

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Panel
Melody James, Susan Barden, Aisha Taylor

SCWCC File No. 0715651
Appellate Case No. 2017-000753

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SC Court of Appeals

Donnie Lowe, Employee, Claimant, Appellant,
v.
BMW Manufacturing Corporation, Employer, and Hartford Ins. Co. of the
Midwest, c/o Sedgewick Claims Management Services, Inc., Carrier, Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. WAS IT AN ERROR OF LAW FOR THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION TO DISMISS APPELLANT'S CHANGE OF CONDITION FOR THE WORSE CLAIM ON GROUNDS THAT SUCH CLAIM WAS FILED OUTSIDE OF THE STATUTE OF LIMITATIONS?**

STATEMENT OF THE CASE

Appellant Donnie Lowe ("Lowe") suffered a work related injury to his low back on October 2, 2007. It was an accepted claim and benefits were paid by the workers' compensation carrier. Lowe did not reach maximum medical improvement until January 6, 2011, over three years from the date of his injury. After a hearing on the matter, Commissioner T. Scott Beck found that, as a result of his low back injury of October 7, 2007, Lowe suffered a 35% impairment to his spine, with effect to the right lower extremity, and awarded Lowe continued medical care and treatment with Dr. James Behr. (See Decision and Order of Commissioner Beck, filed August 28, 2012) Dr. Behr still medically treats Lowe to this day.

Following the Hearing Commissioner's award, and within the one year time frame following the last payment of compensation¹, Lowe timely filed a workers' compensation Form 50 with medical documentation attached² on July 3, 2013. He alleged that he had suffered a change of condition for the worse and sought additional medical care and treatment³. Lowe requested a hearing with the Workers' Compensation Commission. (See Form 50 of July 3, 2013) However, prior to the hearing date, Lowe withdrew his hearing

¹ See S.C. Code Ann. § 42-17-90(A)(2010), which sets forth the one year statute of limitations for change of condition claims. Commissioner Beck's award was paid to Lowe on October 3, 2012. (See Form 19 dated October 3, 2012)

² See S.C. Workers' Compensation Regulation 67-602 (1992), regarding the requirement of medical documentation indicating a change of condition and also authorizing the admission of additional experts reports at the hearing.

³ Lowe alleged in the alternative that he was permanently and totally disabled.

request as a matter of right, with leave to renew, pursuant to S.C. Workers' Compensation Regulation 67-609. Lowe subsequently re-filed his Form 50 Request For Hearing on September 3, 2015, again with medical documentation attached. (See Form 50 of September 3, 2015)

The case was set for hearing and tried before Commissioner Mike Campbell on December 10, 2015. (See Hearing Transcript of December 10, 2015) Lowe argued that his claim for a change of condition for the worse was timely, as his initial Form 50 Request For Hearing was filed on July 3, 2013, within the one year time period following the last payment of compensation. However, Respondents took the position that Lowe's claim was untimely filed and outside of the one year statute of limitations for change of condition claims. Respondents asserted that Claimant's timely filed Form 50 of July 3, 2013 did not toll the statute of limitations and that Lowe's subsequent Form 50 Request For Hearing of September 3, 2015 was filed outside of the one year statute of limitations, thus barring his claim for a change of condition for the worse. (See Hearing Transcript of December 10, 2015)

Commissioner Campbell dismissed Lowe's change of condition for the worse claim. Commissioner Campbell concluded that Lowe's change of condition claim was not timely filed and thus barred by the statute of limitations set forth in S.C. Code Ann. § 42-17-90(A)(2010) because Lowe's Form 50 Request For Hearing of September 3, 2015 was filed outside of the one year statute of limitations despite Lowe having already timely filed a Form 50 Request For Hearing previously on July 3, 2013. (See Decision and Order of Commissioner Campbell, filed July 15, 2016) The Appellate Panel affirmed. (See Appellate Panel Decision and Order, filed February 23, 2017) This appeal follows.

