BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S APPELLATE PANEL

JILL PIERS, Claimant, v. ROCK HILL SCHOOL DISTRICT, Employer, and S.C. SCHOOL BOARDS INSURANCE TRUST, Carrier, Defendants.	)	W.C.C. File No. 1521215 **DECISION & ORDER**

Statement of the Case

This matter is before the Commission's Appellate Panel pursuant to the Claimant's appeal from the April 13, 2017 Decision and Order of Hearing Commissioner Gene McCaskill. Hearing Commissioner McCaskill held a hearing on August 26, 2016 in Rock Hill, South Carolina pursuant to the Forms 50 and 51. The Claimant was present at the hearing and represented by Andrea C. Roche of Mickle and Bass. The Defendants were represented at the hearing by Kirsten L. Barr of Trask & Howell.

The Claimant alleges that she sustained an injury to her "sinuses, headaches, longs, congestion" by either accident or occupational disease on August 1, 2015. She admits that she has pre-existing allergies and pre-existing asthma. The Claimant contends that she is not at maximum medical improvement and seeks additional medical evaluation and treatment and asks that Dr. Alleyne be appointed her authorized treating physician. While the Claimant's Form 50 only states that a determination of

permanent disability would be premature, at the Hearing the Claimant argued that she is entitled to benefits as a result of a whole person impairment rating of ten to 25 percent issued by Dr. Alleyne should she be found to have reached maximum medical improvement.

The Defendants denied the Claimant sustained any injury by accident or occupational disease arising out of or in the course of her employment with the School District and denied the Claimant's pre-existing conditions were aggravated by any alleged accident on August 1, 2015. The Claimant had been diagnosed with, and treated for, allergies, chronic rhinitis, migraines and headaches prior to August 1, 2015 and the Claimant did not report any accident or injury to anyone at the School District on August 1, 2015 or in the days, or weeks, or months that followed. The Defendants argued that the Claimant did not give notice of any alleged accident or injury until five months later, January 19, 2016 and that there is no competent medical evidence that the alleged accident on August 1, 2015 caused or aggravated the Claimant's known pre-existing conditions or that the Claimant requires any additional medical treatment as a result of the alleged accident on August 1, 2015.

Following the hearing and review of the evidence in the record, Hearing Commissioner McCaskill denied the claim based upon the following:

Findings of Fact

1. *Both the Claimant and the Employer were covered by the South Carolina Workers' Compensation Act at the time in question.*
2. *The Claimant was diagnosed with, and treated for allergies, chronic rhinitis, migraine headaches, and asthmas – unrelated to her employment – prior to August 1, 2015.*

3. *The Claimant filed a Form 50 alleging either an "injury" or "occupational disease" on "8/1/2015" due to mold exposure. The Claimant did not amend her Form 50 at any time before the hearing. The Claimant's Form 58 also claims a date of injury of "8/1/15."*
4. *The Claimant admits that she did not report any accident or injury to her employer on August 1, 2015 and she describes no accident or injury or change in her pre-existing symptoms on that date. According to the Claimant's testimony, she believes her symptoms occurred gradually after August 1, 2015. The greater weight of the evidence indicates that the Claimant did not sustain any injury by accident or occupational disease arising out of or in the course of her employment on August 1, 2015.*
5. *There is no competent medical evidence that the Claimant's alleged injuries to her sinuses or lungs, or her symptoms of headaches or congestion, were caused or aggravated by any alleged accident or injury on August 1, 2015.*
6. *There is no competent evidence that the injuries the Claimant alleges are peculiar to her employment as a school teacher.*

Conclusions of Law

1. Pursuant to S.C. Code Ann. § 42-1-160, the Claimant did not sustain any injury by accident arising out of or in the course of her employment on August 1, 2015. Neither the Claimant, nor any medical expert relates

any of the Claimant's alleged injuries to any alleged accident on that date. In addition, the Claimant has not claimed benefits under the repetitive trauma statute, S.C. Code Ann. § 42-1-172, though she testified that she believes her injuries were gradual in nature.

2. Pursuant to S.C. Code Ann. 42-11-10, the Claimant has failed meet any of the required elements of the occupational disease statute. Clearly, sinus problems, headaches, and congestion are not "peculiar" to teaching school and; therefore, the Claimant's occupational disease claim is denied.

3. Pursuant to S.C. Code Ann. § 42-15-20, the Claimant failed to give notice of any accident or injury within ninety (90) days, as specifically required by the statute and; therefore, the claim is barred.

