

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM  
THE WORKERS' COMPENSATION COMMISSION

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SC Court of Appeals

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SCWCC Case No. 1003122  
Appellate Case No. 2013-002076

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Zeena Fletcher, Employee, ..... Respondent,

vs.

Dick's Sporting Goods, Employer, and  
Federal Ins. Co., Carrier, ..... Appellants.

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**BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

Table of Authorities .....	ii
Statement of Issues on Appeal .....	1
Statement of the Case .....	2
Statement of Facts .....	4
Arguments .....	5
I.    The Workers' Compensation Commission did not err in allowing Fletcher to withdraw her form 50 hearing request in this matter or in finding that the applicable time limit in § 42- 17-90 has been satisfied .....	6
Conclusion .....	11

## TABLE OF AUTHORITIES

### Cases

<u>Allen v. Benson Outdoor Adver. Co.</u> , 236 S.C. 22, 112 S.E.2d 722 (1960) .....	9,10
<u>Brown v. Greenwood Mills, Inc.</u> , 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005) .....	5-6
<u>Candado Stevedoring Corp. v. Willard</u> , 91 F. Supp. 77, 80 (E.D.N.Y. 1950) aff'd, 185 F.2d 232 (2d Cir. 1950) .....	10
<u>Wilkins v. State Comp. Comm'r</u> , 198 S.E. 871 (W.Va. 1938) .....	9

### Statutes

S.C. Code Ann. § 42-17-90 (2010) .....	3,6,7,8,11
S.C. Code Ann. § 42-17-90(A)(2010) .....	6

### Regulations

S.C. Code Reg. 67-206 (2010) .....	7
S.C. Code Reg. 67-207 (2010) .....	7
S.C. Code Reg. 67-207(B)(2010) .....	8
S.C. Code Reg. 67-602(C)(2010) .....	7
S.C. Code Reg. 67-609 (2010) .....	6,8,11
S.C. Code Reg. 67-609(A)(2010) .....	6,8

S.C. Code Reg. 67-609(A)(2)(2010) ..... 8

S.C. Code Reg. 67-609(B)(2010) ..... 6,8

S.C. Code Reg. 67-609(B)(1)(2010) ..... 8

## STATEMENT OF ISSUES ON APPEAL

- I. Did the Workers' Compensation Commission err in allowing Fletcher to withdraw her Form 50 hearing request in this matter?
- II. Did the Workers' Compensation Commission err in finding that the applicable time limit in § 42-17-90 has been satisfied?

## STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission. This claim came before a single Commissioner on February 5, 2013 in response to Fletcher's form 50 hearing request alleging a change of condition with regard to a previously-determined compensable injury to her right knee. (R. App. p. 173) As stated in the Commissioner's March 12, 2013 order, following an extensive pre-hearing conference with the attorneys for both parties, the single Commissioner "expressed concern that the authorized treating physician's uncontroverted opinion, stated to a reasonable degree of medical certainty, that 'the Claimant has sustained a change of condition for the worse regarding her right knee condition stemming from her March 13, 2010 injury by accident,' would not be sufficient to warrant a finding that the Claimant has sustained a change of condition for the worse to her right knee." (R. pp. 14-15) The Commissioner recommended that the case be postponed so that Fletcher's attorney could obtain additional diagnostic evidence. However, Dick's Sporting Goods' attorney objected to the case being postponed. In response, Fletcher's attorney withdrew the form 50 hearing request, as is allowed in the Commission's rules. The hearing was not convened or held.

As Dick's Sporting Goods' attorney admitted in the pre-hearing conference that the reason he objected to the postponement and was insisting that Fletcher withdraw the hearing request was so that he could raise a statute of limitations defense, the Commissioner issued an order dated March 12, 2013. (R. pp. 14-15) The Commissioner found that the form 16 in this case was approved by the Commission on February 8, 2012, that the hearing at issue was

originally scheduled for January 18, 2013, that the hearing was reset on January 29, 2013 and then again on February 5, 2013 at the Commissioner's direction, and that Fletcher was ready to proceed at all three scheduled hearings. The Commissioner further found that defendants have been on notice of the change of condition claim for months, as Fletcher had timely filed a claim form 50 attaching medical documentation of the change in condition, and that "[a]ccordingly, all applicable time limits in S.C. Code Ann., §42-17-90 are tolled."

