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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Unpublished Opinion No. 2022-UP-437 (S.C. Ct. App. filed December 7, 2022)

Nicholas B. Thompson, Employee, Respondent,

v.

Bluffton Township Fire District, Employer, and State Accident Fund, Carrier, Petitioners.

PETITION FOR WRIT OF CERTIORARI

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Index

Certificate of Counsel…………………………………………………………………………..1

Questions Presented……………………………………………………………………………1

Statement of the Case/Procedural History……………………………………………………...2

Arguments

I. The Petition for Writ of Certiorari should be granted because the Court of Appeals erred in reversing the S.C. Workers' Compensation Commission's denial of benefits based on Respondent's failure to meet the standard of proving a compensable repetitive trauma injury as set forth in S.C. Code Ann. § 42-1-172 and accompanying case law……………....……………………………….………4

II. The Petition for Writ of Certiorari should be granted because the Court of Appeals erred in their application of the substantial evidence standard of review and exceeded their role as an appellate court by substituting their view of the evidence instead of correctly deferring to the Commission as the appropriate fact finders in the case…………………………………………....7

III. The Petition for Writ of Certiorari should be granted because the Court of Appeals erred in reversing the S.C. Workers' Compensation Commission's denial of benefits based on Respondent's failure to timely file a workers' compensation claim as required by S.C. Code Ann. § 42-15-20(C)……………………………11

IV. The Petition for Writ of Certiorari should be granted because the Court of Appeals erred in failing to address the Petitioners' argument that Respondent cannot prove entitlement to benefits for a repetitive trauma injury due to an aggravation of a pre-existing condition under S.C. Code Ann. § 42-1-172……..13

Conclusion……………………………………………………………………………………14

CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Counsel for Petitioners certifies that a Petition for Rehearing was made to the Court of Appeals on December 20, 2022 and denied on March 23, 2023.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in reversing the S.C. Workers' Compensation Commission's denial of benefits based on Respondent's failure to meet the standard of proving a compensable repetitive trauma injury as set forth in S.C. Code Ann. § 41-1-172 and accompanying case law?
2. Whether the Court of Appeals erred in their application of the substantial evidence standard of review, exceeding their role as an appellate court by substituting their view of the evidence instead of deferring to the S.C. Workers' Compensation Commission as the appropriate fact finders in the case?
3. Whether the Court of Appeals erred in reversing the S.C. Workers' Compensation Commission's denial of benefits based on Respondent's failure to timely file a workers' compensation claim as required by S.C. Code Ann. § 42-15-20(C)?
4. Whether the Court of Appeals erred in failing to address the Petitioners' argument that Respondent cannot prove entitlement to benefits for a repetitive trauma injury due to an aggravation of a pre-existing condition under S.C. Code Ann. § 42-1-172?

STATEMENT OF THE CASE/PROCEDURAL HISTORY

This appeal involves a workers' compensation claim. On April 19, 2017, Respondent filed a Form 50 Request for Hearing on which he alleged an injury to the back and legs which occurred "on, before, and after June 1, 2016" as the result of both injury and repetitive trauma. The Form 50 stated that "Claimant was injured while lifting a very heavy individual (about 400 pounds)." On May 30, 2017, Respondent filed an Amended Form 50 Request for Hearing on which he alleged an injury to the back and legs which occurred "on or about June 1, 2016" as the result of injury. The Amended Form 50 removed the allegation of repetitive trauma. On June 30, 2017, Respondent filed a second Amended Form 50 Request for Hearing on which he alleged an injury to the back, legs, bladder, and bowels which occurred "on/before/after June 1, 2016" as the result of injury and repetitive trauma. The second Amended Form 50 stated that "Claimant was injured lifting an approximately 400 lb. patient; twisting/lifting during Belfair Fire; Cutting/moving trees after Hurricane Matthew." Petitioners denied Respondent sustained an injury by accident or repetitive trauma arising out of and in the course of employment.

