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SC SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

Op. No. 5370 (S.C. Ct. App. filed Dec. 9, 2015)

Ricky Rhame ..... Respondent,

v.

Charleston County School
District ..... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondent would restate the two issues from the cert petition as a single question:

> Did the Court of Appeals correctly apply settled law and reverse the Workers' Compensation Commission's decision that Ricky Rhame's first episode of off-and-on back pain was a "compensable repetitive trauma" injury?

COUNTER-INTRODUCTION

The Court of Appeals rightly reversed the Workers' Compensation Commission for holding Ricky Rhame had a "compensable repetitive trauma" when he had a sore back in 1994 or 1995 and got treatment for pulled muscles. The court did not announce any new rule, test, or standard. It applied existing law to simple facts. According to a chief treatise on this area of the law, the Charleston County School District's argument is "preposterous." This Court should deny certiorari.

COUNTER-STATEMENT OF THE CASE

The School District's certiorari petition follows after a remand from this Court.

After this Court reversed the Court of Appeals for dismissing Ricky Rhame's appeal as untimely, see (App.pp.14-21), the Court of Appeals had to decide Mr. Rhame's argument that the Workers' Compensation Commission erred in finding Mr. Rhame had a "compensable repetitive trauma" when he experienced a sore back in 1994 or 1995 and got treatment for pulled muscles. The court reversed the commission unanimously. 415 S.C. 162, 781 S.E.2d 151 (2015); (App.pp.1-7). The School District says this was a mistake.

Most of the case's facts are uncontested. Mr. Rhame gave the only testimonial evidence, (App.pp.207-226 & p.229), and the majority of documents in the Appendix are his

medical records. (App.pp.281-332). Four of those pages relate to Mr. Rhame's initial report of the injury. (App.pp.329-332). There is also a letter denying the claim 2 days later. (App.p.297). Over a third of the Appendix consists of appellate documents. (App.pp.1-127). This file is lengthy, but the facts are straightforward.

The Court of Appeals gave the case's factual background correctly; both in its original opinion that dismissed the appeal and in the new opinion after this Court's remand. See (App.pp.2-3 and pp.9-10). Mr. Rhame worked as an air conditioning technician from 1987 to 2009. (App.p.208, line 25 - p.214, line 2). He filed a workers' compensation claim in September of 2009 alleging a "repetitive trauma injury" from frequently lifting air conditioning units over his 22-year career. (App.p.157, ¶1b and p.160, ¶12).

The litigation centers on Mr. Rhame's admission that he experienced off-and-on back pain as early as 1994 or 1995. (App.p.215, lines 13-25). He went to the doctor, and he had additional doctor visits in 2001, 2002, 2006, 2007, and 2009. (App.pp.283-328). Some of these visits related to back pain, but others did not. E.g. (App.pp.312-314) (records for visits related to neck pain, for which Mr. Rhame had surgery in 2006). When asked about his history of back pain, Mr. Rhame explained "you [] pull a muscle every now and again." (App.p.216, lines 16-19). He further explained he was always able do his job, (App.p.267, lines 5-11), until his off-and-on pain became constant and debilitating after he moved a particularly heavy unit the previous May. (App.p.245, line 11 - p.250, line 23).

The School District believes Mr. Rhame's admission validates a statute of limitations defense. As the Court of Appeals explained, "[t]he District contended that in 1994 or 1995, as soon as Rhame realized he was having back pain caused by his job, Rhame knew or

should have known he had a compensable injury and brought a claim for benefits." (App.p.2). The School District lost this argument at the hearing commissioner level but prevailed at the appellate panel. See (App.p.138, ¶10) (hearing commissioner's decision); and (App.p.153, ¶2) (appellate panel). As the Court of Appeals has twice recited, see (App.p.3 and p.10), the appellate panel held that Mr. Rhame was aware of a "back injury" in 1994 or 1995 and should have known at that time his "claim" was "compensable."

