
Preparer's Name	Law Firm		

Date of Accident: 5/15/08

Complete each Information blank. Specify clearly when contentions are admitted in part and denied in part.
The employer-insurance carrier in answer to the claim, respectfully shows:

1. It is denied that the employee sustained an injury on or about the date set forth in the application. The reasons for denial are: Claimant failed to suffer an injury by accident in the course and scope of his employment.
2. It is admitted that both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: _____
3. It is admitted that the relationship of employer and employee existed at the time in question. The reasons for denial are: _____
4. It is admitted that at the time in question the employee was performing service growing out of and incidental to his employment. The reasons for denial are: _____
5. It is denied that notice of injury was given to the employer. The reasons for denial are: Claimant alleges a repetitive trauma injury and the date of accident is in dispute. Defendants contend that Claimant did not provide proper notice of an injury by accident as required by the Act.
6. It is denied that the employee needs/is entitled to additional medical care as a result of the injury. The reasons for denial are: See #1 above.
7. It is denied that the employee is entitled to temporary total disability for the period(s) of: See #1 above.
8. It is denied that the employee is permanently disabled. The reasons for denial are: See #1 above.
9. It is denied that the employee has a serious disfigurement.
10. It is contended that an average weekly wage of \$Form 20 to be submitted applies, according to attached accounting of employee's earnings as provided by law.
11. Further contentions or grounds of defense are: Defendants reserve the right to allege all defenses available under the Act and other applicable law, including but not limited to the affirmative defenses set forth in Regulation 67-603, as determined appropriate through the course of further discovery.
12. Estimated time needed for hearing: 45 minutes.

I certify that I have served this document pursuant to R.67-211 by delivering a copy to:

Stuart W. Snow, Esquire
Dusenbury, Snow & McGee, PA
Post Office Box 555
Florence, South Carolina 29503

on the 5th day of September, 2008 by ☒ first class mail; ☐ personal service; ☐ certified mail.
I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature	Attorney for Employer/Carrier	ilichty@mcgaw.com	September 5, 2008
	Title	Email	Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department. Pursuant to R.67-606, a Form 20 must be filed with the Claims Department at least 30 days from the date of filing this form.

South Carolina Workers' Compensation Commission
1612 Marion Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



WCC File #: 0811652
Carrier File #: 103336760
Carrier Code #: 00112
Employer FEIN #: 204921176

Claimant's Name: Ralph Duane King, Jr. SSN: _____ Employer's Name: International Knife & Saw/Riggs, LLC
Address: _____ Address: 1435 N. Cashua
City: Florence State: SC Zip: 29505 City: Florence State: SC Zip: 29501
Home Phone: _____ Work Phone: () - Insurance Carrier: Peerless Insurance Co.
Preparer's Name: Stuart W. Snow Law Firm: Dusenbury, Snow & McGee Preparer's Phone #: (843) 669 - 6481

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: May 15, 2008

☒ Injury ☐ Illness ☒ Repetitive Trauma

- 1a. The claimant sustained an injury to right shoulder, neck and right carpal tunnel syndrome (Part(s) of Body Injured) on May 15, 2008 (Month/Day/Year) in Florence county, state of South Carolina. Body part(s) affected are: right shoulder, arm, hand, fingers, neck
- 1b. Briefly describe how the accident occurred. Claimant has been hammering saw blades with 8 & 10 lb. hammers since 4/95; around 4/17/08, hammer broke while hammering blade, felt sharp pain in shoulder, but continued trying to work until 5/15/08.
2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on 5/15/08 (Month/Day/Year) in the following manner:
At urging of co-worker, Charles Kilgore, claimant notified supervisor, Tony Broach, that he had hurt his shoulder hammering blade.
- ☒ 6. Due to injury, the claimant is in need of (check one):
☒ (a) medical examination and treatment for: impingement of right shoulder, right carpal tunnel release
☒ (b) additional medical examination and treatment for: cervicalgia
- ☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: May 15, 2008 to present and ongoing until MMI.
- ☒ 8. Due to the injury, the claimant has permanent disability of the following nature and extent (check one):
☒ (1) General Disability: ☐ Total ☒ (2) Specific Disability: ☐ Total
☒ (3) Wage Loss ☒ Partial ☒ Partial
- ☐ 9. Due to the injury, the claimant has a serious bodily disfigurement consisting of: _____
- 10a. At the time of the injury, the claimant was paid weekly wages of \$495.20, and demands accounting of days worked and wages earned as provided by law.
- 10b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident:
none
- 11a. Further grounds or unusual aspects of claim: _____
- 11b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident:
Joslyn L. Angus, Jr., MD, 305 E. Cheves, Ste. 160, Florence, SC 29506; Nigel A.R. Watt, MD/W.S. Edwards, MD, 901 E. Cheves, Ste. 100, Florence, SC 29506
- 11c. To the best of your knowledge, did you have any prior permanent disability? No If yes, describe: _____
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- ☐ 13a. I am filing a claim. I am not requesting a hearing at this time.
- ☒ 13b. I am requesting a hearing. A \$25 fee is required.
14. Estimated time needed for hearing: 45 minutes

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature: [Signature] Claimant's Attorney: _____ Title: _____ Email: DusSnow@aol.com
Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

WCC Form # 50
Revised 9/07

Amended
50

Employee's Notice of Claim and/or
Request for Hearing



ATTORNEYS AT LAW

REPLY TO
James H. Lichty
Direct Dial (803) 227-2288
jlichty@mgclaw.com
Columbia

November 13, 2008

BY HAND DELIVERY

Virginia Crocker, Judicial Director
S. C. WORKERS' COMPENSATION COMMISSION
1612 Marion Street
Columbia, South Carolina 29202-1715

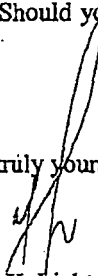
RE: Ralph Duane King, Jr. v. International Knife & Saw/Riggs, L.L.C. and
Peerless Insurance Company c/o Montgomery Insurance
Date of Accident: May 15, 2008
Claim No.: 103336760
WCC File No.: 0811652
Our File No.: 20617.08053

Dear Ms. Crocker:

Please be advised we will rely upon our previously filed Form 51 in response to the Claimant's Amended request for hearing. Should you have any further questions in this regard, please feel free to contact me.

With kind regards, we are

Very truly yours,


James H. Lichty

JHL/smg

cc: Stuart W. Snow, Dusenbury, Snow & McGee, PA
Elnora Rainey, Montgomery Insurance

COLUMBIA | CHARLOTTE | CHARLESTON | GREENVILLE | RALEIGH
700 CERVAS STREET • SUITE 300 • COLUMBIA, SOUTH CAROLINA 29201
POST OFFICE BOX 12519 • COLUMBIA, SOUTH CAROLINA 29211
803-779-2300 PHONE • 803-748-0526 FAX
mgclaw.com

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 0811652**

RALPH KING,

Claimant,

-versus-

**INTERNATIONAL KNIFE
AND SAW,**

Employer,

And

**PEERLESS INSURANCE
COMPANY,**

Carrier/Defendants.

**HEARING BEFORE
COMMISSIONER DAVID W. HUFFSTETLER**

Tuesday, November 25th, 2008

3:57 p.m. – 4:05 p.m.

The hearing of RALPH KING V. INTERNATIONAL
KNIFE & SAW, taken on the 25th day of November,
2008, located at the County Public Service Building,
2685 South Irby Street, Conference Room B, Florence,
South Carolina 29505.

CP-26 REPORTING

Melissa M. Decker, Court Reporter

PHONE: (843) 446-1691

E-MAIL: melissadecker@sc.rr.com

APPEARANCES:

FOR THE EMPLOYEE/CLAIMANT:

Stuart W. Snow, Esquire
201 West Evans Street
Florence, South Carolina 29501

FOR THE CARRIER/DEFENDANT:

James H. Lichty, Esquire
McANGUS GOUDELOCK & COURIE, LLC
700 Gervais Street, Suite 300
Columbia, South Carolina 29211-2519

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Certificate of Court Reporter	12

INDEX OF EXHIBITS

(No Exhibits were marked.)

***THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL.
SUCH MATERIAL IS REPRODUCED AS READ OR
QUOTED BY THE SPEAKER.***

CP-26 REPORTING

Melissa M. Decker, Court Reporter
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PROCEEDINGS

COMMISSIONER HUFFSTETLER: This is Workers' Compensation File Number: 0811652. It's the case of the Claimant, Ralph King, versus the Employer, International Knife and Saw, and the Carrier is Peerless Insurance Company. The Claimant is present. He's represented by Attorney Stuart W. Snow. The Employer, Carrier is represented by Attorney James H. Lichty. The case is set to consider issues outlining Forms 50 and 51. The average weekly wage is \$609.98. The compensation rate is \$406.68. The date of accident is May 15th, 2008; any objection to those items, jurisdiction, venue, or any of the APA submissions?

MR. SNOW: No objection, Your Honor.

MR. LICHTY: None from the defense, Your Honor.

COMMISSIONER HUFFSTETLER: Without objection the Commission file becomes part of the record, with the exception of self-serving declarations and unstipulated

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1 medical reports. The Claimant takes the
2 position he suffered an injury to his
3 right shoulder, his neck, as well as his
4 right arm in the form of carpal tunnel
5 syndrome; that he's suffered those
6 injuries from repetitive trauma as well
7 as from the specific accident. He seeks
8 payment of all cause and related medical
9 treatment received to date. He seeks an
10 award of compensation for temporary
11 total disability from May 21st, 2008
12 forward. And he seeks additional
13 medical treatment through Dr. Watts. In
14 relation to the claim for a repetitive
15 trauma, he relies on Pages 16 and 17 for
16 the medical causation. The defense
17 denies liability for the case based on
18 Section 42-15-20; is that correct?

19 MR. LICHTY: Correct.

20 COMMISSIONER HUFFSTETLER: So the only issue
21 to be determined today is whether proper
22 notice was given; is that correct?

23 MR. SNOW: That's correct,
24 Your Honor.

25 MR. LICHTY: Correct, Your

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1 Honor.
2 RALPH KING, HAVING BEEN DULY SWORN,
3 WAS DEPOSED AS FOLLOWS:
4 COMMISSIONER HUFFSTETLER: If you'd state
5 your name, please.
6 A: Ralph D. King, Jr.
7 COMMISSIONER HUFFSTETLER: Thank you. Go
8 ahead, sir.

9 **DIRECT EXAMINATION**

10 BY MR. SNOW:
11 Q: Ralph, where do you live?
12 A: , Florence.
13 Q: Are you married?
14 A: Yes, sir.
15 Q: Do you have any children?
16 A: Yes, sir, three.
17 Q: How old are they?
18 A: 14, 15 and 17.
19 Q: And how old are you?
20 A: 37.
21 Q: Your date of birth?
22 A: 2/10/71.
23 Q: Are you left or right-handed?
24 A: Right-handed.
25 Q: How far did you get in school?

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1 A: 10th grade.
2 Q: Did you ever get your G.E.D.?
3 A: No, sir.
4 Q: Ever have any kind of vocational training
5 or college?
6 A: No, sir.
7 Q: How long had you been employed by the
8 employer in this case?
9 A: 13 years.
10 Q: And so that would be since 1995?
11 A: Yes, sir.
12 Q: What was the job that you were doing at
13 the time of the accident?
14 A: Hammering.
15 Q: Did they call you hammer man?
16 A: Yes, sir.
17 Q: And how long had you been doing that for
18 this employer?
19 A: No verbal response.
20 Q: More than 10 years?
21 A: Yeah, 10 years or more.
22 Q: What did you do as a hammer man?
23 A: We would, when the saws come off the
24 machine, they'll be bowed, and you have
25 to check them and center the saws up and

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1 hammer them down to whatever the
2 tolerance called for on the paperwork.
3 Q: By saws, are you referring to circular
4 saw blades?
5 A: Yes, sir.
6 Q: And are these industrial sized blades?
7 A: Yes, sir.
8 Q: What size would they be?
9 COMMISSIONER HUFFSTETLER: If I could help
10 you a little bit. There doesn't seem to
11 be any issue here on the benefits you're
12 seeking ---
13 MR. SNOW: Okay.
14 COMMISSIONER HUFFSTETLER: --- other than
15 notice.
16 MR. SNOW: Okay.
17 Q: Tell me: When did it get to the point
18 that you stopped working there?
19 A: When I stopped working?
20 Q: Uh-huh (affirmative response).
21 A: Was May 20--, 21st.
22 Q: Of this year?
23 A: Yes, sir.
24 Q: What happened to cause you to stop
25 working?

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1 A: My arm and shoulder and stuff was hurting
2 me real bad.
3 Q: As soon as that happened did you notify
4 the employer of your injury?
5 A: We notified Tony Broach.
6 Q: When was that?
7 A: (Made sound with mouth.)
8 Q: At that same time, May 21st of '08?
9 A: That's when I went out of work was then,
10 yeah.
11 Q: Right, so he had been notified as of that
12 date?
13 A: Or correct.
14 Q: And he was your supervisor?
15 A: Correct. Yes, sir.
16 Q: Now, have you had any problems using your
17 hands or arms prior to that day?
18 A: No, sir.
19 Q: All right.
20 A: Just normal, you know, when you work your
21 arm gets tired.
22 Q: Let me ask you: This hammer that I have
23 here on the table, is this the type of
24 hammer you used in your job?
25 A: Yes, sir.

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1 Q: Had you ever sought treatment for your
2 hands or arms before May of 2008?
3 A: No, sir.
4 Q: Had you ever sought treatment for pain or
5 numbness in your hands or arms before May
6 of 2008?
7 A: No, sir.
8 Q: Had you ever been advised that you have
9 carpal tunnel syndrome before May of
10 2008?
11 A: No, sir.
12 Q: Had you ever missed any time from work
13 due to pain or numbness in your hands or
14 arms prior to May of 2008?
15 A: No, sir.
16 Q: Had you missed any significant time from
17 work in the 13 years that you had been
18 there until May of 2008?
19 A: No, sir.
20 Q: Please answer any questions that opposing
21 counsel may have.
22 COMMISSIONER HUFFSTETLER: Go ahead, sir.
23 **CROSS-EXAMINATION**
24 BY MR. LICHTY:
25 Q: Mr. King, your doctor has said that your

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1 carpal tunnel syndrome is the result of
2 the repetitive impact from this work; is
3 this correct?

4 A: Yes, sir.

5 Q: And when I took your deposition in
6 October, do you remember telling me that
7 you had been having this injury for the
8 last couple of years?

9 A: Right, arm hurting and aching.

10 Q: But do you recall telling me that you
11 first noticed this injury a couple years
12 ago?

13 A: Yeah, arm hurting. I never went to the
14 doctor to see if it was injured or
15 anything.

16 Q: But you did notice this injury a couple
17 years ago, correct?

18 A: I noticed my arm was bothering me.

19 Q: And at the time when you noticed it a few
20 years ago, you suspected that your arm
21 was bothering you because of the work you
22 were doing; is that correct?

23 A: I figured it was something to do with it.
24 After slinging a hammer all day, (a
25 little chuckle), your arm's going to be

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1 tired.
2 Q: And the first time you ever reported that
3 problem to your employer was around the
4 beginning of May; is that correct?
5 A: Yes, sir.
6 MR. LICHTY: Commissioner,
7 that's all the questions I have.
8 COMMISSIONER HUFFSTETLER: Is there anything
9 else?
10 MR. SNOW: Nothing further,
11 Your Honor.
12 COMMISSIONER HUFFSTETLER: That concludes the
13 hearing.
14 (The hearing concluded at 4:05 p.m.)
15
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25

CP-26 REPORTING

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Fee Dee
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Associates, PA

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901 E. CHEVES ST., SUITE 100 - FLORENCE, SC 29506-2769
1580 FREEDOM BLVD., SUITE 100 - FLORENCE, SC 29505
(843) 662-5233 - FAX (843) 678-9003 - WWW.PDOA.COM

Initial Examination

PATIENT ID: 156352
PATIENT: Ralph King
DOB: 02/10/1971
Occupation: Hammer Man

Date of Service: 05/27/08
Age: 37 years old
Employer: International Knife & Saw

Referring Physician: Angus, Joslyn,
Other Physicians:

Date of injury/onset:

Date: 04/20/2008
Type: Injury

Chief Complaint: Right Shoulder Pain

HPI: Pain in right side of the neck right shoulder upper extremity as far as right hand. Painful burning numbness affecting thumb and index. Pain with movement to the neck and right shoulder. Unable to cope with normal work hammering. Symptoms for month or two. Possibly worse after kickback from his hammer. No benefit so far following steroid pack last week. No previous neck or shoulder treatment or back complaints. No lower extremity complaints.

Allergies: No Known Drug Allergies
Current Meds: Elavil, Flexeril (Dosage: 10mg), Prednisone, Ultram
Past Med Hx: None
Surgical History: Hemorrhoidectomy: x 2
Family History: Parents: Father-Living; Parents: Mother-Living
Social History: Alcohol use: None; Drug Use: In the past; Employment: Full Time; Marital Status: Married; Tobacco: Cigarettes > 1 PPD

REVIEW OF SYSTEMS:

Review of Systems: General, neuro, psychiatric, respiratory, cardiovascular, GI, GU, blood and lymph, EENT, musculoskeletal, skin and endocrine systems are normal except what is noted below:
EENT: Hearing Loss; Musculoskeletal: Joint swelling/stiffness; Musculoskeletal: Muscle aches;
Musculoskeletal: Muscle weakness; Neurological: Chronic headaches

PHYSICAL EXAM:

Vitals: HEIGHT: 5'11" WEIGHT: 185 lbs 0 oz BMI: 25.8
Appearance: No acute distress
Psychiatric: Mood and affect were appropriate.
Head: Normocephalic, atraumatic.
Skin: Clean, dry, no lesions, no rashes.
Neuro: Alert and oriented x 3.

Report Date: August 07, 2008 Patient: King, Ralph DOS: 05/27/08

FOCUSED EXAM:

Cervical spine posture is neutral. Pain with right lateral rotation right lateral flexion. Stiff movements.

