

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Appellate Panel, Workers' Compensation Commission

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AUG 20 2014

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

S.C. Supreme Court

Ricky Rhame, Petitioner,

v.

Charleston County School
District, Respondent.

REPLY BRIEF

Kenneth W. Harrell
Patrick L. Jennings
JOYE LAW FIRM
5861 Rivers Avenue
North Charleston, SC 29406
(843) 554-3100
(843) 554-6539 (facsimile)

Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)

Attorneys for Petitioner

TABLE OF CONTENTS

Table of Authorities ii

Argument 1

 A. The *Crawford* concurrence *is* binding. When 3 members of this Court agree on something, it carries the force of law 1

 B. There is no cogent rationale for limiting the *Crawford* concurrence. If *any* rehearing is allowed, it naturally follows that all forms of rehearing are permissible 2

 C. The Administrative Procedures Act controls over the Workers’ Compensation Act. This case is *not* governed by § 42-17-60. It is governed by § 1-23-380 3

 D. Review by the commission’s appellate panel is not the same thing as asking for rehearing. Mr. Rhame was the losing party, and rehearing involves letting the losing party make his case again. 4

 E. The decision to certify this case is a matter for this Court’s discretion, but many of the School District’s arguments are manifestly incorrect, and this case *does* involve unusual issues 6

 i. The School District is wrong when it says that the commission did not equate the first episode of Mr. Rhame’s back pain with a “repetitive trauma” 7

 ii. The School District is wrong when it says that the “law of the case” bars Mr. Rhame’s argument that a post-2007 law does not apply to a pre-2007 injury 8

 iii. The School District is wrong when it says that Mr. Rhame’s equitable arguments were never presented to the commission 10

 iv. This case *does* contain important issues, and although one of these issues is avoidable, the other is not 11

Conclusion 12

TABLE OF AUTHORITIES

Cases

5 Star, Inc. v. Ford Motor Co.,
408 S.C. 362, 759 S.E.2d 139 (2014) 7

Auto-Owners Ins. Co. v. Rhodes,
405 S.C. 584, 748 S.E.2d 781 (2013) 9

Berry v. South Carolina Dep't of Health and Envtl. Control,
402 S.C. 358, 742 S.E.2d 2 (2013) 3

Bone v. U.S. Food Serv.,
404 S.C. 67, 744 S.E.2d 552 (2013) 3

Elam v. South Carolina Dep't of Transp.,
361 S.C. 9, 602 S.E.2d 772 (2004) 2, 5

Hamilton v. Bob Bennett Ford,
339 S.C. 68, 528 S.E.2d 667 (2000) 4

Harris Teeter, Inc. v. Moore & Van Allen,
390 S.C. 275, 701 S.E.2d 742 (2010) 9

Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.,
407 S.C. 112, 754 S.E.2d 486 (2014) 9

In re Crawford,
205 S.C. 72, 30 S.E.2d 841 (1944) 1, 2, 3, 4, 5, 6

King v. Int'l Knife and Saw-Florence,
395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011) 8, 12

Lark v. Bi-Lo, Inc.,
276 S.C. 130, 276 S.E.2d 304 (1981) 3

McCummings v. South Carolina Dep't of Corr.,
319 S.C. 440, 462 S.E.2d 271 (1995) 6

Nettles v. Spartanburg Sch. Dist. # 7,
341 S.C. 580, 535 S.E.2d 146 (Ct. App. 2000) 6, 12

<i>Pikaart v. A & A Taxi</i> , 393 S.C. 312, 713 S.E.2d 267 (2011)	12
<i>Riddle v. Fairforest Finishing Co.</i> , 198 S.C. 419, 18 S.E.2d 341 (1942)	5
<i>State v. Hewins</i> , Op. No. 27415 (S.C. Sup. Ct. filed July 16, 2014) (Shearouse Adv. Sh. No. 28 at 48)	9
<i>State v. Torrence</i> , 305 S.C. 45, 406 S.E.2d 315 (1991)	1
<i>Stone v. Roadway Express</i> , 367 S.C. 575, 627 S.E.2d 695 (2006)	12

