THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1315636

Kathey L. Staton, Employee, ... Appellant,

v.

Mohawk Industries, Inc., Employer, and
Liberty Mutual, Carrier, ... Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Claimant Kathey L. Staton initially filed a Form 50, *pro se*, on November 14, 2013, alleging an accidental injury to her hands. She alleged an occurrence date of June 28, 2013, and that notice was provided to her employer, Mohawk Industries, Inc.,[1] on June 18, 2013. (Form 50, filed Nov. 14, 2013, R. p. 141). Claimant's Form 50 was scheduled for hearing before Commissioner Aisha Taylor on March 26, 2014. At a pre-hearing conference, Claimant decided to withdraw her Form 50 and seek legal representation.

After being retained to represent her, Claimant's counsel filed an entirely new Form 50, which initiated the current proceeding. This second Form 50, dated July 3, 2014, alleged for the first time a repetitive trauma injury to "both wrists and neck." The date of injury is alleged to be November 17, 2013, with notice to Mohawk on June 28, 2013. (Form 50, dated July 3, 2014, R. p. 142). This second Form 50 was filed more than 30 days after Claimant filed her *pro se* Form 50, and Claimant's counsel did not seek leave of the Commissioner or consent of Respondents to file an Amended Form 50.

Respondents filed a Form 51 denying the claim due to Claimant's failure to provide timely notice of her repetitive trauma injury claim, along with other defenses. (Form 51, dated Aug. 1, 2014, R. p. 143).

The parties filed Pre-Hearing Briefs. In her Pre-Hearing Brief, Claimant deleted her allegations that she suffered a work-related injury to her neck. (Cl. Form 58, dated Sept. 9, 2014, R. p. 144). In an attachment to her Form 58, Claimant alleged that she

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[1] Mohawk's workers' compensation carrier for this claim is Liberty Insurance Corporation, jointly referred to herein as Respondents.

reported the problems she was having to her supervisor on June 18, 2013 and that, on July 3, 2013, her employer filed a First Report of Injury with Liberty. (R. p. 147) (R. p. 182). The First Report of Injury indicates "EE ALLEGES PAIN IN BOTH WRISTS," and lists the date of injury as August 1, 2008. (R. p. 146).

The parties were heard by Single Commissioner Gene McCaskill on October 2, 2014. Although Respondents initially denied that her injuries were caused by repetitive trauma, they stipulated at the hearing before Commissioner McCaskill that, if the Commission found that Claimant had provided timely notice, the claim would be compensable. (R. p. 24, line 19 – p. 25, line 2).

Commissioner McCaskill issued his Decision and Order on January 26, 2015, finding that Claimant withdrew her initial Form 50, which she had filed *pro se*, and that Respondents filed a timely Form 51 to her subsequent Form 50. (Decision and Order of Single Commissioner Gene McCaskill, filed Jan. 26, 2015, R. p. 9 ("Single Commissioner Decision")). Relying on this Court's decision in King v. International Knife & Saw, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011), the Single Commissioner held that Claimant failed to provide notice to Mohawk within 90 days of the date she both believed her wrist injury was work-related and sought medical care for that condition. As a result, she is not entitled to any workers' compensation benefits. (Single Commissioner Decision, R. pp. 10-11).

Claimant timely appealed to the Full Commission, which heard oral argument on May 18, 2015. After careful review of the evidence and arguments, the Full Commission affirmed the Single Commissioner Decision in its entirety. In particular, the Full Commission found that Claimant filed a Form 50 *pro se* on November 13, 2013, which

was later withdrawn. Claimant obtained legal representation and filed a second Form 50, to which Respondents filed a timely Form 51. Relying on this Court's opinion in King, the Commission affirmed the finding that the 90-day period to give notice for her repetitive trauma injury began to run when she both believed her injury was work related and sought medical treatment for that injury, which was late 2012. Because she did not give notice until June 28, 2013, she is not entitled to workers' compensation benefits. (Decision and Order of the Appellate Panel of the Full Commission, filed July 7, 2015, R. pp. 17-20 ("Commission Decision")).

Claimant timely appealed to this Court.

