THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2017-002396
W.C.C. File No. 1408826

Gennette Sowell,

Respondent,

v.

Piggly Wiggly,

and

Auto Owners Insurance Inc.,

Appellants.

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SC Court of Appeals

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This matter came before the Single Commissioner pursuant to the parties' Forms 50 and 51. The hearing was held before the Honorable Melody James on June 22, 2016 and July 21, 2016 in Columbia, South Carolina. Claimant, Gennette Sowell, alleged she contracted occupational asthma as a result of injury by accident, repetitive trauma and/or occupational disease while employed at Piggly Wiggly. Claimant alleged she sustained occupational asthma as well as injuries to her lungs, pulmonary system and autoimmune system as the result of her employment with Piggly Wiggly. The Claimant pled this claim as an injury by accident, repetitive trauma as well as occupational disease. (See Form 50 filed July 17, 2014; September 26, 2014; Amended November 11, 2014).

Appellants denied Claimant's allegations and the claim in its entirety. Specifically, Appellants denied that the Claimant sustained either an injury by accident, occupational disease or repetitive trauma inhalation injury resulting in asthma. Additionally, Appellants timely and properly raised the affirmative defenses of notice and the Statute of Limitations in reference to all three bases of Claimant's claim for benefits. The Defendants maintained that there is medical evidence to suggest that the Claimant's sensitivities extend to exposures beyond those found in the work place. Moreover, the Claimant failed to provide sufficient notice of her claim to the Employer and the Claimant's claim is barred by the statute of limitations.

The Single Commissioner found Claimant permanently and totally disabled by Order dated May 16, 2017. Specifically, the Single Commissioner found Claimant suffered from asthma as a result of a repetitive trauma accident during the course and scope of her employment with Piggly Wiggly. Claimant was also awarded future medical treatment "as specifically referred to in the records of [her treating physicians]".

The Appellants timely filed a Form 30 requesting a review of the Single Commissioner's Order. A hearing before the Appellate Panel of the Workers' Compensation Commission was held on August 22, 2017. The Appellate Panel fully affirmed the Single Commissioner's decision by Decision and Order dated October 17, 2017.

Appellants timely filed a Notice of Appeal with this Court on November 16, 2017. This Initial Brief of the Appellants follows.

STATEMENT OF FACTS

The Claimant, was hired to work in the deli department for Piggly Wiggly in 1999, and was employed as the deli manager for approximately thirteen (13) years. (6/22/2016 Hr'g. Tr. at pp. 19-20). The Claimant maintains that her regular job responsibilities included cooking and cleaning the deli department, equipment and work areas. (6/22/16 Hr'g. Tr. at pp. 19-20). The Claimant indicated that she spent approximately 2 to 3 hours of her work day cleaning the deli area. The Claimant identified certain cleaning products she used during her employment which included "block whitener", "spit fire", Mr. Muscle", window cleaners and sanitizers. (6/22/2016 Hr'g Tr. at pp. 36-37). The Claimant further maintained that she was regularly exposed to grease and cooking oils, bacteria, mold, as well as commercial disinfectants, degreasers, cleaning and decontamination type products used in the industry. (Claimant's PHB at p. 2).

Furthermore, in addition to her normal and usual exposures, the Claimant alleged that in March or April, 2011, the deli department experienced an issue with the waste disposal drains, which resulted in an unpleasant smell and required her to use degreasers even more regularly in order to help prevent back-ups while her employer worked to resolve the drainage issue (Claimant's PHB at p. 2-3). More specifically, the Claimant testified that during the timeframe that the deli developed

blockage/plumbing issues the deli had a strong unpleasant smell and she was required to use Drano and bleach. (6/22/2016 Hr'g Tr. at pp. 30-37). The Claimant alleged that following this incident of 2011, she developed respiratory problems. (6/22/2016 Hr'g Tr. at pp. 38-39). Nevertheless, the Claimant did not stop working for Piggly Wiggly until nearly three (3) years later on January 6, 2014 and did not notify her employer that her condition was allegedly work-related until March 25, 2014. (Defendants APA, p. 396, First Report of Injury).

Based on the extensive medical evidence in the case, the Claimant first sought treatment for her alleged problems on June 3, 2011 from the Chesterfield General Hospital (Defendants' APA at pp. 219-224). At that time, the Claimant presented with symptoms of cough, congestion, and chest pains. (Id.) Although the Claimant indicated that her problems began approximately one week prior to this date of treatment, she reported no history of her problems being work-related. (Id.) The Claimant was provided treatment in the form of an EKG, a nebulizer, as well as prescription medications to include Prednisone, Decadron, Azithropcin, and Norco. (Defendants' APA at pp. 219-224). The Claimant sought and received subsequent medical treatment from Chesterfield General Hospital on June 11, 2011, again presenting with complaints of worsening bronchitis. (Defendants' APA at pp. 225-226). The Claimant was admitted into the hospital for three days and was treated for bronchitis with bronchospasm. (Id.) Portable chest x-rays showed no evidence of any acute cardiopulmonary disease. (Defendants' APA at p. 225).

