

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION APPELLATE PANEL

Appellate Case No. 2015-002120
SCWCC Case No. 0802605

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SC Court of Appeals

Tommy G. Houston, Respondent,

vs.

Garda World Security, Employer, and
Gallagher Bassett Services, Inc., Carrier, Appellants.

INITIAL BRIEF OF RESPONDENT

Kathryn Williams
Kathryn Williams, P.A.
619 North Main St.
P.O. Box 10693
Greenville, SC 29603
(864) 235-6254

Attorney for Respondent

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STATEMENT OF ISSUES ON APPEAL

- I. Did the Commission correctly determine that it had jurisdiction over Houston's claim for a change of condition to the right knee?

- II. Did the Commission correctly determine that Houston sustained a compensable change of condition to the right knee?

STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission. Tommy Houston sustained injuries at work as a result of a motor vehicle accident on March 11, 2008. After a period of treatment, Houston, then unrepresented by counsel, entered into a Form 16A settlement agreement on February 4, 2010 for injuries sustained in the course and scope of his employment to his right shoulder and low back with affected ribs, right knee, right hand, left hip, and left leg. Houston, after retaining counsel, pursued a change of condition for additional medical treatment by filing a Form 50, claim only, on July 13, 2010 for the all the body parts listed above. Houston continued to pursue additional medical treatment for his change of condition by filing a Form 50, request for hearing, on November 11, 2010.

Prior to the hearing, the parties entered into a Consent Order dated March 16, 2011. In that Consent Order, the parties agreed that Houston sustained a change of condition to his low back and right shoulder, Garda World Security and Gallagher Bassett Services ("Garda") would provide treatment and temporary total disability benefits, and all other issues were held in abeyance.

Houston filed a Form 50, request for hearing, on July 22, 2014 seeking treatment for his right knee injury sustained in the work accident. Houston contended that the injury was an undiagnosed condition or, alternatively, had since become worse and needed additional medical treatment, including recommended surgery. Houston asserted that he met the requirements for preserving the issue of treatment and benefits for his right knee, and that at the time of the March 16, 2011 Consent Order, surgery to his low back was the immediate medical issue. Houston further contended that he did not sit on his rights to bring a claim for his right knee because, in the interest of judicial economy, there was no reason to seek an Order from the Commission as treatment was provided by Garda.

Garda did not object to the Commission's jurisdiction to hear the claim but asserted that the Commissioner must make a finding that Houston timely pursued his claim under § 42-17-90 before addressing the merits. If the Commissioner reached the merits, Garda argued that Houston did not timely pursue his right knee change of condition claim. Garda further argued that if the change of condition claim was timely, Houston's right knee symptoms were new and not related to the original injury.

On February 17, 2015, the Commissioner issued an Order finding that the parties' agreement to hold all other issues in abeyance in the March 16, 2011 Consent Order preserved Houston's right to file for a change of condition for his right knee as it was initially pled in his Form 50 for a change of condition filed within the one-year period as provided in the statute. (Single Commissioner Order) The Commissioner found that the Commission had jurisdiction to hear Houston's change of condition claim, that Houston met his burden of proving his claim, that he was entitled to causally-related medical treatment, and that he had not reached maximum medical improvement.

Garda appealed to the Full Commission Panel contending the Commissioner erred in finding jurisdiction to review an award to Houston's right knee and finding Houston sustained a compensable change of condition. On September 8, 2015, the Commission's Appellate Panel denied the appeal and affirmed the Commissioner's Decision and Order without change. (Full Commission Order dated 9/8/15) Garda then appealed to this Court.

STATEMENT OF THE FACTS

At the hearing, Houston testified that he is 58 years old, graduated high school, attended two years of college, but did not earn a degree. (Hrg. tr. p. 13, line 18 – p. 14, line 2) Houston testified that he started work for Employer-Defendant in May 2005 as a driver/messenger. (Hrg. tr. p. 14, lines 3 – 11) Houston testified that his job duties included driving and transporting money

to and from the Federal Reserve Bank, local banks, and merchants. (Hrg. tr. p. 14, lines 6 – 17) Houston testified he was originally injured in a motor vehicle accident at work on March 11, 2008. (Hrg. tr. p. 14, line 18 – p. 15, line 18)

As a result of the accident, Houston testified he underwent right shoulder surgery with Dr. Wessinger in July 2008. (Hrg. tr. p. 16, lines 5 – 9) Houston testified he was out of work until May 11, 2009 from the shoulder surgery then settled his workers' compensation claim on a Form 16A, unrepresented by counsel, in February 2010. (Hrg. tr. p. 16, line 10 – p. 17, line 3) Houston testified that when he signed the Form 16A, his right shoulder had improved post-surgery but his right knee and back were getting worse after starting work and becoming more active again. (Hrg. tr. p. 17, line 18 – p. 18, line 9)

Houston testified that he returned to Dr. Wessinger in September 2010 complaining of his back and right knee. (Hrg. tr. p. 18, line 20 – p. 19, line 16) Houston testified he saw Dr. Michael Bucci and then Dr. Charles Kanos, a spine surgeon, who evaluated his back but would not address his right knee. (Hrg. tr. p. 19, line 21 – p. 20, line 1; p. 33, lines 16 – 23) Houston testified several documents were completed during his return period of treatment with Dr. Wessinger that list his right knee as a complaint, including: a Patient Recheck Questionnaire completed at Dr. Wessinger's office on October 6, 2010, FMLA application paperwork, and a FMLA patient addendum from Steadman Hawkins. (Hrg. tr. p. 20, line 2 – p. 24, line 22)

Houston testified that during the time of his deposition in November 2010 he complained of his right knee as part of his injury by accident and would not have settled his claim unless his back and right knee were included. (Hrg. tr. p. 29, line 18 – p. 30, line 6) Houston testified he pursued his back claim as his most symptomatic medical condition until the carrier denied treatment and then he retained counsel to help seek the treatment recommended by Dr. Kanos.