4. Pursuant to S.C. Code Ann. § 42-9-35, there is no medical evidence that the alleged accident on August 1, 2015 aggravated the Claimant's documented, pre-existing conditions involving her sinuses, headaches, or lungs and; therefore, the Claimant failed to meet her burden of proof under this section as a matter of law.

5. Pursuant to S.C. Code Ann. § 42-15-60, the Claimant is not entitled to any medical benefits for the alleged accident on August 1, 2015, for the reasons set forth above, and furthermore, because there is no medical evidence stated to a reasonable degree of medical certainty that the Claimant requires any medical care or treatment to lessen the alleged period of disability.

On appeal, the Claimant raises the following arguments:

I. *Did the Hearing Commissioner err in denying Claimant's Motion to Amend the Pleadings in order to conform with the evidence?*

II. *Did the Hearing Commissioner err in ruling Claimant's injuries were not compensable injuries by accident when controlling precedent holds that exposure to harmful materials are, in fact, injuries by accident?*

III. *Did the Hearing Commissioner err in ruling that Claimant did not provide adequate notice of her injuries when the notice standard is different for exposure and occupational disease claims than it is for pure accidental injury claims?*

After receiving briefs from both parties and after hearing Oral Arguments in Columbia, the Appellate Panel hereby AFFIRMS the Decision and Order of the Hearing Commissioner in its entirety.

Discussion

I. The Hearing Commissioner properly denied the untimely motion to amend the pleadings in accordance with S.C. Code Reg. 67-610.

The Claimant argues that she should have been permitted to amend her pleadings to allege a new accident date after the hearing concluded and that "a new hearing should

be ordered based on the new pleadings."[1] Instead of alleging an accident on August 1, 2015 as she did on her Forms 50, Form 58, and in her opening arguments before the Hearing Commissioner, the Claimant now wishes to allege an accident "on or about August 1st," despite the fact that discovery has long since concluded and all of the evidence has been taken and the record closed. According to the Claimant, "[t]here is no requirement in the Act nor the case law that a motion to amend the pleadings be made prior to a hearing." This argument is without merit.

The Hearing Commissioner properly denied the Claimant's motion in accordance with S.C. Code Reg. 67-610(B), which clearly and unequivocally states that:

> "A party may amend a form once as a matter of course at any time before or within thirty days after it is served. Otherwise **a party may amend a form no later than ten days prior to the hearing** and only by leave of the Commissioner or by written consent of the adverse party." (emphasis supplied).

According to the mandates of this regulation, the Claimant simply cannot amend her Form 50 "later than ten days prior to the hearing," and the Commission is without authority to abrogate this requirement under any circumstances.

Not only does the Claimant deny the existence of the plain language of S.C. Code Reg. 67-610(B) in her brief to the Appellate Panel, she resorts to arguments regarding the South Carolina Rules of Civil Procedure, which by its own terms does not apply to administrative claims under the Workers' Compensation Act. *See* Rules 1 & 81,

---

[1] The request for a new hearing was made for the first time on the final page of the Claimant's brief to the Appellate Panel, without citation of authority.

S.C.R.C.P. Therefore, such arguments regarding the procedure for civil claims are without merit and cannot be used to supersede the plain requirements of S.C. Code Reg. 67-610(B), which clearly apply in the present context.

In addition, the Claimant cites a 1941 workers' compensation case, Ferguson v. State Highway Dept., 197 S.C. 520, ostensibly in support of her motion to amend the pleadings after the hearing. However, Ferguson was issued more than a half century prior to the promulgation of S.C. Code Reg. 67-610(B) in 1992 and is; therefore, inapplicable to the issues *sub judice*. More importantly, the facts of Ferguson are clearly distinguishable. In Ferguson, the motion to amend the "notice of the claim" was made during the pendency of discovery and prior to the hearing. Here, the motion to amend was made after discovery was completed, after the hearing and after all of the briefs and evidence were presented to the Commission. Therefore, the Claimant's reliance of Ferguson is wholly misplaced.

The Claimant goes on to suggest that S.C. Code Reg. 67-611, which governs pre-hearing briefs, somehow permits her to amend her Form 50 after the hearing. While this regulation does require a party to amend or supplement responses on the Form 58 that are known to be incorrect, this by no means permits a Claimant to amend a Form 50 after a hearing or otherwise contravene the plain requirements of S.C. Code Reg. 67-610, which prohibit amendment of the Form 50 "later than ten days prior to the hearing."