On October 23, 2017, Commissioner R. Michael Campbell, II conducted a hearing on Respondent's Form 50. Commissioner Campbell filed a Decision and Order dated September 19, 2018 in which he concluded that Respondent did not sustain a compensable injury to any part of his body as a result of the three alleged accidents which occurred on/before/after June 1, 2016. He further concluded that Respondent did not sustain a compensable repetitive trauma injury, as he failed to prove a direct causal relationship between the condition under which his work was performed and his injury. Respondent failed to provide the employer with proper notice of either an injury by accident or repetitive trauma injury as required by S.C. Code Ann. § 42-15-20. He further failed to establish by a preponderance of the evidence that he sustained an aggravation of

a pre-existing condition. As a result, Commissioner Campbell denied the claim and did not award Respondent entitlement to any benefits under the S.C. Workers' Compensation Act.

On September 28, 2018, Respondent filed a Form 30 Request for Commission Review. The S.C. Workers' Compensation Commission Appellate Panel conducted an appeal hearing on December 18, 2018. During oral argument at the appeal hearing, Respondent dropped his allegation of a compensable injury by accident and opted instead to pursue only the repetitive trauma claim. The Appellate Panel issued its Decision and Order on March 7, 2019, in which it affirmed the Single Commissioner Decision and Order, as it found that Commissioner Campbell did not err in finding that Respondent failed to meet his burden of proof for entitlement to benefits under the S.C. Workers' Compensation Act for either injury by accident or repetitive trauma injury and denying the claim in its entirety.

Respondent filed a Notice of Appeal with the S.C. Court of Appeals on April 4, 2019. Following oral arguments on September 13, 2022, the Court of Appeals issued an unpublished opinion in which it reversed and remanded the S.C. Workers' Compensation Commission. In its opinion, the Court of Appeals stated that the S.C. Workers' Compensation Commission erroneously narrowly interpreted the word "repetitive" in S.C. Code Ann. § 42-1-172; improperly disregarded Dr. James Lindley's expert medical opinion; and erred in ruling that the Respondent is time-barred under S.C. Code Ann. § 42-15-60(C) from recovering compensation for his repetitive trauma injury. The Court of Appeals opined that the S.C. Workers' Compensation Commission's findings and conclusions were not supported by substantial evidence and were affected by errors of law, resulting in a reversal and remand to the Commission.

ARGUMENTS

1. **The Petition for Writ of Certiorari should be granted because the Court of Appeals erred in reversing the S.C. Workers' Compensation Commission's denial of benefits based on Respondent's failure to meet the standard of proving a compensable repetitive trauma injury as set forth in S.C. Code Ann. § 41-1-172 and accompanying case law.**

The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Sloan v. Hardee, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). When the statue's language is clear and unambiguous, the rules of statutory interpretation are unnecessary, as a court has no choice but to apply the statute as written. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). This is because the language used in the statute is generally considered to be the best evidence of the legislature's intent. Cain v. Nationwide Prop. & Cas. Ins. Co., 378 S.C. 25, 30, 661 S.E.2d 349, 352 (2008) "[W]ords must be given their plain and ordinary meaning without result to subtle or forced construction to limit or expand the statute's operation." State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). As this Court recently stated in Connelly v. The Main Street America Group (Opinion No. 28130, filed January 11, 2023), "we are a court, not a legislative body. We are thus constrained by our judicial role to interpret the law as written and not to create exceptions to plainly-worded statutes. That is the province of the legislature alone, and a boundary we do not cross, even in sympathetic situations such as this."

S.C. Code Ann. § 42-1-172(B) provides, "[a]n injury is not considered a compensable repetitive trauma injury unless a commissioner makes a specific finding of fact by a preponderance of the evidence of a causal connection that is established by medical evidence between the

repetitive activities that occurred while the employee was engaged in the regular duties of his employment and the injury." An appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. Bentley v. Spartanburg County, 730 S.E.2d 296 (S.C. 2012) (citing S.C. Code Ann. § 1-23-380(5)).