(Hrg. tr. p. 30, line 7 – p. 31, line 7) Houston testified that after approval, Dr. Kanos performed back surgery then referred him back to Dr. Jyoti Math for chronic pain management. (Hrg. tr. p. 31, line 13 – p. 31, line 25) Houston testified that he told all his treating physicians about his right knee symptoms.

Houston testified that while recovering from his back surgery, his medical care providers encouraged him to increase walking, and he noticed his right knee was worse. (Hrg. tr. p. 32, lines 3 – 7) Houston testified he requested treatment for his right knee and Defendants sent him to Dr. Paylor. (Hrg. tr. p. 32, lines 8 – 13) Houston testified that the carrier approved all treatment with Dr. Paylor until surgery was recommended, at which point all further treatment was denied. (Hrg. tr. p. 32, line 14 – p. 33, line 5) Houston testified that he has not received any treatment for his right knee since the carrier denied authorization but that he would like the treatment that Dr. Paylor has recommended. (Hrg. tr. p. 32, line 24 – p. 33, line 11)

The medical evidence shows that when Houston presented to Dr. Wessinger on April 30, 2008, Dr. Wessinger noted Houston complained of right knee pain after his motor vehicle accident at work on March 11, 2008 but that the pain had improved since the date of accident. (APA p. 192) Dr. Wessinger continued to monitor Houston's shoulder and back injuries and on July 1, 2009, Dr. Wessinger placed Houston at maximum medical improvement for his right shoulder and back and assigned a 15 percent impairment to his right shoulder and 7 percent to his back. (APA p. 230)

Houston completed a Patient Recheck Questionnaire at Dr. Wessinger's office on October 6, 2010, and indicated problems with his back, shoulder, and knee. (APA p. 10) In a November 3, 2010 statement, Dr. Wessinger opined that Houston sustained a change of condition for the worse since release on July 1, 2009. (APA p. 14)

Houston completed an Information for Disability/FMLA Benefits Form on October 6, 2010, indicating that he was injured in an auto accident on March 11, 2008, and sustained injury to his right shoulder, right knee, and lower back. (APA p. 191)

On December 12, 2012, Houston underwent back surgery with Dr. Kanos, who performed: 1) L5-S1 posterior lumbar interbody fusion; 2) Orthofix Phoenix L5-S1 pedicle screw fixation; 3) L5-S1 interbody fusion cage; 4) L5-S1 decompressive laminectomy; 5) L5-S1 total facetectomy; and 6) L5-S1 foraminotomies. (APA p. 175)

On April 24, 2013, Dr. Kanos assigned Houston permanent restrictions of no lifting over 35 pounds, no repetitive bending more than 60 degrees, and restricted his ability to sit for 8 hours a day or walk for 2 hours with breaks. (APA p. 169) Dr. Kanos placed him at maximum medical improvement for his back with a 25 percent impairment rating to the lumbar spine. (Id.) Dr. Kanos noted that Houston was treating with Dr. Math for pain management and recommended that treatment continue. (Id.) On an October 21, 2013 follow up, Dr. Kanos noted that Houston used a cane because of right knee pain and had received a diagnosis of a meniscal tear. (APA p. 172)

Houston began treatment with Dr. Math on August 18, 2011, initially on referral from Dr. Bucci, then again after back surgery with Dr. Kanos. (APA p. 101) On a June 6, 2013 recheck, Dr. Math noted that Houston complained of right knee pain that had gotten worse. (Id.) On September 9, 2013, Dr. Math confirmed with her office that they tried on multiple occasions to contact workers' compensation regarding his right knee without receiving a response. (APA p. 110) Dr. Math noted that she hoped Houston would not sustain further damage to his right knee as it needed serious attention. (Id.)

On an October 9, 2013 recheck, Dr. Math noted Houston continued to have right knee pain secondary to a meniscal tear. (APA p. 113) Dr. Math noted her concern that Houston needed to

be seen by an orthopedic surgeon but had not heard from workers' compensation. (Id.) Dr. Math noted she would send another request to Houston's follow up appointment with Dr. Wessinger and, in the meantime, arrange a knee brace and prescribe Voltaren gel. (Id.)