STATEMENT OF FACTS

Claimant began working for Mohawk in February 2006 as a CFN twist operator. (R. p. 42, lines 20-22) (R. p. 94, lines 11-18). Her job involved managing a series of spinners, loading spools of thread, tying them, taking off finished spools, cutting them out, and fixing any breakouts during that process. (R. p. 42, line 23 – 43, line 10).

She testified that, at some point, she began to experience pain and numbness in her wrists. She could not recall when she provided notice to Mohawk. (R. p. 43, line 11 – 44, line 13). She testified that, because of her worsening symptoms, she went to see her family doctor, Dr. Kimberley Lingler, on November 20, 2012, who "wasn't there. So they let me see Dr. Millen and I was complaining with my hands." (R. p. 45, lines 7-22) (*see also* R. p. 53, lines 16-21 (Claimant explaining that the pain in her wrists started before November of 2012, "but that's when I first went to the doctor for it really")). She agreed that "at that time, it was [her] belief that the pain in [her] hands was coming from [her] work." (R. p. 54, lines 1-4) (R. p. 110, line 14 – 111, line 6). When asked what

made her think in November of 2012 that her job was causing the pain in her hands, Claimant responded, "[b]ecause when I got off work and went home to bed and my hand would get numb and tingling. And then my fingers started burning." (R. p. 111, lines 7-12).

Medical records indicate that she went to Dr. Lingler's office, on November 20, 2012. Dr. Lingler was not in, so she saw Dr. Millen. Dr. Millen's notes reveal that:

> **PT states that she is here today because of pain to her right hand up to her elbow that started 2 days ago**, described as an intermittent burning, dull pains usually feels number th[e]n after the numbness goes away the burning starts back worsened by nothing relieved by getting up and walking and [shaking] her hands rating 0/10 at present and **8/10 at worse**. She has been taking/using hand braces at night and the shaking the hands thing which she feels like does help. **Was told about 4 years ago that this was from carpal tunnel syndrome** but never went to the specialist.

(R. p. 154) (emphasis added).[2] She was diagnosed with carpal tunnel syndrome, (R. p. 184), and referred to a specialist for the carpal tunnel diagnosis. (R. p. 185). At a subsequent appointment with Dr. Lingler on December 12, 2012, the list of problems Claimant reported included carpal tunnel syndrome. (R. p. 157).

On April 2, 2013, she saw Dr. Kurt P. Wohlrab, who indicated Claimant reported "Bilateral hand numbness X 3 years" as well as the fact that "[s]he reports she was diagnosed with carpal tunnel years ago." He provided her with injections to both hands. (R. pp. 158-159) (R. p. 47, lines 3-11). She continued to see Dr. Wohlrab who recommended in July 2013 that she undergo a nerve conduction study. (R. pp. 160-161).

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[2] In his statement to the Single Commissioner, Claimant's counsel acknowledged that Claimant had "suffered pain and numbness in her bilateral wrists for a period of time that increased over years and ultimately caus[ed] her to go and see her family doctor, Kimberley Linger." (R. p. 29, lines 8-13).

She underwent a nerve conduction/EMG study on July 3, 2013. (R. pp. 162-163). She testified that, at this point in time, she told her supervisor that she was "having trouble with her wrists ..." (R. p. 47, line 20 – p. 48, line 7). A First Report of Injury was filled out and dated July 3, 2013. (R. p. 182).

At her deposition, Claimant testified that she first reported the problems she was having with her wrists to Mohawk on June 28, 2013. (R. p. 54, lines 23-25) (R. p. 108, lines 23-24).

> Q: Okay. And what made you decide to report the claim on June 28th, 2013?
>
> A: Because at work my finger would get numb.
>
> . . . .
>
> Q: Okay. And you hadn't reported anything prior to June 28th, 2013?
>
> A: No.

(R. p. 111, line 17 – p. 112, line 1) (*see also* R. p. 139, lines 10-13).[3]

Claimant began seeing Dr. James P. Wallace at that point. (R. p. 50, lines 23-25) (R. pp. 164-169). In October 2013, he referred her to Dr. Robert Moore. (R. pp. 172-174). Claimant testified that her last day of work was November 17, 2013. (R. p. 52, lines 7-10).

