IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Appellate Case No. 2019-001017

Delinzy Grant, Claimant..... Respondent,

v.

Steel Technologies, Employer,
and
Zurich American Insurance Co., Carrier..... Appellants.

REPLY BRIEF OF APPELLANTS

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I. THE APPELLATE PANEL'S DETERMINATION THAT RESPONDENT SATISFIED THE NOTICE REQUIREMENT OF § 42-15-20(C) IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND IS CONTROLLED BY AN ERROR OF LAW.

Respondent, and the South Carolina Workers' Compensation Commission Appellate Panel ("Appellate Panel"), erroneously rely upon the February 21, 2018 questionnaire ("questionnaire") completed by Respondent's physician, Dr. Anderson, to establish that Respondent timely notified Appellants on September 14, 2017, via Form 50, of her alleged repetitive trauma injury pursuant to the requirements of S.C. Code Ann. § 42-15-20(C). (App. Panel's Decision and Order, p. 8; Respt's. Br. 2-3). In response to the questionnaire provided to Dr. Anderson by Respondent, Dr. Anderson explicity states to a reasonable degree of medical certainty, more likely than not, that the repetitive activities performed by Respondent as a Mechanic Operator "directly caused the injury to her lumbar spine" and, further, "aggravated, exacerbated, and/or worsened her lumber spine." (APA 1, p. 13). To be sure, a questionnaire such as Dr. Anderson's is relevant to *the Commission's* assessment of whether an alleged injury constitutes compensable repetitive trauma pursuant to S.C. Code Ann. § 42-1-172(D). However, the controlling statute for purposes of determining whether Respondent timely notified Appellants of her alleged injury, S.C. Code Ann. § 42-15-20(C), requires no such formal medical determination in order to trigger her reporting obligation. To the contrary, the statute expressly states that in cases 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 [the employee's] condition is compensable." S.C. Code Ann. § 42-15-20(C) (emphasis added).

A. S.C. Code Ann. § 42-15-20(C) must be given its plain meaning.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2 578, 581 (2000); *see also Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Id.*; *see also In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning." *Id.* (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)).

In finding that Respondent satisfied the notice requirement of § 42-15-20(C) solely because Dr. Anderson's questionnaire was "the first ***record*** of [Respondent's] condition being work-related," the Appellate Panel wholly disregarded the plain and unambiguous terms of the statute. (App. Panel's Decision and Order, p. 8 at ¶10). Section 42-15-20(C) imposes no such "record" requirement. The Appellate Panel's holding in this regard essentially finds that an employee's obligation to report a repetitive trauma injury does not begin until the employee receives a written medical determination that the injury is causally related to his/her employment. Such a construction renders the "reasonable diligence" requirement of the statute superfluous, which certainly is not the intended effect of the subject statute. To the contrary, the legislature specifically drafted the statute to require employees to take an active role in determining whether their injuries are work-related. The statute does not state that the employee's obligation arises upon receipt of the "first record", *i.e.* written medical opinion, that the condition is work-related; rather, the employee must give notice within ninety days of the date the employee discovered, or *could have discovered by exercising reasonable diligence*, that the condition is compensable. S.C.

Code Ann. § 42-15-20(C) (emphasis added). If a written medical opinion were the standard for triggering the notice obligation, the additional "or could have discovered" language of the statute would serve no purpose whatsoever. A determination endorsing this outcome flies in the face of the well-settled law of this state, which mandates that the courts effectuate the intent of the legislature by giving statutes their plain and ordinary meaning.

