THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 0824526

Robert L. Harrison, Employee,.....Appellant,

v.

Owen Steel Company, Inc., Employer, and
Old Republic Insurance Company
c/o Gallagher Bassett Services, Inc., Carrier,.....Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF CASE

By Form 50 dated May 8, 2013, Claimant – Appellant sought Worker's Compensation benefits for an admitted accident which occurred on September 17, 2008. The Employer accepted the claim for injury to Claimant's back and provided treatment through Dr. Thomas Holbrook, a neurosurgeon. Dr. Holbrook subsequently performed surgery on November 10, 2009. On July 21, 2010, Dr. Holbrook released Claimant with permanent restrictions and a twenty-five (25%) percent permanent disability. Claimant sought disability benefits for the impairment and loss of use of his spine and future medical treatment.

At an initial hearing before a Single Commissioner held on August 8, 2013, Defendants argued and the Commissioner found Claimant had failed to file a claim within the applicable two year statute of limitations. The Commissioner ruled this way even though a notice of claim letter had been filed in September 2009. The initial decision of November 7, 2013, was appealed to the Full Commission. By the decision of the Appellate Panel issued May 12, 2014, the decision of the Hearing Commissioner was reversed. The Appellate Panel determined the claim had been timely filed and remanded the claim for rehearing.

A second hearing before a Hearing Commissioner was held on August 1, 2014, to address the issues on remand as ordered by the Appellate Panel. Again, Claimant sought benefits for the permanent injury suffered to his spine and medical benefits. This time the Employer argued the claim should be barred by the doctrine of latches and also argued benefits should be denied because of intervening causes. By decision issued February 12,

2015, the Hearing Commissioner ruled the claim was barred by the doctrine of latches and by subsequent accidents suffered by Claimant.

An appeal by Claimant was heard by the Appellate Panel on May 18, 2015. By Decision issued September 8, 2015, the Panel affirmed the Hearing Commissioners' determination the claim was barred by laches. The Panel also affirmed the Commissioners' rulings in regard to subsequent accidents. Notice of the Appellate Panel Decision was received by Claimant on September 8, 2015. Claimants' Notice of Appeal to the South Carolina Court of Appeals was filed on October 7, 2015.

STATEMENT OF FACTS

On September 17, 2008, Claimant–Appellant Robert Harrison was working as a gantry welder for Owen Steel Company. On that date he suffered an admitted on the job injury to his back. The Employer accepted the claim and provided medical treatment through Dr. Thomas Holbrook, a neurosurgeon. Claimant was diagnosed with a cervical disc herniation. Dr. Holbrook performed an anterior cervical discectomy with fusion on November 10, 2009. Just over eight months later, on July 21, 2010, Dr. Holbrook released Claimant with permanent restrictions and a twenty-five (25%) percent permanent disability. Dr. Holbrook noted Claimant had reached maximum medical improvement after having undergone interior cervical discectomy and fusion at C5-6 level, had reached maximum medical improvement, and had a permanent disability rating of a twenty-five (25%) percent to the whole person. (R., p. 86).

Dr. Donald R Johnson, provided a report of an independent medical evaluation of Claimant's workers compensation injury on September 29, 2010. Dr. Johnson also placed

Claimant at maximum medical improvement with permanent work restrictions and a twenty-five (25%) percent impairment rating. (R., p. 90). Upon reaching maximum medical improvement Mr. Harrison returned to work with Owen steel in a supervisory position. This position provided him with lighter duty work. It also provided him with a higher wage than he was earning at the time of his accident of September 17, 2008. (R., p. 193, line 12)

Claimant filed a Form 50 requesting a hearing on May 8, 2013. (R., p. 298). Employer responded with a Form 51, dated May 24, 2013. (R., p. 300). At the first hearing of this matter before a Hearing Commissioner on August 8, 2013, Employer argued Claimant had failed to file notice of claim within the applicable statute of limitations. Importantly, neither Defendants' Form 51 or Form 58 pretrial brief pled or made any mention of a defense of latches (R., p. 118). Furthermore, no mention of latches was made during that first hearing. After appeal by Claimant to the Full Commission the Appellate Panel reversed the Hearing Commissioner and ruled the claim was timely filed. The case was remanded for hearing of issues regarding intervening accidents, latches, and permanency.

