THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

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SC Court of Appeals

Appellate Case No.: 2018-000913
W.C.C. Case No.: 1621577

Carolyn Wilson,

Appellant,

v.

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

Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Carolyn Wilson ("the claimant") filed this workers' compensation claim asserting a repetitive trauma injury arising out of and in the course and scope of employment. The claimant contended she injured her back through repetitive lifting at work. The defendants denied the claim in its entirety and asserted a notice defense. On August 15, 2017, a single commissioner heard the case, and by order dated October 23, 2017, the single commissioner found the claimant's job was not repetitive and denied the case. The claimant appealed to the full commission. After a hearing, the commission issued an order dated April 13, 2018 denying the claim. The claimant filed a notice of appeal to this court on May 11, 2018.

FACTS

At the time of the hearing, the claimant was 57 and had an 11th grade education. (Transcript of the hearing before the single commissioner, p. 13, 15) She worked for the employer for 8 years. (Tr. p. 15) She began as a cashier and eventually worked her way up to assistant manager. (Tr. p. 15)

As an assistant manager, the claimant both managed people and performed physical labor. (Tr. p. 16) The claimant had to lift on a daily basis. (Tr. p. 16, 53-57, 59-64) Once a week, she participated in unloading the truck. (Tr. p. 16) To do so, she helped set up the rollers on the back of the truck to roll the boxes down. (Tr. p. 16) Then, once the boxes rolled down, she lifted them and placed them on a U-boat in order to roll them out on the store floor. (Tr. p. 16-17) Once the truck was unloaded, she and other employees went out onto the store floor and stocked the shelves. (Tr. p. 17) Stocking the shelves involved lifting. (Tr. P. 17) She stocked shelves every day she worked. (Tr. p. 18)

The claimant completed about five planograms a week. (Tr. p.18) Planograms consisted of taking products off the shelf and putting them in order according to the planogram. (Tr. p. 18) She had to lift and move shelves as well as the product to do the planograms. (Tr. p. 17-18) The shelves were heavy. (Tr. p. 19)

The claimant had to lift the mop bucket every day over the lip of the tub where she filled the bucket. (Tr. p. 19) She also had to lift full plastic trash bags out of the trash cans daily. (Tr. p. 19) On the days it was just she and a cashier at the store, she did a lot of the lifting during the day. (Tr. 19-20)

The claimant had problems with her back in 2012. (Tr. p. 20-21, 46, APA p. 99-102) She believed the lifting was causing her back and leg problems. (Tr. p. 43-44). The claimant had injections, and afterwards "felt brand new" and had no pain. (Tr. p. 20, 22, 46-48, 75-76) She believed one of the injections was in 2014. (Tr. p. 48, APA p. 111) She went a long period of time with no problems. (Tr. p. 20) Her physician was aware of the type of work she did, and he released her to full duty. (Tr. p. 21, 76, APA p. 103)

There were two approximately three-month periods in 2015 when the store was without a manager. (Tr. p. 29) Because of that, she and the other assistant manager had to handle opening

and closing, and she only had two days off during those three months. (Tr. p. 29) The problems with her back began anew when she was working extra hours due to the lack of a store manager. (Tr. p. 67-68)

The claimant's back problems eventually became unbearable, and she sought treatment with Dr. Edwards. (Tr. p. 22) She saw Dr. Edwards and described the work she was doing at the employer. (Tr. p. 22-23) Dr. Edwards ordered injections, and wrote her out of work from June to July, 2016. (Tr. p. 23) When she returned to work, her back continued to bother her. (Tr. p. 23-24) Dr. Edwards eventually performed surgery on her back. (Tr. p. 24) She had some physical therapy thereafter, but could not complete it because the employer let her go, and she no longer had insurance. (Tr. p. 24-25)

On February 9, 2017, Dr. Edwards completed a questionnaire wherein he opined the claimant's back condition was causally related to her repetitive lifting at work. (APA p. 45) He confirmed his opinion in his deposition testimony. (Transcript of Deposition of Dr. Edwards p. 40)

The claimant continues to have problems with her back. (Tr. p. 25-27) The claimant thinks she would be able to work if she could find something that would let her sit for twenty minutes and then stand for thirty minutes or so. (Tr. p. 27) She has worked most of her life and does not like being out of work. (Tr. p. 28)

During the period of increased work hours because there was no manager, the claimant told the other assistant manager about her back problems. (Tr. p. 29) She told Mike Holstrom, a district manager, that she'd had "no day off, my back is hurting, every night I go home, I get up and I just need a break." (Tr. p. 71) According to the claimant, a manager from another store location where she was working knew about her back issues as well. (Tr. p. 68) She testified

that when she asked for time off to get treatment, she told Mike Holstrom it was because of the work she had been doing. (Tr. p. 72, 76)