ARGUMENT

First, this case does not involve a novel issue. The Court of Appeals cited the right statutes and lifted the facts straight out of the record. The court did not announce a new rule, test, or standard. Instead, this is the third case where the court has correctly rejected an employer's argument that work-related pain equals a compensable repetitive trauma.

Second, the School District's standard is analytically unsound. According to Professor Larson's treatise, it is "preposterous." The School District and the commission would unwisely force people with nagging physical complaints to claim repetitive trauma injuries. The correct view is that the limitations period does not begin until the claimant should recognize the nature, seriousness, and probable compensable character of the injury.

Finally, it is important to understand that the School District's argument is merely the latest in a line of suspect positions employers have taken against repetitive trauma injuries. The School District never mentions the key feature of these injuries, which is that they have no definite time of "occurrence." Repetitive traumas are unusual and the relevant statutes are construed in the claimant's favor. All of this is dictated by precedent.

A. The Court of Appeals applied the right authorities to the facts and ruled—consistent with precedent—that the first episode of work-related pain is not a "compensable" repetitive trauma.

Repetitive traumas were first recognized as compensable by this Court's decision in *Pee v. AVM.* See 352 S.C. 167, 573 S.E.2d 785 (2002). The same day this Court decided *Pee*, this Court held the statute of limitations for a repetitive trauma begins to run on the date the injured worker was last-exposed to the repetitive activity. *Schulknight v. City of N. Charleston*, 352 S.C. 175, 179, 574 S.E.2d 194, 196 (2002).

The 2007 changes to the Workers' Compensation Act codified the definition of repetitive trauma this Court articulated in *Pee* and *Schurlknight*. See Act No. 111, sec. 7, 2007 S.C. Acts 599, 612. The statute repeats, as both *Pee* and *Schurlknight* explain, that a repetitive trauma has a gradual onset and is caused by the cumulative effect of repeated events. S.C. Code Ann. § 42-1-172(A) (2015).

The 2007 amendments also addressed the rules for giving notice of an injury and the statute of limitations. See Act 111, secs. 25-26, 2007 S.C. Acts at 625-626. The notice statute is section 42-15-20. The limitations provision is 42-15-40. The amendments explain both the notice and the limitations deadlines are based on when the employee knew or should have known that his "injury" or "condition" is "compensable."

The Court of Appeals followed these authorities. The court cited the definitional statute and the limitations statute. (App.pp.4, 6). It even quoted that the limitations deadline hinges on knowledge (actual or imputed) of an injury's compensability. (App.p.6).

The court also cited *Schurlknight*, and it did so not out of any effort to apply the "date of last exposure" rule. Instead, as the court's decision succinctly explains, *Schurlknight*

recognized that repetitive traumas have a gradual onset, are caused by a series of "mini accidents," and have an indefinite time of occurrence because "there is no definite time of injury." (App.p.4). This remains good law. It is virtually identical to section 42-1-172(A).

The Court of Appeals accurately described the facts. Mr. Rhame admits having off-and-on back pain since 1994 or 1995, and he also admits seeing various doctors for his back pain over the years. The court also correctly cited the standard of review, recognizing it must reverse if the commission's decision was either affected by an error of law or clearly erroneous in view of the substantial evidence in the record. (App.pp.3-4).

And the Court of Appeals correctly explained that the School District's argument was inconsistent with precedent. (App.p.5). *Bass v. Isochem* rejected the idea that having work-related pain is enough to trigger the notice requirement for a repetitive trauma. 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005). The case holds that the notice deadline does not begin until the employee "becomes disabled and could discover with reasonable diligence his condition is compensable." *Id.* at 481, 617 S.E.2d at 383. This what the current limitations statute describes. The 2007 revisions codified *Bass*—for both notice and limitations purposes.

The Court of Appeals did not cite *King v. International Knife*, but the parties discussed *King* during the argument. *King* was issued in October of 2011, after final briefing in this case closed. Like *Bass*, *King* rejected the idea that work-related pain equals a compensable repetitive trauma. 395 S.C. 437, 444, 718 S.E.2d 227, 230 (Ct. App. 2011).

