THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Appellate Panel, Workers' Compensation Commission

Opinion No. 5020 (S.C. Ct. App. filed Aug. 8, 2012)

Ricky Rhame, ... Petitioner,

v.

Charleston County School
District, ... Respondent.

BRIEF OF PETITIONER

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II. Should this Court certify this case and explain how the 2007 amendments to the Workers' Compensation Act will apply to an injury that straddles the effective date of those amendments?

STATEMENT OF THE CASE

Ricky Rhame started this workers' compensation case in September of 2009 by asking the commission to award an alleged injury to his back. (App.pp.133, 136). The Charleston County School District (his employer) denied that Mr. Rhame had been injured and raised the statute of limitations as a defense. (App.p.134).

The statute of limitations was the principle issue the parties contested in front of the commission. This issue centered on Mr. Rhame's admission that he began experiencing off-and-on back pain in 1994 or 1995. See (App.p.191, line 13 - p.194, line 1).

The School District argued that the limitations period for this claim began running as soon as Mr. Rhame realized he was having pain that was caused by his job. (App.pp.139-141). By this approach, the limitations clock started in 1994.

For his part, Mr. Rhame said that his past back problems had truly been "off-and-on" and relatively minor, but that this had recently changed. He suffered a significant episode in May of 2009, and he claimed that this episode left him with what appeared to be severe and permanent limitations. See (App.p.201, line 23 - p.202, line 4; p.221, lines 11-24).[1]

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[1]Mr. Rhame worked for the School District for 22 years as a heating and air conditioning technician. His employment lasted from July of 1987 to May of 2009. (App.p.184, line 25 - p.185, line 6; p.189, line 23 - p.190, line 1).

Mr. Rhame also offered several reasons why he had not pursued the issue of his back pain earlier. He said that he was afraid of losing his job, he was misled by the School District into thinking that his work-related health problems were his own responsibility, he was not diagnosed with any permanent injury until 2009, and he was essentially ignorant of the workers' compensation system and the concept of "repetitive trauma" injuries until he retained counsel that same year. (App.pp.154-162). Put simply, Mr. Rhame argued that he never dreamed he might have a valid claim because the School District led him to believe that *his* back pain was *his* problem.[2]

A hearing commissioner found Mr. Rhame's claim to be compensable, see (App.p.114, ¶10), but the School District asked the commission's appellate panel to review that decision. The panel agreed with the School District and reversed. (App.p.130, ¶10).

Mr. Rhame received written notice of the panel's order on August 9, 2010. He filed a petition for rehearing with the commission thirty days later. (App.pp.164-65).

The commission dismissed the petition in an order served September 21, 2010. (App.p.132). Mr. Rhame served and filed his notice of appeal with the Court of Appeals thirty days later. (App.p.180).

After conducting oral argument, the Court of Appeals issued a published decision that dismissed the appeal as untimely. (App.p.1) (also at 399 S.C. 477, 732 S.E.2d 202 (Ct. App.

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[2]This claim was brought as a "repetitive trauma" injury, and as the Court is aware, a repetitive trauma is an injury that is gradual in onset and has no definite time of occurrence. See S.C. Code Ann. § 42-1-172(A) (Supp. 2013) (statutory definition of repetitive trauma). This Court first recognized this type of injury in *Pee v. AVM, Inc.*, 352 S.C. 167, 573 S.E.2d 785 (2002). Unlike an injury that is the result of a single, discreet accident, a repetitive trauma is a series of "mini-accidents" that gradually creates a disabling condition. See *Schurlknight v. City of N. Charleston*, 352 S.C. 175, 178, 574 S.E.2d 194, 195 (2002).

2012)). The court reasoned that Mr. Rhame's petition for rehearing had not stayed the deadline for serving his notice of appeal. The principal basis of this reasoning was that there was no statute in the Workers' Compensation Act that expressly allows a party to ask for rehearing. (App.pp.3-5). Because rehearing (supposedly) did not exist, there was no tolling.