Meriam-Webster Dictionary defines "repetitive" as "repetitious" and "containing repetition." "Repetition" is defined as "the act or an instance of repeating or being repeated" and "a motion or exercise (such as a push-up) that is repeated and usually counted." The Britannica Dictionary defines "repetitive" as "happening again and again; repeated many times." Collins Dictionary states "repetitive movements or sounds are repeated many times." Macmillan Dictionary defines "repetitive" as "involving repeating the same action over long periods of time." Vocabulary.com states "[s]omething that is repetitive involves doing the same thing over and over again."

In this case, the Court of Appeals opined that "the commission equated activities that are 'repetitive' with activities that must be performed on a near constant basis to find that, because Thompson did not lift the same heavy object in the same way throughout each shift, he was unable to prove the admittedly 'routine' and 'frequent' lifting of heavy objects during his shifts as a firefighter were 'repetitive' as required by section 42-1-172." The Court of Appeals further stated that "[n]othing in section 42-1-172 demands such a narrow construction of the word 'repetitive,' and we find this narrow construction goes against the policy of the Worker's (sic) Compensation Act, the plain meaning of the word 'repetitive,' and South Carolina precedent." The Court of Appeals found the record "replete with evidence that Thompson's duties as a firefighter included lifting heavy objects on a regular basis." (emphasis added) It further noted routine duties that

Respondent performed. (emphasis added) The Court of Appeals then went on to describe lifting heavy objects in the course of the regular duties of Respondent's employment.

In support of its opinion, the Court of Appeals cited Stone v. Roadway Express, which states that "[i]n construing a workers' compensation statute, 'the words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation.'" 367 S.C. 575, 585, 627 S.E.2d 695, 700 (2006) Petitioners respectfully contend that the Court of Appeals itself expanded the definition of "repetitive," as opposed to the plain and ordinary meaning of that word, in its December 7, 2022 decision.

Respondent testified regarding a number of physical requirements of his job as a firefighter, but failed to describe any actual repetitive activities. He offered no expert testimony as to the repetitive nature of his job. Captain Pete Reid, an employer representative who testified at the Single Commissioner hearing, could not state any repetitive duties which a firefighter is required to perform. (R. p. 186, line 9)

The Appellate Panel Decision and Order accurately points out that Respondent's job description includes reference to performing a variety of physical activities, none of which are performed on a constant or repetitive basis. (R. pp. 544-546) There is no evidence in the record which supports Respondent's argument that his job as a firefighter involves repetitive activities.

Looking at S.C. Code Ann. § 42-1-172(B), there is the requirement of a causal connection between the "repetitive activities" and the injury. Following the plain meaning rule, in drafting S.C. Code Ann. § 42-1-172, the legislature used the word "repetitive" for a reason, and to construe that language to include any and all physically-demanding jobs would be inappropriate. Workers' compensation is not a full and complete remedy. It is a statutory scheme that covers only certain injuries and provides limited benefits in exchange for workers not having to prove negligence or

being subject to common law defenses. Workers' compensation does not cover everything that occurs at work. It only covers certain injuries and certain accidents as specifically defined by the legislature. For example, heart attacks that occur at work are not compensable unless caused by unusual and extraordinary conditions of employment; mental injuries that occur at work are not compensable unless caused by unusual and extraordinary conditions of employment; common contagious diseases to which the general public is exposed are not compensable. There are countless other examples. In this matter, if the legislature wanted to make compensable an injury stemming from every physically demanding job, it could have easily done so. However, that is not what the legislature did in S.C. Code § 42-1-172. It specifically limited recovery to the injuries caused by repetitive activities, not regular or routine work activities. The expansion of the injuries that are compensable under S.C. Code § 42-1-172 by the Court of Appeals in this decision is improper because it redefines and greatly expands the word repetitive, thereby rewriting and rewording the South Carolina Workers' Compensation Act.