Dick's Sporting Goods appealed to the Full Commission Panel contending "[t]he Single Commissioner erred in allowing the Claimant to withdraw their Form 50, Change of Condition for the worse, since by Order the statute of limitations cannot be tolled as set forth in S.C. Code Ann. § 42-17-90." (R. p. 38, and R. App. pp. 176-184) Following briefing and oral arguments, an Appellate Panel of the Commission issued an order on September 19, 2013 affirming the single Commissioner's order. (R. pp. 16-23)

Dick's Sporting Goods now appeals to this Court.

## **STATEMENT OF FACTS**

Fletcher was initially injured her right knee and back on March 13, 2010 when she slipped and fell while performing her regular work duties for Dick's Sporting Goods. After receiving medical treatment for her injury, Fletcher returned to work on August 2, 2010 and continued working for Dick's. On February 8, 2012, the parties filed and Commission approved a Form 16A providing permanent disability compensation for loss to Fletcher's right leg and back and continuing maintenance medical treatment. (R. p. 1)

On November 20, 2012, Fletcher filed a form 50 alleging a change of condition for the worse with regard to her right knee and seeking additional benefits. (R. App. p. 173)

## ARGUMENTS

In Brown v. Greenwood Mills, Inc., this Court explained at length the standard of review in workers' compensation cases.

The South Carolina Administrative Procedures Act (“APA”) establishes the standard for judicial review of decisions of the workers' compensation commission. 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.” Under the scope of review established in the APA, this Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law.

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Pursuant to the APA, this Court's review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law. 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.

The appellate panel is the ultimate fact finder in workers' compensation cases and is not bound by the single commissioner's findings of fact. The final determination of witness credibility and the weight to be accorded evidence is reserved to the appellate panel. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive.

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. It is not within our province to reverse findings of the appellate panel which are supported by substantial evidence.

Brown v. Greenwood Mills, Inc., 366 S.C. 379, 391-93, 622 S.E.2d 546, 553-54 (Ct. App. 2005)(citations omitted).

I. **The Commission did not err in allowing Fletcher to withdraw her form 50 hearing request in this matter or in finding that the applicable time limit in § 42-17-90 has been satisfied.**

Dick's Sporting Goods' argues that in the context of a change of condition claim withdrawing a form 50 hearing request in the manner provided in S.C. Code Reg. 67-609 withdraws the underlying claim such that the time limit in S.C. Code Ann. § 42-17-90 is no longer satisfied. This argument is contrary to the plain language of the Commission's rule, and Dick's Sporting Goods' appeal should be rejected.

The change of condition statute reads as follows:

On its own motion or on the application of a party in interest on the ground of a change in condition, the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation. . . . [T]he review must not be made after twelve months from the date of the last payment of compensation pursuant to an award provided by this title.

S.C. Code Ann. § 42-17-90(A)(2010). The Commission's rules do not define the term "application" and do not provide a separate procedure specifically for the filing of an

“application” for change of condition. The Commission’s rules do provide procedures for filing a “claim” in S.C. Code Reg. 67-206 and for “requesting a hearing” in S.C. Code Reg. 67-207, and both involve the filing a form 50. The only specific reference to a change of condition claim in the Commission’s rules is found in S.C. Code Reg. 67-602(C), which provides that the moving party must attach to a hearing request a medical report supporting the claim, may request medical evaluation at the employer’s expense, and may submit additional medical information at a hearing. As seen in the Commission’s order at issue here, the Commission has interpreted its rules to allow the filing of a form 50 for the purposes of making the change of condition “application” referred to in § 42-17-90.

