

BEFORE THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO: 00

John Doe,

Claimant,

v.

ACME, Inc.,

Employer, and

State City Ins.,

Carrier,

Defendants.

CLAIMANT/RESPONDENT  
BRIEF

**STATEMENT OF THE CASE**

Claimant was originally injured on September 20, 2005 while employed with Defendant. On November 26, 2007, a Form 16 (Agreement for Permanent Disability/Disfigurement Compensation) was approved indicating that the Claimant had sustained eighteen (18%) percent and thirty (30%) percent permanent partial disability to his right arm and back for his admitted right shoulder area, right arm and neck area injuries, respectively.

On November 12, 2007, pursuant to the parties' proposed agreement, the settlement check, Form 16, and Form 19 (Status Report and Compensation Receipt) were sent to the Claimant. On November 26, 2007, the single Commissioner approved and signed the Form 16 creating the award. The properly executed Form 19 was sent to the Commission on November 28, 2007 by Defendants' counsel. Disbursement was actually received by Claimant on January 8, 2008 following receipt of the award dated November 26, 2007.

On November 25, 2008, Claimant filed a Form 50 alleging a change in condition to his neck,

right shoulder, clavicle, scapula and right arm concerning the November 26, 2007 award. Defendants denied the compensability of a claim on a change in condition, contending that the Form 50 alleging a change in condition was not timely filed. Defendants further contended that a claim for change in condition as to the clavicle and scapula could not be raised on a change in condition since there was no original injury to those body parts.

Following a hearing on March 31, 2009 on Claimant's Form 50, the single commissioner issued a Decision and Order dated June 8, 2009 finding that the Form 50 was timely filed, that a change of condition had occurred, and that Claimant required further treatment prior to maximum medical improvement. The single commissioner also found that while there was no initial injury to the clavicle and scapula and those body parts were not specifically listed on the Form 16, those body parts become compensable if they require treatment because of the neck, arm and shoulder injuries.

Defendants have appealed those findings contending that the Form 50 was untimely and that the finding with regard to the clavicle and scapula are projected, speculative findings of fact not based on existing evidence in the record.

"Defendants admit the Claimant's entitlement to additional medical care pursuant to a prior Consent Order, but deny entitlement to additional medical care to the extent that this finding is based on the change of condition (see Defendants Brief, page 3, Footnote 1 and 2)."

#### **QUESTIONS PRESENTED**

1. Did the single commissioner err in finding that the Claimant's claim for a change of condition is not procedurally barred, as it was timely filed pursuant to §42-19-70?
2. Did the single commissioner err in finding that payment pursuant to the Form 16 was not made until the Form 16 was approved by the Commission on November 26, 2007?
3. Did the single commissioner err in finding that the Claimant timely filed his Form 50 alleging a change of condition for the worse on November 25, 2008?
4. Did the single commissioner err in finding that even though there was no initial injury to the

Claimant's clavicle and scapula, and those body parts were not specifically listed on the Form 16, that if those body parts require treatment because of the original neck, arm, and shoulder injuries, they become compensable as well?

5. Did the single commissioner err in finding that proper notice of the injuries was given?
6. Did the single commissioner err in finding that the Claimant is entitled to ongoing medical care?
7. Did the single commissioner err in concluding that proper notice of the injuries was given?
8. Did the single commissioner err in concluding that even though there was no initial injury to the Claimant's clavicle and scapula, and those body parts were not specifically listed on the Form 16, that if those body parts require treatment because of the original neck, arm, and shoulder injuries, they become compensable as well?
9. Did the single commissioner err in concluding that the Claimant was entitled to medical care?
10. Did the single commissioner err in concluding that the Claimant timely filed his change of condition?
11. Did the single commissioner err in ordering that the Claimant timely filed his Form 50 alleging a change of condition for the worse on November 25, 2008?
12. Did the single commissioner err in ordering that the Claimant is entitled to ongoing medical care pursuant to §42-15-60 for his original neck, right arm and right shoulder work-related injuries and for the clavicle and scapula if those two body parts require treatment because of the original neck, right arm and right shoulder work-related injuries, then the clavicle and scapula become compensable as well?
13. Did the single commissioner err in ordering that the Claimant is entitled to medical care for his work-related injuries, including but not limited to, a neck MRI and other medical care, medical treatment and referrals as recommended by Dr. James O'Leary, authorized treating medical provider, including reimbursement for mileage and medications until further Order of the Commission?

