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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

SCWCC No. 0920040

John R. Bowen, Respondent/Appellant,

v.

Vinyl Services, Inc. South Carolina Builders SIF and Bridgefield Casualty Ins. Co., Defendants,

Of whom Vinyl Services, Inc. and Bridgefield Casualty Ins. Co. are Appellants/Respondents.

and South Carolina Builders SIF is Respondent.

APPELLANTS' REPLY BRIEF OF APPELLANTS/RESPONDENTS TO BRIEF OF RESPONDENT/APPELLANT

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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 BOWEN PROVIDED VINYL SERVICES PROPER NOTICE OF HIS ALLEGED REPETITIVE TRAUMA INJURY PURSUANT TO S.C. CODE ANN. § 42-15-20(C) (2007)?

ARGUMENTS

I.

BASED ON THE RECENT DECISION BY THIS COURT IN *KING V. INTERNATIONAL KNIFE & SAW – FLORENCE*, 718 S.E.2d 227 (2011), BOWEN CLEARLY FAILED TO PROVIDE PROPER NOTICE TO VINYL SERVICES OF HIS ALLEGED REPETITIVE TRAUMA INJURY.

Assuming arguendo that Bowen's job with Vinyl Services was a repetitive job under S.C. Code Ann. § 42-1-172 (2007), which Bridgefield adamantly denies, substantial evidence in the record establishes that Bowen failed to provide Vinyl Services proper notice of his alleged repetitive trauma injury. The workers' compensation claimant bears the burden of proving compliance with notice requirements. Lizee v. S.C. Dept. of Mental Health, 367 S.C. 122, 623 S.E.2d 860 (Ct. App. 2005). South Carolina Code Ann. § 42-15-20(C) (2007) states 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*..."** (emphasis added). Thus, Section 42-15-20(C) mandates that notice must be given within ninety days from the time the claimant knew, or should have known, the case was "compensable."

In the present case, Bowen contends that in order to be "compensable" under S.C. Code Ann. § 42-1-172 (2007), an injured worker must be able to present medical evidence that establishes a causal connection between the repetitive activities that occurred while the injured worker was engaged in the regular duties of his employment and the injury. (Respondent's Brief of Respondent/Appellant, p. 22). Thus, Bowen argues that "the notice period cannot begin to run until the injured worker is able to

obtain evidence from the physician establishing under the terms of the Act that such injury has occurred and that such injury is causally related to repetitive work performed by the injured worker." Id. at 22. As such, Bowen asserts that April 21, 2010, the date of Dr. Emmett S. Lucas's causation opinion, was the first date he could have known that he had a compensable claim, and therefore, the notice period provided in S.C. Code Ann. § 42-15-20(C) (2007) began to run on April 21, 2010. Id. However, Bowen's position is clearly contradicted by this Court's recent decision in King v. International Knife & Saw – Florence, 718 S.E.2d 227 (Ct. App. 2011).[1]

In King, the claimant ("King") used hammers, weighing from six to ten pounds, to hammer saw blades to certain specifications for his employer from April 1995 through May 2008. Id. at 228. On April 17, 2008, the hammer that King was using broke, causing him to experience sharp pain in his shoulder. Id. King continued working for nearly a month before notifying his employer of his injury and seeking medical treatment. King stopped working on May 15, 2008. Id. On August 17, 2008, King filed a claim for workers' compensation benefits alleging injuries to his right shoulder and neck as the result of an "injury" as well as "repetitive trauma." Id. The employer denied his claim and asserted, among other defenses, that King failed to give timely notice of his alleged repetitive trauma injury. Id. King subsequently amended his claim to include carpal tunnel syndrome in his right arm, hand, and fingers as the result of an "injury" as well as "repetitive trauma." Id.

