APPELLATE PANEL

DECISION AND ORDER

OF THE

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1602438

Randy Jordan, Employee,

Claimant/Appellant,

vs.

S.C. Department of Transportation, Employer,
and State Accident Fund, Carrier,

Defendants/Respondents.

Appellate Panel Review held via Zoom
Notices timely and properly served on
all parties of interest.

Appellate Panel Decision and Order filed
March 2, 2022

APPEARANCES:

Claimant/Appellant represented by Stephen J. Wukela
of Florence, South Carolina

Defendants/Respondents represented by Timothy B. Killen
of Charleston, South Carolina

I. STATEMENT OF THE CASE

This is an admitted accident before the Commission on the Claimant's Form 50 seeking a finding of change of condition pursuant to S.C. Code §42-17-90. This case arises out of admitted injuries the Claimant sustained to his neck, back, and left ankle on February 4, 2016, when while in the employ of South Carolina Department of Transportation, he was struck by a vehicle.

The Defendants admit that, in that accident, the Claimant suffered an injury to his back, neck and left ankle. The Defendants provided the Claimant medical treatment for his back, neck, and left ankle. On September 7, 2018, the parties entered into a Form 16A, and by Agreement the Claimant was awarded 5% loss of use to the left leg and 10% loss of use to the whole spine (neck and back).

At that time, the parties had a dispute as to whether the Employer/Carrier were responsible for certain medical treatment. In particular, the Claimant had undergone a fusion of the cervical spine on June 14, 2017 at the hands of Dr. Bill Edwards, who was not an authorized treating surgeon, and for which the Employer denied responsibility.

A hearing was held by the Commission on July 18, 2018 to determine whether the employer was responsible for the cost of the fusion. The Defendants took the position that the cost of the fusion was not the Carrier's responsibility as it was performed by a non-authorized surgeon, was non-emergent, and did not lesson the period of disability within the meaning of S.C. Code §42-15-60.

The Commissioner issued an Order on September 18, 2018; finding that, while the Claimant did sustain an injury to his neck and back and left ankle arising out of the course of employment, the Carrier was not responsible for the fusion of the cervical spine as it was not

authorized, was non-emergent, and there was no medical opinion to a reasonable degree of medical certainty that it was necessary.

Thereafter, the Claimant alleges that he suffered worsening of his condition. On June 8, 2019, the Claimant saw orthopedic, Jason O'Dell, M.D., complaining of worsening pain in his left ankle. (APA#17, p. 211). Dr. O'Dell referred the Claimant for an MRI of his left ankle and saw him again on July 9, 2019, (APA#17, p. 218), where he performed an injection in the subtalar joint of the left ankle. Claimant also alleges that as the condition of the Claimant's left ankle worsened he began developing increasing pain in his right hip and his low back as the result of altered gait.

On August 9, 2019, (within one year of the date of Form 16 dated September 7, 2018) Claimant filed a Form 50 alleging a change of condition. Claimant specifically cited in his Form 50 the worsening condition of his left ankle.

On September 18, 2019, the Commission set a hearing on the Claimant's change of condition Form 50 for October 22, 2019. On September 30, 2019, the Claimant withdrew his hearing request pending additional discovery.

Claimant continued seeing Dr. O'Dell, and on November 21, 2019 (APA#17, p. 222) Dr. O'Dell noted the pain in his right hip, SI joint, and his difficulty walking and referred him for physical therapy to improve his gait. By January 16, 2020, (APA#17, p. 225), Dr. O'Dell noted that the Claimant's pain was getting worse in his left lower extremity, and pain in his back and right hip, and referred him for an MRI of his lumbar spine, which was performed on January 29, 2020. On February 13, 2020, Claimant again saw Dr. O'Dell (APA#17, p. 234) for left lower extremity pain, lower back pain, and right hip pain. Dr. O'Dell reported that his MRI scan demonstrated broad base bulging at L4-5 and L5-S1. Dr. O'Dell continued the Claimant's

physical therapy and saw him on April 24, 2020 (APA#17, p. 236) with the same complaints; whereupon Dr. O'Dell reported that Claimant's symptoms had gotten worse. Dr. O'Dell ordered "Due to the worsening of his back pain and failure of physical therapy, the patient will be referred to Dr. Johnson for evaluation and treatment." (APA#17, p. 237).

Claimant saw Dr. Johnson at McLeod Spine Center where he underwent epidural steroid injections at L5-S1 on May 1, 2020, May 15, 2020, and May 29, 2020. Dr. Johnson noted in his first note on May 1, 2020 "Patient has ongoing lumbar radiculopathy right lower extremity. This is progressively getting worse despite physical therapy done a couple months ago." (APA#18, p. 248). After a course of epidural steroid injections did not improve Mr. Jordan's condition, Dr. Johnson referred the Claimant to orthopedic surgeon, Dr. Bill Edwards, who saw him on June 11, 2020 noting "Patient with worsening back pain radiating into both hips right greater than left." (APA#18, p. 256). Dr. Edwards did not recommend any surgery on the Claimant's lumbar spine at that point, but referred him back to Dr. Johnson for right facet joint block at L5-S1.