The Court of Appeals also cited three appellate decisions — two from this Court and one decision of its own — which stand for the proposition that Rule 59 of the South Carolina Rules of Civil Procedure does not apply in workers' compensation proceedings. (App.pp.5-6) (citing *Pikaart v. A & A Taxi*, 393 S.C. 312, 713 S.E.2d 267 (2011), *Stone v. Roadway Express*, 367 S.C. 575, 627 S.E.2d 695 (2006), and *Nettles v. Spartanburg Sch. Dist. # 7*, 341 S.C. 580, 535 S.E.2d 146 (Ct. App. 2000)). The court concluded "[a]s with motions to reconsider, we find petitions for rehearing are not applicable in [workers' compensation cases]." (App.p.6).

ARGUMENT

There are three reasons why this Court should reverse the holding of the Court of Appeals.

First, the court's holding conflicts with the text of the Administrative Procedures Act. The APA provides that the deadline for an appeal in an administrative case is thirty days after the agency's final decision, "or, if rehearing is requested, within thirty days after the decision is rendered." S.C. Code Ann. § 1-23-380(1) (Supp. 2013). This Court has already held that the APA was designed to provide uniform procedures for administrative agencies, and this Court has already held that the APA applies to workers' compensation cases. Under the statute's language, the appeal deadline is tolled if a party requests rehearing.

Second, this Court has already held that the commission has the inherent power to rehear its decisions. The power to make a decision logically includes the power to reconsider it. This precedent has never been limited or overruled. Though Mr. Rhame presented this authority to the Court of Appeals, the court made no effort to discuss or distinguish it.

Finally, although there are three appellate decisions which suggest that the losing party in a workers' compensation case cannot request reconsideration, Mr. Rhame respectfully submits that on this point, those decisions are wrong. The principal case in this group is a Court of Appeals decision. That decision does not discuss the relevant statute.

Once the procedural error in this case is resolved, the case will be postured for a court to review the merits. This Court will decide for itself, but Mr. Rhame respectfully submits that circumstances make it appropriate for this Court — not the Court of Appeals — to review the merits of this appeal. The 2007 amendments to the Workers' Compensation Act modified the law for "repetitive trauma" injuries. These revisions apply to injuries that "occur" on or after July 1, 2007. This standard might seem easy to apply, but it is not. By definition, a repetitive trauma injury has no definite time of occurrence. This case illustrates why the practicing bar needs clarity on this issue: the commission used a 2007 statute to kill a repetitive trauma claim that supposedly "occurred" 13 years before the statute even existed. This cannot have been correct. This Court should reverse.

I. Filing a Petition for Rehearing with the Commission Stays the Deadline for Appealing the Case to the Court of Appeals.

The Court of Appeals held that Mr. Rhame's appeal was untimely. There are three reasons why this holding is incorrect.

1. The Administrative Procedures Act is the controlling statute, and the APA provides that the appeal deadline is stayed while a rehearing petition is pending.

The Court's decision should begin, end, and be controlled by the language of section 1-23-380 of the South Carolina Code. This is the part of the APA that governs the process of appealing an agency's decision to an appellate court. This statute is comprehensive. It contains the standard for appealability, the filing deadline, and the standard of review.

a. The APA gives parties thirty days after a final decision to request rehearing.

The statute provides that the deadline for appealing an administrative case is thirty days after the agency's final decision. The statute further provides "if rehearing is requested," the deadline is "thirty days after the decision [on rehearing] is rendered." § 1-23-380(1). It is difficult to see how this language could be plainer. If a party requests rehearing, the deadline to appeal is thirty days after the agency acts on the request.

