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**Aug 17 2022**

**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

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WCC File No. 1116698  
Appellate Case No. 2018-001294

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Ex Parte: Robert Horne, as Personal  
Representative of the Estate of Gus A. King  
and Laura King,

Appellants,

In Re: Gus A. King, Claimant

Appellant,

v.

Pierside Boatworks, Employer,  
And PMA Insurance Group, Carrier,

Respondents.

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**RESPONDENTS' PETITION FOR REHEARING EN BANC  
AND MEMORANDUM IN SUPPORT**

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INSURANCE GROUP*

Pursuant to Rules 219, 221, and 240 of the South Carolina Appellate Court Rules, Respondents Pierside Boatworks and PMA Insurance Group respectfully petition the Court for a rehearing *en banc*.

### **LEGAL STANDARD**

A rehearing *en banc* may be ordered “(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.” S.C.A.C.R. 219(a). “The purpose of a petition for rehearing is not to present points which lawyers for the losing party have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” Kennedy v. S.C. Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). “In order to prevail on a petition for rehearing,” the petitioner “must demonstrate the Court overlooked or misapprehended their argument.” Id.; S.C.A.C.R. 221(a).

### **ARGUMENT**

The Court should grant Respondents’ Petition for Rehearing En Banc and rehear the appeal *en banc* because the proceeding on appeal involves a question of exceptional importance in the interpretation of South Carolina’s Workers’ Compensation Act. The decision of the panel, if not corrected, would effectively rewrite the entire mediation process in South Carolina as relates to workers’ compensation cases and create an entirely new standard for what can qualify as a settlement document in a workers’ compensation case, in derogation of existing regulatory standards. As such, this decision is a potential sea-change decision that has significant importance to the workers’ compensation system, its bar, and all of its stakeholders. Public policy issues of exceptional importance are involved, and, therefore, this matter should be reheard *en banc*.

The Court's Opinion issued on August 3, 2022, overlooked or misapprehended the following points:

1) The Court misapprehended the proper application of S.C. Code Ann. § 42-9-390 and mistakenly ruled that the 2007 amendment to S.C. Code Ann § 42-9-390 removes the requirement for filing a prepared Agreement and Final Release document (also known as a "clincher"), as required by Regulation 67-803 of the South Carolina Code of Regulations.

In the Court's interpretation, S.C. Code Ann. § 42-9-390 stands alone as the procedure for settling a workers' compensation case and as to the documentation required to settle a case with finality. The Court erroneously held that the 2007 amendment to the statute, which removed the requirement of obtaining the approval signature of a commissioner on a settlement agreement, has made the remaining aspects of drafting and filing an Agreement and Final Release "simply a perfunctory act." According to the Court's Opinion, the contents of a simple post-mediation notation of a tentative agreement suffice to meet the requirements of § 42-9-390 and all of the statute's language regarding how a case may be settled in workers' compensation matters in South Carolina. The Court's Opinion overlooks the clear language of § 42-9-390, which provides that a settlement must be done "in accordance with the provisions of this title [(the South Carolina Workers' Compensation Law, 42-1-10, et seq.).]" S.C. Code Ann. § 42-9-390.

Title 42 empowers the South Carolina Workers' Compensation Commission to "promulgate all regulations relating to the administration of the workers' compensations laws" of South Carolina. S.C. Code Ann. § 42-3-30. Thus, the substantive and procedural law of workers' compensation is largely governed by regulations, including the regulations that delineate the procedural requirements for finalizing a settlement per § 42-9-390.

Regulations 67-801 and Regulation 67-803 contain wording requiring the approval by the Commission of any Agreement and Final Release (clincher). See S.C. Code Ann. Regs. 67-801(E), (F); 67-803(B), (C). Regulation 67-801 of the South Carolina Code of Regulations controls how parties may settle a workers' compensation case and the finality of such an agreement between parties. Regulation 67-801 still requires that an Agreement and Final Release (clincher) be prepared, signed by all parties, and filed with the Commission to finalize a settlement. Regulation 67-803 spells out what must be in an Agreement and Final Release (clincher). The regulation requires the document be prepared with specific information as to the details of, among others: a statement of the facts at issue, of the nature of the injuries received by claimant, and the terms of payment. More specifically, when both parties are represented by an attorney—as in the case at hand—the Agreement and Final Release “shall be approved” by the Commission and must be prepared as required by Regulation 67-803, including all the required contents, signed by the claimant and his attorney, and signed by the attorney for employer's representative, and then “the Agreement and Final Release shall be filed with the Claims Department.” S.C. Code Ann. Regs. 67-803(B)(2).