Dr. Moore performed carpal tunnel surgery on her left hand in December 2013. (R. p. 113, lines 15-20). She later had surgery on her right hand. (R. p. 52, line 25 – p. 53, line 2).

[3] Although at the hearing she claimed to have just remembered that she told her employer at some point prior to June 28, 2013 about the problems she was having with her wrists, she could not remember when that might have been. (R. p. 43, line 11 – p. 44, line 13) (R. p. 54, line 5 – p. 55, line 9).

STANDARD OF REVIEW

Judicial review of a Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2014). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5). It is the Commission's role to find facts, evaluate the credibility of the witnesses and assign weight to the evidence. Crisp v. South Co., Inc., 401 S.C. 627, 639, 738 S.E.2d 835, 841 (2013).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission's finding from being supported by substantial evidence." Hartzell v. Palmetto Collision, LLC, 406 S.C. 233, 246, 750 S.E.2d 97, 104 (Ct. App. 2013). Instead, the findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992).

Whether and when a claimant knew or should have known a condition is related to employment is a question of fact for the Commission. Holmes v. National Serv. Indus., Inc., 395 S.C. 305, 309, 717 S.E.2d 751, 753 (2011). The Full Commission is the ultimate fact finder in workers' compensation cases. Id. at 308, 717 S.E.2d at 752. Where there is a conflict in the evidence, either by different witnesses or the testimony of the same witness, the factual findings of the Commission are conclusive. Anderson v. Baptist Med. Ctr., 343 S.C. 487, 492-93, 541 S.E.2d 526, 528 (2001).

ARGUMENT

I. Respondents properly raised the defense of lack of timely notice.

Claimant argues that, because Respondents did not file a Form 51 response to her *pro se* Form 50, filed on November 14, 2103, they are barred from raising any affirmative defenses to the second Form 50 filed by her attorney on July 3, 2014. Claimant is wrong for several reasons.

To begin with, it was Respondents' counsel's recollection, and apparently Commissioner Taylor's recollection as well, that Claimant withdrew her *pro se* Form 50 at the March 26, 2014 pre-hearing conference. Respondents note that Commissioner Taylor both conducted the March 26, 2014 pre-hearing conference and was on the Appellate Panel that issued the Commission Decision that found as a matter of fact that Claimant withdrew her initial *pro se* Form 50. (Commission Decision, R. pp. 14, 20).

However, for the reasons discussed below, it does not matter whether Claimant withdrew her initial *pro se* Form 50. That fact alone is not determinative of whether Respondents are entitled to raise the affirmative defense of lack of timely notice, because

Claimant has not pursued a claim for accidental injury to her hands that occurred on June 28, 2013. That is the only claim raised in her initial Form 50.

Regulation 67-603(A) provides that an employer "shall respond to a Form 50 by preparing a Form 51 ..." S.C. Code Reg. § 67-603(A). However, it does not provide, as Claimant suggests, that where multiple Form 50s are filed alleging different claims with different dates of injury, an employer is barred from raising any affirmative defenses to subsequent claims unless it files a Form 51 response to the first Form 50. The only effect of Respondents' not filing a Form 51 to Claimant's first November 14, 2013 Form 50 claiming injury by accident is that Respondents may be barred from raising affirmative defenses to her claim of accidental injury.[4] It does not control the defenses available to Respondents in response to the July 3, 2014 Form 50 raising for the first time a repetitive trauma injury claim.

The two Form 50s allege different injuries, different dates of injury, and different notice dates. Claimant's initial Form 50 alleged an injury by accident to her hands that occurred on June 28, 2013, with a notice date of June 18, 2013. Her second Form 50, filed over seven months later, alleged an entirely different claim – repetitive trauma injury to her wrists and neck – and an entirely different date of injury, November 17,