The Claimant was then evaluated at Chesterfield General Hospital on December 23, 2011 and again presented with complaints of shortness of breath and wheezing. (Claimant's APA at pp. 173-175). At this point, the Claimant indicated that she had been exposed to strong odors such as Chloride and Ammonia at work. (Id.) The ER note states that this "probably" triggered her bronchial

asthma exacerbation. (Claimant's APA at p. 173). The ER physician indicated that the Claimant had not undergone a pulmonary function test to determine the severity of her asthma but also indicated that the Claimant worked in the cleaning business. (Claimant's APA at p. 173). The Claimant was provided with a CT scan of the chest, which failed to reveal a pulmonary embolism. (Claimant's APA at p. 174). Although the Claimant was diagnosed with a rib fracture, the EKG was normal. (Id.) Additional scans of the Claimant's chest also failed to reveal any evidence of cardio pulmonary disease. Accordingly, the Claimant was diagnosed with an acute asthma exacerbation, likely secondary to exposure to chemicals. (Claimant's APA at pp. 175-176). The Claimant was specifically advised to avoid chemical exposures as these were the triggers for her asthma exacerbation. (Claimant's APA at p. 171). Upon discharge by the hospital, the Claimant was provided with several prescription medications to include an albuterol inhaler for shortness of breath, Advair, Singulair, and Hydrochlorothiazide. (Id.) The Claimant was advised to follow up with her primary care doctor, Dr. Hammett, for subsequent treatment. (Id.)

The Claimant was also evaluated by Dr. Hammett of Carolina Physicians Group on December 6, 2011 and presented with complaints of coughing, chronic bronchitis and allergic rhinitis. (Defendants' APA at p. 256). The Claimant was diagnosed with acute chronic bronchitis and was prescribed the Claimant a nebulizer machine as well as a Z pack and Medrol dose pack. The Claimant returned to Dr. Hammett for a follow-up evaluation on December 27, 2011. (Defendants' APA at p. 258). Based on the medical report, the Claimant's symptoms occurred approximately 4 to 6 months prior to this date of treatment. Dr. Hammett indicated that the Claimant had a current diagnosis of asthma. (Defendants' APA, p. 258).

The Claimant sought treatment again from Chesterfield General Hospital on November 12, 2012 at which time the Claimant presented with complaints of shortness of breath/asthma. (Defendants' APA at p. 231). At that time the Claimant again contributed her problems to a cleaning compound, which she used at work as well as the fumes from cooking. (Defendants' APA at p. 231).

The Claimant also received medical treatment from Dr. Dayrit of Center for Lung and Sleep Medicine. Pursuant to the diagnostic report of Dr. Dayrit of December 19, 2012, the Claimant presented with complaints of shortness of breath and wheezing for the past two (2) years. (Defendants' APA at p. 304). Dr. Dayrit noted that the Claimant was exposed to cleaning chemicals at work to include the cleaners that were used. (Id.) Dr. Dayrit suggested the Claimant had sensitivity to chemicals that she was being exposed to at work. (Defendants' APA at p. 306). He further indicated there appeared to be a temporal relationship with her symptoms and further advised the Claimant that she should consider changing jobs if her wheezing continued. (Id.)

During her follow up with Dr. Dayrit on January 6, 2013, Dr. Dayrit indicated that the Claimant had not developed any exacerbations of her symptoms since returning to work. (Defendants' APA at p. 308). The Claimant was sent for a pulmonary function testing and provided Prednisone and inhalers. (Defendants' APA at p. 308). Upon review of the Claimant's pulmonary function test, Dr. Dayrit diagnosed the Claimant with extrinsic asthma in his diagnostic report of January 16, 2013. (Defendants' APA at p. 311). Pursuant to the medical note of Dr. Dayrit of February 11, 2013, Dr. Dayrit continued to assess the Claimant with asthma and allergies. (Defendants' APA at p. 314).

While treating with Dr. Dayrit, the Claimant returned to Dr. Hammett for additional treatment. Pursuant to Dr. Hammett's medical note of March 19, 2013, Dr. Hammett noted that the Claimant had a history of chronic asthma, exacerbation "that was determined to be work related and was suggested that she remove herself from the job, which she has not yet". (Defendants' APA at p. 268). Most interestingly, however, the Claimant continued to work for Piggly Wiggly for an additional ten (10) months thereafter until January 6, 2014.

That being said, the Claimant filed for Social Security Disability on December 12, 2013 while continuing to work for Piggly Wiggly. (Defendants' APA, pp. 361-367). Dr. Hammett later completed an initial disability claim form identifying the Claimant's first date of disability as December 6, 2011 (Defendants' APA at p. 368). The Claimant did not notify her employer that she contributed her respiratory problems to her employment until March 25, 2014, despite the fact that she initially developed these problems on June 3, 2011, informed the ER physician that she contributed her breathing problems to her work environment and was advised to avoid chemicals on December 23, 2011 and again on November 12, 2012, was advised to change jobs by Dr. Dayrit on January 6, 2013 if her wheezing continued, and was advised to discontinue work by Dr. Hammett in March 19, 2013 and again in November 2013. Nevertheless, the Claimant did not stop working for Piggly Wiggly until January 6, 2014 and did not notify her employer that her condition was allegedly work-related until March 25, 2014. (First Report of Injury, Defendants' APA at p. 396).

