THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Case No. 2018-000913

Carolyn Wilson, Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS

Matthew C. LaFave
Crowe LaFave, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5727
matt@crowelafave.com
Attorney for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Case No. 2018-000913

Carolyn Wilson, Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS

Matthew C. LaFave
Crowe LaFave, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5727
matt@crowelafave.com
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

I. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT, SUBJECT TO S.C. CODE ANN. § 42-1-172, APPELLANT DID NOT SUSTAIN A COMPENSABLE REPETITIVE TRAUMA INJURY?

II. WAS THE DECISION OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION THAT APPELLANT DID NOT SUSTAIN A COMPENSABLE REPETITIVE TRAUMA INJURY SUPPORTED BY SUBSTANTIAL EVIDENCE?

III. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT, SUBJECT TO S.C. CODE ANN. § 42-15-20(C), APPELLANT FAILED TO GIVE TIMELY NOTICE OF HER ALLEGED REPETITIVE TRAUMA INJURY TO HER EMPLOYER?

STATEMENT OF THE CASE

This case involved a denied claim for a repetitive trauma injury to Appellant's back, bi-lateral lower extremities, and bladder. Appellant, 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 Respondent/Employer, Fred's Stores of Tennessee, Inc. Respondents, by and through their counsel filed their Form 51, Employer's Answer to Request for Hearing contending that Appellant failed to present sufficient evidence of the existence of a repetitive trauma injury as required by S.C. Code Ann. § 42-1-172. Respondents specifically contended that there were no repetitive activities undertaken by Appellant in her employment with Respondent/Employer, Fred's Stores of Tennessee, Inc. Additionally, Respondents submitted that Appellant 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. Respondents contend that medical evidence coupled with Appellant's own testimony and admissions established that she knew her low back and leg problems were the result of the lifting activities undertaken in her employment and arose

beginning as far back as 2012. Based upon statute and case law Appellant was required to notify her employer within 90 days from the date this alleged condition led to her need for medical treatment, which was in 2012.

The Hearing in this case was originally scheduled for May 10, 2017, in Sumter, South Carolina; however, a postponement was needed 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.

The hearing took place before the Single Commissioner on August 15, 2017, in Florence, South Carolina. The Single Commissioner, on September 14, 2017, issued his order instructions in this matter. Specifically, the Single Commissioner noted Appellant had back pain requiring medical treatment, including and MRI and epidural steroid injections, in 2012. The Single Commissioner further found that Appellant knew the back problems in 2012 were related to the lifting activities occurring in her employment with Respondent/Employer. The Single Commissioner concluded that Appellant did not report any incident, accident or repetitive issue until 2016. Ultimately, the Single Commissioner found that Appellant was not employed in a repetitive job noting hard work is not repetitive. Therefore, it was held that Appellant failed to meet the requirements of the repetitive trauma statute S.C. Code Ann. § 42-1-172.

After the Decision and Order of the Single Commissioner (R. pp. 14-28) was filed, Appellant appealed the ruling to the Full Commission. The Full Commission heard oral arguments on January 22, 2018, and issued its Decision and Order on April 13, 2018, (R. pp. 1-13) affirming the Single Commissioner with certain amendments to the findings of fact and conclusions of law. Appellant filed her Notice of Appeal to this Court on May 11, 2018.

FACTS

Respondents largely accept the recitation of facts as set forth by Appellant in her Initial Brief; however, it is necessary to include additional pertinent information. Appellant testified that, as an assistant manager, she would work "every truck day." (R. p. 102, ll. 6-8). However, each truck day she would work with another assistant manager and the two would do "team lifting on heavier items." (R. p. 102, ll. 13-17). In addition to the assistant manager she indicated three (3) people are routinely employed to unload the truck with the unloading process being completed in approximately forty-five (45) minutes. (R. p. 103, ll. 15-22). The planograms, as testified to by Appellant, would take between thirty (30) minutes to an hour for an easy one and up to three (3) hours for a harder one (R. p. 110) and she was responsible for eight (8) to nine (9) per month. (R. p. 112-113). Appellant indicated that on average she would work between thirty-two (32) and thirty-six (36) hours as an assistant manager when the store she was working in had a store manager. (R. p. 107-108). Appellant testified that, during the extended period where the store was without a store manager in May or June of 2015, she shared duties with the other assistant manager and reported directly to the district manager.