This is admittedly a sympathetic situation, but again, as this Court stated in Connelly, "we are a court, not a legislative body. We are thus constrained by our judicial role to interpret the law as written and not to create exceptions to plainly-worded statutes. That is the province of the legislature alone, and a boundary we do not cross, even in sympathetic situations such as this." Given the novel issue of law presented in this situation, specifically the interpretation of the word "repetitive," Petitioners respectfully request the Petition for Writ of Certiorari be granted to allow further briefing on this issue.

2. **The Petition for Writ of Certiorari should be granted because the Court of Appeals erred in their application of the substantial evidence standard of review, exceeding**

their role as an appellate court by substituting their view of the evidence instead of deferring to the Commission as the appropriate fact finders in the case.

The Administrative Procedures Act ("APA") establishes the standard for judicial review of decisions of the Workers' Compensation Commission. Hargrove v. Titan Textile Co., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Upon review, appellate courts have the power to reverse or modify a decision if the findings and conclusions of the administrative agency are affected by an error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, arbitrary or capricious, characterized by an abuse of discretion, or a clearly unwarranted exercise of discretion. Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000). Under the APA, an appellate court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, but it may reverse for errors of law. Bentley v. Spartanburg County, 730 S.E.2d 296, 398 S.C. 418 (S.C. 2012) (citing S.C. Code Ann. § 1-23-380(5)). Specifically, "[i]n workers' compensation cases, the Appellate Panel is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (S.C. 2000) (citing Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986)). "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Full Commission." Id. (citing Ford v. Allied Chem. Co., 252 S.C. 561, 167 S.E.2d 564 (1969)). It is not the task of the appellate court to weigh the evidence as found by the Full Commission. Id. (citing Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981)).

The substantial evidence rule of the APA governs the standard of review in a workers' compensation decision. Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004). This Court must affirm the findings of fact made by the Full Commission if they are

supported by substantial evidence. Jordan v. Kelly Co., 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009). Substantial evidence is neither a mere scintilla of evidence, nor evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action. Pratt v. Morris Roofing, Inc., 357 S.C. 619, 594 S.E.2d 272 (2004). Thus, substantial evidence is a lesser standard than by a preponderance of the evidence. Id.

The APA requires that "[a] final decision . . . include findings of fact and conclusions of law, separately stated. Findings of Fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C. Code Ann. § 1-23-350 (2005). Moreover, the Full Commission's findings of fact must be sufficiently detailed to enable the appellate court to determine whether the evidence supports the findings and whether the law was properly applied to those findings. Frame v. Resort Servs. Inc., 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004).

In this case, the Appellate Panel complied with the requirements of the APA. The Full Commission made 27 Findings of Fact which are sufficiently detailed to enable the Court of Appeals to determine whether the evidence supported it findings and whether the law was properly applied to those findings. Instead, the Court of Appeals reversed the factual conclusions of the Appellate Panel and substituted its own judgment regarding the medical opinions of Dr. James Lindley.

Respondent obtained a causation statement from Dr. James Lindley dated July 11, 2017, which the Court of Appeals referenced in its opinion. However, Petitioners conducted Dr. Lindley's deposition on January 18, 2018, and he provided further clarification of his opinions. Dr. Lindley testified that he is not sure if the repetitive nature of Respondent's job caused his back

condition or if the work accidents caused the back condition. (R. p. 566, lines 19-20) Dr. Lindley believes it is speculative to say that Respondent's back injury is due to the repetitive nature of his job because "there are multiple factors, so we don't know exactly which factor was the primary reason for the problem or was it multiple factors where there was wear and tear over time." (R. p. 567, line 23-p. 568, line 2) Dr. Lindley cannot state to a reasonable degree of medical certainty that Respondent's back condition is causally-related to his employment. (R. p. 568, lines 13-20; p. 568, lines 23-25; p. 580, lines 21-24) Dr. Lindley cannot say whether an exacerbation of Respondent's back condition is related to repetitive trauma versus the three alleged work accidents versus the general physical nature of his job. (R. p. 586, lines 21-22; p. 587, line 8)