[4] There is a question whether, even as to Claimant's first *pro se* Form 50, the restriction in S.C. Code Reg. § 67-603(C) can operate to forfeit valid defenses. The statutory provisions providing for the affirmative defenses referenced in S.C. Code Reg. § 67-603(C) – intoxication or wilful intent to injure in Section 42-9-60; late notice in Section 42-15-20; time limit for filing claim in Section 42-15-40; and time limit for filing change of condition claim in Section 42-17-90 – do not contain any limitation as to when they must be raised. While it is true that regulations promulgated by a state agency or commission carry the force of law, they may not add or remove anything from the statute. *E.g.*, Goodman v. City of Columbia, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995) ("[a]lthough a regulation has the force of law, it may not alter or add to a statute"); Society of Prof. Journalists v. Sexton, 283 S.C. 563, 567, 324 S.E.2d 313, 315 (1984) (holding that a regulation that added limitations that were not contained in the statute "must fall"). Thus, it is unclear whether the time limitations contained in S.C. Code Reg. § 67-603(C) can bar an employer from raising an otherwise valid defense.

2013. Her initial Form 50 claimed she provided notice to Mohawk on June 18, 2013, whereas her second Form 50 alleged notice was provided on June 28, 2013. Thus, Claimant's assertion that the claim that was heard by the Commission and that is the subject of this appeal is the same claim that Claimant filed *pro se* on November 22, 2013, (App. Br. p. 11), is simply incorrect. The injury by accident claim she filed on November 22, 2013 may or may not have been withdrawn; however, what is clear and undeniable is that that claim has not been pursued beyond March 26, 2014.

In her Form 58, Claimant attempted to characterize her second Form 50 as an "Amended Form 50." However, Regulation 67-610 sets out the rules for amending a previously-filed pleading, and provides that a party may amend a pleading once as a matter of right within 30 days after it is initially served. Thereafter, "a party may amend a form ... **only** by leave of the Commissioner or by written consent of the adverse party." S.C. Code Reg. 67-610(B) (emphasis added). In this case, Claimant has not alleged and there certainly is no proof that she either obtained leave of a Commissioner or written consent from Respondents to amend her Form 50. Instead, the second Form 50, filed over seven months after the initial *pro se* Form 50, initiated a new claim alleging an entirely different type of injury for the first time, repetitive trauma injury, with a different date of injury and different date of notice. In addition, the amended form must have the word "Amended" typed or printed "boldly across the top of the form ..." S.C. Code Reg. 67-610(B)(1). The second Form 50 conspicuously does not contain any indication that it purports to be an amended Form 50 as opposed to an entirely new claim, to which Respondents timely responded. There is no question that Respondents filed a timely

Form 51 to her second Form 50 raising a repetitive trauma injury claim and, therefore, are entitled to raise the late notice defense to that claim.

Claimant highlights S.C. Code Reg. § 67-613, regarding postponing hearings. (App. Br. p. 9). In particular, she focuses on subsection 67-613(B)(4), which provides, in pertinent part that, '[i]f the nature of the claim or the relief requested changes, file a new hearing request according to R.67-207 unless R.67-610 applies." S.C. Code Reg. 67-613(B)(4). Here, as explained above, the nature of her claim changed from claiming an accidental injury to claiming a repetitive trauma injury. As noted above, Regulation 67-610 does not apply as she did not amend her prior Form 50, which meant she had to file a new Form 50 to raise her new claim. It is undisputed that Respondents filed a timely Form 51 to her second Form 50, effectively raising the late notice defense.

Thus, while Claimant's argument might find some traction if, in fact, the claim she pursued below was her claim of injury by accident to her hands on June 28, 2013, which Respondents do not concede,[5] the reality is that she has not pursued that claim. At the hearing, Commissioner McCaskill stated that the parties were before him on the Form 50 that Claimant's counsel had filed on behalf of his client. There was no objection. (R. p. 28, lines 19-24). Claimant's counsel further stipulated that the claim she was pursuing was for "injury to both of her wrists from repetitive work at the job ..." (R. p. 28, line 24 – p. 29, line 2), and not an accidental injury to her hands or any other body part. *See also* (R. p. 108, lines 12-15 (Claimant agreeing that she is alleging a repetitive trauma injury)). As a result, her argument regarding the timeliness of Respondents' Form 51 simply has no bearing on the instant claim, filed on July 3, 2014, alleging a repetitive trauma injury to "both wrists and neck" occurring on November 17, 2013.

[5] *See* note No. 4 above.

