

DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1621577

Carolyn Wilson,.....Claimant,

vs.

Fred's Stores of Tennessee, Inc., Employer, and
Safety National Casualty Corporation, Carrier.....Defendants.

HEARING: Held in Columbia, South Carolina
January 22, 2018

APPEARANCES: Claimant represented by:
Andrea C. Roche, Esquire
Mickle & Bass, LLC
Post Office Box 5639
Columbia, SC 29250

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SC Court of Appeals

Defendants represented by:
Matthew C. LaFave
Crowe LaFave, LLC
500 Taylor Street, Suite 401
Post Office Box 1149
Columbia, SC 29202

PURPOSE OF HEARING: To determine issues as set forth on Claimant's Form 30,
Request for Commission Review.

DECISION AND ORDER: Commissioners Gene McCaskill, Chair, Aisha Taylor, and
Susan S. Barden

FILED: ~~April~~ 13, 2018

BACKGROUND

Pursuant to Forms 50 and 51, a hearing was held on August 15, 2017, before Commissioner Avery B. Wilkerson to determine compensability of Claimant's alleged injuries to her back and bilateral lower extremities, which she claimed to be as a result of repetitive lifting activities. Further, Commissioner Wilkerson was asked to render a conclusion, if the claim was found compensable, as to Claimant's entitlement to an award of disability as well as her entitlement to future medical treatment. On September 14, 2017, the Single Commissioner issued his Decision and Order Instructions, which were subsequently reduced to a formal Decision and Order filed October 23, 2017. The Single Commissioner specifically found Claimant had not sustained a compensable repetitive trauma injury. Based upon the foregoing finding of the Single Commissioner, it was held that Claimant was not entitled to any applicable benefits under the Act.

On November 3, 2017, Claimant filed a Form 30, Request for Commission Review, alleging numerous errors by the Single Commissioner. The crux of the Request for Commission Review centered largely on an assertion that the Single Commissioner erred in finding Claimant failed to prove a repetitive trauma injury arising out of the course and scope of employment. As a secondary issue, it was argued that the Single Commissioner erred in providing her employer with timely notice of an alleged repetitive trauma injury. Parties submitted their briefs on the issues in a timely manner.

On January 22, 2018, oral arguments were heard by the Full Commission, which was comprised of Commissioners McCaskill, Taylor, and Barden.

STATEMENT OF THE CASE

This case involves a denied claim for a repetitive trauma injury to Claimant's back, bilateral lower extremities, and bladder. Claimant, by and through her counsel, filed a Form 50, Employee's Request for Hearing, on March 1, 2017 alleging that she sustained injuries to the aforementioned body parts, which purportedly resulted from repetitive lifting during her employment with Defendant/Employer, Fred's Stores of Tennessee, Inc. Defendants, by and through their counsel filed their Form 51, Employer's Answer to Request for Hearing contending that Claimant failed to present sufficient evidence of the existence of a repetitive trauma injury as required by S.C. Code Ann. § 42-1-172. Defendants specifically contended that there was no repetitive activities undertaken by Claimant in her employment with Defendant/Employer, Fred's Stores of Tennessee, Inc. Additionally, Defendants submitted that Claimant failed to provide notice of the injury at the time she should have known a purportedly compensable injury existed pursuant to S.C. Code Ann. § 42-15-20. Defendants contend that medical evidence coupled with Claimant's own testimony and admissions established that she knew or should have known the problems she claims are now related to her employment arose in 2012. Based upon statute and case law, Claimant should have notified her employer within 90 days from the date this alleged condition led to her need for medical treatment.

The Hearing in this case was originally scheduled for May 10, 2017 in Sumter, South Carolina; however, a postponement was needed so as to allow for the deposition of Dr. W.S. Edwards. Due to the postponement, the hearing was rescheduled for August 15, 2017, in Florence, South Carolina.