Both regulations clearly reference a specific document that must be created to denote what was settled, and on what terms, in any case before the Commission, *e.g.* an Agreement and Final Release (clincher). A clincher is a very specific document used for settlement in workers' compensation cases in South Carolina and is always a much more detailed document than any simple post-mediation notation agreement document. To conflate the two, and to determine that the Agreement Following Mediation Conference (R. p. 187) meets the requirements of Regulation 67-801 and Regulation 67-803, overlooks

not only the prevailing practice of the entire bar involved in workers' compensation cases, but also the regulations promulgated to control the settlement process under the authority of the South Carolina Workers' Compensation Commission as dictated by the requirements of Title 42.

The 2007 amendment to § 42-9-390 did not revoke or amend the regulations that accompany the process for final settlement of a case. Regulation 67-803 clearly states the requirements of what an Agreement and Final Release "shall include." S.C. Code Ann. Regs. 67-803 (emphasis added). Regulation 67-801(A) very clearly notes the two specific types of settlement documents used within workers' compensation cases, one being an Agreement and Final Release (clincher), and no alternate documents or deviations are provided for. S.C. Code Ann. Regs. 67-801(A). Notably, Regulation 67-801 and Regulation 67-803 were both amended in 2010, after the 2007 amendment to S.C. Code Ann. § 42-9-390, and they still contain all the requirements regarding what delineates an Agreement and Final Release as well as the proper procedure for execution and filing of such documents with the South Carolina Workers' Compensation Commission. The 2010 amendment to the regulations did not remove the approval requirement, and still makes each element (preparation of the document, signature by all parties, and filing with the Commission) essential to create a valid settlement. The 2007 amendment to § 42-9-390 did not negate the regulations nor their requirement for approval, only how approval occurs. Approval now occurs when a clincher is (1) prepared, (2) signed by the parties, and (3) filed with the Commission, all per the dictates of 67-803. The only step removed from the process was the review and signature by a single commissioner.

Here, the simple post-mediation Agreement Following Mediation Conference (R. p. 187), prepared by the mediator at mediation, did not contain all of the required information. Regulation 67-803(A) specifically requires that the settlement document contain the following: (1) the caption of the claim; (2) a statement of the facts at issue; (3) the date and nature of the alleged injury coinciding with the date and nature of each injury on the Form 12A, Form 50, or Form 52; (4) the amount of the settlement and terms of payment (emphasis added); and (5) the signature of the claimant, his or her attorney, if any, and the attorney for the employer's representative. The post-mediation Agreement Following Mediation Conference (R. p. 187) did not contain each of these elements, and, therefore, it was not a clincher as required pursuant to the regulations for effective settlement. Further, the document, on its face, clearly pointed to the requirements for an Agreement and Final Release to be prepared and signed at a later date by all parties, acknowledging the requirements of Regulation 67-803. This document merely indicated an intention to enter into settlement and serves as a commemoration of the discussion at mediation for reference by the parties in preparation of the eventual clincher document. The regulation also specifically lists the requirement that the settlement document be filed with the Commission in order to become binding, (Regulation 67-803(B)(2)), which the post-mediation Agreement Following Mediation Conference here was not. The Court should have concluded the requirements of Regulation 67-803 were not met, held that the settlement is unenforceable, and affirmed the ruling of the Full Commission. Accordingly, Respondents request the Court rehear the appeal *en banc*.

2) The Court misapprehended or conflated the terms "compensation" and "medical benefits" to mean the same thing under the statute by assuming that a claimant or his

dependents are entitled to any medical benefit monies to pass through their hands as a direct payment.