The difference between an alleged injury by accident and an alleged injury due to repetitive trauma is not merely semantic. The Workers' Compensation Act ("Act") embodies different standards and procedures for accidental injuries and repetitive trauma injuries. For example, notice of an injury by accident must be provided to the employer "within ninety days after the occurrence of the accident or death ..." S.C. Code Ann. § 42-15-20(B). In contrast, notice must be given to the employer of an alleged repetitive trauma injury "within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable ..." S.C. Code Ann. § 42-15-20(C). Thus, it is clear that, while an employer might not be in a position to raise a late notice defense for an accidental injury claim, which has a definite date of occurrence, that same employer may well have a solid late notice defense to a repetitive trauma injury based on application of the discovery rule embodied in Section 42-15-20(C). In the former situation, there would be no reason to file a Form 51 to preserve the late notice defense, whereas in the latter there would be.

In addition, the evidentiary proof required for an accidental injury claim is different than that required to prove a repetitive injury claim. *Compare* Bagwell v. Earnest Burwell, Inc., 227 S.C. 444, 450, 88 S.E.2d 611, 613 (1955) (generally, a claimant must prove by a preponderance of the evidence, which can include circumstantial evidence, that he or she suffered an accident injury that arose out of and in the course of employment), *with* S.C. Code Ann. § 42-1-172 (repetitive trauma injury must be proven "by a preponderance of the evidence of a causal connection that is established medical evidence between the repetitive activities that occurred while the

employee was engaged in the regular duties of his employment and the injury"). This is further indication that her second Form 50 raised an entirely new claim.

In the end, Claimant raised a totally new and distinct claim – repetitive trauma injury – with a new date of occurrence and new date of notice in her second Form 50. This Court should affirm the Commission finding that Respondents were entitled to and did file a timely Form 51 which properly raised the late notice defense.

II. The Commission properly held that the notice period was triggered when Claimant both believed the problems she was experiencing with her wrists were work-related and sought medical care for that condition.

Claimant makes several arguments based on a strained reading of what is required under Section 42-15-20(C), all of which must be rejected. First, she argues illogically that the notice period cannot be triggered until a commissioner makes a determination, based on medical evidence, that a causal connection exists between the claimant's repetitive work activities and his or her injury. Under Claimant's theory, a claimant's notice period does not begin to run until the hearing is over and the Commission has ruled. (App. Br. p. 13). This is not a "plain reading" of the statute, but an absurd construction of the Act in general, and Sections 42-15-20 and 42-1-172 specifically.

The cardinal rule in statutory construction is to discern the intent of the Legislature. *E.g.*, Duvall v. South Carolina Budget & Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 127 (2008). Claimant is correct that, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 481 (2000). Nonetheless, applying Claimant's interpretation of what she asserts is the literal meaning of Section 42-15-

20(C) produces an absurd result is anything but unambiguous. It has long been held that, "[h]owever plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." Kiriakides v. United Artists Commc'ns, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994), *quoting* Stackhouse v. County Bd. of Comm'rs, 86 S.C. 419, 68 S.E. 561 (1910). Instead, "[i]f possible, the court will construe the statute so as to escape the absurdity and carry the intention into effect." Catawba Indian Tribe of South Carolina v. State of South Carolina, 372 S.C. 519, 527, 642 S.E.2d 751, 755 (2007) (citations omitted).

Furthermore, a "statute should not be construed by concentrating on an isolated phrase." Duvall, 377 S.C. at 42, 659 S.E.2d at 128. Instead, the "real purpose and intent of the lawmakers will prevail over the literal import of particular words." Sloan v. South Carolina Bd. of Physical Therapy Exam'rs, 370 S.C. 452, 468, 636 S.E.2d 598, 606-607 (2006).

> While it is an elementary rule of construction that words used in a statute should be given their plain and ordinary meaning this, as all other rules, is subject to the prime object of ascertaining and giving effect to the legislative intention. In doing this, we are not to be governed by the apparent meaning of words found in one clause, sentence, or part of the act, but by a consideration of the whole act, read in the light of the conditions and circumstances as we may judicially know they appeared to the Legislature, and the purpose sought to be accomplished.
>
> Crisp, 401 S.C. at 643-44, 738 S.E.2d at 843.

