

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC Case No. 0726308

RECEIVED
APR 14 2015
S.C. Supreme Court

Shannon Cook, Claimant, ...Respondent,

v.

Spartanburg Steel Products, Inc., Defendant, ...Petitioner.

APPENDIX

Ryan S. Montgomery
Ryan Montgomery Attorney at Law, LLC
108 Mills Ave.
Greenville, SC 29605

Attorney for Respondent

McANGUS GOUDELOCK & COURIE, LLC
Brad B. Easterling
P.O. Box 2980
Greenville, South Carolina 29602
(864) 239-4000

Helen F. Hiser
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

Attorneys for Petitioner

INDEX

	<u>Page</u>
Court of Appeals Order Denying Petition for Rehearing	2
Court of Appeals Order of Dismissal	6
Petitioner's Motion for Rehearing and/or to Reinstate Appeal	8
Att A: Form 50 dated May 9, 2012.....	20
Att B: Form 50 dated May 17, 2013	29
Att C: Form 50 dated Aug. 9, 2013	36
Att D: Pre-Hearing Brief of Claimant.....	43
Att E: Transcript of Hearing before Hearing Commissioner, Sept. 27, 2013.....	45
Att F: Request for Proposed Order	75
Att G: Decision and Order of Hearing Commissioner, Nov. 25, 2014.....	80
Att H: Transcript of Hearing before Appellate Panel, March 17, 2014.....	95
Att I: Appellate Panel Decision and Order, May 20, 2014.....	112
Claimant's Return and Motion to Strike.....	130
Petitioner's Reply to Respondent's Return and Motion to Strike	134
Claimant's Motion to Dismiss	140
Petitioner's Return to Respondent's Motion to Dismiss	142
Claimant's Reply	148
Petitioner's Form 30, dated Dec. 9, 2013	152
Petitioner's Pre-Hearing Brief to the Commission	158
Claimant's Respondents' Brief to Full Commission Appellate Panel.....	159
<u>Nicholson v. S.C. Dep't of Social Services</u> , 2011 SC Wrk. Comp. LEXIS 321 (Dec 20, 2011)	168
<u>Rose v. JJS Trucking, LLC</u> , 768 S.E.2d 412, 2015 S.C. App. LEXIS 7 (Jan. 28, 2015), Final Brief of the Appellants	176
<u>Rose v. JJS Trucking, LLC</u> , 768 S.E.2d 412, 2015 S.C. App. LEXIS 7 (Jan. 28, 2015)Final Brief of Respondent, SC Uninsured Employers' Fund	190
CERTIFICATE OF COUNSEL	
Certificate for Helen F. Hiser	203

The South Carolina Court of Appeals

Shannon Cook, Claimant, Respondent,

v.

Spartanburg Steel Products, Inc., Defendant, Appellant.

Appellate Case No. 2014-001372

ORDER

Appellant petitions this court to rehear the dismissal of its appeal. Because the order indicates the appellate panel of the South Carolina Workers' Compensation Commission held the issues of temporary total disability and permanent disability in abeyance, the order is not immediately appealable. We deny the petition for rehearing.

Respondent injured his lumbar spine in 2007. In 2011, a single commissioner found Respondent was entitled to an award of twenty-five percent permanent partial disability to the spine and full medical treatment for pain medications, psychological evaluation and treatment, spinal injections, and physical therapy. The next year, Respondent filed a Form 50, alleging he suffered a change of condition for the worse from the injury to his "spine and psyche." Respondent did not request a hearing at that time. In 2013, Respondent filed a Form 50 request for a hearing, claiming injuries to his back, psyche, bilateral legs, and hips. Shortly thereafter, Respondent filed an amended Form 50, requesting a hearing and alleging a change of condition. The parties filed pre-hearing briefs and proceeded to a hearing before a single commissioner.

At the hearing, Respondent claimed he suffered a change of condition for the worse, argued he was entitled to spinal surgery, and sought reimbursement for a C.T. Myelogram and other co-pays. In her final order, the single commissioner found Respondent's spine condition had significantly worsened. The single commissioner ordered Appellant to provide ongoing medical care and reimburse

Respondent for the C.T. Myelogram, other co-pays, and filing fee. The single commissioner found Respondent had not yet reached maximum medical improvement. However, the single commissioner concluded she could not order surgery because she was limited by the 2011 award, which provided a list of future medical treatments. The single commissioner decided permanency was premature and stated, "Any issue relating to [total temporary disability] and permanency is held in abeyance, as the only issue before the undersigned was whether the claimant has sustained a change of condition for the worse."

Appellant filed a Form 30 request for review by an appellate panel of the commission. At the hearing, Appellant argued Respondent had not suffered a change of condition for the worse and the commission lacked jurisdiction due to Respondent's alleged filing errors of the Form 50. The commission affirmed the single commissioner's findings in full, including her decision that the issues of total temporary disability and permanent disability were to be held in abeyance.

Appellant appealed to this court, and Respondent moved to dismiss the appeal. This court dismissed the appeal as not immediately appealable because the commission's order indicated the issues of temporary total disability and permanent disability were held in abeyance as the issue of permanency was premature.

The Administrative Procedures Act governs judicial review of decisions of the commission. S.C. Code Ann. § 1-23-380 (Supp. 2014); *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013). Section 1-23-380 of the Act limits appeals to those from a "final decision" of the commission. An order of the commission is not a final decision unless it resolves the entire action. *See Price v. Peachtree Elec. Servs., Inc.*, 405 S.C. 455, 457, 748 S.E.2d 229, 230 (2013) ("An agency decision that does not decide the merits of a contested case is not a final agency decision subject to judicial review."); *Bone*, 404 S.C. at 73, 744 S.E.2d at 556 (same); *see also id.* at 75, 744 S.E.2d at 557 ("A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." (quoting *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env't Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010))).

Here, the commission's order indicates the issue of permanency was premature because Respondent had not reached maximum medical improvement. Specifically, the order states, "Any issue relating to [total temporary disability] and permanency is held in abeyance, as the only issue before the undersigned was whether the [Respondent] has sustained a change of condition for the worse."

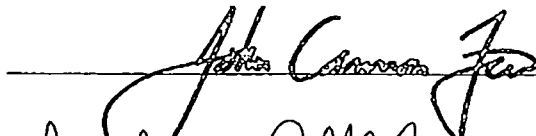
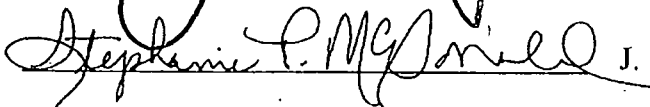
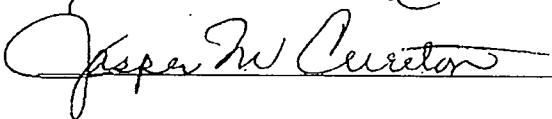
Because the commission has yet to determine permanency and indicates additional proceedings will be necessary, the commission's order is not a final decision and not immediately appealable. *See Rose v. JJS Trucking, LLC*, Op. No. 5291 (S.C. Ct. App. filed Jan. 28, 2015) (Shearouse Adv. Sh. No. 4 at 91) (finding a commission's order was not a final decision and not immediately appealable because the order left the merits of the employee's claim for permanent disability unresolved); *Ex parte S.C. Prop. & Cas. Ins. Guar. Ass'n*, Op. No. 5290 (S.C. Ct. App. filed Jan. 28, 2015) (Shearouse Adv. Sh. No. 4 at 85) (finding a commission's order was not a final decision and not immediately appealable because the commission had yet to determine the claimant's substantive rights).

Appellant argues the commission's order is a final decision because the parties did not raise the issues of temporary total disability and permanency to the commission. Further, Appellant alleges Respondent added the "boilerplate language" of "[a]ny issue relating to [total temporary disability] and permanency is held in abeyance, as the only issue before the undersigned was whether the claimant has sustained a change of condition for the worse" to the single commissioner's proposed order, which was later adopted by the commissioner. According to Appellant, allowing a party to add vague "boilerplate language" would preclude an appeal to this court. However, Appellant did not raise this argument before the appellate panel.

Appellant also argues this court erred in applying *Bone* because *Bone* addressed appealability under section 1-23-390 of the South Carolina Code (Supp. 2014), while section 1-23-380 governs this case. However, we dismissed the appeal pursuant to section 1-23-380. Further, *Bone* is instructive for determining whether an order is a "final decision" of the commission. *See id.* at 73-74, 744 S.E.2d at 556. ("An agency decision which does not decide the merits of a contested case . . . is not a final agency decision subject to judicial review. . . . A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." (citations and internal quotation marks omitted)).

Finally, Appellant asserts the order is immediately appealable because it has exhausted all other administrative remedies. *See* § 1-23-380 ("A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."). Appellant fails to distinguish this case from any other workers' compensation case where there is no practical hope of the employer receiving a refund on its payments after a successful appeal.

Accordingly, we find the commission's order is not immediately appealable. We deny the petition for rehearing.¹

 C.J.
 J.
 A.J.

Columbia, South Carolina

cc:

Ryan Spence Montgomery, Esquire
Bradford B. Easterling, Esquire
Helen Faith Hiser, Esquire

FILED
3/19/15

¹ Because we deny the petition for rehearing, we find it unnecessary to address Respondent's motion to strike.

The South Carolina Court of Appeals

Shannon Cook, Claimant, Respondent,

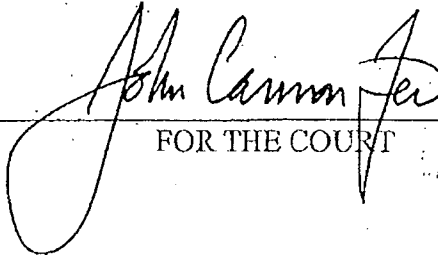
v.

Spartanburg Steel Products, Inc., Defendant, Appellant.

Appellate Case No. 2014-001372

ORDER

Respondent has filed a motion to dismiss, alleging the order of the Appellate Panel of the South Carolina Workers' Compensation Commission is not a final order that may be immediately appealed. Appellant filed a return, and Respondent filed a reply. After careful consideration, we dismiss Appellant's appeal. The order on appeal is not a final judgment, and therefore, it is not immediately appealable. *See* S.C. Code Ann. § 1-23-380 (Supp. 2013) ("A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review . . ."). A "final judgment" is an order "that finally disposes of the whole subject matter of the action or terminates the action, leaving nothing to be done but to execute the judgment." *Bone v. U.S. Food Serv.*, 404 S.C. 67, 83, 744 S.E.2d 552, 561 (2013). Under *Bone*, the Appellate Panel's order is not a final judgment. The order states the Appellate Panel held "[a]ll other issues not addressed herein . . . in abeyance pending a final order" Specifically, the order indicates the Appellate Panel held the issues of temporary total disability and permanent disability in abeyance because it was premature to rule upon permanency. Because the order is not immediately appealable, we dismiss the appeal.


FOR THE COURT

Columbia, South Carolina

cc: Ryan Spence Montgomery, Esquire
Bradford B. Easterling, Esquire

FILED

August 29, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC Case No. 0726308

13508
RECEIVED

SEP 11 2014

SC Court of Appeals

Shannon Cook, Claimant, ...Respondent,

v.

Spartanburg Steel Products, Inc., Defendant, ...Appellant.

APPELLANT'S MOTION FOR REHEARING
AND/OR TO REINSTATE APPEAL

Pursuant to Rules 240(i) and 260(a), SCACR, Appellant Spartanburg Steel Products, Inc. hereby moves this Court for rehearing and/or to reinstate its appeal in the above-referenced case. This Court's August 29, 2014 Order has the effect of dismissing or finally deciding Appellant's appeal, which should be reinstated for the reasons set forth below.

Respondent Shannon Cook, Claimant below, has not and cannot point to any justiciable issue he raised and argued below that was held in abeyance and/or remanded by the Commission. The issues purportedly held in abeyance, Total Temporary Disability ("TTD") and permanency, were never argued to the Commission. Claimant did not present any evidence regarding either issue to the Commission. Furthermore, the issue of permanency is "premature," meaning it has not accrued and, therefore, could not have been determined by the Commission at this time. To

determine that a Commission decision is not final for purposes of appellate review because an unripe, unaccrued and/or unlitigated issue has not yet been decided is the height of procedural formalism. Appellant has clearly exhausted its administrative remedies – there is no issue pending before or remanded by the Commission to be decided, and Claimant has been awarded the relief he requested.

STATEMENT OF FACTS

Claimant sustained a compensable injury by accident to his lumbar spine on September 17, 2007. By Decision and Order dated June 8, 2011, Commissioner Avery B. Wilkerson, Jr., awarded Claimant twenty-five percent (25%) permanent partial disability to the spine. He further ordered that Claimant was entitled to future medical treatment pursuant to Dodge v. Bruccoli as directed by Dr. LaTourette on his Form 14B dated June 16, 2010. Specifically, Dr. LaTourette noted Claimant would require future medical care related to the work injury in the form of medications for pain, psychological evaluation and treatment, spinal injections and physical therapy.

Appellant paid the 25% award on June 27, 2011.

Claimant was initially represented by attorney Tom Gagne. On May 9, 2012, within 12 months of Appellant's last payment to Claimant, Mr. Gagne filed a Form 50 (notice of claim only) on Claimant's behalf, alleging a change of condition for the worse and injury to Claimant's "Spine and Psyche" only. Line 13a on the Form 50, which states "I am filing a claim. I am not requesting a hearing at this time," was checked. (Att. A) (emphasis added). Attached to this Form 50 was a written medical report and questionnaire from Dr. Yashbir T. Rana.

In 2013, Claimant terminated his relationship with Mr. Gagne and retained Ryan Montgomery as counsel. On or about May 17, 2013,¹ Claimant filed a Form 50 request for hearing, claiming injury not only to his back and psyche, but also to his bilateral legs and hips. (Att. B). However, the May 2013 Form 50 did not indicate or reference the May 2012 Form 50, or allege a change of condition. Furthermore, there were no medical reports attached to the May 2013 Form 50. The May 2013 Form 50 was filed over 22 months after Appellant's last payment to Claimant.

Finally, on August 9, 2013, over 25 months after Appellant's last payment, Claimant filed an Amended Form 50, both requesting a hearing and alleging a change of condition. (Att. C). However, as was the case with the May 2013 Form 50, no medical reports were attached to the August 2013 Form 50.

