

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1102937
Appellate Case No. 2016-000514

RECEIVED
FEB 01 2018
SC Court of Appeals

Barry Adickes, Claimant, Respondent,

v.

Philips Healthcare, Employer,
and Fidelity and Guarantee
Insurance Company, Carrier, Appellants.

PETITION FOR REHEARING

This petition is filed pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules. Rule 221 governs rehearing petitions. Rule 240 governs motions and petitions.

The Court issued its decision January 17, 2018. See Op. No. 2018-UP-027. This petition is timely under Rule 221(a).

Respondent wishes to preserve the arguments from briefing for further review. In addition to those arguments, Respondent respectfully submits the Court may have overlooked or misapprehended the following points in its decision.

*

The Workers' Compensation Act is not read literally. The Act is to be read liberally and in the injured workers' favor. *Ham v. Mullins Lumber Co.*, 193 S.C. 66, 78, 7 S.E.2d

712, 718 (1940). This applies to all workers' compensation laws—the law “will be construed liberally to effect its beneficent purpose.” *Cross v. Concrete Materials*, 236 S.C. 440, 446, 114 S.E.2d 828, 831 (1960). Every statute in the Act is to be read in a way that furthers the Act's purpose of protecting injured workers. “Strict construction” means reading exceptions to coverage narrowly, not rigidly.

The partial disability statute—section 42-9-20—is no different from, and no more a “limit” than, any other statute in the Workers' Compensation Act.

Consider the statute of limitations. It is read flexibly. The Act says the right to compensation is barred unless a claim is filed within two years of the “accident,” see S.C. Code Ann. § 42-15-10, but precedent says the statute is to be given a liberal construction. *Chapman v. Foremost Dairies*, 249 S.C. 438, 451, 154 S.E.2d 845, 852 (1967). A leading commentator explains the proper interpretation of this sort of provision is that it does not begin to run “until the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of his or her injury or disease.” 7 Lex K. Larson, *Larson's Workers' Compensation* § 126.05[1] (2003). A literal interpretation would not support this reading, but South Carolina does not follow a literal interpretation. South Carolina generally follows Prof. Larson's rule. *Mauldin v. Dyna-Color/Jack Rabbit*, 308 S.C. 18, 22, 416 S.E.2d 639, 641 (1992) (the discovery rule applies to workers' compensation cases; also mentioning Prof. Larson's treatise).

The same flexible meaning is applied to the Act's one-year limitation on the commission's ability to adjust an award for a change of condition. See S.C. Code Ann. § 42-17-90. Here too, the Supreme Court rejected “a literal and strict construction” because the

“well settled rule” was that “a liberal construction is required.” *Allen v. Benson Outdoor Advert. Co.*, 236 S.C. 22, 30, 112 S.E.2d 722, 725 (1960).

Partial lump-sum payments of lifetime benefits awards are permitted because this Court applied a narrow construction of the statute prohibiting lump-sum payments. *Cox v. BellSouth Telecomm.*, 356 S.C. 468, 472, 589 S.E.2d 766, 768 (Ct. App. 2003). According to the Supreme Court, that narrow construction “confirms [] the Commission regularly exercises its flexibility” in making awards that ensure an injured worker’s best interests are protected “to the extent the award is not otherwise prohibited by [the Act].” *James v. Anne’s Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010).

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The Act does not “otherwise prohibit” a 340-week award to someone like Barry Adickes. The partial disability statute references the “date of injury,” but “injury” is a debatable term and its application to these circumstances is unclear. The Act nebulously defines injury as “injury by accident arising out of and in the course of employment[.]” S.C. Code Ann. § 42-1-160. We might say Barry injured his head when his car crashed, but it is just as fair to say Barry’s earning capacity was not injured until he lost his job at Phillips. Pinpointing when Barry’s cognitive abilities were injured is elusive and may be impossible. As far as Barry knew, he was performing his job when he went back to work—he had no cognizable injury. It was only after he lost his job that his impairment became fully-evident.

In the case of a worker who falls and breaks a bone, the date of injury is obvious. In the case of a claimant with a cognitive deficiency that reveals itself over time, it seems reasonable to read “injury” to mean the date the cognitive deficiency impaired the claimant’s

ability to earn his or her pre-accident wages. This interpretation is fairly comparable to the flexible interpretation the Supreme Court applied to the word “accident,” which it read in *Drake v. Raybestos-Manhattan, Inc.*, to mean the time a claimant became disabled from an occupational disease. 241 S.C. 116, 122, 127 S.E.2d 288, 291 (1962).

Appellants and their amicus noted the Commission’s award was based on the Commission’s long-standing interpretation of the wage loss statute. Precedent explains the court should defer to an agency’s interpretations of a statute entrusted to the agency’s administration “unless there is a compelling reason to differ.” *Kiawah Dev. Partners, II v. S.C. Dep’t of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014). This is the state counterpart to *Chevron* deference, which provides a federal court will not substitute its construction of a statute administered by an agency in place of a “reasonable interpretation” made by that agency. *Chevron, U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984). There is no compelling reason to overrule the Commission’s interpretation here, as this case involves the unusual circumstance of a claimant whose cognitive injury does not have a definite time of occurrence and revealed itself gradually.

The Commission did not allow Barry to receive permanent partial disability benefits during the same period Barry returned to work and was working full time. It awarded Barry 340-weeks of benefits from the time his wage loss was injured. Also, the comparison between full-time work and weeks of disability benefits rests on a false equivalence. Barry was getting paid because he was doing his job. His wages during that period are not

compensation for the reduced earning capacity Barry's cognitive deficiency will produce over the remainder of his working life.

Phillips isn't being asked to pay anything more than other employers. Phillips paid Barry for the wages he earned while he was working, and it was ordered to pay Barry 340 weeks of benefits for the permanent injury to Barry's earning capacity. At the end of the day, Barry is just getting less in disability benefits, and Phillips is getting to pay less in benefits, without a good reason.

CONCLUSION

The Court should grant this petition and issue an opinion fully affirming the Workers' Compensation Commission's decision.

Respectfully submitted,

 SL BAR#: 72825

February 1, 2018

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Barry Adickes, Claimant, Respondent,

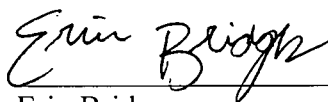
v.

Philips Healthcare, Employer,
and Fidelity and Guarantee
Insurance Company, Carrier, Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served
counsel for the Appellants with a copy of the *Petition for Rehearing* by mailing copies of
the same by United States Mail with first class postage prepaid to the following address:

Brooke A. Payne
Lueder, Larkin & Hunter
503 Wando Park Blvd., Ste. 205
Mt. Pleasant, SC 29464



Erin Bridges

February 1, 2018

February 1, 2018

VIA HAND DELIVERY

The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED
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SC Court of Appeals

Re: Barry Adickes v. Philips HealthCare
Case Tracking No. 2016-000514

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of a *Petition for Rehearing* in reference to the above matter. I have also enclosed a proof of service of this document on counsel for the Appellants and a \$25.00 check for filing this motion. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,



Erin Bridges
Paralegal

BLUESTEIN THOMPSON SULLIVAN, LLC

/emb

Enclosures

cc: William L. Smith, II, Esquire
Brooke A. Payne, Esquire
Grady L. Beard, Esquire
Nicolas L. Haigler, Esquire