On cross-examination, the Claimant admitted that she has operated a catering business out of her home for the past 10 years. (6/22/2016 Hr'g Tr. at pp. 79-80). The Claimant testified that since November 2013, her daughter has primarily been running the catering business, but she indicated that she was still involved on a limited basis. (6/22/2016 Hr'g Tr. at pp. 79-81). More specifically,

the Claimant testified that she goes with her daughter and other family members to pick up the food at the Piggy Wiggly and sometimes accompanies them to deliver food to customers. (6/22/2016 Hr'g Tr. at pp. 83-84). The Claimant denied being involved in the catering business to the extent that she goes into the kitchen and cooks. (6/22/2016 Hr'g Tr. at pp. 84-85). With regards to her current condition, the Claimant testified that she currently experiences breathing problems on a daily basis and is unable to be around strong smells. (6/22/2016 Hr'g Tr. at pp.64-65). The Claimant indicated that she has no restrictions with regards to driving, but does limit herself from going to many public places. (6/22/2016 Hr'g Tr. at pp. 86-87). The Claimant testified that she is unable to clean her own home and indicated that her sister cleans her house at which point she either goes on the porch or leaves the home. (6/22/2016 Hr'g Tr. at p. 81).

The Claimant's two daughters also testified on her behalf. Amy Edwards is the Claimant's daughter who has allegedly taken over the Claimant's catering business. (6/22/2016 Hr'g Tr. at p. 92). Ms. Edwards testified that the Claimant gets sick from being around fresh meat and thus when the family goes to Piggly Wiggly to purchase food items for the business, the Claimant avoids the meat department. (6/22/2016 Hr'g Tr. at pp. 92-93). Ms. Edwards also testified that the Claimant is unable to be inside the kitchen due to the strong smells and indicated that her aunt does the Claimant's house work. (6/22/2016 Hr'g Tr. at p. 94).

On cross examination, Ms. Edwards indicated that Claimant continues to receive money from the catering business. (6/22/2016 Hr'g Tr. at pp. 103-105). Although Ms. Edwards tried to suggest that the money was for reimbursement for paying for the food, she could not explain why it would be necessary for her mother to do this when their customers typically pays for the food upfront. (Id.)

Ms. Edwards also testified that she was unable to confirm the cleaning products that her mother used to clean her home prior to her developing asthma. (6/22/2016 Hr'g Tr. at pp. 101-102).

Dr. Robert Bennett also provided expert testimony at the hearing. Dr. Bennett was found to be duly qualified as an expert in forensic toxicology and pharmacy with an emphasis in toxicology. (7/21/2016 Hr'g Tr. at p. 52-53). Dr. Bennett testified that the materials used by the Claimant in her workplace constitute common nonindustrial household products safe for the general public. (7/21/2016 Hr'g. Tr. at p 56). He clarified that Pinesol, Bleach and Drano are compounds that have been around for decades and used essentially by tens of millions of people on a daily basis, without any significant toxicological effect. (7/21/2016 Hr'g Tr. at p 56).

Dr. Bennett further indicated that the products Mr. Muscle and Spit Fire contain the same ingredients that are available to the general public for cleaning purposes. (7/21/2016 Hr'g Tr. at p. 56). Dr. Bennett further testified that based on the Claimant's work area and the chemicals involved, the Claimant's asthma would not have been caused by her work. (7/21/2016 Hr'g Tr. at p. 64-70). Rather, Dr. Bennett indicated that the Claimant's asthma was most likely due to the Claimant's genetic predisposition to asthma due to the Claimant's IgE levels and family history. (7/21/2016 Hr'g Tr. at pp. 65-70; 105). Dr. Bennett further testified that from a toxicological standpoint, the Claimant could return to work for the Employer in a variety of capacities and functions. (7/21/2016 Hr'g Tr. at p. 75).

STANDARD OF REVIEW

An appellate court may reverse or modify a decision by the Workers' Compensation Commission if the decision is not supported by substantial evidence or is affected by an error of law. S.C. Code Ann. § 1-23-380(5) (Supp. 2016); Jones v. Ga.-Pac. Corp., 355 S.C. 413, 586 S.E.2d 111,

113 (2003). 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 conclusion that [the Commission] reached or must have reached" to support its orders. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981).

ARGUMENTS

I. THE APPELLATE PANEL ERRED AS A MATTER OF LAW IN EVALUATING THE CLAIMANT'S OCCUPATIONAL ASTHMA AS A REPETITIVE TRAUMA INJURY UNDER SECTION 42-1-172.

The Appellate Panel erred in evaluating Claimant's claim under the repetitive trauma statute versus the occupational disease statute. Under section 42-1-172 of the Act, "'repetitive trauma injury' means an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." Alternatively, an "occupational disease" means a disease arising out of and in the course of employment that is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged." S.C. Code Ann. Section 42-11-10.