Dr. Edwards did see the Claimant again on June 16, 2020, this time concerned about the worsening pain he was having in his cervical spine (also an admitted body part) and the radicular symptoms he was complaining of in his right upper extremity. Dr. Edwards ordered cervical MRI and epidural steroid injections of the cervical spine. Ultimately, on July 23, 2020 Dr. Edwards referred the Claimant to Duke for further evaluation of his cervical spine.

The parties took the deposition of Dr. O'Dell on December 3, 2020. Dr. O'Dell testified:

> Q. Okay. So now, you know, we had been talking about the ankle and your treatment of the left ankle and now we're talking about the right hip. What's the clinical significance of that?
> A. So in somebody who has a lingering issue or potentially a worsening issue I do think that gait related problems can

lead to some of these secondary hip or back problems or even knee problems on the other side.

(APA#, p. 12, lines 13- 21).

* * *

Q. I see. Okay. And, you know, as I said at the outset, his back was an admitted injury in the initial accident, his ankle was an admitted injury. **At this, point both his ankle and his back are worsening, is that a fair statement?**

A. **Yes.**

(APA#, p. 14, lines 14-19)(Emphasis added).

* * *

Q. It's still your concern or impression is that this worsening of the back situation is a product of gait?

A. That is my opinion.

(APA#, p. 15, lines 21-24).

He went on to testify:

A. ...his chronic ankle injury is what led to the worsening of his back so to me I think the right thing for him is to continue treatment on the back....

(APA#, p. 18, lines 6-9).

* * *

Q. **...do you have an opinion as to whether his ankle condition worsened after being released by Dr. Daily?**

A. **I think it did, yes.**

(APA#, p. 19, lines 12-14) (Emphasis added).

* * *

Q. ...do you have an opinion as to whether his ankle condition aggravated the condition of his back?

A. I believe that he did.

(APA#, p. 19, lines 19-22).

In conclusion, Dr. O'Dell opined:

Q. **All right. The question I asked, though, was whether the condition of his ankle and the altered gait resulted in the aggravation and a worsening of the condition of his lumbar spine?**

A. **Yes. I think that's what happened.**

Q. **...And was the treatment, the referrals you made to Dr. Johnson and then ultimately from Dr. Johnson to Dr. Edwards, necessary to treat that worsening?**

A. **Yes, it was.**

(APA#, p. 20, line 19-p. 21, line 3) (Emphasis added).

The Claimant requested a hearing by Form 50 dated December 7, 2020.

This matter was heard by the Single Commissioner on March 2, 2021.

At hearing the Claimant sought a finding that his case should be reopened pursuant to S.C. Code §42-17-90.

By Order of June 1, 2021, the Single Commissioner denied the Claimant's claim for change of condition, finding that the claim was time barred and that the Claimant had "elected his remedy by treating on his own outside of the confines of the Workers' Compensation Act."

Specifically, the Commissioner found:

FINDINGS OF FACT

After the hearing and giving careful consideration to the documentary evidence, medical records, and the testimony of the above individuals.

1. **That Employee, Employer and Carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act. That Claimant was an employee of the named Employer on and prior to February 4, 2016.**

2. **Claimant sustained admitted injuries to his neck, back, and left ankle arising out of and in the course and scope of his employment on February 4, 2016.**

3. **Claimant underwent various evaluation and treatment for his admitted work-related injuries to his neck, back, and left ankle.**

4. **On September 18, 2018, in her Decision and Order subsequent to Defendants' Form 21 hearing, Commissioner Melody James found that Defendants were not responsible for the unauthorized cervical fusion surgery performed by Dr. Edwards or for any future medical care and treatment to the cervical spine related to the fusion surgery, including hardware.**

5. **On September 18, 2018, in her Decision and Order subsequent to Defendants' Form 21 hearing, Commissioner**

Melody James found that there is no evidence in the record that any additional medical treatment would tend to lessen the period of Claimant's disability in regard to the Claimant's causally related myofascial neck or back symptoms; however, Commissioner James found that the Claimant has up to one year from the date of her signed Order to return to see his authorized treating providers for any change of condition for the worse and to seek medical treatment to the neck or back as related to the February 4, 2016 accident.

6. **On September 7, 2018, on a Form 16A, the parties settled the case for 5% disability to the left leg and 10% disability to the whole back (neck and back). In addition, the parties agreed the employer would provide medical care and treatment as set out in the Commission's Order of September 18, 2018, and the Claimant had one year from the date of the last payment of compensation to file a claim for a worsening of his condition. While the Form 16A was entered into by the parties on September 7, 2018, it was stamped as received by the Commission on September 26, 2018.**

7. **On August 15, 2019, Claimant filed a Form 50 requesting additional medical treatment.**

8. **On September 30, 2019, Claimant withdrew his Form 50 alleging a change of condition and requesting a hearing, and requested that the claim be returned to general files.**

9. **While the Claimant did file a Form 50 within the one-year timeframe as set forth in Commissioner James' Decision and Order and on the Form 16A, he did so subsequent to having already sought treatment on his own, under his own insurance, and without any notice to Defendants with Dr. O'Dell, and he then withdrew his Form 50 requesting a hearing subsequent to the expiration of the one-year.**