Michael Holstrom, the District Manager, testified to the job responsibilities of an assistant manager "from his perspective." (R. p. 136, ll. 4). Holstrom did not testify to his job duties during the time he served as an assistant manager. He set forth a list of responsibilities undertaken by an assistant manager, which included lifting in different capacities. Holstrom testified that there was not a set requirement for lifting for assistant managers, but he concluded that they would engage in some form of lifting over the course of a week totaling approximately eight (8) to (9) hours per week of the thirty-six (36) to forty (40) hours worked. (R. p. 137, ll. 3-

9). Holstrom also described in detail the activities involved with a planogram noting that not all planograms required shelves to be moved. (R. p. 139).

Mr. Holstrom first became familiar with Appellant upon his taking over the responsibilities of district manager. At the time he began working as a district manager in October of 2014 he was responsible for Appellant's store. As of October 2014 Mr. Holstrom testified that Appellant, "all the times that I've seen her" was wearing a back brace. (R. p. 138, ll. 1-4). Appellant only reported to him that "sometimes her back hurt" but never related it to her job or any particular activity she did in her job. (R. p. 138). In fact, it was his understanding that she just had regular back issues noting specifically she had told him about her having arthritis and it causing her aches and pains at times. (R. p. 139). Finally, on cross-examination, Mr. Holstrom testified that Appellant never related her physical pains to him as being related to her work or specifically related to lifting she was doing as a part of her job. (R. pp. 147 & 149). Claimant admitted she did not tell Holstrom that the job was causing her back problems despite believing they were related to her work. (R. p. 120). In fact, Appellant specifically acknowledged that she did not believe she followed the company protocol for handling her on the job problems. (R. p. 123-124).

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004); (*See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981); *Gibson v. Spartanburg Sch. Dist. No. 3,* 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000)). "A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are 'clearly erroneous in view

of the reliable, probative and substantial evidence on the whole record.'" *Id.*; (*quoting Bursey v. South Carolina Dep't of Health and Envtl. Control,* Op. No. 3813, 360 S.C. 135, 600 S.E.2d 80, (Ct. App. filed June 1, 2004) (Shearouse Adv. Sh. No. 24 at 47); S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp. 2003). "Under the scope of review established in the APA, this Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Id.*, 360 S.C. at 289; (*See Frame v. Resort Servs., Inc.,* 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); *Stephen v. Avins Constr. Co.,* 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp. 2003)).

Review of decisions rendered by the South Carolina Workers' Compensation Commission is governed by the substantial evidence rule as promulgated by the APA. *Id.* Any such review by the Court of Appeals is limited to a determination of whether the decision(s) is/are unsupported by substantial evidence to or was a result of an error in the application of the law. *Id.* "In reviewing the decision of the commission, we will not set aside its findings unless they are not supported by substantial evidence or they are controlled by an error of law." *Lyles v. Quantum Chem. Co. (Emery)*, 315 S.C. 440, 445, 434 S.E.2d 292, 294 (Ct. App. 1993). A finding is supported by substantial evidence "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." *Id.* A finding upon which reasonable men might differ will not be set aside. *Id.*; (*quoting Lark v. Bi-Lo, Inc.,* 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)).

"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 the administrative agency reached in order to justify its

action." *See Supra Hargrove*, 360 S.C. at 289; (*See Etheredge v. Monsanto Co.,* 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); *Broughton v. South of the Border,* 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999)). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Id.* at 290; (*See Sharpe v. Case Produce, Inc.,* 336 S.C. 154, 519 S.E.2d 102 (1999); *Muir,* 336 S.C. at 282, 519 S.E.2d at 591). "Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive." *Id.*; (*See Etheredge,* 349 S.C. at 455, 562 S.E.2d at 681).