### **STATEMENT OF FACTS**

Pursuant to the parties' proposed agreement to settle Claimant's permanent partial disability to his back and right arm contingent upon commission approval of the Form 16 and Consent Order, Defendants sent the settlement check and Form 19 to Claimant on November 12, 2007 (Exhibit 12).

The Form 16 was approved by the Commission on November 26, 2007, and the Form 19,

receipt for compensation, was forwarded to the Commission on November 28, 2007. Claimant's Form 50 alleging a change in condition was filed on November 25, 2008, less than twelve months after the Form 16 was approved.

The single commissioner's Decision and Order states: "There was no initial injury to the clavicle and scapula, and these body parts were not specifically listed on the Form 16. However, if these body parts require treatment because of the original neck, arm and shoulder injuries, they become compensable as well."

### **STATEMENT OF LAW**

S.C. Code Ann. §42-17-90 (1976, as amended) provides:

Upon its own motion or upon the application of any party in interest on the ground of a change in condition, the Commission may review any award and on such review may make an award ending, diminishing or increasing the compensation previously awarded, subject to the maximum or minimum provided in this Title, and shall immediately send to the parties a copy of the order changing the award. No such review shall affect such award as regards any moneys paid and no such review shall be made after twelve months from the date of the last payment of compensation **pursuant to an award** under this Title. (emphasis added).

Allen v. Benson Outdoor Advertising Co., 236 S.C. 22, 112 S.E.2d 722 (1960),

describes a factual scenario in which the last payment of compensation was made after the award was approved.

On October 15, 1957, the parties reached an agreement under which the insurance carrier agreed to pay all medical bills and compensation for one week. This agreement was promptly filed with the Industrial Commission and approved by that body on October 26<sup>th</sup>. On November 7<sup>th</sup> the week's compensation was paid, at which time claimant signed the Standard form of final compensation settlement receipt, in which he acknowledged the payment of \$28.50 in final settlement and satisfaction of all claims for compensation subject to review as provided by law on account of the injury sustained on July 31<sup>st</sup>. This receipt was filed with the Commission on November 9, 1957. Allen v. Benson Outdoor Advertising Co., 236 S.C. 22, 112 S.E.2d 722 (1960).

If a review of a compensation agreement or settlement is sought on the change of

condition of the employee, a change in condition must be shown, and it must be causally connected with the original compensable accident. Krell v. South Carolina State Highway Dept., 237 S.C. 584, 118 S.E.2d 322 (1961).

Any reasonable doubts as to construction of the Act should be resolved in favor of coverage. Ost v. Integrated Products, Inc., 296 S.C. 241, 371 S.E.2d 796 (1988); Davis v. South Carolina Dep't of Corrections, 289 S.C. 123, 345 S.E.2d 245 (1986).

### ARGUMENTS

I. The single Commissioner did not err in finding that Claimant's Form 50 for a change in condition was timely filed. Under S.C. Code Ann. §42-17-90 (1976 as amended), "... No such review shall affect such award as regards any moneys paid and no such review shall be made after twelve months from the date of the last payment of compensation *pursuant to an award* under this Title." (emphasis added). An award has not occurred until the Commissioner approves and signs the Form 16. S.C. Reg. 67-802(b)(c). A Commissioner does not have to approve the Form 16. *Id.* Therefore, approval of a Form 16 is not by any means a foregone conclusion. An attorney cannot disburse funds to a Claimant until the Form 16 has been approved and signed by the Commissioner. If the attorney disbursed funds before a Commissioner approved the Form 16, the attorney would be subject to disciplinary action and sanctions. Rule 1.15 and Rule 417 of South Carolina Appellate Court Rules.

South Carolina Code of Laws Section 42-17-40 (1976 as amended) describes what an award is. "The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue, must be filed with the record of the proceedings and a copy of the award must immediately be sent to the parties in dispute." Thus, the term "award" would include a Form 16. *See also* (S.C. Code of Laws §42-17-50

(1976 as amended) stating that an award can be reviewed by the Commissioner within fourteen days from the date when notice of the award shall have been given.) *See also* (S.C. Code of Laws §42-17-60 (1976 as amended) discussing when, where, and how to appeal an award.)