As discussed in Appellants' Initial Brief, this Court previously interpreted § 42-15-20(C) in *King v. International Knife and Saw–Florence*, 395 S.C. 437, 718 S.E.2d 227 (Ct.App. 2011). Pursuant to *King*, "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.* 395 S.C. at 444, 718 S.E.2d at 231 (emphasis added). "The Act requires an injured employee *to be diligent*, not prescient." *Id.* 395 S.C. at 445, 718 S.E.2d at 231 (emphasis added). The Court found that King's condition "was not compensable until it *either* required medical care *or* interfered with his ability to perform his job, *whichever occurred first*." *Id.* (emphasis added). As such, it is without question that an employee's obligation under § 42-15-20(C) to notify the employer of a repetitive trauma injury is not dependent upon a physician's determination as to causation but, rather, turns on whether the employee discovers, or by reasonable didligence *could* discover, that the condition is work-related. *See King supra*; *see also Bass v. Isochem*, 365 S.C. 454, 481, 617 S.E.2d 369, 383 (Ct. App. 2005).

Respondent's request that this Court affirm the Appellate Panel's ruling is tantamount to a request that it rewrite the statutory law of this state. As this Court well knows, such a task is one reserved solely for the legislature. *See Bass, supra,* 365 S.C. at 470, 617 S.E.2d at 377–78 ("'Once the legislature has made [a] choice, there is no room for the courts to impose a different judgment

based upon their own notions of public policy'…'Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language.'") (internal citations omitted).

B. Respondent failed to give proper notice to Appellants within ninety days of the date she discovered or could have discovered that her repetitive trauma injury was compensable.

Respondent argues that because "[n]one of her medical records indicate that *she believed* her job had played a role in her low back problem," she had no obligation to report her injury to her employer. (Resp.'s Br. 2) (emphasis added). Further, the Appellate Panel improperly relied upon Respondent's testimony that "she did not report an injury to her employer because *she did not realize* her condition was work-related until advised by Dr. Anderson." (App. Panel's Decision and Order, p. 8 at ¶ 8) (emphasis added). However, Respondent's subjective belief is not the standard imposed by § 42-15-20(C). Again, such a conclusion would render the "or could have discovered by exercising reasonable diligence" portion of the statute meaningless. Moreover, Respondent's medical records do not support the notion that she had no reason to believe that her condition was related to her employment, and without question show that she "could have discovered" that her injury was work-related had she exercised reasonable diligence.

Plaintiff first sought treatment with Dr. Anderson on September 20, 2016. Respondent reported that day that her back pain was worsened with lifting and further indicated in the medical forms she completed that standing and bending aggravated the pain. (APA 4, pp. 35-37). Moreover, she noted "standing" and "lifting" as her job description. *Id.* at 38. Importantly, the record of her visit that day notes as follows:

> [Respondent] reports an injury approximately 9 years ago at her job ***causing current symptoms***. The symptoms acutely were resolved with rest and medications. Over the past several years she has had intermittent back and right lower extremity pain. Her symptoms have worsened over the last several weeks without acute

> injury. She describes constant pain in the low back and worsens throughout the day. She has burning and stabbing pains in the right buttock as well as a constant numbness in the right hamstring. She also has constant numbness to the great toes bilaterally. Her pain was so severe she was evaluated in the emergency department 2 weeks ago.

(APA 1, p. 1). The injury "approximately 9 years ago at her job" was an injury to her lower back as a result of lifting skids, the exact job duty she continued to perform for the next seven years and which Dr. Anderson later stated directly caused the compensable injury to her lumbar spine. (APA 1, p. 1; APA 1, p. 12-13, APA 4, p. 51-52; Single Comm. Hrg. Trans., p. 48, ll. 1-3). It is clear from Dr. Anderson's September 20, 2016 note that the symptoms for which Respondent sought treatment were related to her employment. In fact, he related the 2009 work injury as the ***cause*** of her 2016 symptoms. (APA 1, p. 1). Respondent offers no explanation as to why she would understand in 2009 that her lower back injury was the result of the physical duties of her job, *i.e.* lifting skids, but would have no cause whatsoever to suspect such duties as the culprit of the symptoms for which she sought treatment on September 20, 2016. (Single Comm. Hrg. Trans., pp. 25-29).