The parties filed Form 58, Pre-Hearing Briefs. On Claimant's Form 58, he alleged he was entitled to "additional medical [treatment] under the original order or as a change of condition." Specifically, Claimant sought "a finding of change of condition and an order instructing carrier to provide medical as request[ed] by their doctors, repay Medicare for the causally related medical treatment, and for any further relief the Commissioner deems appropriate. Additional permanency is premature at this time and would request this issue be held in abeyance." (Att. D).

The parties came before Single Commissioner Susan S. Barden on September 27, 2013. At that hearing Claimant alleged he has suffered a change of condition for the worse with regard to his admitted back injury, for which he sought surgery. Claimant also sought reimbursement for a C.T. Myelogram which he underwent at his own expense as well as for other co-pays he covered. (Transcript of Single Commissioner Hearing, held September 27, 2013, Att. E, p. 5,

¹ The May 2013 Form 50 is dated May 21, 2013, but the Certificate of Service is dated May 17, 2013.

lines 8-20)) (Id., p. 6, line 14 – p. 7, line 20). Claimant's counsel indicated that he was "satisfied" with Commissioner Barden's recitation of his pending claims. (Att. E, p. 13, lines 15-20). Appellant denied that Claimant had sustained a change of condition for the worse and that, in any event, Claimant's claim was barred because he failed to timely file a request for hearing on the change of condition as required under S.C. Code Ann. § 42-17-90. (Att. E, p. 11 line 4 – p. 12, line 17). Appellant clarified Commissioner Barden's summary of its position by raising the applicability of Regulation 67-203(C). (Att. E, p. 13, line 24 – p. 14, line 5).

Claimant testified that he wanted surgery as recommended by Dr. Charles Kanos. (Att. E, p. 17, lines 12-21). He also testified that he had incurred certain co-pays. (Att. E., p. 16, line 21 – p. 17, line 6). At no point during the hearing before Commissioner Barden did Claimant request any additional relief. (Att. E). In fact, Claimant's counsel specifically objected to a line of cross-examination regarding whether Claimant had been offered a light-duty position with Appellant following his compensable injury, asserting, "Objection. We're here on a change of condition. I don't know what relevance this has." (Att. E, p. 28, lines 3-5). Commissioner Barden overruled the objection on the basis that, "Well, it's cross examination. I'm going to let him continue and see where he's going." (Att. E, p. 28, lines 6-8). This exchange demonstrates that both Claimant and Commissioner Barden understood TTD was not pending before the Commission.

Following the hearing, Commissioner Barden requested that Claimant's counsel draft a Proposed Order, and provided 20 specific Findings of Fact to be included in the order, including findings that Claimant had sustained a change of condition for the worse, that Claimant was entitled to ongoing medical treatment with Dr. Kanos, and that Claimant had not reached maximum medical improvement ("MMI"). She also found that Claimant was entitled to

reimbursement for a \$25.00 fee for a Motion to Compel, as well as co-pays associated with Claimant's treatment with Dr. Kanos. (Att. F). Commissioner Barden's Finding No. 17 simply stated "Permanency is premature." (Att. F, p. 3).

Commissioner Barden issued her Decision and Order dated November 25, 2014. The Order stated that the "Purpose of the Hearing" was "To determine only the issues on the Form 50 Change of Condition Request And/or Additional Medical Pursuant to Commission Order." The Order included the above-referenced findings of fact, along with two additional findings that were not requested but, instead, were inserted by Claimant's counsel. Finding of Fact No. 21 stated that "[a]ny issue relating to TTD and permanency is held in abeyance, **as the only issue before the undersigned was whether the claimant has sustained a change of condition for the worse.**" (Att. G., p. 11) (emphasis added). Claimant's counsel also added language to the Conclusions of Law and Ordering paragraphs to the effect that issues not addressed in the order were held in abeyance.

Appellants filed a Form 30 Request for Commission Review on December 9, 2013. An Appellate Panel of the Full Commission heard oral argument on March 17, 2014. (Transcript of Full Commission hearing, held March 17, 2014, Att. H). The **only** issues argued by either party in their briefs or at that hearing concerned: 1) whether Claimant had proven he sustained a change of condition for the worse; and 2) whether the Form 50s filed by Claimant's prior or current counsel in 2012 and 2013 satisfied the requirements of S.C. Code Ann. § 42-17-90 and/or S.C. Code Ann. Reg. § 67-602. (Att. H).²

The Commission issued its Decision and Order, dated May 20, 2014, fully affirming the Single Commissioner. (Att. I). The Commission reiterated Finding of Fact No. 21, stating that

² Claimant also argued that Appellant should be estopped from arguing the second point because Appellant paid for medical examinations. (Att. H).

"[a]ny issue relating to TTD and permanency is held in abeyance, as the only issue before the undersigned was whether the claimant has sustained a change of condition for the worse." (Att. I., p. 14) (emphasis added). Although the Commission repeated language in the Conclusions of Law and Ordering paragraphs to the effect that issues not addressed in the order were held in abeyance, as noted above, the only issues before the Commission were whether Claimant had timely claimed and then proved that he sustained a change of condition for the worse. The Commission did not remand any issues to Commissioner Barden for consideration or determination. (Att. I).

Appellant timely appealed to this Court. Claimant moved to dismiss Appellant's appeal, which this Court granted in an Order dated August 29, 2014.

ARGUMENT

Relying on Bone v. U.S. Food Serv., 399 S.C. 566, 733 S.E.2d 200 (2012), this Court dismissed the pending appeal in this matter based on the statement in the Commission's Decision and Order that "[a]ll other issues not addressed herein are hereby held in abeyance pending a final order," pointing to the issues of TTD and permanency. However, all of the parties agreed that the only issues before the Commission were the determination of whether Claimant timely filed a sufficient claim for change of condition and whether he proved the same. In addition, as explained in more detail below, Bone, which is based on S.C. Code Ann. § 1-23-390, does not apply to this case, which involves an appeal directly from the Commission to this Court under S.C. Code Ann. §§ 1-23-380 and 42-17-60.

As is clear from the facts set forth above, neither TTD nor permanency was argued to either the Single Commissioner or the Commission. In fact, both the Single Commissioner and the Commission readily acknowledged that "the only issue before the undersigned was

whether the claimant has sustained a change of condition for the worse.” (Att. G, p. 11) (Att. I, p. 14) (emphasis added). Thus, the “boilerplate” language added to both orders by Claimant’s counsel refers to issues that the orders themselves acknowledge are not pending before the Commission at any level. To allow parties who prevail at the Commission level to add such vague “boilerplate” language to orders they are asked to draft for the Commission, in order to prevent appeal of otherwise final decisions of the Commission, would create a procedural “gotcha” that will be exploited by both sides and will result in wide-spread injustice.

Claimant did not present any evidence to the Commission regarding either TTD or permanency.³ Because those issues were not litigated before either the Single Commissioner or the Commission, and there is no process in place to determine either of those issues, they cannot serve as the basis for finding the Commission Decision is not final for purposes of appellate review. As noted above, the Commission did not remand any issue to the Single Commissioner. The Commission left nothing to be done: it ordered Appellant to pay for Claimant’s additional medical care through Dr. Kanos, including surgery, and to reimburse Claimant for certain costs he had incurred. As is the case with any compensable workers’ compensation claim, at some point issues like permanency and TTD become ripe for determination, but that does not make the initial determination of compensability non-final for purposes of review.

³ Alternatively, to the extent the issue of whether Claimant is entitled to TTD is viewed as an outstanding issue to be resolved by the Commission, even though there was no remand for determination of the same, there is no conflicting evidence in this record regarding that issue which can, therefore, be decided by this Court. See, e.g., Pack v. South Carolina Dept. of Transp., 381 S.C. 526, 534, 673 S.E.2d 461, 465 (Ct. App. 2009) (holding that “when the evidence is susceptible of but one reasonable inference, the question becomes a matter of law”). On cross-examination, Claimant specifically testified that Appellant offered him a light duty position prior to the first hearing before Commission Wilkerson in 2011, but Claimant never responded to that offer in any way. Claimant has not worked since he quit working for Appellant. (Att. E, p. 27, line 17 – 29, line 3) (Att. G, p. 9) (Att. I, p. 7). As noted above, Claimant’s counsel objected to this line of questioning as irrelevant to the issue before the Commission; however, there is absolutely no conflicting evidence. Therefore, to the extent this Court believes this issue was pending before the Commission, which Appellant does not concede, this Court can decide this issue as a matter of law as there is no conflict in the evidence in the record.

It is common in workers' compensation cases to have multiple proceedings throughout the life of a claim, each of which addresses different aspects of an injured worker's entitlement to benefits. For example, there may be one hearing before the Commission that finally determines whether an injury arose out of and in the course of employment. There may be a subsequent hearing that determines whether a claimant has reached MMI and/or a claimant's entitlement to future medical and permanent disability benefits. Just because there are various issues brought before the Commission at various times does not render the decisions concerning those issues interlocutory.⁴ The instant case presents no different scenario. Although the Commission may anticipate that there will be a subsequent determination of Claimant's entitlement to further compensation, the Commission has finally determined the issues that were before it: whether Claimant timely claimed and proved that he sustained a change of condition for the worse and is entitled to medical benefits, including surgery.

In addition, the South Carolina Supreme Court recently explained that Bone v. U.S. Food Serv., 399 S.C. 566, 733 S.E.2d 200 (2012), "addressed appealability under the predecessor to section 1-23-390 of the South Carolina Code, which provided that in appeals from an administrative agency, such as the Commission, to the circuit court '[a]n aggrieved party may obtain a review of any final judgment of the circuit court ... by appeal to the Supreme Court.'" Shatto v. McLeod Reg. Med. Ctr., 406 S.C. 470, 474 n.2, 753 S.E.2d 416, 418 n.2 (2013). The instant appeal does not involve an appeal to or order from the circuit court. Moreover, this appeal does not involve a remand from the circuit court to the Commission for further

⁴ For example, this Court recently considered an appeal from the Commission concerning a change of condition, without regard to permanent benefits. See Carter v. Verizon Wireless Southeast, 407 S.C. 641, 757 S.E.2d 528 (2014) (considering whether the claimant suffered a change of condition to her knee as opposed to suffering a condition due to natural progression of a preexisting disease and making a determination as to the claimant's entitlement to future medical treatment). This Court also recently has reviewed Commission decisions concerning compensability without regard to permanency. See, e.g., Nicholson v. South Carolina Dept. of Soc. Servs., 405 S.C. 537, 748 S.E.2d 256 (Ct. App. 2013).

proceedings, which was the case in Bone and which was the basis for that decision. 399 S.C. at 576-77, 733 S.E.2d at 205.

As the Supreme Court noted in Shatto, as part of Act 387 (2006), workers' compensation appeals for injuries incurred after July 1, 2007 no longer go from the Commission to the circuit court, but instead, go directly from the Commission to this Court.⁵ In addition, the Supreme Court recognized the distinction between appellate review of a "final decision" and a "final judgment." Shatto, 406 S.C. at 474 n.2, 753 S.E.2d at 418 n.2. Both S.C. Code Ann. § 42-17-60, the statute governing appeals from the Commission, and S.C. Code Ann. § 1-23-380, the applicable Administrative Procedures Act ("APA") appellate provision, discuss appeals from a final decision, not a final judgment. Because Bone applies to pre-July 1, 2007 injuries and this case involves a post-July 1, 2007 injury, and because the statutory requirements governing appealability are different for post-July 1, 2007 workers' compensation claims, the requirement of a "final judgment" set forth in Bone and in S.C. Code Ann. § 1-23-390 and cases decided under that statutory provision is neither applicable to nor controlling in this case.

As the Supreme Court held in Shatto, appeals from this Court are pursuant to the South Carolina Appellate Court Rules. 406 S.C. at 474 n.2, 753 S.E.2d at 418 n.2. Rule 242(a), SCACR, provides review of a "final decision" of this Court and does not require a "final judgment." The same is true of S.C. Code Ann. § 1-23-380, which controls in this case and provides for appeal from a "final decision in a contested case." The Commission Decision in this case is a final decision for purposes of appellate review.

Other cases relied on in Bone are not applicable to this case either. See Charlotte-Mecklenburg Hosp. Auth. v. South Carolina Dept. of Health & Env'tl Control, 387 S.C. 265, 692

⁵ Although S.C. Code Ann. § 1-23-390 still requires that appeals from the circuit court be from a "final judgment," this case simply does not involve an appeal from the circuit court. Instead, this matter involves a post-July 1, 2007 injury.

S.E.2d 894 (2010) (appeal from an order of the Administrative Law Court which remanded the case to the Department for further proceedings not immediately appealable); Montjoy v. Astenhill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994) (involving pre-July 1, 2007 injuries and holding that "an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable"); and Long v. Sealed Air Corp., 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011) (finding circuit court order remanding to the Commission for further proceedings in a case involving pre-July 1, 2007 injuries not immediately appealable).

Furthermore, the concerns expressed in Bone are not present in this appeal. First, as noted above, this case was not remanded for further proceedings and no further proceedings are contemplated presently. Thus, there is no risk of piecemeal litigation or inefficiency. Second, there is no question regarding exhaustion of administrative remedies – the Commission admittedly has decided all of the issues that were pending before it. (Att. G, p. 11 (the only issue before the undersigned was whether the claimant has sustained a change of condition for the worse")) (Att. I, p. 14 (same)). The concerns raised in Bone, Charlotte-Mecklenburg, Montjoy, and Long simply are not present here, where the case has not been remanded for any further proceedings.

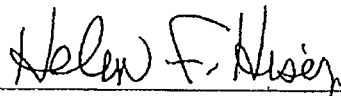
CONCLUSION

For all the reasons stated herein, this Court should grant rehearing of its August 29, 2014

Order and reinstate this appeal.

Respectfully submitted,
McANGUS GOUDELOCK & COURIE, LLC

September 11, 2014


Brad B. Easterling,
S.C. Bar No.: 70328
P.O. Box 2980
Greenville, South Carolina 29602
(864) 239-4000

Helen F. Hiser
S.C. Bar No.: 76124
P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC Case No. 0726308

Shannon Cook, Claimant, ...Respondent,

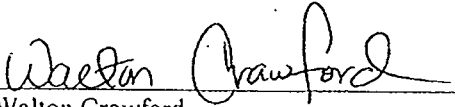
v.