On January 6, 2014, Dr. Math noted Houston had right knee pain since his work injury and a June 25, 2013 MRI was read to reveal an extensive tear in the lateral meniscus, possible bucket handle tear, and lateral tibiofibular chondromalacia. (APA pp. 121, 416) She noted Houston had treated with Dr. Wessinger and was evaluated by Dr. Paylor. (APA p. 121) She noted Dr. Paylor recommended surgery and was awaiting approval from workers' compensation. (Id.) She noted Houston had right knee pain that gave him a lot of trouble and his knee started to make noises – cracking and popping – whenever he walked. (Id.) She noted he walked with a limp from right knee pain. (Id.) On June 4, 2014, Dr. Math noted that Houston still had not received surgery for his right knee meniscal tear and he was also waiting for a SI injection. (APA p. 137)

In a June 13, 2014 statement, Dr. Math opined that it is more likely than not that the increased activity and walking that Houston engaged in pursuant to his medical providers' advice following his back surgery aggravated his right knee pain causing the need for additional evaluation and treatment of his right knee. (APA p. 140)

On July 2, 2014, Dr. Math noted that Houston continued to have left hip, lower back, and right knee pain. (APA p. 141) She noted Houston felt the right knee pain was getting worse as the knee would occasionally lock or give out on him and he was scared of losing his balance and falling. (Id.) Dr. Math noted Houston felt his gait had been abnormal because of the knee pain and that his left hip had flared up around the left SI joint. (Id.) She noted that Houston continued to wait for workers' compensation regarding the recommended arthroscopic repair by Dr. Paylor.

(APA p. 142) Dr. Math noted that if the repair is not done in a timely manner, the outcome will not be optimal. (Id.)

October 17 and 28, 2013 office notes from Piedmont Orthopaedics show workers' compensation authorization for evaluation and treatment of Houston's right knee. (APA pp. 181, 182)

Houston underwent an evaluation with Dr. Paylor for his right knee on November 5, 2013. (APA p. 178) Dr. Paylor noted that Houston sustained a right knee injury from a March 11, 2008 on the job motor vehicle accident, experienced pain since the injury, and that his right knee continued to bother him a great deal. (APA p. 179) Dr. Paylor discussed treatment recommendations and noted Houston would like to be scheduled for an arthroscopy of the right knee with a lateral meniscectomy. (Id.)

On March 25, 2014, Dr. Paylor noted that Houston's right knee was getting worse and was still swollen. (APA p. 180) He noted that Houston required a cane to walk, was unable to work, and was waiting on approval for surgery. (Id.)

In a June 26, 2014 statement, Dr. Paylor opined that it is more likely than not that Houston suffered injury to his right knee as a result of his motor vehicle accident while working on or about March 11, 2008, that his right knee symptoms became less noticeable as he pursued treatment for other injuries and was less active, and then became more symptomatic again as treatment for his other injuries wound down and he increased his activity and began walking more following his back surgery. (APA p. 185)

In his November 17, 2010 deposition, Houston testified that when he was 18 years old he was involved in a motor vehicle accident in which he was struck by a drunk driver. (Houston depo p. 16, lines 13 – 18) As a result of the accident, Houston testified that he had right knee surgery

to repair cartilage but did not have any further problems with his right knee until his March 11, 2008 motor vehicle accident at work. (Houston depo p. 16, lines 19 – 25) After his March 11, 2008 accident, Houston testified that he treated with Dr. Wessinger for his right shoulder, back, and right knee. (Houston depo p. 24, lines 16 – 20) Houston testified that while he was treating with Dr. Wessinger, his right knee symptoms improved as he recovered from surgery but when he returned to work on May 11, 2009, his knee symptoms returned and slowly got worse. (Houston depo p. 24, line 21 – p. 25, line 1)

Houston testified that at the time of signing the Form 16A in February 2010, he had soreness and swelling in his right knee and that the next treatment he received was a return visit to Dr. Wessinger on September 1, 2010 for pain in his right shoulder, back, and right knee. (Houston depo p. 33, lines 2 – 15) Houston testified that he began to notice soreness and a worsening of his right knee when he returned to work and became active after remaining largely immobile after surgery. (Houston depo p. 41, lines 13 – 24) Houston testified that if he walked for 10 minutes, he needed something to hold for support because he felt like his knee would give away. (Houston depo p. 45, lines 4 -13) Houston testified that he thought his back was the worst problem initially but Dr. Wessinger was focused on his right shoulder. (Houston depo p. 45, line 25 – p. 46, line 5)

In Dr. Paylor's July 1, 2014 deposition, he testified that if other medical records do not include mention of Houston's right knee, it is likely because the medical providers did not specifically ask and that they were focused on other body parts besides the right knee. (Paylor depo p. 20, line 15 – p. 21, line 9) Dr. Paylor noted that he did not ask about or give an opinion regarding Houston's back because he focused on Houston's right knee. (Paylor depo p. 23, line 20 – p. 24, line 11) Dr. Paylor testified that the only known cause for Houston's right knee problems was the March 11, 2008 motor vehicle accident. (Paylor depo p. 24, lines 12 – 24; p.

25, lines 12 – 21) Dr. Paylor testified that the radiology note from Houston's June 25, 2013 MRI did not mention a new tear since the accident and opined that if Houston's tear was newer, the radiologist would have made note of it. (Paylor depo p. 26, line 25 – p. 27, line 7) Dr. Paylor testified that it is a regular occurrence for the severe injuries from an auto accident to be treated first and then for other injuries that were not as noticeable at the time to arise later. (Paylor depo p. 30, lines 8 – 13, 23 – 25) Dr. Paylor testified that on Houston's right knee MRI, the handle portion of the bucket handle tear can no longer be seen, indicating the tear has been present a long time. (Paylor depo p. 34, line 22 – p. 35, line 2)