Based upon the foregoing, on September 20, 2016, Respondent either discovered or possessed information from which she could have discovered by exercising reasonable diligence that her subject injury was related to her employment with Appellant Steel Technologies.[1] *See also King, supra,* 395 S.C. at 445, 718 S.E.2d at 231 (finding King's condition "was not compensable until it either required medical care or interfered with his ability to perform his job, *whichever occurred first*") (emphasis added).

[1] As set forth above, Dr. Anderson's September 20, 2016 note reflects that Respondent's symptoms had worsened over the prior several weeks, for which she was evaluated in the emergency department two weeks prior due to the severity of the pain. (APA 1, p. 1). As such, her condition actually required medical treatment prior to her September 20, 2016 visit with Dr. Anderson.

Following her initial appointment with Dr. Anderson and a subsequent follow-up appointment during which she received L4-5 facet injections, Respondent saw Dr. Anderson on March 2, 2017, during which time he noted that Respondent "has continued to work full time which includes lifting of greater than 75 pounds on a regular basis" and that she has "'good days and bad days' and this is unchanged after the injections." (APA 1, p. 5). Clearly, the lifting component of Respondent's job duties were of importance to Dr. Anderson and he associated them in some way with Respondent's injury.

On April 27, 2017, the date that Dr. Anderson and Respondent determined and agreed that she would undergo lumbar fusion surgery, Respondent completed a "Pre-Surgical Survey." (APA 4, p. 40). In the Survey, Respondent stated that it is "hard to work [at] steel plant, lifting, hard to do housework." *Id.* Additionally, following a response in which she indicated that prior modification of her activity level to see if it would help with symptoms was not successful, she stated that she modified activity for "6 years – worsened over past 6 months." *Id.*

On June 8, 2017, Respondent underwent L4-5 fusion surgery. (APA 2, p. 24). Dr. Anderson's record of her June 5, 2017 pre-operative appointment again notes as follows:

> [Respondent] reports an injury approximately 9 years ago at her job ***causing current symptoms***. The symptoms acutely were resolved with rest and medications. Over the last several years, she has had intermittent back and right lower extremity pain. Her symptoms have worsened over the last several months without acute injury. She describes constant pain in the low back that worsens throughout the day. She has burning and stabbing pain into the right buttock as well as a constant numbness in the right hamstring. She also has constant numbness to the great toes bilaterally. Her pain was so severe, she has been evaluated in the Emergency Department several times. She has been a patient at our practice in 9/2016.

(APA 2, p. 21)[2]. As of June 5, 2017, Dr. Anderson clearly related Respondent's job to her condition. Moreoever, Respondent's last date of work was June 5, 2017 (Single Comm. Hrg.

[2] Of import, Dr. Anderson's June 5, 2017 note is not simply a "copy and paste" of his September 20, 2016 note quoted on pp.4-5 above, which sets forth similar conclusions. It is clear that Dr. Anderson made intentional changes to the

Trans., p. 37). Certainly, as of this date, there can be no question that Respondent's injury was work-related, and that it both required medical care *as well as* interfered with her ability to perform her job. *See King, supra,* 395 S.C. at 445, 718 S.E.2d at 231 (finding condition "was not compensable until it either required medical care or interfered with his ability to perform his job, *whichever occurred first*") (emphasis added).

While the Appellate Panel determined the date of Respondent's repetitive trauma injury was June 5, 2017, even this date is more than ninety days prior to her submission of the September 14, 2017 Form 50 notifying Appellants of her alleged injury. Moreoever, even with June 5, 2017 as the date for Respondent's alleged repetitive trauma injury, the Appellate Panel further erred in then finding that her notice obligation did not arise until seven (7) months later, on February 21, 2018, when Dr. Anderson completed a questionnaire crafted by her attorney. Such a finding does not comport with the controlling law and must be reversed. *See* S.C. Code Ann. § 42-15-20(C); *see also Bass v. Isochem*, 365 S.C. 454, 481, 617 S.E.2d 369, 383 (Ct.App. 2005) ("We rule that in applying section 42–15–20 to a repetitive trauma injury,...the Commission shall determine the statutory notice requirement from the time of disablement of the claimant. Notice begins to run when the employee becomes disabled and could discover with reasonable diligence his condition is compensable.").