Spartanburg Steel Products, Inc., Defendant, ...Appellant.

PROOF OF SERVICE

I certify that on the 11th day of September 2014, I served the Appellant's Motion for Rehearing and/or to Reinstate Appeal on Shannon Cook by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Ryan S. Montgomery, Esq.
Ryan Montgomery Attorney At Law, LLC
108 Mills Ave.
Greenville, SC 29605


Walton Crawford
Legal Assistant to Helen F. Hiser
McAngus, Goudelock & Courie LLC

Attorneys for Appellant

Attachment A



Personal
Injury Practice

Attorney Offices of Thomas Gagne, P.A.

Thomas M. Gagne, Esquire, Owner/President*

Samuel Hays, Esquire, Of Counsel**

May 9, 2012

2920.572

MAY 10 2012

S.C. Workers' Compensation Commission
Claims Department
PO Box 1715
Columbia SC 29202-1715

Re: Our Client: Shannon Cook
SS# 251-49-0214
WCC File # 0726308

Dear Sir or Madame:

Please let this letter serve as notice that I represent the above named individual in his Worker's Compensation claim with Spartanburg Steel Products, Inc. in connection with injuries he suffered on or about 9/17/07.

Enclosed please find the original and one (1) copy of the Form 50 and Certificate of Mailing. I ask that you please return a filed, stamped copy to me in the envelope that has been provided for same.

In that regard, please direct all future correspondence concerning this claim to me at the below address.

Also, please let this letter serve as a lien in the amount of 33.33% of any settlement offers obtained by the Attorney Offices of Thomas M. Gagne, P.A.

I look forward to working with you. Please call me immediately if there are any questions or concerns.

Yours very truly,

Attorney Offices of Thomas Gagne, P.A.

Thomas M. Gagne
Thomas Gagne, Esq.
Owner/President

Enclosure

TMG/hs

"Dedicated To The Injured Person"

Greenville Office: 101 Chapman St., Greenville, SC 29605

Spartanburg Office: 412 Magnolia St., Spartanburg, SC 29303

Phone: (864) 233-2000

Phone: (864) 591-1114

Fax: (864) 233-1913

Fax: (864) 585-1131

Website: www.tgagne.com

E-mail: tgagne@prodigy.net

*Licensed in South Carolina and New York

**Licensed in South Carolina and North Carolina

CERTIFICATE OF SERVICE

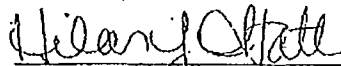
I, the undersigned, of The Attorney Offices of Thomas M. Gagne, L.L.C. do hereby certify that I have served the below addressee with a copy of the pleading herein below specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

S.C. Workers' Compensation Commission
ATTN: Claims Department
PO Box 1715
Columbia SC 29202-1715

Brad B. Easterling, Esquire
Turner Padgett
PO Box 1509
Greenville, SC 29602

Specialty Risk Services
PO Box 305104
Nashville, TN 3723

Form: Form 50 for change in condition, Treating physician list, Letter of representation, IME report and medical questionnaire from Dr. Tony Rana
Claimant: Shannon Cook
SS#:
Date of Injury: 9-17-2007
WCC File # 0726309



Hilary State for
Thomas M. Gagne, Esq.
Attorney for Claimant
101 Chapman Street
Greenville, SC 29605
Dial: 864.233.2000
Fax: 864.233.1913

Date: May 9, 2012

South Carolina Workers' Compensation Commission
1612 Marion Street • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



WCC File #: 0726308
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Shannon Cook SSN: _____ Employer's Name: Spartanburg Steel Products, Inc.
Address: _____ Address: 1290 New Cut Road
City: Cowpens State: SC Zip: 29330 City: Spartanburg State: SC Zip: 29303
Home Phone: _____ Work Phone: () Insurance Carrier: Specialty Risk Services
Preparer's Name: Thomas M. Gagne, Esq. Law Firm: Attorney Offices of Preparer's Phone #: (864) 233 - 2000
Thomas M. Gagne, PA

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: 09/17/2007

☒ Injury ☐ Illness ☐ Repetitive Trauma

1a. The claimant sustained an injury to Spine and Psyche (Part(s) of Body Injured) on 09/17/2007 (Month/Day/Year) in Spartanburg, state of SC.

1b. Body part(s) affected are: See 1a.

Briefly describe how the accident occurred. Claimant was lifting boxes.

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.

3. The relationship of employer and employee existed at the time of injury.

4. At the time of the injury the claimant was performing services arising out of and in the course of employment.

5. Notice of the accidental injury was given to the Employer on 09/17/2007 (Month/Day/Year) in the following manner:
Verbally to Ray Martin his supervisor.

☒ 6. Due to injury, the claimant is in need of (check one):

☐ (a) medical examination and treatment for: TDD

☒ (b) additional medical examination and treatment for: See attached IME and medical questionnaire from Dr. Tony Rana.

☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
TDD

☒ 8. Due to the injury, the claimant has permanent disability of the following nature and extent (check one): TDD

☐ (1) General Disability:

☐ Total

☐ (2) Specific Disability:

☐ Total

☐ (3) Wage Loss

☐ Partial

☐ Partial

☒ 9. Due to the injury, the claimant has a serious bodily disfigurement consisting of: TDD

10a. At the time of the injury, the claimant was paid weekly wages of \$Request Form 20, and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident:
NA

11a. Further grounds or unusual aspects of claim:

Claimant comes on a change of condition. See attached IME and medical questionnaire from Dr. Tony Rana.

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident:
Please see attached treating physicians list.

11c. To the best of your knowledge, did you have any prior permanent disability? Yes

If yes, describe: 10% to the Spine by Dr. Latourelle, MD.

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☒ 13a. I am filing a claim. I am not requesting a hearing at this time.

☐ 13b. I am requesting a hearing. A \$25 fee is required.

14. Estimated time needed for hearing: _____

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature

Attorney for Claimant
Title

tgagne@prodigy.net
Email

5/9/12
Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

WCC Form # 50
Revised 9/07

50

Employee's Notice of Claim and/or
Request for Hearing

11b. Treating Physician List

Southeastern Neurosurgical & Spine
111 Doctors Drive
Greenville, SC 29605

Carolina Center for the Advanced Management of Pain
1330 Boiling Springs Road, Suite 2700
Spartanburg, SC 29303

Gaffney Family Physicians
101 Professional Park
Gaffney, SC 29340

Spartanburg Regional Occupational Health
8311 Warren H Abernathy Highway
Spartanburg, SC 29301-1249

Greenville Memorial Hospital
701 Grove Road
Greenville, SC 29605

Piedmont Imaging
684 North Pine Street
Spartanburg SC 29303

Spartanburg Regional
101 East Wood Street
Spartanburg, S.C. 29303

Spartanburg Neurosurgical
1075 Boiling Springs Rd.
Spartanburg, SC 29303

Spartanburg Regional Rehab Services
631 North Church Street
Spartanburg, SC 29303-3046

Urology Center of Spartanburg
391 Serpentine Dr
Spartanburg, SC 29303

Upstate Health Professionals
2084 East Main Street
Duncan, SC 29334

Adams & Wilkinson
P.O.Box 537
White Rock, SC 29177-0537

Dr. L. Randolph Waid
1459 Stuart Ingals Blvd, Suite 204A
Mount Pleasant, S.C. 29464

Weldon & Associates
1225 S. Church St.
Greenville SC 29605

Palmetto State Medical, Dr. Rana
1425 John B White SR Blvd
Spartanburg, SC 29306

CAROLINA HEALTH PROFESSIONALS, LLC

PO Box 171982

Spartanburg, SC 29301

Office: 864-381-4171 Fax: 864-804-6613

info@carolinahealthpros.com

Dr. Yashbir T. Rana, MD
1425 John B. White Sr. Blvd
Spartanburg, SC 29306

SC License #15940

PATIENT NAME : Shannon Cook
DATE OF BIRTH : 04-26-1980
DATE OF INJURY : 09-17-2007
DATE(S) OF SURGERY : 05-14-2009 & 05-20-2009
DATE OF EXAM : 02-16-2012

ADDITIONAL RECORDS REVIEWED

- 1- Carolinas Center for Advanced Management of Pain
- 2- David Tollison, PhD

INTRODUCTION

Mr. Cook was previously evaluated on July 14, 2010 at 2084 East Main Street, Spartanburg, SC to determine permanent impairment due to injuries sustained on September 17, 2007. As a result of that evaluation he was assigned 21% impairment to the lumbar spine. He has continued treatment including psychological evaluation and returns for evaluation of worsening of condition.

HISTORY OF PRESENT ILLNESS/REVIEW OF MEDICAL RECORDS

Mr. Cook injured his back on September 17, 2007. He reports that he was lifting a box weighing approximately 40 pounds when he experienced sudden onset lower back pain extending into the left lower extremity. He was initially evaluated by Dr. Trott at Occupational Medicine/Minor Care who diagnosed lumbar sprain/strain. He underwent a course of physical therapy without relief. He then began treatment with Dr. LaTourette at Carolinas Center for Advanced Management of Pain. MRI revealed disc herniation at L4/L5. Discectomy at this level was performed on May 14, 2009 by Dr. Hodge. While in the recovery room, after difficult waking from anesthesia, he fell and began having pain in the left hip. A follow-up procedure was performed on May 20, 2009. He also has undergone trial with a spinal stimulator which was unsuccessful. Treatment since his prior evaluation has included psychological counseling by Dr. Tollison and transforaminal epidural steroid injections by Dr. LaTourette. Further MRI scans have revealed several disc herniations in the thoracic region with the worst being at the T8/T9 level to the right.

Page 2

Shannon Cook

CURRENT MEDICATIONS

Kadian 50mg every 12 hours

Vallum 10mg tid

Percocet 10mg every 4-6 hours

Abilify 10mg qhs

Effexor 37.5mg tid

Lyrca 150mg tid

Effexor 37.5mg qid

PAST MEDICAL HISTORY/SURGERY

Past medical/surgical history includes hernia repair at three months old and orchidectomy.

PHYSICAL EXAMINATION

Mr. Cook is alert and oriented to time, place, person and circumstances. The spine is central. Straight Leg Raising test is positive bilaterally at 30 degrees. DTR are slightly sluggish at 1+ bilaterally and equal. There is mild paraspinal muscle spasm noted from the T8 level through the lumbar region. There is noted restriction of lumbar range of motion. The measured deficits and related impairments are as follows.

In accordance with Table 15-8, page 407 of the 5th edition of the Guides

True lumbar flexion to 45 degrees

= 2 whole person impairment

True lumbar extension to 20 degrees

= 2 whole person impairment

In accordance with Table 15-9, page 409 of the 5th edition of the Guides

Right lateral bending to 15 degrees

= 2 whole person impairment

Left lateral bending to 15 degrees

= 2 whole person impairment

Total whole person impairment due to lumbar ROM deficit is 8%.

CALCULATION OF IMPAIRMENT

As noted above and in the earlier report dated July 14, 2010, Mr. Cook is assigned 8% whole person impairment due to lumbar range of motion deficit. Additionally, in accordance with Table 15-7, page 404 of the 5th edition of the Guides, he also qualifies under disorder II, Section E and Section G, and is assigned 12% whole person impairment. These figures are combined in accordance with the Combined Values Chart on page 604 of the 5th edition of the Guides resulting in 19% whole person impairment. Conversion to regional impairment in accordance with Section 15.13, page 427 of the 5th edition of the Guides results in a final lumbar spine impairment of 21%.

Additionally, he has been found to suffer from thoracic disc herniation at the T8/T9 level. In accordance with Table 15-7, page 404 of the 5th edition of the Guides, he qualifies under disorder II, Section B and is assigned 2% whole person impairment due to thoracic disc lesion with documented injury, pain and rigidity. Conversion to regional impairment in accordance with Section 15.13, page 427 of the 5th edition of the Guides results in final thoracic spine impairment of 5%.

Page 3

Shannon Cook

RECOMMENDATIONS FOR FURTHER TREATMENT/RESTRICTIONS

Mr. Cook has reached MMI for injuries received as a result his accident of September 17, 2007. He remains under the care of Dr. LaTourette for pain management and will likely be in need of this type care on a lifelong basis. Due to his continued severe pain and the medication that he must take to control it, I am doubtful of his ability to be gainfully employed in any capacity. He may suffer psychological impairment as well, however, I will defer to Dr. Tollison for that determination.

All the above is reasonable of medical certainty.

Thank you for allowing me to re-evaluate Mr. Cook. If I may be of any further assistance to you, please do not hesitate to contact me.

Yashbir T. Rana

YR:th

Electronically Signed by: Yashbir T. Rana on Thursday, February 16, 2012

Board Certified in Occupational Medicine (ABPM), (ABOEM)
Medical Review Officer (MRO)
Certified Independent Medical Examiner (IME)

MEDICAL INTERROGATORY

To: Tony Rana, M.D., Carolina Health Professionals
Re: Patient: Shannon Cook
SSN:
DOA: 9/17/07
Injuries: Spine

Based on your examination of Shannon Cook, his medical history, and to a reasonable degree of medical certainty and most probably, please answer the following questions:

1. Did Mr. Cook most-probably proximately suffer a worsening of condition to his spine?

Spine ☒ Yes ☐ No

Other ☐ Yes ☒ No

2. Please indicate the percentage of permanent partial impairment(s) and identify the body part to which the impairment is assigned.

5 % partial permanent impairment to the Spine (thoracic)

21 % partial permanent impairment to the Other (lumbar spine)

Yashbir T. Rana

YR:th

Electronically Signed by: Yashbir T. Rana on Thursday, February 16, 2012

Board Certified in Occupational Medicine (ABPM), (ABOEM)
Medical Review Officer (MRO)
Certified Independent Medical Examiner (IME)

Very Truly Yours,

Attorney Offices of Thomas M. Gagne, P.A.