The hearing on remand was held August 1, 2014. At that time Claimant again requested compensation for the permanent injury to his back and continuing medical treatment as needed for his back injury. The Employer argued the claim should be barred by the doctrine of latches. Employer further claimed the degree of permanent injury to Claimant could not be determined because of other accidents. Notably, Employer made no attempt to amend its Form 50 answer to allege a defense of latches. Also, although the Form 58 pretrial brief provides a specific line to assert any amendment of the pleadings, Employer failed to allege a defense of latches. (R., p. 118, Section 12).

Evidence at the second hearing showed Mr. Harrison suffered an admitted on the job accident on September 17, 2008. Employer provided the necessary medical treatment needed by Claimant including treatment through Dr. Thomas Holbrook, a neurosurgeon. Dr. Holbrook, as the authorized treating physician, performed a cervical discectomy and fusion upon Claimant on November 10, 2009. After a follow-up period of approximately eight months Dr. Holbrook reported Claimant had reached maximum medical improvement on July 21, 2010. Dr. Holbrook, the physician authorized for treatment by Employer, determined Mr. Harrison had a suffered a twenty-five (25%) percent impairment to the whole person as a result of his on the job accident of September 17, 2008. (R., p. 86).

An independent medical evaluation of Claimant was conducted by Dr. Don Johnson on September 29, 2010. Upon evaluating Mr. Harrison Dr. Johnson concurred with Dr. Holbrook. He reported Claimant was at maximum medical improvement and reported he had a twenty-five (25%) percent impairment to the whole person. He further stated Mr. Harrison would need a change of vocation or he would require future neck surgery. (R., p. 90). Fortunately, at the time of the first hearing of this case on July 17, 2013, Claimant had moved to a supervisory position earning higher wages than at the time of the accident of September 2008. This work status continued at the time of the second hearing of August 1, 2014. (R., p. 193, line 12).

Although it argued the claim was barred by the doctrine of latches, Employer made no attempt to show any prejudice on its part. Employer provided no evidence to contradict the conclusions of Dr. Holbrook, the authorized treating physician, or the concurring report of Dr. Johnson. Employer gave no reason and provided no evidence to

show the conclusions of these two doctors should be ignored. Employer simply argued the claim should be barred by laches because no request for hearing was filed until May 2013.

Additionally, Employer submitted evidence Claimant had been involved in other accidents. Employer submitted evidence Claimant was involved in a motorcycle accident in April 2010. (R., p. 138). Mr. Harrison testified he suffered a broken clavicle, but denied any injury to the area injured in his worker's compensation accident of September 17, 2008. Employer provided no testimony or medical evidence Claimant injured his back or neck in the April 2010 accident.

Employer also provided evidence of other accidents in which Mr. Harrison was involved, but those accidents occurred after the reports of Dr. Holbrook and Dr. Johnson in regard to maximum medical improvement and permanent impairment were issued. Significantly, Employer made no attempt to depose Dr. Holbrook or Dr. Johnson to determine if any of the other accidents raised by Employer would in any manner change the impairment ratings given. Also, Employer made no attempt to request updated reports from those doctors.

Evidence submitted by Employer in regard to the April 2010 accident confirmed Claimant's testimony of a clavicle injury. There was no evidence showing that accident caused any injury to the area injured in the Claimant's worker's compensation accident of September 17, 2008. In fact, the emergency room report submitted by Employer for the April 4, 2010, motorcycle accident detailed, "He denies any neck pain at this time." (R., p. 137).