Dr. Math testified in her September 3, 2014 deposition that she saw Houston mainly for his right shoulder and back issues, not his right knee. (Math depo p. 8, lines 6 – 13) Dr. Math testified that she recalled and her medical records reflect that Houston complained of knee pain in his first visit in August 2011 but she did not record which knee. (Math depo p. 11, line 19 – p. 12, line 8; p. 27, lines 3 – 11) Dr. Math testified that she specifically noted that Houston complained of right knee pain in June 2013 but that his knee had been bothering him since his March 11, 2008 motor vehicle accident. (Math depo p. 29, lines 5 – 10) Dr. Math opined to a degree of certainty greater than 50 percent that the motor vehicle accident most likely caused Houston's right knee traumatic tear. (Math depo p. 34, line 20 – p. 35, line 8; p. 58, lines 5 – 22) Dr. Math testified that in her experience, she commonly sees patients complain about the most symptomatic body part, receive treatment for that one body part, the body part improves, and then the focus shifts to the next more symptomatic body part that was injured but underlying. (Math depo p. 67, lines 10 – 21) Dr. Math maintained and reiterated her June 13, 2014 statement that, to a reasonable degree of medical certainty, more likely than not, Houston's increased activity after his back surgery

aggravated his right knee pain causing the need for additional evaluation and treatment. (Math depo p. 73, lines 2 – 18)

Dr. Wessinger testified in his October 10, 2014 deposition that in his initial office note on April 30, 2008, he recorded that Houston experienced right knee pain but mainly focused on his more symptomatic back and shoulder. (Wessinger depo p. 5, lines 22 – 25) Dr. Wessinger testified that Houston complained of knee pain on the Patient Recheck Questionnaire for his office on October 6, 2010, in FMLA documents completed the same day, and in Houston's November 2010 deposition. (Wessinger depo p. 60, line 14 – p. 61, line 2; p. 61, lines 10 – 16; p. 62, lines 6 – 20; p. 63, lines 2 – 10) Dr. Wessinger testified that Houston's account that his right knee pain increased after returning to activity post back surgery is possible. (Wessinger depo p. 66, lines 6 – 17; p. 69, lines 7 – 23) Dr. Wessinger testified that it is also possible Houston's right knee problems originated in his work related accident and that he did not record or recall specifically examining Houston's right knee. (Wessinger depo p. 69, line 24 – p. 70, line 1; p. 81, lines 17 – 25) Dr. Wessinger testified that his speculation on probability is based on information from an MRI he had not read and a knee he had not evaluated. (Wessinger depo p. 70, lines 7 – 12) Based on that speculation, Dr. Wessinger testified that, outside the period of Houston's treatment with him, he would defer to the opinion of Dr. Paylor who had the opportunity to see the diagnostic imaging and examine Houston's right knee. (Wessinger depo p. 70, lines 15 – 21; p. 71, lines 13 – 21)

STANDARD OF REVIEW

In Brown v. Greenwood Mills, Inc., this Court explained at length the standard of review in appeals from the Workers' Compensation Commission.

The South Carolina Administrative Procedures Act (“APA”) establishes the standard for judicial review of decisions of the workers' compensation commission. A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are “clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.” Under the scope of review established in the APA, this Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law.

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Pursuant to the APA, this Court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action.

The appellate panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. The final determination of witness credibility and the weight to be accorded evidence is reserved to the appellate panel. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. It is not within our province to reverse findings of the appellate panel which are supported by substantial evidence.

Brown v. Greenwood Mills, Inc., 366 S.C. 379, 391-93, 622 S.E.2d 546, 553-54 (Ct. App. 2005)(citations omitted).

ARGUMENTS

- I. The Commission correctly determined that it had jurisdiction over Houston's claim for a change of condition to the right knee.**
 - a. Houston's change of condition claim for the right knee was preserved and held in abeyance by agreement of the parties**

A review of all the evidence on the record shows that the Commission correctly determined it had jurisdiction over Houston's change of condition claim under the Act. The Commission specifically found, in relevant part, that:

5. Houston, unrepresented by counsel, initially resolved his workers' compensation claim via a Form 16A settlement on February 4, 2010. Although Houston's right knee was listed as an affected body part, Houston only received compensation for his back and his right shoulder. Other affected body parts included Houston's ribs, right hand, left hip, and left leg.
6. On July 13, 2010, after retaining counsel, Houston filed a Form 50, claim only, alleging a change of condition to his right shoulder, back, ribs, right knee, right hand, left hip, and left leg.
7. On November 11, 2010, within the one year period per § 42-17-90, Houston filed a Form 50, request for hearing, alleging a change of condition to his right shoulder, back, ribs, right knee, right hand, left hip, and left leg.

8. The change of condition hearing notice was served on the parties on January 7, 2011, with a hearing date of February 17, 2011.
9. Prior to the February 17, 2011 hearing, the parties entered in to a Consent Order, dated March 16, 2011, wherein Garda admitted that Houston sustained a change of condition to his back and right shoulder and that “all other issues are held in abeyance.”
10. The undersigned find[] that the term “held in abeyance” in the March 16, 2011 Consent Order preserved Houston’s right to file for a change of condition for his right knee as it was initially pled in his Form 50 for a change of condition that was filed within the one year period per the statute.
11. As Houston’s right to file for change of condition for his right knee was preserved, the undersigned find[] the Commission has jurisdiction to hear Houston’s change of condition claim as it pertains to his right knee.

(Full Commission Order dated 9/8/15)

Against the weight of the evidence, Garda argues that Houston’s Form 50, request for hearing, filed within one-year after the last payment of compensation with supporting medical documentation, was not timely pursued.