Thomas M. Gagne, Esq.,
Owner/President

TMG/hs

Attachment B



RYAN MONTGOMERY

ATTORNEY AT LAW, LLC

May 17, 2013

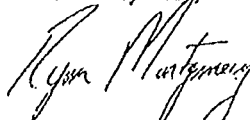
The Honorable Virginia L. Crocker
Judicial Director
SC Workers' Compensation Commission
PO Box 1715
Columbia, SC 29202-1715

Re: Claimant: Shannon Cook
Employer: Spartanburg Steel Products, Inc.
Carrier: Shannon Cook
WCC File No.: 0726308
Claim No.: YDS656635C
D.O.L.: 9/17/2007

Dear Director Crocker:

Please find enclosed our Form 50 requesting a hearing along with a check for \$25.00 to cover the cost of filing same. By copy of this letter to the Defense Attorney, I am serving him with a copy of this Form 50. A certificate of service accompanies this correspondence.

Yours very truly,



Ryan S. Montgomery

cc: Mr. Shannon Cook
Brad Basterling, Esq.

108 MILLS AVENUE • GREENVILLE • SOUTH CAROLINA 29605 • (864) 373-7333 • (864) 373-7334 (FAX)

WWW.RYANMONTGOMERYLAW.COM

SL dx 6/14/13
2920.572

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



WCC File #: 0726308
Carrier File #:
Carrier Code #:
Employer FEIN #:

Claimant's Name: Shannon Cook SSN: Employer's Name: Spartanburg Steel Products, Inc.
Address: Address: 1290 New Cut Road
City: Cowpens State: SC Zip: 29330 City: Spartanburg State: SC Zip: 29303
Home Phone: () Work Phone: () Insurance Carrier: Specialty Risk Services
Preparer's Name: Ryan S. Montgomery Law Firm: Ryan Montgomery, Attorney at Law, LLC Preparer's Phone #: 864-373-7333

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: 9/17/2007

☒ Injury ☐ Illness ☐ Repetitive Trauma

1a. The claimant sustained an injury to back, bilateral legs, hips and psyche (part(s) of body injured) on 9/17/2007 (Month/Day/Year) in Spartanburg county, state of SC.

1b. Body part(s) affected are: back, bilateral legs, hips and psyche

Briefly describe how the accident occurred. Claimant was lifting a box, twisted and injured his back.

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.

3. The relationship of employer and employee existed at the time of injury.

4. At the time of the injury the claimant was performing services arising out of and in the course of employment.

5. Notice of the accidental injury was given to the Employer on 9/17/07 (Month/Day/Year) in the following manner:

Claimant reported this accident to his supervisor

☒ 6. Due to injury, the claimant is in need of (check one):

☒ (a) medical examination and treatment for: back, bilateral legs, hips and psyche per recommendation of treating doctors

☒ (b) additional medical examination and treatment for: back, bilateral legs, hips and psyche

☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:

☐ 8. Due to the injury, the claimant has permanent disability of the following nature and extent (check one):

☐ (1) General Disability:

☐ Total

☐ (2) Specific Disability:

☐ Total

☐ (3) Wage Loss

☐ Partial

☐ Partial

☐ 9. Due to the injury, the claimant has a serious bodily disfigurement consisting of:

10a. At the time of the injury, the claimant was paid weekly wages of \$846.64, and demands accounting of days worked and wages earned as provided in law.

10b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident:

None

11a. Further grounds or unusual aspects of claim: All that are available under the S.C. Workers' Compensation Act. Attorney fees to be approved as lump sum up front payment and Utica Motawak language requested in Final Order. Additionally

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident: Please see attached Addendum.

11c. To the best of your knowledge, did you have any prior permanent disability? _____
If yes, describe: _____

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 13a. I am filing a claim. I am not requesting a hearing at this time.

☒ 13b. I am requesting a hearing. A \$25 fee is required.

14. Estimated time needed for hearing: _____

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature
Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

Attorney for the Claimant
Title

Ryan@ryanmontgomerylaw.com
Email

May 17, 2013
Date

WCC Form # 50 Revised 9/07

50

Employee's Notice of Claim and/or Request for Hearing

ADDENDUM

St. Francis Workwell
125 Commonwealth Drive
Greenville, SC 29615

VBS
705 S. E. Main Street
Simpsonville, SC 29681

St. Francis Hospital – Downtown
One St. Francis Drive
Greenville, SC 29609

Oaktree Medical Center
115 Brushy Creek Road
Easley, SC 29642

Piedmont Spine & Neurosurgical Group
3 St. Francis Drive
Ste. 330
Greenville, SC 29601

Diagnostic Health
1 Cannon Drive
Greenville, SC 29605

Mary Black Physicians Group
2995 Reidville Road, Suite 100
Spartanburg, SC 29301

Pain Management Associates
115 Brushy Creek Road
Easley, SC 29642

Palmetto Health Baptist Easley
200 Fleetwood Drive
Easley, SC 29604

Associates in General Surgery
317 St. Francis Drive, Suite 360
Greenville, SC 29601

Southeastern Neurosurgical & Spine Institute
109 Doctors Drive
Greenville, SC 29605

Carolina Centers for Advanced Management of Pain
1330 Bolling Springs Road, Suite 270
Spartanburg, SC 29303

Gaffney Family Physicians
101 Professional Park
Gaffney, SC 29340

Spartanburg Regional Occupational Health
1311 Warren H. Abernathy Highway
Spartanburg, SC 29303

Greenville Memorial Hospital
701 Grove Road
Greenville, SC 29605

Piedmont Imaging
84 North Pine Street
Spartanburg, SC 29303

Spartanburg Regional Medical Center
901 East Wood Street
Spartanburg, SC 29303

Spartanburg Neurosurgical
1075 Boiling Springs Road
Spartanburg, SC 29303

Spartanburg Regional Rehab Services
North Church Street
Spartanburg, SC 29303

Neurology Center of Spartanburg
91 Serpentine Dr.
Spartanburg, SC 29303

Upstate Health Professionals
1084 East Main Street
Duncan, SC 29334

Adams & Wilkinson
PO Box 537
White Rock, SC 29177

Dr. L. Randolph Waid
1459 Stuart Ingals Blvd. Suite 204A
Mount Pleasant, SC 29464

Weldon & Associates
1225 S. Church Street
Greenville, SC 29605

Palmotto State Medical, Dr. Rana
1425 John B. White Sr. Blvd.
Spartanburg, SC 29306

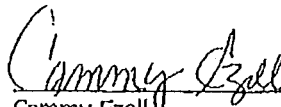
CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Ryan Montgomery, Attorney at Law, LLC, and that the attached Form 50 requesting a hearing, was served this 17th day of May, 2013, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

The Honorable Virginia L. Crocker
Judicial Director
SC Workers' Compensation Commission
PO Box 1715
Columbia, SC 29202-1715

Mr. Brad Easterling
Turner Padgett Graham & Laney
PO Box 1509
Greenville, SC 29602

Mr. Shannon Cook
340 Hart Street
Cowpens, SC 29330


Cammy Ezell
Paralegal for Ryan S. Montgomery

DATE : May/16/2013
CHE # : 000714
AMOUNT : \$25.00
ACCOUNT: GENERAL - 2
PAID TO: South Carolina Workers Compensation Comm
PO Box 1715
Columbia
SC
29202

000714

Filing Fee Associated with Hearing for Medical Treatment

CLIENT: 00261 - Shannon Cook
MATTER: 00928

RYAN MONTGOMERY ATTORNEY AT LAW, LLC

COST ADVANCE ACCOUNT
108 MILLS AVENUE
GREENVILLE, SC 29605
(864) 373-7333
(864) 373-7334 - FAX

SCBT, N.A.
www.SCBTonline.com
200 E Broad St.
Greenville, SC 29601

67-98/532

000714

CHECK NO.

Twenty Five ***** 00/100

DATE May/16/2013 AMOUNT \$25.00

South Carolina Workers Compensation Comm
PO Box 1715
Columbia, SC 29202

PAY
TO THE
ORDER
OF

Filing Fee Associated with Hearing for Medical Treatment

000714 0532009831 270013624

RYAN MONTGOMERY ATTORNEY AT LAW, LLC

DATE : May/16/2013

CHE # : 000714

AMOUNT : \$25.00

ACCOUNT: GENERAL - 2

PAID TO: South Carolina Workers Compensation Comm

Filing Fee Associated with Hearing for Medical Treatment

00261 - Shannon Cook

MATTER : 00928

ATTORNEY : Ryan S. Montgomery

140 Hart Street

** GENERAL BALANCES **

UNBILLED DISBS:

A/R BALANCE :

000714

25.00

0.00

** TRUST BALANCES **

TRUST BALANCE :

0.00

lowpens

IC

9330

ISA

Shannon Cook v. Spartanburg Steel Products

REORDER FORM #800LH1 (1 PART)

USE WITH COMPANION ENVELOPE #44-001

Attachment C



RYAN MONTGOMERY

ATTORNEY AT LAW, LLC

August 9, 2013

The Honorable Virginia L. Crocker
Judicial Director
SC Workers' Compensation Commission
PO Box 1715
Columbia, SC 29202-1715

Re: Claimant: Shannon Cook
Employer: Spartanburg Steel Products, Inc.
Carrier: Shannon Cook
WCC File No.: 0726308
Claim No.: YDS656635C
D.O.L.: 9/17/2007

Dear Director Crocker:

Please find enclosed our Amended Form 50 requesting a hearing. By copy of this letter to the Defense Attorney, I am serving him with a copy of this Amended Form 50. A certificate of service accompanies this correspondence.

Yours very truly,

Ryan S. Montgomery

cc: Mr. Shannon Cook
Brad Easterling, Esq.
The Honorable Susan S. Barden

108 MILLS AVENUE • GREENVILLE • SOUTH CAROLINA 29605 • (864) 373-7333 • (864) 373-7334 (FAX)

WWW.RYANMONTGOMERYLAW.COM

AUG 13 2013
02920.00572

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



WCC File #: 0726308
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Shannon Cook SSN: _____ Employer's Name: Spartanburg Steel Products, Inc.
Address: _____ Address: 1290 New Cut Road
City: Cowpens State: SC Zip: 29330 City: Spartanburg State: SC Zip: 29303
Home Phone: () Work Phone: () Insurance Carrier: Specialty Risk Services
Preparer's Name: Ryan S. Montgomery Law Firm: Ryan Montgomery, Attorney at Law, LLC Preparer's Phone #: 864-373-7933

Complete each information blank. To request a hearing, check box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: 9/17/2007

☒ Injury ☐ Illness ☐ Repetitive Trauma

1a. The claimant sustained an injury to back, bilateral legs, hips and psyche. Part(s) of body injured on 9/17/2007 (month/day/year) in Spartanburg county, state of SC.

1b. Body part(s) affected are: back, bilateral legs, hips and psyche

Briefly describe how the accident occurred. Claimant was lifting a box, twisted and injured his back.

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.

3. The relationship of employer and employee existed at the time of injury.

4. At the time of the injury the claimant was performing services arising out of and in the course of employment.

5. Notice of the accidental injury was given to the Employer on 9/17/07 (month/day/year) in the following manner:

Claimant reported this accident to his supervisor

☒ 6. Due to injury, the claimant is in need of (check one):

☒ (a) medical examination and treatment for: back, bilateral legs, hips and psyche per recommendation of treating doctors

☒ (b) additional medical examination and treatment for: back, bilateral legs, hips and psyche

☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:

☐ 8. Due to the injury, the claimant has permanent disability of the following nature and extent (check one):

☐ (1) General Disability:

☐ Total

☐ (2) Specific Disability:

☐ Total

☐ (3) Wage Loss

☐ Partial

☐ Partial

☐ 9. Due to the injury, the claimant has a serious bodily disfigurement consisting of:

10a. At the time of the injury, the claimant was paid weekly wages of \$846.64, and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident:
None

11a. Further grounds or unusual aspects of claim: All that are available under the S.C. Workers' Compensation Act. Attorney fees to be approved as lump sum up front payment and Utica Mohawk language requested in Final Order. Change of condition.

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident:
Please see attached Addendum.

11c. To the best of your knowledge, did you have any prior permanent disability? _____
If yes, describe: _____

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 13a. I am filing a claim. I am not requesting a hearing at this time.

☒ 13b. I am requesting a hearing. A \$25 fee is required.

14. Estimated time needed for hearing: _____

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature

Attorney for the Claimant
Title

Ryan@ryanmontgomerylaw.com
Email

August 9, 2013
Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

WCC Form # 50 Revised 9/07

Amended 50

Employee's Notice of Claim and/or Request for Hearing

CERTIFICATE OF SERVICE

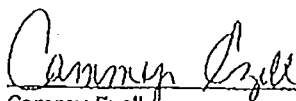
The undersigned certifies that she is an employee at Ryan Montgomery, Attorney at Law, LLC, and that the attached Form 50 requesting a hearing, was served this 9th day of August, 2013, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

The Honorable Virginia L. Crocker
Judicial Director
SC Workers' Compensation Commission
PO Box 1715
Columbia, SC 29202-1715

The Honorable Susan S. Barden
SC Workers' Compensation Commission
PO Box 1715
Columbia, SC 29202-1715

Mr. Brad Easterling
Turner Padgett Graham & Laney
PO Box 1509
Greenville, SC 29602

Mr. Shannon Cook
340 Hart Street
Cowpens, SC 29330


Cammy Ezell
Paralegal for Ryan S. Montgomery

ADDENDUM

St. Francis Workwell
125 Commonwealth Drive
Greenville, SC 29615

VBS
705 S. E. Main Street
Simpsonville, SC 29681

St. Francis Hospital – Downtown
One St. Francis Drive
Greenville, SC 29609

Oaktree Medical Center
115 Brushy Creek Road
Easley, SC 29642

Piedmont Spine & Neurosurgical Group
3 St. Francis Drive
Ste. 330
Greenville, SC 29601

Diagnostic Health
1 Cannon Drive
Greenville, SC 29605

Mary Black Physicians Group
2995 Reidsville Road, Suite 100
Spartanburg, SC 29301

Pain Management Associates
115 Brushy Creek Road
Easley, SC 29642

Palmetto Health Baptist Easley
200 Fleetwood Drive
Easley, SC 29604

Associates in General Surgery
317 St. Francis Drive, Suite 360
Greenville, SC 29601

Southeastern Neurosurgical & Spine Institute
109 Doctors Drive
Greenville, SC 29605

Carolina Centers for Advanced Management of Pain
1330 Boiling Springs Road, Suite 270
Spartanburg, SC 29303