Shoulder exam:

Appearance: Normal
Deformity: Normal
Skin: Normal
Neck: Limited range of motion. Very stiff and moves neck and body together when turning. Right lateral rotation and lateral flexion with pain 50% on normal.
Vascular: 2+ bilateral radial pulse. 2+ carotid <2 seconds cap. Refill at digits.
Lymphatics: No lymphadema or abnormal palpable nodes
Palpable tenderness: Mild tenderness anterior lateral right shoulder. No AC joint tenderness
Reflexes: Biceps, triceps and brachioradialis are +2 and symmetric bilaterally.
Sensory: Normal
Motor: No weakness.
Thoracic Outlet: Adson's maneuver negative
Range of Motion: Abduction 100°, forward flexion 130° with painful arc from 80° to 120°. No drop
Affected Shoulder: sign.
Range of Motion: Abduction 160°, flexion 160°, external rotation 90°, internal rotation 45°, adduction
Contralateral Shoulder: 60°.
Stability: Stable with all motions.
Strength: Subscapularis, supraspinatus, infraspinatus, deltoid, pectoralis major, pectoralis minor, latissimus dorsi, biceps, triceps and trapezius are normal
Impingement: Positive
Load shift: Negative
Bicep Load: Negative
O'Brien's Test: Negative
Cross Arm test: Negative
Normal gait. Pain-free normal movements hips and knees.

X-ray: AP and trans-scapular outlet/lateral views of right shoulder today show normal appearances. Normal glenohumeral, acromioclavicular and subacromial intervals. No degenerative or traumatic changes. No fractures or soft tissue calcification.

ASSESSMENT:

Diagnosis: -Right shoulder radicular pain and rotator cuff disease

OPINION: Combined symptoms from likely cervical disc disease and right upper extremity radicular pain and also right shoulder rotator cuff pathology.

RECOMMENDATION: Continue out of work. Continue medications already commenced by Dr. Angus. Requires an MRI of the cervical spine and right shoulder. Return appointment subsequently for further management.

Prescription: No data for Prescription

Nigel Watt

Nigel A. R. Watt, M.D.

CC: Dr. Angus



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Follow Up Examination

PATIENT ID: 156352
PATIENT: Ralph King
DOB: 02/10/1971
Occupation: Hammer Man

Date of Service: 06/05/08
Age: 37 years old
Employer: International Knife & Saw

Referring Physician: Angus, Joslyn, ;
Other Physicians:

DATE
No Data

TYPE
No Data

TIME SINCE SURGERY
No Data

Chief Complaint: Follow up for right shoulder and cervical MRI

HPI: No new complaints. He still reports that is right "shoulder" pain radiates from right-sided neck as far as the right hand including index and middle fingers.

Allergies: No Known Drug Allergies
Current Meds: Etavil, Flexeril (Dosage: 10mg), Prednisone, Ultram

PHYSICAL EXAM:

Appearance: No acute distress
Psychiatric: Mood and affect were appropriate.
Head: Normocephalic, atraumatic.
Neuro: Alert and oriented x 3.

FOCUSED EXAM:

Imaging: MRI right shoulder June 2, 2008 images reviewed personally and radiology report reviewed and filed. Normal appearance of right shoulder joint and rotator cuff mechanism and subacromial interval. Incidental report is of the subcutaneous cyst over his lateral deltoid area which has been there for many years.

ASSESSMENT:

Diagnosis: -Right upper extremity pain

OPINION:

Right upper extremity radicular symptoms likely from cervical disc disease. With normal right shoulder MRI he now requires MRI of the cervical spine.

MANAGEMENT:

Consultation requested with spine specialist for evaluation after the MRI scan of cervical spine.

Report Date: August 07, 2008 Patient: King, Ralph DOS: 06/05/08

Prescription: No data for Prescription

Nigel Watt

Nigel A. R. Watt, M.D.
CC: Dr. Angus

Report Date: August 07, 2008 Patient: King, Ralph DOS: 06/05/08

Angus, Joslyn - SPECIALTY: Family Practice



**Pee Dee
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Initial Examination

PATIENT ID: 156352

Patient: Ralph King
Address: SC 29505
DOB: 02/10/1971
Employer: International Knife & Saw

Date of Service: 08/17/08
Gender: male
Age: 37 years old
Occupation: Hammer Man

Referring Physician: Angus, Joslyn, ;
Other Physicians:

Date of injury/onset:

Date: 04/20/2008
Type: Injury

Chief Complaint: Neck Pain and right arm numbness and extreme tingling.

() Low back pain () Leg pain () L () R () Thoracic back pain
(X) Neck pain (X) Arm pain () L (X) R

History of Present Illness: Patient presents with neck pain and right shoulder and arm pain for about two years. He does extremely heavy work activities with a sledgehammer on a daily basis and back in April his symptoms got much worse. He describes paresthesias in the right C7 distribution. Has been out of work for one month because of this pain. Dr. Watt evaluated the shoulder and found nothing significant.

Medications: Elavil, Flexeril (Dosage: 10mg), Prednisone, Ultram
Allergies: No Known Drug Allergies
Surgical History: Hemorrhoidectomy: x 2
Medical History: None
Family History: Parents: Father-Living; Parents: Mother-Living
Social History: Alcohol Use: None; Drug Use: In the past; Employment: Full Time; Marital Status: Married; Tobacco: Cigarettes > 1 PPD

REVIEW OF SYSTEMS:

Review of Systems: General, neuro, psychiatric, respiratory, cardiovascular, GI, GU, blood and lymph, EENT, musculoskeletal, skin and endocrine systems are normal except what is noted below:
EENT: Hearing Loss; Musculoskeletal: Joint swelling/stiffness; Musculoskeletal: Muscle aches; Musculoskeletal: Muscle weakness; Neurological: Chronic headaches

PHYSICAL EXAM:

Vitals: HEIGHT: 5'11" WEIGHT: 185 lbs 0 oz BMI: 25.8

Report Date: August 07, 2008 Patient: King, Ralph DOS: 06/17/08

Appearance: No acute distress
Psychiatric: Mood and affect were appropriate.
Head: Normocephalic, atraumatic.
Skin: Clean, dry, no lesions, no rashes.
Neuro: Alert and oriented x 3.

FOCUSED EXAM:

Healthy appearing gentleman well conditioned. Normal cervical lordosis. No torticollis. Mild decrease cervical motion especially with lateral bending to the left side. Minimal impingement symptoms right shoulder. Motor strength 5/5. Subjective decreased strength in the right grip however. Reflexes 2+ and symmetric. Paresthesias right C7 distribution.

Xrays: Xrays show no abnormalities. Good preservation of disc space height and lordosis.

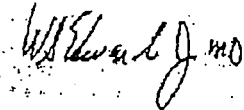
MRI: Cervical study from June the 13th is essentially normal. Right shoulder MRI scan was also normal.

ASSESSMENT:

Diagnosis: -Right cervical radiculopathy

PLAN:

His pain may be related to peripheral entrapment neuropathy rather than spinal or shoulder causes. No surgical treatment is indicated at this time. Therapy with Marlo has been prescribed today before he returns to work. Recheck in three weeks.



Willie S. Edwards, M.D.

Referral (Reprint) dated 05/24/08

Angus, Joslyn - SPECIALTY: Family Practice



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Dewey N. Ervin, M.D. * A. Cecil Bozard, Jr., M.D. * Joseph W. Dunlap, Jr., M.D., FACS

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(843) 662-6233 - FAX (843) 678-9003 - WWW.PDOA.COM

Follow Up Examination

PATIENT ID: 156352

PATIENT: Ralph King
DOB: 02/10/1971
Employer: International Knife & Saw

Date of Service: 07/08/08
Age: 37 years old
Occupation: Hammer Man

Referring Physician: Angus, Joslyn,
Other Physicians: Healey, R, Joseph,

Date of injury/onset:

Date: 04/20/2008
Type: Injury

Chief Complaint: Neck pain with burning between shoulder blades.

History of Ralph King is here today in follow up for continued right shoulder and arm pain. Therapy
Present Illness: for three episodes has not helped thus far. Has been out of work. Pain is localized to the
ulnar aspect of the hand and wrist. Shoulder pain has also been well localized to the sub
deltoid region.

Allergies: No Known Drug Allergies
Current Meds: ULTRAM (Dosage: 50MG SIG: 1 p.o. q 6 hours prn pain Dispense: 40 Refills: 0 Note:
called in walgreens 629-8427), Elavil, Flexeril (Dosage: 10mg), Prednisone, Ultram

PHYSICAL EXAM:

Vitals: HEIGHT: 5'11" WEIGHT: 185 lbs 0 oz BMI: 25.8
Appearance: No acute distress
Psychiatric: Mood and affect were appropriate.
Head: Normocephalic, atraumatic.
Skin: Clean, dry, no lesions, no rashes.
Neuro: Alert and oriented x 3.

FOCUSED EXAM:

Good cervical flexibility. Mild impingement findings right shoulder. Right C7 paresthesia. Motor strength 5/5. Reflexes
2+ symmetric.

X-ray: None

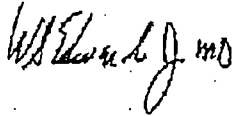
ASSESSMENT:

Diagnosis: -Rule-out right cervical radiculopathy

PLAN:

Report Date: August 07, 2008 Patient: King, Ralph DOS: 07/08/08

Electrodiagnostic studies by Dr. Healy have been ordered. Remain out of work. Continue therapy. Previous MRI scan showed no significant compressive pathology. Shoulder scan also was unremarkable. Recheck after Dr. Healy's consultation.



Willie S. Edwards, M.D.

Referred by Dr. Joslyn Angus, M.D. 07/15/08

Angus, Joslyn - SPECIALTY: Family Practice
Healey, R - SPECIALTY: Neurology



**Fee Dee
Orthopaedic
Associates, PA**

W.S. (Bill) Edwards, Jr., M.D. * Rakesh P. Chokshi, M.D.
Patrick K. Denton, M.D. * Anthony W. Alexander, M.D. * Barry L. Clark, D.O.
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Follow Up Examination

PATIENT ID: 156352

PATIENT: Ralph King
DOB: 02/10/1971
Employer: International Knife & Saw

Date of Service: 08/07/08
Age: 37 years old
Occupation: Hammer Man

Referring Physician: Angus, Joslyn, ;
Other Physicians:

Date of injury/onset:

Date: 04/20/2008
Type: Injury

Chief Complaint: Neck pain with burning between the shoulder blades

History of Present Illness: Ralph King is here today in follow up for continued pain, numbness and tingling in the right arm. He does extremely heavy physical work on his job. Dr. Healy performed electrical studies which showed moderate carpal tunnel syndrome on the right and minimal changes on the left. There was no evidence of radiculopathy which fits with his normal MRI scan June 8.

Allergies: No Known Drug Allergies
Current Meds: ULTRAM (Dosage: 50MG SIG: 1 p.o. q 6 hours prn pain Dispense: 40 Refills: 0 Note: called in walgreens 629-8427), Elavil, Flexeril (Dosage: 10mg), Prednisone, Ultram

PHYSICAL EXAM:

Vitals: HEIGHT: 5'11" WEIGHT: 185 lbs 0 oz BMI: 25.8
Appearance: No acute distress
Psychiatric: Mood and affect were appropriate.
Head: Normocephalic, atraumatic.
Skin: Clean, dry, no lesions, no rashes.
Neuro: Alert and oriented x 3.

FOCUSED EXAM:

Motor strength 5/5 in all extremities. Reflexes 2+ and symmetric in all locations. No dermatomal paresthesias. No long tract findings. Gait normal.

X-ray: None

ASSESSMENT:

Diagnosis: -Carpal tunnel syndrome right hand



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OT Progress Note

PATIENT: Ralph King
DOB: 02/10/1971
ACCT #: 156352

Date of Service: 08/19/08
Age/Gender: 37 years old male
VISIT: 15/17

REFERRED BY
Bill Edwards, MD

TREATMENT DX
723.1; 726.2 R DOI: 4-2008

HAND DOMINANCE
R

SUBJECTIVE: My right shoulder blade burning is not there as much, just at times. My right hand continues to be numb.

OBJECTIVE: Patient received ETPS current to the right hand for 15 minutes. Patient received MFR/SCS techniques to the right forearm for 25 minutes. Kinesiotex tape was applied to the right forearm, wrist and hand. Patient is to don tape for 2 days. Patient is to continue with West/Wing arm exercise, five repetitions, holding 20 seconds, TID and to add left median nerve gliding exercises, 3 reps, holding 30 seconds, 3x/day. Patient received a copy of the handout with original placed in chart. Patient acknowledged understanding verbal instructions received.

ASSESSMENT: Decreased tenderness along the right forearm, wrist and hand musculature after completed procedures.

PLAN: Will continued to follow per physician orders until next follow up with Dr. Edwards.

CPT: ESA: 97032-GO 15 x minutes; US: 97035-GO x minutes; MT: 97140-GO 25 x minutes;
TE 97110-GO x minutes; Total Treatment Time: 40 minutes

Mario Canelon, MS, OTR/L, CHT

Mario Canelon, MS, OTR/L, CHT



Pee Dee
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OT Progress Note

PATIENT: Ralph King
DOB: 02/10/1971
ACCT #: 156352

Date of Service: 08/21/08
Age/Gender: 37 years old male
VISIT: 16/18

REFERRED BY
Bill Edwards, MD

TREATMENT DX
723.1; 726.2 R DOI: 4-2008

HAND DOMINANCE
R

SUBJECTIVE: My right shoulder blade burning is very light. My right hand continues to be numb.

OBJECTIVE: Patient received IFC current to the right hand carpal tunnel area at 10mA for 15 minutes. Patient received MFR/SCS techniques to the right forearm for 20 minutes followed by carpal tunnel stretching for 5 minutes. Patient is to continue with West Wing arm exercise; five repetitions, holding 20 seconds, TID and to add left median nerve gliding exercises, 3 reps; holding 30 seconds, 3x/day. Patient received a copy of the handout with original placed in chart. Patient acknowledged understanding verbal instructions received.

ASSESSMENT: Decreased tenderness along the right forearm, wrist and hand musculature after completed procedures however no overall change in numbness of the hand.

PLAN: Will continued to follow per physician orders until next follow up with Dr. Edwards on 8-28-08.

CPT: ESA: 97032-GO 16 x minutes;
TE 97110-GO 5 x minutes;

US: 97035-GO x minutes;
Total Treatment Time: 40 minutes

MT: 97140-GO 20 x minutes;

Marlo Canelon, MS, OTR/L, CHT

Marlo Canelon, MS, OTR/L, CHT.



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Follow Up Examination

PATIENT ID: 156352

PATIENT: Ralph King
DOB: 02/10/1971
Employer: International Knife & Saw

Date of Service: 08/26/08
Age: 37 years old
Occupation: Hammer Man

Referring Physician: Angus, Joslyn,
Other Physicians:

Date of injury/onset:

Date:
04/20/2008

Type:
Injury

Chief Complaint: neck pain with burning between shoulder blades. S/P EMG.

History of

Present Illness:

Ralph King is here today in follow up for continued discomfort in his right arm and hand. Dr. Healy determined that he had carpal tunnel syndrome only and no radiculopathy. Previous MRI scan of the cervical spine was completely normal. MRI scan of the shoulder showed no rotator cuff tear.

Allergies: .No Known Drug Allergies

Current Meds: ULTRAM (Dosage: 50MG SIG: 1 p.o. q 6 hours prn pain Dispense: 40 Refills: 0 Note: called in walgreens 629-8427), Elavil, Flexeril (Dosage: 10mg), Prednisone, Ultram

PHYSICAL EXAM:

Vitals: HEIGHT: 5'11" WEIGHT: 185 lbs 0 oz BMI: 25.8
Appearance: No acute distress
Psychiatric: Mood and affect were appropriate.
Head: Normocephalic, atraumatic.
Skin: Clean, dry, no lesions, no rashes.
Neuro: Alert and oriented x 3.

FOCUSED EXAM:

Impingement symptoms are prominent. No focal neurologic deficit. Cervical motion full and painless.

X-ray: None

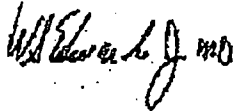
ASSESSMENT:

Diagnosis: -Impingement syndrome right shoulder, -Carpal tunnel syndrome right wrist

PLAN:

Report Date: September 29, 2008 Patient: King, Ralph DOS: 08/26/08

I have reassured he and his wife that there is no evidence of intrinsic spinal pathology causing his symptoms.. Despite normal shoulder scan this appears to be a predominantly shoulder issue and have asked him to return to Dr. Watt for further recommendations.



W. S. Edwards, M.D

[REDACTED]

Dr. Joslyn Angus



W.S. (Bill) Edwards, Jr., M.D. * Rakesh P. Chokshi, M.D.
Patrick K. Denton, M.D. * Anthony W. Alexander, M.D. * Barry L. Clark, D.O.
Nigel A.R. Watt, M.D. * Robert E. Elvington, Jr. M.D. * Douglas B. Freels, M.D.
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Follow Up Examination

PATIENT ID: 156352
PATIENT: Ralph King
DOB: 02/10/1971
Occupation: Hammer Man

Date of Service: 09/02/08
Age: 37 years old
Employer: International Knife & Saw

Referring Physician: Angus, Joslyn, :
Other Physicians:

Date: 04/20/2008
Type: Injury

DATE
No Data

TYPE
No Data

TIME SINCE SURGERY
No Data

Chief Complaint: Follow up for right shoulder pain

HPI: Still has pain posterior right shoulder anterior lateral shoulder and also painful numbness into right hand. Hand pain and numbness wakes him at night.

Allergies: No Known Drug Allergies
Current Meds: ULTRAM (Dosage: 50MG SIG: 1 p.o. q 6 hours pm pain Dispense: 40 Refills: 0 Note: called in walgreens 629-8427), Elavil, Flexeril (Dosage: 10mg), Prednisone, Ultram

PHYSICAL EXAM:

Appearance: No acute distress
Psychiatric: Mood and affect were appropriate.
Head: Normocephalic, atraumatic.
Neuro: Alert and oriented x 3.

Focused Exam: Right shoulder guarded movements with positive impingement on abduction external and internal rotation at 90°.

IMAGING: MRI cervical spine and right shoulder have both been normal. Electrodiagnostic studies by Dr. Healy revealed no radiculopathy but moderate right carpal tunnel syndrome.

ASSESSMENT:

Diagnosis: -Right shoulder and arm pain

OPINION:

Previous MRI reports, Dr. Healy's report, and Dr. Edward's evaluations have been reviewed. Unlikely to be symptoms from cervical spine and either rotator cuff impingement and/or carpal tunnel syndrome remain possible causes.

MANAGEMENT:

Recommend right shoulder subacromial anesthetic/steroid injection today for diagnostic

Report Date: September 29, 2008 Patient: King, Ralph DOS: 09/02/08

and possibly therapeutic purpose. If absolutely no benefit then recommend right carpal tunnel decompression.

The patient's right shoulder was injected with 2cc's lidocaine, 2 cc's marcaine, and 80mg depo-medrol. Betadine skin preparation, posterior subacromial injection. Procedure tolerated well. Possible post injection pain and ice application and delayed benefit discussed.

Return appointment two weeks. Remains disabled from his work.