Statutes & Other Authorities

S.C. Code Ann. § 1-23-320 (Supp. 2013)	4
S.C. Code Ann. § 1-23-330 (2005)	4
S.C. Code Ann. § 1-23-350 (2005)	4
S.C. Code Ann. § 1-23-380 (Supp. 2013)	3
S.C. Code Ann. § 42-1-172 (Supp. 2013)	9
S.C. Code Ann. § 42-9-200 (1985)	11
S.C. Code Ann. § 42-17-50 (Supp. 2013)	5
S.C. Code Ann. § 42-17-60 (Supp. 2013)	3, 5
Section 7035-62, 1942 Code of Laws	5
Section 7035-63, 1942 Code of Laws	5

ARGUMENT

A. **The *Crawford* concurrence is binding. When 3 members of this Court agree on something, it carries the force of law.**

Under any reading that is sensible, the concurring decision in *In re Crawford* stands for the proposition that until a party files an appeal, the workers' compensation commission can exercise all powers that are "incident to [its] jurisdiction." 205 S.C. 72, 93-94, 30 S.E.2d 841, 849-50 (1944). The concurrence also reasons that this includes the power to rehear a case after the case has already been decided by the commission. *Id.* We can quibble about the extent of this power, but these points should be off the table.

It is difficult to follow the argument that this decision is not binding. While it is true that the lead opinion in *Crawford* did not address this issue and was a unanimous opinion, the concurring decision was joined by 4 of this Court's 5 members. There is no limiting language in the concurrence. Nothing suggests these justices were forecasting a ruling that they might make sometime in the future. Instead, the concurrence reads as though 4 members of this Court felt it necessary to decide a question that the parties had "squarely raised and strenuously argued[.]" *Id.* at 93, 30 S.E.2d at 849. That was these justices' prerogative, and Mr. Rhame is not aware of any legal principle that allows parties to ignore a view that a majority of this Court says is right.

The *Crawford* concurrence is similar to the concurring decisions in *State v. Torrence*. The principal opinion in *Torrence* was authored by then-Chief Justice Finney, see 305 S.C. 45, 54-55, 406 S.E.2d 315, 321 (1991), but Justice Chandler authored a concurrence that garnered the votes of 3 of the Court's 4 other members, and the same was true of the

concurrence authored by then-Associate Justice Toal. These concurring decisions resolved the case differently than the lead decision, but nobody would suggest that the principles in these concurrences are not binding. Everyone's opinions are entitled to respect, but when 3 members of this Court agree on something, their ruling carries the force of law.

B. There is no cogent rationale for limiting the *Crawford* concurrence. If any rehearing is allowed, it naturally follows that all forms of rehearing are permissible.

The School District also suggests that *if* the *Crawford* concurrence means what it says, it should mean *only* what it says. Under this view, the commission has the power entertain a petition for rehearing, but only if it is based on newly-discovered evidence.

The School District offers no rationale for this limited view. It never explains why the workers' compensation commission would have *some* of the normal rehearing powers that are possessed by adjudicative bodies, but not *all* rehearing powers.

This Court has written at length about post-judgment requests and the importance of a party presenting all of his or her arguments to a lower tribunal. See *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 21-25, 602 S.E.2d 772, 778-80 (2004) (discussing this in the context of a motion for "reconsideration," which is allowed in practice but is not expressly authorized under the rules of civil procedure). This Court has also recognized that while it might seem redundant to ask the fact-finder to hear a case again after it has already ruled, there is nothing unfair about giving a losing party this opportunity, and to *disallow* this chance is "inherently *unfair*." *Id.* at 22, 602 S.E.2d at 779 (emphasis added). Requests for rehearing are desirable because they reduce decisional errors. They ensure that no point is overlooked and that a litigant has a full opportunity to make his or her case.