The other accidents raised by Employer occurred after the reports were issued by the medical experts for this claim. Claimant's request for benefits based on permanent loss of use were based upon the reports of Dr. Johnson and Dr. Holbrook issued before those accidents. Mr. Harrison made no claim for additional impairment as a result of the injuries suffered after the reports of Holbrook and Johnson.

The Hearing Commissioner ruled with Employer on the issues of latches and subsequent accidents. The Appellate Panel affirmed that decision in full. Claimant respectfully submits the Commission was in error in relying on laches and the subsequent accidents to deny Mr. Harrison's claim.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act governs judicial review of a decision of the workers' compensation commission." Lark v. Bi-Lo, Inc., 276 S.C. 130, 134, 276 S.E.2d 304, 306 (1982); Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, (Ct. App. 2005) cert. dismissed as improvidently granted Aug. 2007; Hargrove v. Titan Textile Co., 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004). Pursuant to the APA, an appellate 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. Grant v. Grant Textiles, 372 S.C. 196, 200, 641 S.E.2d 869, 871 (2007); S.C. Code Ann. Section 1-23-380(A)(5) (Supp. 2006).

The judicial review of the Appellate Panel's factual findings is governed by the substantial evidence standard. Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006); Frame v. Resort Servs., Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004); Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 94-95 (Ct. App. 2002); Lockridge v. Santens of America, Inc., 344 S.C. 511, 515, 544 S.E.2d 842, 844 (Ct. App. 2001). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (citing Sharpe v. Case Produce, Inc., 366 S.C. 154, 160, 519 S.E.2d 102, 105 (1999)). A reviewing court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. S.C. Code Ann. Section 1-23-380(A)(5)(d)(e)(Supp. 2006), see, also, Hall v. United Rentals, Inc., 371 S.C. 69, 77, 636 S.E.2d 876, 881, (Ct. App. 2006). However, a reviewing court may reverse of modify a decision of the Appellate Panel if the findings, inferences,

conclusions, or decisions of them are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. Section 1-23-380(A)(5)(e)(Supp. 2006); Bass v. Kenco Group, 366 S.C. 450, 457, 622 S.E.2d 577, 580 (Ct. App. 2005); Bursey v. S.C. Dep't of Health & Envtl. Control, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004) aff'd, 369 S.C. 176, 631 S.E.2d 899 (2006).

ARGUMENT I

THE WORKERS' COMPENSATION COMMISSION ERRED IN CONSIDERING THE DOCTRINE OF LACHES WHICH WAS NOT PLED BY RESPONDENTS. (ISSUE 1)

The Workers' Compensation Commission concluded Appellant's claim was barred by the doctrine of latches. Latches was not pled by Employer in its Form 51, dated May 24, 2013. (R., p. 300). Last employer made no attempt to amend its pleadings in the prehearing brief Form 58 filed for the first hearing. (R., p. 288). Employer did not raise the issue of latches during the initial hearing of August 8, 2013. Finally, Employer made no attempt to amend its pleadings in the prehearing brief Form 58 filed for the hearing of August 1, 2014. (R., p. 118). Under these circumstances, Claimant respectfully submits the Commission was in error in considering the defense of latches.

S.C. Code Section 705 requires an employer to plead with specificity all defenses to be relied upon by the employer. Our South Carolina courts have consistently held latches is an affirmative defense which must be specifically pled. Mack v. Edens, 306 SC 433, 412 SE2d 431 (Ct. App. 1992); Collins Entertainment Inc. v. White, 363 SC 546, 611 SE2d 262 (Ct. App. 2005); SC Rules of Civil Procedure, Rule 8 (c). Failure to

plead latches as an affirmative defense constitutes a waiver of that defense. Collins Entertainment Inc. v. White, supra.

