





Notice and Statute of Limitations Issues in Repetitive Trauma Cases

By Matthew O. Riddle and Leslie M. Whitten

Almost 10 years ago, the S.C. Supreme Court issued its opinion in *Pee v. AVM*, confirming that injuries caused by repetitive work activity are compensable under the Workers' Compensation Act (the Act). 352 S.C. 167, 573 S.E.2d 785 (2002). As a result, a receptionist who develops carpal tunnel syndrome caused by typing at work has just as valid a claim for compensation as a construction worker who is injured in a fall on the job.

The advent of the repetitive trauma claim caused considerable confusion regarding the notice and statute of limitations requirements set forth in the Act. The appellate courts initially addressed these issues and set forth applicable rules. Then the legislature got involved, issuing

wide-ranging amendments to the Act that took effect July 1, 2007. These amendments included rules specifically applicable to repetitive trauma claims and modified prior holdings regarding notice and the statute of limitations. Lawyers representing employers, insurance carriers and injured workers are now calling on the appellate courts to provide clarification with regard to the 2007 amendments. The main issue in dispute involves the "discovery rule" as it applies to the notice and statute of limitations provisions. This article will trace the development of the rules applicable to repetitive trauma claims and provide an overview of the issues currently in dispute with regard to interpretation of the 2007 amendments.

ILLUSTRATION BY STEVEN WHESTONE

The notice requirement

The general rule set forth by the Act is that an injured worker must give notice of an injury to the employer immediately “upon the occurrence of an accident or as soon thereafter as practicable.” S.C. Code Ann. § 42-15-20 (2007) (emphasis added). A claim is barred if the claimant does not give the required notice within 90 days after an accident, unless the claimant presents a reasonable excuse and can show a lack of prejudice to the employer. *Id.* Because a repetitive trauma injury is the result of a series of occurrences, there is no single “accident” to start the 90-day notice period running. The S.C. Court of Appeals addressed this issue in *Bass v. Isochem*, determining that the 90-day period starts when the employee (1) becomes disabled and (2) could, through reasonable diligence, discover that his condition is compensable. 265 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005).

In 2007, the legislature codified this rule, with one important modification. S.C. Code Ann. § 42-15-20(C) provides that an employee must report a repetitive trauma injury to the employer within 90 days of discovery, regardless of when the employee becomes disabled. For example, even if the claimant continues working, he must report a work related injury to his employer within 90 days of discovering “his condition is compensable.” S.C. Code Ann. § 42-15-20 (2007).

The statute of limitations

The statute of limitations states that a claim is barred unless a claimant files the claim within two years of the date of injury. S.C. Code Ann. § 42-15-40 (2007). The statute begins to run when the claimant has discovered or reasonably should have discovered that he has a compensable injury. *Mauldin v. Dyna-Color/Jack Rabbit*, 308 S.C. 18, 416 S.E.2d 639 (1992). However, in *Schurlknight v. City of North Charleston*, the Supreme Court rejected the “discovery rule” in the context of repetitive trauma. 352

S.C. 175, 574 S.E.2d 194 (2002). The Court held that the date of injury for purposes of determining the limitations period in repetitive trauma claims is the “last date of injurious exposure”—not the date of discovery. *Id.*

The claimant in *Schurlknight*, a fire fighter, knew as early as 1995 that he had sustained hearing loss resulting from exposure to noise at work. He continued to work until 1997 and eventually filed a workers’ compensation claim in 1998. 352 S.C. at 176-77, 574 S.E.2d at 194-95. The S.C. Workers’ Compensation Commission (the Commission) and the Court of Appeals found that the claim was barred by the statute of limitations. *Id.* at 177 & 195. The Supreme Court reversed, noting that application of the discovery rule would often prejudice a claimant who discovers symptoms of a repetitive trauma injury but continues to work. Therefore, the Court determined that the date of injury in repetitive trauma cases is the last date of injurious exposure. This rule is “premised on the recognition that the injury is caused by trauma repeatedly until the particular employment ends.” *Id.* at 178 & 195.