The South Carolina Supreme Court has made it clear that a repetitive trauma is not an occupational disease as an occupational disease results from exposure to conditions in the workplace that originate from a source that is neither traumatic or physical versus an unforeseen injury by trauma. Pee v. AVM, Inc., 352 S.C. 167, 172-73, 573 S.E.2d 785, 788 (2002) (emphasis added). As such, the Single Commissioner's reliance on King v. International Knife is misplaced. King v. International Knife, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011).

In finding the claimant's carpal tunnel syndrome a repetitive trauma resulting in an injury by accident versus an occupational disease, the Pee v. AVM, Inc. Court cited the reasoning from other jurisdictions that held the claimant's carpal tunnel was not caused by "an invasion of her body by

outside agent but by external traumatic forces." Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d 785 (2002) *affirming* Pee v. AVM, Inc., 344 S.C. 162, 169, 543 S.E.2d 232, 236 (2001).

The Supreme Court and Court of Appeals' reasoning in Pee v. AVM, Inc. relies heavily on exposure to an outside source as the defining factor of an occupational disease. Id. at 169, 543 S.E.2d 236 ("the term exposure indicates a passive relationship between the worker and his work environment.") (internal citations omitted). Following the Courts' analysis in this case, the Claimant alleges that exposure to chemicals caused her to develop the disease occupational asthma. More specifically, Claimant alleges chemical fumes from cleaning products invaded her body affecting her lungs/respiratory system. Therefore, Claimant's claim should be evaluated under the occupational disease statute, not the repetitive trauma statute.

II. THE APPELLATE PANEL ERRED AS A MATTER OF LAW IN FINDING CLAIMANT MET HER BURDEN OF PROOF UNDER 42-11-10, ET AL.

The Appellate panel erred as a matter of law in alternatively finding the Clamant sustained an occupational disease under S.C. Code Ann. Section 42-11-10. In addition to alleging an injury by accident and a repetitive trauma injury, Claimant alleged that she contracted occupational asthma as well as sustained injuries to her lungs, pulmonary system and autoimmune system as the result of her continued exposure to chemicals and toxins while employed as the deli manager for Piggly Wiggly. The Claimant averred she has been rendered permanently and totally disabled due to an occupational disease contracted during her employment with Piggly Wiggly.

An occupational disease is a disease arising out of and in the course of employment which is due to hazards in excess of those ordinarily incident to employment and is peculiar to the occupation in which the employee is engaged. Section 42-11-10(A). Muir v. CR Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (S.C. App. 1999). Moreover, a claimant must establish by a preponderance of the

evidence that the disease is caused by "a hazard recognized as peculiar to a particular trade, process, occupation or employment as a direct result of continuous exposure to the normal working conditions of that particular trade, process, occupation or employment." (Id.) In short, a claimant must demonstrate that he or she was exposed to a greater risk by reason of his or her employment than the general public. Fox v. Newberry County Memorial Hosp., 316 SC 537, 451 S.E.2d 28 (S.C. App. 1994).

To the extent that the Claimant developed asthma as the result of the alleged drainage block in 2011, the Claimant's condition is arguably more appropriately pled as an injury by accident as opposed to occupational disease (See Grayson v. Gulf Oil Co., 292 S.C. 528, 532-533, 357 S.E.2d 479, 481 (Ct. App. 1987 (quoting 82 Am. Jur. 2d Workers Compensation Section 303). In short, the Claimant's problems appeared to have developed both suddenly and unexpectedly. That being said, the Claimant failed to timely file her claim pursuant to Section 42-15-40 and would thus be barred from compensation.

A. CLAIMANT'S CONDITION DOES NOT CONSTITUTE A DISEASE PURSUANT TO SECTION 42-11-10, AND THEREFORE, THE APPELLATE PANEL ERRED AS A MATTER OF LAW.

In contrast to injuries by accident, which occur suddenly, occupational diseases are insidious, most often with an identifiable starting point. See Hiers v. Brunson Construction Company, 221 S.C. 212, 70 S.E.2d 211, (1951). Even if a sequence of exposures or events accumulates into a severe medical impairment, this impairment will most likely be compensable as an injury by accident, not as an occupational disease. (Id.).

The South Carolina Court of Appeals further explains, "where a sudden illness or collapse is precipitated by the inhalation of harmful elements at a definite time, which brings to a climax the

cumulative deleterious effects of the inhalation of such elements in the course of employment over a period of time, it is generally considered that the disability is attributable to an accidental injury rather than to occupational disease. See Grayson v. Gulf Oil Co., 292 S.C. 528, 532-533, 357 S.E.2d 479, 481 (Ct. App. 1987 (quoting 82 Am. Jur. 2d Workers Compensation Section 303).

In this case, the Claimant maintains that her problems began when she was exposed to certain chemicals and/or toxins while the deli was experiencing a significant drainage blockage in April 2011. (6/22/2016 Hr'g Tr. at pp. 29-34). The Claimant provides a detailed account of the drainage incident and specifically contributed her problems to this initial exposure. (Id.) (see also medical report of Dr. Hammett of December 27, 2011 suggesting that Claimant's respiratory problems began around June 2011. (Defendants' APA at p. 258). The Claimant is able identify an onset date with some degree of specificity and began seeking treatment for respiratory problems shortly thereafter. (6/22/2016 Hr'g Tr. at pp. 29-34; Defendants' APA at p. 258).