Employer had three chances to affirmatively plead the doctrine of latches. It failed to do so in its initial answer, Form 51. Although the prehearing brief, Form 58, in Section 12, includes a specific area for a party to amend its pleadings, Employer filed two Form 58's and failed to amend its pleadings to include the affirmative defense of latches. Under these circumstances it is respectfully submitted the Commission erred in ruling latches applied and its decision should be reversed.

ARGUMENT II

THE WORKERS' COMPENSATION COMMISSION ERRED IN CONCLUDING APPELLANT'S CLAIM WAS BARRED BY THE DOCTRINE OF LACHES. (ISSUE 2)

Even if the issue of laches was properly before the Hearing Commissioner, Claimant respectfully submits the Commission erred in determining the claim was barred by laches. Laches is an affirmative defense and the party asserting laches has the burden of proving it is applicable. In order to prove laches, the asserting party must show negligence in pursuing a claim, opportunity to act sooner, and material prejudice. Delay alone in the assertion of a claim or right does not constitute laches. Mazloom v. Mazloom, 382 SC 307, 675 SE2d 746 (Ct. App. 2009), Affd. on Cert. 392 SC 403, 709 SE2d 661 (2011); Timms v. Timms, 290 SC 133, 348 SE2d 386 (Ct. App. 1986); Bailey v. Lyman Printing and Finishing Co., 245 SC 13, 138 SE2d 410 (1964).

Although Employer claimed the doctrine of laches was applicable, it made no attempt to prove it was materially prejudiced in any way by the time of the filing of the

request for hearing. Dr. Holbrook, the authorized treating physician, issued a report on July 21, 2010, indicating Claimant had suffered a twenty-five (25%) percent impairment to the whole person because of the cervical injuries suffered as a result of Claimant's on the job accident of September 17, 2008. Dr. Johnson's report of September 29, 2010, also concluded Claimant suffered a twenty-five (25%) percent whole person impairment because of his injuries resulting from his workers compensation accident of September 17, 2008.

Employer presented evidence of the motorcycle accident of April 2010, but the emergency room report of April 4, 2010, introduced by Employer showed there was no neck injury or neck pain suffered as a result of that accident. (R., p. 137). The other accidents introduced by Employer all occurred after the September 29, 2010, report of Dr. Johnson. Obviously, these later accidents had no impact on the medical opinions reached by Dr. Holbrook and Dr. Johnson prior to those accidents.

Employer made no attempt to present any evidence as to why the opinions of Dr. Holbrook and Dr. Johnson should be disregarded. Although Employer argued Claimant suffered a number of other accidents, there was no attempt made by Employer to show the other accidents in any way impacted the impairment ratings reported by Dr. Holbrook and Dr. Johnson. Employer failed to depose their own authorized treating physician, Dr. Holbrook, or Dr. Johnson to determine if any of the other accidents would have changed the impairment ratings given by the doctors. Furthermore, no attempt was made by Employer to obtain any amended report by these doctors.

To meet its burden of proof for the defense of latches Employer was required to show a delay caused by Claimant caused material prejudice to Employer in the defense of this

case. Employer made no showing any evidence was lost because of a delay in hearing the claim. Employer made no showing it had in any manner changed its position to its detriment because of any delay. Finally, the Employer was actually responsible for providing the medical treatment by Dr. Holbrook and was fully aware of Mr. Harrison's condition and the status of his claim at all times. If Employer was in any manner concerned about a delay in hearing, it could have simply requested a hearing by the filing of a Form 21.

For all of the above reasons, Claimant respectfully submits Employer failed to prove the material allegations necessary for a defense of latches. The decision of the Commission should be reversed.

ARGUMENT III

THE WORKERS' COMPENSATION COMMISSION ERRED IN CONCLUDING APPELLANT'S CLAIM WAS BARRED AS A RESULT OF INTERVENING ACCIDENTS. (ISSUE 3)

Dr. Holbrook and Dr. Johnson provided reports Claimant suffered a twenty-five (25%) percent impairment to the whole person as a result of his accepted workers compensation accident of September 17, 2008. The report of Dr. Holbrook was issued July 21, 2010. (R., p. 86). The report of Dr. Johnson was issued September 29, 2010. (R., p. 90). Both doctors reached the same conclusion in regard to the permanent impairment suffered by Claimant as a result of the injury of September 17, 2008, and resulting surgery.