STATEMENT OF THE FACTS

The facts of this case that come to bear on this appeal are straightforward. Lowe had an MRI scan of his low back in February 2010 as part of his initial workers' compensation claim. (APA p. 4) Lowe reached MMI and, after his initial claim concluded per the August 28, 2012 Decision and Order of Commissioner Beck, Lowe continued to treat with Dr. James Behr. (APA pp. 5-185) Lowe had a subsequent, post-hearing award MRI scan of his lower back in August 2013, after his initial claim had concluded but within the one year time period following the last payment of compensation. (APA p. 3) Both Lowe's authorized treating doctor, Dr. James Behr, as well as an independent radiologist, Dr. Jason Kelly, reviewed the pre- and post-hearing award MRI scans and gave medical opinions to a reasonable degree of medical certainty that Lowe had in fact sustained a physical change of condition for the worse with regard to his lower back work-related injury. (APA p. 1-2) Those medical opinions were submitted to the Commission. However, as stated above for the foregoing reasons, the Commission dismissed Lowe's claim, finding that Lowe's change of condition for the worse claim was not timely filed and barred by the statute of limitations set forth in S.C. Code Ann. § 42-17-90(A)(2010).

ARGUMENT

I. THE WORKERS' COMPENSATION COMMISSION COMMITTED AN ERROR OF LAW BY FINDING AND CONCLUDING THAT APPELLANT'S CLAIM WAS BARRED BY THE STATUTE OF LIMITATIONS SET FORTH IN S.C. CODE ANN. § 42-17-90(A)(2010).

Lowe submits that his change of condition for the worse claim should not have been dismissed and that the South Carolina Workers' Compensation Commission's Decision and Order should be reversed because it is controlled by an error of law.

This Court can reverse or modify the decision of the Appellate Panel only if the substantial rights of the appellant have been prejudiced “because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” *See Wilson v. Charleston County School District*, Opinion No. 5475, 798 S.E.2d 449 (Ct. App. 2017)(quoting *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010)).

“A change in condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award.” *Wilson* at p. XX (quoting *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct. App. 2003)). The South Carolina statute governing change of condition claims is S.C. Code Ann. § 42-17-90 (2010). In pertinent part, it reads:

On its own motion or on the application of a party in interest on the ground of a change in condition, the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation. . . . **the review must not be made after twelve months from the date of the last payment of compensation pursuant to an award provided by this title.**

S.C. Code Ann. § 42-17-90(A)(2010)(emphasis added). The South Carolina Supreme Court has held that so long as the change of condition claim is filed with the Commission within the specified one year period, the actual hearing on the issue need not be heard during the one year. *See Allen v. Benson Outdoor Adver. Co.*, 236 S.C. 22, 112 S.E.2d 722 (1960). In so doing, the Court approvingly quoted and adopted the following language from a West Virginia case:

‘The filing of a claim for further compensation within the statutory period and partial but not complete development thereof within such period, with loss of jurisdiction by the commissioner during the progress of the case, would be an absurd result which the legislature certainly did not have in

mind, and we feel warranted in holding that the statute in question should be given a construction which permits the commissioner to hear and pass upon any application in writing for a further adjustment of a claim, if filed within the statutory period applicable to the nature of the claim filed.'

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

By opinion filed March 22, 2017, the South Carolina Court of Appeals decided the case of Wilson v. Charleston County School District, Opinion No. 5475, 798 S.E.2d 449 (Ct. App. 2017). The Wilson case addresses the very issue raised by Lowe in this appeal. In Wilson, the Court of Appeals noted that Wilson filed a Form 50 timely, within one year after the date of the last payment of compensation, alleging a change of condition for the worse. Thereafter, outside of the one year time frame, Wilson filed a subsequent Form 50 requesting a hearing on her change of condition claim. The Court of Appeals stated:

Although Wilson did not file the subsequent Form 50 requesting a hearing on her change of condition claim until March 29, 2011, we find her January 6, 2009 Form 50 Notice of Claim alleging a change of condition satisfied the statute's plain and unambiguous requirement that such a claim be filed within the twelve-month deadline. As the Appellate Panel's contrary determination is controlled by an error of law, we reverse the circuit court's order affirming this finding.

Wilson at p. 458. The facts of the Wilson case are strikingly similar to the instant case. In Wilson, Wilson filed a Form 50 Notice of Claim within the one year time frame. She did not request a hearing. Subsequently, she filed a Form 50 Request For Hearing after the expiration of the one year statute of limitations. The Court of Appeals found that, so long as Wilson had filed a claim within the one year time frame, there was no statute of limitations violation. *See* Wilson at p. 458.