B. THE CLAIMANT'S CONDITION WAS NOT DUE TO HAZARDS IN EXCESS OF THOSE ORDINARILY INCIDENT OR PECULIAR TO THE CLAIMANT'S EMPLOYMENT.

In this case the Claimant has identified cleaning supplies that allegedly triggered her asthma, including Drano, Bleach, Mr. Muscle, Spit Fly and PineSol. (6/22/2016 Hr'g Tr. at pp. 36-38). All cleaners identified can easily be purchased over the counter and are commonly used for non-commercial/residential purposes. (7/21/2016 Hr'g Tr. at p. 56). That being said, the medical evidence also indicates that the Claimant's allergies included pollen and dust and the Claimant was characterized as being very symptomatic outside of her work environment (Defendants' APA at pp. 269 & 271). Accordingly, following allergy testing and a pulmonary functioning testing (which was normal), Dr. Dayrit of Center for Lung and Sleep Medicine diagnosed the Claimant with extrinsic asthma. (Defendants' APA at pp. 304-306; 311). Although Dr. Dayrit warned the Claimant to change

jobs due to the Claimant's sensitivity to the cleaning chemicals, it is also clear that the Claimant also had similar sensitivities to allergens outside of her work environment. (Defendants' APA at pp. 304-319).

Moreover, the Claimant underwent an independent medical evaluation with Dr. Gordon Early of Upstate Occupational Medicine on December 17, 2015. (Claimant's APA at p. 219). Although Dr. Early opined that the Claimant developed occupational asthma due to her exposures at Piggly Wiggly, it is clear from Dr. Early's report that he was not provided with the medical records of Dr. Dayrit prior to rendering such opinion. In short, Dr. Early was only provided the hospital records, the records of Dr. Hammett and the records of Dr. De Dios. (Id.) Additionally, Dr. Early specifically states that the Claimant was provided with a peak flow meter to obtain readings at home and at work. (Claimant's APA at pp. 219-220). Dr. Early further indicated that these readings were not part of the medical records but would be beneficial to the analysis of this case. (Claimant's APA, p. 219).

Additionally, the Claimant testified that in addition to her work with Piggly Wiggly, she operated a catering business for seven years. (6/22/2016 Hr'g Tr. at pp. 79-80). The Claimant's outside work as a caterer was similar to her work as deli manager with Piggly Wiggly. In fact, the Claimant testified that she often cooked the food for her catering service at Piggly Wiggly. (6/22/2016 Hr'g Tr. at pp. 65-66).

In short, the Claimant cannot satisfy her burden of proving that her alleged occupational disease was the result of hazards in excess of those ordinarily incident or peculiar to her employment with Piggly Wiggly when she was required to use cleaning products commonly used as household cleaning agents, the Claimant's respiratory problems were also triggered by pollen and dust as substantiated in the records of Dr. De Dios and Dr. Dayrit, Dr. Early did not have the benefit of the

complete medical file, and the Claimant performed the same and/or similar job functions while also working as a caterer.

C. THE CLAIMANT'S CLAIM FOR BENEFITS IS BARRED PURSUANT TO SECTION 42-15-20 WHEN THE CLAIMANT FAILED TO NOTIFY HER EMPLOYER WITHIN NINETY DAYS OF DEFINITIVE DIAGNOSIS OF OCCUPATIONAL ASTHMA.

Section 42-15-20(C) provides that 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, unless reasonable excuse is made and the employer has not been unduly prejudiced. The notice requirement for occupational disease cases parallel that for injuries by accident, requiring a factual determination of: (1) whether the notice was given within ninety days and, if not; (2) whether the failure to give such notice was excusable; and (3) whether the employer was prejudiced by the delayed notice. Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962); McCraw v. Mary Black Hospital, 350 SC 229 (2002).

The trigger date for notice in this case is arguably at the earliest date of December 22, 2011 and at the latest, March 19, 2013. However, the date of notice is March 25, 2014, over a year past the latest date to trigger notice. (Defendants APA, p. 396). Although the Claimant would argue that she exercised reasonable diligence, the record is clear that the Claimant became overtly aware of her respiratory condition and the fact that her work environment exacerbated her systems long before she informed her employer.

Specifically, on December 22, 2011, the Claimant treated at Chesterfield General Hospital at which time she was diagnosed with bronchial asthma exacerbation secondary to exposure to chemicals (Claimant's APA at p. 171). At that time, the Claimant was specifically advised to avoid

chemical exposures as these were the triggers for her asthma exacerbation. (Claimant's APA at p. 171). Despite the clear language in the report, the Claimant testified that she did not inform her employer of this in 2011 because, according to the Claimant, she had not been diagnosed that the job was causing her to be sick. (6/22/2016 Hr'g Tr. at p. 38). This statement stands in stark contrast to the medical evidence.