Gaffney Family Physicians
101 Professional Park
Gaffney, SC 29340

Spartanburg Regional Occupational Health
1311 Warren H. Abernathy Highway
Spartanburg, SC 29303

Greenville Memorial Hospital
701 Grove Road
Greenville, SC 29605

Piedmont Imaging
84 North Pine Street
Spartanburg, SC 29303

Spartanburg Regional Medical Center
901 East Wood Street
Spartanburg, SC 29303

Spartanburg Neurosurgical
1075 Bolling Springs Road
Spartanburg, SC 29303

Spartanburg Regional Rehab Services
North Church Street
Spartanburg, SC 29303

Neurology Center of Spartanburg
91 Serpentine Dr.
Spartanburg, SC 29303

Upstate Health Professionals
1084 East Main Street
Duncan, SC 29334

Adams & Wilkinson
PO Box 537
White Rock, SC 29177

Dr. L. Randolph Wald
1459 Stuart Ingals Blvd. Suite 204A
Mount Pleasant, SC 29464

Weldon & Associates
1225 S. Church Street
Greenville, SC 29605

Palmetto State Medical, Dr. Rana
1425 John B. White Sr. Blvd.
Spartanburg, SC 29306

Orthopedic Specialties of Spartanburg
303 E. Wood Street
Spartanburg, SC 29303

Attachment D



PRE-HEARING BRIEF
WCC File No: 0726308

Claimant's Name: Shannon Cook Employer's Name: Spartanburg Steel Products
Address: _____ Address: 1200 New Cut Road
City: Cowpens State: SC Zip: 29330 City: Spartanburg SC 29303
Home Phone: () Work Phone: () Carrier: Spartanburg Steel Products, Inc. c/o Specialty Risk Services
Preparer's Name: Ryan S. Montgomery Preparer's Phone #: (864) 373-7333

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$564.46 2. AWW: \$846.64 Date of Injury: 9/17/2007
3. Type of Injury and body part(s): Back, bilateral legs, hips and psyche (change of condition)
4. Facts in controversy: Claimant has a previous order in place to provide medical treatment. Claimant has requested medical. And the carrier referred him to Dr. Marco Rodriguez and Dr. Charles Kanos both of whom have opined that the claimant needs additional medical treatment. To date, the carrier has not provided any of the recommended medical treatment from either Rodriguez or Kanos. Claimant has sustained a change of condition as supported by all of the claimant's treating physicians (LaTourette, Rodriguez and Kanos). In addition, claimant had the CT Myelogram recommend through Kanos but denied by carrier through his Medicare which showed "post-surgical changes" thereby reinforcing the change of condition. Either the claimant gets additional medical under the original order or as a change of condition. Carrier has not provided it under either scenario despite an order and multiple requests to do so. Carrier has also not complied with the Order to Compel as they have not re-paid the claimant the \$25.00 filing fee associated with that Order. Claimant seeks a finding of change of condition and an order instructing carrier to provide medical as request by their doctors, repay Medicare for the causally related medical treatment, and for any further relief the Commissioner deems appropriate. Additional permanency is premature at this time and would request this issue be held in abeyance.
5. Legal Issues Involved: See #4. Change of Condition
6. Unusual aspects: See #4 and #5.
7. Witnesses (designate if expert):* Shannon Cook. Claimant reserves the right to supplement this and/or call any witnesses listed On the defendants' pre-hearing brief (Form 58).
8. Exhibits: Job Description, surveillance, previous workers compensation Commission order, correspondence between counsel; Order to Compel; and Commission file.
9. Medical evidence (Indicate report pursuant to R.67-612; deposition or appearance): See APA Index
10. Name, address, and specialty, if any, of the treating physician: Dr. Phillip LaTourette; Dr. Charles Kanos; Dr. Marco Rodriguez
11. Impairment rating(s); body part(s); physician and date of opinion: Previous ratings outlined in Order; Current rating or change in rating premature.
12. I am amending my Form 50/51 in the following manner: _____

I verify the contents of this form are accurate and true to the best of my knowledge.

Signature: Ryan S. Montgomery
Ryan S. Montgomery, Attorney for the Claimant

Email: Ryan@RyanMontgomeryLaw.com

Date of hearing: 8/26/13 @ 11:00am with Comm. Barden

Time needed for hearing: 60 minutes

On behalf of ☒ Claimant ☐ Employer

File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports.
* Commissioners reserve the right to admit expert witnesses at hearings.

Attachment E

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
COLUMBIA, SOUTH CAROLINA
WCC FILE NO. 0726308

EMPLOYEE/CLAIMANT: SHANNON COOK

EMPLOYER: SPARTANBURG STEEL PRODUCTS

INSURER: (SELF-INSURED)

 COPY

SOUTH CAROLINA WORKERS' COMPENSATION HEARING

PURSUANT TO NOTICE OF WORKERS' COMPENSATION
HEARING, THE WITHIN HEARING WAS TAKEN ON THE 27TH DAY OF
SEPTEMBER, 2013, COMMENCING AT THE HOUR OF 10:32 A.M., IN
GREENVILLE, SOUTH CAROLINA, BEFORE THE HONORABLE SUSAN BARDEN,
ATTENDED BY COUNSEL AS FOLLOWS:

JAN L. WHITWORTH
VERBATIM REPORTER

JAN L. WHITWORTH
COURT REPORTING SERVICES
POST OFFICE BOX 551
ROEBUCK, S.C. 29376

APPEARANCES

RYAN S. MONTGOMERY, ESQUIRE, OF THE FIRM
RYAN S. MONTGOMERY ATTORNEY AT LAW, LLC
108 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605

ATTORNEY FOR THE EMPLOYEE/CLAIMANT,

BRAD B. EASTERLING, ESQUIRE, OF THE FIRM
TURNER PADGET GRAHAM & LANEY, P.A.
POST OFFICE BOX 1509
GREENVILLE, SOUTH CAROLINA 29602

ATTORNEY FOR THE EMPLOYER/INSURER.

ALSO ATTENDING: JOHN NELSON

I N D E X

PAGE

~~SHANNON COOK:~~

DIRECT EXAMINATION BY MR. MONTGOMERY.....	16
CROSS EXAMINATION BY MR. EASTERLING.....	23
CERTIFICATE OF NOTARY PUBLIC.....	30

1 PURSUANT TO NOTICE OF HEARING, THE WITHIN HEARING
2 ~~WAS TAKEN BY THE ABOVE NAMED COURT REPORTER, A NOTARY~~
3 PUBLIC FOR THE STATE OF SOUTH CAROLINA, IN GREENVILLE,
4 SOUTH CAROLINA.

5 * * * * *

6 BY COMMISSIONER BARDEN:

7 TODAY'S DATE IS SEPTEMBER 27TH, 2013. THIS
8 IS SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
9 FILE NUMBER 0726308. THIS IS THE CASE OF THE
10 CLAIMANT MR. SHANNON COOK WHO IS PRESENT TODAY AND
11 REPRESENTED BY ATTORNEY RYAN MONTGOMERY VERSUS THE
12 EMPLOYER SPARTANBURG STEEL, WHICH IS SELF INSURED
13 AND REPRESENTED BY ATTORNEY BRAD EASTERLING. THE
14 PURPOSE OF TODAY'S HEARING IS TO DETERMINE ISSUES
15 RAISED IN FORMS 50 AND 51. BY PREVIOUS ORDER OF THE
16 COMMISSION, MR. COOK'S AVERAGE WEEKLY WAGE WAS
17 ESTABLISHED AT \$846.64 YIELDING A COMPENSATION RATE
18 OF \$564.46. THE DATE OF THIS ADMITTED ACCIDENT, AND
19 WHEN I SAY ADMITTED, THAT'S THE UNDERLYING ACCIDENT,
20 WAS SEPTEMBER 17TH, 2007.

21 ARE THERE ANY OBJECTIONS TO APAs, JURISDICTION,
22 VENUE OR ANY OTHER ITEMS?

23 BY MR. MONTGOMERY:

24 NO, COMMISSIONER.

25 BY MR. EASTERLING:

1 NONE, COMMISSIONER.

2 ~~BY COMMISSIONER BARDEN:~~

3 THANK YOU BOTH. WITHOUT OBJECTION, THE
4 COMMISSION FILE BECOMES A PART OF THE RECORD WITH
5 THE EXCEPTION OF SELF-SERVING DECLARATIONS AND
6 UNSTIPULATED MEDICAL REPORTS.

7 PRIOR TO GOING ON THE RECORD, WE HELD A
8 PREHEARING CONFERENCE. IT'S THE POSITION OF THE
9 CLAIMANT -- AND HE HAS A COUPLE OF POSITIONS, BUT
10 FIRST OF ALL, HE CONTENDS THAT HE HAS SUSTAINED A
11 COMPENSABLE CHANGE OF CONDITION FOR THE WORSE WITH
12 REGARD TO HIS ADMITTED BACK INJURY, AND ALSO THERE
13 IS PSYCHOLOGICAL OVERLAY INVOLVED AS WELL. IT IS
14 HIS POSITION THAT HIS RADICULAR PROBLEMS INTO HIS
15 LEGS AND HIS HIPS HAVE WORSENERED, THAT HIS BACK
16 CONDITION HAS WORSENERED SUCH THAT AN AUTHORIZED
17 PHYSICIAN, DR. KANOS, HAS RECOMMENDED SURGERY. SO,
18 THEREFORE, THE CLAIMANT SEEKS A FINDING OF
19 COMPENSABILITY OF HIS CHANGE OF CONDITION, AND AS
20 WELL, HE ALSO SEEKS THE SURGERY. IT'S HIS POSITION
21 THAT HIS LAWYER AT THE TIME WHO WAS MR. GAGNE TIMELY
22 FILED A CHANGE OF CONDITION FOR THE WORSE PURSUANT
23 TO SECTION 42-17-90. ALTHOUGH MR. GAGNE DID NOT
24 FILE A REQUEST FOR A HEARING, HE DID IN FACT MEET
25 THE REQUIREMENTS OF THE STATUTE OF LIMITATIONS WHEN

1 HE FILED A REQUEST FOR -- OR HIS FORM 50 WAS NOTICE
2 ~~OF THE CLAIM FOR A CHANGE OF CONDITION, AND THAT~~
3 THERE WAS A STATEMENT ATTACHED AS REQUIRED BY THE
4 STATUTE FROM DR. RANA WHO STATED THAT THE CLAIMANT
5 HAD SUSTAINED A CHANGE OF CONDITION FOR THE WORSE.
6 THE CLAIMANT WILL POINT TO MY ATTENTION THE FACT
7 THAT THE COMMISSION IS CHARGED WITH ADJUDICATING
8 WHETHER OR NOT THERE'S A CHANGE OF CONDITION, BUT
9 PROCEDURALLY WHAT IS REQUIRED WAS COMPLIED WITH, AND
10 THAT WAS THE RANA STATEMENT. AND THEN SUBSEQUENT TO
11 THE RANA STATEMENT, THERE ARE OTHER RECORDS AND
12 OPINIONS FROM DOCTORS WHO STATE THAT THE CLAIMANT
13 HAS IN FACT SUSTAINED A CHANGE OF CONDITION FOR THE
14 WORSE. SO, THE CLAIMANT SEEKS A FINDING OF
15 COMPENSABILITY OF HIS CHANGE OF CONDITION FOR THE
16 WORSE, AND HE SEEKS A DETERMINATION THAT -- OR AN
17 ORDER REQUIRING THE DEFENDANTS TO PROVIDE HIM WITH
18 THE SURGERY, WHICH HAS BEEN RECOMMENDED BY DR.
19 KANOS, AND DR. LATOURETTE HAS STATED THAT HE WOULD
20 DEFER TO DR. KANOS. AND I BELIEVE DR. RODRIGUEZ AS
21 WELL HAS OPINED THAT THE CLAIMANT IS IN NEED OF
22 SURGERY. BUT AGAIN, I'VE JUST BEEN HANDED THESE
23 RECORDS, AND SO I'M NOT CERTAIN AS TO THAT
24 PARTICULAR FACT. ALTERNATIVELY, THE CLAIMANT WOULD
25 CONTEND THAT HE IS ENTITLED TO RECEIVE THE SURGERY

1 AS A DODGE MEDICAL, AND WHILE IT MAY NOT HAVE BEEN
2 ~~MENTIONED WITH ANY SPECIFICITY, THE CLAIMANT'S~~
3 CONDITION HAS WORSENER. BUT THE CLAIMANT'S PRIMARY
4 POSITION IS IT'S A RESULT OF A CHANGE OF CONDITION
5 FOR THE WORSE, AND THE CLAIMANT WOULD CONTEND THAT
6 THE MERE FACT THAT THE CLAIMANT NEEDS SURGERY IS --
7 CONNOTES OR SUGGESTS ITSELF THAT THERE HAS BEEN IN
8 FACT A CHANGE OF CONDITION FOR THE WORSE, AND HE
9 DOES BELIEVE THAT HE MEETS NOT ONLY THE PROCEDURAL
10 REQUIREMENTS OF 42-17-90 BUT THE MERITS AS WELL, AND
11 HE HAS PRESENTED EVIDENCE, WHICH SHOWS THAT HE HAS
12 IN FACT SUSTAINED A CHANGE OF CONDITION FOR THE
13 WORSE. REGARDLESS OF WHAT THE RANA OPINION IS,
14 WHICH WAS IN FACT THAT THERE HAD BEEN A CHANGE,
15 THERE HAS BEEN FURTHER CLARIFYING EVIDENCE, WHICH
16 SUPPORTS HIS CONTENTION. FINALLY, THE CLAIMANT
17 SEEKS REIMBURSEMENT FOR THE C.T. MYELOGRAM, WHICH HE
18 UNDERWENT AT HIS OWN EXPENSE. AND WHILE THERE HAS
19 BEEN -- FOR ANY CO-PAYS THAT HE MAY HAVE BEEN
20 RESPONSIBLE FOR. THAT DR. KANOS WHO IS AN
21 AUTHORIZED PROVIDER STATED THAT HE NEEDED, AND HE
22 DID IN FACT UNDERGO THE C.T. MYELOGRAM, WHICH IN
23 FACT SHOWS THAT HE NEEDS SURGERY. SO, SHE REQUESTS
24 REIMBURSEMENT FOR THAT MODALITY. SECONDLY, I SIGNED
25 AN ORDER BASED UPON THE CLAIMANT'S MOTION TO COMPEL