The principle thrust of the *Crawford* decision is that even though the workers' compensation commission is an arm of the executive branch, it was designed to act like a court and it is entrusted with all of the powers that naturally flow from its authority to decide contested cases. The concurrence is honest about the lay of the land; it openly acknowledges that the Workers' Compensation Act does not expressly authorize rehearing. Nevertheless, *Crawford* still holds that the power to grant rehearing is "clearly necessary" to carry out the commission's job. 205 S.C. at 93, 30 S.E.2d at 849-50. If the commission has the power to entertain one sort of rehearing request — and *Crawford* says that it does — it naturally follows that the commission can entertain any of the usual sorts of rehearing requests. The School District does not identify any principle of law that would lead to a narrower view. It never says why one sort of rehearing should be fair, but the other should be foul.

C. The Administrative Procedures Act controls over the Workers' Compensation Act. This case is *not* governed by § 42-17-60. It is governed by § 1-23-380.

The School District says that the APA does not control while a case is still pending in front of the commission. It is difficult to reconcile this argument with this Court's administrative precedents. This Court has repeatedly recognized that the APA "purports to provide uniform procedures before State Boards and Commissions." *Berry v. South Carolina Dep't of Health and Env'tl. Control*, 402 S.C. 358, 364, 742 S.E.2d 2, 5 (2013); *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013); *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981). The petitioner did not create this language. These are this Court's words, which the School District would like to write differently. The School District would say that the APA is designed to provide uniform procedures for

administrative cases, but only after those cases enter the court system. This is an attempt to re-write history. The APA is broader than the School District acknowledges.

How does the School District square this position with the idea that administrative cases are supposed to follow procedures that are *uniform*? We expect that there will be minor differences from agency to agency, but according to the view taken by the School District and the Court of Appeals, there can be wild variances at even the most general level. One agency might allow rehearing, another might not. The rules will depend on the forum.

How does the School District explain statutes like section 1-23-320 (which governs hearings and discovery), section 1-23-330 (which sets the evidentiary standards for administrative cases), and section 1-23-350 (which requires an agency's orders and decisions to be in writing)? These are parts of the APA, and their application does not appear to be debatable. See, e.g., *Hamilton v. Bob Bennett Ford*, 339 S.C. 68, 70, 528 S.E.2d 667, 667-68 (2000) (modifying a Court of Appeals decision that used the rules of evidence to judge an evidentiary issue in a workers' compensation case). The School District knows it is wrong — it knows that the APA applies. Its real argument is that the APA applies selectively. This scattershot reasoning is not principled. It is piecemeal application that serves a desired end.

D. Review by the commission's appellate panel is not the same thing as asking for rehearing. Mr. Rhame was the losing party, and rehearing involves letting the losing party make his case again.

The School District says that appellate panel review is the same thing as rehearing.

If this was true, *Crawford* would have been written differently. The claim in *Crawford* was decided by the hearing commissioner, appealed to the full commission, and it was not until *after* the full commission's decision that the losing party asked for rehearing.

See 205 S.C. at 76, 70 S.E.2d at 842. If panel review was the same thing as rehearing, the concurring opinion would not exist. These statutes have not materially changed from the versions that were in place at the time of *Crawford*. Compare S.C. Code Ann. §§ 42 17-50 and -60 (Supp. 2013) with 1942 Code of Laws §§ 7035-62 and -63. If the School District was right, there would have been no reason to discuss the powers that logically flow from the commission's authority. The Court would have said that rehearing already happened.

The second reason that panel review is not the same as "rehearing" is a point of posture. This Court has already taken at least one occasion to describe the interplay between the decisions of a single commissioner and the full commission. *Riddle v. Fairforest Finishing Co.* involved a party who tried to skip review by the commission and appeal a hearing commissioner's decision directly to circuit court. In rejecting this attempt, this Court wrote that when the commission reviews a hearing commissioner's decision, the posture is "akin to that of a Court," like an *appeal* from an inferior court to the court of common pleas. 198 S.C. 419, 424-25, 18 S.E.2d 341, 343 (1942). We typically associate the term "rehearing" with inviting the same body to reconsider its own prior ruling. We do not think of rehearing as asking new group of individuals to review someone else's work.