The employer eventually hired a manager for the store, Robert Moore. (Tr. p. 30) The claimant reported to Robert Moore that lifting at the store had hurt her back. (Tr. p. 30-31) Instead of offering medical treatment or to file a workers' compensation claim, he told her to take it easy. (Tr. p. 32-33)

As for her issues in 2012, although she did not officially report her problems in 2012, she told her various store managers that her back was hurting because of the lifting on the job. (Tr. p. 78-79, 81)

At the hearing, Michael Holstrom testified for the defendants. Holstrom is currently a district manager for the employer, but was at one time an assistant manager (Tr. p. 86-87) According to Holstrom, the assistant manager is to perform the duties of the manager when the manager is not there. (Tr. p. 86) There is no set requirement as to how much lifting an assistant manager is to do, but an assistant manager is expected to be doing things in the store, including lifting. (Tr. p. 86) The employer requires the assistant manager be able to lift fifty-five pounds and to do team lifting on heavy items. (Tr. p. 86) On truck day, the assistant manager would lift around four hours that day and the rest of the week would spend four to five hours lifting. (Tr. p. 87) Holstrom confirmed the planograms take anywhere between 15 minutes and 4 hours to complete. (Tr. p. 92) He agreed it is necessary to remove the product in order to do the planogram. (Tr. p. 92)

According to Holstrom, the claimant wore a back brace and complained of her back hurting her. (Tr. p. 88) He did not recall her indicating anything about her job as having caused her back problems to become worse. (Tr. p. 90) Holstrom confirmed there were periods of time

when the store did not have a manager, and the claimant was called on to work more hours (Tr. p. 96)

Furthermore, Holstrom explained the store manager, not the district manager, handled all workers' compensation claims. (Tr. p. 94) The manager would send in the forms and those responsible for workers' compensation at the corporate office would handle it. (Tr. p. 94)

STANDARD OF REVIEW

"The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission." Burnette v. City of Greenville, 401 S.C. 417, 426, 737 S.E.2d 200, 205 (Ct. App. 2012). This court can "reverse or modify the decision only if the claimant's substantial rights have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Hutson v. South Carolina State Ports Authority, 399 S.C. 381, 387, 732 S.E.2d 500, 503 (2012). Substantial evidence is neither a "mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." Id.

Furthermore, "[i]n determining whether a work-related injury is compensable, the Workers' Compensation Act is liberally construed toward providing coverage and any reasonable doubt as to the construction of the Act will be resolved in favor of coverage." Davaut v. University of South Carolina, 418 S.C. 627, 795 S.E.2d 678 (2016).

ARGUMENTS

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED AS A MATTER OF LAW BY REQUIRING THE CLAIMANT PROVE HER JOB WAS REPETITIVE IN NATURE WHERE S.C. CODE ANN. § 42-1-172 ONLY REQUIRES PROOF OF REPETITIVE TRAUMATIC EVENTS AND REPETITIVE ACTIVITIES IN THE REGULAR DUTIES OF EMPLOYMENT.

The commission's decision regarding what constitutes repetitive trauma was affected by an error of law and should be reversed. Repetitive trauma injury is "an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C. Code Ann. § 42-1-172(A). The claimant must establish a causal connection by medical evidence between the injury and "the repetitive activities that occurred while the employee was engaged in the regular duties of his employment." S.C. Code Ann. § 42-1-172(B). There is no requirement in the statute that the employment itself must be "repetitive in nature," such as work on an assembly line. Instead, the statute requires repetitive activities during the engagement of the regular duties of employment.

For example, in Rhame v. Charleston County School District, 415 S.C. 162, 781 S.E.2d 151 (Ct. App. 2015), this court addressed a statute of limitations issue in a repetitive trauma case. Although, the issue of the proper application of § 42-1-172 was not before the court, the claimant in Rhame sustained repetitive trauma from lifting in his employment as a heating and air conditioning technician. At the hearing before the single commissioner, the claimant's duties were described as follows:

> the Claimant travels from school to school repairing air conditioning units. For example, the Claimant testified that if a compressor was down, he would un-wire the same, come off the roof, get another compressor, go back the ladder with the tools, and install the new compressor. He stated that he will lift compressors, ladders, fan motors, and coils. The lifting the Claimant does on the job ranges anywhere from 20 to 100 pounds. Throughout the course of the day, he spends most of the time walking, bending, stooping, squatting, climbing, pushing, and pulling.