Because the Claimant's motion to amend her pleadings was made "later than ten days prior to the hearing," and more specifically, after the hearing, the Hearing Commissioner properly denied her motion and the Appellate Panel hereby affirms this decision.

II. Regardless of the alleged date of accident, the claim does not meet the requirements of S.C. Code Ann. § 42-1-160.

The Claimant argues that the Hearing Commissioner "misinterpreted or misapplied the relevant and controlling caselaw [sic] which clearly holds that an exposure is, in fact, an accident where the result of the exposure is unexpected." Again, the Claimant misrepresents both the Hearing Commissioner's conclusions of law and the applicable legal authority.

The Hearing Commissioner denied the claim under S.C. Code Ann. § 42-1-160 based upon the following:

> "...the Claimant did not sustain any injury by accident arising out of or in the course of her employment on August 1, 2015. Neither the Claimant, nor any medical expert relates any of the Claimant's alleged injuries to any alleged accident on that date. In addition, **the Claimant has not claimed benefits under the repetitive trauma statute, S.C. Code Ann. § 42-1-172, though she testified that she believes her injuries were gradual in nature**." (emphasis supplied).

Not only is this conclusion supported by substantial evidence (*see* Hrg. T. p.36, line 9 – p.37, line 21), but it accurately reflects the current requirements of S.C. Code Ann. § 42-1-160.

In 2007 – decades after the cases cited by the Claimant – S.C. Code Ann. § 42-1-160 was amended to include the following provision:

"(F) The word "accident" as used in this title must not be construed to mean a series of events in employment, of a similar or like nature, occurring regularly, continuously, or at frequent intervals in the course of such employment, over extended periods of time. Any injury or disease attributable to such causes must be compensable only if culminating in a compensable repetitive trauma injury pursuant to Section 42-1-172 or an occupational disease pursuant to the provision of Chapter 11 of this title."

Because the Claimant testified that she believes her injuries developed "gradually over a period of time" (Hrg. T.p.42, lines 20—24) and because she now argues that this is "a mold exposure case, not a mold accident case" that did "not occur on a single day," but "over a period of months,"[2] she is not entitled to benefits under S.C. Code Ann. § 42-1-160 as a matter of law.

Similarly, because she has never claimed benefits under the repetitive trauma statute[3], S.C. Code Ann. § 42-1-172, she is not entitled to benefits under that section as a matter of law because the issue is simply not before the Commission. Lastly, the Hearing Commissioner properly concluded that the Claimant "failed to meet any of the required elements of the occupational disease statute," S.C. Code Ann. § 42-11-10, and the Claimant did not appeal this ruling, making it the law of the case. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997)

---

[2] The pages of the Claimant's Brief to the Appellate Panel are unnumbered; however, these quotations are taken from the 17th page.

[3] Indeed, the Claimant has not moved to amend her Form 50 to include a repetitive trauma claim. Neither her Forms 50, nor her Form 58, nor her Brief to the Appellate Panel make any allegation that she is entitled to benefits under S.C. Code Ann. § 42-1-172.

(holding that an unappealed ruling is the law of the case); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159,161, 177 S.E.2d 544, 544 (1970) (stating that an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.").

Therefore, the Hearing Commissioner properly concluded that the Claimant did not sustain any injury by accident on August 1, 2015, as alleged. Even had she been permitted to amend her claim to allege an accident "on or about August 1st," her claim would still not meet the requirements of an "accident" under S.C. Code Ann. § 42-1-160 because the Claimant repeatedly alleged at the hearing and in her brief to the Appellate Panel that her injuries were gradual in onset and occurred over a period of months. As such, the Hearing Commissioner's Decision and Order is affirmed.

III. The Hearing Commissioner properly concluded that the claim is barred by failure to give proper notice under S.C. Code Ann. § 42-15-20.

The Claimant's Forms 50 both allege that she gave notice of her alleged injuries to her employer on August 1, 2015. At the hearing, the Claimant was forced to admit under cross-examination that this was not true – she did not report any accident or injury to anybody at the school district on August 1, 2015. (Hrg. T. p.37, lines 12-15). The record, in fact, indicates that the Claimant did not report any injury to the school district until January 19, 2016. (Hrg. T. p.41, line 21 – p.42, line 11; APA p.38—39). Therefore, it is clear that the Claimant did not report any accident or injury to her employer within the 90 days required by S.C. Code Ann. § 42-15-20, that her Forms 50 contained false

statements of material fact, and; therefore, the Hearing Commissioner's findings and conclusions in this regard should be affirmed.