1 AS THE CLAIMANT CONTENDS THAT THE DEFENDANTS HAD NOT
2 PROVIDED THE MODALITIES, WHICH HAD BEEN ORDERED BY
3 COMMISSIONER WILKERSON IN HIS ORDER OF -- I BELIEVE
4 IT WAS JUNE 8TH, 2011, WHICH WOULD INCLUDE PAIN
5 MEDICATION, PSYCHOLOGICAL EVALUATION AND TREATMENT,
6 INJECTIONS AND PHYSICAL THERAPY. AND I DID SIGN AN
7 ORDER TO COMPEL AND ---

8 BY MR. EASTERLING:

9 NOT TO INTERRUPT, I'M SORRY, BUT THAT WAS AN
10 ORDER TO COMPEL PRODUCTION OF SOME DOCUMENTS, SOME
11 SURVEILLANCE DOCUMENTS. IT DIDN'T HAVE ANYTHING TO
12 DO WITH ---

13 BY COMMISSIONER BARDEN:

14 I APOLOGIZE. I THOUGHT THAT WAS FOR FUTURE
15 MEDS.

16 BY MR. EASTERLING:

17 NO, MA'AM.

18 BY MR. MONTGOMERY:

19 NO, COMMISSIONER. THAT WAS ---

20 BY COMMISSIONER BARDEN:

21 WELL, I STAND CORRECTED. OKAY. I THOUGHT ---

22 BY MR. EASTERLING:

23 I APOLOGIZE FOR INTERRUPTING.

24 BY COMMISSIONER BARDEN:

25 IT'S JUST ANOTHER CASE I'M THINKING OF. OKAY.

1 I APPRECIATE THAT CORRECTION. YOU JUST -- I THOUGHT
2 ~~YOU STATED THAT I HAD SIGNED~~

3 BY MR. EASTERLING:

4 THERE WAS AN ORDER TO COMPEL THE PRODUCTION OF
5 THE SURVEILLANCE DOCUMENTS THAT WE ---

6 BY COMMISSIONER BARDEN:

7 BUT YOU WERE ALSO LOOKING FOR ---

8 BY MR. MONTGOMERY:

9 IT WAS TWO-FOLD. I THINK YOU COMBINED THE TWO.

10 BY COMMISSIONER BARDEN:

11 OKAY.

12 BY MR. MONTGOMERY:

13 SO THE \$25 WAS IN THAT ORDER, WHICH WAS
14 COMPELLING ---

15 BY COMMISSIONER BARDEN:

16 THAT'S WHAT YOU'RE LOOKING FOR TO BE PAID?

17 BY MR. MONTGOMERY:

18 CORRECT.

19 BY COMMISSIONER BARDEN:

20 OKAY.

21 BY MR. MONTGOMERY:

22 AND ALTERNATIVELY, WE HAD ASKED FOR ---

23 BY COMMISSIONER BARDEN:

24 OKAY. I APOLOGIZE FOR THAT.

25 BY MR. MONTGOMERY:

1 AND ALTERNATIVELY IF YOU HAD FOUND THAT THIS
2 ~~WAS NOT A CHANGE OF CONDITION AND WAS DODGE~~
3 MEDICALS, THEN THEY FAILED TO COMPLY WITH THAT
4 UNDERLYING ORDER.

5 BY COMMISSIONER BARDEN:

6 OF COMMISSIONER WILKERSON?

7 BY MR. MONTGOMERY:

8 CORRECT. AND THEY WOULD BE SUBJECT TO
9 SANCTIONS AS YOU DEEM FIT.

10 BY COMMISSIONER BARDEN:

11 I SEE. GO AHEAD. GO AHEAD.

12 BY MR. EASTERLING:

13 AND, I MEAN, COMMISSIONER ROCHE ISSUED AN ORDER
14 ADDRESSING HIS MOTION COMPELLING THE MEDICAL
15 TREATMENT, AND SHE DETERMINED THAT IT -- IT WENT TO
16 THE MERITS.

17 BY COMMISSIONER BARDEN:

18 MERITS, OKAY.

19 BY MR. EASTERLING:

20 AND THAT WE DIDN'T HAVE -- WE WERE NOT DILATORY
21 IN DOING ANYTHING THAT WE WERE SUPPOSED TO.

22 BY COMMISSIONER BARDEN:

23 OKAY. WELL, WE'RE GOING ELECTRONIC, AND I DID
24 FIND THE COMMISSIONER WILKERSON ORDER LAST NIGHT,
25 BUT I DIDN'T SEE THE ROCHE ORDER IN HERE, AND I

1 DON'T KNOW WHETHER IT'S IN HERE OR NOT. I DIDN'T
2 SEE IT. SO, THANK YOU. I APPRECIATE THAT, AND WE
3 NEEDED TO KNOW ALL OF THAT.

4 ALL RIGHT. CONVERSELY, IT IS THE POSITION OF
5 THE DEFENDANTS THAT THE CLAIMANT'S CONTENTION THAT
6 HE HAS SUSTAINED A COMPENSABLE CHANGE OF CONDITION
7 FOR THE WORSE SHOULD BE DENIED, AND BENEFITS UNDER
8 THE ACT SHOULD BE DENIED OTHER THAN THOSE THAT WERE
9 ORDERED BY COMMISSIONER WILKERSON, WHICH ARE IN FACT
10 -- OR IS IN FACT -- THAT ORDER IS IN FACT AND THE
11 PROVISIONS THEREOF ARE THE LAW OF THE CASE. THE
12 DEFENDANTS BELIEVE THAT THE CLAIMANT'S CLAIM FAILS
13 BOTH PROCEDURALLY AND ON THE MERITS. THE DEFENDANTS
14 BELIEVE THAT THE OPERATIVE WORDS OF THE STATUTE 42-
15 17-90, WHICH OF COURSE IS THE CHANGE OF CONDITION
16 STATUTE AND SPECIFICALLY THE LAST SENTENCE OF
17 PARAGRAPH "A," THAT THE REVIEW MUST NOT BE MADE 12
18 MONTHS AFTER THE DAY OF THE LAST PAYMENT OF
19 COMPENSATION PURSUANT TO COMMISSIONER WILKERSON'S
20 AWARD. THE DEFENDANTS BELIEVE THAT BECAUSE THE
21 CLAIMANT'S PREVIOUS COUNSEL ONLY FILED A NOTICE OF A
22 CLAIM FOR A CHANGE OF CONDITION BUT DID NOT TIMELY
23 FILE A REQUEST FOR HEARING UNTIL AFTER THE 12 MONTHS
24 HAD RUN, AND THEN THE DEFENDANTS BELIEVE THAT THE
25 OPINION OF DR. RANA, WHICH I HAVE NOT READ, IS

1 NEBULOUS AT BEST AND SUCH THAT IT DOES -- IT IS --
2 ~~SHOULD BE FOUND INADMISSIBLE, BUT IT DOES NOT MEET~~
3 OR SERVE TO MEET THE REQUIREMENTS OF 42-17-90. THE
4 DEFENDANTS BELIEVE THAT THE CLAIM IS PROCEDURALLY
5 BARRED. THAT THE REQUEST FOR HEARING WAS NOT FILED
6 UNTIL MAY 17TH, 2013, WHICH IS WELL OUTSIDE THE ONE-
7 YEAR CHANGE OF CONDITION REQUIREMENT. THE
8 DEFENDANTS AS TO THE MERITS, THE DEFENDANTS WOULD
9 POINT TO MY ATTENTION THE FACT THAT DR. RANA -- IN
10 THE RANA REPORT, THE PRE AND POST REPORTS SHOW NO
11 DIFFERENCE, NO SIGNIFICANCE DIFFERENCE IN THE
12 CONDITION. SO, THEREFORE ON THE MERITS, THE
13 DEFENDANTS BELIEVE THAT THE CLAIM FAILS. AS FAR AS
14 -- THE DEFENDANTS CONTEND THAT THERE'S NOT ENOUGH
15 JUST TO FILE A REQUEST FOR A CHANGE OF CONDITION FOR
16 THE WORST TIMELY; THAT IT HAS TO BE A REQUEST FOR
17 HEARING, AND THAT WAS NOT ACCOMPLISHED IN THIS CASE.
18 AS A FUTURE MODALITY, THE DEFENDANTS WOULD POINT TO
19 MY ATTENTION THE FACT THAT SURGERY WAS NOT A
20 MODALITY ORDERED BY COMMISSIONER WILKERSON, AND
21 THEREFORE THE LAW OF THE CASE IS ONLY PAIN
22 MEDICATION, PSYCHOLOGICAL EVALUATION TREATMENT,
23 INJECTIONS, AND PHYSICAL THERAPY. NOWHERE IN THE
24 ORDER IS SURGERY MENTIONED. SO, THEREFORE, SURGERY
25 IS NOT A FUTURE MODALITY FOR WHICH THE DEFENDANTS

1 ARE RESPONSIBLE. SO THEREFORE, UNDER WHETHER IT'S A
2 ~~FUTURE MED OR WHETHER IT'S UNDER A CHANGE OF~~
3 CONDITION FOR THE WORSE, THE DEFENDANTS BELIEVE THAT
4 THE CLAIMANT FAILS ON BOTH FRONTS AND BOTH ACCOUNTS,
5 AND THEREFORE BENEFITS UNDER THE ACT SHOULD BE
6 DENIED. ALL RIGHT. AND OF COURSE, THE DEFENDANTS
7 HAVE PROVIDED TWO CASES, THE ALLEN V. VINSON AND THE
8 YOUNG V. TIDE CRAFT, FOR THE PROPOSITION AS FAR AS
9 THE PROCEDURAL REQUIREMENT THAT AN APPLICATION FOR
10 REVIEW MUST BE NOT HELD WITHIN -- I MEAN, THE REVIEW
11 DOESN'T NEED TO BE HELD, BUT THE APPLICATION MUST BE
12 HELD WITHIN 12 MONTHS, AND THE OTHER CASE FOR THE
13 PROPOSITION THAT AN OPINION CANNOT -- MUST BE BASED
14 ON MORE THAN JUST NEBULOUS CIRCUMSTANCES.

15 ALL RIGHT. Y'ALL SAID A LOT MORE, AND YOU SAID
16 IT A LOT BETTER, BUT IF THERE IS ANYTHING THAT I MAY
17 HAVE OVERLOOKED, MISSTATED, MISCHARACTERIZED, I WILL
18 HEAR FROM YOU NOW. YOU'RE SATISFIED?

19 BY MR. MONTGOMERY:

20 I'M SATISFIED.

21 BY COMMISSIONER BARDEN:

22 MR. EASTERLING IS NOT, SO GO AHEAD.

23 BY MR. EASTERLING:

24 I WOULD ALSO JUST LIKE TO POINT OUT REGULATION
25 67-602-C, WHICH SAYS THAT THE REQUEST FOR HEARING

1 FOR A CHANGE OF CONDITION, THE ACTUAL FORM THAT
2 ~~REQUESTS THE HEARING HAS TO HAVE A MEDICAL OPINION~~
3 ATTACHED TO IT SUPPORTING A CHANGE OF CONDITION.
4 THE FORM 50 THAT WAS FILED REQUESTING A HEARING BY
5 MR. MONTGOMERY HAD NO SUCH DOCUMENT ATTACHED.

6 BY COMMISSIONER BARDEN:

7 OKAY. DO YOU WISH TO RESPOND TO THAT JUST
8 BECAUSE I DIDN'T TAKE THAT UP?

9 BY MR. MONTGOMERY:

10 MY ONLY POINT WAS IT DEFERRED BACK TO THE
11 ORIGINAL 50 THAT HAD THE RECORD. I'M SURPRISED THIS
12 IS BEING RAISED.

13 BY MR. EASTERLING:

14 AND I'VE ALREADY POINTED OUT THE DEFICIENCIES
15 IN THAT RECORD. AND I WOULD ALSO LIKE TO NOTE THAT
16 IN RANA'S I.M.E., THE ONE ATTACHED TO GAGNE'S FORM
17 50 NOTICING THE CLAIM, THAT HE OPINED IN THE CHANGE
18 OF CONDITION REPORT THAT THE CLAIMANT REMAINED AT
19 MAXIMUM MEDICAL IMPROVEMENT.

20 BY COMMISSIONER BARDEN:

21 OKAY.

22 BY MR. EASTERLING:

23 THEREBY SUPPORTING ITS NEBULOUSNESS.

24 BY COMMISSIONER BARDEN:

25 OKAY, ALL RIGHT. I SEE WHERE YOU BOTH ARE

1 COMING FROM.

2 ~~MR. MONTGOMERY, YOUR FIRST AND ONLY WITNESS IS~~

3 MR. COOK; IS THAT CORRECT?

4 BY MR. MONTGOMERY:

5 YES, COMMISSIONER.

6 BY COMMISSIONER BARDEN:

7 MR. COOK, IF YOU WILL RAISE YOUR RIGHT HAND,
8 PLEASE.

9 * * * * *

10 THE WITNESS WAS DULY SWORN TO TELL THE TRUTH, THE
11 WHOLE TRUTH, AND NOTHING BUT THE TRUTH CONCERNING THE
12 MATTER HEREIN;

13 SHANNON COOK

14 BEING FIRST DULY SWORN, TESTIFIED ON HIS OATH AS FOLLOWS:

15 BY COMMISSIONER BARDEN:

16 PLEASE STATE YOUR FULL NAME FOR THE RECORD.

17 BY THE WITNESS:

18 SHANNON WAYNE COOK.

19 BY COMMISSIONER BARDEN:

20 THANK YOU VERY MUCH. PLEASE ANSWER ANY
21 QUESTIONS THAT MR. MONTGOMERY HAS, AND I'M GOING TO
22 ASK AS BEST YOU CAN, IF YOU WILL DIRECT YOUR
23 RESPONSES TO ME.