Here is the point: the theme of cases like *Riddle* is that until the appellate panel has acted, the commission has not taken "final" action. One way this principle finds expression is in the recognition that the commission — not the hearing commissioner — is the fact-finder. The thesis of *Elam* and *Crawford* is that rehearing is an important tool for lower tribunals and for litigants, and the message of the APA is that rehearing comes *after* an administrative agency has made a final decision. With the utmost respect for the

commission, its regulation about refusing to hear motions that involve the merits does not matter. The commission can handle a rehearing petition however it wants; Mr. Rhame does not care. But the operative language of the APA seems plain. A party who loses after a final decision has 30 days to appeal, and if the party asks for rehearing, the deadline is tolled.

The view that the Court of Appeals announced (via a footnote) in *Nettles v. Spartanburg School District # 7* is both right and wrong. See 341 S.C. 580, 588 n.4, 535 S.E.2d 146, 150 n.4 (Ct. App. 2000). It is true that Rule 59 of the South Carolina Rules of Civil Procedure does not apply to administrative cases, but the court was wrong when it suggested that the losing party in a workers' compensation case cannot ask the commission to rehear a decision. The APA says differently, *Crawford* says differently, this Court's decision in *McCummings v. South Carolina Department of Corrections* says differently, and a common sense of reasonableness says differently.¹ The power to make a decision necessarily includes the power to reconsider that decision. To suggest that *Nettles* (or its progeny) has any serious discussion of this question is to overstate the case. The *Nettles* court raised this issue on its own motion, and it did not consider any of these authorities.

E. The decision to certify this case is a matter for this Court's discretion, but many of the School District's arguments are manifestly incorrect, and this case *does* involve unusual issues.

Mr. Rhame will concede that if this Court is inclined to follow the normal procedure, this matter should be remanded for the Court of Appeals to address the merits. A remand usually follows when this Court reverses a decision of the Court of Appeals which did not

¹*McCummings* held that "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[.]" 319 S.C. 440, 441, 462 S.E.2d 271, 272 (1995).

address all of the issues in the case. See, e.g., *5 Star, Inc. v. Ford Motor Co.*, 408 S.C. 362, 759 S.E.2d 139 (2014).

But Mr. Rhame has proposed that this Court consider certifying this case from the Court of Appeals rather than sending the case down the typical path, and the School District opposes this proposal with two types of arguments. The first set of arguments relates to the case's merits. The second set of arguments attacks the idea that this case presents any extraordinary or unusual circumstances.

Certification is a matter that is entrusted to this Court's discretion. In deciding whether to exercise its discretion, this Court should not give any weight to the positions the School District is advancing. The School District's merits-based arguments are inaccurate, and despite the protest to the contrary, this case *does* involve unusual and important issues.

- i. The School District is wrong when it says that the commission did not equate the first episode of Mr. Rhame's back pain with a "repetitive trauma".

A large part of Mr. Rhame's argument on the merits is that the commission's decision was controlled by an error of law because it equated the first episode of Mr. Rhame's off-and-on back pain with a "repetitive trauma" injury that was compensable. The School District says that this characterization of the commission's decision is inaccurate. According to the School District, the commission never found that the statute of limitations began to run when Mr. Rhame first experienced back pain that was caused by his job.

The following is taken from the School District's brief to the commission:

Beginning around 1994, the claimant started experiencing pain in his low back. His unwavering testimony is that he knew from the beginning that his job was the cause of his low back pain. *** The claimant's unwavering

testimony is that he knew his low back problems were related to his job since 1994, about 15 years before he filed a Form 50 hearing request on this issue. Since the claimant knew he had a compensable injury in 1994 . . . his claim is barred based on the statute of limitations.

