THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from the South Carolina Workers' Compensation Commission

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

Ricky Rhame,

Respondent,

v.

Charleston County School District,

Petitioner.

REPLY IN SUPPORT OF CERTIORARI

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ARGUMENT

According to the Court of Appeals, even though, without question, since no later than 1995, Claimant/Respondent Ricky Rhame ("Claimant") had been receiving medical treatment for, and missing work because of, a *persistent* back condition brought on by the activities of his job, it was not until this condition became *permanent* in 2009 that the statute of limitations began to run on his workers' compensation claim for repetitive trauma injury to his back. Respectfully, the Court of Appeals' holding is both illogical and incongruent with the governing law.

The Claimant incorrectly states that Employer/Petitioner Charleston County School District ("School District") argued that "work-related pain equals a compensable repetitive trauma." (Return, p. 3.) The School District's argument is two-fold. First, the School District argued that the Court of Appeals erred in concluding that the South Carolina Workers' Compensation Act ("the Act") required a "permanent injury" or "permanent restriction" to trigger the statute of limitations for a repetitive trauma injury. (See App. p. 5.) Second, the Claimant knew or should have known that his repetitive trauma injury was compensable more than two years before filing the claim in September 2009. As such, his claim was barred by the statute of limitations.

I. The Act does not require permanency for the statute of limitations to begin on a claim.

Respectfully, the School District has not changed its argument to hinge on permanency, but it addressed the opinion written by the Court of Appeals. The School District has consistently argued that the Claimant knew or should have known more than two years prior to September 2009 that he had a compensable injury, which is discussed further in Section II, *infra*.

The School District's petition for rehearing (App. pp. 23-28) and petition for writ of certiorari address permanency because the Court of Appeals raised this as a factor in reversing the South Carolina Workers' Compensation Commission's ("Commission") findings. (See App. p. 5.) The Court of Appeals' opinion implied that because the Claimant was not diagnosed with a permanent injury or given a permanent restriction then his condition would not trigger the statute of limitations clock to run.

Respectfully, this is an incorrect interpretation of the clear and unambiguous language of S.C. Code Ann. § 42-15-40 (Supp. 2015). The Act does not require that an injury be "permanent" in order for an employee to receive medical treatment (S.C. Code Ann. § 42-15-60 (Supp. 2015)) or compensation (S.C. Code Ann. §§ 42-9-10 to -30 (Supp. 2015)). To apply the statute of limitations clock as not beginning to run until the Claimant knew or should have known that he had a "permanent injury" or a "permanent restriction" adds the requirement of permanency to § 42-15-40 which is not in the plain and unambiguous language of the statute and is inconsistent with other provisions of the Act.

II. The Claimant knew or should have known his injury was compensable for more than two years before filing his claim.

The Court of Appeals in King v. International Knife and Saw-Florence noted that it must determine when a repetitive trauma injury became compensable for the purpose of determining whether notice was timely. 395 S.C. 437, 444, 718 S.E.2d 227, 230 (Ct. App. 2011). The King court noted:

> 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.**

Id., 718 S.E.2d at 230-31 (emphasis added).

Substantial evidence in the record supports the finding that the Claimant received medical treatment for his repetitive trauma injury since 1994 or 1995 and through the early 2000s, all of which are more than two years before he filed his claim in September 2009. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 133, 276 S.E.2d 304, 305 (1981). Even assuming, *arguendo*, that the Court of Appeals' pain-injury distinction could potentially be valid, here, the Claimant's persistent pre-2009 back condition cannot be cast aside as mere work-related pain that somehow falls short of injury. Instead, by any logical measure, he had a work-related injury which required medical care and, indeed, caused him to miss work. Applying the facts to the law set forth in King, the time when the Claimant knew or should have known that his injury was compensable was clearly more than two years prior to September 2009. Respectfully, Professor Larson's treatise need not be addressed as it not controlling, instead, King is. Nonetheless, as discussed below, this case does not involve "relatively minor back pains" as referenced by Professor Larson but instead continued medical treatment of the Claimant's injury.