Nigel A. R. Watt

Nigel A. R. Watt, M.D.
CC: Dr. Angus

Revised by: [REDACTED] Date: 09/03/08

Angus, Joslyn - SPECIALTY: Family Practice



Pee Dee
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Follow Up Examination

PATIENT ID: 156352
PATIENT: Ralph King
DOB: 02/10/1971
Occupation: Hammer Man

Date of Service: 09/16/08
Age: 37 years old
Employer: International Knife & Saw

Referring Physician: Angus, Joslyn,
Other Physicians:

Date: 04/20/2008
Type: Injury

DATE	TYPE	TIME SINCE SURGERY
No Data	No Data	No Data

Chief Complaint: Follow up for right shoulder and arm pain.

HPI: Less pain in right shoulder following steroid injection here September 2, 2008. No improvement in symptoms right forearm and hand. Hand feels dead and wakes him at night. He "wants to shake the hand" and rubs it. Mainly thumb, index and middle finger more than little finger.

Allergies: No Known Drug Allergies
Current Meds: ULTRAM (Dosage: 50MG SIG: 1 p.o. q 6 hours prn pain Dispense: 40 Refills: 0 Note: called in walgreens 629-8427), Elavil, Flexeril (Dosage: 10mg), Prednisone, Ultram

PHYSICAL EXAM:

Appearance: No acute distress
Psychiatric: Mood and affect were appropriate.
Head: Normocephalic, atraumatic.
Neuro: Alert and oriented x 3.

Focused Exam: Reduced sensation right thumb, index and middle finger. Positive Phalen and wrist.

IMAGING:

ASSESSMENT:

Diagnosis: -Carpal tunnel syndrome right hand; -Right shoulder and arm pain

OPINION: Symptoms now more typical for right carpal tunnel syndrome. Nerve conduction studies have confirmed this. This is also consistent with his work related mechanism with repetitive impact hammering saw blades.

MANAGEMENT: Recommend right carpal tunnel release. His right carpal tunnel syndrome is as a result of

Report Date: September 29, 2008 Patient: King, Ralph DOS: 09/16/08

the repetitive impact from his work. He remains temporary disabled from his work at present. Has not reached maximum improvement. Return appointment here for preoperative visit after scheduling outpatient right carpal tunnel decompression surgery.

Prescription: No data for Prescription

Nigel Watt

Nigel A. R. Watt, M.D.
CC: Dr. Angus

~~RECEIVED AT THE CLINICAL RECORDS DEPARTMENT~~

Angus, Joslyn - SPECIALTY: Family Practice

JOB DESCRIPTION AND ANALYSIS

Employer:	INTERNATIONAL KNIFE AND SAW		
Employee:	RALPH KING JR. "Pete"		
Job Title:	HAMMERMAN - inspecting 106 Saws	Date of Hire:	7-31-2006

During the period of 7-31-06 to 5-21-08 the employee was assigned to work at INTERNATIONAL KNIFE & SAW to perform the following specific tasks/assignments:

1. Uses Machine Grinder to grind Large Diameter Log Saws
2. Inspect And Measure using Calipers & Micrometers
3. Use Computer to ck Dimensions - Thickness, Design
4. Hammer Areas on Saws - TP needed - Re inspect - Re Measure
- 5.

In order to perform these tasks, the employee had to utilize the following types of tools and equipment:

- | | | |
|---------------|----------------|------------|
| 1. 8LB Hammer | 3. Micrometers | 5. Grinder |
| 2. Calipers | 4. Computer | |

For the specific job noted above, the employee's occupational duties included the following activities:

	Not at All	Occasionally 1-4 hours/day	Frequently 3-5 hours/day	Continually 5-8 hours/day
Sitting	✓			
Standing/ Walking				✓
Driving (other than to & from work)		✓		
Work in Awkward Physical Position	✓			
Working in Tight/ Confined places	✓			
Use of Jarring/Vibrating Equipment		✓		
Repetitive Hand Motion		✓		
Fine Hand Motor Skills			✓	
Repetitive Foot Motion	✓			
Bending		✓		
Twisting		✓		
Squatting	✓			
Kneeling	✓			
Climbing	✓			
Reaching/Stretching		✓		
Lifting			✓	

	Not at All	1-10 loads/ hr	10-15 loads / hr	15+ loads /hr
10 lbs Maximum Lifting		✓		
20 lbs Maximum Lifting		✓		
30 lbs Maximum Lifting	✓			
50 lbs Maximum Lifting	✓			
75 lbs Maximum Lifting	✓			
100 lbs Maximum Lifting	✓			

JOB DESCRIPTION AND ANALYSIS (Cont.)

Employer:	INTERNATIONAL Knife And Saw		
Employee:	RALPH KING JR		
Job Title:	Log Saw OPERATOR	Date of Hire:	7-31-2006

A copy of the employee's job application and/or resume, noting his employment history, is attached for review:

☐ Yes ☒ No See note

The employee was hired through a Union. No specific information was provided to me concerning his employment history: ☐ Yes ☒ N/A

At the time of hire the employee was required to submit to a general physical examination and/or drug testing.

☒ Yes ☐ No See note

* If yes, indicate where the physical was completed or attach a copy of the medical report generated as a result of the examination/testing.

Comments: Ralph was originally employed by THE PREVIOUS INTERNATIONAL Knife And Saw And All employment Records were kept in Cincinnati - His office - Co. was sold to Simard's Int. 12-2003. Simard's sold Florence Facility to Four local owners July 2006 who Renamed Co. International

Completed By:	Date:
Title:	

Knife And Saw Again.

All Records (pre employment physical - Emp. App. Letters/Resume) etc. are NOT AVAILABLE

Kay Howard
Director of Human Resources
6-20-2008

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 0811652

RALPH DUANE KING, JR.,	)	
	)	
Employee,	)	
	)	CLAIMANT/RESPONDENT'S
	)	BRIEF TO FULL COMMISSION
INTERNATIONAL KNIFE & SAW -	)	
FLORENCE,	)	
	)	
Employer,	)	
and	)	
	)	
PEERLESS INS. CO. C/O	)	
MONTGOMERY INS.,	)	
	)	
Insurer.	)	

2. The Single Commissioner correctly held that the Claimant provided timely notice of his injury.

For claims arising on or before July 1, 2007, the law on notice was established in the Bass case, which held that the date of injury in a repetitive trauma claim, for purposes of notice, "begins to run when the employee becomes disabled and could discover with reasonable diligence his condition is compensable." §42-15-20 of the new statute deletes the requirement that the claimant provide notice within 90 days of when he became disabled, now requiring that notice be provided within 90 days of when he discovered that his condition is "compensable."¹

¹ Even then, §42-15-20 go on to provide: "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."

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Case Tracking No. 2009-141286

Ralph D. King, Jr., ... Appellant,

v.

International Knife and Saw-Florence,

Employer,

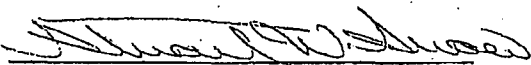
and

Peerless Insurance Company c/o

Montgomery Insurance, ... Respondents.

CERTIFICATE OF COUNSEL FOR APPELLANT

I hereby certify that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.


Stuart W. Snow

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Case Tracking No. 2009-141286

Ralph D. King, Jr., ... Appellant,

v.

International Knife and Saw-Florence, ... Employer,

and

Peerless Insurance Company c/o
Montgomery Insurance, ... Respondents.

FINAL BRIEF OF APPELLANT

Stuart W. Snow
Dusenbury, Snow & McGee, PA
Post Office Box 555
Florence, S.C. 29503
843/669-6481

Attorney for Appellant

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2. The Commission clearly erred as a matter of law in concluding that Mr. King's repetitive trauma injury was "compensable" at a time when he had missed no work as a result of the condition, and had not sought treatment for, nor been diagnosed with, a repetitive trauma injury	7
3. No substantial evidence supports the Commission's findings of fact that the Claimant first noticed [a repetitive trauma injury] a couple of years ago, that the Claimant suspected his job was causing [a repetitive trauma injury] when he first noticed it, and that the Claimant discovered his condition was compensable a couple of years ago	10
4. No substantial evidence supports the Commission's finding of fact that even had the Claimant not discovered his condition was compensable a couple of years ago, reasonable diligence, i.e., examination by a doctor, could've discovered the condition was compensable.	11

5. The Commission clearly erred as a matter of law in failing to address the issue of whether the employee had a reasonable excuse for allegedly not giving timely notice, and whether the employer has not been unduly prejudiced thereby 12

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STATEMENT OF ISSUES ON APPEAL

1. Did the Commission clearly err as a matter of law in concluding that the ninety day period for giving notice of his repetitive trauma injury began to run against Mr. King more than eight months before he was even diagnosed with a repetitive trauma injury?
2. Did the Commission clearly err as a matter of law in concluding that Mr. King's repetitive trauma injury was "compensable" at a time when he had missed no work as a result of the condition, and had not sought treatment for, nor been diagnosed with, a repetitive trauma injury?
3. Does substantial evidence supports the Commission's findings of fact that the Claimant first noticed [a repetitive trauma injury] a couple of years ago, that the Claimant suspected his job was causing [a repetitive trauma injury] when he first noticed it, and that the Claimant discovered his condition was compensable a couple of years ago?
4. Does substantial evidence support the Commission's finding of fact that even had the Claimant not discovered his condition was compensable a couple of years ago, reasonable diligence, i.e., examination by a doctor, could've discovered the condition was compensable?
5. Did the Commission clearly err as a matter of law in failing to address the issue of whether the employee had a reasonable excuse for not giving timely notice, and whether the employer has not been unduly prejudiced thereby?

STATEMENT OF THE CASE

This is a workers' compensation case. Ralph King appeals the denial of benefits due to

an alleged failure to provide timely notice of a repetitive trauma injury. Mr. King had been employed by International Knife and Saw for thirteen years, the last ten years as a "hammer man." (R. p. 24, lines 7 - 21). Mr. King's job involved repetitive hammering of circular saw blades with eight pound hammers. (R. p. 47-48). Mr. King, who has a tenth grade education (R. p. 24, line 1), admitted that for the past several years, he experienced pain and soreness in his arm from performing his job, but never to the extent that it interfered with his ability to perform his hammering work or caused him to seek medical treatment (R. p. 27, lines 1-19). However, within weeks of suffering a kickback from his hammer, the pain worsened to the point that he went to see Dr. Joslyn Angus, his family physician, on May 20, 2008. Dr. Angus prescribed pain medication, wrote him out of work and referred him to an orthopaedic surgeon. Mr. King notified the employer of his injury on May 21, 2008. He was initially examined by Dr. Nigel Watt, the orthopaedic surgeon, on May 27, 2008. Dr. Watt ordered cervical and right shoulder MRI's, and referred him to his partner, Dr. W.S. Edwards. Dr. Edwards ordered occupational therapy and referred him for electrodiagnostic studies by Dr. Joseph Healy. Following completion of those studies, Dr. Edwards diagnosed him with impingement syndrome of the right shoulder, and both Dr. Edwards and Dr. Watt diagnosed the Claimant with carpal tunnel syndrome of the right wrist. By report of September 16, 2008 (R. p. 45), Dr. Watt recommended right carpal decompression surgery, reporting that the Claimant's "right carpal tunnel syndrome is as a result of the repetitive impact from his work. He remains temporarily disabled from his work at present. He has not reached maximum improvement."

Mr. King filed his claim for workers' compensation benefits on August 7, 2008, asserting both an injury by accident and a repetitive trauma injury. The employer filed a Form

51 denying the claim on the grounds that Mr. King did not suffer a compensable injury and that he did not provide proper notice. Following the September 16, 2008 diagnosis of Dr. Watt that Mr. King had suffered a work-related carpal tunnel injury, Mr. King filed an amended claim on October 13, 2008, asserting that he had suffered a carpal tunnel injury. A hearing was held before Commissioner Huffstetler on November 25, 2008. By order of December 31, 2008, Commissioner Huffstetler found Mr. King sustained a compensable repetitive trauma injury, had provided proper notice, and awarded benefits. The employer timely appealed to the Full Commission on the grounds that Mr. King did not provide proper notice of his injury. Oral arguments were held before the Full Commission on May 26, 2009. By order of September 22, 2009, the Full Commission reversed the order of the Single Commissioner, concluding that Mr. King failed to provide proper notice of his injury. This appeal follows.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) governs judicial review of decisions of the Workers' Compensation Commission. Pursuant to the APA, a reviewing court is limited to deciding whether the Commission's decision is unsupported by substantial evidence or affected by an error of law. S.C. Code §1-23-380(5); Rodriguez v. Romero, 363 S.C. 80, 610 S.E.2d 488 (2005); Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). The question of whether a claimant asserts an "injury by accident" within the meaning of the Act is a question of law. Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114 (Ct.App.1995). Thus, this Court may review the Commission's legal conclusion to determine if it is affected by an error of law. "The South Carolina Court of Appeals exercises freedom and independence in deciding an issue of law in a workers' compensation case." Thompson ex

rel. Harvey v. Cisson Const. Co., 377 S.C. 137, 659 S.E.2d 171 (Ct.App.2008).

In addition, to facilitate such review, the Commission's findings of fact, if set forth in statutory language, must be accompanied by a concise and explicit statement of the underlying facts supporting the findings. S.C. Code Ann. §1-23-350. The reviewing court will not accept an administrative agency's decision at face value without requiring the agency to explain its reasoning; a recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues. Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007). A proceeding should be remanded to the Commission when the decision fails to address critical issues and is not sufficiently detailed to permit this Court to properly review the decision. See, e.g., Mahasco Corp., Dixiana Mill Div. v. Rising, 289 S.C. 130, 345 S.E.2d 249 (Ct.App. 1986); DiMaria v. Multimedia, Inc., 418 S.E.2d 324 (Ct. App. 1992).

ARGUMENT

1. The Commission Clearly Erred as a Matter of Law in Concluding That the Ninety Day Period for Giving Notice of His Repetitive Trauma Injury Began to Run Against Mr. King More than Eight Months Before He Was Even Diagnosed with a Repetitive Trauma Injury

In 2007, the South Carolina Legislature revised the workers' compensation provisions for repetitive injury claims, making such claims a separate category of injury with its own standards for notice, statute of limitations, and proof of injury. For claims arising after July 1, 2007, a "repetitive trauma injury" is statutorily defined as "an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C.

Code §42-1-172(A). The statutory definition of such an injury is identical to the prior judicial definition. See, Schurlock v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2002) (repetitive trauma injuries have a gradual onset caused by the cumulative effect of repetitive traumatic events).

Under prior case law, the statute of limitations began to run from the last day of exposure, and the notice requirement began to run when the employee became disabled and could discover with reasonable diligence his condition is compensable. Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct.App. 2005). The amended statute provides a uniform rule for both notice and statute of limitations defenses in repetitive trauma cases. In both instances, the repetitive trauma injury occurs when "the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable." S.C. Code §42-15-20(C), §42-15-40 (right to compensation barred unless claim filed "within two years after the employee knew or should have known that his injury is compensable"). Thus, under the new statute, the notice clock is no longer tolled until disability; the notice clock begins to run on the date the employee could have discovered with reasonable diligence that his condition is compensable.¹

The issues unanswered by the amendments is what is the "condition" that triggers the clock, when could the employee "have discovered" the condition, and what condition is "compensable." The Commission concluded that the notice clock began to run against Mr. King on some unspecified date "a couple of years ago," based upon his candid admission that he first noticed his arm hurting, aching and bothering him a few years earlier, and

¹ Even then, §42-15-20 further provides: "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," discussed below.

"figured" his work had something to do with it: "After slinging a hammer all day, (a little chuckle), your arm's going to be tired." (R. p. 28, lines 19-25, p. 29, line 1). Significantly, it is undisputed that whatever pain or soreness he began to experience at that time did not prevent him from continuing to perform his hammering work without interruption or accommodation, never caused him to miss any time from work, and never caused him to seek medical attention.

The effect of the 2007 legislative change as to notice is to clarify that the "discovery rule" applies to repetitive trauma injuries. In Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992), our supreme court held the discovery rule applied in workers' compensation actions. Under the discovery rule, the notice requirement begins to run from the date the employee either knew or should have known of his compensable injury. In Schurlknight, supra, our Supreme Court reversed the Court of Appeals' application of the discovery rule in repetitive trauma cases, in favor of the last date of exposure. However, legislative reinstatement of the discovery rule in repetitive trauma cases does not cause Mr. King's claim to fail. The Court of Appeals had concluded that the claimant knew or reasonably should have known he had a "compensable injury" at the time he was informed by a doctor that he had a permanent hearing loss, which was also the time he knew that the loss was adversely impacting his ability to perform his job. Schurlknight v. City of North Charleston, 345 S.C. 45, 574 S.E.2d 194 (App. 2002). Similarly, in White v. Medical Univ. of South Carolina, 355 S.C. 560, 586 S.E.2d 157 (Ct.App. 2003), in interpreting the discovery rule, this Court concluded that even if the employee knew for several years that his back pain was work-related, his injury was not severe enough at that time to warrant any

change to his duties at work. None of those factors are involved herein - Mr. King was never advised by any doctor of any job injury, permanent or otherwise, until he stopped working ; and Mr. King's pain never adversely impacted his ability to perform his job until May 21, 2008, the date he provided notice.

The Commission concluded that Mr. King discovered his condition was compensable a couple of years ago, and that even if he didn't, "reasonable diligence, i.e., examination by a doctor, could've discovered the condition was compensable." In so concluding, the Commission is charging Mr. King with notice of a "condition," carpal tunnel syndrome, that was not even diagnosed until August of 2008, more than three months after he was first examined for the pain in his arm and he stopped working. Under the statutory proof standard for repetitive trauma injuries, such a claim is not "compensable" without direct medical evidence of such an injury. For claims arising after July 1, 2007, a claimant can only prove that a repetitive trauma injury is compensable by "medical evidence" of a direct causal connection between the condition under which the work is performed and the injury. S.C. Code §42-1-172(D). "Medical evidence" is defined as expert opinion "to a reasonable degree of certainty from a licensed health care provider. S.C. Code §42-1-172(G). Prior to this amendment, a claimant was not required to provide any medical evidence that his claim was work-related. See, e.g., Tiller v. National Health Care Center, 334 S.C. 333, 513 S.E.2d 843 (1999). The Commission did not conclude, and there is no evidence of same, that any doctor advised him of a causal connection between his injury and his employment prior to May 21, 2008, the date he became disabled and provided notice.