ARGUMENTS

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY APPLIED S.C. CODE ANN. § 42-1-172 IN REACHING ITS CONCLUSION THAT CLAIMAINT DID NOT SUSTAIN A COMPENSABLE REPETITIVE TRAUMA INJURY.

A repetitive trauma injury under the Workers' Compensation Act is governed by S.C. Code Ann. § 42-1-172, in defining one as an "injury, which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." The repetitive trauma statute further notes "[a]n injury is not considered a compensable repetitive trauma injury unless ... a causal connection ... is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury." In *Schurlknight v. City of North Charleston,* 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002), our supreme court held repetitive trauma injuries have a gradual onset caused by the cumulative effect of repetitive traumatic events or "mini-accidents." *Rhame v. Charleston County School Dist.*, 415 S.C. 162, 168, 781 S.E.2d 151, 154 (Ct. App. 2015). The court noted, "it is difficult to

determine the date an accident occurs in a repetitive trauma case because there is no definite time of injury." *Id.*

Appellant has challenged the decision of the Commission arguing that it was controlled by an error of law. Specifically, Appellant contends that the Commission erroneously applied S.C. Code Ann. § 42-1-172 in that it found as a fact that none of "the positions held by Appellant [were] repetitive in nature." This assertion reflects a very narrow interpretation of the decision of the Commission, which also found variance in her job responsibilities and that her "problems were not caused by the cumulative effects of repetitive traumatic events occurring during her employment." Appellant is requesting this Court reverse the decision of the Commission simply due to the use of the term "positions" as opposed to activities. The position of Appellant fails to appreciate the precise language of S.C. Code Ann. § 42-1-172(B), which states

> "An injury ***is not*** considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury."

Based upon the construction of the foregoing statutory section the absence of a conclusion by the Commission that a causal connection exists between "repetitive activities" and the employment is not fatal to the decision but rather is supportive of a finding that this is not a compensable repetitive trauma injury. The Commission is not required, to support a conclusion that there was no compensable repetitive trauma injury, to make a specific finding that no causal connection exists. It was, however, found that her low back and leg pain were not a result of repetitive traumatic events occurring during her employment reflecting a clear understanding and proper application of S.C. Code Ann. § 42-1-172.

Furthermore, Appellant directs the Court's attention to other findings by the Commission in an attempt to support her position that there was a misapplication of the law. Specifically, Appellant references the finding that sets forth the varied activities included in Appellant's job. It is required, to establish a compensable repetitive trauma injury, that Plaintiff's regular job duties include repetitive activities. This finding underscores the wide array of activities that Plaintiff undertakes in her job duties as an assistant manager and third-key holder prior to that. Therefore, this finding represents precise application of S.C. Code Ann. § 42-1-172 in showing that the activities are varying such that none qualify as repetitive. Appellant, to reinforce her contention that the decision was controlled by an error of law, directs this Court to *Rhame v. Charleston County Schools*. However, Appellant directs this Court to testimony proffered by the employee at the hearing before the single commissioner setting forth the duties described by the employee in his role as a heating and air conditioning technician for the school district. Appellant then selectively pulls a finding of fact from an Order of the Single Commissioner, 2010 WL 3326893, at (S.C. Work. Comp. Comm. Feb. 26, 2010), that was eventually reversed by the Full Commission. The finding by the Single Commissioner is not precedent to be followed nor is it persuasive as it is uniquely applied to the facts of that case in which the evidence was presented. *Rhame* was appealed to the Court of Appeals but the appeal solely focused on the application of the statute of limitations for repetitive trauma claims. Therefore, the Court never addressed, let alone affirmed, the position of the single commissioner on the issue of whether or not the employee's "varied" duties included a repetitive activity. Appellant, in presenting the duties set forth in *Rhame*, as a point of comparison to this case, is asking this Court to substitute its judgment on the point that even "varied" job responsibilities can be repetitive. "In an appeal from the Commission, Court may not substitute its judgment for that of the Commission as to the

weight of the evidence on questions of fact ...." *Corbin v. Kohler Co.*, 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). The record in this case has ample evidence regarding Appellant's job activities, which were duly weighed by the Commission. In weighing the evidence as a whole the Commissioner properly concluded Appellant's position, thus the activities undertaken therein, were not repetitive in nature and as such there is no compensable repetitive trauma injury under S.C. Code Ann. § 42-1-172. This Court cannot substitute its own judgment as to the weight of evidence on questions of fact, which is what Appellant is seeking.