Rhame v. Charleston County School District, 2010 WL 3326893, at *2 (S.C. Work. Comp. Comm. Feb. 26, 2010). Although his duties varied, the lifting he did throughout his day in completing his duties constituted repetitive trauma.

In its order denying the claim in the case at bar, the commission found "the positions held" by the claimant were not "repetitive in nature." Furthermore, the commission found the 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." Finally, the commission found the claimant's "job had physical aspects but that hard work is not necessarily repetitive." These findings are indicative of a misapplication of the law regarding repetitive trauma. Based on its findings, the commission is inserting a requirement into the statute that the claimant do the same task over and over. Nothing in the statute requires this.

Almost all the "varied" job responsibilities cited by the commission's order involved lifting. As the claimant went through her regular duties of employment—stocking shelves, moving merchandise, unloading trucks, sweeping and mopping the floors—she was lifting. She may have been lifting different items, but she was lifting over and over during the course of the day. Every incident of lifting was a traumatic event. She lifted many times throughout the day, *i.e.*, repetitively. This is the extent of what the statute requires; therefore, the Commission's findings in this regard must be reversed.

II. BECAUSE THE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD, THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED BY FINDING THE CLAIMANT DID NOT SUSTAIN A REPETITIVE TRAUMA INJURY.

The commission's finding the claimant did not sustain a repetitive trauma injury is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole

record." The only evidence in the record is that the claimant performed repetitive lifting during her regular duties of employment.

The commission specifically found both the claimant and the employer representative to be credible. The claimant testified she lifted many times every day at work. On weekly truck days, she repetitively lifted for hours. On other days, she lifted throughout the day while stocking, doing planograms, mopping, and other duties. She informed her medical providers on several occasions that her employment involved a lot of lifting.

Holstrom testified assistant managers would normally lift for at least four hours on weekly truck days and would spend four to five hours lifting the rest of the week. Based on Holstrom's testimony, the claimant would spend between 22% and 25% of her workweek lifting. This testimony by itself establishes repetitive lifting. Even if only the weekly truck day was considered, the testimony from both witnesses regarding the hours of lifting on those days is enough to establish repetitive lifting in the employment.

Before the full commission, both in the employer's brief and at oral argument, counsel for the employer insisted Holstrom's testimony was not offered to establish the claimant's duties as an assistant manager but only reflected Holstrom's personal experience on the job. (Respondent's Brief to the Full Commission p. 4, Transcript of Hearing before the Full Commission, p. 9-10). Given that, the only evidence in the record offered to establish repetitive lifting during the claimant's employment is the claimant's testimony. She testified she lifted repetitively every day. This is uncontroverted testimony.

The only medical evidence in the record is Dr. Edward's opinion that the repetitive lifting at work caused her back condition, and the defendants offered no other opinion. The testimony of the claimant, the testimony of the employer's only witness, and the medical evidence established the claimant lifted many times during the employment day, and the lifting caused her

back problems. There is no evidence in the record otherwise, and the decision of the Commission is clearly erroneous and is not supported by substantial evidence.

III. BECAUSE THE DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD, THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERRED BY FINDING THE CLAIMANT FAILED TO GIVE TIMELY NOTICE OF HER REPETITIVE TRAUMA INJURY TO HER EMPLOYER.

The claimant provided proper notice to her employer, and the commission's ruling that she failed to do so is not supported by the substantial evidence in the record and should be reversed. Section 42-15-20(C) provides:

> [i]n 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 to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

S.C. Code Ann. § 42-15-20(C). "Workers' compensation laws in general, and notice requirements in particular, are to be liberally construed in favor of claimants and coverage." Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 130, 623 S.E.2d 860, 864 (Ct. App. 2005).

The defendants argue that because the claimant knew her job was causing her back pain in 2012, she should have given notice then. Although it is the claimant's position that she did not sustain an injury until 2016 (see arguments below), the credible, uncontradicted testimony in the record is that the claimant told her employer in 2012 that lifting was causing her to have back pain.

The commission found the claimant credible. Although the claimant testified she did not tell any "authorities" about her back, she clarified that although she did not formally report her problems in 2012, she did tell her various store managers that her back was hurting, she was lifting too much, and it was hurting because she was lifting at work. (Tr. p. 75, 78-79, 81) There

was no contrary testimony in the record. Although Holstrom testified she did not report her repetitive trauma injury to him, he was a district manager, and Holstrom explained the store managers, not the district managers, handled workers' compensation matters. (Tr. p. 94) No store managers testified. The commission found the claimant did not report her repetitive trauma injury to any supervisors. This finding is not in accord with the record and appears to be based on surmise and speculation.