2. The Commission Clearly Erred as a Matter of Law in Concluding That Mr. King's

Repetitive Trauma Injury Was "Compensable" at a Time When He Had Missed
No Work as a Result of the Condition, and Had Not Sought Treatment For, Nor
Been Diagnosed With, a Repetitive Trauma Injury

Pursuant to S.C. Code §42-1-160(F), any injury attributable to "a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time" is "compensable" only if it culminates in a compensable repetitive trauma injury pursuant to §42-1-172. A "repetitive trauma injury" is considered to arise out of employment only if it is established by medical evidence that there is a direct causal relationship between the condition under which the work is performed and the injury. Thus, a repetitive trauma injury is not compensable without such medical evidence. Based upon Dr. Watt's report of September 16, 2008, the Commission found that Mr. King provided the required medical evidence to establish his "repetitive trauma injury." However, the Commission went on to find that Mr. King "first noticed [the repetitive trauma] injury a couple of years ago, suspected his job was causing the [repetitive trauma] injury when he first noticed it, and discovered his [repetitive trauma injury] was compensable a couple of years ago." Thus, the Commission is saddling Mr. King with a self-diagnosis he was not qualified to make, years before multiple medical specialists, with the aid of diagnostic testing, first determined that he was suffering from a repetitive trauma injury, carpal tunnel syndrome. As this Court recognized in Pee v. AVM, Inc., carpal tunnel syndrome can be caused by "a variety of factors, including age, gender, weight, acute trauma, rheumatoid arthritis, and other inflammatory diseases, pregnancy, diabetes, tumors, hormonal factors, and congenital

defects." 344 S.C. 162, 172, 543 S.E.2d 232 (Ct.App.2001) (citations omitted). Mr. King's suspicion that his pain and soreness was caused by his job duties does not equate with compensability.

The Commission's decision provides no guidance as to when pain or soreness from performing work triggers the ninety day notice requirement, merely finding that "[t]he Claimant knew well before he gave notice that he had a work-related problem." In equating the gradual onset of pain and soreness with "compensability," the Commission construed the legislative amendment against coverage. Workers' compensation statutes are to be construed liberally in favor of coverage. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992); It follows that any exception to workers' compensation coverage must be narrowly construed. Peay v. United States Silica Co., 313 S.C. 91, 437 S.E.2d 64 (1993). Since the nature of a repetitive trauma injury is that it "is gradual in onset and caused by the cumulative effects of repetitive traumatic events," there is no reasonable argument that the notice requirement would be triggered the first time the employee experiences pain or soreness. Similarly, there is no rationale basis for choosing the fifth, twenty-fifth or any other time that the employee experiences pain or discomfort as the triggering event. Under §42-1-160(F), a repetitive trauma injury is not "compensable" unless it culminates in a compensable repetitive trauma injury. If the statute is viewed as unambiguous, the notice requirement does not commence until the employee discovers or could have reasonably discovered that his condition has culminated in a repetitive trauma injury, when a doctor has diagnosed the employee with a compensable repetitive trauma injury. Under such a construction, Mr. King's notice was clearly timely, since he was not

diagnosed with a compensable repetitive trauma injury until several months after he became disabled. By the express terms of the new notice statute, "several years ago" Mr. King's condition was not compensable; until his "gradual injury" culminated in a repetitive trauma injury, it was not compensable. The statutory language is circular and ambiguous; to accept the construction adopted by the Full Commission, the notice period runs against a claim that has not yet matured, and when it matures by culmination in a compensable repetitive trauma injury, it is already barred.

Thus, it is left to this Court to resolve the ambiguity. At a minimum, the only rationale basis to determine the date of discovery of a repetitive trauma injury is the date when the employee is notified by a medical doctor that he has a repetitive trauma injury, the date when the repetitive trauma interferes with the employee's ability to perform the work allegedly causing the injury, or the date when the employee becomes disabled as a result of the repetitive trauma, whichever first occurs. Under such a standard, it is undisputed that Mr. King provided timely notice of his claim. To hold that the notice requirement is triggered by anything less would be to bar South Carolina employees from recovering for a traumatic injury unless the employee provides the employer notice of a claim within ninety days after the first time the employee experiences any pain or discomfort in performing work activities, a draconian interpretation unique to South Carolina. See, 7 Larson, Workers' Compensation Law, §126.06

3. No substantial evidence supports the Commission's findings of fact that the Claimant first noticed [a repetitive trauma injury] a couple of years ago, that the Claimant suspected his job was causing [a repetitive trauma injury] when he first noticed it.

and that the Claimant discovered his condition was compensable a couple of years ago

In finding that Mr. King suffered a repetitive trauma injury, and proceeding to conclude that he knew of "this injury" several years ago, the Full Commission created a reverse chronology not supported by the evidence. The evidence underlying the finding of a repetitive trauma injury was the September 18, 2008 expert opinion of Dr. Watt. The only evidence underlying the findings as to when Mr. King knew of "this injury" is Mr. King's own testimony that for a couple of years prior to that diagnosis, he knew his arm was hurting and bothering him. In finding that Mr. King first noticed "this injury" a couple of years ago, the Commission is charging Mr. King with knowledge of an injury that was not even diagnosed until at least three months after he provided notice of injury. Furthermore, although Mr. King admitted that the strenuous nature of his job was likely causing his pain and discomfort, there is no evidence that he suspected his job was causing a repetitive trauma injury. In addition, he could not have discovered his condition was compensable a "couple of years" before medical experts determined that his condition had culminated in a compensable repetitive trauma injury. To hold otherwise would be to hold that an employee's lay suspicion that his work activities are causing pain and discomfort is sufficient to establish a compensable repetitive trauma injury.

4. No Substantial Evidence Supports the Commission's Finding of Fact That Even Had the Claimant Not Discovered His Condition Was Compensable a Couple of Years Ago, Reasonable Diligence, i.e., Examination by a Doctor, Could've Discovered the Condition Was Compensable.

The Full Commission attempted to avoid the requirement of medical evidence of compensability by finding that "[e]ven had the client not discovered his condition was compensable a couple of years ago, reasonable diligence (i.e. reporting to a doctor) could've discovered it was compensable" (R. p. 6). In so finding, the Full Commission engaged in pure speculation, as no underlying facts support this finding. Even if Mr. King had "reported to a doctor" earlier, there is no evidence that a doctor would have diagnosed him with a repetitive trauma injury at that time, especially since it took a battery of three specialists, two orthopaedists and a neurologist, aided by two MRI's and an EEG, approximately three months to diagnose his undisputed carpal tunnel injury. Moreover, if Mr. King had seen a doctor "several years ago," there is no evidence a doctor would have referred to him specialists or ordered diagnostic testing at that time, especially since he was able to perform all of his work duties at that time. To the contrary, a doctor could easily have diagnosed Mr. King with a muscle strain or some other non-permanent injury at that time, and Mr. King would have been entitled to reasonably rely on such a diagnosis.

Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992) (under discovery rule, claimant reasonably relied on non-compensable initial diagnoses).

5. The Commission Clearly Erred as a Matter of Law in Failing to Address the Issue of Whether the Employee Had a Reasonable Excuse for Not Giving Timely Notice, and Whether the Employer Has Not Been Unduly Prejudiced Thereby

Although the issue was raised by Mr. King, the Commission never determined whether Mr. King had a reasonable excuse for not giving timely notice or whether the employer was unduly prejudiced thereby. The Commission is required to make findings on

the issues of "reasonable excuse" and "prejudice," and a remand is appropriate when the Commission fails to make such findings. Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 623 S.E.2d 860 (Ct.App.2005); Harpe v. Kline Iron & Metal Works, 219 S.C. 527, 532-33, 66 S.E.2d 30, 32 (1951).

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, 63 S.E.2d 50 (1951); Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct.App. 2002). 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 disregarded 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.

Id. at:414, 63 S.E.2d at 52 (citations omitted). It is not the claimant's burden to show the absence of prejudice, but it is the employer's burden to prove the presence of prejudice.

Dawkins v. Capitol Const. Co., 252 S.C. 536, 539, 167 S.E.2d 439, 440 (1969). Prejudice is demonstrated in two ways: first, by showing that the employer was hampered in making its factual investigation and preparing its case, and second, by showing that the claimant's injury was aggravated by reason of the employer's inability to provide early medical diagnosis and treatment. 7 Larson, Workers' Compensation Law, §78.32(c). The Commission failed to require Respondent to demonstrate that it was prejudiced by Mr. King's alleged failure to give proper notice. Moreover, neither basis for a finding of prejudice exists herein. If Mr. King had notified his employer "several years ago" that he

experienced pain and soreness from his hammering work, but that it was not interfering with his ability to perform his job, it is highly unlikely that a reasonable supervisor would have launched an investigation and questioned witnesses where the employee is not claiming any disability, need for accommodation or medical treatment. As to the second purpose of avoiding aggravation, if the employer refused to provide medical treatment for Mr. King's condition when it finally reached the point that he could no longer perform his hammering work, it is highly unlikely that it would have provided medical treatment when his condition did not prevent him from performing his work. There is no evidence that if Mr. King had reported his arm pain and soreness the first, fifteenth or fiftieth time he experienced it would have changed the nature or cost of treatment, or resulted in any greater disability.

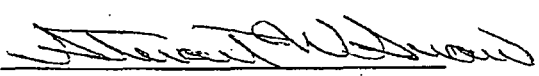
CONCLUSION

For the reasons stated, this Court should reverse the decision of the Workers'

Compensation Commission.

Respectfully submitted,

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March 30, 2010

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Case Tracking No. 2009-141286

Ralph D. King, Jr., ... Appellant,

v.

International Knife and Saw-Florence,

Employer,

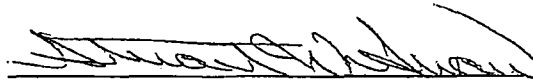
and

Peerless Insurance Company c/o

Montgomery Insurance, ... Respondents.

CERTIFICATE OF COUNSEL

I hereby certify that the Final Brief of Appellant complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.



Stuart W. Snow

THE STATE OF SOUTH CAROLINA

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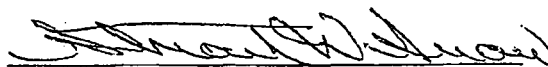
Peerless Insurance Company c/o

Montgomery Insurance, ... Respondents.

PROOF OF SERVICE

I hereby certify that a true copy of the Final Reply Brief of Appellant was served on the following parties by depositing said copy in the United States Mail with sufficient first class postage attached thereto, this 31st day of March, 2010, addressed as follows:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
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Ralph Duane King, Jr. Appellant,

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International Knife and Saw Florence, Employer,
and
Peoples Insurance Company c/o
Montgomery Insurance Respondents.

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STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE COMMISSION PROPERLY DENIED CLAIMANT'S CLAIM FOR FAILURE TO PROVIDE TIMELY NOTICE UNDER S.C. CODE ANN. § 42-15-20(C).
- II. WHETHER THE COMMISSION COMMITTED REVERSIBLE ERROR IN NOT ADDRESSING THE ISSUE OF WHETHER CLAIMANT HAD A REASONABLE EXCUSE FOR NOT GIVING TIMELY NOTICE AND WHETHER EMPLOYER HAS BEEN UNDULY PREJUDICED THEREBY.

STATEMENT OF THE CASE

The facts of this case are not complicated. Claimant Ralph Duane King, Jr. ("Claimant") worked for International Knife & Saw – Florence ("Employer") as a "hammer man" from 1995 until May 21, 2008. (Hr'g Tr., R. p. 24 lines 7-15; R. p. 25 lines 17-23). His job duties included taking industrial sized circular saws off the machine, "check[ing] them and center[ing] the saws up and hammer[ing] them down to whatever the tolerance called for on the paperwork." (Hr'g Tr., R. p. 24, line 22 – p. 25, line 7). Claimant testified both at his deposition and at the hearing that, several years before he stopped working, he experienced pain in his arm and believed that the repetitive motion of his work was the cause of the pain. (Hr'g Tr., R. p. 28, line 5 – p. 29, line 1). Claimant nonetheless did not notify Employer that he was experiencing work-related pain nor did he seek treatment for his condition until May 2008, when he was no longer able to work. (Hr'g Tr., R. p. 25, line 17 -- p. 26, line 10; R. p. 27, lines 1-7; R. p. 29, lines 2-5).

Claimant filed a claim for workers' compensation coverage on August 7, 2008, claiming injury by accident and a repetitive trauma injury to his right shoulder and neck. (Claimant Form 50, R. p. 15). Employer and its insurer, Peerless Insurance Company (jointly herein "Respondents") denied the claim based on the fact that Claimant had not suffered an injury by accident and had failed to provide timely notice of injury. (Respondents' Form 51, R. p. 16). Claimant filed an amended claim on October 13, 2008 alleging that, in addition to the right shoulder and neck injury, he suffered from work-related carpal tunnel syndrome. (Claimant's Amended Form 50, R. p. 17). Respondents advised the Commission that they denied the amended claim based on the reasons set

forth in their initial Form 51. (Letter from James H. Lichty to Virginia Crocker, Judicial Director, S.C. Workers' Compensation Commission, dated November 13, 2008, R. p. 18).

On November 25, 2008, a hearing was conducted before Single Commissioner David W. Huffstetter, who subsequently issued an order on December 31, 2008 finding that "[o]n May 15, 2008, the claimant sustained an injury to his right arm and shoulder . . . as a result of the repetitive trauma of hammering steel saw blades with six to ten pound hammers." (Single Commissioner Order, Nov. 25, 2008, R. p. 12). The Commissioner concluded that "Claimant did sustain a repetitive trauma injury by accident arising out of an in the course of his employment," and that Claimant had provided timely notice. (Id. R. p. 13). Respondents appealed to the Full Commission on numerous grounds, including that the Single Commissioner erred in finding that Claimant suffered both an injury by accident and a repetitive trauma injury; in finding that Claimant provided timely notice to Employer; in finding that Claimant suffered a compensable injury to his right shoulder; and in finding that Claimant was entitled to benefits including medical care and compensation. (Respondents' Form 30).

An Appellate Panel of the Full Commission heard oral argument on May 26, 2009 and issued its order on September 22, 2009 reversing the Single Commissioner. (Appellate Panel Decision and Order, Sept. 22, 2009, R. pp. 2-8 ("Commission Order")). The Commission held that Claimant alleged a repetitive trauma injury to his right shoulder and neck, suffers from carpal tunnel syndrome of the right hand, and also experiences right shoulder and arm pain. (Commission Order, R. p. 6). The Commission also made a factual finding that Claimant first noticed his injury "a couple of years ago"

and "suspected his job was causing the injury when he first noticed it." Thus, the Commission concluded that Claimant discovered that his condition was compensable years before he notified Employer of his condition. (Id.). Even if he had not actually believed his injury was work-related, the Commission found that he could have discovered that his claim was compensable through the exercise of reasonable diligence. Consequently, the Commission ruled that Claimant's claim was statutorily barred because he failed to give notice within 90 days of learning that he had a work-related problem. (Id. R. p. 7).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2007). Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. § 1-23-380(A)(5).

The Full Commission is the ultimate fact finder in workers' compensation cases. Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989). It is not within the appellate court's purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999). Thus, the findings of the Full Commission are presumed correct and

can be set aside only if unsupported by substantial evidence or based on an error of law. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (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 same conclusion the administrative agency reached in order to justify its action. Id.

I. The Commission properly denied Claimant's claim for failure to provide timely notice under S.C. Code Ann. § 42-15-20(C).

Claimant correctly points out that the provisions of the South Carolina Workers' Compensation statute relating to repetitive trauma injuries were revised effective July 1, 2007. (*See* App. Br. p. 4). Claimant is also correct that, under the applicable revised statutory provision, the notice period begins to run from "the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable . . ." S.C. Code Ann. § 42-15-20(C). Claimant accurately points out that the statutory choice of the so-called discovery rule changes the practice under prior case law, which provided that the notice period began to run when a claimant *both* was disabled *and* could have discovered his claim was compensable. *See Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005). Claimant acknowledges that the rule under the revised statute is simply that the notice period begins to run when a claimant discovers or could have discovered through the exercise of reasonable diligence that he has a work-related claim.

However, in order to create ambiguity where there is none, Claimant fabricates a circular, nonsensical interpretation of the statutory notice provision for repetitive trauma injuries, (App. Br. pp. 7-10), and suggests a detailed framework as a substitute for what

the statute actually provides. As is set out in more detail below, application of the discovery rule turns on the facts of each case, and specific criteria for applying the analysis, as proposed by Claimant, (*see* App. Br. pp. 9-10), are neither warranted or necessary under the statute. Claimant's invitation to this Court to engage in judicial legislating must be rejected and the statute applied according to its terms.

A. The Workers' Compensation statute unambiguously adopts the discovery rule as the trigger for the notice period in repetitive trauma injury cases.

The cardinal rule in statutory interpretation is to discern the intent of the Legislature. *E.g.*, Duvall v. South Carolina Budget & Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 127 (2008). Where that intent is clear from the plain language of the statute, no further investigation is required. Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 525, 642 S.E.2d 751, 754 (2007). Furthermore, the words used in a statute "must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." *Id.* at 525-26, 642 S.E.2d at 754.

On its face, *Section 42-15-20(C)* is mandatory and unambiguously sets out what is commonly referred to as the "discovery rule" as the trigger for the notice period.¹ The discovery rule has been applied by South Carolina courts in various factual situations. *See, e.g.*, Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E. 2d 645 (1996) (applying the discovery rule in a case involving gradual injury to a building); Johnston v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (1993) (applying the discovery rule to a knee injury); Knox v.

¹ Claimant also correctly points out that the same trigger is applicable to the statute of limitations for repetitive trauma injuries. (App. Br. p. 5). A claim for a repetitive trauma injury must be filed within two years of when "the employee knew or should have known that his injury is compensable but no more than seven years after the last date of injurious exposure." S.C. Code Ann. § 42-15-40. Thus, the net effect of the two revised statutory provisions relating to notice and limitations are that an employee must notify his employer within ninety days and must file his claim within two years of the date on which he knew or reasonably could/should have known he had a work-related injury..

Greenville Hosp. Syst., 362 S.C. 566, 608 S.E.2d 459 (Ct. App. 2005) (applying the discovery rule to a claim alleging injury caused by administration of an intravenous saline treatment); Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997) (applying the discovery rule to legal malpractice claims); Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), *overruled on other grounds*, Atlas Food Syst. & Serv., Inc. v. Crane Nat. Vendors Div., 319 S.C. 556, 462 S.E.2d 858 (1995) (applying the discovery rule in a faulty building design and construction case).

There is nothing ambiguous about the statutory notice provision for repetitive trauma claims. Application of the discovery rule in this as in other cases requires a factual determination of what the claimant knew or could have learned through the exercise of reasonable diligence.² This Court should hold that S.C. Code § 42-15-20(C) unambiguously requires notice within 90 days of when a claimant knows or through the exercise of reasonable diligence should know that he has a work-related injury.