(App.pp.140-41).

The School District has consistently advanced the theory that the statute of limitations began to run on the first instance when Mr. Rhame experienced back pain and associated that pain with his work. Is the School District suggesting that the commission ruled differently? The School District was the appellant. To win, it had to find a winning error in the hearing commissioner's decision. But that is not the argument the School District is making. It says that this panel ruled in the appellant's favor, but rejected the appellant's theory of the case.

This happens to be the same theory of the case that the employer advanced in *King v. Int'l Knife and Saw-Florence*. See 395 S.C. 437, 443-44, 718 S.E.2d 227, 230-31 (Ct. App. 2011) ("Employer urges us to equate pain with a compensable condition."). This theory began to appear after the 2007 amendments to the Workers' Compensation Act modified the way that the statute of limitations operates for these injuries. The *King* decision was issued just over a year after the appellate panel's decision in Mr. Rhame's case, and it rejected the very same argument that the School District sold to the commission in Mr. Rhame's case. This is why the School District is shying away. It knows that this premise is faulty.

- ii. The School District is wrong when it says that the "law of the case" bars Mr. Rhame's argument that a post-2007 law does not apply to a pre-2007 injury.

The School District repeatedly suggests that several things are "the law of this case" and that the "law of the case" doctrine precludes Mr. Rhame from arguing that it was

impermissible for the commission to apply a post-2007 statute to a pre-2007 injury. The argument goes that when Mr. Rhame made the decision to file his claim under the “new” law, he waived any claim that the “old” law applied.

The “law of the case” doctrine is a tool that is used by appellate courts. It provides that all lower court rulings which a party does not challenge on appeal become the “law of the case.” See, e.g., *Harris Teeter, Inc. v. Moore & Van Allen*, 390 S.C. 275, 282 n.5, 701 S.E.2d 742, 745 n.5 (2010); see also *State v. Hewins*, Op. No. 27415 (S.C. Sup. Ct. filed July 16, 2014) (Shearouse Adv. Sh. No. 28 at 48, 61 n.5) (citing *Hudson ex rel. Hudson v. Lancaster Convalescent Ctr.*, 407 S.C. 112, 119, 754 S.E.2d 486, 490 (2014)). This does not apply in the present case. Unless Mr. Rhame has missed something, he has challenged all of the commission’s rulings that are material to this appeal.

The School District is really arguing some form of waiver or judicial estoppel. This Court has previously explained that judicial estoppel “is an equitable concept” that prevents a litigant from asserting a position that is inconsistent or in conflict with a position that the litigant has previously taken in the same or related proceeding. *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 597, 748 S.E.2d 781, 788 (2013).

Judicial estoppel does not apply here. Mr. Rhame is not taking conflicting positions. When Mr. Rhame argued his case to the commission, he argued that his claim was valid as long as the “new” law was construed properly. Put differently, he said that the discovery rule contained in section 42-1-172 does not begin to run until an injured worker recognizes an injury’s nature, seriousness, and probable compensable character. See (App.p.159). Because Mr. Rhame did not reach this stage until 2009, Mr. Rhame said that his claim was timely.

When the commission disagreed, and when the commission found that Mr. Rhame had experienced a compensable repetitive trauma since 1994 or 1995, Mr. Rhame alerted the commission to the fact that by using the discovery rule to judge the timeliness of a 1994 injury, the commission was applying a new statute to an injury that preceded the statute's effective date.

There is nothing inequitable about Mr. Rhame making both of these arguments. The first argument represents his theory of the case. The second argument is an argument that the commission's resolution was legally defective. And this is not even the argument that the School District is making. The School District has not argued judicial estoppel. The School District is arguing that Mr. Rhame's complaints are barred by the "law of the case." The law of the case doctrine does not apply. Mr. Rhame has challenged all of the commission's findings that affect the matters he has raised in this appeal.