Based on the stipulations of the parties and the testimony and evidence received and produced at the hearing, as well as the Single Commissioner's personal observation of the

witnesses, the Single Commissioner found the following facts based upon the preponderance of the evidence:

FINDINGS OF FACT
(Single Commissioner)

1. The parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Steel Technologies, as the Employer, and Twin City Fire Insurance Company as the Carrier.
2. Counsel for both parties received order instructions on September 14, 2017.
3. Testimony of Claimant was clear and she was felt to be honest and trustworthy.
4. Claimant was an employee of Defendant/Employer and had been employed there since 2008.
5. Claimant knew that she had back and leg problems at least beginning in 2012.
6. Claimant believed that the problems with her back and leg beginning in 2012 were a result of the physical demands of her employment with Defendant/Employer.
7. Despite her belief that the position with Defendant/Employer was causing her back and leg problems she accepted a promotion that was more physical in nature.
8. Despite her belief that the position with Defendant/Employer was causing her back and leg problems she did not report this to any supervisors.
9. Claimant did not report an incident, accident, or repetitive issues to anyone with her employer in a supervisory capacity until 2016.
10. Michael Holstrom, District Manager for Defendant/Employer was felt to be honest and trustworthy.
11. Claimant never reported a back claim to Michael Holstrom.

12. Claimant told Michael Holstrom her back hurt on occasions but never reported and injury to her back, repetitive claim, or that her back pain was in any way connected with her employment

13. Based on the greater weight of the evidence, I do not find the positions held by Claimant to be repetitive in nature.

14. Based on the greater weight of the evidence, I find that Claimant's job responsibilities varied and included tasks such as being a cashier, stocking shelves, moving merchandise, unloading trucks, and sweeping and mopping the floors.

15. Based on the greater weight of the evidence, I find that Claimant's job had physical aspects but that hard work is not repetitive.

16. I find that Claimant back and leg problems were not caused by the cumulative effects of repetitive traumatic events occurring during her employment.

17. I find that Claimant is not entitled to benefits under the South Carolina Workers' Compensation Act, including, but not limited to temporary total disability compensation, a permanent partial disability award, or medical benefits.

CONCLUSIONS OF LAW
(Single Commissioner)

The following sections of the South Carolina Code of Laws give the appropriate definitions and provisions of the South Carolina Workers' Compensation Act as applicable to this case:

1. S.C. Code Ann. § 42-1-120 defines disability.
2. S.C. Code Ann. § 42-1-172(A) defines a repetitive trauma injury. Pursuant to this statute, Claimant did not sustain a compensable repetitive trauma injury.

3. S.C. Code Ann. § 42-9-200 provides for temporary disability benefits. Pursuant to the foregoing determination that Claimant did not sustain a compensable repetitive trauma injury Claimant is not entitled to benefits under this section.

4. S.C. Code Ann. § 42-15-60 provides for the provision of medical treatment to injured workers. Pursuant to the foregoing determination that Claimant did not sustain a compensable repetitive trauma injury Claimant is not entitled to medical treatment, past or future.

Based on the above Statement of the Case, Evidence of the Case, Findings of Fact, and Conclusions of Law, the following Order is made:

AWARD
(Single Commissioner)

Based on the foregoing, it is hereby:

ORDERED that Claimant's claim for repetitive trauma injuries during her employment with Defendant/Employer to her back and bilateral lower extremities is denied;

IT IS FURTHER ORDERED that Defendants are not obligated to pay Claimant for any time lost from her employment;

IT IS FURTHER ORDERED that Defendants are not obligated to reimburse Claimant for any medical expenses incurred; and

IT IS FURTHER ORDERED that Defendants are not obligated to provide Claimant with any future medical treatment.

FULL COMMISSION DISCUSSION

The Claimant alleges to have sustained injuries to her low back, which required surgery, and her bilateral lower extremities. Claimant's contention that the injuries sustained were a result

of repetitive activities undertaken by her in her employment with Fred's Stores of Tennessee, Inc. At the Full Commission Hearing, Counsel for Claimant focused on the contention that Claimant's job required her to engage in lifting-type activities on a daily basis in support of her argument that the evidence satisfies the requirements of S.C. Code Ann. § 42-1-172. Specifically, the foregoing section requires an employee undertake "repetitive activities ... while ... engaged in the regular duties of his employment" Counsel for Defendants countered this argument through reliance on the record wherein it was reported that only approximately 25% of the job of an assistant manager, which was Claimant's last held position, involved lifting activities. Prior to becoming an assistant manager, Claimant testified to being required to do even less lifting. Furthermore, the testimony proffered by Claimant describes a varied list of lifting-type activities that were far anything but repetitive in nature. The facts, as established in this case, was that Claimant was engaged, as an assistant manager, where 75% of her activities did not involve lifting, and as such there can be no finding that she undertook repetitive lifting activities when they accounted for such a minor percentage of her overall job duties.