Neither Respondent nor the Appellate Panel set forth any reasoning as to why Dr. Anderson's February 21, 2018 questionnaire should be afforded greater weight than any of the other medical records prepared by him. Dr. Anderson did not complete the questionnaire under oath, nor execute it with any apparent formality above that associated with his earlier medical records. As such, it should not be considered more favorably than any of his other records.

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text and, in doing so, had the opportunity to revise his opinion as to the relation of Respondent's condition to her job. He made no such revision.

Further, the fact that he checked "No" in response to a question on a post-surgery July 21, 2017 progress report, which asked whether the subject injury was work-related, is not determinative. (APA 4, p. 41). When considered as a whole, Dr. Anderson's records, and the information provided by Respondent in connection therewith, overwhelming show that Respondent's condition was associated with her employment. Based upon the foregoing, the instant action is distinguishable from *Murphy v.* Owens *Corning*, 393 S.C. 77, 710 S.E.2d 454 (Ct. App. 2011), upon with Respondent relies.

The fact that Respondent allegedly first understood after a conversation with a short-term disability adjuster on August 21, 2017, that her injury may have been caused by her work activities does not change the foregoing analysis. (Resp.'s Br., p. 2; Single Comm. Hrg. Trans., pp. 38-40). Again, the date upon which Respondent's notice obligation arose is not based solely on her subjective understanding. An employee must give notice within ninety days of the date she discovered, or *could have discovered by exercising reasonable diligence*, that her condition was compensable. S.C. Code Ann. § 42-15-20(C). An employee is not permitted to simply act as a passive observer and wait to provide the requisite notice unless and until some third party happens to suggest that the injury may be work-related. For the reasons previously set forth herein, even if Respondent had not subjectively discovered by August 21, 2017, that her injury was work-related, it is indisputable that she could, and should, have discovered that fact at every point in her treatment with Dr. Anderson, including on September 20, 2016, and under no circumstances any later than June 8, 2017, when she underwent the lumbar fusion surgery.

Respondent was under the care and treatment of Dr. Anderson for nine (9) months before her surgery, twelve (12) months before she filed her initial Form 50, and seventeen (17) months before she sought his opinion as to causation. There can be no question that Respondent

discovered, or could have discovered with reasonable diligence, that her condition was compensable on September 20, 2016, but in no event later than June 8, 2017, when she could no longer work as a result of the lumbar fusion. As such, Respondent's September 14, 2017 Form 50 failed to satisfy the notice requirement of § 42-15-20(C) and this Honorable Court must reverse the Appellate Panel's decision, which is unsupported by substantial evidence and controlled by errors of law. "While the notice requirement must be construed liberally in favor of claimants, it is 'not to be treated as a mere formality or technicality and dispensed with as a matter of course.'" *Bass v. Isochem*, 365 S.C. 454, 473, 617 S.E.2d 369, 379 (Ct.App. 2005) (internal citation omitted).

CONCLUSION

For the foregoing reasons, this Honorable Court should reverse the decision of the Appellate Panel and find Respondent's claim barred due to her failure to provide timely notice pursuant to the requirements of S.C. Code Ann. § 42-15-20(C).

Respectfully submitted,

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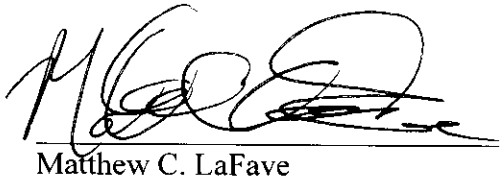
PROOF OF SERVICE

I do hereby certify on this 15th day of November, 2019, that I served the Reply Brief of Appellants on Respondent by depositing a copy of it in the United States Mail, postage prepaid, addressed to Respondent's attorney of record, Ryan T. LeBlanc, Esquire, Joye Law Firm, P.O. Box 62888, North Charleston, SC 29419-2888.



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