The statute of limitations applicable to workers’ compensation claims, like the Workers’ Compensation Act as a whole, should be given liberal construction, and any reasonable doubts should be resolved in favor of coverage. Rogers v. Spartanburg Regional Medical Center, 328 S.C. 415, 491 S.E.2d 708 (Ct. App. 1997). The time limit in § 42-17-90 is in effect a notice provision. The Commission determined that the Form 50 filed on November 11, 2010 timely plead the right knee, putting Garda on notice of Houston’s intent to pursue a change of condition claim. The South Carolina Supreme Court has held that so long as the change of condition application is filed with the Commission within the one-year period, the actual hearing on the issue need not be

adjudicated within the one-year period. Allen v. Benson Outdoor Adver. Co., 236 S.C. 22, 112 S.E.2d 722 (1960). In so doing, the Court reiterated the guiding principle that “a liberal construction [of the statute] is required” and that:

‘[t]o sustain appellants' contention would lead to a rather unreasonable result clearly not within the intent of the Legislature. An application might be seasonably made but due to crowded dockets or other causes could not be heard within the statutory period.’

Allen, 112 S.E.2d at 725-26 (emphasis added). The Court also approvingly quoted the following language from a West Virginia case:

‘The filing of a claim for further compensation within the statutory period and partial but not complete development thereof within such period, with loss of jurisdiction by the commissioner during the progress of the case, would be an absurd result which the legislature certainly did not have in mind, and we feel warranted in holding that the statute in question should be given a construction which permits the commissioner to hear and pass upon any application in writing for a further adjustment of a claim, if filed within the statutory period applicable to the nature of the claim filed.’

Allen, 112 S.E.2d at 726 (quoting Wilkins v. State Comp. Comm’r, 198 S.E. 869, 871 (W.Va. 1938)(emphasis added).

In the current case, Houston was out of work from right shoulder surgery as a result of his work accident until May 11, 2009. (Hrg. tr. p. 16, line 5 – p. 17, line 3; APA p. 192) Houston then settled his Workers’ Compensation claim on a Form 16A, unrepresented by counsel, in February 2010. (Id.) Houston testified that when he signed the Form 16A, his right shoulder had

improved post-surgery but his right knee and back were getting worse after starting work and becoming more active again. (Hrg. tr. p. 17, line 18 – p. 18, line 9) Additionally, Houston testified that during the time of his November 2010 deposition that he complained of his right knee as part of his injury by accident and would not have settled his claim unless his back and right knee were included. (Hrg. tr. p. 29, line 18 – p. 30, line 13; Houston's depo. p. 33, lines 2 – 15)

Houston returned to Dr. Wessinger in September 2010 complaining of pain in his back and right knee. (Hrg. tr. p. 18, line 20 – p. 19, line 16; APA p. 10) He then saw Dr. Michael Bucci and Dr. Charles Kanos, both spine surgeons, who evaluated his back and recommended back surgery but would not address his right knee. (Hrg. tr. p. 19, line 21 – p. 20, line 1; p. 33, lines 16 – 23; APA p. 101) Dr. Kanos recommended back surgery, which Houston pursued, as it was his most symptomatic medical condition, until Garda denied treatment and the recommended back surgery. (Hrg. tr. p. 30, line 7 – p. 31, line 7; APA p. 175) At that point, Houston retained counsel. (Id.) The parties eventually entered into a Consent Order providing for the back surgery and leaving all other issues in abeyance. (See Consent Order dated March 16, 2011)

While recovering from back surgery, Houston testified that his medical care providers encouraged him to increase walking, and as he did so, noticed that his right knee was worse. (Hrg. tr. p. 32, lines 3-7) Houston requested treatment for his right knee, and Garda sent him to Dr. Paylor for treatment. (Hrg. tr. p. 32, lines 8 – 13; APA pp. 178 – 182) Houston underwent treatment at Garda's direction, with Dr. Paylor until he recommended right knee surgery, at which point Garda denied all further treatment. (Hrg. tr. 32, line 14 – p. 33, line 5; APA p. 179) After Garda denied treatment, Houston filed a Form 50, request for hearing, on July 22, 2014, seeking the recommended treatment for his right knee.

As the evidence shows, Houston has consistently pursued treatment and has not rested on his right to pursue a change of condition claim for his right knee. Houston actively sought and underwent all recommended treatment provided by Garda until it denied right knee surgery with Dr. Paylor. Garda now expects this Court to ignore the agreement of the parties memorialized in the Consent Order as “boilerplate” language insufficient to preserve the known and properly plead issues in Houston’s Form 50 hearing request. Garda agreed in the Consent Order to hold all other issues in abeyance, and those issues included the properly pleaded knee injury for which they had provided treatment until it became expensive.

As referenced by the case law, it is an absurd result to suggest that Houston, in need of recommended back surgery, should refuse the opportunity of treatment by an agreement of the parties in order to continue adjudication of all issues plead. Houston opted to undergo treatment for his most symptomatic injury at the time, while continuing to pursue treatment for his other injuries. It is also an absurd result to assume that the Commission, properly noticed of issues plead in the Form 50 filing and held in abeyance by the parties in a Consent Order, should lose jurisdiction while Houston is in active treatment and should prevent him from pursuing those issues once he is in the position to do so. Houston actively pursued and received treatment for his back and then his right knee, all authorized by Garda, until Dr. Paylor recommended right knee surgery. At that time, in response to Garda’s denial of treatment, Houston filed a hearing request to continue treatment for his right knee. Therefore, Houston’s change of condition claim for his right knee is proper, and the Commission had jurisdiction to hear the claim.