This Court has already construed this part of the statute once. In *McCummings v. South Carolina Department of Corrections*, 319 S.C. 440, 462 S.E.2d 271 (1995), the question presented involved the length of the deadline to ask for rehearing. The plaintiff in *McCummings* argued that there was *no* deadline for rehearing requests because the statute did not articulate one. This Court disagreed and held "in the absence of an agency rule specifying a time limit, parties have thirty days after a final agency decision to petition the agency for rehearing or appeal the decision[.]" *Id.* at 441, 462 S.E.2d at 272.

Here again, the relevant language seems straightforward. *McCummings* recognizes the rehearing process and gives the time limit for making such a request.

b. The APA applies to this case because it provides uniform procedures for all administrative cases.

The Court of Appeals disagreed and offered two grounds for its conclusion. First, the court opined that *McCummings* did not apply because it involved an employee grievance proceeding and not a workers' compensation case. (App.p.4, n.1). Second, the court opined that the Workers' Compensation Act — *not* the APA — provides the procedure for appealing the commission's decision to the judicial system. (App.p.5).

Both of these reasons conflict with this Court's existing precedents. Within four years of the APA's passage, this Court had recognized that the APA was designed to supply "uniform procedures" to cases involving administrative boards and commissions. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981). This principle has been re-affirmed on a number of occasions.

For example, when the legislature amended the APA in 2006, it included an instruction that "[t]his act is intended to provide a uniform procedure for contested cases." See Act. No. 387, Section 53, 2006 S.C. Acts 3093, 3131. That same instruction also provides "to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling." *Id.* This Court has continuously held that when the APA and the Workers' Compensation Act conflict, the APA controls. See *Bone v. U.S. Food Serv.*, 404 S.C. 67, 84, 744 S.E.2d 552, 561 (2013) (APA governs appealability); *Pringle v. Builders Transp.*, 298 S.C. 494, 495-96, 381 S.E.2d 731, 731-32 (1989) (APA governs contents of notice of appeal); *Lark v. Bi-Lo*, 276 S.C. at 134-35, 276 S.E.2d at 306 (APA governs standard of appellate review). The point is not fairly debatable.

McCummings cannot be meaningfully distinguished on the grounds that it involves a different administrative agency. The APA sets *uniform* procedures for *all* administrative agencies. The APA controls this case, and the Court of Appeals erred in holding otherwise.

c. This Court should reject the arguments the School District is likely to offer.

The School District may try to rebut this argument in two ways. First, it may say that a party may not petition the commission for rehearing because the commission does not have any regulations allowing it.

With the utmost respect, it does not matter what the commission's regulations say on this point. An administrative regulation cannot undo a statute. See, e.g., *S.C. Coastal Conservation League v. South Carolina Dep't of Health & Envtl. Control*, 390 S.C. 418, 429, 702 S.E.2d 246, 252 (2010) (recognizing this principle). The commission can dispose of rehearing petitions however it pleases, but once a petition for rehearing is filed, the APA ties the appellate deadline to the date that the commission decides the petition.

The School District's argument also has a historical flaw. While it is absolutely true that the commission does not have any regulations on rehearing, at the time of the *McCummings* decision, the State Employee Grievance Committee did not have any such regulations either. See 24 S.C. Code Ann. Regs. 59-1 to -36 (1982).[3] If the absence of a regulation mattered, *McCummings* would have held that a rehearing request is *always* improper — regardless of when it is filed. This question of rehearing is not tied to whether a regulation does or does not exist. The question is controlled by the APA.

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[3]These regulations have since been repealed. State Register Volume 6, Issue 9, page 212.

The second argument the School District may make is that the rehearing process is included in a party's "appeal" to the commission's appellate panel. As this Court is aware, most workers' compensation cases are heard first by a single hearing commissioner. After this, there is a right of "appeal" or "rehearing" to a panel of commissioners. See S.C. Code Ann. §§ 42-17-50 & -60 (Supp. 2013); see also 8 S.C. Code Ann. Regs. 67-709 (2012).