Medical benefits are not compensation to a claimant—these monies are never paid directly to a claimant or his dependents, under any aspect of the statute or the regulations. Rather, these monies are paid directly to a claimant’s medical providers by the employer. See S.C. Code Ann. § 42-15-60 and S.C. Code Ann. Regs. 67-1301 et seq. Here, the medical benefit monies agreed to in the mediation were for claimant Gus A. King’s (“King”) future medical benefits. The monies were not compensation that dependents or even the Estate could have sought to acquire, as was the case in McMahan v. South Carolina Department of Education-Transportation, 417 S.C. 481, 790 S.E.2d 393 (Ct. App. 2016), which the Court relied on in overturning the Commission here.

McMahan is easily distinguishable per this difference between compensation for a bodily injury and payment of medical benefits: in McMahan, the plaintiffs were seeking compensation for bodily injuries (*i.e.*, a monetary award), which the Commission can award to a claimant (or his dependents if he dies) to compensate the claimant for permanent partial or permanent total disability under either S.C. Code Ann. § 42-9-10 or § 42-9-30. These statutes give the Commission the absolute ability to provide a monetary award to a claimant in a workers’ compensation case for the degree or percentage of disability a claimant sustains from a workplace injury. It is impossible for the Commission to order a defendant to pay any money for medical care directly to a claimant. All medical costs are paid directly to medical providers by way of a specifically spelled out statutory and regulatory process that completely bypasses the claimant. The Commission lacks any

statutory authority to order the direct payment of medical benefit monies to a claimant. As such, the Court improperly applied McMahan to the case at hand.

Neither King's Estate nor King's dependents had any right to "receive(s) compensation to which (they) (are) otherwise entitled," as they are precluded from raising any claim to speculative future medical benefits, which are the only possible claims remaining in King's case. All possible compensation had been ordered and paid well prior to King's death. Therefore, the Court improperly applied McMahan to this case, and the decision of the Commission should have been affirmed. Accordingly, Respondents request the Court rehear the appeal *en banc*.

3) The Court misunderstood the mediation process in workers' compensation and the process by which workers' compensation cases are settled at mediation, including the use of pre-final agreement notations for agreement, which required additional documentation by an Agreement and Final Release.

Here, the document created at mediation, the "Agreement Following Mediation Conference," (R. p. 187), was not drafted by the parties to the settlement. Rather, it was created by the mediator to memorialize the matters determined at mediation. Again, this document itself clearly denotes the requirement for an actual Agreement and Final Release to be prepared by the employer/carrier (here, Respondents). The actual Agreement and Final Release was to contain significantly greater detail regarding the case and the details of the settlement, and it was to be subsequently signed by all parties, including King. This process is essential to meet the requirements of the controlling regulations: Regulation 67-801, which dictate the two forms of settlement and their respective documents available in workers' compensation matters in South Carolina; and Regulation 67-803, which spells

out the procedural requirements for the clincher document to be effective and binding in settling a workers' compensation case in South Carolina. The document created at mediation does not meet the requirements of these regulations and was not meant to be the final and binding settlement document.

The Court incorrectly concluded and overlooked the clear intent of the parties, as reflected by the mediation agreement itself, which specifically stated on its face that the mediation agreement was not the final agreement settlement document and that a proper Agreement and Release was to be completed subsequent to the mediation. Either party could have revoked their agreement to settle after the mediation and prior to the filing of a signed Agreement and Final Release (the clincher) as per the tenets of Regulation 67-801. As such, the ruling of the Full Commission should have been affirmed. Accordingly, Respondents request the Court rehear the appeal *en banc*.

### **CONCLUSION**

For the foregoing reasons, the Court should grant Respondents' Petition for Rehearing En Banc and rehear the appeal *en banc*.

Respectfully submitted,

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s/ R. Daniel Addison

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on the date indicated below he served counsel for the Appellants with a copy of the Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, and emailing on August 17, 2022, to the following addresses:

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A handwritten signature in blue ink, appearing to be 'R. Daniel Addison', written over a horizontal line.

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