10. **Because the Claimant withdrew his request for additional medical treatment by withdrawing his Form 50 asserting a change of condition and requesting a hearing on September 30, 2019, as well as continuing to treat with Dr. Odell, I find as a matter of Fact that the Claimant has elected his remedy.**

11. **It is found as fact that this case is distinguishable from Tucker v. S.C. Dept. of Transportation, 427 S.C. 299, 831 S.E. 2d 426 (2019). In Tucker, the Supreme Court held that the Claimant tolled the one-year statute under Sec. 42-17-90 by filing a Form 50 "Claim Only" within one year of the last payment of compensation. Here, while Claimant's initial Form 50 filed on August 15, 2019, might have tolled the statute, the Claimant unilaterally withdrew this Form 50. Claimant neither filed a Motion for a postponement or adjournment, nor offered a proposed Consent Order. Unlike in Tucker, the Claimant took the affirmative action of withdrawing his initial Form 50 rendering his subsequent request fifteen months later untimely.**

12. **I find this claim to be res judicata and barred by the doctrine of laches.**

13. **I find Claimant's request for benefits under the Act is hereby denied.**

CONCLUSIONS OF LAW

ACCORDINGLY, IT IS THE DETERMINATION OF THIS COMMISISON THAT:

1. **Under Section 42-1-130, Claimant was a covered employee at the time in question; and under Section 42-1-140, Defendant/Employer was a covered employer under the Act.**

2. **The Decision and Order of Commissioner Melody James dated September 18, 2018, was not appealed, is the law of this case, and nothing in this Order shall be construed so as to amend, delete from, or add to that Order. The Decision and Order of Commission Melody James dated September 18, 2018, is the law of this case and cannot be disregarded by this Commission.**

3. **Under Tucker v. S.C. Dept of Transportation, 427 S.C. 299, 831 S.E. 2d 426 (2019), the Claimant's affirmative action of withdrawing his initial Form 50 change of condition claim hearing request rendered his subsequent request fifteen months later untimely.**

4. **While the Claimant tolled the one-year statute under Sec. 42-17-90 by filing a Form 50 "Claim Only" within one year of the last payment of compensation, the Claimant's affirmative action of unilaterally withdrawing this Form 50 hearing request and asking the Commission to return the claim to general files while he continued to treat on his own for over a year rendered his subsequent request fifteen months later untimely in keeping with the September 18, 2018, Order from Commissioner James which is the law of this case.**

5. **Pursuant to Section 42-15-60 and Section 42-15-80, the Claimant has not established in a compelling manner that Defendants are responsible for any additional medical treatment that would tend to lessen the Claimant's period of disability for his left ankle, back, or neck injuries, as related to the original injury at work.**

6. **I find this claim to be res judicata and barred by the doctrine of laches.**

7. **I find the Claimant elected his remedy when he withdrew his request for additional medical treatment on September 30, 2019, seeking treatment with providers of his own choosing outside of the confines of the South Carolina Workers' Compensation Act.**

Claimant filed a Motion for Reconsideration on June 4, 2021 asking the Commission to reconsider its ruling, in particular, to reconsider its finding that the Claimant had withdrawn his claim by withdrawing his request for hearing. Claimant's Motion for Reconsideration also requested that the Commission address Claimant's argument that the Defendants had forfeited any statute of limitations defense by failing to raise it in their Form 51.

The Commission responded on June 22, 2021, finding "Claimant Motion for Reconsideration is hereby denied." In doing so, the Single Commissioner declined to rule on the Claimant's argument that the Defendants had forfeited their statute of limitations defense by failing to raise it in their Form 51.

This appeal followed.

II. EVIDENCE

A. STIPULATIONS

Counsel for the parties stipulated at the hearing to the following:

1. That the purpose of the hearing is to determine issues set forth in the Forms 50 and 51, and any other issues which may timely come before the Commission.

2. Notice of the hearing was timely and properly served upon all parties of interest.

3. Venue is proper.

B. APA SUBMISSIONS

Under the South Carolina Administrative Procedures Act, the following records were submitted into evidence:

Submissions of SC Department of Transportation

APA#	DOCTOR	DATES	PAGE #'s
Exhibit A	SCWCC E-Case Print Out	2/19/2021	1-5
Exhibit B	Decision and Order	9/18/2018	6-16
Exhibit C	Agreement for Permanent Disability 16(A)	9/18/2018	17
Exhibit D	Status Report Compensation Receipt (Form 19)	10/9/2018	18

Submissions of Claimant

APA#	DOCTOR	PROVIDER	DATES	PAGE #'s
1		McLeod Health	2/4/2016	1-19
2		Carolina Radiology Associates	2/4/2016	20-26
3	Dr. Christina Biester	CareSouth	2/8/2016 2/12/2016	27-36
4	Amanda Kiker, P.A. David Anderson, M.D. Ronald VanDerNoord, M.D.	OrthoCarolina	3/9/2016- 11/17/2016 6/29/2017	37-70