The Supreme Court’s language clearly indicates that a claim be made – that the notice of the change of condition claim be given – within the one-year time period and that subsequent development of the case, hearing, and decision can all be accomplished outside the one-year time

period. See also Candado Stevedoring Corp. v. Willard, 91 F. Supp. 77, 80 (E.D.N.Y. 1950) aff'd, 185 F.2d 232 (2d Cir. 1950)(“it was sufficient if proceedings were ‘begun’ within the year which . . . means from the time of the filing of the claim and giving of notice”)(See also S.C. Code Regs. 67-602(D)(“The [required] documents must be filed in the Commission’s file before the date set for the hearing.”). This interpretation is the only reasonable one because, as the Court in Allen recognized, it takes time to develop a case for hearing, and there is no need to adjudicate a change of condition claim for treatment if such treatment is already provided. It is disingenuous to think that Houston should litigate something that Garda is authorizing. Even outside the purview of Houston’s right to pursue a change of condition claim, adjudicating a request for treatment already being provided is not in the interest of judicial economy.

Garda’s arguments are contrary to the plain language of the Commission’s rules and the applicable statutes, as interpreted by the Supreme Court. For these reasons, the Commission’s Decision and Order should be affirmed.

b. Alternatively, Houston’s change of condition claim is a previously undiagnosed condition arising from the original accident

In the alternative, the Commission also has jurisdiction over Houston’s claim for benefits as an undiagnosed condition arising from the original injury. The South Carolina Supreme Court has held that within the meaning of S.C. Ann. § 42-17-90, a change of condition claim may be based upon undiagnosed conditions arising from the original injury but not discovered until after the first award. Brayboy v. Clark Heating Co., 306 S.C. 56, 409 S.E.2d 767 (1991) (citing Krell v. South Carolina Hwy. Dept., 237 S.C. 584, 589, 118 S.E.2d 322, 325 (1961)). Under the discovery rule, the statute of limitations would begin to run from the date Houston either knew or should have known of his compensable injury. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 20, 416 S.E.2d 639, 640 (1992). The court noted that the discovery rule - as related to statutes of

limitation - should not cause claimants to suffer where circumstances prevent them from knowing they have been harmed. Santee Portland Cement v. Daniel Int'l Corp., 299 S.C. 269, 271, 384 S.E.2d 693, 694 (1989). “[S]tatutes of limitation which are susceptible to judicial construction should not be applied mechanically.” (Id.)(quoting Gattis v. Chavez, 413 F.Supp. 33, 39 (D.S.C. 1976)).

Here, Houston initially settled on a Form 16A dated February 4, 2010. After the award, Houston’s condition deteriorated, and he pursued a change of condition claim for more treatment. Houston received additional treatment, including surgery to his low back and right shoulder. (APA p. 175, 230; Hrg. tr. p. 17, line 18 – p. 18, line 9) While recovering from surgery and becoming more mobile, Houston’s right knee became more symptomatic. (APA p. 185; also see, Paylor depo p. 40, lines 11 – 18) Houston did not discover, could not discover, and could not be diagnosed as needing right knee surgery until his other, more symptomatic, conditions began to resolve. (Hrg. tr. p. 32, lines 3-7) When Garda sent him for treatment with Dr. Paylor in November 2013, Houston was finally able to discover the extent of his right knee condition and need for surgery.

Dr. Paylor testified in his deposition that the only known cause for Houston’s right knee problems was the March 11, 2008 motor vehicle accident. (Paylor depo p. 24, lines 12 – 24; p. 25, lines 12 – 21; p. 30, lines 8 – 13; p. 30, lines 23 – 25) He also stated that it is a regular occurrence for the more severe injuries from an auto accident to be treated first and then for other injuries to come to the forefront that were not as noticeable at the time of the injury. (Id.)

Based on the case law interpreting statutes of limitation and change of condition claims, the Commission had jurisdiction of Houston’s claim for benefits as he actively pursued his right knee injury as a previously undiagnosed condition arising from the original accident. For these reasons, the Commission’s Decision and Order should be affirmed.

II. The Commission correctly determined that Houston sustained a compensable change of condition to the right knee.

A review of all the evidence on the record shows that the Commission correctly determined that Houston sustained a compensable change of condition and is entitled to further medical treatment. Specifically, the Commission correctly determined that Houston is entitled to all causally-related medical evaluation and treatment expenses, including right knee surgery as recommended by Dr. Paylor.

In order to prove a change of condition under § 42-17-90, an injured worker must show a change in condition as a result of his original injury, occurring after the first award. Causby v. Rock Hill Printing & Finishing Co., 249 S.C. 225, 227, 153 S.E.2d 697, 698 (1967). To justify a modification of an award based on a change of condition, an injured worker must show the change of condition and its causal connection to the original compensable accident. Krell v. S.C. State Hwy. Dept., 237 S.C. 584, 588, 118 S.E.2d 322, 323 (1961). However, there is no requirement in the Act that an injured worker prove a change of condition by objective evidence. Russell v. Wal-Mart Stores, Inc., Op. No. 5376 (S.C. Ct. App. filed January 20, 2016)(Shearouse Adv.Sh. No. 3 at 35, 38-39)(“there is no requirement in the Act that the evidence relied upon by the Commission be either subjective or objective.”) Houston has carried this burden in both regards and the Commission’s Decision and Order is supported by substantial evidence.