In the instant case, it is undisputed that Lowe filed a Form 50 Request For Hearing within the one year time frame. He then withdrew his hearing request as a matter of right

pursuant to S.C. Workers' Compensation Regulation 67-609(2010). Subsequently, Lowe re-filed his Form 50 Request For Hearing after the expiration of the one year statute of limitations.

Lowe submits that he, like the claimant in the Wilson case, satisfied the one year statute of limitations filing requirement when he timely filed his July 3, 2013 Form 50 Request For Hearing within the one year allotted time frame following the last payment of compensation. According to the Wilson case, there is a "plain and unambiguous requirement that such a claim be filed within the twelve-month deadline." Wilson at p. 458. As such, the first question that must be addressed is whether Lowe's July 3, 2013 Form 50 Request For Hearing "filed a claim" within the twelve month deadline. According to S.C. Workers' Compensation Regulation 67-207 (2010), the filing of a Form 50 Request For Hearing "files the claim." (S.C. Workers' Compensation Regulation 67-207 (2010)) Lowe submits that the question is answered in the affirmative, and his claim for a change of condition for the worse was timely filed within the twelve-month deadline.

As long as the claim was timely filed, the actual hearing on the issue of Lowe's change of condition claim need not have been held within one year. *See Allen v. Benson Outdoor Adver. Co.*, 236 S.C. 22, 112 S.E.2d 722 (1960). Plus, according to the Wilson case, it is not statutorily required that Lowe's physical change of condition for the worse occur entirely within the one year period after last payment of compensation so long as the claim was filed timely within one year. The Wilson Court stated that construction of S.C. Code Ann. § 42-17-90(A)(2010) in such a manner contrary to this would "impose a requirement upon claimants not intended by the Legislature." Wilson at p. 457. Although, in the instant case, Lowe was actually able to show that his change of condition for the

worse was in fact present during the one year time period, as his MRI showing the change of condition for the worse was taken in August 2013 and the one year statute of limitations for filing Lowe's change of condition claim did not expire until October 2013. (*See* APA p. 3; *See* Form 19 dated October 3, 2012)

In the instant case, the Commission found that, although Lowe had the right to withdraw his hearing request and re-file it at a later date, Lowe's Form 50 Request For Hearing of September 3, 2015 was untimely because it was required to be re-filed within the one year time period following the last payment of compensation. (Appellate Panel Decision and Order, filed February 23, 2017) Essentially, the Commission said that Lowe was statutorily required to request the hearing on his change of condition for the worse claim within one year following the last payment of compensation. Lowe submits that this was legal error. The Wilson case states that this is a requirement that is not intended by the legislature and that the language of the statute requires that the "claim be filed prior to the twelve month deadline." Wilson at p. 458. It does not mandate that a hearing on the matter must be requested within the twelve months; rather, it requires that a claim be filed. *See* Wilson at pp. 458. In this case, Lowe did in fact file a claim prior to the twelve month deadline when he filed his Form 50 Request For Hearing on July 3, 2013.

Whether Lowe elected to withdraw his hearing request pursuant to S.C. Workers' Compensation Regulation 67-609 (2010), with leave to renew, and re-request the hearing at a later date does not change the fact that Lowe timely filed a claim when he filed his Form 50 Request For Hearing, alleging a change of condition for the worse on July 3, 2013, prior to the twelve month deadline. At that point in time, the twelve month statute of limitations requirement was satisfied. Lowe did not somehow "un-file" his claim when he

elected to withdraw his hearing request as a matter of right, with leave to renew, pursuant to S.C. Workers' Compensation Regulation 67-609 (2010).⁴ It is common practice for claimants to file their workers' compensation claims formally by way of a Form 50 Request For Hearing and, if necessary, withdraw their hearing request prior to the hearing. S.C. Workers' Compensation Regulation 67-609 (2010) specifically states that a Form 50 Request For Hearing "files the claim." Furthermore, when a claimant withdraws a hearing request and a notice is sent out by the Commission removing the case from the hearing docket, "[t]he notice is without prejudice to the claimant's right to proceed with his or her claim." S.C. Workers' Compensation Regulation 67-609(B) (2010). Nowhere in these applicable regulations does it indicate that withdrawing a hearing request as a matter of right, with leave to renew, "un-files" a workers' compensation claim such that the statute of limitations is no longer satisfied and begins to run again. To the contrary, Lowe would argue that it is the intent of the Commission, by promulgating the above regulations, to allow claimants to file their claims by use of the Form 50, whether they request a hearing or not, and to have free leave to remove their claim from the hearing docket if the claimant so chooses, without prejudice.