	Jeffery Daily, M.D.			
5		**Camden Open MRI**	**3/21/2016**	**71**
6		**Cheraw Physical Therapy and Rehabilitation Center, LLC**	**5/4/2016 5/18/2016 6/8/2016 12/6/2017**	**72-94**
7		**Lancaster Imaging Center**	**9/9/2016 2/15/2017**	**95-100**
8	**Dr. W.S. Bill Edwards**	**Pee Dee Orthopedic Associates**	**6/9/2016- 12/7/2017**	**101-169**
9		**Palmetto Health Tourney**	**12/12/2016**	**170**
10		**Cora Rehabilitation Clinic (FCE)**	**6/13/2017**	**171-189**
11	**Willie S. Edwards, M.D.**	**Attending Physician's Statement**		**190-191**
12		**Photos of Claimant's Left and Right ankle**		**192-19813**
13		**Deposition of Dr. W.S. Bill Edwards**	**1/26/2017**	
15		**Form 16A**	**9/7/2018**	**199**
16		**Decision and Order**	**9/18/2018**	**200-210**
17	**Dr. Jason O'Dell**	**McLeod Orthopedics**	**6/18/2019- 4/24/2020**	**211-238**
18	**Dr. W.S. Bill Edwards Dr. Bruce Johnson**	**McLeod Spine Center**	**2/8/2018 10/22/2020**	**239-307**
19	**Dr. William James Richardson**	**Duke University**	**7/22/2020**	**308-313**
20		**Tucker v. S.C. DOT**	**12/23/2020**	**314-319**
21		**Deposition of Dr. Jason B. O'Dell**	**12/3/2020**	

Claimant's APA #14 was listed on the Claimant's APA notice and in the Single Commissioner's Order. However, the deposition listed, though initially scheduled, was, in fact, never ultimately taken; and, therefore, it was never submitted to the Commission.

C. TESTIMONY

In addition to the above set-out APAs, Exhibits, and depositions, the parties agreed at the hearing before the Single Commissioner that, although the Claimant was present and prepared to testify, the case could be decided upon the record; and that testimony by the Claimant was unnecessary. (Tr. p.20, L. 9-p.21, L. 1).

D. COMMISSION FILE

Also, at the commencement of the Hearing before the Single Commissioner, the Commission's file became part of the record with the exception of self-serving declarations and unstipulated medical reports. (Tr. P.3, L. 19-22). While common practice, this fact is notable here, given that the Commissioner's record contains documents which were considered by the Single Commissioner and Appellate Panel, including the following documents, which were attached as exhibits to the Claimant's Motion for Reconsideration before the Single Commissioner:

A. Email September 30, 2019 from Wukela Law Firm to Ms. Deborah Hutto, South Carolina Workers' Compensation Commission and reply dated September 30, 2019.
B. Form 51, August 27, 2019 and email August 27, 2019 from Ms. Sarah Verstraten to South Carolina Workers' Compensation Commission.
C. Form 51, January 5, 2021 and email January 5, 2021 from Ms. Sarah Verstraten to South Carolina Workers' Compensation Commission.

WE, THE APPELLATE PANEL, have reviewed the evidence of the record, the Commission's file, the single Commissioner's Order, the Motion for Reconsideration, and the briefs and oral arguments of the parties, hereby, REVERSE the Decision and Order of the Single Commissioner.

III. APPELLATE PANEL FINDINGS OF FACT

Based upon the evidence submitted by the respective parties pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. **We find the parties to the proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, with Randy Jordan being the Claimant, and South Carolina Department of Transportation being the Employer, and State Accident Fund being the Carrier.**

This finding is based upon stipulation of the parties at the commencement of the hearing.

2. **We find that, pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Eight Hundred Nineteen and 77/100 ($819.77) Dollars a week resulting in a compensation rate of Five Hundred Forty Six and 54/100 ($546.54) Dollars.**

This finding is pursuant to the stipulation of the parties at the commencement of the hearing. (Tr. p.3, L. 12-14).

3. **We find that pursuant to S.C. Code §42-1-160, the Claimant sustained admitted compensable injuries by accident to his left leg (ankle) and whole spine (neck and back) arising out of and in the course of his employment on February 4, 2016, when the Claimant was struck by a vehicle.**

This finding is based on the parties' stipulations as well as the Form 61(A) dated September 7, 2018.

4. We find that, pursuant to SC Code §42-7-90 the Claimant has suffered a compensable change of condition of those admitted, compensable, injuries.

On September 7, 2018 the parties entered into a Form 16(A) Consent Order in which the Claimant was awarded benefits for permanent loss of use of the left leg and whole spine (neck and back).

Thereafter, the record reflects that the Claimant complained of, and was treated for, worsening pain, initially in his left ankle. In particular, on June 8, 2019, the Claimant saw orthopedic surgeon, Dr. Jason O'Dell complaining of worsening pain in his left ankle. (APA#17, p. 211). Dr. O'Dell referred the Claimant for an MRI of his left ankle and saw him again on July 9, 2019, (APA#17, p. 218), where he performed an injection in the subtalar joint of the left ankle. As the condition of the Claimant's left ankle worsened, the record reflects that the Claimant began developing increasing pain in his right hip and his low back as the result of altered gait.