The Claimant sought treatment again from Chesterfield General Hospital on November 12, 2012 at which time the Claimant presented with complaints of shortness of breath/asthma. (Defendants' APA at p. 231). At that time the Claimant again contributed her problems to the cleaning compound that she used at work as well as the fumes from cooking. (Defendants' APA at p. 231).

The Claimant was then sent to Dr. Dayrit of Center for Lung and Sleep Medicine. Pursuant to the diagnostic report of Dr. Dayrit of December 19, 2012, the Claimant presented with complaints of shortness of breath and wheezing for the past 2 years. (Defendants' APA at p. 304). Dr. Dayrit noted that the Claimant was exposed to cleaning chemicals at work to include the cleaners that were used. Dr. Dayrit suggested that the Claimant had a sensitivity to some chemicals that she was being exposed to at work. (Defendants' APA at pp. 304 & 306). He further indicated that there appeared to be a temporal relationship with her symptoms and further advised the Claimant that she should consider changing jobs if her wheezing continued. (Defendants' APA at p. 306). Following a pulmonary function test, Dr. Dayrit diagnosed the Claimant with extrinsic asthma in his diagnostic report of January 16, 2013. (Defendants' APA at p. 311). Thereafter, Dr. Hammett stated in her medical note of March 19, 2013, that the Claimant had a history of chronic asthma, exacerbation that was determined to be work related and further indicated that the Claimant remove herself from the

job, "which she ha[d] not yet". (Defendants' APA at p. 268). It appears that Dr. Hammett continued to recommend that the Claimant stop working in November 2013, but the Claimant refused to do so. The Claimant testified that in November 2013 she requested that Dr. Hammett not place her out of work. (6/22/2016 Hr'g Tr. at pp. 76-77).

That being said, the Claimant filed for Social Security Disability on December 12, 2013 while continuing to work for Piggly Wiggly. (Defendants' APA at pp. 361-367). Dr. Hammett later completed an initial disability claim form identifying the Claimant's first date of disability as December 6, 2011 (Defendants' APA at p. 368). The Claimant did not notify her employer that she contributed her respiratory problems to her employment until March 25, 2014 despite the fact that she initially developed these problems on June 3, 2011, was advised to avoid these chemicals by the ER physicians on December 22, 2011 and again on November 12, 2012, was advised to change jobs by Dr. Dayrit on January 6, 2013 if her wheezing continued, was diagnosed with extrinsic asthmas by Dr. Dayrit on January 16, 2013, and was advised to discontinue work by Dr. Hammett in March 19, 2013 and again in November 2013. (See First Report of Injury, Defendants' APA at p. 396). Nevertheless, the Claimant did not stop working for Piggly Wiggly until January 6, 2014 and did not notify her employer that her condition was allegedly work-related until March 25, 2014.

D. THE CLAIMANT'S FAILURE TO REMOVE HERSELF FROM WORK AND CONTINUOUS DISREGARD FOR RECOMMENDATIONS OF SAME CONSTITUTES A WILLFUL INTENT TO INJURE.

If an employee intentionally exposes herself to the agent that later causes an occupationally related disease, the employer's carrier is not liable for workers compensation payments. See S.C. Code Ann. Section 42-9-60. In its most narrow sense, "intent" denotes an actor's specific desire to cause the consequences of his act. See Restatement (Second) of Torts § 8A (1965). However,

"intent" may be construed more broadly to include consequences which are not desired. Where an actor knows that consequences are substantially certain to result from his act and still goes ahead, he is treated by the law as if he had in fact desired to produce the result. *Id.* Restatement (Second) of Torts § 8A (comment b) (1965) (cited in Peay v. US Silica Co., 313 SC 91, 437 SE2d 64 (1993).

In this case, the Claimant was advised to stop working with the chemicals at Piggly Wiggly as early as December 22, 2011 and was advised the same multiple times until she left in January 6, 2014. However, the record reflects that not only did the Claimant ignore the recommendations, she specifically directed her primary care physician to allow her to continue working in an effort to make it to retirement age. (6/22/2016 Hr'g Tr. at p. 77). As set forth above, on December 22, 2011, the ER physicians advised the Claimant to avoid chemical exposures as these were the triggers for her asthma exacerbation. (Claimant's APA at p. 171). The Claimant continued to work. On December 19, 2012, Dr. Dayrit indicated that there appeared to be a temporal relationship with her symptoms and further advised the Claimant that she should consider changing jobs if her wheezing continued. (Defendants' APA at p. 306). The Claimant continued to work. On January 16, 2013, Dr. Dayrit diagnosed the Claimant with extrinsic asthma (Defendants' APA at p. 311). The Claimant continued to work. On March 19, 2013, Dr. Hammett, the Claimant's primary physician, noted that the Claimant's condition was determined to be work related and further indicated that the Claimant remove herself from the job. (Defendants' APA at p. 268). The Claimant continued to work. Dr. Hammett continued to ignore warnings/recommends that the Claimant stop working in November 2013, but the Claimant refused to do so. The Claimant testified that in November 2013 she requested that Dr. Hammett not place her out of work. (6/22/2016 Hr'g Tr. at p. 77). The Claimant continued to work another two months.