Defendants cite Allen v. Benson Outdoor Advertising Co., 236 S.C. 22, 112 S.E.2d 722 (1960) for the proposition that the Claimant must file a Form 50 change of condition within one year after the last payment of compensation. Allen is inapposite to the facts in our case. In Allen, the agreement was promptly filed with the Industrial Commission and approved by that body on October 26, 1957. The final payment was made on November 7 1957, *after* the award had already been approved by the Industrial Commission. Thus, the Claimant in Allen had already received an award under this Title when the last payment of compensation was made. Therefore, Claimant in Allen was allowed to actually receive the check without contingency on November 7, 1957 following the award on October 26, 1957.

In the present case, Claimant did not have an award until November 26, 2007, the date the Commission approved and signed the Form 16. The properly executed Form 19 was sent to the Commission on November 28, 2007 by Defendants' counsel. The last payment of compensation was actually received by Claimant on January 8, 2008, the date of disbursement. Claimant's attorney was required to hold the settlement proceeds in the lawyer's trust account until the Form 16 was approved by the Commission. Furthermore, Claimant had no right to that compensation until and unless the commission approved the proposed award.

To have a commission review under §42-17-90, there must first be an award to review. In Allen, the Supreme Court ruled that the Claimant had twelve months from

November 7, 1957 (the last payment of compensation pursuant to an award) in which to file an application for commission review. The award in Allen was approved on October 26, 2007. Thus, the Claimant had until November 7, 1958 to file an application for commission review. There is no South Carolina case which holds that §42-17-90 prohibits a Claimant from commission review if the application for review was filed within twelve months of the award. The properly executed Form 19 was sent by Defendants counsel to the commission on November 28, 2007. Allen stands for the proposition that a Claimant has twelve months from the date of the last payment of compensation after there has been award under this Title to file for commission review. Otherwise, a Claimant would be limited to less than the twelve months statutorily provided to request review of the award.

II. Even though there is no specific mention of clavicle and scapula in the medical records, if these body parts require treatment because of the original neck, arm and shoulder injuries, the clavicle and scapula or any other body parts related to the original injury would become compensable.

A causally connected, newly manifested symptom of an original injury can constitute a change in condition. Estridge v. Joslyn Clark Controls, Inc., 325 S.C. 532, 482 S.E.2d 577 (S.C. App. 1997). Estridge involved a change in condition claim for psychological injury in a case where the original compensable injuries were physical. The commission had held that the psychological problems could not be considered because they were not included in the original claim for benefits and/or were barred by *res judicata*. The circuit court affirmed, but the court of appeals reversed and remanded the case to the commission for a determination of whether the psychological problems were casually related to the original injuries on which the award was made.

A change of condition claim may also be based on a previously undiagnosed condition. See Brayboy v. Clark Heating, 306 S.C. 56, 409 S.E.2d 767 (1991).

In Krell v. South Carolina Highway Dept., 237 S.C. 584, 589, 118 S.E.2d 322, 324 (1961), we stated, "if claimant sustained injuries . . . which *he knew about at the time of his claim* but for some reason failed to include in the claim, he cannot for the first time assert disability for these injuries . . . based on 'change of condition.'" (Emphasis supplied). We hold, as a matter of law, that a claim of change of condition may be based upon undiagnosed conditions, resulting from the original injury, which are discovered after the first award. Since there has been no finding in the instant Order as to a scapula or clavicle injury, the Order is merely stating that law of the causal connection requirement of a newly manifested symptom and/or a previously undiagnosed condition.

III. Defendants do not contest that Claimant has had a change of condition according to the medical evidence, nor that he needs additional medical care, but merely that the change of condition was not timely filed and, therefore, Claimant is entitled to no further medical care nor permanent disability benefits as a result of a change of condition. Claimant respectfully submits that he has suffered a change of condition, it has been timely filed and is therefore, entitled to causally related medical care in accord with the single Commissioner's findings based on the preponderance of the evidence in the record.

#### CONCLUSION

Claimant's Form 50 for a change in condition was timely filed within one year of the date of last payment of compensation pursuant to an award under this Title; therefore, the single Commissioner's Decision and Order should be affirmed. The single Commissioner's finding of further medical care pursuant to the change of condition is



also supported by the greater weight of the evidence.

The single Commissioner's finding that the scapula and clavicle become compensable if they require treatment because of the original neck, arm and shoulder injuries is a correct application of the law.

Respectfully submitted,

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