Despite her repeated claims that she gave verbal notice to her employer on August 1, 2015, the Claimant now alleges that she was not required to give notice within 90 days of her accident, despite the plain terms of S.C. Code Ann. § 42-15-20 to the contrary. According to the Claimant, her claim should be treated as a "repetitive trauma," despite the fact that she has not filed any claim for repetitive trauma, and she cites case law involving the application of the notice provision to actual repetitive trauma claims. Obviously, this argument is without merit, as the only claim before the Commission is an "accident" claim under S.C. Code Ann. § 42-1-160.[4]

Furthermore, the Claimant alleges that her failure to give notice under § 42-1-160 should be excused because she didn't have the results of mold testing until December. However, this position is clearly contrary to the Claimant's allegations regarding notice in the pleadings and this new argument should not be entertained on appeal. To hold otherwise would be to reject the overwhelming consensus of authority:

> "It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts

[4] The Claimant repeatedly attempts to characterize this claim as an "exposure" claim; however, the law recognizes only three classes of claims: accidents, repetitive trauma, and occupational diseases. The term "exposure" is of no legal consequence.

> which are admitted by the pleadings are taken as true against the pleader for the purpose of the action."

Skull Creek Club Ltd. Partnership v. Cook and Book, Inc., 313 S.C. 283, 289, 437 S.E.2d 163, 166 (Ct. App. 1993) (quoting Elrod v. All, 243 S.C. 425, 134 S.E.2d 410 (1964)); *see also* Mellon Bank, N.A. v. Carroll, 314 S.C. 468, 445 S.E. 2d 466 9 (Ct. App. 1994); Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992).

Furthermore, the mere fact that the Claimant did not have the results of mold testing did not prevent her from giving notice of her alleged injury, as required by statute. According to the South Carolina Supreme Court, statutes of limitations do not begin to run

> "when advice of counsel is sought or a full-blown theory of recovery is developed. The date of discovery is not when the plaintiff discovers a witness to support or prove his case." Johnston v. Bowen, 313 S.C. 61, 437 S.E.2d 45 (1993) (emphasis added).

Instead, the "standard as to when the limitations period begins to run is objective, rather than subjective." Gibson v. Bank of American, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). Here, the statute of limitations began to run when Piers knew, or by the exercise of reasonable diligence could have known, that she might have symptoms related to her employment, "not when advice of counsel is sought or a full-blown theory is developed." Gibson, *supra*, citing Burgess v. Am. Cancer Soc'y, 300 S.C. 182, 187, 386 S.E.2d 798, 800 (Ct. App. 1989) and Grillo v. Speedrite Products, Inc., 340 S.C. 498, 503, 532 S.E.2d 1, 3 (Ct. App. 2000) (quoting Snell v. Columbia Gun Exch.,

Inc., 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). As her own pleadings indicate, Piers could have given notice on August 1, 2015 as alleged, but simply failed to do so until January 19, 2016. Therefore, the Hearing Commissioner's findings and conclusions regarding notice are affirmed.

IV. The Hearing Commissioner's finding and conclusion under S.C. Code Ann. § 42-9-35 was not appealed and is the law of the case.

The Hearing Commissioner specifically concluded that:

> "Pursuant to S.C. Code Ann. § 42-9-35, there is no medical evidence that the alleged accident on August 1, 2015 aggravated the Claimant's documented, pre-existing conditions involving her sinuses, headaches, or lungs and; therefore, the Claimant failed to meet her burden of proof under this section as a matter of law."

The Claimant did not appeal this legal conclusion, or the concomitant finding of fact. Indeed, the Claimant's brief to the Appellate Panel makes no mention of S.C. Code Ann. § 42-9-35 whatsoever.[5] Therefore, the Hearing Commissioner's finding and conclusion that the Claimant's is not entitled to any benefits under the Act pursuant to S.C. Code

[5] Without referencing S.C. Code Ann. § 42-9-35, the Claimant's burden of proof under that statute, or the Hearing Commissioner's specific finding and conclusion regarding her failure to meet that burden, the Claimant does inexplicably suggest that the burden was upon the Respondents to offer "expert medical evidence that Claimant's current problems were the result of a mere continuation of her pre-existing issues..." This argument is without merit.

Ann. § 42-9-35 is the law of the case and bars her claim irrespective of any arguments about amending her pleadings or excusing the notice requirement.