The Court of Appeals acted consistently with the relevant statutes and precedent. Mr. Rhame did not miss significant work or get work restrictions until 2009. (App.pp.287, 295). He did not have a "repetitive trauma" in 1994. He had a sore back.

B. The School District's standard is unsound. Rather than force a worker with off-and-on pain to allege a "repetitive trauma," the rule is that a condition must be significant to be "compensable."

The correct rule is set forth in Professor Larson's treatise, which explains the notice and limitations periods should "not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of his or her injury or disease." 7 Lex K. Larson, *Larson's Workers' Compensation* § 126.05[1] (2003). This is in volume 11 of the treatise in this Court's library, but several pages are missing.

Mr. Rhame has consistently advanced this as the proper standard. (App.p.63) (merits brief to Court of Appeals); (App.p.183) (appellate panel brief). The standard does not require a definitive diagnosis or even a "permanent" injury. Instead, it is enough that the claimant knows (or should know) that the condition is significant and work-related.

The commission did not agree with this because at the commission level, the School District said the limitations period began as soon as Mr. Rhame knew he was having any back pain caused by work. See (App.pp.164-165) (memo to the hearing commissioner); (App.pp.172-173) (brief to the appellate panel). After the Court of Appeals rejected this argument, the School District changed its position to hinge on "permanency." It now believes the Court of Appeals has required an injury to be "permanent" and says the limitations clock should start whenever a claimant goes to the doctor or whenever an ailment interferes with a claimant's ability to do his job, whichever occurs first.

Here again, Larson's treatise is instructive. "Compensable" is not another way of saying an injury must require a worker to miss work. Where gradual injuries are concerned, the treatise suggests this interpretation of what it means to know a claim is compensable:

> A line must be drawn between the cases in which a person, with an objectively disabling injury, persists in hanging onto a job for some special reason, and the cases in which a person experiences some relatively minor back pains or other symptoms that would not necessarily impel a worker to quit work under normal conditions. After all, it is a rare adult who has not at some time experienced back pain at work; most of the time nothing comes of it, but sometimes it is the first ominous sign of a herniated disc. Often at that stage even the most competent specialists cannot tell the difference. *To impose on a worker at that juncture the absolute duty of filing a compensation claim at peril of losing his or her rights forever in case a disc disability related to the original pain develops would be preposterous.*

Larson, *supra* page 6, at § 126.10[1] (emphasis added).

That is why the first pain from carpal tunnel syndrome did not trigger the notice deadline in *Bass*. It is why the first arm pain did not trigger the same deadline in *King*, and it is why the first back pain did not trigger the limitations period in *this* case. Like the *Bass* and *King* claimants, Mr. Rhame did not have an "objectively disabling condition." The doctors he saw off-and-on over a 15 year period never told him to quit or that his job would leave him disabled. He did not miss any significant work until 2009, (App.p.267); an important point because a disability must last more than 7 days for a claimant to receive anything other than medical treatment. S.C. Code Ann. § 42-9-200 (2015). Mr. Rhame was never given work restrictions. He went to a chiropractor, (App.p.299); he was recommended ice packs, proper sleeping positions, and exercises, (App.p.304); and he received pain pills and advice to get stronger. (App.pp.309-316 and pp.320-321). If all of these things trigger "repetitive trauma" claims, heavy duty workers will have several. All the time.

Yes, a claimant *is* entitled to treatment even though an injury is not permanent, but the fact of seeking medical care does not mean there is a repetitive trauma. The School District's standard is unsound. Pain is not an "injury" just because you go to the doctor.

C. This case continues the trend of dubious arguments against repetitive traumas—a fact indicated by the School District's failure to acknowledge that these injuries are unusual and that the relevant statutes are to be construed in the claimant's favor.