In Allen v. Benson Outdoor Advertising Co., regarding the one year change of condition statute of limitations, the Court stated, "[w]e have gone no further than to hold that the application for review must be made within one year after the last payment of compensation." Allen at p.30, 112 S.E.2d at 725-726.⁵ The Wilson Court applied that

⁴ The Form 50 is the claimant's mechanism for not only filing a workers' compensation claim, but also for requesting a hearing. This is true for a claimant's initial claim as well as for change of condition claims. Whether the Form 50 is for Notice Of Claim only, or a Request For Hearing, the end result is the same. A claim is filed, and the statute of limitations is satisfied. *See* S.C. Workers' Compensation regulations 67-206 and 67-207(2010). Again, this is true for a Claimant's initial claim as well as for change of condition claims.

⁵ Lowe submits that an "application for review" has been widely interpreted to mean the filing of a claim.

holding when it found that Wilson's change of condition for the worse claim was not barred by the statute of limitations because Wilson "satisfied the statute's plain and unambiguous requirement that such a claim be filed within the twelve-month deadline." Wilson at p. 458.

When read together, Lowe submits that the Allen and Wilson Courts have interpreted the language of S.C. Code Ann. § 42-17-90(A)(2010) to place a burden upon a workers' compensation claimant to timely file a claim within one year of the last payment of compensation if he or she intends to pursue a change of condition claim. The statute does not require that the worsening specifically take place during, or reach a full point of worsening, during the one year time period; nor does the statute require that a workers' compensation hearing be requested during the one year time period. What the statute requires is that the claimant file a claim during the one year time period after last payment of compensation. Lowe did exactly this, and met this burden, when he filed a Form 50 Request For Hearing on July 3, 2013. By doing so, Lowe satisfied the statute of limitations. It was legal error for the Commission to find otherwise.

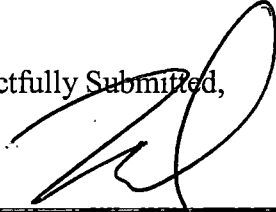
CONCLUSION

This Honorable Court should reverse the Decision and Order of the Appellate Panel. Appellant Donnie Lowe sustained a change of condition for the worse and his claim was timely filed prior to the expiration of the twelve (12) month statute of limitations specified in S.C. Code Ann. § 42-17-90(A)(2010). The Appellate Panel committed legal error when they found otherwise and should be reversed. The case should be remanded to

The claimant's mechanism for filing a change of condition for the worse claim is the Form 50, whether it be for Notice of Claim only or a Request For Hearing. There is no workers' compensation form specific to change of condition claims. A timely Form 50, whether it requests a hearing or not, files the claim and satisfies the applicable statute of limitations.

the South Carolina Workers' Compensation Commission to enter findings of fact and conclusions of law regarding Lowe's change of condition for the worse claim.

Respectfully Submitted,



May 18, 2017

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May 18, 2017

The Honorable Jenny Abbott Kitchings
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**RE: Donnie Lowe, Employee, Claimant, Appellant v. BMW,
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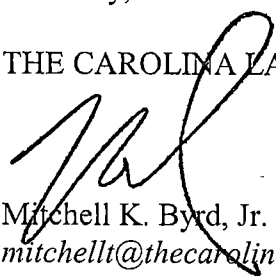
Dear Ms. Kitchings:

Please find enclosed for filing the original and two (2) copies of the Initial Brief of Appellant and Appellant's Designation of Matter to be Included in the Record on Appeal, along with our Proof of Service of same, in the above-referenced case. We would sincerely appreciate you filing the originals and returning the file stamped copies in the enclosed, self-addressed, stamped envelop.

As always, we greatly appreciate your assistance in this matter.

Sincerely,

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MKB,Jr./t/m
Enclosures

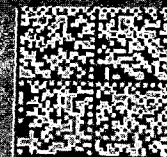
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