The problem with this argument is that the APA contemplates rehearing coming *after* an agency's final decision. Rehearing is a post-judgment request, not a pre-judgment request. In workers' compensation cases, the commission's decision is not final until after the appellate panel has spoken or the deadline to seek the panel's review has expired. The hearing commissioner is *not* the final fact-finder — that role belongs to the panel. *Jordan v. Kelly Co.*, 381 S.C. 483, 486, 674 S.E.2d 166, 168 (2009). When the APA talks of "rehearing," it is not discussing the procedure for asking a new group of deciders to take a look at someone else's decision. "Rehearing" is asking the same fact-finder to reconsider its own decision before the losing party pursues an appeal.

The Court's decision should begin, end, and be controlled by the language of the APA. In pertinent part, this act provides that once a party requests rehearing, the deadline to appeal is thirty days after the agency acts on the request.

2. This Court has already held that the commission can rehear its decisions. The power to make a decision necessarily includes the power to reconsider it.

The second reason this Court should reverse is that even if the APA did not exist, the holding of the Court of Appeals would still be incorrect. This Court has already held that the commission has the inherent authority to rehear its decisions.

This was the holding of Justice Stukes' concurring opinion in *In re Crawford.* Though it was not the lead opinion, this concurrence was joined by three of the court's other four members. The opinion reasons that until a party files an appeal, the commission can exercise all powers that are "incident to [its] jurisdiction," including rehearing decisions. 205 S.C. 72, 93-94, 30 S.E.2d 841, 849-50 (1944). This case has never been overruled.

There have been a number of subsequent events that have impacted this area. The passage of the APA would be chief among them. But even though some of this landscape has changed, the central force of this decision remains valid. The power to make a decision necessarily includes the power to reconsider it.

3. This Court should overrule the three appellate cases which suggest that the losing party in a workers' compensation case cannot request reconsideration.

To support its holding that petitions for rehearing do not apply in workers' compensation cases, the Court of Appeals cited two decisions from this Court and one decision of its own which stand for the proposition that Rule 59 of the South Carolina Rules of Civil Procedure does not apply in workers' compensation proceedings. This reliance was in error. These decisions do not control, and they should be limited or overruled.

The three cases involved are *Pikaart v. A & A Taxi*, *Stone v. Roadway Express*, and *Nettles v. Spartanburg School District # 7.* See (App.pp.5-6).

Both *Pikaart* and *Stone* are decisions of this Court. In each decision, the relevant language consists of a summary observation that Rule 59 does not apply to cases at the commission. *Pikaart*, 393 S.C. at 324, 713 S.E.2d at 274 ("Although Rule 59(e), SCRCP motions are not applicable in matters before the Commission itself . . . ."); *Stone*, 367 S.C.

at 582, 627 S.E.2d at 699 ("Rule 59(e) is not applicable in proceedings before the commission."). There is no substantive analysis or additional explanation. Instead, and as the Court of Appeals did here, these cases cite to the decision of the Court of Appeals in *Nettles*.

The relevant portion of *Nettles* is a footnote in which the Court of Appeals considered whether an argument was procedurally barred by a party's failure to obtain a ruling on the argument from the commission. See 341 S.C. at 588 n.4, 535 S.E.2d at 150 n.4. The court considered this question on its own motion. No party raised the issue, and it was not covered in any briefing. The analysis in *Nettles* did not discuss the APA or this Court's decision in *In re Crawford*. Instead, *Nettles* relied on parts of the Workers' Compensation Act and on the commission's own regulations.

These cases — *Pikarrt*, *Stone*, and *Nettles* — are partially right. There are no "Rule 59" motions in workers' compensation cases, but this is because the rules of civil procedure apply to *courts*, see Rule 1, SCRCP (scope of coverage), and the commission is not a court. The commission is an administrative agency. The APA contains rule-making provisions, see S.C. Code Ann. § 1-23-650, and adopts the South Carolina Rules of Evidence for most (but not all) administrative cases, see S.C. Code Ann. § 1-23-330, but no statute adopts the rules of civil procedure for workers' compensation cases specifically or administrative cases generally. The reason Rule 59 does not apply is because the APA never incorporates it.