[1] The Court's decision in King v. Int'l Knife & Saw – Florence, 718 S.E.2d 227 (Ct. App. 2011), was not filed until October 19, 2011, exactly one month after Appellants filed their Initial Brief with the Court on September 19, 2011. Thus, Appellants were unable to address and apply the King decision in their Initial Brief.

At the hearing before the single commissioner on November 25, 2008, King conceded that his right arm had hurt and ached for the past couple of years and that he suspected that his prior right arm problems were connected to using a hammer all day at work. Id. at 229. The medical records indicated that from May 2008 to September 2008, King sought and received medical treatment for pain on his right side from his neck to his right hand. Id. Based on the evidence in the record, the single commissioner found that King reported his alleged repetitive trauma injuries timely and awarded benefits. Id. The employer appealed, and the Appellate Panel reversed both the finding that King reported his alleged injuries timely and the award of benefits. Id. The Appellate Panel specifically found that King "first noticed his injury a couple of years ago," suspected his work caused the injury, "knew well before he gave notice that he had a work-related problem," and "discovered his condition was compensable a couple of years ago." Id. King appealed to this Court. Id.

On appeal, King argued that the Appellate Panel erred in concluding that his repetitive trauma injury was compensable at a time when he had missed no work because of the condition, had sought no medical treatment for it, and had not been diagnosed as to having a repetitive trauma injury. Id. Thus, the issue before this Court was "in the case of a repetitive trauma injury, what triggers an employee's obligation to report and commences the ninety-day reporting period established in section 42-15-20(C)?" Id. at 230. The Court rejected the employer's position that any occurrence of pain, when coupled with the employee's belief that the pain is work-related, triggers the employee's reporting obligation under S.C. Code Ann. § 42-15-20(C) (2007). Id. The Court noted that nothing in the Act suggested that the legislature intended to compensate an employee

for aches and pains that do not interfere with his ability to do his or her job, even if those conditions are work-related. Id. However, the Court held that "an 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. Therefore, the Court had to determine when a repetitive trauma injury becomes "*compensable*." Id.

The Court noted that the Act entitles employees to compensation for (1) medical care or treatment for a work-related injury and/or (2) disability. Id. Thus, the Court specifically held 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. at 231. **As such, the Court further held that King's condition was not "compensable" until it either (1) required medical care or (2) interfered with his ability to perform his job, *whichever occurred first.*** Id. (emphasis added). The Court then determined that King timely reported his alleged repetitive trauma injuries in May of 2008 because the first time he missed work due to his alleged injuries was on May 15, 2008 and the first time he sought medical treatment was two weeks after that date. Id. As a result, the Court reversed the Appellate Panel's decision and reinstated the single commissioner's award of benefits. Id.

Based on this Court's recent decision in King, a repetitive trauma injury becomes compensable, triggering the start of the ninety-day notice requirement in S.C. Code Ann. § 42-15-20(C) (2007), when a claimant knows or should have known that his condition is related to his employment and either (1) required medical care for his condition or (2)

missed work as a result of his condition, whichever occurs first. *See* King, 718 S.E.2d at 231. As such, in the present case, Bowen clearly failed to provide Vinyl Services with proper notice of his alleged repetitive trauma injury pursuant to S.C. Code Ann. § 42-15-20(C) (2007).

First, Bowen specifically testified that he had known since at least 2008 that the problems he is currently experiencing with his lower back were the result of his activities at work:

> Q: (Mr. Lewis) Well, do you know -- we can go back over your deposition but when -- when you gave the deposition on this case, I mean, you told us that you knew at least back in 2008, that the problems you were having, the pain you were having, was being caused by your work?
>
> A: (Bowen) I did, definitely, yeah.
>
> Q: All right. So, you've known for some years now that that work was what's causing your problems that you're having now; is that right?
>
> A: Yes. I'd have to answer yes to that.

(R. p. 97, lines 2-11). Even though Bowen was aware that his job with Vinyl Services was causing his lower back problems for years, Bowen's condition was not "compensable" under the Act until he either (1) sought medical treatment for his lower back condition or (2) went out of work for his lower back condition. *See* King, 718 S.E.2d at 231.