Claimant also argued on appeal that the Single Commissioner erred in finding a failure to timely notify her employer of an alleged repetitive trauma claim. Counsel for Claimant argued that Claimant notified her employer timely when such notice was made to her supervisor in 2016. Counsel argued that notice was provided to her employer when the alleged repetitive trauma activity reached a culmination where Claimant could no longer work through her problems and treatment that had worked in the past was no longer effective. However, Counsel for Defendants argued that the fact that Claimant was undergoing medical treatment and believed, of her own accord, that it was a result of her job was sufficient to find that she should have, within ninety (90) days, notified her employer. The record was clear that Claimant had a history of back pain, medical

treatment therefor, and personal knowledge, or at a minimum a belief by Claimant that the back pain was attributable to the lifting she was doing in her employment with Defendant/Employer as far back as 2009. Claimant testified multiple times that she did not notify anyone other than her doctors of her belief that it was the job that was the cause of her back problems. The foregoing failure by Claimant results in her claim being barred under S.C. Code Ann. 42-15-20(C).

Claimant's Counsel argued, in the alternative, that even if Claimant had a duty to notify her employer of an alleged repetitive trauma claim previously there was a "reasonable excuse" for her failure. Specifically, it was argued that Claimant received certain medical treatment, including injections, after which she would make a complete recovery. In light of the presumed "complete recovery" that Claimant argued notice was not required previously. Claimant's counsel argued that there was a reasonable excuse to not notify her employer until the notice provided for the instant claim. In response to the "reasonable excuse" argument, Defense Counsel noted that Plaintiff required repeat injections, which she had previously maintained was a result of one "wearing off." Additionally, Claimant had testified to her inability, at times, to get certain medical care due to her not having health insurance previously. Claimant's testimony contradicted her claim of a "complete recovery" as it was clear the treatment was effective, but she did not recover as her problem, as reflected in a 2014 MRI, included a bulging disc. Counsel for Defendants argued that if a "reasonable excuse" was found there was still significant prejudice in Claimant's failure to report an alleged repetitive trauma claim when she first began receiving treatment. Counsel for Defendants pointed to the two-prong basis for the notice requirement as the clear prejudice. The notice requirement was established so employers could investigate claims while evidence was available and witnesses' recollections were unfaded. In this case, there were no witnesses to even be questioned as a result of the delay in notifying the Defendant/Employer. Second, and perhaps

most significantly, the notice requirement was designed to allow employers to provide medical care to minimize disability and consequent liability. *Hartzell v. Palmetto Collision, LLC*, 406 S.C. 233, 750 S.E.2d 97 (Ct.App. 2013). The record in this case was clear that the failure to notify the employer had the opposite of its intended effect. Claimant testified that she was, prior to becoming assistant manager, in a position that required her to do less lifting. Further, prior to becoming the assistant manager she indicated the treatment she was receiving was resulting in a complete recovery. The record established that Claimant knew, or at least believed, lifting was causing her back problems and yet she accepted a position that required her to do even more lifting without notifying her employer. Therefore, by failing to notify the employer of her belief that there was a connection between the lifting activities of her employment and back problems that required medical attention, Claimant was ultimately placed in a position of greater exposure to potentially increased disability thereby increasing the potential consequent liability of the employer.

Based on a review of the record including evidence received and produced at the hearing, applicable laws, and oral arguments of the parties, the Appellate Panel hereby finds the following facts based upon the preponderance of the evidence:

FINDINGS OF FACT
(Full Commission)

1. The parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Steel Technologies, as the Employer, and Twin City Fire Insurance Company as the Carrier.
2. Counsel for both parties received order instructions on September 14, 2017.

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6. Claimant believed that the problems with her back and leg beginning in 2012 were a result of the physical demands of her employment with Defendant/Employer.
7. Despite her belief that the position with Defendant/Employer was causing her back and leg problems, she accepted a promotion that was more physical in nature.
8. Despite her belief that the position with Defendant/Employer was causing her back and leg problems, she did not report this to any supervisors.
9. Claimant did not report an incident, accident, or repetitive issues to anyone with her employer in a supervisory capacity until 2016, which resulted in extreme prejudice on the part of Defendants.
10. Michael Holstrom, District Manager for Defendant/Employer was felt to be honest and trustworthy.
11. Claimant never reported a back claim to Michael Holstrom.
12. Claimant told Michael Holstrom her back hurt on occasions but never reported an injury to her back, repetitive claim, or that her back pain was in any way connected with her employment.
13. Based on the greater weight of the evidence, we do not find the positions held by Claimant to be repetitive in nature.