The truth about *Pikaart*, *Stone*, and *Nettles* is that because they do not discuss the APA, they cannot legitimately be viewed as informative. The APA was Mr. Rhame's vehicle for rehearing; he did not cite or rely on the Workers' Compensation Act. The *Nettles* court's

sua sponte analysis appears to have either overlooked or been totally unaware of the relevant language in section 1-23-380. *Nettles* also did not discuss this Court's previous decision in *In re Crawford*, which appears to be the only case where parties actually litigated the question whether the commission has the ability to grant rehearing. This Court should limit *Nettles* and its progeny. A case cannot be relevant if it fails to discuss the controlling statute. Furthermore, it is not possible to reconcile the footnote in *Nettles* with the language of the APA, this Court's holding in *McCummings*, and this Court's holding in *In re Crawford*. These authorities cannot co-exist. If the APA controls, this part of *Nettles* must fall.

For these three reasons, this Court should reverse the holding that Mr. Rhame's notice of appeal was untimely. Once a party files for rehearing, the appeal deadline is tolled.

II. This Court Should Certify this Case and Explain How the 2007 Amendments to the Workers' Compensation Act Will Apply to an Injury That Straddles the Effective Date of Those Amendments.

1. A repetitive trauma does not have a definite time of occurrence.

A "repetitive trauma" injury has no definite time of occurrence. When this Court first recognized these as valid claims in *Pee v. AVM*, one of the arguments that was offered against such recognition was that a repetitive trauma could not be compensable *precisely because* there was no definite time of injury. See 352 S.C. at 172, 573 S.E.2d at 788. This Court rejected that argument. The lack of a definite time of injury did not control.

What mattered was the fact that the claimant's condition had been *caused* by her work. A repetitive trauma is different from a discreet injury caused by a single incident, but this Court wrote "[t]he fact that a repetitive trauma injury is disease-like in its gradual onset

does not preclude it from coverage[.]" *Id.* at 172, 573 S.E.2d at 788. Nobody expects their work to give them permanent limitations. Awarding a repetitive trauma claim protects someone whose job slowly creates a condition that eventually becomes disabling.

2. This lack of a definite time of "occurrence" is causing two areas of conflict in this case.

This lack of a definite time of occurrence is creating two areas of conflict in the law that are playing out in Mr. Rhame's case. The first relates to the statute of limitations.

In *Schurlknight v. City of North Charleston*, this Court held that the statute of limitations in a repetitive trauma case does not begin to run until the last date that the injured worker was exposed to the condition that caused his or her injury. 352 S.C. at 179, 574 S.E.2d at 196. Under this rule, the statute of limitations in Mr. Rhame's case would not begin to run until May 4, 2009. This was the last day Mr. Rhame worked and the same day he claimed he became disabled. See (App.p.133; p.221, lines 11 - 24).

The 2007 amendments changed this. Under the amended version of the Workers' Compensation Act, a claim for a repetitive trauma is barred unless the claim is filed within two years of the time the employee knew or should have known that his injury is "compensable." S.C. Code Ann. § 42-15-40 (Supp. 2013). This law was passed with an effective date. The new limitations period applies to injuries that "occur" on or after July 1, 2007. See Act. No. 111, Part IV, Section 2, 2007 S.C. Acts 599, 644.

The problem ought to be obvious: how does the new statute apply to a repetitive trauma injury, which has no date of occurrence? What about a repetitive trauma that begins prior to July 1, 2007, but does not become permanently disabling until after this date?

The second problem that is playing out relates to how the commission is viewing these injuries. The commission found that Mr. Rhame had a "back injury" since 1994 or 1995. (App.p.129, ¶2). Based on this finding, the commission barred the claim.

This finding equates a repetitive trauma with the first occurrence of work-related pain. Under this view, an off-and-on period of muscular stiffness is the equivalent of a permanent injury that is compensable under the Workers' Compensation Act.