In this appeal, Dick’s Sporting Goods does not contend that the form 50 hearing request filed by Fletcher on November 20, 2012 with supporting documentation was untimely or was in any way deficient. As the time limit in § 42-17-90 is in effect a notice provision, the Commission here determined that the November 20, 2012 filing put Dick’s Sporting Good on notice of the change of condition claim. (R. p. 21, FOF #9) The Commission further found that the filing satisfied the time limit in §42-17-90. (R. p. 21, FOF #10 and ROL #3,4)

Those findings are factually and legally correct. Fletcher’s application for review – the form 50 hearing request, with the requisite attached medical documentation – was filed on November 20, 2012. (R. App. p. 173) Since the Form 16 settlement agreement in this case addressing compensable injuries to claimant’s right knee and back was approved by the Commission on February 8, 2012 (R. p. 1), and the last payment of compensation was made on or about that date, the form 50 alleging a change of condition was filed within the one-year

period.<sup>1</sup> Substantial evidence supports the Commission's findings that the time limit contained in § 42-17-90 was satisfied. The change of condition application was timely made, and once that time limit has been satisfied, it is difficult to see how it could at some later point be rendered unsatisfied.

Dick's Sporting Goods' contention is that subsequent withdrawal of the hearing request in some way removed the claim form change of condition as if it had never been made. There is simply no support for this contention. The Commission's rule concerning the withdrawal of a hearing request indicates that such withdrawal does not affect the underlying claim. Regulation 67-609 provides that "[a] claimant may withdraw a Form 50 [hearing request] or Form 52 once as a matter of right with leave to renew" and that the withdrawal "is without prejudice to the claimant's right to proceed with his or her claim." S.C. Code Reg. 67-609(A), (B)(2010). In fact, the rule provides that the withdrawal does not actually remove the hearing request itself but simply removes the case from the hearing docket. S.C. Code Reg. 67-609(A)(2)(2010). If the relief sought does not change, all a claimant needs to do to restore the case to the docket is write the Commission a letter making that request.<sup>2</sup> S.C. Code Reg. 67-609(B)(1)(2010).

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<sup>1</sup>

The Commission's regulation concerning hearing requests specifically states that "[f]iling a Form 50 or Form 52 with the Commission requesting a hearing also files the claim if a claim has not been filed before." S.C. Code Reg. 67-207(B)(2010). Since claimant filed her Form 50 hearing request on November 20, 2012, she also filed her claim – or application for review – alleging a change of condition for the worse with regard to her right knee injuries on that date.

<sup>2</sup>

The fact that Fletcher had not yet made the request to restore the case to the docket at the time of the appeal to the Full Commission Panel is immaterial, as Dick's Sporting Goods appeal removed from the single Commission the jurisdiction to hold a hearing on the claim.

However, even if in some way the withdrawal did remove the “request for hearing” aspect of the form 50 application, it is clear that the remaining “claim” aspect of the form 50 is enough. The Supreme Court has held that so long as the change of condition application is filed with the Commission within the one-year period, the actual hearing on the issue need not be held during the one-year time period. Allen v. Benson Outdoor Adver. Co., 236 S.C. 22, 112 S.E.2d 722 (1960). In so doing, the Court noted that “a liberal construction [of the statute] is required” and that

[t]o sustain appellants' contention would lead to a rather unreasonable result clearly not within the intent of the Legislature. An application might be seasonably made but due to crowded dockets or other causes could not be heard within the statutory period.

Allen, 112 S.E.2d at 725-26. The Court also approvingly quoted the following language from a West Virginia case:

‘The filing of a claim for further compensation within the statutory period *and partial but not complete development thereof within such period*, with loss of jurisdiction by the commissioner during the progress of the case, would be an absurd result which the legislature certainly did not have in mind, and we feel warranted in holding that the statute in question should be given a construction which permits the commissioner to hear and pass upon any application in writing for a further adjustment of a claim, if filed within the statutory period applicable to the nature of the claim filed.’