The S.C. Workers' Compensation Commission appropriately considered the competing opinions between Dr. Lindley's July 11, 2017 statement and his January 18, 2018 sworn deposition testimony, then appropriately placed greater weight on the deposition testimony. It is the S.C. Workers' Compensation Commission's job to consider the evidence as a whole, then determine which evidence should be given greater weight. "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Commission and it is not the task of the court to weigh the evidence as found by the Commission." Sharpe v. Case Produce, Inc., 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999).

As stated in Fox v. Newberry Co. Memorial Hospital, "[i]n the review of a finding of the Worker's Compensation Commission, the reviewing court may not make findings of fact as to basic issues of liability for compensation, where, to do so, would impose upon the court the function of determining such facts from conflicting evidence. 319 S.C. 278, 461 S.E.2nd 392 (1995). Further, "[w]hile reasonable minds could have reached a different conclusion based on the

record, we must not engage in fact-finding that would disregard the Commission's factual finding on these issues." Hartzell v. Palmetto Collision, 415 S.C. 617, 623, 785 S.E.2nd 194, 197 (2016).

Petitioners contend that the Court of Appeals' reversal of the S.C. Workers' Compensation Commission's Decision and Order went far beyond a determination of whether there was evidence to support the conclusions of the S.C. Workers' Compensation Commission, and instead served the function of fact-finding that disregarded the Commission's findings on conflicting evidence in the record. Specifically, the Appellate Panel quoted Dr. Lindley's deposition testimony in Finding of Fact No. 20 of its Decision and Order. It also referenced Dr. Lindley's deposition testimony in Findings of Fact Nos. 19 and 21 of its Decision and Order. Petitioners contend that the Appellate Panel, as the fact finder, appropriately weighed the evidence, including the deposition testimony of Dr. Lindley, and its findings of fact should have been affirmed, as they were supported by substantial evidence. Instead, the Court of Appeals substituted its own judgment for that of the Appellate Panel as to the weight of the evidence. The Court found that Dr. Lindley's testimony was not speculative, when Dr. Lindley himself testified that it was speculative. As such, Petitioners respectfully request this Court grant the Petition for Writ of Certiorari and allow further briefing on this issue.

3. **The Petition for Writ of Certiorari should be granted because the Court of Appeals erred in reversing the S.C. Workers' Compensation Commission's denial of benefits based on Respondent's failure to timely file a workers' compensation claim as required by S.C. Code Ann. § 42-15-20(C).**

"In the case of repetitive trauma, notice must be given by the employee within ninety days

of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable." S.C. Code Ann. § 42-15-20(C).

Respondent presented to Dr. Daniel Hall at The Joint on September 8, 2014, and Bluffton Family Chiropractic on November 24, 2014, with lower back pain and radicular symptoms. (R. pp. 210-211; R. p. 216) He was advised to avoid heavy lifting in order to encourage healing time. (R. p. 219) There is no disputing that Respondent believed his lower back pain with right-sided radiculopathy was work-related on November 16, 2015, when he saw Dr. David Dorsner with a report of lower back pain with radiculopathy on the right side which had been present for five months and which was due to his work. (R. pp. 226-227) Dr. Dorsner diagnosed him with sciatica, back pain, and radiculopathy and ordered a lumbar spine brace. (R. p. 227) This is further evident by Respondent's report to Dr. John Batson on December 2, 2015, that "the pain interrupts activity/exercise, sleep, *work*." (emphasis added) (R. p. 236) He further reported balance/walking difficulty, weakness, numbness, and tingling in the right leg. (R. p. 236) Dr. Batson diagnosed Respondent with low back pain, sprain of ligaments of lumbar spine, and radiculopathy of the lumbosacral region and recommended use of a lumbar corset. (R. p. 238)

Respondent did not provide notice of his allegation of repetitive trauma injury to the employer until April 19, 2017, when he filed a Form 50 Request for Hearing. (R. p. 41) Respondent did not formally provide notice of what he felt was the repetitive trauma until his deposition on July 10, 2017.