24 BY MR. MONTGOMERY:

25 THANK YOU, COMMISSIONER.

DIRECT EXAMINATION BY MR. MONTGOMERY:

- 1
- 2 Q. ~~MR. COOK, I'M GOING TO CUT TO THE CHASE AND GET~~
- 3 RIGHT TO THE POINT. AT SOME POINT, WERE YOU
- 4 REFERRED TO DR. RODRIGUEZ FOR MEDICAL TREATMENT?
- 5 A. YES, SIR.
- 6 Q. ALL RIGHT. WHO SENT YOU THERE?
- 7 A. DR. LATOURETTE.
- 8 Q. OKAY. AND IS DR. LATOURETTE, IS IT YOUR
- 9 UNDERSTANDING HE WAS THE AUTHORIZED TREATING
- 10 PHYSICIAN IN YOUR EARLIER CASE?
- 11 A. YES, SIR.
- 12 Q. OKAY. DO YOU HAVE AN UNDERSTANDING AS TO WHAT DR.
- 13 RODRIGUEZ RECOMMENDED IN TERMS OF MEDICAL TREATMENT?
- 14 A. DR. RODRIGUEZ IS LOOKING FOR A SURGERY -- TO PERFORM
- 15 A SURGERY.
- 16 Q. ALL RIGHT. AND AT SOME POINT, WERE YOU SENT TO DR.
- 17 KANOS FOR A SECOND OPINION?
- 18 A. YES, SIR.
- 19 Q. ALL RIGHT. DO YOU HAVE AN UNDERSTANDING AS TO WHAT
- 20 DR. KANOS ORIGINALLY RECOMMENDED TO YOU?
- 21 A. HE WANTED TO HAVE A C.T. MYELOGRAM.
- 22 Q. ALL RIGHT. DID THAT EVER GET AUTHORIZED BY THE
- 23 CARRIER?
- 24 A. NO.
- 25 Q. HAVE YOU HAD THAT DONE?

1 A. YES.

2 Q. ~~HOW DID YOU GET IT DONE?~~

3 A. MEDICARE PAID FOR IT.

4 Q. ALL RIGHT. DID YOU HAVE ANY CO-PAYS IN RELATION TO
5 YOUR VISIT TO DR. KANOS OR FOR THE C.T. MYELOGRAM?

6 A. YES.

7 Q. AND WHAT ABOUT TO DR. RODRIGUEZ?

8 A. NO.

9 Q. OKAY. THE CARRIER PAID FOR RODRIGUEZ AS FAR AS YOU
10 KNOW?

11 A. AS FAR AS I KNOW.

12 Q. ALL RIGHT. AFTER YOU HAD THE C.T. MYELOGRAM DONE,
13 HAVE YOU BEEN BACK TO DR. KANOS?

14 A. YES.

15 Q. ALL RIGHT. HAS HE RECOMMENDED ANY FURTHER MEDICAL
16 TREATMENT TO YOU?

17 A. HE RECOMMENDED SURGERY AND TO KEEP FOLLOWING UP WITH
18 DR. LATOURETTE.

19 Q. ALL RIGHT. DO YOU WANT THAT SURGERY AS RECOMMENDED
20 BY DR. KANOS?

21 A. YES.

22 Q. ALL RIGHT.

23 BY COMMISSIONER BARDEN:

24 DO YOU STILL SEE DR. LATOURETTE OR NOW YOU'RE
25 SEEING DR. RODRIGUEZ?

1 BY THE WITNESS:

2 ~~NO, MA'AM, I DON'T SEE RODRIGUEZ.~~

3 BY COMMISSIONER BARDEN:

4 YOU SEE LATOURETTE?

5 BY THE WITNESS:

6 YES, MA'AM.

7 BY COMMISSIONER BARDEN:

8 OKAY.

9 DIRECT EXAMINATION RESUMED BY MR. MONTGOMERY:

10 Q. ARE YOU STILL TREATING WITH DR. LATOURETTE FOR PAIN
11 MANAGEMENT?

12 A. YES.

13 Q. OKAY. AND THAT'S ALL BEING AUTHORIZED AS FAR AS YOU
14 KNOW BY THE CARRIER?

15 A. YES.

16 Q. ALL RIGHT. DID KANOS -- YOU'VE HAD TWO
17 RECOMMENDATIONS FOR TWO TYPES OF SURGERIES; IS THAT
18 YOUR UNDERSTANDING?

19 A. CORRECT.

20 Q. AND DO YOU WANT TO GO WITH RODRIGUEZ' RECOMMENDATION
21 OR KANOS' RECOMMENDATION OR NEITHER OR BOTH?

22 A. KANOS.

23 Q. OKAY. YOU TRUST KANOS?

24 A. YES, SIR.

25 Q. ALL RIGHT. NOW, OVER THE LAST SIX MONTHS TALKING

1 ABOUT YOUR COMPLAINTS OF PAIN AND PROBLEMS AND WE
2 ~~CALL IT RADICULAR SYMPTOMS, BUT THE STUFF THAT GOES~~
3 INTO YOUR LEG.

4 BY MR. EASTERLING:

5 OBJECT TO THE LEADING QUESTIONS.

6 BY COMMISSIONER BARDEN:

7 ALL RIGHT.

8 BY MR. MONTGOMERY:

9 ALL RIGHT, I'LL REPHRASE IT.

10 BY COMMISSIONER BARDEN:

11 THANK YOU.

12 DIRECT EXAMINATION RESUMED BY MR. MONTGOMERY:

13 Q. HAS THE PAIN GOTTEN WORSE IN YOUR BACK?

14 A. YES.

15 Q. ALL RIGHT. HAVE YOU HAD ANY INCREASE, DECREASE, OR
16 HAS IT STAYED THE SAME IN YOUR LEGS IF AT ALL?

17 A. IT'S BEEN WORSE.

18 Q. ALL RIGHT. IF YOU COULD HAVE THE SURGERY TODAY,
19 WOULD YOU?

20 A. YES.

21 Q. ALL RIGHT. NOW, THE CARRIER HAS PUT IN SOME
22 SURVEILLANCE FOOTAGE. HAVE YOU SEEN A COPY OF THEIR
23 SURVEILLANCE FOOTAGE?

24 A. YES, SIR.

25 Q. ALL RIGHT. IN THE VIDEOS, DOES IT DEPICT YOU DOING

1 SOMETHING WITH A FOOTBALL?

2 A. YES.

3 Q. ALL RIGHT. WHAT DOES IT DEPICT YOU DOING?

4 A. I BELIEVE IT'S JUMPING UP AFTER A FOOTBALL, BLOCKING
5 OR ---

6 BY MR. EASTERLING:

7 JUST SO WE'RE CLEAR, I HAVE NOT SUBMITTED THAT.

8 BY MR. MONTGOMERY:

9 OH, YOU HAVE NOT, OKAY. WAS THERE A SECOND?

10 BY MR. EASTERLING:

11 IT DOESN'T SHOW WHAT HE'S SAYING. IT SHOWS
12 SOMETHING DIFFERENT. I IMAGINE YOU'RE GOING TO GET
13 INTO THAT IN A MINUTE.

14 BY MR. MONTGOMERY:

15 I'LL GET INTO THAT. THANK YOU FOR THE
16 CLARIFICATION.

17 BY COMMISSIONER BARDEN:

18 OKAY.

19 BY MR. MONTGOMERY:

20 WE'LL JUST STRIKE THAT. I THOUGHT IT WAS BOTH.

21 DIRECT EXAMINATION RESUMED BY MR. MONTGOMERY:

22 Q. HAVE YOU SEEN ANY OTHER SURVEILLANCE FOOTAGE?

23 A. YES.

24 Q. ALL RIGHT. WHAT DID THAT SHOW? TELL THE
25 COMMISSIONER WHAT THAT SHOWED.

- 1 A. THE OTHER ONE SHOWED ME WORKING ON A CAR.
- 2 Q. ~~ALL RIGHT. WHY WERE YOU WORKING ON YOUR CAR?~~
- 3 A. THE HEATER BLOWED UP -- IT OVERHEATED ON US.
- 4 Q. DID THE VIDEO DEPICT THE CAR ACTUALLY BREAKING DOWN
- 5 OR YOU WORKING ON THE CAR OR BOTH?
- 6 A. BOTH ACTUALLY.
- 7 Q. WHY DID YOU WORK ON THE VEHICLE INSTEAD OF TAKING IT
- 8 TO A GARAGE OR SOMETHING LIKE THAT?
- 9 A. I DON'T HAVE THE MEANS TO AFFORD IT.
- 10 Q. ALL RIGHT. DID YOU HAVE ANY CHOICE BUT TO FIX IT?
- 11 A. NO.
- 12 Q. ALL RIGHT. NOW, DO YOU HAVE ANY INCOME AT ALL RIGHT
- 13 NOW?
- 14 A. SOCIAL SECURITY.
- 15 Q. ALL RIGHT. HOW MUCH DO YOU GET IF YOU KNOW?
- 16 A. MINE IS A LITTLE OVER 1600, AND THEN MY CHILDREN
- 17 DRAW ALSO.
- 18 Q. IS THAT YOUR ONLY INCOME?
- 19 A. YES.
- 20 Q. NOW, AFTER WORKING ON THE CAR, HOW DID YOU FEEL THE
- 21 NEXT DAY?
- 22 A. HURTING.
- 23 Q. ALL RIGHT. DID YOU CONTINUE TO HURT?
- 24 A. YES.
- 25 Q. FOR HOW LONG?

1 A. ABOUT THREE TO FOUR DAYS.

2 Q. ~~AFTER THAT THREE TO FOUR DAYS, DID THE PAIN LEVEL~~
3 STAY THE SAME, GET BETTER OR GET WORSE?

4 A. IT WENT BACK TO THE SAME.

5 Q. ALL RIGHT. NOW, WHEN WE'RE TALKING ABOUT THE SAME,
6 WAS THAT BEFORE THIS SIX MONTHS AGO WHEN YOU TALK
7 ABOUT -- SIX OR SEVEN MONTHS AGO WHEN YOU TALK ABOUT
8 THE INCREASE IN BACK PAIN?

9 BY MR. EASTERLING:

10 OBJECT TO LEADING.

11 BY COMMISSIONER BARDEN:

12 CAN YOU REPHRASE THAT QUESTION? IT WAS A
13 LITTLE BIT CONFUSING.

14 BY MR. MONTGOMERY:

15 YES, I'M SORRY.

16 DIRECT EXAMINATION RESUMED BY MR. MONTGOMERY:

17 Q. NOW, HOW LONG AGO WAS THE VIDEO WHEN YOU WERE
18 WORKING ON THE CAR IF YOU KNOW?

19 A. ALMOST A YEAR.

20 Q. OKAY. SINCE THAT TIME, HAS YOUR PAIN GOTTEN WORSE --
21 --

22 BY MR. MONTGOMERY:

23 STRIKE THAT.

24 DIRECT EXAMINATION RESUMED BY MR. MONTGOMERY:

25 Q. OVER THE LAST SEVEN, EIGHT, NINE MONTHS, HAS YOUR

1 PAIN GOTTEN WORSE, STAYED THE SAME OR GOTTEN BETTER?

2 A. ~~IT'S GOTTEN WORSE.~~

3 Q. OKAY. WHERE HAS IT GOTTEN WORSE?

4 A. MY LOWER BACK AND LEFT LEG.

5 Q. ALL RIGHT.

6 BY MR. MONTGOMERY:

7 I DON'T HAVE ANYTHING ELSE.

8 BY COMMISSIONER HARDEN:

9 ALL RIGHT. PLEASE ANSWER ANY QUESTIONS MR.
10 EASTERLING HAS FOR YOU.

11 CROSS EXAMINATION BY MR. EASTERLING:

12 Q. MR. COOK, YOU'VE BEEN TREATING WITH DR. LATOURETTE
13 THE ENTIRE TIME; IS THAT RIGHT?

14 A. YES, SIR.

15 Q. AND MY CLIENT, SPARTANBURG STEEL, HAS PROVIDED THAT
16 TREATMENT FOR YOU THE ENTIRE TIME, CORRECT?

17 A. CORRECT.

18 Q. THERE'S NOT BEEN AT ANY TIME THAT THEY'VE WITHHELD
19 ANY TREATMENT FROM DR. LATOURETTE OTHER THAN THE
20 RECOMMENDATIONS THAT WE'RE HERE TODAY ABOUT SURGERY,
21 RIGHT?

22 A. (NO VERBAL RESPONSE)

23 Q. I MEAN, EVERY TIME YOU GO TO DR. LATOURETTE ---

24 A. I MAINLY WOULD SAY YES.

25 Q. AND MR. MONTGOMERY, YOUR ATTORNEY, ASKED YOU ABOUT

1 THE SURVEILLANCE. DID YOU REVIEW THAT SURVEILLANCE
2 ~~BEFORE TODAY?~~

3 A. YES.

4 Q. AND YOU ACTUALLY REVIEWED IT WHEN WE WERE DEPOSING
5 DR. LATOURETTE IN HIS OFFICE BECAUSE YOU WERE THERE
6 WITH US, WEREN'T YOU?

7 A. CORRECT.

8 Q. DR. LATOURETTE LOOKED AT IT?

9 A. CORRECT.

10 Q. AND IT SHOWS YOU WORKING UNDERNEATH THE HOOD OF YOUR
11 CAR; IS THAT RIGHT?

12 A. CORRECT.

13 Q. AND IT SHOWS YOU DOING THAT FOR APPROXIMATELY AN
14 HOUR. IS THAT FAIR?

15 A. I WOULD SAY AROUND ABOUT THAT TIME.

16 Q. AND DURING THAT HOUR PERIOD OF TIME, THERE'S SEVERAL
17 OCCASIONS WHEN YOU'RE BENT OVER UNDERNEATH THE HOOD
18 OF THE CAR; IS THAT RIGHT?

19 A. CORRECT.

20 Q. AND THERE ARE OCCASIONS WHEN YOU MOVE AN INDUSTRIAL
21 JACK; IS THAT RIGHT?

22 A. IT'S A FLOOR JACK.

23 Q. IT'S MORE THAN JUST A JACK THAT I PULL OUT OF THE
24 BACK OF MY CAR THOUGH, ISN'T IT?

25 A. YES.

1 Q. HOW MUCH DO YOU THINK THAT JACK WEIGHS?

2 A. ~~I DON'T KNOW.~~

3 Q. THERE ARE SEVERAL OCCASIONS IN THE VIDEO THOUGH
4 WHERE YOU PULL THE JACK AND MOVE IT FROM PLACE TO
5 PLACE, RIGHT?

6 A. CORRECT.

7 Q. AND THERE ARE OCCASIONS IN THE VIDEO WHERE YOU TAKE
8 YOUR SHIRT OFF AND THEN GO BACK UNDERNEATH THE HOOD,
9 RIGHT?

10 A. YES.

11 Q. OKAY. YOU TALK ABOUT YOUR INABILITY TO PAY FOR THE
12 MECHANICAL STUFF ON THE CAR THAT WAS NEEDED. YOU
13 WERE DRAWING SOCIAL SECURITY AT THE TIME, RIGHT?