Claimant continued seeing Dr. O'Dell, and on November 21, 2019 (APA#17, p. 222) Dr. O'Dell noted the pain in his right hip, SI joint, and his difficulty walking and referred him for physical therapy to improve his gait. By January 16, 2020, (APA#17, p. 225), Dr. O'Dell noted that the Claimant's pain was getting worse in his left lower extremity, noted pain in his back and right hip, and referred him for an MRI of his lumbar spine, which was performed on January 29, 2020. On February 13, 2020, Claimant again saw Dr. O'Dell (APA#17, p. 234) for left lower extremity pain, lower back pain, and right hip pain. Dr. O'Dell reported that his MRI scan demonstrated broad base bulging at L4-5 and L5-S1. Dr. O'Dell continued the Claimant's physical therapy and saw him back on April 24, 2020 (APA#17, p. 236) with the same

complaints; whereupon Dr. O'Dell reported that Claimant's symptoms have gotten worse.

Dr. O'Dell ordered ADue to the worsening of his back pain and failure of physical therapy, the patient will be referred to Dr. Johnson for evaluation and treatment. (APA#17, p. 237). Claimant saw Dr. Johnson at McLeod Spine Center where he underwent epidural steroid injections at L5-S1 on May 1, 2020, May 15, 2020, and May 29, 2020. Dr. Johnson noted in his first note on May 1, 2020 APatient has ongoing lumbar radiculopathy right lower extremity. This is progressively getting worse despite physical therapy done a couple months ago. (APA#18, p. 248).

After a course of epidural steroid injections did not improve Mr. Jordan's condition, Dr. Johnson referred the Claimant to orthopedic surgeon, Dr. Bill Edwards, who saw him on June 11, 2020 noting Patient with worsening back pain radiating into both hips right greater than left. (APA#18, p. 256). Dr. Edwards did not recommend any surgery on the Claimant's lumbar spine at that point but referred him back to Dr. Johnson for right facet joint block at L5-S1.

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The parties took the deposition of Dr. O'Dell on December 3, 2020. Dr. O'Dell testified:

> Q. Okay. So now, you know, we had been talking about the ankle and your treatment of the left ankle and now we're talking about the right hip. What's the clinical significance of that?
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> A. So in somebody who has a lingering issue or potentially a worsening issue I do think that gait related problems can lead to some of these secondary hip or back problems or

even knee problems on the other side.
(APA#21, p. 12, lines 13- 21).

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Q. I see. Okay. And, you know, as I said at the outset, his back was an admitted injury in the initial accident, his ankle was an admitted injury. **At this, point both his ankle and his back are worsening, is that a fair statement?**

A. **Yes.**

(APA#21, p. 14, lines 14-19) (Emphasis added).

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Q. It's still your concern or impression is that this worsening of the back situation is a product of gait?

A. That is my opinion.
(APA#21, p. 15, lines 21-24).

He went on to testify:

A. ...his chronic ankle injury is what led to the worsening of his back so to me I think the right thing for him is to continue treatment on the back....
(APA#21, p. 18, line 6-9).

* * *

Q. **...do you have an opinion as to whether his ankle condition worsened after being released by Dr. Daily?**

A. **I think it did, yes.**
(APA#21, p. 19, lines 12-14) (Emphasis added).

* * *

Q. ...do you have an opinion as to whether his ankle condition aggravated the condition of his back?

A. I believe that he did.
(APA#21, p. 19, lines 19-22).

In conclusion, Dr. O'Dell opined:

Q. **All right. The question I asked, though, was whether the condition of his ankle and the altered gait resulted**

in the aggravation and a worsening of the condition of his lumbar spine?

A. **Yes. I think that's what happened.**

Q. **...And was the treatment, the referrals you made to Dr. Johnson and then ultimately from Dr. Johnson to Dr. Edwards, necessary to treat that worsening?**

A. **Yes, it was.**

(APA#21, p. 20, line 19-p. 21, line 3) (Emphasis added).

In sum, Claimant sustained an admitted injury to his back, neck, and, left ankle. The uncontradicted testimony of the record is that the Claimant's left ankle has worsened and, as a result, has led to a worsening of the condition of the spine.

S.C. Code §42-17-90 and "Election of Remedy"

In denying the claim for change of condition the Single Commissioner found:

"THE CLAIMANT TOOK THE AFFIRMATIVE ACTION OF WITHDRAWING HIS INITIAL FORM 50 RENDERING HIS SUBSEQUENT REQUEST 15 MONTHS LATER UNTIMELY." (ORDER P. 15, PARAGRAPH 11).

"BECAUSE THE CLAIMANT WITHDREW HIS REQUEST FOR ADDITIONAL MEDICAL TREATMENT BY WITHDRAWING HIS FORM 50 ASSERTING A CHANGE OF CONDITION AND REQUESTING A HEARING ON SEPTEMBER 30, 2019, AS WELL AS CONTINUING TO TREAT WITH DR. ODELL, I FIND AS A MATTER OF FACT THAT THE CLAIMANT HAS ELECTED HIS REMEDY." (ORDER, P. 15, PARAGRAPH 10).

"I FIND THE CLAIMANT ELECTED HIS REMEDY WHEN HE WITHDREW HIS REQUEST FOR ADDITIONAL MEDICAL TREATMENT ON SEPTEMBER 30, 2019, SEEKING TREATMENT WITH PROVIDERS OF HIS OWN CHOOSING OUTSIDE OF THE CONFINES OF THE SOUTH CAROLINA WORKERS' COMPENSATION ACT." (ORDER, P. 17, PARAGRAPH 7).