II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S DECISION THAT APPELLANT DID NOT SUSTAIN A COMPENSABLE REPETITIVE TRAUMA INJURY WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

"In reviewing the decision of the commission, we will not set aside its findings unless they are not supported by substantial evidence or they are controlled by an error of law." *Lyles v. Quantum Chem. Co. (Emery)*, 315 S.C. 440, 445, 434 S.E.2d 292, 294 (Ct. App. 1993). A finding is supported by substantial evidence "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." *Id.* "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 the administrative agency reached in order to justify its action." *See Supra Hargrove*, 360 S.C. at 289; (*See Etheredge v. Monsanto Co.,* 349 S.C. 451, 562 S.E.2d 679 (Ct. App.2002); *Broughton v. South of the Border,* 336 S.C. 488, 520 S.E.2d 634 (Ct. App.1999)). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Id.* at 290; (*See Sharpe v. Case Produce, Inc.,* 336 S.C. 154, 519 S.E.2d 102 (1999); *Muir,* 336 S.C. at 282, 519 S.E.2d at 591). "Where there are conflicts in the evidence over a

factual issue, the findings of the Appellate Panel are conclusive." *Id.*; (*See Etheredge,* 349 S.C. at 455, 562 S.E.2d at 681).

Respondents do not dispute that, of the evidence presented regarding Appellant's job activities, she put forth the lion's share during her testimony. However, to contend that "the only evidence in the record" (Initial Brief of Appellant p. 8) as to her job activities was offered by her and was uncontroverted is patently false. Moreover, Appellant couches her testimony as having "established repetitive lifting" as it purportedly included her testifying that she "lifted repetitively every day." In completing a sweeping review of the transcript of the hearing before the single commissioner the word "repetitive" is never used once by Appellant during her testimony nor is it present in any question asked by her attorney. While Appellant certainly presented testimony about the activities of her job, the evidence was that she undertook a wide array of varying activities, which at times included lifting.

Furthermore, Appellant incorrectly asserts Holstrom only testified to the varying job activities to be undertaken by him during his time as an assistant manager. Appellant boldly asserts in her initial brief "Holstrom's testimony was not offered to establish the ***Appellant's duties*** as an assistant manager by only reflected [his] personal experience on the job." (***emphasis added***) (Initial Brief of Respondent p. 8). Appellant further contends that counsel for Respondent even ***insisted*** that Holstrom's testimony was only presented to support his personal experience from his time spent as an assistant manager. (***emphasis added***). In support of her contention Appellant directs this Court to the Respondents' Brief and Transcript of Hearing before the Full Commission (R. pp. 29-50). The position taken by Appellant creatively selects two statements without any regard for the context in which they were made. Counsel, in the Respondents' Brief acknowledged testimony by Holstrom about four (4) hours of lifting by the employer

representative and that it was in direct response to a question about the lifting ***he*** would undertake rather than his rendering testimony about the lifting undertaken by Appellant. Likewise, during the hearing before the Full Commission Counsel for Respondents reaffirmed that the testimony relative to four (4) hours of lifting during truck day was from Holstrom's past experience and not intended to be representative of Appellant's experience. In fact, Appellant herself had already testified that the process of unloading the truck took, on average, forty-five (45) minutes. However, Appellant simply disregards all other components of Holstrom's testimony, including those she previously relied upon in her Appellant's Brief to the Full Commission. Specifically, Appellant dedicated an entire paragraph about "admissions" made by Holstrom about activities undertaken by "assistant managers." (Appellant's Brief to the Full Commission).

Respondents contend that the record speaks for itself with regards to the presentation of evidence regarding Appellant's job activities and that it was based upon the evidence, taken in whole, that the Commission ultimately concluded Appellant failed to present sufficient evidence to support a finding that she sustained a compensable repetitive trauma injury. The Commission was presented a complete picture, by both parties, of the duties and activities undertaken by Appellant, and assistant managers generally, and upon weighing the evidence properly arrived at its conclusion that this was not a compensable repetitive trauma injury in accordance with S.C. Code Ann. § 42-1-172.

III. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DID NOT ERR IN FINDING APPELLANT FAILED TO GIVE TIMELY NOTICE OF HER REPETITIVE TRAUMA INJURY IN ACCORDANCE WITH THE REQUIREMENTS OF S.C. CODE ANN. § 42-15-60(C).

Appellant, finally, challenged the Commission's decision on the issue of untimely notice. An injured worker is required to timely notify his/her employer of an alleged repetitive trauma

injury in accordance with S.C. Code Ann. § 42-15-20(C). The foregoing statute states that when an employee suffers a repetitive trauma injury:

> [n]otice 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 [Workers' Compensation C]ommission 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) (Supp.2010).

The notice requirement in repetitive trauma claims is an area of great dispute and litigation, because of the difficulty in establishing, with precision, a date on which the "injury" occurred as the condition is gradual in onset. "Repetitive trauma injuries ... have a gradual onset caused by the cumulative effect of repetitive traumatic events or 'mini-accidents.'" *Schurlknight v. City of N. Charleston*, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002)

Appellant again relies on *Rhame v. Charleston County School District*, 415 S.C. 162, 781 S.E.2d 151 (Ct. App. 2015) in her attempt to challenge the decision of the Commission that notice was untimely. However, the issue taken up by the Court of Appeals in *Rhame* related to an employee's claim being be barred by the statute of limitations under S.C. Code Ann. § 42-15-40. In fact, this Court does not, at any time in the decision in *Rhame,* address the notice issue or even reference S.C. Code Ann. § 42-15-20. Therefore, Respondents contend that reliance on *Rhame* in challenging the conclusion that Appellant's notice to her employer, in the instant case, was untimely is misplaced, as this case is clearly distinguishable in that regard.

Unlike in *Rhame*, the Court of Appeals, in 2011, took up the specific issue of notice in repetitive trauma claims in *King v. International Knife and Saw-Florence*, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011). In the opinion of the Court in *King* it is noted specifically "[t]he question before us is this: in the case of a repetitive trauma injury, what event triggers an injured

employee's obligation to report and commences the ninety-day reporting period established in section 42-15-20(C)." *Id.* 395 S.C. at 443. In *King*, the employer argued that its employee, who acknowledge long-term arm ache, which he attributed to swinging hammers to hammer saw blades, failed to notify them timely. The employer specifically took the position that the employee could have discovered he had a compensable condition "a couple of years" prior to when he made his claim. As is consistent with the holding in *Rhame*, this Court in *King* noted "[a]n employee's obligation to report a work-related repetitive trauma injury is not triggered by the onset of pain but, rather, by the employee's diligent discovery that his condition is compensable." *Id.* at 444. In light of the foregoing holding this Court tasked itself, which is directly applicable to the instant case, with identifying when a condition becomes compensable thereby starting the clock for the duty to notify under S.C. Code Ann. § 42-15-20. It was ultimately determined that:

> a work-related repetitive trauma injury does not become compensable, and the ninety-day reporting clock does not start until the injured employee discovers or should discover he qualifies to receive benefits for medical care, treatment, or disability due to his condition.

Id.

Appellant argues that she did not sustain an injury, under S.C. Code Ann. § 42-1-172 until 2016, as it was not until then her pain became constant and began interfering with her ability to work such that notice was not required until then. However, the record clearly establishes notice was required as far back as 2012. There is overwhelming evidence in the record in this case that, from 2012 and forward, Appellant was experiencing pain in her back and lower extremity, which she knew to be work related, that required medical treatment. In applying the holding in *King* to this case Appellant's "ninety-day reporting clock" began as soon as she

required medical care or treatment that would otherwise have been benefits the employer would be required to pay under the Workers' Compensation Act, which dates back to 2012.