The Claimant has received treatment for respiratory problems since June 2011. The Claimant was told by various doctors to avoid the chemicals at work as they were exacerbating her problems. (Claimant's APA at p. 171; Defendants' APA at pp. 268, 306 & 311). On December 19, 2012, Dr. Dayrit, who indicated that there was still a temporal relationship with the Claimant's symptoms at that time, warned the Claimant to change jobs if her wheezing continued. (Defendants' APA at p. 306). According to the medical report of Dr. Hammett, dated March 19, 2013, the Claimant was definitely diagnosed with extrinsic asthma that was work-related and was again advised to discontinue working with chemicals. (Defendants' APA at p. 268). However, the Claimant failed to follow the recommendations and by November 2013 the Claimant indicated that she unable to work at regular capacity. (6/22/2016 Hr'g Tr. at p. 77). Accordingly, the Claimant was later diagnosed by De Dios, work-related asthma on November 4, 2014. (Claimant's APA at p. 127).

III. THE CLAIMANT'S CANNOT SATISFY HER BURDEN OF PROOF THAT SHE HAS BEEN RENDERED PERMANENTLY AND TOTALLY DISABLED AS SET FORTH IN SECTION 42-9-10; AND THEREFORE, THE APPELLATE PANEL ERRED IN FINDING CLAIMANT PERMANENTLY AND TOTALLY DISABLED.

The Appellate Panel erred in finding the Claimant permanently and totally disabled because the substantial evidence shows Claimant (1) failed to provide any vocational evidence to support her allegations of an inability to find gainful employment; and (2) failed to prove incapacity to earn wages because of her condition.

Section 42-11-10(D) generally allows for compensation to be paid to an employee with an occupational disease who suffers from a disability under Sections 42-9-10, 42-9-20 or 42-9-30. However, Section 42-11-10(B)(5) (Supp. 2010) exempts from the definition of occupational disease "any disease of the cardiac, pulmonary, circulatory system." Skinner v. Westinghouse Elec. Corp,

394 S.C. 428, 716 S.E.2d 443 (S.C. 2011); Koon v. Spartan Mills, 286 S.C. 190 (1985). Thus, no compensation shall be payable for any pulmonary disease arising out of the inhalation of organic or inorganic dust or fumes unless the claimant suffers disability as described in Section 42-9-10 or 42-9-20. See *Langley v. Pierce*, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993) (citing *Lloyd v. Lloyd*, 295 S.C. 55, 57-58, 367 S.E.2d 153, 155 (1988)) ("Generally, specific laws prevail over general laws and later legislation takes precedence over earlier legislation.") Therefore, a claimant must meet the requirements of sections 42-9-10, 42-9-20, or 42-9-30 in order to be rendered permanently and totally disabled.

Under the Act, disability is to be measured by loss of earning capacity. Keeter v. Clifton Mfg. Co., 225 S.C. 389, 82 S.E.2d 520 (1954). The Act is clear that any disability award is predicated on a claimant proving they are incapable of working as a result of an injury, not some other cause. See S.C. Code Ann. § 42-9-10(A) (Supp. 2013) (a claimant is entitled to permanent and total disability benefits "[w]hen the incapacity for work resulting from an injury is total."); see also 25A S.C. Code Reg. 67-502(B)(1) (Supp. 2012) (disability is considered "incapacity because of injury to earn wages which the employee was receiving at the time of the injury in the same or any other employment.") (emphasis added).

It is well-settled that total disability does not require complete helplessness. Wynn, 238 S.C. at 15, 118 S.E.2d at 817. Inability to perform common labor is total disability for one who is not qualified by education, training or experience for any other employment. Wynn, 238 S.C. at 15-16, 118 S.E.2d at 816-17 (citing Colvin v. E. I. DuPont de Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955)). "The test of total disability is inability to perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.

Wynn, 238 S.C. at 16, 118 S.E.2d at 818. Moreover, it is well-settled that an award may not rest upon surmise, conjecture, or speculation. Tiller v. Nat'l Health Care Ctr. of Sumter, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999). An award "must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S.C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

In Wynn v. People's Natural Gas Company of South Carolina., the Supreme Court reversed the commission's finding of permanent and total disability where no vocational evidence was provided and the claimant's bare assertion that he could not work was not corroborated by his physicians. Wynn, 238 S.C. at 12-13, 118 S.E.2d at 818. Similarly in the case at bar, the **only** evidence in the record regarding the Claimant's inability to work is the Claimant's own testimony. (6/22/2016 Hr'g Tr. at pp. 109-111).

Furthermore, as in Wynn, the Claimant has failed to provide vocational evidence indicating that she is not able to return to work and she testified that she has not looked for employment since leaving Piggly Wiggly in January of 2014. (6/22/2016 Hr'g Tr. at p. 87); Wynn v. Peoples Natural Gas Company of South Carolina, 238 S.C. 1, 118 S.E.2d 812 (1961); Coleman v. Quality Concrete Products, Inc., 245 S.C. 625 (S.C. App. 1985).