Claimant simply cannot explain how her interpretation of Section 42-15-20(C), which is that her notice period is not triggered until a commissioner makes a finding of fact, after a full hearing and based on medical evidence proving that a causal connection

exists between her work and her condition, does not constitute a complete abrogation of the notice provision. The notice period, under her theory, would not even begin to accrue until after she had filed her claim, gone through a hearing and obtained a ruling in her favor. Her interpretation would completely abolish any notice period for repetitive injury claims because, no matter when a claimant decided to provide notice under her interpretation of Section 42-15-20(C), the employer would always have "notice" of the claim before a commissioner issued his or her decision, *i.e.*, when she filed her Form 50 and pre-hearing brief. Such an absurd result simply cannot be what the Legislature intended and, consequently, should be rejected.

She asserts that the "legislature used terms that it defined specifically and clearly," and that "compensable" is defined in Section 42-1-172(B). (App. Br. p. 14). However, while the Act contains numerous definitions, S.C. Code Ann. §§ 42-1-20 – 42-1-175, the term "compensable" is not among them. Even Claimant concedes that the term "compensable" is more a "term of art." (App. Br. p. 14). The phrases "repetitive trauma injury", and "medical evidence" are defined in Sections 42-1-172(A) and 42-1-172(C), respectively; however, Section 42-1-172 does not contain a separate definition of the word "compensable." Nowhere in the Act are the terms "compensable" or "compensable repetitive trauma" set out in quotations marks, as is the case with every other term that is defined in the Act. This is a clear indication that the Legislature was not defining the term "compensable" in Section 42-1-172(B) or elsewhere, and Claimant's arguments to the contrary are both circular and incorrect.

Where undefined, the words used in a statute "must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the

statute's operation." Catawba Indian Tribe, 372 S.C. at 525-26, 642 S.E.2d at 754. The Merriam-Webster definition of the word "compensable" is: "that is to be or can be compensated."[6] Dictionary.com defines "compensable" as "eligible for or subject to compensation, especially for a bodily injury."[7] Black's Law Dictionary, on-line version, defines "compensable" as "an injury that arises from your employment."[8] These definitions are in line with this Court's decision in King, which identifies the trigger as when the claimant has sufficient information or knowledge to put her on notice that an injury or condition is related to his or her work, and is serious enough that it requires medical treatment or interferes with her ability to perform her job, whichever comes first.

On its face, Section 42-15-20(C) is mandatory and sets out what is commonly referred to as the "discovery rule" to determine when notice must be given for repetitive trauma injury claims: "In the case of repetitive trauma, notice must be given by the employee within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable ..." S.C. Code Ann. § 42-15-20(C). The discovery rule has been applied by South Carolina courts in various factual situations. *See, e.g.,* Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E. 2d 645 (1996) (applying the discovery rule in a case involving gradual injury to a building); Johnston v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (1993) (applying the discovery rule to a knee injury); Knox v. Greenville Hosp. Syst., 362 S.C. 566, 608 S.E.2d 459 (Ct. App. 2005) (applying the discovery rule to a claim alleging injury caused by administration of an intravenous saline treatment).

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[6] http://www.merriam-webster.com/dictionary/compensable.
[7] http://dictionary.reference.com/browse/compensable?s=t.
[8] http://thelawdictionary.org/compensable-injury/.

Application of the discovery rule to a repetitive trauma claim, as is the case with other types of claims, requires a factual determination of what the claimant knew or could have learned through the exercise of reasonable diligence. "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." Knox, 362 S.C. at 570, 608 S.E.2d at 462 (citation omitted).

This Court has already explained how this provision is to be applied in a repetitive trauma injury case. Whereas experiencing a "mere work-related ache does not constitute a compensable condition" that triggers the notice period, the point at which: 1) a worker believes her condition is related to her job, and 2) that condition requires medical treatment or interferes with her ability to perform her job, does. King, 395 S.C. at 444-45, 718 S.E.2d at 231. Claimant's attempts to twist, ignore and/or overturn this Court's decision in King must be rejected.