Employer introduced evidence Claimant was involved in a motorcycle accident in April 2010. The evidence showed, however, Claimant suffered an injury to his clavicle as

a result of that accident. There was no proof the motorcycle accident caused any injury to the area of Claimant's neck which was operated on by Dr. Holbrook. In fact, the emergency room record of April 4, 2010, introduced by Employer specifically noted there was no neck pain or injury as a result of the motorcycle accident.

The Employer also introduced evidence Claimant suffered a work-related accident in October 2010, an accident at home in February 2012, a motor vehicle accident in July 2013, and a motor vehicle accident in March 2014. Based on the evidence of these subsequent accidents the Commission determined an award of permanent partial disability would be speculative.

The evidence submitted by Employer showed the motorcycle accident of April 2010 did not cause any injury to the lower neck which was operated on by Dr. Holbrook. All of the other accidents raised by Employer occurred after the opinions of permanent impairment were issued by Dr. Holbrook and Dr. Johnson. Employer made no attempt to depose Dr. Holbrook or Dr. Johnson. Furthermore, employer made no attempt to obtain or introduce any medical evidence or testimony to show the other accidents suffered by Claimant would have any effect upon the impairment ratings issued by Holbrook or Johnson.

Claimant respectfully submits the uncontradicted reports of Dr. Holbrook and Dr. Johnson conclusively established Mr. Harrison suffered a twenty-five (25%) percent whole person impairment as a result of his workers compensation accident of September 17, 2008, and resulting surgery performed by Dr. Holbrook. Employer provided no sufficient evidence or reason for the Commission to disregard the impairment rating provided by these two doctors. For all of the above reasons Claimant respectfully submits

the decision of the Commission denying him an award for permanent partial disability to his back and denial of continuing medical treatment should be reversed.

CONCLUSION

The Employer claimed it was entitled to rely upon the affirmative defense of laches, but laches was not pled by Employer on the three occasions it had opportunity to do so. As laches was not pled the Commission erred in considering that defense. Furthermore, even if the doctrine of latches were to be considered, Employer failed to provide any evidence it was materially prejudiced by any delay in having a hearing or that it in any manner changed its position to its detriment as a result of any delay. A claim of injury by delay in the scheduling of a hearing is especially difficult for Employer to prove when it could have requested a hearing at any time by the filing of a Form 21.

Dr. Holbrook and Dr. Johnson issued reports determining Claimant had suffered a twenty-five (25%) percent whole person impairment as a result of this worker's compensation accident of September 17, 2008, and the resulting surgery. Employer provided no pertinent or relevant evidence indicating any other accidents would have had an impact on Claimant's impairment rating. Employer provided no medical evidence or testimony to show any rational reason those medical opinions should be ignored. The decision of the Commission should be reverse and the case remanded to require a finding of permanent partial disability for the loss of use of Claimant's back and requiring Employer to provide any necessary future medical treatment for the workers compensation injury suffered by Claimant on September 17, 2008.

Respectfully submitted,

March 15, 2016
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CERTIFICATE OF COUNSEL

The undersigned certifies that the **BRIEF OF APPELLANT** dated March 15, 2016, and filed on March 22, 2016, complies with Rule 211(b) of the South Carolina Appellate Court rules.

Respectfully submitted,

West Columbia, South Carolina
March 22, 2016

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PROOF OF SERVICE

The undersigned does hereby certify three copies of the **FINAL BRIEF OF APPELLANT** was served in the foregoing action by depositing the same in the United States mail, with sufficient postage affixed thereon and return address clearly visible on March 22, 2016, addressed to the following:

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