If the Court determines, however, that the statute is ambiguous, then it may look elsewhere in order to glean the intent of the legislature. Bass v. Isochem, 365 S.C. 454, 471, 617 S.E.2d 369, 378 (Ct. App. 2005). In this process, “[c]ourts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.” Bass, 365 S.C. at 471-72, 617 S.E.2d at 378. Instead, “[i]f possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect.”

² “The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.” Knox, 362 S.C. at 570, 608 S.E.2d at 462 (citation omitted).

Catawba Indian Tribe, 372 S.C. at 527, 642 S.E.2d at 755 (citations omitted). A “statute should not be construed by concentrating on an isolated phrase,” Duvall, 377 S.C. at 42, 659 S.E.2d at 128; rather, the “*real purpose and intent of the lawmakers will prevail over the literal import of particular words.*” Sloan v. South Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 468, 636 S.E.2d 598, 606-07 (2006) (emphasis added). Finally, the construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons.” Sloan, 370 S.C. at 469, 636 S.E.2d at 607.

Claimant’s strained analysis of *Section 42-15-20(C)* depends entirely on isolating the term “compensable” and misconstruing it in this context to mean that the notice period begins to run only when a claimant has sufficient medical evidence to ultimately prove his case. Claimant’s interpretation would effectively replaced the term “discover” with “prove.” Therefore, even if *Section 42-15-20(C)* is determined to be ambiguous, which Respondents do not concede, Claimant’s strained analysis fails to comport with traditional rules of statutory interpretation and must be rejected.

While it is true that notice provisions, as is the case with many other provisions in the Workers Compensation Act, are to be construed liberally in favor of coverage, (App. Br. pp. 8-9), “there are limitations upon that rule” and the notice provision “is not to be treated as a mere formality or technicality . . .” Mintz v. Fiske-Carter Const. Co., 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951). Furthermore, courts may not construe the Workers’ Compensation statute so “as to do violence to a specific requirement of the Act.” Ashe v. Rock Hill Hardware Co., 219 S.C. 159, 167, 64 S.E.2d 396, 400 (1951), quoting Wallace v. Campbell Limestone Co., 198 S.C. 196, 17 S.E.2d 309 (1946)

(observing the need to properly apply statutes of limitations, even in hard cases where a claimant *might* be entitled to benefits had he or she filed a timely manner, because of the difficulties that employers and insurers would face in resisting long-delayed claims); *see also Johnson v. Beauty Unlimited Landscape Co.*, 379 S.C. 403, 410, 665 S.E.2d 656, 660 (Ct. App. 2008) (the fact that courts interpret the Workers' Compensation Act "in the light most favorable to claimant" does not "empower the courts to employ semantics to stretch the Act" to grant coverage where it should be denied). Thus, contrary to Claimant's suggestion otherwise, simply because Commission ruled against Claimant based on the facts of this case does not mean it "construed the legislative amendment against coverage." (App. Br. p. 8). Instead, the Commission properly applied the notice provision for repetitive trauma injuries to the facts of this case.

The South Carolina Supreme Court has held that the Workers' Compensation statute, which is in derogation of the common law, must be strictly construed. Wigfall v. Tideland Util., Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003).³ Courts "are not at liberty to extend by construction the meaning implicit in the language found in the *Workmen's [sic] Compensation Act* in order to provide a more liberal rule of compensation than that which the legislature has seen fit to adopt." Wigfall, 354 S.C. at 117, 580 S.E.2d at 109, *citing Singleton v. Young Lumber Co.*, 236 S.C. 454, 473, 114 S.E.2d 837, 846 (1960). Therefore, when interpreting the Workers' Compensation statute, courts "strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities." Id. Here, the South Carolina Legislature has done just that – it

³ This case does not involve an "exception" to the Workers' Compensation statute as is suggested by Claimant. (App. Br. p. 9). The case cited by Claimant for this point, Peay v. U.S. Silica Co., 313 S.C. 91, 437 S.E.2d 64 (1993), involved the intentional injury exception to the Workers' Compensation statute. S.C. Code § 42-1-540. In contrast, this case involves the notice provision which is a condition of coverage, not an exception.

has enacted legislation clarifying when both the notice and statute of limitations periods begin to run for workers' compensation claims caused by repetitive trauma.

Claimant argues that *Section 42-15-20(C)* is "circular and ambiguous." Claimant further alleges that the Commission's interpretation of the statute provides that "the notice period runs against a claim that has not yet matured, and when it matures by culmination in a compensable repetitive trauma injury, it is already barred." (App. Br. p. 10). In essence, Claimant argues that in order to trigger the notice period, a plain reading of the statute requires a claimant to have amassed sufficient medical evidence to ultimately prove his claim and, by then, it is too late to provide timely notice. (App. Br. pp. 7-9).⁴ Then, as a solution to such an imagined "Catch 22," Claimant provides a three-pronged test that he can pass. (*Id.* pp. 9-10).

Claimant's so-called rational resolution of the notice provision's ambiguity is to propose that the "date of discovery of a repetitive trauma injury is the date when the employee is notified by a medical doctor that he has a repetitive trauma injury, the date when the repetitive trauma interferes with the employee's ability to perform the work allegedly causing the injury, or the date when the employee becomes disabled as a result of the repetitive trauma, whichever occurs first." (App. Br. pp 9-10). Such an approach invites this Court to engage in judicial legislating on its face. Whether or not the formula suggested by Claimant might be rational,⁵ that is clearly not what the Legislature drafted into law and should not be adopted here.

⁴ Alternatively, Claimant argues that adopting the Commission's interpretation of the statute necessarily means that "an employee's lay suspicion that his work activities are causing pain and discomfort is sufficient to *establish* a compensable repetitive trauma injury." (App. Br. p. 11) (emphasis added). On the contrary, the Commission's interpretation of the statute does not even suggest such a result.

⁵ Although Claimant acknowledges that "under the new statute, the notice clock is no longer tolled until disability," (App. Br. p. 5), he later argues that the only rational interpretation of the revised notice provision is that the notice period does not begin to run until a claimant receives a medical diagnosis, or

There are a number of additional problems with Claimant's suggested approach. First, if the legislature had intended for the notice period to run from a specific, more easily discernable point in time, such as disability or a medical diagnosis, it easily could have done so. Instead, it chose the discovery rule, understanding, as had been expressed in Schurlock v. City of North Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002), that it might work a hardship in some cases. It must be presumed that the Legislature was familiar with long-standing case law applying the discovery rule and that, by utilizing the statutory formula for the discovery rule, it intended to adopt precisely that and not some three-pronged test as is suggested by Claimant.

Second, as noted above, application of the discovery rule is a fact-based inquiry and each case must be decided on its own facts. There conceivably could be cases where the earliest date a claimant could have known he suffered from a compensable injury is the date on which he became disabled or received a medical diagnosis – *i.e.*, where the claimant did not notice the effects of the repetitive trauma and/or had no reason to associate any injury with his job – but that certainly is not the case before this Court.

Third, the purpose of notice provisions would be defeated by waiting until a claimant was totally disabled – because the employer would lose any opportunity to adjust his work duties or provide early treatment to lessen or prevent the injury. The dual purposes of the notice provisions of the Workers' Compensation statute are “[f]irst, to enable the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and second, to facilitate the earliest possible

when the repetitive trauma injury either “interferes with the employee’s ability to perform the work allegedly causing the injury, or the date when the employee becomes disabled as a result of the repetitive trauma . . .” (App. Br. pp. 9-10). Thus, the test Claimant proposes is, in part, the very test that he concedes the Legislature has rejected.

investigation of the facts surrounding the injury.” Bass, 365 S.C. at 474, 617 S.E.2d at 379; *see also* Mintz, 218 S.C. at 414, 63 S.E.2d at 52 (same).⁶ In this case in particular, had Claimant notified Employer of the pain in his arm and that he believed the repetitive hammering of his job was causing his injury, Employer would have had the option of either changing Claimant’s job description in order to lessen or altogether prevent the injury, and/or providing medical care earlier in order to minimize the disability.⁷ By continuing to work without notifying Employer until the injury was so significant that he could no longer work, Claimant deprived Employer of any chance to mitigate or prevent his repetitive trauma injury.

In the end, the Legislature did not adopt and the Commission did not interpret *Section 42-15-20(C)* to provide such a circular and unworkable notice provision as is suggested by Claimant. Instead, what the statute provides, and the Commission held in this case, is that if a claimant knows he is being injured by repetitive trauma and believes that his work conditions are the source of his injury, then he is under an obligation to provide timely notice to his employer if he wants to later file a workers’ compensation claim.

- B. The Commission properly applied the discovery rule in this case when it concluded, based on substantial evidence in the record, that Claimant knew or could have known he had a work-related injury years before he provided notice.

Appellant argues that the Commission committed legal error in its application of the discovery rule in this case. (App. Br. pp. 7-10). However, application of the

⁶ As this Court observed in Bass, “*Section 42-15-20* is a policy statement embedded in the Workers’ Compensation Act by the South Carolina General Assembly that consolidates and harmonizes the employer and employee under the statutory rubric of notification and accountability.” 365 S.C. at 474, 617 S.E.2d at 380.

⁷ In the case before the Court, the critical fact is not that Claimant kept working, (App. Br. p. 5), but that he kept working without providing any notice to Employer.

discovery rule – determining when a litigant knew or should have known that a cause of action existed – is a question of fact. *See, e.g., Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338-39, 534 S.E.2d 672, 681 (2000), *overruled on other grounds State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004); *Johnston*, 313 S.C. 61, 437 S.E.2d 45. Under the discovery rule, the clock starts ticking when a claimant discovers he is being injured, and not when he “appreciate[s] the full extent of the damage.” *Dillon*, 286 S.C. at 215, 332 S.E.2d at 559. The analysis of what a claimant could or should have known is an objective, rather than a subjective, test. *Berry*, 328 S.C. at 445, 492 S.E.2d at 799.

In the case before the Court, as was the case in *Dean v. Ruscon Corp.*, there is no question that the injured party knew of the injury, if not the extent of the injury, and made a positive association between the injury and the cause (in *Dean*, nearby pile driving activities; in this case, the repetitive motion of Claimant’s job). 321 S.C. at 364, 468 S.E.2d at 647. In *Dean*, the Supreme Court held that it was immaterial whether the plaintiff comprehended the full extent or the progression of the damage that was being done to her building. *Dean*, 321 S.C. at 366, 468 S.E.2d at 647; *see also Knox*, 362 S.C. at 570-71, 608 S.E.2d at 462 (holding that the fact that an injured party does not know the extent of his injuries is immaterial). Here, it is likewise immaterial that Claimant had not received a final diagnosis or comprehended the full extent of his injuries. The notice period was triggered when he knew he was being injured and believed his job was causing the injury. *Johnston*, 313 S.C. at 64-64, 437 S.E.2d at 47 (statutory period begins to run when a person of ordinary knowledge and experience has been put on notice that some right has been invaded or a claim might exist “and not when advice of counsel is

sought or full-blown theory of recovery is developed. [citation omitted] The date of discovery is not when the plaintiff discovers a witness to support of prove his case”).

In reaching this conclusion, the Commission is not “saddling Mr. King with a self-diagnosis he was not qualified to make . . .” (App. Br. p. 8). Claimant already knew he was being injured and had linked that injury to the repetitive motions of his job. Claimant suggests that, had he seen a doctor when he first noticed the injury, there is no evidence that he would have obtained a correct diagnosis, or worse, that he might have been misdiagnosed. (App. Br. pp. 11-12). However, such conjecture and speculation cannot absolve Claimant of the responsibility to provide timely notice to Employer or to exercise some degree of reasonable diligence. In fact, had Claimant sought medical care and received an incomplete or incorrect diagnosis, the facts of this case would have been more analogous to those in Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992) (under the discovery rule, statute of limitations did not begin to run until knee problem was diagnosed correctly). As it is, because Claimant did nothing — neither provided notice nor sought medical attention — Mauldin is totally distinguishable on its facts and has no application here.

Contrary to assertions in Claimant’s Brief, by properly applying the discovery rule to the facts of this case, the Commission is not charging Claimant with notice of any particular medical condition, including the specific diagnosis of carpal tunnel syndrome. (See App. Br. p. 7). Nor does the Commission’s Order require Claimant to self-diagnose himself. (App. Br. pp. 10-11). Rather, the Commission’s Order simply and properly relies on Claimant’s testimony admitting that, years before he provided notice to Employer, his arm was hurting and he believed his job was causing the injury. The

Commission's Order thus charges Claimant with the responsibility, in light of the facts of this case, to have provided notice to Employer within 90 days of the date he was aware that his job-related duties were injuring his arm. The record reveals, however, that he did nothing whatsoever to find the cause of or treat his injured arm -- he simply continued to work, admittedly believing the repetitive hammering was injuring his arm, without providing notice until his injury was severe enough that he could no longer work. (Hr'g Tr., R. p. 28, line 5 -- p. 29, line 5).⁸

Claimant argues that the Commission's interpretation of the discovery rule equates the gradual onset of pain and soreness with 'compensability,'" (App. Br. p. 8), and that there is no "rationale basis for choosing the fifth, twenty-fifth or any other time that the employee experiences pain or discomfort as the triggering event." (App. Br. p. 9). In the case before the Court, it is not necessary to pinpoint the exact day that Claimant knew he was being injured and suspected his job was the cause. Instead, in this case, the record clearly demonstrates that Claimant was aware of these facts well over 90 days prior to providing any notice to Employer.

Finally, contrary to Claimant's assertions, the Commission's finding of fact No. 9 is not an attempt to "avoid the requirement of medical evidence of compensability." (App. Br. p. 11). Instead, the Commission was stating the obvious, which is that, even without Claimant's admission on the record that he suspected his job was injuring his arm, he would have been obligated at the time he noticed the injury to demonstrate reasonable diligence, such as seeking medical assistance, which "could've discovered it was compensable." (Commission Order, R. p. 6). The Commission did not say a doctor

⁸ In Dean, the plaintiff at least hired a contractor and structural engineer to inspect the building when she first noticed the damage to her building. 321 S.C. at 362, 468 S.E.2d at 646.

definitely would have advised Claimant that his injury was work-related, but that Claimant was expected to exercise reasonable diligence. Here, however, it is a moot point because Claimant testified that he actually was aware that he was being injured and believed his job was causing that injury.

In the end, the Commission made a finding of fact, supported by Claimant's own testimony at the hearing, that Claimant knew or should have known that he was suffering from a compensable repetitive injury years before he provided notice to Employer. Since this factual finding is supported by substantial evidence in the record, this Court is bound by the Commission's finding. Ross, 298 S.C. 490, 381 S.E.2d 728; Broughton, 336 S.C. 488, 520 S.E.2d 634. Therefore, this Court should uphold the Commission's ruling that Claimant's claim is barred by his failure to provide timely notice under S.C. Code § 42-15-20(C).

C. Prior case law analyzing repetitive injury claims does not support Claimant's assertion that he provided timely notice.

Claimant correctly notes that the Supreme Court's definition of a repetitive trauma injury in Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2002), a hearing loss case, is incorporated into the current Workers' Compensation statute. See S.C. Code § 42-1-172(A); (App. Br. p. 4). In Schurlknight, however, the Supreme Court rejected the discovery rule – the very rule adopted in the current Workers' Compensation statute – in favor of the “‘last date of exposure’ or ‘last day worked’ rule premised on the recognition that the injury is caused by trauma that occurs repeatedly until the particular employment ends.” 352 S.C. at 178, 574 S.E.2d at 195. In that case, the Supreme Court noted the difficulty of determining the date of injury in repetitive trauma cases, and justified its rejection of the discovery rule to determine the trigger for

the statute of limitations on the basis that “[a]pplying the discovery rule to such an injury often works to the prejudice of an employee who discovers symptoms of a repetitive trauma injury but continues to work.” Id. at 178, 574 S.E.2d at 195. Similarly, in Bass, this Court held that in a repetitive trauma injury case the notice period begins to run “on the date the employee becomes disabled and could discover with reasonable diligence his condition is compensable.” 364 S.C. at 481, 617 S.E.2d at 383. Presumably, the South Carolina legislature was aware of these court decisions when it revised the Workers’ Compensation statute. See Wigfall, 354 S.C. at 111, 580 S.E.2d at 105 (the legislature is presumed to be aware of judicial interpretation of its statutes). The legislature could have but specifically did not adopt a last day of exposure, or disability, or some other more definite point in time as the trigger for notice and limitations periods. Instead, it adopted the very rule rejected by the Supreme Court in Schurlnight.⁹

Although overruled by the Supreme Court, this Court’s opinion in Schurlnight v. City of North Charleston, 345 S.C. 45, 545 S.E.2d 833 (Ct. App. 2001), is nonetheless instructive to the case at hand. In analyzing when the statute of limitations began to run under the discovery rule, this Court concluded that a May 1995 doctor’s diagnosis triggered the limitations period. Claimant suggests that this Court’s ruling in Schurlnight therefore supports the conclusion that he did not and reasonably should not have known he had a compensable injury until he obtained a medical diagnosis. (App. Br. p. 6). It is important, however, to examine exactly what this Court did and did not

⁹ Claimant’s reliance on White v. Medical University of South Carolina, 355 S.C. 560, 586 S.E.2d 157 (Ct. App. 2003), is inapposite, as that case adopted and applied the last day of injurious exposure rule from Schurlnight, and therefore clearly was not applying the discovery rule. In fact, in White, this Court held that “*even if* substantial evidence supported the Commission’s determination that [the claimant] knew since 1997 that his back pain was work-related, the statute of limitations did not begin to run until the last day of exposure – White’s last day of work . . .” Id. at 566, 586 S.E.2d at 160-61 (emphasis added).

hold. This Court determined that claimant Schurlnight was on notice that he had a compensable injury as of the date he received a copy of a May 1995 physical exam that identified his progressive hearing loss, labeled it as a “slight hearing impairment,” and recommended annual audiograms. 345 S.C. at 50, 545 S.E.2d at 836. It is important to note that, in picking the May 1995 date, this Court observed that “[p]rior to the physical, Schurlnight *had not noticed any hearing loss.*” *Id.* at 47, 545 S.E.2d at 835 (emphasis added). Had the claimant in Schurlnight noticed prior to the May 1995 physical that he was suffering from hearing loss and believed that his job was causing it, the trigger date may well have been earlier. In any event, this Court’s choice of May 1995 as the trigger represents *both* the first time Schurlnight knew he had a work-related injury *and* a medical diagnosis of the same, but does not express a choice of one over the other.