The Appellant bears the burden of proving compliance with the notice requirement. Lizee v. S.C. Dept. of Mental Health, 367 S.C. 122, 127, 623 S.E. 2d 860, 863 (Ct. App. 2005) The findings of the Appellate Panel concerning notice should be upheld if substantial evidence supports them. King v. International Knife, 395 S.C. at 443, 718 S.E. 2d at 230. Petitioners contend that the

Court substituted its own judgment regarding the facts surrounding Respondent's past back injury and treatment. The Court of Appeals' December 7, 2022 decision states that "[b]ack pain is not the same as a back injury when evaluating the date a Claimant reasonably should have known he or she has experienced a repetitive trauma injury." Respondent was diagnosed with a back injury, not simply back pain, in 2015 which he knew was work-related, as he told his doctor it was work-related. The S.C. Workers' Compensation Commission Appellate Panel, as the finder of fact, correctly and appropriately found that Respondent failed to provide the employer with proper notice of a repetitive trauma injury within 90 days as required by S.C. Code § 42-15-20. There is no evidence in the record to show that Respondent provided a reasonable excuse for his failure to provide notice within 90 days.

4. **The Petition for Writ of Certiorari should be granted because the Court of Appeals erred in failing to address the Petitioners' argument that Respondent cannot prove entitlement to benefits for a repetitive trauma injury due to an aggravation of a pre-existing condition under S.C. Code Ann. § 42-1-172.**

In its December 7, 2022 decision, the Court of Appeals failed to address Petitioners' argument that Respondent cannot prove entitlement to benefits for a repetitive trauma injury due to an aggravation of a pre-existing condition under S.C. Code § 42-1-172. Respondent's Initial Brief asks, "Is a firefighter with a back condition aggravated by cumulative effects of repetitive trauma on the job entitled to workers' compensation benefits …? (emphasis added) As Petitioners argued during oral arguments, the answer to that question is no. S.C. Code § 42-1-172(A) states that "repetitive trauma injury" means an injury which is gradual in onset and caused by the

cumulative effects of repetitive traumatic events. Compensability of a repetitive trauma injury must be determined only under the provisions of this statute. The plain language of S.C. Code § 42-1-172 requires that the injury must be caused by, not aggravated or exacerbated by. The Court of Appeals failed to analyze whether Respondent proved that his back injury was caused by his alleged repetitive work activities. Dr. Lindley could not state to a reasonable degree of medical certainty that the Claimant's alleged repetitive work activities caused his back injury. He could only state that the alleged repetitive work activities may have exacerbated the pre-existing back condition, though he had several qualifications to that opinion. Petitioners contend that, had the Court of Appeals addressed this argument, it would have found that Respondent did not meet his burden for proving compensability for a repetitive trauma injury, as an aggravation of a pre-existing condition is not possible under S.C. Code § 42-1-172.

CONCLUSION

For the reasons set forth above, Petitioners argue that the Court of Appeals erred in finding Respondent proved a compensable repetitive trauma injury, in exceeding its role as an appellate court by substituting its view of the evidence, in finding that Respondent timely filed a workers' compensation claim, and in failing to address Petitioners' argument regarding proving entitlement to workers' compensation benefits for an aggravation of a pre-existing condition in a repetitive trauma claim. This case involves the novel issue of the interpretation of the word "repetitive." Further, the Court of Appeals decision conflicts with prior Supreme Court holdings involving the role of the S.C. Workers' Compensation Commission as the ultimate fact finder in workers' compensation claims. As such, Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari and allow further briefing on the issues.

Respectfully submitted,

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