"WHILE THE CLAIMANT TOLLED THE ONE-YEAR STATUTE UNDER SEC.

42-17-90 BY FILING A FORM 50 'CLAIM ONLY' WITHIN ONE YEAR OF THE LAST PAYMENT OF COMPENSATION, THE CLAIMANT'S AFFIRMATIVE ACTION OF UNILATERALLY WITHDRAWING THIS FORM 50 HEARING REQUEST AND ASKING THE COMMISSION TO RETURN THE CLAIM TO GENERAL FILES WHILE HE CONTINUED TO TREAT ON HIS OWN FOR OVER A YEAR RENDERED HIS SUBSEQUENT REQUEST FIFTEEN MONTHS LATER UNTIMELY IN KEEPING WITH THE SEPTEMBER 18, 2008, ORDER FROM COMMISSIONER JAMES WHICH IS THE LAW OF THIS CASE." (ORDER, P. 16, PARAGRAPH 4).

First, the well-established doctrine of election of remedy is inapplicable to in this case. The doctrine of election of remedy in the Workers' Compensation context is borne of the Court of Appeals decision in Hudson v. Townsend Saw Chain Co., 296 SC 17 (Ct. App. 1988). There, the Court of Appeals found that if a Claimant files and prosecutes a third-party action against a third party tortfeasor, but fails to give the notice required by Section 42-1-560(b), the Claimant will be regarded as having elected his or her remedy and will be barred from receiving workers' compensation benefits. Hudson, at 20-21.

The instant case involves a change of condition. There was no allegation or evidence in the record that the Claimant prosecuted a third-party action without giving the proper notice under the Act. The doctrine of election of remedy, therefore, has no application in the issue before the Commission.

Secondly, we find that the claim met the time requirements of S.C Code §42-17-90. As the Commission's file reflects, the claim was timely filed on August 9, 2019, within one year of the date of the Form 16 dated September 7, 2018. The Claimant did not withdraw his claim.

By email of September 30, 2019, the Claimant's counsel wrote the Commission I am

withdrawing my hearing request pending additional discovery. Please return the case to the general files. (Emphasis added). It is based on this email that the Single Commissioner found:

> 8. On September 30, 2019, Claimant withdrew his Form 50 alleging a change of condition and requesting a hearing, and requested that the claim be returned to general files. (Ord., p. 15).
>
> * * *
>
> 9. Because the Claimant withdrew his request for additional medical treatment by withdrawing his Form 50 asserting a change in condition and requesting a hearing on September 30, 2019, as well as continuing to treat with Dr. O'Dell, I find as a matter of Fact that the Claimant has elected his remedy. (Ord., p. 15).

Respectfully, we find that the Claimant did not withdraw is claim for a change of condition. He, instead, withdrew only his hearing request.

Though both "claims" and "hearing requests" are procedurally accomplished by filing a Form 50, Commission Regulations distinguish between filing a claim and requesting a hearing. R.67-206 is titled **Filing a Claim**, whereas, R.67-207 is titled **Requesting a Hearing, Claimant**.

R.67-609 titled: **Withdrawing a Request for Hearing.** provides that a claimant may withdraw a request for hearing by writing the Commission's Judicial Department and the Commission shall file a notice removing the case from the docket.

Such is precisely what the Claimant did by email of September 30, 2019.

R. 67-609 goes on to specifically provide that, The notice is **without prejudice to the Claimant's right to proceed with his or her claim**. (emphasis added).

Ultimately, S.C. Code §42-17-90 governs the timeliness of a claim for change of condition and would supersede Commission regulation were there a conflict between the two.

S.C. Code §42-17-90 requires that "on the application of a party in interest on the ground

of a change in condition, the Commission may review an award... the review must not be made after twelve months from the date of the last payment of compensation..." S.C. Code §42-17-90(A).

Our Supreme Court has construed this language in the case of Tucker v. S.C. DOT, 427 SC 299 (2019). There, the Court found that the Court of Appeals properly reversed a Commission decision finding that an employee's claim was untimely under §42-17-90. The Claimant on Tucker had filed a Form 50 seeking a change of condition within one year, but had not requested a hearing. More than a year after the last payment of compensation, the Claimant filed a second Form 50; requesting a hearing. The Commission found the claim untimely. The Court of Appels reversed.

The Supreme Court affirmed the Court of Appels and distinguished "claims" from "hearing requests." The Supreme Court held that a Form 50 claim, even without a hearing request, meets the §42-17-90 requirement of an "application for review" within one year. The Supreme Court held "the filing of a Form 50 to initiate a claim for a change of condition is the event that must occur within twelve months of the last payment of compensation to meet the timing requirement of subsection §42-17-90(A)" Tucker, at 303.

Thus, pursuant to Tucker, the Claimant's filing of a Form 50 on August 9, 2019 to initiate a claim for a change of condition was the event that must occur within twelve months of the Form 16(A) of September 18, 2018, and it, therefore, met the timing requirement of §42-17-90.