As noted above, an unappealed ruling – right or wrong – is the law of the case and cannot be disturbed on appeal. ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 489 S.E.2d 470 (1997) (holding that an unappealed ruling is the law of the case); Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159,161, 177 S.E.2d 544, 544 (1970) (stating that an unchallenged ruling, "right or wrong, is the law of this case and requires affirmance.").

Moreover, the Hearing Commissioner's finding and conclusion in this regard is supported by none other than the Claimant's own physician, Dr. Alleyne, who testified that there is no objective evidence that the Claimant's pre-existing condition worsened to "any degree" as a result of any alleged exposure (Alleyne T. p.50, lines 8—15), that the Claimant does not currently require any medical treatment (Alleyne T. p.38, lines 22—24), and that he could not attribute any impairment due to alleged mold exposure (Alleyne T. p.51).[6] Therefore, the Claimant's claim for benefits was properly denied under S.C. Code Ann. § 42-9-35 and this denial is hereby affirmed by the Appellate Panel.

Conclusion

After careful review of the Record on Appeal and the arguments of the parties, the Appellate Panel AFFIRMS the Hearing Commissioner's Decision and Order and adopts the following findings and conclusions:

[6] Note that the Claimant has no lost time from work and has no work restrictions. (Hrg. T.p.46, lines 3—4).

Findings of Fact

1. Both the Claimant and the Employer were covered by the South Carolina Workers' Compensation Act at the time in question.
2. The Claimant was diagnosed with, and treated for allergies, chronic rhinitis, migraine headaches, and asthmas – unrelated to her employment – prior to August 1, 2015.
3. The Claimant filed a Form 50 alleging either an "injury" or "occupational disease" on "8/1/2015" due to mold exposure. The Claimant did not amend her Form 50 at any time before the hearing. The Claimant's Form 58 also claims a date of injury of "8/1/15."
4. The Claimant admits that she did not report any accident or injury to her employer on August 1, 2015 and she describes no accident or injury or change in her pre-existing symptoms on that date. According to the Claimant's testimony, she believes her symptoms occurred gradually after August 1, 2015. The greater weight of the evidence indicates that the Claimant did not sustain any injury by accident or occupational disease arising out of or in the course of her employment on August 1, 2015.
5. There is no competent medical evidence that the Claimant's alleged injuries to her sinuses or lungs, or her symptoms of headaches or congestion, were caused or aggravated by any alleged accident or injury on August 1, 2015.
6. There is no competent evidence that the injuries the Claimant alleges are peculiar to her employment as a school teacher.

Conclusions of Law

1. Pursuant to S.C. Code Ann. § 42-1-160, the Claimant did not sustain any injury by accident arising out of or in the course of her employment on August 1, 2015. Neither the Claimant, nor any medical expert relates any of the Claimant's alleged injuries to any alleged accident on that date. In addition, the Claimant has not claimed benefits under the repetitive trauma statute, S.C. Code Ann. § 42-1-172, though she testified that she believes her injuries were gradual in nature.

2. Pursuant to S.C. Code Ann. 42-11-10, the Claimant has failed meet any of the required elements of the occupational disease statute. Clearly, sinus problems, headaches, and congestion are not "peculiar" to teaching school and; therefore, the Claimant's occupational disease claim is be denied.

3. Pursuant to S.C. Code Ann. § 42-15-20, the Claimant failed to give notice of any accident or injury within ninety (90) days, as specifically required by the statute and; therefore, the claim is barred.

4. Pursuant to S.C. Code Ann. § 42-9-35, there is no medical evidence that the alleged accident on August 1, 2015 aggravated the Claimant's documented, pre-existing conditions involving her sinuses, headaches, or lungs and; therefore, the Claimant failed to meet her burden of proof under this section as a matter of law.

5. Pursuant to S.C. Code Ann. § 42-15-60, the Claimant is not entitled to any medical benefits for the alleged accident on August 1, 2015, for the reasons set forth above, and furthermore, because there is no medical evidence stated to a reasonable degree

of medical certainty that the Claimant requires any medical care or treatment to lessen the alleged period of disability.

IT IS SO ORDERED!

Avery B. Wilkerson, Jr.
S.C. Workers' Compensation Commissioner

Dated: 8-30-2017

WE CONCUR:

T. Scott Beck, Commissioner

Melody L. James, Commissioner

6860\939\Appellate Panel Decision & Order

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia on September 25, 2017