The legislature’s 2007 amendments to the Act essentially overruled *Schurlknight* and reinstated the discovery rule. S.C. Code Ann. § 42-15-40 now provides that a repetitive trauma claim is barred if not filed within two years of the date the “employee knew or should have known his claim was compensable but no more than seven years after the last date of injurious exposure.” S.C. Code Ann. § 42-15-40 (2007).

Application of the discovery rule in repetitive trauma cases

The legislature’s 2007 amendments put the onus on the claimant to pursue a claim within a certain time after the claimant discovers an injury caused by repetitive work activity. The date of discovery, therefore, has become a hotly disputed issue in many cases involving repetitive trauma

injuries. In each case, the Commission must determine when a claimant discovered or should have discovered a compensable injury. Making this determination requires an understanding of precisely what kind of knowledge or discovery will trigger the Act’s limitation periods. Does the claimant “discover” a compensable claim when he first experiences pain that he believes is related to work? Or must the claimant actually be aware that he is entitled to reimbursement under the Act before the notice and statute of limitations periods begin to run?

Last March, the Court of Appeals decided *Murphy v. Owens Corning*, holding the injured worker’s claim was not barred by the statute of limitations. No. 4807 (S.C. Ct. App., Mar. 9, 2011) (Shearouse Adv. Sh. No. 9). Op. No. 4807, filed March 9, 2011. In *Murphy*, the court declined to squarely address the legal questions that seem to be at the root of the confusion over the discovery rule. The court relied heavily on the Commission’s underlying factual findings rather than specifically dealing with these issues as a matter of law. The claimant in *Murphy* began experiencing various sorts of pain between 2003 and 2005. Her medical records from 2004 noted the difficulty she had with her job due to her pain. However, the claimant testified that she was not aware that the repetitive nature of her job was actually causing her pain until her doctor informed her in September of 2007. The Commission believed the claimant, and the Court of Appeals affirmed the Commission’s finding that she timely gave notice and filed a claim. The court noted that the Commission is the ultimate fact finder and had substantial evidence to support its finding. The court did not seem to find it necessary to address specific issues of the definitions of the terms “discover” or “compensable.”

It remains yet to be seen whether the parties will appeal this decision to the Supreme Court. In the meantime, *Murphy* may signal

that the appellate courts are simply not inclined to provide much guidance when it comes to applying the discovery rule in the context of repetitive trauma cases or that the court is content to view this issue as strictly a question of fact to be decided on a case by case basis. Although *Murphy* seems to leave many questions unanswered, practitioners can rest assured that this is not the last case in which the Court of Appeals will address these issues. At least three other repetitive trauma cases involving the discovery rule are currently pending before the Court of Appeals. (*King v. International Knife and Saw*, 2009 SC Wrk. Comp. LEXIS 210; *Rhame v. Charleston County School District*, 2010 SC Wrk. Comp. LEXIS 95; *Martin v. Michelin North America, Inc.*, 2009 SC Wrk. Comp. LEXIS 300). A review of the facts in two of these cases further demonstrates how these issues continue to arise with regard to interpretation of the 2007 amendments.

In *King v. International Knife and Saw*, 2009 SC Wrk. Comp. LEXIS

210, the claimant alleged that he injured his right arm and shoulder on May 15, 2008, from repetitively hammering steel saw blades. The Single Commissioner found this claim compensable, but on appeal the Full Commission panel reversed, finding the claimant had not provided notice of an injury within 90 days of discovery under § 42-15-20 (C) (2007). The Full Commission found that the claimant noticed symptoms of carpal tunnel syndrome and suspected that the symptoms were work related for years prior to providing notice on May 21, 2008. According to the Full Commission, Mr. King could have discovered more than two years before May of 2008 that he had a compensable claim if he had exercised reasonable diligence.

In *Rhame v. Charleston County School District*, 2010 SC Wrk. Comp. LEXIS 95, the claimant's job involved repairing air conditioning units. Mr. Rhame began having lower back pain around 1994 or 1995. He periodically

received treatment over the years, and he admitted that he always knew that his low back pain was related to his job. The claimant voluntarily terminated his employment on May 4, 2009, due to his continued back pain. He filed a workers' compensation claim for this injury in 2009. The Single Commissioner found that Mr. Rhame had a compensable claim. The Full Commission reversed the Single Commissioner, holding that Mr. Rhame did not file a claim within two years of the date he knew or should have known that his injury was work related.