The Defendants seek to distinguish Tucker from this case on the basis that, here, the Claimant withdrew his "request for hearing." We find that the Claimant's withdrawal of his hearing request had no effect on the timely filing of his claim. Tucker distinguished "claims" from "hearing requests" and held that the Claimant need only file a "claim" within one year. See

Tucker, at 303. The Supreme Court's interpretation of S.C. Code §42-17-90 is, therefore, in accord with Commission Regulations.

Moreover, Commission Regulation R.67-609 titled "withdrawing a request for hearing" specifically provides that withdrawal of a hearing request "is without prejudice to the Claimant's right to proceed with his or her claim." R.67-609 (emphasis added).

Finally, the Defendants argue that the Claimant "withdrew the Form 50 requesting a hearing... to intentionally delay a hearing in the hope that evidence would later develop to support a change of condition claim." (Order p.13).

As the Tucker Court noted, "the fact that a Claimant does not request a hearing does not mean the claim will sit unattended... if the parties reasonably need time to prepare, or to negotiate in good faith, the assigned Commissioner-or an Appellant Panel on review-should allow it... if an employer suspects [the Claimant is intentionally delaying a hearing in hopes that evidence will later develop]... the employer may request a hearing or in some other fashion seek to protect its interest." Tucker at 303-304.

Here, the employer made no effort to request a hearing or to speed the determination of the claim for change of condition.

Moreover, we find no evidence of improper delay by the Claimant.

The 16A was signed on September 18, 2018. By June 8, 2019, the record reflects that the Claimant was treated for worsening ankle pain. (APA#17, p.211 (O'Dell, June 8, 2019 note)). Within two months thereafter, on August 9, 2019, (APA#17, P.222), the Claimant filed a Form 50 filing a claim for change of condition and requesting a hearing. However, when the Claimant began to suffer and complain of worsening spinal pain as well, he withdrew his hearing request, on September 30, 2019, to allow for additional discovery.

Indeed, by November 2019 Dr. O'Dell, who treated the Claimants ankle, noted his spinal complaints; which Dr. O'Dell ultimately related to altered gait from his worsening ankle condition (APA#21, p.12-20). Dr. O'Dell referred the Claim to a spine specialist, where he was treated regularly through 2000. (Id.; see Also APA 18).

At no point during this treatment did the employer depose the Claimant to learn about his complaints and treatment; nor did they seek a hearing to adjudicate his claim for a change of condition.

On December 3, 2020 the Claimant deposed Dr. O'Dell, who recited this treatment history and testified that the Claimant's worsening ankle caused altered gait which caused worsening pain in the Claimant's spine. (see Dep. O'Dell P.12-20). On December 7, 2020 the Claimant requested a hearing which was conducted on March 2, 2021.

As the Supreme Court described in Tucker, the Commission, by regulation, deliberately separated the procedure for filing a claim from that for requesting a hearing; precisely "to eliminate setting claims for adjudication prematurely." Tucker, at 302, FN2.

It is evident from the medical evidence that between the filing of the first Form 50 of August 9, 2019 and second Form 50 requesting a hearing on December 7, 2020, the worsening condition of the Claimant's ankle caused an altered gait, which caused a worsening of the Claimant's spine. (see Depo. O'Dell p. 12-20). This deterioration of the condition of the admitted body parts is well documented in the Claimant's treatment notes for that period. (see APA 17-18).

Given that developing condition, it would have been premature for the Commission to determine the claim when it was first set for hearing. Moreover, if the Defendants' believed that the hearing was being delayed improperly, they could have moved, themselves, that the

Commission set a hearing; they did not. We find nothing improper or dilatory in the timing of the adjudication of the claim.

Finally, even assuming that the claim was untimely filed, the statute of limitations was not raised in either of the Defendants' Forms 51 dated August 27, 2019 or January 5, 2021.

The Statute of Limitations set forth in §42-17-90 is an affirmative defense which must be raised in Defendants' Form 51 answer. See R.67-603(c). A Statute of Limitations defense under '42-17-90 not raised in a Form 51 is forfeited. See R.67-603(c).

Testimony of Unauthorized Surgeon

Our Courts have repeatedly held that the Commission may disregard medical evidence only when other competent evidence exists in the record. See Burnette v. City of Greenville, 401 S.C. 417 (Ct. App. 2012) (citing Potter v. Spartanburg School District 7 395 S.C. 17, 23 (Ct. App. 2011)).

Here, the uncontradicted testimony of the record by the Claimant's treating, albeit unauthorized, surgeon, Dr. O'Dell, was that he had suffered a change of condition.

In ruling contrary to this testimony, the Commissioner noted that the testimony came from a physician who was not authorized by the Employer/Carrier. Specifically, the Single Commissioner found that the Claimant elected his remedy by treating on his own outside of the confines of the Workers' Compensation Act. (See Order p. 17). Likewise, the Defendants argue that "the Claimant usurped Defendants' rights under the statute to control medical treatment." (Order, p.6)

The Commission cannot disregard the testimony of the Claimant's qualified treating surgeon simply because the surgeon was not authorized by the Carrier, i.e. because the Claimant treated on his own; particularly where, as here, that surgeon's testimony is uncontradicted in the

record.