The medical records in the file clearly indicate that Bowen first sought medical treatment for his lower back condition in May of 2009. On May 6, 2009, Bowen presented to Golden Corner Family Practice with complaints of back pain. (R. p. 404). It was specifically noted that Bowen complained of "lower back pain radiating to the legs

and back stiffness," and Bowen was diagnosed with lumbar disc degeneration. (R. p. 405). On May 20, 2009, Bowen returned to Golden Corner Family Practice with continued complaints of back pain. (R. p. 402). It was once again noted that Bowen was experiencing "lower back pain radiating to the legs and back stiffness." Id. Bowen was diagnosed with lumbar disc degeneration and prescribed Motrin 800. (R. p. 403-04).

Consequently, pursuant to King, Bowen's lower back condition became "compensable" under S.C. Code Ann. § 42-15-20(C) (2007) on May 6, 2009, the date that he first sought medical treatment. As such, Bowen had ***ninety days*** from May 6, 2009 to report his alleged repetitive trauma injury to Vinyl Services. *See* S.C. Code Ann. § 42-15-20(C) (2007). However, Bowen did not notify Vinyl Services of his alleged repetitive trauma injury until he filed a claim on February 19, 2010, ***289 days after he first sought medical treatment for his alleged condition***. Thus, Bowen clearly failed to provide Vinyl Services proper notice of his alleged repetitive trauma injury.

Additionally, even assuming Bowen's condition did not become "compensable" until it interfered with his ability to perform his job, substantial evidence in the record clearly establishes that Bowen still failed to provide Vinyl Services with proper notice of his alleged repetitive trauma injury. Bowen testified at the hearing that he went out of work on November 11, 2009 because he was unable to do his job anymore. (R. p. 88, lines 16-22; R. p. 97, line 25–p. 98, line 4). In fact, Bowen asserts that his "injuries first became disabling on November 11, 2009." (Respondent's Brief of Respondent/Appellant, p. 23). Thus, even assuming his condition did not become "compensable" until November 11, 2009, Bowen still failed to provide Vinyl Services with proper notice of his alleged repetitive trauma injury. As noted above, Bowen first notified Vinyl Services

of his alleged repetitive trauma injury on February 19, 2010, ***100 days after his alleged condition interfered with his ability to perform his job and caused him to miss work.***

CONCLUSION

Based on the foregoing, it is more than apparent that Bowen failed to provide Vinyl Services with proper notice of his alleged repetitive trauma injury pursuant to S.C. Code Ann. § 42-15-20(C) (2007). Not only did Bowen fail to report his alleged repetitive trauma injury to Vinyl Services within ninety days of the date he first sought medical treatment, Bowen also failed to report his alleged repetitive trauma injury within ninety days of the date that his condition first interfered with his ability to perform his job.

Therefore, pursuant to this Court's recent decision in King, even if the Court determines that Bowen sustained an injury by repetitive trauma as defined in S.C. Code Ann. § 42-1-172 (2007), Appellant Bridgefield requests that the Court reverse the Commission's Order and deny Bowen's claim for benefits due to the fact that Bowen failed to provide Vinyl Services proper notice of his alleged repetitive trauma injury as required by S.C. Code Ann. § 42-15-20(C) (2007).

Respectfully submitted,

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March 15, 2012

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Briefs comply with Rule 211(b), SCACR.

March 19, 2012

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PROOF OF SERVICE

I certify that I have served the Final Brief of Appellants, Final Reply Brief of Appellants, and Final Brief of Respondents on John R. Bowen by depositing a copy of it in the United State Mail, postage prepaid, on March 19, 2012, addressed to his attorney of record, Kathryn Williams, Esquire, Kathryn Williams, P.A., P.O. Box 10693, Greenville, South Carolina 29603.

March 19, 2012

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