Claimant then dials it back a step and argues that, maybe the trigger is not a finding by a commissioner after all but, instead, that her notice period is triggered only when she receives or is made aware of medical evidence causally linking her repetitive trauma injury to her job. That is not the test under the discovery rule embodied in Section 42-15-20(C) or applied in case law. *See, e.g.*, King, 395 S.C. at 445, 718 S.E.2d at 231 (the claimant's notice period was not triggered until he believed his repetitive trauma injury was work related and "it either required medical care or interfered with his ability to perform his job, whichever occurred first"); *see also* Holmes, 395 S.C. 305, at 717 S.E.2d at 753 (notice period began to run in occupational disease claim when the

claimant believed her condition was related to her work environment and was diagnosed with sarcoidosis, even though no physician linked her sarcoidosis to her work conditions until years later). As noted above, under the discovery rule, the notice period is triggered when the "facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist ... and not when advice of counsel is sought or full-blown theory of recovery is developed." Johnston, 313 S.C. at 64-65, 437 S.E.2d at 47. Contrary to Claimant's assertion, the discovery rule does not require that a claimant have medical evidence linking her injury to her work before providing notice to her employer. It simply requires that she knows she is injured, believes her injury is work-related, and the injury either requires medical treatment or interferes with her ability to perform her job. King, 395 S.C. at 445, 718 S.E.2d at 231.

Claimant's interpretation would effectively replace the term "discover" with "prove." However, Section 42-15-20(C) provides that notice of a repetitive trauma injury must be given within 90 days of when "the employee **discovered** or could have **discovered** by exercising reasonable diligence, that his condition is compensable ..." S.C. Code Ann. § 42-15-20(C) (emphasis added). The key here is that Section 42-15-20(C) by its very terms requires **discovery**, not **proof** of compensability.

The purposes of the Act's notice provisions are "to enable the employer to investigate the claim and to give prompt medical attention if necessary." Ashe v. Rock Hill Hardware Co., 219 S.C. 159, 164, 64 S.E.2d 396, 398 (1951). Notice under the Act "is not to be treated as a mere formality or technicality and dispensed with as a matter of course." Mintz v. Fiske-Carter Const. Co., 218 S.C. 409, 414, 63 S.E.2d 50, 52 (1951).

Furthermore, the "construction of a statute by an agency charged with its administration is entitled to the most respectful consideration and should not be overruled absent compelling reasons." Sloan, 370 S.C. at 469, 636 S.E.2d at 607; *see also* Brown v. Bi-Lo, Inc., 354 S.C. 436, 441, 581 S.E.2d 836, 838 (2003) (courts generally give "deference to an administrative agency's interpretation of an applicable statute or its own regulation").

Finally, Claimant continues to argue that the ruling in Schurlknight v. City of North Charleston, 352 S.C. 175, 574 S.E.2d 194 (2002), which has been overruled by the 2007 revisions to the Act, specifically Section 42-15-20(C), should apply here instead of the statute. (App. Br. pp. 20-21). In Schurlknight, the Supreme Court rejected the discovery rule – the very rule adopted in Section 42-15-20(C) – in favor of the last day of injurious exposure as the trigger for notice in repetitive trauma injury claims. While Schurlknight might apply to repetitive trauma injuries that occurred prior to July 2007, Section 42-15-20(C) indisputably controls for repetitive trauma injuries that occurred after July 2007. As Claimant's injuries arose after July 2007, Section 42-15-20(C) applies to her claim, not Schurlknight. Patently, had the Legislature intended to set the trigger for the notice period to begin running at the date of last injurious exposure, it easily could have done so. The fact that it did not is compelling evidence that it rejected that trigger for repetitive trauma injury claims.

This Court should reject Claimant's arguments and affirm the Commission's proper interpretation of Section 42-15-20(C) and the ruling in King, that the notice period in a repetitive trauma injury claim begins to run when a claimant believes her condition is

related to her job and either seeks medical treatment or the condition interferes with the claimant's ability to perform her job.

III. The Commission properly found that Claimant failed to provide timely notice of her repetitive trauma injury to her employer.