In this case, the Claimant maintains that she has been rendered permanently and totally disabled. However, the Claimant testified she continues to operate a catering business for which she receives financial benefits. (6/22/2016 Hr'g Tr. at p. 85). Dr. Early testified that the Claimant has reached maximum medical improvement and has work restrictions relating to her windedness. (Deposition of Dr. Early at p. 69, ll. 13-25). More specifically, Dr. Early indicated that the Claimant could return to sedentary work. (Deposition of Dr. Early at p. 69-70). Dr. Early further opined that to

the extent that the Claimant returned to work she could perform sedentary work for an eight-hour day with no lifting more than ten (10) pounds and the ability to use a nebulizer (Deposition of Dr. Early at p. 71, ll. 20-22).

For reasons set forth more fully above, the Appellants request a reversal of the finding determining the Claimant is permanently and totally disabled as she cannot establish her burden of proving that she is incapable of perform services other than those that are so limited in quality, dependability, or quantity that a reasonably stable market for them does not exist.

IV. THE APPELLATE PANEL ERRED AS A MATTER OF LAW IN AWARDING FUTURE MEDICAL TREATMENT "AS SPECIFICALLY REFERRED TO IN THE RECORDS".

The Appellate Panel erred in finding the Claimant is entitled to "all such causally related medical care for life which specifically shall include all treatment necessary and related to the treatment of her occupational asthma and all causally related conditions and specifically includes all treatment . . . as is contained in the records of Dr. Hammett, Dr. Mendez, Dr. deDios and Dr. Dyce beginning and including the treatment on January 6, 2014 and continuing through the present time as is reflected in the records." (10/17/2017 Decision and Order at pp. 50-51). Moreover, the Claimant was found entitled to "all causally related future medical care specifically to include all such medical care as will affect a cure or provide relief from the Claimant's disabling symptoms and which is reasonable and necessary to treatment of Claimant's occupational asthma and related conditions." (Id.)

Section 42-15-60(C) of the Act provides "reasonable and necessary" treatment or care during the life of a claimant found permanently and totally disabled. Additionally Dodge v. Bruccoli provides that a claimant is entitled to treatment that will tend to lessen the claimant's period of

level can be contributed to a genetic component of her asthmatic condition. (7/21/2016 Hr'g. Tr. at p. 68.) In fact, Dr. Bennett expressly indicated that the Claimant's elevated IgE levels are linked to a number of factors outside of her work and not any alleged exposure. (*Id.* at p. 105.)

The opinions of Dr. deDios, Dr. Early, and Dr. Bennett clearly show that the Claimant's prescription for Xolair is related to a number of causal factors, including her underlying allergies to dust and pollen. These extrinsic asthmatic conditions are wholly unrelated to any alleged occupational exposure and are the causes of her elevated IgE level, for which the Xolair was prescribed to remedy. Based on the competent evidence in the record, Appellants contend that the ongoing prescription for Xolair does not fall under the umbrella of "causally related future" medical treatment under Section 42-15-60 and, therefore, should not be considered as part of Claimant's award.

Based on the above, Appellants respectfully request that the references to future medical treatment in the Decision and Order be found overly broad, reversed and modified to establish Xolair is not causally related future medical treatment and Claimant is not entitled to the same under the Act.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the Appellate Panel.

[SIGNATURE BLOCK TO FOLLOW]

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2017-002396
W.C.C. File No. 1408826

Gennette Sowell,

Respondent,

v.

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SC Court of Appeals

Piggly Wiggly,

and

Auto Owners Insurance Inc., Appellants.

CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee Dickie, McCamey & Chilcote, P.C. and that she has served, on the date set forth below, a copy of the document described below, in the above entitled action to the following persons, pursuant to Section 15-9-930 and Section 15-9-940 of the Code of Laws of South Carolina, 1976, as well as Rule 203 and Rule 262 of the SCACR, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

TO: VIA REGULAR U.S. MAIL
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

VIA REGULAR U.S. MAIL
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DOCUMENT: INITIAL BRIEF OF APPELLANTS

DATE OF MAILING: February 1, 2018

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February 1, 2018

VIA REGULAR MAIL
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
FEB 06 2018
SC Court of Appeals

RE: Genette Sowell v. Piggly Wiggly
Appellate Case No. 2017-002396
Date of Accident: 1/6/2014
WCC File No.: 1408826
Our File No.: 0056461.0349337
Claim No.: 36-1835-2014

Dear Ms. Kitchings:

Enclosed for filing please find one (1) original and two (2) copies of the Initial Brief of Appellants in the above-referenced matter. Please clock the copies and return them to us in the enclosed self-addressed stamped envelope. By copy of this letter, we are serving the Initial Brief via regular U.S. mail to Respondent's attorneys, Preston McDaniel, Esquire and Gerald Malloy, Esquire. Enclosed please find a certificate of service verifying same. Please feel free to contact me should you have any questions or concerns regarding this submission.

Very truly yours,

Kenya C. Miller

KCM:KCB

cc: Preston McDaniel, Esquire (via regular mail)
Gerald Malloy, Esquire (via regular mail)
Ryan Hall, Auto-Owners Insurance (via email)
Stephanie Wilson, Auto-Owners Insurance (via email)

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FEB 06 2018
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
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