The medical evidence shows that Houston first made mention of his right knee injury to Dr. Wessinger on April 30, 2008; then again on a Patient Recheck Questionnaire completed at Dr. Wessinger’s office on October 6, 2010; and on FMLA application paperwork and patient addendum from Steadman Hawkins dated October 6, 2010. (APA pp. 10, 14, and 191) During

this period, Houston actively treated for his back and right shoulder, both of which required surgery and periods of immobility. (APA pp. 175, 230; Hrg. tr. p. 17, line 18 – p. 18, line 9)

While in pain management following surgery, Dr. Math noted Houston complained of right knee pain that had gotten worse after returning to activity post-surgery; that she attempted to contact workers' compensation because his right knee needed medical attention; and that Houston's June 25, 2013 MRI was read to reveal an extensive tear in the lateral meniscus, possible bucket handle tear, and lateral tibiofibular chondromalacia. (APA pp. 101, 110, 121, 416) While waiting for authorization of treatment, Houston's knee started to make noises – cracking and popping – when he walked, and he developed a limp from right knee pain. (APA p. 121) On June 13, 2014, Dr. Math opined that it is more likely than not that the increased activity and walking that Houston engaged in pursuant to his medical providers' advice following his back surgery aggravated his right knee pain causing the need for additional evaluation and treatment of his right knee. (APA p. 140)

Houston requested, and Garda authorized, treatment with Dr. Paylor for Houston's right knee. (APA pp. 181 and 182) During a March 25, 2014 follow up visit, Dr. Paylor noted that Houston's right knee was getting worse and was still swollen; that he required a cane to walk; that he was unable to work; and that he was still waiting for surgery recommended on November 5, 2013. (APA pp. 178 – 180) In a June 26, 2014 statement, Dr. Paylor opined that it is more likely than not that Houston suffered injury to his right knee as a result of his motor vehicle accident while working on or about March 11, 2008, that his right knee symptoms became less noticeable as he pursued treatment for other injuries and was less active, and then became more symptomatic again as treatment for his other injuries wound down and he increased his activity and began walking more following his back surgery. (APA p. 185; also see, Paylor depo p. 40, lines 11 - 18)

Dr. Paylor testified in his deposition that the only known cause for Houston's right knee problems was the March 11, 2008 motor vehicle accident. (Paylor depo p. 24, lines 12 – 24; p. 25, lines 12 – 21; p. 30, lines 8 – 13; p. 30, lines 23 – 25) He further stated that it is a regular occurrence for the more severe injuries from an auto accident to be treated first, and then for other injuries to arise later that were not as noticeable at the time of the injury. (Id.)

In her September 3, 2014 deposition, Dr. Math opined to a degree of certainty - greater than 50 percent - that the motor vehicle accident most likely caused Houston's right knee traumatic tear. (Math depo. p. 34, line 20 – p. 35, line 8; p. 58, lines 5 – 22) Dr. Math testified that in her experience, she commonly sees patients complain about the most symptomatic body part, receive treatment for that more symptomatic body part, and then shift focus to another injured body part. (Math depo. p. 67, lines 10 – 21) Dr. Math maintained and reiterated her June 13, 2014 statement that, to a reasonable degree of medical certainty, more likely than not, Houston's increased activity after his back surgery aggravated his right knee pain causing the need for additional evaluation and treatment. (Math depo. p. 173, lines 2 – 18)

In his October 10, 2014 deposition, Dr. Wessinger testified that he had not examined Houston's right knee. (Wessinger depo. p. 70, lines 15 – 21; p. 79, lines 2 – 3) He stated that he would defer to the opinion of Dr. Paylor, as Dr. Paylor had the opportunity to see the diagnostic imaging and examine Houston's right knee. (Wessinger depo. p. 70, lines 15 – 21)

As the record reflects, Houston has consistently reported his right knee condition to his providers as he recovered from right shoulder and back surgery. Additionally, the Commission found Houston credible in his testimony, where he described that his right knee became more symptomatic while recovering from surgery to his back and right shoulder.

Garda's reliance on Robbins v. Walgreens & Broadspire Servs., Inc., 375 S.C. 259, 652 S.E.2d 90 (Ct. App. 2007) regarding the sufficiency of evidence for a change of condition claim is misplaced, as the factual and legal framework in that claim differs from the current claim. In Robbins, the injured worker "was afraid to inform his employer or request additional treatment [for his injury] for fear of being terminated" and sought to hide the extent of his injury. Robbins, 375 S.C. 259, 263, 652 S.E.2d 90, 92. Additionally, the only evidence regarding the injured worker's condition was that it was similar both before and after the settlement and that his treating physicians did not opine his condition had worsened. Robbins, 375 S.C. 259, 265-266, 652 S.E.2d 90, 94.

In the present case, Houston has pursued treatment for his right knee and told all his providers about his right knee problems. (Hrg. tr. p. 31, line 13 – 25) Even before retaining counsel, his right knee was listed in the Form 16A settlement agreement drafted by Garda. Houston has not shied away from reporting his injury or requesting additional treatment. Additionally, Houston's testimony is that his right knee condition has changed for the worse and that testimony is supported by the opinions of Dr. Math and Dr. Paylor. Again, the Commission found Houston's testimony credible.