Defining "compensable"

In both *King* and *Rhame*, the defendant's position is that the claimant's awareness of pain related to the job is enough to trigger the notice and statute of limitations provisions. The claimants, on the other hand, argue that a claimant must actually know he is entitled to benefits under the Act before the limitations periods begin to run. According to this line of reasoning,

a claimant with a limited educational background and no knowledge of the workers' compensation system would arguably be given more time to provide notice or file a claim than a human resources manager who holds meetings about reporting claims.

At the heart of this controversy is uncertainty as to the meaning of the term "compensable" as used in the notice and statute of limitations provisions. Claimants will refer to S.C. Code Ann. § 42-1-100, which defines "compensation" as "money allowance payable to an employee or to his dependents." S.C. Code Ann. § 42-1-100 (1962). Therefore, claimants will argue that the statute of limitations and notice provisions will not run until the claimant knows he is entitled to payment of monetary benefits. Defendants, on the other hand, will assert "compensable" should be defined based on when the claimant would be entitled to benefits of any kind under the Act, including medical care. Employers and insurance carriers argue that the term "compens-

able" is distinct from the word "compensation" and has never been used in the Act or case law to mean exclusively that the claimant was entitled to money.

A review of the Supreme Court's precedent involving the discovery rule may provide some insight into the way this issue will be resolved. Two early decisions seemed to indicate that the appellate courts would strictly apply the limitations periods and that ignorance of the law would not be an excuse. In 1947, in *Young v. Sonoco Products*, the Supreme Court held that the claimant's claim was barred by the statute of limitations. 210 S.C. 146, 41 S.E.2d 860 (1947). The claimant's excuse for failing to file a claim within the statutory time period was that she was not properly educated by her employer about the workers' compensation system. The court held that her ignorance of the law was not a defense and that she was "constructively charged with such knowledge." *Young* at 156, 41 S.E.2d at 864.

Two years later, the Supreme

Court decided *Samuel v. Appleton Co. et al.*, 214 S.C. 157, 51 S.E.2d 508 (1949). In that case, the claimant was illiterate and argued that because he did not understand what he was required to do to obtain compensation, he did not bring his claim within the statute of limitations. The court reiterated its decision in *Young*, stating that "no exceptions to the requirement of the act in respect of a timely filing of a claim or excuses for non-compliance therewith may be invoked other than those provided for in the act." *Id.* at 160-161, 509.

The Supreme Court took a more lenient approach in *Mauldin v. Dyna-Color*, adopting the discovery rule to extend the claimant's period for filing a claim. 308 S.C. 18, 416 S.E.2d 639 (1992). The claimant injured her knee at work on January 2, 1985. She was diagnosed with a sprain, missed no time from her work, and her case was closed. Thereafter, the claimant had intermittent swelling and pain in her knee and returned to her doctor. She was diagnosed with a torn medial meniscus on November 1, 1987, and filed a claim on December 30, 1987. The court noted that the claimant had only a high school education and that she "reasonably relied" on her primary care doctor's diagnosis of arthritis during the more than two-year period between her date of accident and the date she finally saw a knee specialist. Therefore, the Court determined that she first "discovered or reasonably could have discovered that her knee problem resulted from the January 2, 1985, accident" when she was diagnosed with a torn meniscus on November 1, 1987. *Id.* at 20, 416 S.E.2d at 640-41.

Since none of these cases involved repetitive trauma injuries, the Supreme Court's precedent arguably does not provide much guidance. As noted above, *Schurlknight* was the Court's first decision regarding the discovery rule in the context of repetitive trauma, and the Court simply held that the rule was not applicable. The Court of Appeals later relied on

Schurknight in reaching its decision in *White v. MUSC*, 355 S.C. 560, 586 S.E.2d 157 (Ct. App. 2003), a case involving a repetitive trauma injury to the claimant's back. *Schurknight* and *White* rejected the discovery rule, but the appellate courts' examination of the underlying Commission decisions in those cases may indicate how the rule will be applied under the new statutes. In both cases, the Commission determined that the claims were barred pursuant to the discovery rule. The Commission was not concerned with when the claimant became aware of his rights under the Act. Instead, the Commission used the term "compensable" interchangeably with "work related," finding that the statute of limitations began to run when the claimant became aware of a problem that he believed was work related.