Allen, 112 S.E.2d at 726 (quoting Wilkins v. State Comp. Comm’r, 198 S.E. 869, 871 (W.Va. 1938)(emphasis added).

This language clearly indicates that the Supreme Court intended only that the claim be made—that the notice of the change of condition claim be given—within the one-year time period and that subsequent development of the case, hearing, and decision can all be accomplished outside the one-year time period. See also Candado Stevedoring Corp. v. Willard, 91 F. Supp. 77, 80 (E.D.N.Y. 1950) aff'd, 185 F.2d 232 (2d Cir. 1950)(“it was sufficient if proceedings were ‘begun’ within the year which . . . means from the time of the filing of the claim and giving of notice”). This interpretation is the only reasonable one because, as the Court in Allen recognized, it takes time to develop a case for hearing. If an injured worker walked into an attorney’s office on the last day of the one-year notice period and the application was timely filed on that date, the attorney would still need time to develop the case.

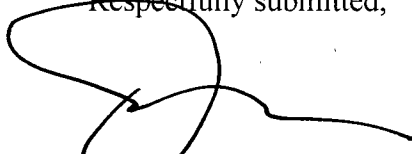
Defendants’ arguments are wholly without support and are contrary to the plain language of the Commission’s rules and the applicable statute, as interpreted by the Supreme Court. The appeal to this Court should be denied, and the Commission’s order should be affirmed.

## CONCLUSION

Dick's Sporting Goods' appeal and arguments are contrary to the plain language of the Commission's rule 67-609 and should be rejected. Substantial evidence supports the Commission's findings that the time limit contained in § 42-17-90 was satisfied when Fletcher filed her form 50 on November 20, 2012. Once that time limit has been satisfied, it logically cannot then be rendered unsatisfied. As the Commission's rule states, the withdrawal of the hearing request under 67-609 merely removes the case from the docket with leave to restore by letter. The filing of an additional form 50 is not even required.

The Commission's Order is factually and legally correct. Under the applicable standard of review, that Order should be affirmed by this Court without change.

Respectfully submitted,

A handwritten signature in black ink, appearing to be "Kathryn Williams", written over a horizontal line. To the right of the signature, the number "(16633)" is handwritten in black ink.

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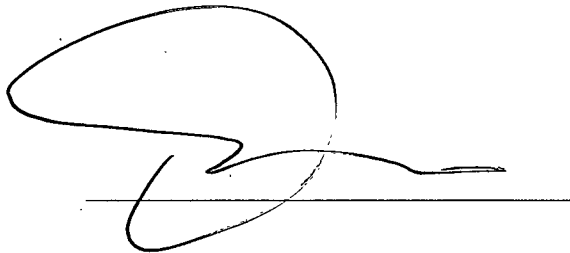
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**CERTIFICATE OF SERVICE**

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This is to certify that the undersigned did cause the **FINAL BRIEF OF RESPONDENT** to be served upon Appellant by mailing a copy of same to the below-named by U.S. Mail, proper postage prepaid, on the 22<sup>nd</sup> day of June, 2014.

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(S)

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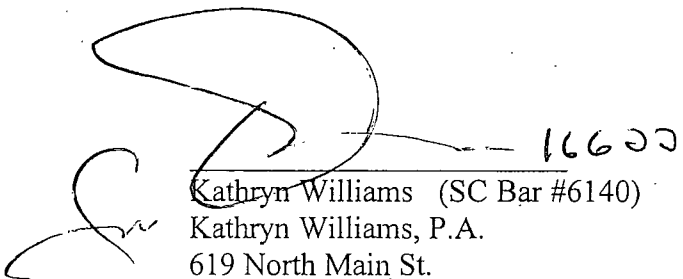
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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief complies with the Supreme Court's August 13, 2007 Order concerning personal date identifiers and other sensitive information.

  
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