Furthermore, relying on Rhame v. Charleston County School District, 415 S.C. 162, 781 S.E.2d 151 (Ct. App. 2016) it is the position of the claimant that she did not sustain an injury for which notice was required until 2016. In Rhame, the claimant asserted a 2009 repetitive trauma injury to his back from lifting. The record revealed the claimant had "progressive and intermittent" back pain for which he received medical attention in 1994 or 1995, and 2001, 2002, 2006, and 2007. The back pain was on and off, and "retained its on-and-off character until May 2009." Id. at 154. He would miss "'a day or two of work, here and there.'" Id. at 155. After May, 2009, the claimant experienced "a constant, throbbing pain from his lower back down the front of his right leg." At that time, he was written out of work. In addressing whether the claimant knew or should have known his claim was compensable, the court held:

> While [the claimant] experienced off-and-on back pain since 1994 or 1995, it was not until May 2009 that he began experiencing constant, throbbing pain that interfered with his ability to perform his job. Furthermore, it was not until May 2009 that [the claimant] was diagnosed with disc disruption and lumbar radiculitis and told by his doctor he could not work. For the foregoing reasons, we find [the claimant] was not aware his back injury was compensable until May 2009.

Id. at 155.

Likewise, in the present case, it was not until 2016 that the claimant's back pain became constant and ultimately interfered with her ability to work. She testified that before 2016, her back pain would improve with treatment until she was pain-free. Then, in the first part of 2016, her back pain returned and became "unbearable." She expected it to get better as it had before,

but it did not, and she ultimately required surgery. It was not until June of 2016 that her doctors precluded her from working due to her back. Like the claimant in Rhame, the claimant did not sustain an injury until the nature of her condition changed from "on and off" back pain to "constant, throbbing pain that interfered with [her] ability to perform [her] job." Id. The claimant argues, then, this shift to "constant, throbbing pain" represents the cumulative effect of repetitive trauma events, as required by S.C. Code Ann. § 42-1-172(A).

The claimant testified she gave notice at that time to her store manager Robert Moore (also referred to as Robert Morris in the transcript). This testimony is uncontradicted in the record.

Assuming *arguendo* the claimant failed to give timely notice, it is the position of the claimant that she had a reasonable excuse. The notice statute provides the failure to provide notice is not fatal to a claim if "reasonable excuse is made to the satisfaction of the Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby." S.C. Code Ann. § 42-15-20(C). Once reasonable excuse is established, the burden shifts to the employer to prove prejudice. Lizee v. S.C. Dep't of Mental Health, 367 S.C. 122, 129, 623 S.E.2d 860, 864 (Ct. App. 2005).

The commission failed to make a finding regarding reasonable excuse. The record supports a finding of reasonable excuse. The claimant testified she would recover from her on-and-off back pain to become pain-free. If she were pain-free, then she would have no reason to pursue a workers' compensation claim and no reason to give her employer notice, and therefore, a reasonable excuse to not give notice until her pain became unbearable and constant in 2016.

Even though the commission failed to make a finding regarding reasonable excuse, it found the lack of notice resulted in "extreme prejudice on the part of the Defendants." The employer offered no evidence at all regarding prejudice at the hearing. The Commission's

finding regarding "extreme prejudice" is improperly based on surmise, conjecture, and speculation. At the very least, the case should be remanded to the Commission to make a finding regarding reasonable excuse.

CONCLUSION

For the reasons stated, this court should reverse the decision and order of the South Carolina Workers' Compensation Commission and remand to the commission for a determination of benefits, or, in the alternative, remand to the commission for a finding regarding reasonable excuse.

July 25, 2018

Respectfully submitted,

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No.:2018-000913
W.C.C. Case No.: 1621577

Carolyn Wilson, Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on Respondents by depositing a copy in the United States Mail, postage prepaid, on July 25, 2018, addressed to the attorney of record as follows:

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July 25, 2018

Reply to: Columbia Office

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RE: Carolyn Wilson v. Fred's Stores of Tennessee, Inc. and Safety National Casualty Corporation
Appellate Case No. 2018-000913

Dear Ms. Kitchings:

Enclosed please find the original and one copy of the Initial Brief of Appellant, Designation of Matter to be Included in the Record on Appeal and Proof of Service. Please file these documents and return clocked-in copies in the self-addressed stamped envelope.

Yours very truly,

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