14. Based on the greater weight of the evidence, we find that Claimant's job responsibilities varied and included tasks such as being a cashier, stocking shelves, moving merchandise, unloading trucks, and sweeping and mopping the floors.

15. Based on the greater weight of the evidence, we find that Claimant's job had physical aspects but that hard work is not necessarily repetitive.

16. We find that Claimant back and leg problems were not caused by the cumulative effects of repetitive traumatic events occurring during her employment.

17. We find that Claimant is not entitled to benefits under the South Carolina Workers' Compensation Act, including, but not limited to temporary total disability compensation, a permanent partial disability award, or medical benefits.

CONCLUSIONS OF LAW
(Full Commission)

The following sections of the South Carolina Code of Laws give the appropriate definitions and provisions of the South Carolina Workers' Compensation Act as applicable to this case:

1. S.C. Code Ann. § 42-1-120 defines disability.
2. S.C. Code Ann. § 42-1-172(A) defines a repetitive trauma injury. Pursuant to this statute, Claimant did not sustain a compensable repetitive trauma injury.
3. S.C. Code Ann. § 42-9-200 provides for temporary disability benefits. Pursuant to the foregoing determination that Claimant did not sustain a compensable repetitive trauma injury Claimant is not entitled to benefits under this section.
4. S.C. Code Ann. § 42-15-60 provides for the provision of medical treatment to injured workers. Pursuant to the foregoing determination that Claimant did not sustain a compensable repetitive trauma injury Claimant is not entitled to medical treatment, past or future.

5. S.C. Code Ann. § 42-15-20(C) requires a claimant to notify his/her employer within ninety (90) days of the date the employee discovered, or could have discovered, that the condition was compensable.

6. A Claimant may be excused from the notice requirement of S.C. Code Ann. § 42-15-20(C) if they can show a "reasonable excuse" for not providing timely notice and there is a lack of prejudice on the employer and carrier.

Based on the above Statement of the Case, Evidence of the Case, Findings of Fact, and Conclusions of Law, the following Order is made:

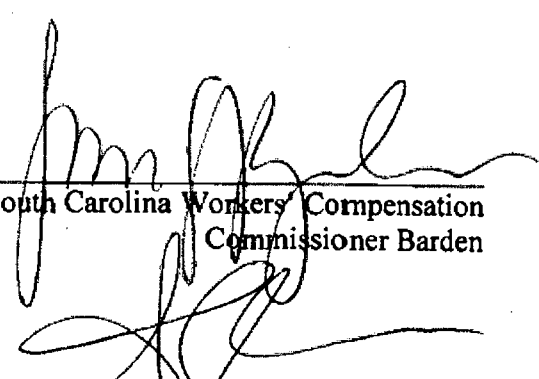
ORDER OF THE FULL COMMISSION

Pursuant to S.C Code Ann. § 42-17-50, we, the Appellate Panel, have reviewed the Decision and Order of the Single Commissioner and weighed the evidence as presented at the initial hearing and considered all issues raised in the briefs of the Parties, as well as those issues raised at the Full Commission Review hearing.

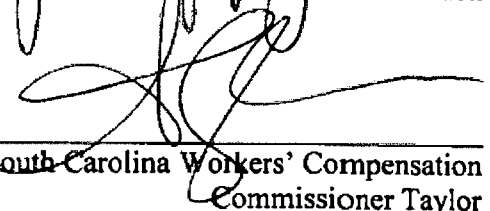
After careful review, The Appellate Panel of the South Carolina Workers' Compensation Commission, by unanimous vote, AFFIRMED with AMENDMENTS the Single Commissioner's order consistent with our Findings of Fact and Conclusions of Law as above.

IT IS THEREFORE ORDERED that, the findings of fact and conclusions of law of the Single Commissioner are incorporated herein as if set forth verbatim unless specifically reversed in the Order of the Full Commission.

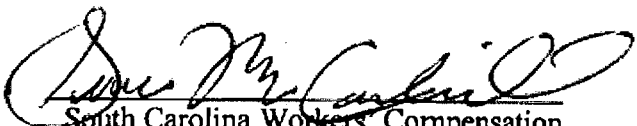
AND IT IS SO ORDERED.



South Carolina Workers' Compensation
Commissioner Barden



South Carolina Workers' Compensation
Commissioner Taylor



South Carolina Workers' Compensation
Commissioner McCaskill

Columbia, South Carolina

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 April 13, 2018