When this Court recognized repetitive traumas in *Pee*, it did so over the employer's argument that these injuries were not "accidents." The claimant's job required repetitive use of her hands, so the employer believed an injury like carpal tunnel syndrome was not compensable because repetitive use of the hands was just a part of the job. 352 S.C. at 170-71, 573 S.E.2d at 787-88. The employer also argued repetitive traumas could not be compensable because they do not have a definite time of occurrence. *Id.* at 172, 573 S.E.2d at 788. This Court rejected both positions. Most people do not expect their jobs to leave them disabled, and the fact that repetitive traumas happen gradually does not offset the fact that they *should* be compensable because they are caused by work.

It is difficult to see how the School District's argument could be reconciled with *Pee* and with other precedents whose validity has not been challenged.

For example, even though *Pee* rejected the idea that repetitive traumas were just a part of the job, the School District's first defense to Mr. Rhame's case was that there was no "accident." Once Mr. Rhame had back pain, the School District believes he should have realized he had a progressive injury and expected it to get worse. (App.pp.162-163).

It is also difficult to reconcile the School District's argument with precedent's consistent recognition that repetitive traumas occur gradually, are the result of several "mini-accidents," and are unusual because they have no definite time of occurrence. E.g., *King*, 395 S.C. at 443, 718 S.E.2d at 230; *Schulknight*, 352 S.C. at 178, 574 S.E.2d at 195. This

has been enshrined in statutory law, which explains repetitive traumas are "gradual in onset and caused by the cumulative effect of repetitive traumatic events." § 42-1-172(A). These characteristics are conspicuously absent from any of the School District's discussion.

The School District further neglects to mention precedent's command that statutes of limitations should not be construed mechanically and should be construed "in the manner most consistent with both their underlying purposes and the requirements of substantial justice to the parties." *White v. Med. Univ. of S.C.*, 355 S.C. 560, 567, 586 S.E.2d 157, 161 (Ct. App. 2003); *Mauldin v. Dyna-Color/Jack Rabbit*, 308 S.C. 18, 21, 416 S.E.2d 639, 639 (1992). *White* is a repetitive trauma case decided under the old limitations regime. The subsequent decision by the Court of Appeals in *Murphy v. Owens Corning* involved the updated rules and explains that the precise statute in question here—section 42-15-40—should be "liberally construed in favor of claimants." 393 S.C. 77, 82, 710 S.E.2d 454, 457 (Ct. App. 2011). That is in line with this Court's recent observation that workers' compensation laws are construed "liberally in favor of coverage" and that "only exceptions and restrictions to coverage are strictly construed." *Lewis v. L.B. Dynasty*, 411 S.C. 637, 641, 770 S.E.2d 393, 395 (2015). The School District never mentions these principles either.

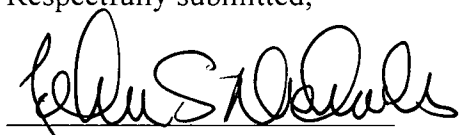
This is about trying to save a losing argument that employers began selling the commission after the 2007 amendments changed the limitations rule from *Schurlknight*'s "last date of exposure" standard to the compensability test from *Bass*. In the wake of those amendments, employers began selling the argument that the compensability clock starts once the claimant feels the "first twinge of pain." That was what the employer argued in *King*, and it was the School District's argument to the commission here. (App.pp.164-165).

King rejected this argument, just as *Bass* had done nearly a decade before. The Court of Appeals is deciding these cases correctly, and though a denial of certiorari is certainly not any sort of disposition on the merits, this Court reviewed *Bass* only to dismiss the writ as improvidently granted, 374 S.C. 346, 649 S.E.2d 485 (2007), and this Court denied certiorari in *King*. See (Shearouse Adv. Sh. No. 23 at 5). Now that *King* is final, the School District is attempting to sell the idea that going to the doctor for pain makes a difference, but that is still not the proper standard, and it is nothing like the argument the School District made below. The Court of Appeals is getting these cases right. There is no need for this Court to speak on this issue and there no conflict in authority for the Court to resolve.

CONCLUSION

The Court of Appeals was correct. Ricky Rhame did not have a "compensable repetitive trauma" when he had a sore back in 1994 or 1995 and got treatment for pulled muscles. The Court should deny the School District's petition.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner with a copy of the *Return to Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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