Appellant has taken the position that the uncontradicted testimony in the record was that "the Appellant told her employer in 2012 that lifting was causing her to have back pain." (Initial Brief of Appellant p. 9). Despite the foregoing assertion by Appellant the record, as a whole, is riddled with contradictory testimony. On cross-examination Appellant testified as follows:

Q: Did you believe in 2012, that the lifting was causing the back problems and your leg problems?

A: Yes.

Q Okay. And you didn't report that to anyone in 2012, correct?

A: No --

Q: Okay.

A: -- just my doctor.

(R. p. 93 & 94, ll. 24-25 & 1-6).

Additionally, on re-direct the following exchange occurred:

Q: In 2012, did you tell anybody in 2012, that you were having – that your back hurt because of lifting at the store?

A: Not nobody as far as actually, you know, no authorities that works there.

(R. p. 125, ll. 9-13).

Appellant later asserts in her initial brief that she "clarified" and claimed to "tell her various store managers" that her back was hurting because of lifting at work. (Initial Brief of Appellant p. 9). The need to provide "clarified testimony" by Appellant only serves to underscore the presence of contradictions in her testimony relative to notice and that substantial evidence indeed existed to support a finding that she did not notify a supervisor until 2016 and

that such notice was untimely under S.C. Code Ann. § 42-15-20(C). The burden of proof lies with a workers' compensation Appellant to show that he/she has complied with the notice provisions of S.C. Code Ann. § 42-15-20(C). *Nero v. South Carolina Department of Transportation*, 420 S.C. 523, 804 S.E.2d 269 (Ct. App. 2017). The record, taken as a whole, shows that substantial evidence existed to support the Commission's finding that Appellant failed to carry her burden of proof that notice to her employer was timely.

Appellant, in an additional attempt to overcome the issue of her untimely notification submits that there was a reasonable excuse for the notice being untimely. S.C. Code Ann. § 42-15-20(C) plainly states that untimely notice may not prove fatal to a claim provided "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." Appellant submits that the Commission committed a reversible error in failing to make a specific finding regarding a reasonable excuse despite her assertion that the record supported such a finding. Appellant has not directed this Court to any precedent that requires such a finding to be made. However, even assuming such a finding would have been supported by substantial evidence, which Respondents submit it was not, the subsequent finding of prejudice would directly negate any impact on the absence of a finding of a reasonable excuse. In fact, the finding of extreme prejudice can be reasonably interpreted as a conclusion that, even in the face of a reasonable excuse, Appellant failed to satisfy the requirements of S.C. Code Ann. 42-15-20(C) or otherwise meet the exception.

Appellant contends that the record contains substantial evidence to establish a reasonable excuse for her failure to give timely notice. There was testimony by Appellant that she would experience prolonged periods of time where she was pain free as supportive of an assertion that

she had no reason to pursue a workers' compensation claim or give notice until the pain became unbearable and constant in 2016. In fact, Appellant went so far as to contend "she would recover" during periods where she was without pain. Appellant herein again takes a one-sided view of the record and fails to account for it as a whole.

The record, which was clear and uncontradicted, indicates that as far back as May of 2009, Appellant was experiencing low back and leg pain that required medical attention such that she could have qualified for benefits under the Act. Appellant's medical condition with respect to her back continued to deteriorate to the point that she required an MRI scan on July 9, 2012. The MRI report revealed degenerative disc disease at multiple levels, constriction of the spinal canal at multiple levels and a possible symptomatic annular tear. The MRI findings represent conclusive diagnostic evidence of an injury in 2012 rather than a mere ache or pain. Beyond the MRI Appellant testified to having an epidural steroid injection, which had to be repeated, in 2014, when one "wore off." (R. p. 98, ll. 1-2 & 16-21). During an appointment in 2014 Appellant provided a medical history that included a report of several years of low back pain noting "she has had a gradual increase in pain in her low back with radiation bilaterally into the hips." (R. p. 315). The foregoing description provided in 2014 mirrors the definition of a repetitive trauma injury in S.C. Code Anno. § 42-1-172. Moreover, the history provided by Appellant in 2014 directly refutes her assertion that she had prolonged pain-free periods. Appellant, absent any corroborating medical evidence, presented her own testimony that she "recovered" during these pain free periods, despite contradictions in her medical report of "gradually increasing back pain that had been present for several years." Therefore, there was substantial evidence in the record to show that Appellant was continuing to experience pain and

required ongoing medical treatment such that she had no reasonable excuse for her untimely notification to her employer.