Determining when a claimant discovered a repetitive trauma injury

Even if the appellate courts determine that the triggering event is discovery of a work-related condition, as opposed to knowledge of entitlement to benefits and compensation under the Act, uncertainty would still remain as to when a claimant should reasonably be expected to discover that an injury or condition stems from repetitive work activity. The extreme position for claimants would be that a claimant cannot know the injury is "work related" until there is an order from the Commission finding the claim compensable. After all, if the claim must be litigated on the issue of compensability, how can a claimant unfamiliar with workers' compensation law be expected to know the injury is work related beforehand, especially if there are differing doctors' opinions? The counterargument is that such a rule would lead to absurd results. A claim would never be subject to the statute of limitations, because the triggering event—an order from the Commission—relies on a claimant to file a claim in the first place.

Alternatively, defendants argue

that the notice or the statute of limitations period should begin to run from the first twinge of pain. However, S.C. Code Ann. § 42-1-172(A) defines "repetitive trauma injury" as "an injury which is gradual in onset and caused by the cumulative effects of repetitive traumatic events." S.C. Code Ann. § 42-1-172 (2007). The Act's notice provision uses the term "condition," and the statute of limitations uses the word "injury;" neither statute simply refers to "pain." Therefore, a simple and singular muscle spasm that might go away in a few hours is not necessarily a condition or an injury.

Due to this ambiguity, and the cumulative nature of a repetitive work injury, claimant's attorneys have argued that the date a physician diagnoses the claimant with a work-related condition should be used as the date of discovery. The *Mauldin* case mentioned above may provide some basis for this argument, as the court in that case held the claimant did not discover her injury until she received a diagnosis more than two years after her date of accident. The defense's response is that the legislature would have included "date of diagnosis" language in the statute if that is what it intended. Similar language already exists with regard to occupational diseases that could have been adopted to apply to repetitive trauma claims. For instance, the Act states that the two-year period for filing an occupational disease claim begins to run when the claimant has been "diagnosed definitively as having an occupational disease and has been notified of the diagnosis." S.C. Code Ann. § 42-15-40 (2007). In addition, a date of diagnosis rule would not take into account the lack of reasonable diligence from a claimant who knows about an increasing work injury for years and simply chooses not to go to a doctor.

Finally, the Court of Appeals may choose to survey other jurisdictions' approaches to this issue. However, a review of the case law in several states will come no closer to providing uniform direction for this problem. Many courts look to the

"manifestation test" that provides the statute begins to run in a repetitive trauma claim when the fact of the injury and its causal connection to work would be manifest to a reasonable person. See *Oscar Mayer & Co. v. Industrial Comm'n*, 531 N.E.2d 174 (Ill. App. Ct. 1988); see also *George A. Hormel & Co. v. Jordan*, 569 N.W.2d 148 (Iowa 1997). Other states have used the first day of medical care, see *Munsingwear, Inc. v. Tullis*, 557 P.2d 899 (Okla. 1976), or the date the claimant receives work restrictions. *Alberty v. Excel Corp.*, 951 P.2d 967 (Kan. Ct. App. 1998). The South Carolina repetitive trauma statutes uses of the phrase "knew or should have known" at least suggest that such a "reasonable person" standard should apply, but this rule would still create a question of fact in every case. The Court of Appeals' recent decision in *Murphy* might well be an indicator that the courts will choose to handle these cases one at a time, rather than providing more far-reaching legal guidance.

Conclusion

Workers' compensation cases involving repetitive trauma injuries have always presented thorny issues of fact and law. Prior to the legislature's 2007 amendments to the Act, *Bass* and *Schurknight* set forth two different dates of injury, depending on whether the issue was notice or the statute of limitations. The 2007 legislation appeared to have simplified the process by adopting the date of discovery to trigger both the 90-day notice requirement and the two-year limitations period. Of course, using the discovery rule in these cases created a new array of difficulties. Repetitive trauma cases will no doubt continue to present challenges regardless of how the appellate courts resolve these issues, but further guidance from the courts will at least provide a clearer framework in which to apply the Act's notice and statute of limitations requirements.

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