This Court further observed that, at the latest, Schurlnight “certainly knew or should have known of his compensable injury after his audiogram in February of 1996.” *Id.* at 50, 545 S.E.2d at 836. Interestingly enough, following the February 1996 audiogram, Schurlnight was told his hearing loss was “minor,” and that he should “go back to work.” *Id.* at 48, 545 S.E.2d at 835. The doctor recommended protective gear and annual audiograms. *Id.* Thus, despite Claimant’s arguments that use of the term “compensable” in *Section 42-15-20(C)* means Claimant must accumulate medical proof of compensability before the notice provision begins to run, (*see App. Br. pp. 6-7*), this Court looked to medical reports that simply notified the claimant of his potential claim as the trigger for the limitations period.

It is also critical to note that, in Schurlnight, this Court did *not* hold that a medical diagnosis was required to fulfill discovery rule. Based on the facts of that case,

the medical diagnosis put the claimant on notice of his compensable hearing loss. However, the injury analyzed in Schurknight is fundamentally different from Claimant's repetitive trauma injury in this case. A claimant might not notice loss of hearing – such a process is gradual and not necessarily painful. Here, Claimant testified that his arm was “hurting and aching” – his was a much less subtle kind of injury. Furthermore, Claimant testified both at his deposition and at the hearing that he believed his injury was caused by the work he was doing. (Hr'g Tr., R. p. 28, line 5 – p. 29, line 1).

II. The Commission did not commit reversible error in not addressing the issue of whether Claimant had a reasonable excuse for not giving timely notice and whether Employer has been unduly prejudiced thereby.

Claimant argues that the Commission erred by failing to make a specific finding of fact regarding whether he had proven that he had a reasonable excuse for not giving timely notice and, if he met that burden, whether Employer had been unduly prejudiced thereby. (App. Br. pp. 12-13). Although Claimant cites support for this proposition, what he fails to note is that he made no argument whatsoever below regarding whether he had a reasonable excuse. In addition, there is absolutely no evidence in the record regarding whether Claimant had a reasonable excuse for failing to provide timely notice. Thus, the Commission had no evidence or arguments before it on which to base such a finding. Because there is no evidence in the record pointing to any excuse, reasonable or otherwise, for Claimant's failure to provide timely notice, the only conclusion the Commission could draw is that Claimant failed to meet his burden of proving a reasonable excuse. For this Court to remand for the Commission to make such a finding would be a pointless exercise – the only conclusion the Commission could reach on the

record below is that Claimant failed to meet his burden of showing a reasonable excuse because the record is devoid of any evidence to the contrary.

Given Claimant's failure to raise and/or present evidence to the Commission regarding whether he had a reasonable excuse for not providing timely notice, it would be inappropriate to remand at this point in order to allow him to supplement the record. Although Claimant's position below was that he provided timely notice, he easily could have argued in the alternative that, in the event the Commission ruled against him on that issue, he had a reasonable excuse for failing to provide timely notice. However, he did not. A party is expected to present all his arguments and evidence to the forum below and not try his case in piecemeal fashion. Salley v. McCoy, 186 S.C. 1, 10, 195 S.E. 132, 136 (1937) (parties are not permitted to try their cases piecemeal).

Logically, an employer's burden to prove undue prejudice does not arise until and unless the claimant has met his burden of proving he had a reasonable excuse for failing to provide timely notice. Therefore, precisely because Claimant has presented absolutely no evidence that he had a reasonable excuse for failing to provide timely notice, there has been no reason for Respondents to demonstrate undue prejudice. However, to the extent this Court considers whether the Employer has been unduly prejudiced by Claimant's failure to provide timely notice, there is no doubt that such prejudice exists in this case. The long delay between the commencement of Claimant's repetitive trauma injury and his notice to Employer prevented Employer from either adjusting his work responsibilities so as to entirely avoid the injury, or treating the injury earlier and thereby lessen the degree of injury. Consequently, this case presents a clear-cut case of undue prejudice. See Bass, 365 S.C. at 474, 617 S.E.2d at 379; see also Mintz, 218 S.C. at 414,

63 S.E.2d at 52. Because there is no evidence to the contrary, this Court can decide as a matter of law, that Claimant's failure to provide timely notice unduly prejudiced Employer regardless of any excuse he might attempt to argue at this point. *See Kinsey v. Champion Am. Serv. Ctr.*, 268 S.C. 177, 232 S.E.2d 720 (Ct. App. 1977) (holding that "[a]lthough the Commission is the fact finding body, where the evidence gives rise to but one reasonable inference the question becomes one of law for the courts to decide"); *see also Broughton*, 336 S.C. at 498, 520 S.E.2d at 639 (where there is no conflict in evidence, factual determinations may be made by the court). Thus, because the record is devoid of any evidence that Claimant had a reasonable excuse for not providing timely notice and, because the failure to provide timely notice deprived Employer of any opportunity to provide medical care and/or change Claimant's job duties when Claimant first noticed his job was causing him injury, this Court should conclude as a matter of law that the claim is barred under *Section 42-15-20(C)*. S.C. Code § 42-15-20(C).

CONCLUSION

Section 42-15-20(C) unambiguously provides that notice of a repetitive trauma injury must be provided within 90 days of when a claimant knew or could have known through the exercise of reasonable diligence that he has a compensable, or work-related, claim. The Commission properly interpreted this provision in accordance with legislative intent. In addition, the Commission properly applied the discovery rule to the facts of this case and concluded that, because Claimant failed to provide notice of his repetitive trauma injury within 90 days of learning he had a compensable injury, his claim is barred. Furthermore, the record contains absolutely no evidence that Claimant's failure to provide timely notice was excusable. In light of the fact that Claimant's failure to

provide notice deprived Employer of any opportunity to mitigate or provide early medical care, this Court should find as a matter of law that, regardless of whether Claimant may or may not have had a reasonable excuse, Employer was unduly prejudiced by his failure to provide timely notice. As a result, this Court should uphold the Commission's order denying Claimant's claim for failure to provide timely notice.

Respectfully submitted,



March 26, 2010

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Helen F. Hiser
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Attorneys for Respondents

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case Tracking No. 2009-141286

Ralph Duane King, Jr., ... Appellant,

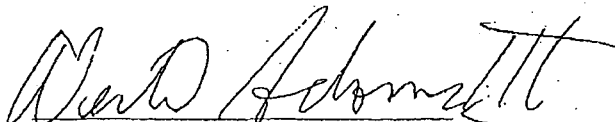
v.

International Knife and Saw-Florence, ... Employer,
and
Peerless Insurance Company c/o
Montgomery Insurance, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Respondents' Final Brief complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

March 26, 2010



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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Case Tracking No. 2009-141286

Ralph D. King, Jr., ... Appellant,

v.

International Knife and Saw-Florence, ... Employer,

and

Peerless Insurance Company c/o

Montgomery Insurance, ... Respondents.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

1. Under the Discovery Rule, Work-Related Pain Alone is Neither a Compensable Injury Nor a Work-Related Injury

Respondents argue that the legislative adoption of the "discovery rule" as the trigger for notice of workers' compensation claims creates an unambiguous standard - "the employee must notify his employer within ninety days ... of the date on which he knew or reasonably could/should have known he had a work-related injury." (Resp. Br. p. 5). In so arguing, Respondents acknowledge the very ambiguity they deny, for the statutory modification provides that notice is triggered when the employee knew or reasonably should have known that his condition or injury is compensable." S.C. Code §42-15-20(C), §42-15-40. If the legislature had intended to trigger notice on the date of the employee's knowledge of a "work-related injury," rather than the date of the employee's knowledge that the injury is "compensable," it easily could have done so by using the words "work-related injury" rather than "compensable."

Respondents contend that their interpretation of the discovery rule is supported by judicial application of the discovery rule in other factual situations. However, contrary to Respondents' assertion, the discovery rule has never been interpreted to trigger notice of a claim prior to notice of an injury. In this case, the only evidence upon which Respondents and the Full Commission rely to support the finding that Mr. King should have known that he had suffered a work-related injury "a couple of years ago" was Mr. King's testimony that several years before he stopped working, he experienced pain in his arm and believed that the repetitive motion of his work was the cause of the pain. (R. p. 28, lines 5-18). "The mere presence of pain or discomfort, to be sure, will ordinarily not serve to trigger the commencement of the applicable statute of limitations." Knox v. Greenville

Hosp. Sys., 362 S.C. 566, 569-70, 608 S.E.2d 459, 461 (Ct. App. 2005).

Essentially, Respondents are taking Mr. King's admission of pain and urging this Court to conclude that there is no difference between pain and injury. There is no evidence that Mr. King knew he was being injured "for a couple of years," only that he experienced pain and soreness from performing his work duties for several years. Respondents contend that the purpose of the notice provisions would be defeated by waiting until the claimant became "totally disabled." (Resp. Br. P. 10). Mr. King does not argue that the clock should not start to run until the claimant becomes totally disabled; he merely argues that the clock should not start to run until the condition begins to interfere with the claimant's ability to perform his work duties. For Mr. King, it is undisputed that whatever pain and soreness he experienced did not begin to interfere with his work duties until May of 2008, and that he clearly provided proper timely notice from that date.

2. The Claimant Properly Raised the Issue of Reasonable Excuse and Provided Evidence of Reasonable Excuse

Respondents contend that this Court should not address the issues of reasonable excuse and undue prejudice, claiming that Mr. King failed to raise those issues below. Contrary to Respondents' assertion, in his brief to the Full Commission, Mr. King pointed out that even if the Commission concluded that notice was not timely, S.C. Code §42-15-20 provides that the claim is nevertheless compensable if "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." (Resp. Br. to Full Commission, p. 3).

In addition, Mr. King provided evidence of reasonable excuse. As noted by our Supreme Court in Mintz v. Fiske-Carter Constr. Co., 218 S.C. 409, 63 S.E.2d 50 (1951), one of the purposes

of the notice provision is to afford the employer an opportunity to furnish medical care "in order to minimize the disability." It is undisputed that Mr. King did not become disabled until May 20, 2008; in fact, prior to that date, any pain or soreness he experienced in his arm never interfered with his ability to perform his hammering work or cause him to miss any time from his job. Thus, there was no disability to minimize prior to that date.

Respondents argue that this is a "clear-cut case of undue prejudice" because the Employer could have adjusted Mr. King's work responsibilities to avoid the injury, or treated the injury earlier and thereby lessen the degree of injury. (Resp. Br. P. 19). Not only have Respondents failed to provide any evidence of such alleged prejudice, but its argument demonstrates the fallacy of its interpretation of the notice provision. In arguing that the Employer could have adjusted Mr. King's work responsibilities to avoid the injury, Respondents concede that any pain or soreness Mr. King experienced was not an "injury." Respondents can't have it both ways, claiming pain and soreness is an "injury" for purposes of his duty to provide notice, but not for purposes of its duty to demonstrate undue prejudice. Moreover, Respondents fail to explain how it could have adjusted his work responsibilities to avoid the injury, especially since the trigger for accommodation is a condition which interferes with an employee's ability to perform the regular duties of his employment - it is undisputed that Mr. King's condition never interfered with his ability to perform the regular duties of his employment until May of 2008.

Finally, Respondents' contention that it would be inappropriate to remand this action on the issues of reasonable excuse and undue prejudice is the same argument rejected by this Court in Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 623 S.E.2d 860 (Ct.App.2005). In Lizee, the employer also opposed a remand, alleging that the claimant failed to argue "reasonable excuse" at the hearing.

This Court rejected the employer's argument for four reasons:

First, the informal nature of administrative proceedings before the Commission is inconsistent with the exacting procedural hurdles the Department seeks to impose on Lizee and claimants like her. Second, we adhere to the principle that workers' compensation laws in general, and notice requirements in particular, are to be liberally construed in favor of claimants and coverage. Third, the Commission's adoption of Lizee's position on notice removed the need for her to pursue the alternative "reasonable excuse" and "prejudice" prong of section 42-15-20. Finally, we recognize that it is not the claimant's burden to show the absence of prejudice, but it is the employer's burden to prove the presence of prejudice.

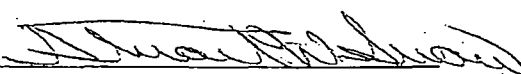
Lizee, 367 S.C. at 130, fn. 2 (citations omitted). Thus, in the event that this Court concludes that Mr. King failed to provide notice within ninety days of the date in which he knew or reasonably should have known that his condition was compensable, this Court should remand for findings as to the issues of reasonable excuse and undue prejudice.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the Workers' Compensation Commission, or, in the alternative, remand to the Commission for findings on the issues of reasonable excuse and undue prejudice.

Respectfully submitted,

DUSENBURY, SNOW & McGEE, P.A.

BY: 

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Attorney for Appellant

March 30, 2010

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Case Tracking No. 2009-141286

Ralph D. King, Jr., ... Appellant,

v.

International Knife and Saw-Florence,

Employer,

and

Peerless Insurance Company c/o

Montgomery Insurance, ... Respondents.

CERTIFICATE OF COUNSEL

I hereby certify that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.



Stuart W. Snow

20617.08053

The South Carolina Court of Appeals

Ralph Duane King, Jr.,

Appellant,

v.

International Knife and Saw - Florence,

Employer,

and

Peerless Insurance Company c/o
Montgomery Insurance,

Respondents.

Appellate Panel
Richland County
Trial Court Case No. 2009-WC-40-11652

ORDER of DISMISSAL

The above entitled case is pending on appeal in this Court. Due to the failure of appellant to file proof of service for the Record on Appeal in the above matter, as provided for in Rule 210 of the South Carolina Appellate Court Rules,

IT IS ORDERED that the above captioned appeal be and hereby is dismissed. Pursuant to Rule 221(b) of the South Carolina Appellate Court Rules, the remittitur in the case will be sent to the Clerk of Court for the South Carolina Workers' Compensation Commission after fifteen (15) days, exclusive of the date of filing this Order.

V. Claire Allen, Deputy CLERK
For the Court

Columbia, South Carolina

03/25/2010

cc: Stuart Wesley Snow, Esquire
James H. Lichty, Esquire
Weston Adams, III, Esquire
Helen F. Hiser, Esquire
Virginia L. Crocker

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March 29, 2010

Honorable Tanya Gee
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1015 Sumter St.
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803/734-1890
803/734-1839 (Fax)

RE: Ralph Duane King, Jr. v. International Knife & Saw -
Florence
Case Tracking Number 2009-141286

Dear Ms. Gee:

Pursuant to my conversation today with Claire Allen, I have enclosed herewith an original and six (6) copies of our Petition for Reinstatement, along with proof of service of the Record on Appeal and the Petition for Reinstatement upon counsel for Respondent, along with our filing fee of \$25.

I am,

Sincerely yours,



Stuart W. Snow

Enclosures

cc/ Weston Adams, III
Helen F. Hiser
700 Gervais St., Suite 300
P.O. Box 12519
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Case Tracking No. 2009-141286

Ralph D. King, Jr., ... Appellant,

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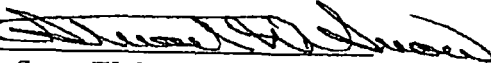
PETITION FOR REINSTATEMENT

The Appellant, by and through his undersigned attorney, hereby Petitions for Reinstatement of this Appeal. As grounds for granting his Petition, Appellant would respectfully show that Appellant timely served the Record on Appeal upon counsel for Respondent, but inadvertently failed to file proof of said service with the Court. Appellant further respectfully shows that he has consulted with counsel for Respondent, and that counsel for Respondent has no objection to the reinstatement of this appeal.

Respectfully submitted,

DUSENBURY, SNOW & McGEE, P.A.

BY:



Stuart W. Snow
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March 26, 2010

Attorney for Appellant

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Case Tracking No. 2009-141286

Ralph D. King, Jr., ... Appellant,

v.

International Knife and Saw-Florence,

Employer,

and

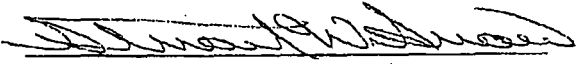
Peerless Insurance Company c/o

Montgomery Insurance, ... Respondents.

PROOF OF SERVICE

I hereby certify that a three copies of the Record on Appeal was served on the following parties by depositing said copy in the United States Mail with sufficient first class postage attached thereto, this 17 day of March, 2010, addressed as follows:

Weston Adams, III
Helen F. Hiser
700 Gervais St., Suite 300
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Columbia, SC 29211


Stuart W. Snow

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Case Tracking No. 2009-141286

Ralph D. King, Jr., ... Appellant,

v.

International Knife and Saw-Florence,

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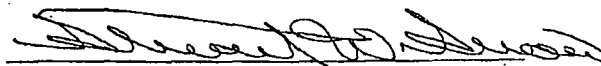
Peerless Insurance Company c/o

Montgomery Insurance, ... Respondents.

PROOF OF SERVICE

I hereby certify that a true copy of the Petition for Reinstatement was served on the following parties by depositing said copy in the United States Mail with sufficient first class postage attached thereto, this 27 day of March, 2010, addressed as follows:

Weston Adams, III
Helen F. Hiser
700 Gervais St., Suite 300
P.O. Box 12519
Columbia, SC 29211


Stuart W. Snow



The South Carolina Court of Appeals

TANYA A. GEE
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V. CLAIRE ALLEN
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March 31, 2010

Stuart Wesley Snow, Esquire
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P.O. Box 555
Florence, SC 29503

Re: King, Ralph v International Knife
Case Tracking Number 2009-141286

Dear Mr. Snow:

The following Order has been endorsed on your Petition for Reinstatement in the above entitled case on appeal.

"GRANTED.

John Cannon Few C.J.
For the Court

By s/ Tanya A. Gee
Clerk

March 31, 2010."

Please be advised that the Record on Appeal and all Final Briefs should be served and filed no later than April 20, 2010.

Very truly yours,

V. Claire Allen, Deputy Clerk
CLERK

TAG/pd

cc: James H. Lichty, Esquire
Weston Adams, III, Esquire
Helen F. Hiser, Esquire
Virginia L. Crocker

R114



20017.08053
RECEIVED
10/20/11

The South Carolina Court of Appeals

TANYA A. GEE
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October 19, 2011

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Weston Adams, III, Esquire
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McAngus Goudelock
& Courie, LLC
P.O. Box 12519
Capitol Station
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Re: King, Ralph v. International Knife

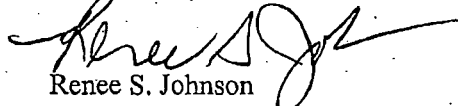
Dear Counsel:

Enclosed is the opinion of the Court of Appeals in this case.

Pursuant to Rule 221(b) of the South Carolina Appellate Court Rules, the remittitur in this case will be sent to the Appellate Panel of the Workers' Compensation Commission after fifteen (15) days, exclusive of the date of filing of this opinion.