Claimant argues that she provided timely notice of her injury to Mohawk. The Commission held that the 90-day notice period was triggered on November 20, 2012, which was when Claimant both believed her symptoms to be work-related and sought medical treatment for her condition. Claimant argues that there is no proof that Dr. Millen told her that he had diagnosed her with carpal tunnel syndrome at the November 20, 2012 visit. His medical notes clearly state that he diagnosed her with carpal tunnel syndrome. (R. pp. 154-156). However, even if she could establish that Dr. Millen did not discuss his diagnosis of carpal tunnel syndrome with her, which Respondents do not concede, that is not the test for determining when the notice period begins to run. Neither Section 42-15-20(C) nor King require that a claimant receive a specific diagnosis before the notice period begins to run.

Although Claimant appears to believe it is the employer's burden to prove that Dr. Millen told her of his carpal tunnel diagnosis, (App. Br. pp. 18-19), it is the claimant who bears the burden of proving the facts that she has complied with the applicable notice provision, not the employer. *See* Hartzell, 406 S.C. at 247, 750 S.E.2d at 104. It is purely speculative and entirely counterintuitive that Dr. Millen would have diagnosed Claimant with carpal tunnel syndrome and not discussed that diagnosis with her at the November 20, 2012 visit. Although Claimant's counsel elicited testimony from her that Dr. Wohlrab told her she might have carpal tunnel syndrome, (R. p. 47, lines 3-11), he did not establish that Dr. Millen failed to discuss his diagnosis with Claimant on

November 20, 2012. (R. p. 45, line 4 – p. 46, line 17). All Claimant said, before a proper objection to the hearsay nature of her testimony was raised, was that she did not remember exactly what Dr. Millen had told her. (R. p. 46, lines 3-5). Claimant admits in her Brief that Dr. Millen referred her to Dr. Wohlrab. (App. Br. p. 6). It is illogical and inconceivable that Dr. Millen would have given her the referral without discussing with her the condition for which she was being referred. Furthermore, Dr. Wohlrab's notes reveal that Claimant was referred to him "for evaluation of bilateral carpal tunnel. She reports she was diagnosed with carpal tunnel years ago," and that she reported a long-standing problem with carpal tunnel issues: "Bilateral hand numbness X 3 years." (R. pp. 158-159).

Furthermore, whether Dr. Millen discussed his diagnosis of carpal tunnel syndrome with Claimant or not on November 20, 2012, the fact remains that, at that time, she: 1) was experiencing pain and numbness in her wrists and hands; 2) believed her condition was caused by her job; and 3) required medical treatment for that condition. (R. p. 110, line 14 – p. 111, line 12). Claimant testified that in November 2012, she believed the problems she was having with her hands/wrists were caused by her job. At the hearing, she agreed that, "at that time, it was [her] belief that the pain in [her] hands was coming from [her] work." (R. p. 54, lines 1-4) (R. p. 110, line 14 – p. 111, line 6). When asked what made her think in November of 2012 that her job was causing the pain in her hands, Claimant responded, "[b]ecause when I got off work and went home to bed and my hand would get numb and tingling. And then my fingers started burning." (R. p. 111, lines 7-12). She testified that she sought medical treatment because of her worsening symptoms. (R. p. 45, lines 7-9) (*see also* R. p. 53, lines 16-21 (Claimant

explaining that the pain in her wrists started before November of 2012, "but that's when I first went to the doctor for it really")).

The discovery rule does not require that a claimant alleging a repetitive trauma injury have a full-blown diagnosis or theory of their case, but only that they are injured enough to seek medical treatment for a condition or that it affects their ability to work, and that they believe their condition is caused, at least in part, by their job. King, 395 S.C. at 445, 718 S.E.2d at 231. Thus, the Commission did not err in finding that Claimant's notice period was triggered in November 2012 when she both sought medical treatment for the problems she was having with her hands/wrists and believed those problems were caused by her job.

CONCLUSION

For all the reasons stated herein, this Court should affirm the Commission Decision finding that Claimant is not entitled to any workers' compensation benefits because she failed to provide timely notice to her employer.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 1315636

Kathey L. Staton, Employee, ... Appellant,

v.

Mohawk Industries, Inc., Employer, and
Liberty Mutual, Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Respondents' Brief of Owen Steel Company, Inc. and Great American Insurance Group c/o Strategic Comp Services complies with Rule 211(b), SCACR. The undersigned also certifies that this Respondents' Brief complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

January 14, 2016

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