Assuming this Court finds it necessary to address the issue of a reasonable excuse to Appellant's untimely notice, it is still the position of Respondents that they were, by her delay, subjected to extreme prejudice as was found by the Commission. It is well settled that:

> The purpose of the notice provision 'is at least twofold; first, it affords protection of the employer in order that he may investigate the facts and question witnesses while their memories are unfaded, and second, it affords the employer opportunity to furnish medical care of the employee in order to minimize the disability and consequent liability upon the employer.'

Nero Supra, 420 S.C. 523, 530-31, 804 S.E.2d 269, 273 (Ct. App. 2017); (*quoting Mintz v. Fiske-Carter Const, Co.*, 218 S.C. 409-414, 63 S.E.2d 50, 52 (1951)).

A claimant may, under certain circumstances, be excused from giving timely notice as established in S.C. Code Ann. § 42-15-20(C). However, the determination does not end at a finding that a reasonable excuse was shown for the delay. The record as a whole is replete with evidence establishing the extreme prejudice Respondents faced due to the untimely notice. Appellant, after she began seeking medical treatment for low back and leg pain in 2012, accepted a more physically demanding position as an assistant manager. In her role as an assistant manager she was required to assist in unloading trucks, which had not been a requirement in her prior position as third key holder. Appellant has taken the position that the lifting activities required by her job satisfy the requirements of S.C. Code Ann. §42-1-172 such that every time she lifted she had a "mini-accident." Therefore, by accepting a position requiring more lifting she knowingly exposed herself to additional accidents inarguably leading, by her own claim, to a worsening of her low back and leg pain. Appellant accepted the assistant manager position without notifying her employer, nor did

she, at anytime during her employment request less lifting or other changes to her position. The fact that Appellant failed to notify Respondents of the low back and radicular leg complaints had the opposite of one of the intended effects of the notice requirement in that it significantly increased the consequent liability. The failure by Appellant to notify Respondents combined with her accepting a job requiring even more lifting caused her problems to worsen ultimately to the point where she required surgical intervention and could no longer perform her job.

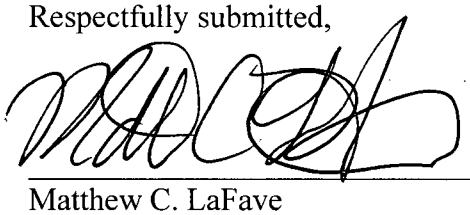
Based upon the record there was more than ample evidence to reach the conclusion that Appellant did not report an incident, accident, or repetitive issues to anyone with her employer in a supervisory capacity, as is required, until 2016. Appellant, in fact, could not identify, by name, a single manager she reported her injury to until 2016 nor did she provide dates to substantiate any such reports to prior managers. Therefore, based upon this conclusion, and substantial evidence, Appellant failed to meet her burden establishing that proper notice was given. Alternatively, Respondents contend experiencing a temporary period of relief provided by epidural steroid injections is not a reasonable excuse to not provide timely notice and even if it were reasonable the delay exposed Respondents to extreme prejudice thus barring her recovery for untimely notice under S.C. Code Ann. § 42-15-20.

CONCLUSION

For the reasons stated herein, this Court should affirm the Decision and Order of the South Carolina Workers' Compensation Commission Appellate Panel in full.

(SIGNATURE PAGE FOLLOWS)

Respectfully submitted,



November 19, 2018

Matthew C. LaFave
CROWE LAFAVE, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5727
matt@crowelafave.com
ATTORNEY FOR RESPONDENTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Case No. 2018-000913

Carolyn Wilson, Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents complies with Rule 211(b), SCACR.

November 19, 2018

Matthew C. LaFave
Crowe LaFave, LLC
Post Office Box 1149
Columbia, South Carolina 29202
(803) 724-5727
matt@crowelafave.com
Attorney for Respondents