No extension for a petition for rehearing will be granted except in the most extraordinary circumstances and, except in the rarest cases, with seven days' notice.

Sincerely,


Renee S. Johnson
Administrative Specialist

TAG/rj

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Ralph Duane King, Jr., Appellant,

v.

International Knife and Saw -
Florence, Employer,

and

Peerless Insurance Company
c/o Montgomery Insurance, Respondents.

Appeal From the Appellate Panel
Of the Workers' Compensation Commission

Opinion No. 4895
Heard October 3, 2011 – Filed October 19, 2011

REVERSED

Stuart Wesley Snow, of Florence, for Appellant.

James H. Lichty, Weston Adams, III, and Helen F.
Hiser, all of Columbia, for Respondents.

CURETON, A.J.: After Ralph D. King, Jr., suffered work-related injuries and filed a workers' compensation claim, the single commissioner awarded him benefits. King's employer, International Knife and Saw-Florence, and its insurance carrier, Peerless Insurance Company, (collectively Employer) appealed to the Appellate Panel of the Workers' Compensation Commission (Appellate Panel). The Appellate Panel reversed. King appeals, arguing the Appellate Panel erred in: (1) concluding his repetitive trauma injury was compensable at a time when King had missed no work because of the condition, had sought no treatment for it, and had not been diagnosed as having a repetitive trauma injury; (2) concluding the ninety-day notice period commenced before King was diagnosed with a repetitive trauma injury; (3) finding substantial evidence indicated King had "first noticed [a repetitive trauma injury] a couple of years ago, . . . suspected his job was causing [a repetitive trauma injury] when he first noticed it, and . . . discovered his condition was compensable a couple of years ago"; (4) finding substantial evidence that, even if King had not discovered his condition was compensable, he could have done so years earlier through the exercise of reasonable diligence; and (5) failing to address whether King had a reasonable excuse for failing to give timely notice and whether Employer suffered undue prejudice as a result. We reverse on the issue of compensability, reinstate the benefits awarded by the single commissioner, and decline to address King's remaining issues.

FACTS

From April 1995 to May 2008, King used six-, eight-, and ten-pound hammers to hammer saw blades to customer specifications for his employer. On April 17, 2008, the hammer King was using broke, and King experienced a sharp pain in his shoulder. He continued working for nearly a month before notifying his supervisor of his injury and seeking medical treatment. King stopped working on May 15, 2008.

On August 7, 2008, King filed a claim for workers' compensation benefits due to right shoulder and neck injuries. Employer denied his claim, alleging his injuries were not work-related and he failed to give timely notice of a repetitive trauma injury. King later amended his claim to include carpal

tunnel syndrome in his right arm, hand, and fingers. Both the original and the amended claim indicated he sought benefits for "injury" as well as "repetitive trauma."

On November 25, 2008, the parties appeared for a hearing before the single commissioner on the issue of whether King gave Employer proper notice. King testified he stopped working for Employer in May because of pain in his "arm and shoulder and stuff." Although King denied having any problems using his hands or arms prior to that day, he conceded his right arm had hurt and ached for the past couple of years. Furthermore, he suspected the ache in his arm was connected to his work: "After slinging a hammer all day, . . . your arm's going to be tired."

King's medical records reflected that, from May to September 2008, King sought and received medical treatment for pain on his right side, from his neck to his hand, and numbness in his right hand. He received prescription pain medications, and his doctors explored possible causes in his rotator cuff, cervical spine, nervous system, and carpal tunnel. An MRI excluded King's rotator cuff and spine as sources of the pain; however, one of his treating physicians found a mild nerve impingement in his right shoulder. A steroid injection to King's shoulder relieved some of his shoulder pain.

In addition, electrodiagnostic studies revealed King suffered from moderate carpal tunnel syndrome on his right side. He underwent ETPS¹ and physical therapy. By August, King reported his right hand was still numb. His doctor recommended carpal tunnel release surgery to treat King's hand.

The single commissioner found King's report to Employer was timely and awarded benefits for total disability and medical treatment. Employer appealed, and the Appellate Panel reversed both the finding of timeliness and the award of benefits. Specifically, the Appellate Panel found King "first noticed this injury a couple of years ago," suspected his work caused the injury, "knew well before he gave notice that he had a work-related problem,"

¹ The record identifies this procedure only by its initials. It appears to be a form of acupuncture accompanied by an electric current that may be used to treat carpal tunnel syndrome.

and "discovered his condition was compensable a couple of years ago." This appeal followed.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Appellate Panel. S.C. Code Ann. § 1-23-380 (Supp. 2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the substantial evidence standard of review, this court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact. Stone v. Traylor Bros., Inc., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). However, we may reverse the Appellate Panel's decision when it is unsupported by substantial evidence or controlled by an error of law. Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002).

"Statutory interpretation is a question of law." Hopper v. Terry Hunt Constr., 373 S.C. 475, 479, 646 S.E.2d 162, 165 (Ct. App. 2007). This court is free to decide matters of law with no particular deference to the fact finder. Pressley v. REA Constr. Co., 374 S.C. 283, 287-88, 648 S.E.2d 301, 303 (Ct. App. 2007). "But whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." Hopper, 373 S.C. at 479-80, 646 S.E.2d at 165.

LAW/ANALYSIS

King asserts the Appellate Panel erred in concluding his repetitive trauma injury was compensable at a time when he had missed no work because of the condition, had sought no treatment for it, and had not been diagnosed as having a repetitive trauma injury. We agree.

The South Carolina Workers' Compensation Act (Act) requires employers to compensate employees who sustain injuries "arising out of and in the course of employment." S.C. Code Ann. § 42-1-160(A) (Supp. 2010). The compensation to which an injured employee is entitled is "the money allowance payable to an employee or to his dependents as provided for in . . .

Title [42] and includes funeral benefits." S.C. Code Ann. § 42-1-100 (1985). Employers are obligated to provide medical treatment and supplies. S.C. Code Ann. § 42-15-60 (Supp. 2010). In addition, employers must pay benefits to injured employees for their total or partial disability, according to a statutory schedule. S.C. Code Ann. § 42-9-10 to -30 (1985 & Supp. 2010). Our supreme court has observed the workers' compensation system does not compensate an employee for his injury but, instead, "provid[es an] injured employee with sufficient income and medical care to keep him from destitution." Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 116, 580 S.E.2d 100, 108 (2003).

When an employee suffers a repetitive trauma injury:

[N]otice 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 [Workers' Compensation C]ommission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

S.C. Code Ann. § 42-15-20(C) (Supp. 2010). The statutory notice requirements in this section "should be liberally construed in favor of claimants." Murphy v. Owens Corning, 393 S.C. 77, 82, 710 S.E.2d 454, 457 (Ct. App. 2011). The Appellate Panel's findings concerning notice are subject to the substantial evidence standard. Id. at 82-83, 710 S.E.2d at 457.

We find substantial evidence does not support the Appellate Panel's findings characterizing King's long-term arm ache as an "injury," determining King discovered or could have discovered "a couple of years ago" that he had a compensable condition, and barring King from receiving benefits for failing to satisfy the notice requirement. Therefore, we reverse the Appellate Panel's decision and reinstate the single commissioner's award of benefits.

The question before us is this: in the case of a repetitive trauma injury, what event triggers an injured employee's obligation to report and

commences the ninety-day reporting period established in section 42-15-20(C)? By its nature, a repetitive trauma injury lacks a definite time of injury because the damage "is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C. Code Ann. § 42-1-172(A) (Supp. 2010); see also Schurilknight v. City of N. Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002) ("Repetitive trauma injuries . . . have a gradual onset caused by the cumulative effect of repetitive traumatic events or 'mini-accidents.' As noted by other courts, it is difficult to determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury."). 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 a compensable condition. We decline to do so. Nothing in the Act suggests our legislature intended to compensate an employee for aches, pains, or other conditions that do not interfere with his ability to do his job, even if those conditions are work-related. Cf. Wigfall, 354 S.C. at 116, 580 S.E.2d at 108 (observing workers' compensation laws "are not designed to compensate the employee for his injury, but merely to provide him with the bare minimum of income and medical care to keep him from being a burden to others").

An employee's obligation to report a work-related repetitive trauma injury is not triggered by the onset of pain but, rather, by the employee's diligent discovery that his condition is compensable. § 42-15-20(C). We must determine, then, when a repetitive trauma injury becomes compensable. Our supreme court has long recognized that the Act entitles employees injured at work to compensation on only two bases, lost earning capacity and specific, scheduled injuries. Wigfall, 354 S.C. at 104, 580 S.E.2d at 102 (citing Jewell v. R.B. Pond Co., 198 S.C. 86, 90-91, 15 S.E.2d 684, 686 (1941)); see also §§ 42-1-100, 42-9-10 to -30, & 42-15-60 (establishing and describing compensation for (1) medical care or treatment for a work-related injury and/or (2) disability). Accordingly, a work-related repetitive trauma 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.

Here, the Appellate Panel found King was obligated to give Employer notice of his injury based upon his knowledge of pain "a couple of years" before he either required medical care or was unable to perform his job. In doing so, the Appellate Panel improperly required King to give notice of a condition that he had no reason to believe was compensable. Under section 42-15-20(C) and the sections addressing compensation, King had a duty to notify Employer of his injury within ninety days of the date he discovered or should have discovered it qualified him to receive benefits for medical care, treatment, or disability. The record reflects King acknowledged to the single commissioner that his arm was tired, sore, and achy for a couple of years before he became unable to work. He 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's condition was not compensable until it either required medical care or interfered with his ability to perform his job, whichever occurred first.

The record reflects King first missed work on May 15, 2008, and first saw a doctor for his injuries within two weeks after that date. King testified that, until May 2008, he neither required medical treatment nor experienced any condition that affected his ability to perform his job as he had done for many years. Nonetheless, his medical records reflect he reported to his physician that his pain suddenly became "much worse" in April 2008. Even assuming King should have discovered in April 2008 that his injury required medical treatment, his report of his injury to Employer in May 2008 fell well within the ninety-day notice period.

For the foregoing reasons, the Appellate Panel erred in finding King knew or should have known his injury was compensable "a couple of years" before he became disabled. As a result, the Appellate Panel's denial of benefits was error. Therefore, we reverse the Appellate Panel's decision and reinstate the single commissioner's award of benefits.

We decline to address King's remaining issues because reversal on the issue of compensability disposes of this appeal. See Futch v. McAllister

Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).
(ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

CONCLUSION

We find an injury does not become compensable under the Workers' Compensation Act until the injured employee satisfies the statutory criteria entitling him to compensation. We further find the evidence adduced in this case indicates King had no reason to discover his injury was compensable before April 2008, and the factual determinations supporting the Appellate Panel's denial of King's claim are unsupported by substantial evidence in the record. Accordingly, we reverse the decision of the Appellate Panel, reinstate the single commissioner's award of benefits, and do not reach King's remaining issues on appeal.

REVERSED.

SHORT and WILLIAMS, JJ., concur.



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COLUMBIA

November 2, 2011

RECEIVED
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SC Court of Appeals

Via hand delivery

Via Hand Delivery

The Honorable Tanya Gee
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Ralph Duane King, Jr. v. International Knife & Saw/Riggs, L.L.C.
Our File No.: 20617.08053
Case Tracking No.: 2009-141286
Claim No.: 103336760 - 2009-141286

Dear Ms. Gee:

Enclosed for filing please original and seven (7) copies of Respondents' Petition for Rehearing and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return the clocked-in copies via our courier.

Also, enclosed is our firm's check in the amount of \$25 for filing the motion.

If you have any questions, please contact me.

Yours truly,

McAngus Goudelock & Courie, LLC

Weston Adams, III

WA/lhs
Enclosures

cc: Stuart W. Snow, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case Tracking No. 2009-141286

Ralph Duane King, Jr., ... Appellant,

v.

International Knife and Saw-Florence, ... Employer,
and

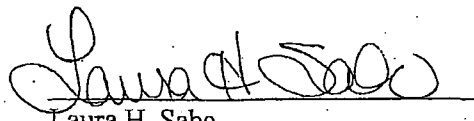
Peerless Insurance Company c/o

Montgomery Insurance, ... Respondents.

PROOF OF SERVICE

I certify that on the 2nd day of November 2011, I served the Respondents' Petition for Rehearing on Ralph Duane King, Jr. by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Stuart W. Snow
Dusenbury, Snow & McGee, PA
Post Office Box 555
Florence, S.C. 29503



Laura H. Sabo
Paralegal to Weston Adams, III

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE SOUTH CAROLINA
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Ralph Duane King, Jr., ... Appellant,

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RESPONDENTS' PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Respondents International Knife and Saw-Florence ("Employer") and Peerless Insurance Company c/o Montgomery Insurance hereby petition this Court to reconsider its Opinion in King v. International Knife and Saw, Op. No. 4895 (S.C.Ct.App. filed October 19, 2011) ("Opinion"). Respondents respectfully submit that this Court misapprehended and/or overlooked the proper interpretation of the notice provision set forth in S.C. Code Ann. § 42-15-20(C), which adopts the discovery rule. In addition, this Court misapprehended and/or overlooked the proper application of section 42-15-20(C) to the facts in this case. The factual findings of the Commission – that Appellant Ralph Duane King, Jr. ("Claimant") knew he had a compensable injury more than 90 days before he gave notice to his employer – are supported by substantial evidence in the record and should have been upheld on appeal.

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2007). Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by errors of law. S.C. Code Ann. § 1-23-380(A)(5).

The Full Commission is the ultimate fact finder in workers' compensation cases. Ross v. American Red Cross, 298 S.C. 490, 381 S.E.2d 728 (1989). It is not within the appellate court's purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999). Thus, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E.2d 679 (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 same conclusion the administrative agency reached in order to justify its action. Id. The fact that the evidence in the record might support a different outcome is of no import, so long as there is substantial evidence in the record to support the Commission's factual findings. See, e.g. Hopper v. Terry Hunt Constr., 373

S.C. 475, 479, 646 S.E.2d 162, 164 (Ct. App. 2007) (observing that "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence"). Where there is conflicting evidence in the record, the Commission's findings must be upheld on appeal. Etheredge, 349 S.C. at 455, 562 S.E.2d at 681.

ARGUMENT

I. The Court misapprehended and misinterpreted the notice provision in S.C. Code Ann. § 42-15-20(C).

Instead of analyzing whether the Commission properly applied the discovery rule to the facts of this case, this Court accepted Appellant's invitation to "rewrite" the statutory notice provision for repetitive trauma injuries into a formula that provides a readily ascertainable trigger. The Opinion holds that the 90-day notice period in repetitive trauma injury claims is not triggered until "the injured employee discovers or should discover he qualifies to receive benefits for medical care, treatment, or disability due to his condition." Alternatively, the Opinion concludes that Claimant's condition did not become "compensable until it either required medical care or interfered with his ability to perform his job, whichever occurred first." This Court's formulation in its Conclusion that, "an injury does not become compensable under the Workers' Compensation Act until the injured employee satisfies the statutory criteria entitling him to compensation," appears to accept and, in fact, adopts Claimant's circular argument regarding S.C. Code § 42-15-20(C). Under this formulation, the "statutory criteria" presumably include either acceptance by the employer of a workers' compensation claim, or order of the Commission awarding the same. Thus, under the Opinion, the notice period does not begin to run until after a claim is either accepted or adjudicated by the

Commission. In any event, under any of this Court's formulations, such judicial legislating oversteps the bound of judicial authority. Santee Cooper Resort, Inc. v. S.C. Pub. Serv. Comm'n, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989) (admonishing that "[t]his Court has no legislative powers; it is our province to construe laws, not make them"). Therefore, Respondents respectfully request this Court to reconsider and reverse its decision, and apply section 42-15-20(C) as written by the Legislature.

This Court framed the question before it as, "what event triggers an injured employee's obligation to report and commences the ninety-day reporting period established in section 42-15-20(C)?" That question has already been answered by the South Carolina Legislature in section 42-15-20(C). The 90-day notice begins to run from the date when "the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable . . ." The quoted language sets forth what is commonly referred to as the discovery rule, which South Carolina courts have applied in various other contexts, and each case is decided under the discovery rule on its own facts.¹

This Court correctly notes that statutory interpretation is a question of law and that a question of law may be reviewed *de novo*. However, the construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons Sloan v. South

¹ See, e.g., Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E. 2d 645 (1996) (applying the discovery rule in a case involving gradual injury to a building); Johnston v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (1993) (applying the discovery rule to a knee injury); Knox v. Greenville Hosp. Syst., 362 S.C. 566, 608 S.E.2d 459 (Ct. App. 2005) (applying the discovery rule to a claim alleging injury caused by administration of an intravenous saline treatment); Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997) (applying the discovery rule to legal malpractice claims); Dillon County Sch. Dist. No. Two v. Lewis Sheet Metal Works, Inc., 286 S.C. 207, 332 S.E.2d 555 (Ct. App. 1985), *overruled on other grounds*, Atlas Food Syst. & Serv., Inc. v. Crane Nat. Vendors Div., 319 S.C. 556, 462 S.E.2d 858 (1995) (applying the discovery rule in a faulty building design and construction case).

Carolina Bd. of Physical Therapy Examiners, 370 S.C. 452, 469, 636 S.E.2d 598, 607 (2006); *see also* Pressley v. REA Constr. Co., Inc., 374 S.C. 283, 288, 648 S.E.2d 301, 303 (Ct. App. 2007) (noting that statutory interpretation is a legal matter but that an agency's interpretation of its own statute "will be accorded the most respectful deference and will not be overturned absent compelling reasons"). Furthermore, while statutory interpretation is a question of law, "whether the facts of a case were correctly applied to a statute is a question of fact, subject to the substantial evidence standard." Hopper, 373 S.C. at 479, 646 S.E.2d at 165.