In the recent case of Russell v. Wal-Mart Stores, Inc., this Court addressed the type and weight of evidence considered in a change of condition claim. This Court held that the Commission erred in relying exclusively on objective evidence in denying an injured worker's change of condition claim. Russell, Op. No. 5376 (S.C. Ct. App. filed January 20, 2016)(Shearouse Adv.Sh. No. 3 at 35). This Court found that there is no requirement in the Act that the evidence relied upon by the Commission in a change of condition claim be either subjective or objective. Id. at 38.

In Russell, the Commissioner found the injured worker's testimony credible that she experienced new symptoms after her initial settlement. Id. at 36. Objective medical tests did not reveal a significant worsening. Id. at 39. However, her doctors testified to a reasonable degree of medical certainty that the injured worker suffered a change of condition for the worse. Id. This Court reversed the Commission and found that there is no requirement in the Act that an injured worker prove a change of condition by objective evidence to the exclusion of subjective evidence. Id.

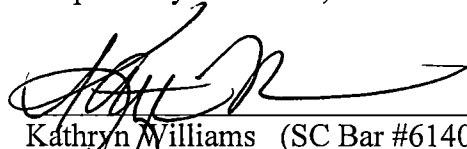
As in Russell, Houston gave notice of his change of condition, the Commission found his testimony credible, and his testimony is supported by the medical opinions of Dr. Math and Dr. Paylor. Additionally, Houston's June 25, 2013 MRI provides objective support as it was read to reveal an extensive tear in the lateral meniscus, possible bucket handle tear, and lateral tibiofibular chondromalacia. (APA pp. 121, 416; Paylor depo p. 26, line 25 – p. 27, line 7) Most convincingly, surgery for the knee had not been recommended at the time of the Form 16A settlement, but was later recommended by the doctor Garda authorized to treat him. Houston's change of condition claim is supported by objective and credible subjective evidence.

Based on the record as whole, Houston met his burden of proof in establishing a change of condition claim. Houston properly gave notice of his change of condition and pursued treatment. The medical evidence and course of treatment shows his condition has deteriorated since the original award. Therefore, the Commission's findings on this issue are correct, and their Decision and Order should be affirmed in its entirety.

CONCLUSION

Houston respectfully submits that the Commission committed no error and correctly determined, based on the facts and law, that the Commission had jurisdiction over Houston's claim for a change of condition to his right knee. Based on the facts and law, the Commission also correctly determined Houston sustained a compensable change of condition to his right knee. Garda's arguments against these findings should be rejected by this Court, and the Commission's Decision and Order should be affirmed in its entirety.

Respectfully submitted,



Kathryn Williams (SC Bar #6140)
Kathryn Williams, P. A.
619 North Main St.
P.O. Box 10693
Greenville, S.C. 29603
(864) 235-6254

Attorney for Respondent

Date: 2/25/16
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION APPELLATE PANEL

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SC Court of Appeals

Appellate Case No. 2015-002120
SCWCC Case No. 0802605

Tommy G. Houston, Respondent,

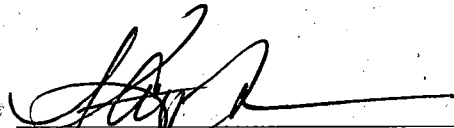
vs.

Garda World Security, Employer, and
Gallagher Bassett Services, Inc., Carrier, Appellants.

CERTIFICATE OF SERVICE

This is to certify that the undersigned did cause the **RESPONDENT'S INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** to be served upon the following parties by mailing a copy of same to the addresses shown below by United States Mail, proper postage prepaid, on the 25 day of February, 2016.

R. Daniel Addison
Lee E. Dixon
Hedrick Gardner Kincheloe & Garofalo
P.O. Box 11267
Columbia, SC 29211



Kathryn Williams (SC Bar #6140)
Kathryn Williams, P.A.
619 North Main St.
P.O. Box 10693
Greenville, S.C. 29603
(864) 235-6254
Attorney for Respondent

KATHRYN WILLIAMS, P.A.

ATTORNEYS AT LAW
POST OFFICE BOX 10693
GREENVILLE, SC 29603

KATHRYN WILLIAMS
DONALD E. KAMB, JR.
ANDREW N. PRICE
TOM J. ERVIN
OF COUNSEL

619 N. MAIN STREET
GREENVILLE, SC 29601
TELEPHONE (864) 235-6254
FAX (864) 233-6591

February 25, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re: **Tommy G. Houston vs. Garda World Security, et al.**
WCC File No.: 0802605
Case Tracking No.: 2015-002120

Dear Ms. Kitchings:

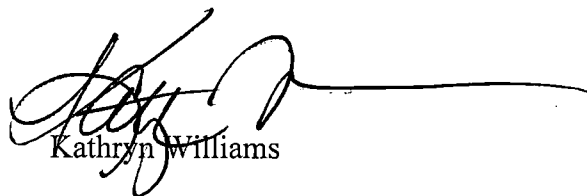
Enclosed herein please find the following items for filing in the above-referenced matter:

1. Initial Brief of Respondent;
2. Designation of Matter to be Included in the Record on Appeal; and
3. Certificate of Service by Mail.

By copy of this letter, I am also serving appellants' attorney with copies of the same.

Kindest regards,

Yours truly,


Kathryn Williams

KW/anp
Enclosure

cc: R. Daniel Addison
Lee E. Dixon
Hedrick Gardner Kincheloe & Garofalo
P.O. Box 11267
Columbia, SC 29211

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KATHRYN WILLIAMS, P.A.

ATTORNEYS AT LAW
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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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