Off-and-on pain is not a repetitive trauma. If Mr. Rhame had truly been "injured" in 1994 or 1995, he could not have continued working for another 14 or 15 years. There is nothing in the record suggesting Mr. Rhame was experiencing a permanent injury at this early date. The first such suggestion appears in a 2007 record that says Mr. Rhame "may be at risk" of developing low back problems in the future. (App.p.281). This was not 15 years of working through a disability. This was a condition that developed gradually over time.

3. Though the School District will suggest avoiding these questions, they are ripe for resolution.

The School District will likely try to dismiss these issues as distractions. It will say that the "new" law applies because Mr. Rhame chose to file this claim under the new statutes, and it will also say that none of this is being raised in a timely fashion.

It is the School District that is trying to distract the Court — not Mr. Rhame.

Yes, Mr. Rhame relied on the new statutes in arguing his case. See (App.p.159) (citing § 42-1-172 in his brief to the appellate panel). Under a proper interpretation of the new statute, the limitations period does not begin to run "until the claimant, as a reasonable person, should recognize the nature, seriousness, and probable compensable character of his

[] injury or disease." (App.pp.38) (from Mr. Rhame's merits brief below). An ailment is not the same thing as an "injury." The question is whether the claimant should have known that he was being *permanently* damaged and that work was causing it. See (App.pp.37-42).

Yes, it was not until the petition for rehearing that Mr. Rhame presented an argument on how the pre-2007 law applied to these circumstances, but the appellate panel's decision was the first time the commission found that Mr. Rhame had been "injured" in 1994 and then applied a 2007 law to bar compensation. If Mr. Rhame had *not* petitioned the commission for rehearing, this argument would never have been presented below.

These issues are causing broader controversy. Though it had already rejected the argument once, see *Bass v. Isochem*, 365 S.C. 454, 481, 617 S.E.2d 369, 383 (Ct. App. 2005), the Court of Appeals has had to re-reject the idea that a repetitive trauma is equivalent to the first occurrence of work-related pain. See *King v. Int'l Knife & Saw-Florence*, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011) (cert. petition pending). That is the same view the commission applied here. Furthermore, as of the writing of this brief, no court has passed on how to deal with a repetitive trauma that begins prior to the effective date of the new law, but does not become disabling until later. This question appears to be novel.

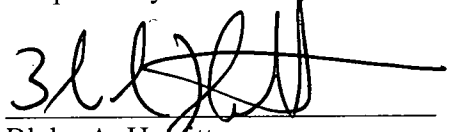
The decision whether to accept the merits of this case for review is a decision that is entrusted solely to this Court's discretion. See Rule 204, SCACR. Mr. Rhame respectfully requests that this Court consider and grant such certification. These questions are ripe for decision. They were presented below, and litigants would benefit from knowing the proper application of the new statute; both in terms of how it applies to repetitive traumas generally and how it applies to injuries that straddle the statute's effective date.

CONCLUSION

The holding of the Court of Appeals is incorrect. Mr. Rhame's notice of appeal was *not* untimely. When a party files a petition for rehearing, the APA provides that the deadline for appealing to the Court of Appeals is stayed.

It is time for this case to be heard on the merits. When Mr. Rhame first reported his back pain to the School District, his supervisor sent him the message that his pain was his problem. When Mr. Rhame worked through the pain, became disabled, and filed a claim, the commission found that he had been injured in 1994, and it killed his claim with a statute that only applies to injuries occurring on or after July 1, 2007. When Mr. Rhame tried to point the commission to the legal error in its decision, the commission dismissed the request. When he appealed to the Court of Appeals, the court dismissed the case, reasoning that although the APA ties the appeal deadline to the denial of a rehearing request, that statute (supposedly) does apply. None of this was correct. This Court should reverse.

Respectfully submitted,



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APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

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The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Brief of Petitioner* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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