- iii. The School District is wrong when it says that Mr. Rhame's equitable arguments were never presented to the commission.

The School District makes several suggestions that Mr. Rhame's equitable arguments were never presented to the commission. This is incorrect.

Mr. Rhame's brief to the appellate panel argued that the School District knew about his injury, never offered him treatment, never offered him light duty work, and that when he *did* make a claim, the School District denied it. (App.pp.157-162). The language of the commission's order also belies the School District's argument. When the appellate panel reversed the hearing commissioner and held (erroneously) that this claim was barred by the statute of limitations, the panel wrote that Mr. Rhame "was not coerced into waiting to file

a claim[.]” (App.p.130). The commission would not have made this finding unless somebody raised the question of whether the School District’s actions had been misleading.

- iv. This case *does* contain important issues, and although one of these issues is avoidable, the other is not.

Despite the School District’s argument to the contrary, this case does contain at least two important issues.

The first issue relates to the effective date of the statute that contains the “discovery rule.” This statute has an effective date that is tied to the date of an injury’s “occurrence,” but part of the definition of a repetitive trauma is that it does not have a date of occurrence. The School District’s brief never proposes an answer to this question, but Mr. Rhame will concede that it is not necessary to address this issue in his case. Because Mr. Rhame’s claim is valid under a proper construction of the “new law,” this problem is avoidable.

But the second issue is not avoidable. The principal disagreement that is driving this dispute is the standard for determining what it means for someone to know that they have a repetitive trauma injury and to know that such an injury is “compensable.” The commission said that discovery of a “compensable” claim is the same as the discovery of a work-related injury, see (App.pp.127-130), but there must be more to the test than this.

Where is the evidence that Mr. Rhame’s off-and-on back pain caused him to miss a significant amount of work? This is important because compensation is not allowed unless a disability lasts for more than 7 days. See S.C. Code Ann. § 42-9-200 (1985).

Where is the evidence that Mr. Rhame’s off-and-on back pain was severe enough to change his job restrictions? The first suggestion of any sort of permanent damage is a 2007

record which indicates that Mr. Rhame “may” be at risk of developing back problems, see (App.p.281), and it was not until 2009 that a doctor wrote him out of work. See (App.p.263).

The true test is focused on finding the point at which someone knows (or should reasonably know) that a permanent injury is occurring, that this injury is not trivial but has some degree of seriousness, and that the injury is work-related. The Court of Appeals addressed some of these issues in *King*, but it did not address them all.

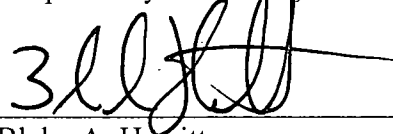
CONCLUSION

Mr. Rhame’s notice of appeal was *not* untimely. This Court should reverse the Court of Appeals, and it should overrule the relevant language in *Pikaart v. A & A Taxi*, *Stone v. Roadway Express*, and *Nettles v. Spartanburg School District # 7*.

If this Court decides to certify this case on the merits, it should reverse the commission’s decision. Mr. Rhame did not have a “repetitive trauma” in 1994 or 1995, and regardless of whether the old law or the new law applies, Mr. Rhame’s claim is not barred by the statute of limitations.

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Respectfully submitted,



Blake A. Hewitt
John S. Nichols
BLUESTEIN NICHOLS
THOMPSON & DELGADO
P.O. Box 7965
Columbia, SC 29202
(803) 779-7599
(803) 779-8995 (facsimile)
bhewitt@bntdlaw.com
jsnichols@bntdlaw.com

Attorneys for Petitioner

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PROOF OF SERVICE

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

Stephen L. Brown, Esquire
Catherine H. Chase, Esquire
Leslie M. Whitten, Esquire
Young Clement Rivers, LLP
Post Office Box 993
Charleston, South Carolina 29402



Erin Bridges
BLUESTEIN, NICHOLS,
THOMPSON & DELGADO, LLC

August 20, 2014
Columbia, South Carolina