It is certainly true that S.C. Code 42-15-60 provides that "during any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the Commission for good cause shown." S.C. Code 42-15-60.

S.C. Code 42-15-60 does not, however, prohibit a Claimant from treating with physicians and surgeons that are not authorized by the Carrier. Nor does S.C. Code 42-15-60 permit the Commission to disregard the opinions such unauthorized treating providers. See Burnette, 401 S.C. 417 (Commission may disregard medical evidence only when other competent evidence exists in the record).

Res Judicata and Laches.

Finally, the Order of June 1, 2021 finds the claim barred by the doctrines of res judicata and laches.

Under the doctrine of res judicata "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Plum Creek Dev. Co v. City of Conway, 334 S.C. 30, 34 (1999).

However, the matter before the Commission is a reopening proceeding; in which the Commission is asked, pursuant to §42-17-90, to review the previous award to determine the extent of improvement or worsening of the injuries upon which the original award is based.

Put differently, the issue before the Commission deciding a claim under §42-17-90 is whether there has been a change of condition since the last payment of compensation on the previous award; an issue which was not, and chronologically could not have been, before the

Commission at the first hearing. See Cromer v. Newberry Cotton Mills, 201 S.C. 349 (S.C. 1942); Wilson v. Charleston Cnty. Sch. Dist., 419 S.C. 442 (Ct. App. 2017).

Thus, where, as here, the Commission is reviewing a previous award to determine whether there has been a worsening in the condition of the injured body parts on which the original award was based, the doctrine of res judicata has no application.

Similarly, laches is an equitable doctrine that our courts have defined as neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 432, 673 S.E.2d 448, 456 (2009) (quoting Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)). To establish laches as a defense, a party must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the party asserting the defense of laches. Id.

The Defendants argue that the Claimant delayed unreasonably his assertion of his right to adjudicate his claim for change of condition. In determining what is an unreasonable delay under the equitable doctrine of laches, the Commission must first look to the law. It is well established that equity follows the law and when an adequate remedy at law does exist an equitable remedy, such as laches, should not be fashioned. See Santee Cooper Resort v. SC Public Service Co., 298 S.C. 179 (1989).

Here, a remedy at law exists. The Workers' Compensation Act establishes, as a matter of law, the time limit within which one must file a claim for change of condition. S.C. Code 42-17-90 sets that time limit at one year from the last payment of compensation on the previous award.

We find that the claim was timely filed within one year pursuant to the statute. Given that equity follows the law, the Commission may not use an equitable doctrine such as laches to

impose a different time limit from that set at law by the statute.

Further, as set out above, we find nothing improper or dilatory in the adjudication of this claim. Moreover, if the Defendants believed that the hearing was being delayed improperly, they could have moved, themselves, that the Commission set a hearing; they did not. (see §42-17-90(A) ("on its own motion or on the application of any party in interest on the ground of a change in condition, the Commission may review an award...") (emphasis added)

Even if the Claimant had unreasonably delayed in requesting a hearing, the Employer can establish no prejudice. The law, §42-17-90(A), provides an adequate remedy: the Employer may request, or the Commission on its own motion may set, a hearing to determine whether there has been a change of condition.

Therefore, the equitable doctrine of laches does not apply.

5. We find that all other issues, including, but not limited to, Claimant's entitlement to indemnity and medical benefits, maximum medical improvement and permanency, are held in abeyance pending further determination by the Commission.

CONCLUSIONS OF LAW

In view of the above set out Findings of Fact and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS A MATTER OF LAW:

1. Pursuant to S.C. Code §42-1-130, the Claimant was a covered Employee at the time in question; and under S.C. Code §42-1-140, the Defendant-Employer was a covered Employer under the Act.

2. Pursuant to S.C. Code §42-1-40 the Claimant's average weekly wage is Eight Hundred Nineteen and 77/100 ($819.77) Dollars a week resulting in a compensation rate of Five Hundred Forty Six and 54/100 ($546.54) Dollars.

3. Pursuant to S.C. Code §42-1-160, the Claimant sustained admitted compensable injuries by accident to his left leg (ankle) and whole spine (neck and back) arising out of and in the course of his employment on February 4, 2016, when the Claimant was struck by a vehicle.

4. We find that, Pursuant to S.C. Code §42-17-90, the Claimant has suffered a compensable change of condition of those admitted, compensable injuries.

5. That all other issues, including, but not limited to, the Claimant's entitlement to additional indemnity and medical benefits, maximum medical improvement, and permanency, are held in abeyance pending further determination by the Commission.

ORDER

IT IS, THEREFORE, ORDERED that the Claimant has sustained a compensable change of condition and the Workers' Compensation File No. 1602438 shall be reopened. All other issues, including, but not limited to, Claimant's entitlement to additional indemnity and medical benefits, maximum medical improvement, and permanency, are held in abeyance pending future determination by the Commission.

The Single Commissioner's Order of June 1, 2021, is, therefore,

REVERSED.

AND IT IS SO ORDERED.

S.C. WORKERS' COMPENSATION COMMISSION

SUSAN S. BARDEN, COMMISSIONER, CHAIR

AVERY B. WILKERSON, JR., COMMISSIONER

T. SCOTT BECK, COMMISSIONER

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on March 2, 2022