This Court apparently accepted Claimant's argument that the Commission's interpretation of the discovery rule equates the gradual onset of pain and soreness with "compensability." The Opinion states that Respondents, "equate pain with a compensable condition," and that "[n]othing in the Act suggests our legislature intended to compensate an employee for aches, pains, or other conditions that do not interfere with his ability to do his job, even if those conditions are work-related." First, South Carolina courts consistently have recognized pain as an indication of injury. *See, e.g., Sanders v. MeadWestvaco Corp.*, 371 S.C. 284, 638 S.E.2d 66 (Ct. App. 2006) (after work-related injury to his leg, claimant began complaining about lower back pain that later was held to be compensable); Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005) (compensation awarded to claimant based in part on pain radiating into his leg); *see also* McCuén v. MBW Manuf. Corp., 383 S.C. 19, 677 S.E.2d 28 (Ct. App. 2009) (claimant noticed pain in his wrist, and promptly reported the same to his employer who altered his work responsibilities; claimant continued to experience pain and was awarded benefits for a compensable wrist injury). Second, it is not solely the fact that Claimant

experienced pain as a result of the series of “mini-accidents” that required him to provide notice to his employer. It was the fact that Claimant specifically linked of that pain and injury to his job, (R. p. 28, line 5 – p. 29, line 1), that triggered the notice period. Third, this Court has recognized that the Act authorizes payment of benefits to claimants under the scheduled member provisions even where the condition does not interfere with the claimant’s ability to perform his or her job. See, e.g., Harbin v. Owens Corning Fiberglas, 316 S.C. 423, 427, 450 S.E.2d 112, 114 (Ct. App. 1994) (allowing award of “scheduled member” compensation where the claimant not only continued to be employed, but earned more at the time of the award than he had at the time of his work-related accident).²

In fact, in Murphy v. Owens Corning, cited in this Court’s Opinion, this Court upheld the Commission’s factual determination that the claimant’s notice was timely because she testified that, “she did not realize her **symptoms were related to her job**,” until September 7, 2007, the date she actually provided notice to her employer, despite the fact that there was medical evidence suggesting she should have known of her injuries as early as 2004. 393 S.C. 77, 83, 710 S.E.2d 454, 457 (Ct. App. 2011) (emphasis added). Even though the claimant in that case only experienced symptoms – pain, headaches and tingling in her fingers – it was the link between her symptoms and her job that triggered her duty to provide her employer with notice. Despite the fact that there

² Jewell v. Pond Co., 198 S.C. 86, 15 S.E. 684 (1941), which this Court relies on for the proposition that our Workers’ Compensation Act entitles injured workers “to compensation on only two bases, lost earning capacity and specific, schedule injuries,” dealt with whether the claimant’s disfigurement was compensable. In Jewell, the Court was called on to determine whether the claimant’s disfigurement decreased his ability to obtain employment, (“[b]ody disfigurement, when shown to affect a claimant’s earning power by a diminution thereof is logically an element of compensation specifically provided for in the Act, though not compensable merely as such”), and not when a repetitive trauma injury is deemed compensable for notice purposes. 198 S.C. at 89, 15 S.E. at 685.

was evidence suggesting the claimant should have known earlier, this Court noted, "the Commission is the fact-finder," and upheld the Commission's factual finding that, "she 'first knew her condition was work related on September 7, 2007.'" Id., 710 S.E.2d at 457.

Unlike Claimant in this case, the claimant in Murphy sought out medical care when she experienced pain and discomfort – in essence, she exercised reasonable diligence. Here, Claimant failed to seek any medical attention until he reached the point that his injury was disabling. That is hardly the exercise of reasonable diligence. Thus, even if this Court correctly concluded that the Commission finding that Claimant knew he noticed his injury a couple of years prior to giving notice is not supported by substantial evidence, which Respondents do not concede, this Court's interpretation of S.C. Code Ann. § 42-15-20(C) would read the phrase, "or could have discovered by exercising reasonable diligence," out of the statute entirely. The Legislature is presumed to have meant for all parts of a statute to have meaning. Duvall v. S.C. Budget & Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 128 (2008). If the phrase, "or could have discovered by exercising reasonable diligence," means anything, it means an employee cannot continue to injure himself daily, when he believes his job is the cause, and do absolutely nothing about it until he reaches the point he is totally disabled. (See R. p. 28, lines 10-23 (Claimant admitting that he noticed the pain in his arm a couple of years prior to giving notice, suspected his job was causing it, but that he "never went to the doctor to see if it was injured or anything"))).

If the legislature had intended for the notice period to run from a specific, more easily discernable point in time, such as disability or a medical diagnosis, it easily could

have written the notice provisions to provide for such. Instead, it chose the discovery rule, understanding, as had been expressed in Schurlknight v. City of North Charleston, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002), that it might work a hardship in some cases. It is presumed that the Legislature is familiar with long-standing case law applying the discovery rule and that, by utilizing the statutory formula for the discovery rule, it intended to adopt precisely that and not the criteria set out in the Opinion. By pinning the trigger date for repetitive trauma injury claims to the date a claimant's condition, "either required medical care or interfered with his ability to perform his job, whichever occurred first," this Court essentially reinstitutes the analytical framework set out in prior cases like Schurlknight and Bass v. Isochem, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005), which were superseded by the specific provisions of section 42-15-20(C).

In Schurlknight, the Supreme Court rejected the discovery rule – the very rule adopted in the current Workers' Compensation statute – in favor of the "last date of exposure" or "last day worked" rule premised on the recognition that the injury is caused by trauma that occurs repeatedly until the particular employment ends." 352 S.C. at 178, 574 S.E.2d at 195. Similarly, in Bass, this Court held that in a repetitive trauma injury case the notice period begins to run, "on the date the employee becomes disabled and could discover with reasonable diligence his condition is compensable." 364 S.C. at 481, 617 S.E.2d at 383. In Schurlknight, the Supreme Court noted the difficulty of determining the date of injury in repetitive trauma cases, and justified its rejection of the discovery rule to determine the trigger for the statute of limitations on the basis that, "[a]pplying the discovery rule to such an injury often works to the prejudice of an

employee who discovers **symptoms** of a repetitive trauma injury but continues to work.” 352 S.C. at 178, 574 S.E.2d at 195 (emphasis added). Presumably, the South Carolina Legislature was aware of these court decisions when it revised the Workers’ Compensation statute. See Wigfall v. Tideland Util., Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003) (the legislature is presumed to be aware of judicial interpretation of its statutes). The Legislature could have, but specifically did not, adopt a last day of exposure, or disability, or some other more definite point in time as the trigger for notice and limitations periods, as this Court erroneously has done in its Opinion. This is not a proper role for the courts.

Although this Court correctly points out that notice provisions should be liberally construed in favor of claimants, it fails to recognize that there, “are limitations upon that rule and the statutory requirement cannot be disregarded altogether.” Etheredge, 349 S.C. at 458, 562 S.E.2d at 683. Furthermore, the Act’s notice provision “is not to be treated as a mere formality or technicality . . .” Mintz v. Fiske-Carter Const. Co., 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951). Courts may not construe the Workers’ Compensation statute so “as to do violence to a specific requirement of the Act.” Ashe v. Rock Hill Hardware Co., 219 S.C. 159, 167, 64 S.E.2d 396, 400 (1951), *quoting* Wallace v. Campbell Limestone Co., 198 S.C. 196, 17 S.E.2d 309 (1946) (observing the need to properly apply statutes of limitations, even in hard cases where a claimant *might* be entitled to benefits had he or she filed a timely manner, because of the difficulties that employers and insurers would face in resisting long-delayed claims); *see also* Johnson v. Beauty Unlimited Landscape Co., 379 S.C. 403, 410, 665 S.E.2d 656, 660 (Ct. App. 2008) (the fact that courts interpret the Workers’ Compensation Act “in the light most

favorable to claimant" does not "empower the courts to employ semantics to stretch the Act" to grant coverage where it should be denied).

Furthermore, The South Carolina Supreme Court has held that the Workers' Compensation statute, which is in derogation of the common law, must be strictly construed. Wigfall, 354 S.C. at 110, 580 S.E.2d at 105. Courts "are not at liberty to extend by construction the meaning implicit in the language found in the *Workmen's [sic] Compensation Act* in order to provide a more liberal rule of compensation than that which the legislature has seen fit to adopt." Id. at 117, 580 S.E.2d at 109, citing Singleton v. Young Lumber Co., 236 S.C. 454, 473, 114 S.E.2d 837, 846 (1960). As a result, when interpreting the Workers' Compensation statute, courts "strictly construe its terms, leaving it to the Legislature to amend and define its ambiguities." 354 S.C. at 117, 580 S.E.2d at 109.

In reality, this Court's Opinion entirely guts the purposes underlying the notice provision, which are to afford the employer an opportunity to furnish medical care to the employee in order to minimize the disability and consequent liability upon the employer, as well as to provide the employer a chance "to investigate the facts and question witnesses while their memories are unfaded." Etheredge, 349 S.C. at 458, 562 S.E.2d at 683. If an employee is not required to provide notice until he or she is qualified under the Act to receive benefits for medical care, treatment or disability, there is no opportunity for the employer to minimize the extent of the injury prior to disability in cases such as this one. The Legislature's choice of the discovery rule demands a different outcome than the one reached by this Court in this case.

II. The Court misapprehended and misapplied the notice provision in S.C. Code Ann. § 42-15-20(C) to the facts of this case.

Application of the discovery rule – determining when a litigant knew or should have known that a cause of action existed – is a question of fact. *See, e.g., Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 338-39, 534 S.E.2d 672, 681 (2000), *overruled on other grounds State v. Cherry*, 361 S.C. 588, 606 S.E.2d 475 (2004). Under the discovery rule, the clock starts ticking when a claimant discovers he is being injured, and not when he “appreciate[s] the full extent of the damage.” *Dillon*, 286 S.C. at 215, 332 S.E.2d at 559. The analysis of what a claimant could or should have known is an objective, rather than a subjective, test. *Berry*, 328 S.C. at 445, 492 S.E.2d at 799. Factual findings of the Commission must be upheld on appeal where they are supported by substantial evidence. *Broughton*, 336 S.C. at 496, 520 S.E.2d at 637.

This Court essentially characterized Claimant’s testimony before the Single Commissioner as stating he had a “long-term arm ache” and concluded that this did not constitute a compensable injury for purposes of the notice provision. However, the Commission’s findings that Claimant suffered a repetitive trauma injury, that he “noticed his injury a couple of years ago,” and that he “suspected his job was causing the injury when he first noticed it,” (R. p. 6), are supported by substantial evidence in the record and, therefore, should be upheld by this Court.³ The transcript of the Claimant’s testimony reveals the following:

³ In this case, it is not necessary to pinpoint the exact day that Claimant should have known that his condition was compensable. He openly testified that he knew he was being injured, and suspected his job was the cause, two years prior to giving notice. Thus, the record clearly demonstrates that Claimant was aware that he was incurring a compensable injury well over 90 days prior to providing any notice to Employer.

Q: When I took your deposition in October, do you remember telling me that you had been having this **injury** for the last couple of years?

A: **Right, arm hurting and aching.**

Q: But do you recall telling me that you first noticed this **injury** a couple years ago?

A: **Yeah, arm hurting. I never went to the doctor to see if it was injured or anything.**

Q: But you did notice this injury a couple years ago, correct?

A: I noticed my arm was bothering me.

Q: And at the time when you noticed it few years ago, **you suspected that your arm was bothering you because of the work you were doing**; is that correct?

A: **I figured it was something to do with it.** After slinging a hammer all day, (a little chuckle), your arm's going to be tired.

(R. pp. 28, line 5 – p. 29, line 1) (emphasis added). In addition to Claimant's own testimony, the records of Dr. Edwards, based on description provided by Claimant, reveal:

Patient presents with neck **pain** and right shoulder and arm **pain for about two years.** He **does extremely heavy work activities with a sledgehammer on a daily basis** and back in April his symptoms got much worse. He describes paresthesias in the right C7 distribution. **Has been out of work for one month because of this pain.**

(R. p. 34) (emphasis added). Taken together, Claimant's testimony and this medical report support the Commission's findings that Claimant noticed his condition was compensable a couple of years prior to the date he gave Employer notice. In other words, substantial evidence in the record supports the Commission's finding of fact as to when claimant knew or should have known with the exercise of reasonable diligence that he had a compensable repetitive trauma injury or condition. He noticed the pain a couple of years before providing notice or seeking medical care. He reported to his doctor that he

performed "extremely heavy work activities with a sledgehammer on a daily basis," and Dr. Edwards noted he was out of work due to pain. (R. p. 34).

Not only did Claimant agree that he had been experiencing his shoulder injury for a couple of years, he frankly admitted that he never took any steps in order to determine whether or how badly it was injured or what might have been the cause of his injury. Thus, Claimant both knew he was being injured a little each day (which is the nature of a repetitive trauma injury) and failed to exercise any diligence whatsoever in order to address his injury or determine the cause of it. Instead, he continued to work and, by not providing his employer of any notice until he was totally unable to perform his job, he denied his employer any opportunity to either change his job responsibilities or provide early treatment to minimize the injury. "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." Knox, 362 S.C. at 570, 608 S.E.2d at 462. In fact, this Court appears to recognize this very fact, by stating that the notice period is triggered "by the employee's diligent discovery that his condition is compensable," and "[t]he Act requires an injured employee to be diligent . . ." At the point Claimant noticed that he was being injured – by the gradual, cumulative effect of repetitive events or "mini-accidents" – he was under an obligation to either notify his employer within 90 days, or take some action such as consulting a physician. Here, Claimant did neither. He simply continued to work, admittedly believing the repetitive hammering was injuring his arm, without providing

notice until his injury was severe enough that he could no longer work. (R. p. 28, line 5 – p. 29, line 5).

The Opinion overlooks the basic nature of repetitive trauma injuries, which are “gradual in onset and caused by the cumulative effects of repetitive traumatic events.” S.C. Code Ann. § 42-1-172(A). The pain Claimant experienced in his shoulder was the result of a series of mini-accidents to his shoulder which culminated in disability. See Schurlknight, 352 S.C. at 178, 574 S.E.2d at 195 (describing repetitive trauma injuries as a series of “mini-accidents” that culminate in injury). If a claimant is not required to provide notice until he or she “qualifies to receive benefits for medical care, treatment, or disability due to his [or her] condition,” then claimants easily can continue to work without seeking any medical care or treatment until their repetitive trauma injury leaves them disabled, and employers will have no opportunity to minimize their liability by providing early medical treatment or changing the employee’s job duties in order to lessen the degree of disability.

In the case before the Court, as was the case in Dean v. Ruscon Corp., there is no question that the injured party knew of the injury, if not the extent of the injury, and made a positive association between the injury and the cause (in Dean, nearby pile driving activities; in this case, the repetitive motion of Claimant’s job). 321 S.C. at 364, 468 S.E.2d at 647. In Dean, the Supreme Court held that it was immaterial whether the plaintiff comprehended the full extent or the progression of the damage that was being done to her building. Dean, 321 S.C. at 366, 468 S.E.2d at 647; see also Knox, 362 S.C. at 570-71, 608 S.E.2d at 462 (holding that the fact that an injured party does not know the extent of his injuries is immaterial). Here, it is likewise immaterial that Claimant had not

received a final diagnosis or comprehended the full extent of his injuries. The notice period was triggered when he knew he was being injured and believed his job was causing the injury. Johnston, 313 S.C. at 64-64, 437 S.E.2d at 47 (statutory period begins to run when a person of ordinary knowledge and experience has been put on notice that some right has been invaded or a claim might exist "and not when advice of counsel is sought or full-blown theory of recovery is developed. [citation omitted] The date of discovery is not when the plaintiff discovers a witness to support of prove his case").

In the end, the Commission made a finding of fact, supported by Claimant's own testimony at the hearing, that Claimant knew that he was suffering from a compensable repetitive injury years before he provided notice to Employer. Since this factual finding is supported by substantial evidence in the record, this Court is bound by the Commission's finding. Ross, 298 S.C. 490, 381 S.E.2d 728; Broughton, 336 S.C. 488, 520 S.E.2d 634. Therefore, this Court should uphold the Commission's ruling that Claimant's claim is barred by his failure to provide timely notice under S.C. Code § 42-15-20(C).

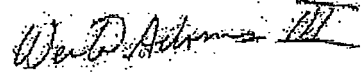
CONCLUSION

This Court misinterpreted and misapplied the notice provision in *Section 42-15-20(C)* to provide a specific, discernable trigger for repetitive trauma injury claims, where the Legislature chose the discovery rule instead. In addition, this Court improperly overturned the Commission's finding of fact that Claimant knew he had a compensable condition more than 90 days prior to giving notice to Employer, because the Commission's finding is supported by substantial evidence in the record. As a result,

Respondents respectfully request this Court to reconsider its Opinion, and affirm the Commission's Decision in this case.

Respectfully submitted,

November 2, 2011



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December 19, 2011

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Re: King, Ralph v. International Knife

Dear Counsel:

Enclosed is a copy of an Order of the Court denying your Petition for Rehearing in the above case.

The Remittitur in this case will be held in this Court only so long as required by Appellate Court Rule 221 (b).

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining Records on Appeal and briefs we may have in this case. Also enclose a check payable to the S. C. Court of Appeals, in the amount of \$7.50, to cover mailing costs. If we have not heard from you within ten (10) days, the Record on Appeal and briefs will be disposed of.

Sincerely,


Renee S. Johnson
Case Specialist II

 VAG/rj

cc: Stuart Wesley Snow, Esquire
James H. Lichty, Esquire

The South Carolina Court of Appeals

Ralph Duane King, Jr.,

Appellant,

v.

International Knife and Saw - Florence, Employer,

and

Peerless Insurance Company c/o
Montgomery Insurance,

Respondents.

Appellate Panel
Richland County

Trial Court Case No. 2009-WC-40-11652

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the Petition for Rehearing be denied.

Paul E. Short Jr.

H. B. W. J.

James W. Creciton A. J.

Columbia, South Carolina

cc: Stuart Wesley Snow, Esquire
James H. Lichty, Esquire
Weston Adams, III, Esquire
Helen F. Hiser, Esquire

FILED
19 December 2011

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Case No. 2009-141286

Ralph Duane King, Jr., ... Respondent,

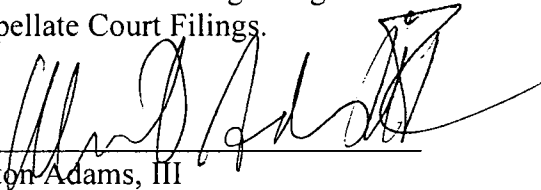
v.

International Knife and Saw-Florence, ... Employer,
and
Peerless Insurance Company c/o
Montgomery Insurance, ... Petitioners.

CERTIFICATE OF COUNSEL

The undersigned certifies that this **Appendix** complies with Rule 242(e), SCACR. The undersigned also certifies that this **Appendix** complies with the South Carolina Supreme Court's August 13, 2007 Order re: Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings.

January 13, 2012



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 13 2012

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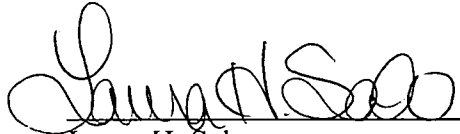
v.

International Knife and Saw-Florence, ...Employer,
and
Peerless Insurance Company c/o
Montgomery Insurance, ... Respondents.

PROOF OF SERVICE

I certify that on the 13th day of January 2012, I served the **Appendix** on Ralph Duane King, Jr. by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

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