The Claimant's condition was compensable prior to June 2006 when he required medical treatment and would miss time from work. See King, 395 S.C. at 445, 718 S.E.2d at 231. The Claimant testified that since the mid-1990s he knew that his back was

hurting and that his job was causing it. (App. p. 207; p. 215, line 3 – p. 216, line 13; p. 217, lines 6-14; p. 218, lines 5-16; p. 235, line 23 – p. 236, line 20; p. 246, lines 3-24; p. 255, lines 17-20; p. 260, lines 5-8.)

By the mid-1990s, the Claimant knew that he had a back injury which required medical treatment and was related to his employment. The Claimant testified that he went out of work for his back in the mid-1990s and saw his own doctor, Dr. T. Pappas, over the years for this problem. (App. p. 260, line 5 – p. 261, line 5; App. p. 224, lines 19-22; p. 225, line 20 – p. 226, line 4; *see* App. pp. 309-310, 315.) He testified that he knew his back pain required medical treatment, time away from work, and was related to his work. (App. p. 267, line 17 – p. 268, line 19.) The Claimant testified that he went to a chiropractor in 2001 and to a physical therapist in 2002 for problems with back pain. (App. p. 261, line 6 – p. 262, line 1; *see* App. pp. 299-310, 317-322.)

> Q: Okay. And you went to a chiropractor in 2001, for your lower back?
> A: Yes, ma'am.
> Q: And did you tell him that you were hurting because you had been lifting AC units at work?
> A: Yes, ma'am.

(App. p. 261, lines 6-11.) Records from his physical therapist, Trident Medical Center, indicate that in 2002 the Claimant attributed his back injury to his job. (App. p. 317 (Claim form indicating condition related to employment, accident date of January 1, 1999, "hurt back on job," signed by the Claimant on September 19, 2002); App. p. 321 (record dated September 19, 2002 noting "Date of onset 4-5 yrs"); *see* App. pp. 318-322.) The Claimant testified that he received shots in his back in 2006.

> Q: Okay. So you've had surgery to your neck, what have you had for your low back[?]

A: **A bunch of shots from the hospital at Trident. I had to go two times one day.**
Q: Okay. And when were the shots?
A: Where?
Q: When. I'm sorry. About – I know more than once, but –
A: **I think it was in June of '06.**
Q: Okay. Is that the first time you'd ever had injections in your back?
A: Yes, ma'am. Let's see. I want to say Dr. Pappas give me some injections in my back. I know he did, but I don't know if it was before or after.

(App. p. 220, lines 6-20 (emphasis added).)

The record is clear that the Claimant received medical treatment for and missed work because of his back injury since 1994 or 1995. As such, under King, the injury was compensable since the same time.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petition for writ of certiorari, the School District respectfully requests this Court to grant its petition for writ of certiorari, to reverse the Court of Appeals' order, and to affirm the Commission's decision.

[Signature block on following page.]

Respectfully submitted,

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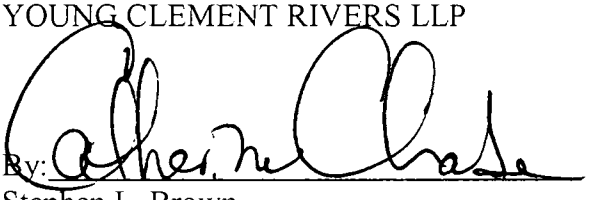
By: 

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Dated: April 7, 2016

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I, Catherine H. Chase, do hereby certify that a copy of the *Reply in Support of Certiorari* submitted by the Petitioner was sent to counsel for the Respondent on April 7, 2016 via email and United States Mail, postage pre–paid and addressed as follows:

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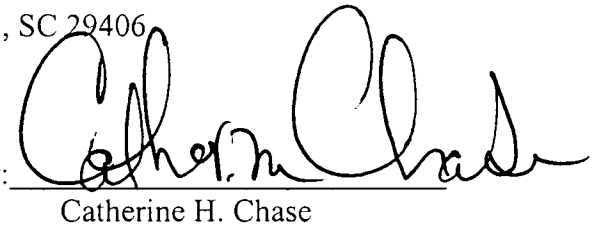
By: 
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