14 A. CORRECT.

15 Q. AND YOU ARE IN FACT RECEIVING MONTHLY SOCIAL
16 SECURITY BENEFITS NOW?

17 A. CORRECT.

18 Q. AND YOU HAVE MEDICARE?

19 A. CORRECT.

20 Q. AND SO YOU HAD MEDICARE PAY FOR THE C.T. MYELOGRAM
21 THAT WAS RECOMMENDED IN THIS CASE?

22 A. CORRECT.

23 Q. AND IF YOU NEEDED TO HAVE SURGERY, MEDICARE WOULD
24 PAY FOR IT, RIGHT?

25 BY MR. MONTGOMERY:

1 OBJECTION.

2 ~~BY COMMISSIONER BARDEN:~~

3 OVERRULED. HE CAN ANSWER THE QUESTION.

4 BY THE WITNESS:

5 I BELIEVE THEY WILL.

6 BY COMMISSIONER BARDEN:

7 BUT I DON'T KNOW WHETHER HE KNOWS.

8 CROSS EXAMINATION RESUMED BY MR. EASTERLING:

9 Q. WHEN I TOOK YOUR DEPOSITION -- I'VE TAKEN YOUR
10 DEPOSITION ONCE OR -- WELL, I KNOW TWICE.

11 A. I BELIEVE SO.

12 Q. AND WHEN I DEPOSED YOU LAST IN NOVEMBER OF 2012, I
13 ASKED YOU IF YOU WERE ABLE TO WORK ON YOUR VEHICLE,
14 AND AT LINE 15, YOU TOLD ME NO. DO YOU REMEMBER
15 THAT?

16 A. NO, SIR, I DON'T. IF IT'S IN THERE, I BELIEVE IT.

17 Q. IF IT'S IN THERE, YOU BELIEVE ME?

18 A. YES, SIR.

19 Q. ALL RIGHT. BUT THE VIDEO SHOWS THAT YOU DO IN FACT
20 OR YOU DID IN FACT WORK ON YOUR VEHICLE?

21 A. CORRECT.

22 BY COMMISSIONER BARDEN:

23 DO YOU HAVE THAT? IS THAT PART OF THIS JUST SO
24 ---

25 BY MR. EASTERLING:

1 I DIDN'T HAND UP THE DEPOSITION.

2 BY MR. MONTGOMERY:

3 ARE YOU TALKING ABOUT THE VIDEO OR THE
4 DEPOSITION?

5 BY COMMISSIONER BARDEN:

6 NO, THE DEPOSITION.

7 BY MR. MONTGOMERY:

8 I DON'T KNOW IF I HANDED ---

9 BY COMMISSIONER BARDEN:

10 OR JUST TELL ME THE DATE OF THE DEPOSITION.

11 BY MR. EASTERLING:

12 THE DATE OF THE DEPOSITION IS NOVEMBER 16TH,
13 2012.

14 BY COMMISSIONER BARDEN:

15 THANK YOU.

16 CROSS EXAMINATION RESUMED BY MR. EASTERLING:

17 Q. DO YOU RECALL THAT BACK WHEN WE HAD THE ORIGINAL
18 HEARING IN THIS CASE IN FRONT OF COMMISSIONER
19 WILKERSON WHEN MR. GAGNE WAS REPRESENTING YOU?

20 A. I REMEMBER THE HEARING, YES, SIR.

21 Q. AND THE EMPLOYER SPARTANBURG STEEL MADE AN OFFER TO
22 YOU TO COME BACK TO WORK LIGHT DUTY?

23 A. YES.

24 Q. AND DO YOU REMEMBER THAT THAT OFFER WAS FOR YOU TO
25 GO INTO THE TOOL ROOM, AND IT WAS BASICALLY A

1 SEDENTARY JOB SEDENTARY SIT-DOWN JOB, CORRECT?

2 A. CORRECT.

3 BY MR. MONTGOMERY:

4 OBJECTION. WE'RE HERE ON A CHANGE OF
5 CONDITION. I DON'T KNOW WHAT RELEVANCE THIS HAS.

6 BY COMMISSIONER BARDEN:

7 WELL, IT'S CROSS EXAMINATION. I'M GOING TO LET
8 HIM CONTINUE AND SEE WHERE HE'S GOING.

9 BY MR. MONTGOMERY:

10 FAIR ENOUGH.

11 CROSS EXAMINATION RESUMED BY MR. EASTERLING:

12 Q. AT NO POINT AFTER ---

13 BY COMMISSIONER BARDEN:

14 YOU HAVE A RUNNING OBJECTION THOUGH TO THIS
15 TESTIMONY.

16 CROSS EXAMINATION RESUMED BY MR. EASTERLING:

17 Q. AT NO POINT AFTER THAT OFFER, DID YOU EVER MAKE AN
18 ATTEMPT TO GO BACK TO SPARTANBURG STEEL, DID YOU?

19 A. NO.

20 Q. AND YOU HAVE NOT SINCE MADE AN ATTEMPT TO GO BACK TO
21 SPARTANBURG STEEL EVEN THOUGH THAT LIGHT-DUTY JOB
22 WAS OFFERED?

23 A. NO.

24 Q. AND DO YOU RECALL THAT DR. LATOURETTE ACTUALLY
25 SUGGESTED OR MADE A RECOMMENDATION THAT MAYBE DOING

1 A LIGHT-DUTY SEDENTARY JOB WOULD BE BENEFICIAL FOR
2 YOU? DID YOU KNOW THAT?

3 A. I BELIEVE SO.

4 Q. HOW OLD ARE YOU?

5 A. THIRTY-THREE.

6 BY MR. EASTERLING:

7 I DON'T HAVE ANY OTHER QUESTIONS.

8 BY COMMISSIONER BARDEN:

9 DID YOU SAY 33?

10 BY THE WITNESS:

11 YES, MA'AM.

12 BY COMMISSIONER BARDEN:

13 THANK YOU. ALL RIGHT, MR. MONTGOMERY, ANY
14 QUESTIONS?

15 BY MR. MONTGOMERY:

16 NOTHING, COMMISSIONER.

17 BY COMMISSIONER BARDEN:

18 ALL RIGHT. THAT'S THE CLAIMANT'S CASE. DO YOU
19 HAVE ANY WITNESSES, MR. EASTERLING?

20 BY MR. EASTERLING:

21 I DO NOT.

22 BY COMMISSIONER BARDEN:

23 ALL RIGHT. THAT CONCLUDES THIS PROCEEDING
24 (THERE BEING NO FURTHER QUESTIONS, THIS HEARING WAS
25 CONCLUDED AT THE HOUR OF 10:53 A.M.)

Attachment F

REQUEST FOR PROPOSED ORDER

This document is not an Order. It is a request for a proposed Order. The undersigned reserves the right to modify or delete any portion of this document.

WCC #: 0726308

DATE OF HEARING: September 27, 2013
PLACE OF HEARING: Greenville, SC

CLAIMANT: Shannon Cook

EMPLOYER: Spartanburg Steel

CARRIER: Spartanburg Steel

CLAIMANT'S ATTY: Ryan Montgomery DEFENDANTS' ATTY: Brad Basterling

FINDINGS OF FACT

1. In an admitted accident on September 17, 2007, Claimant injured his back (resulting in bilateral radiculopathy) and sustained admitted psychological overlay. He alleges that (a) he has sustained a change of condition for the worse; or alternatively, (b) Defendants should be required to provide the surgery recommended for Claimant as a Dodge/future medical.
2. Claimant is 33 years of age (medical evidence establishing Claimant's date of birth as 4/26/80).
3. Prior to the hearing with Commissioner Wilkerson, Claimant (a) underwent two lumbar surgeries for a "large" herniated disc; and (b) failed a spinal cord stimulator trial (Claimant's APA #1, pages 3, 7, 11, and 19).
4. Commissioner Wilkerson awarded Claimant permanency benefits to the spine (25%) on June 8, 2011. I base this finding on the Commission's file (See also Claimant's APA #7).
5. Defendants paid the permanency award on June 27, 2011.
6. Claimant's counsel (Mr. Gagne) timely filed a Form 50 on May 9, 2012, alleging a change of condition for the worse. Attached to the Form 50 was an opinion from Dr. Rana that Claimant has sustained a change of condition for the worse (Claimant's APA #8).
7. On May 17, 2013, Claimant's current counsel (Mr. Montgomery) filed a Form 50 requesting a hearing on the change of condition for the worse (Claimant's APA #9).
8. Pursuant to Section 42-17-90 and a sequential review of the treatment records dated after the hearing before Commissioner Wilkerson, I find that Claimant's lumbar spine condition has significantly worsened; after the permanency award was paid, Claimant's back and leg pain increased, and a cane was prescribed for "antalgic gait and leg weakness." Claimant's

Commissioner's Notes for Decision and Order
Page 1 of 4

medications were no longer relieving his pain, and were therefore changed/increased. Treatment records note that (a) morphine was having "very little effect," (b) Claimant's Waddell's signs were consistently "0/5," and, most importantly, (c) Claimant has "*severe [post-surgical] scar tissue formation.*" Claimant has also undergone multiple injections since the date of the permanency award, and he requested another surgical consult/opinion in December 2011. As all these records are from authorized providers, Defendants had notice of Claimant's worsening condition as well as notice of his request for another surgical opinion (e.g., Claimant's APA #1, pages 5-6, 8, 10, 13, 21, 26, 33, 36, 38-39, 45, 48, 50, 53, 57, 59, 75, 80, 85, 97, 102, 108, 110, 114, and 116; *See also* Claimant's APA #3, page 143).

9. Three authorized physicians state that Claimant has sustained a change of condition for the worse, and that Claimant needs further surgery. There is no competing questionnaire or evidence to the contrary (medical evidence in its entirety, including but not limited to Claimant's APA #1, pages 128-128A; Claimant's APA #3, pages 136, 143, and 146; Claimant's APA #5, pages 155, 155A, and 155D).
10. The questionnaires referenced *supra* are clearly supported by the treatment records in evidence; and I therefore accord the questionnaires great weight (medical evidence in its entirety).
11. At the hearing, Claimant appeared to be in genuine discomfort, a presentation which did not appear to be feigned or contrived. I considered the fact that Dr. Kanos found some "exaggerated response" during his exam of Claimant, but given the fact that there is objective pathology after both an MRI and a CT myelogram (such that three physicians, including Dr. Kanos, recommend surgery), I find that Claimant may be merely appealing for help. Moreover, Claimant has not exaggerated his condition to authorized treating physicians; in fact, the opposite is true. To treating physicians, Claimant volunteered the fact that he went out to dinner and a movie with his son, and that he is "trying to do some walking and he is praised." If Claimant were being untruthful about his condition, it would have been far more expedient for him to claim he cannot go anywhere or do anything (Claimant's APA #1, pages 122 and 126; observations of the undersigned; medical evidence in its entirety; Commission file containing pleadings and Orders).
12. Surgery was not a future medical ordered by Commissioner Wilkerson. Although there is no dispute that Claimant now needs surgery, I am unable to order surgery as a future medical (See ORDBR language, page 16 of Commissioner Wilkerson's Order, which limits future medicals to those listed on the Form 14B).
13. Claimant has not reached maximum medical improvement, a finding I base on the opinions of three authorized physicians (e.g., Claimant's APA #1, page 128A).
14. Claimant shall receive reimbursement for his \$25 filing fee, such that he is not charged or responsible for the cost of his Motion to Compel (Claimant's APA #10).
15. Claimant shall receive reimbursement for the CT Myelogram and visits with Dr. Kanos: Dr. Kanos (Defendants' IME) requested a CT Myelogram prior to rendering a surgical opinion. Once Dr. Kanos reviewed the results of the CT Myelogram, he agreed that Claimant needs surgery, although Dr. Kanos does not recommend fusion surgery (Claimant's APA #5, pages 155, 155A,

and 156; Claimant's APA #6, pages 156-157).

16. Dr. Kanos is hereby named the treating surgeon. He is very familiar with Claimant's spinal condition, and his surgical approach in Claimant's case is more conservative than that recommended by other physicians in this case.

17. Permanency is premature.

18. I find that the opinion from Dr. Rana is not inadmissible. Dr. Rana's physical examination mentions the lumbar spine no fewer than 5 times, and he opines that Claimant sustained a change of condition to the spine. Whether or not Dr. Rana found Claimant to be at maximum medical improvement is not dispositive any more than is a statement by a physician to a reasonable degree of medical certainty that a claimant has sustained a repetitive trauma injury. Otherwise, the Commission's involvement would be unnecessary. Dr. Rana does opine that Claimant has an "additional" problem of thoracic spine involvement; whether or not the Commission or any other physician agrees with that statement is a merits issue for adjudication. The undersigned is unwilling to "punish" Claimant for any deficiencies with regard to Dr. Rana's record/opinion, when the authorized treatment records clearly support the an opinion of a worsened condition (Claimant's APA #2).

19. I considered Defendants' video surveillance, but it does nothing to persuade the undersigned to deviate or retreat from this decision.

20. Claimant's average weekly wage is \$846.64, yielding a compensation rate of \$564.46. I base this finding on the Order of Commissioner Wilkerson.

YOU MAY ADD TO/REARRANGE/CLARIFY/AMPLIFY/CORRECT THESE FINDINGS AS NECESSARY IN ORDER TO EFFECTUATE MY INTENT.

INSTRUCTIONS: Attorney Ryan Montgomery to prepare proposed Order unless otherwise agreed upon by the parties. Proposed Order shall include VERBATIM Findings of Fact attached hereto, unless there is a mistake, in which case, it may be corrected. ATTORNEYS ARE RESPONSIBLE FOR PROOFING ORDERS PRIOR TO SUBMISSION. Any other Findings of Fact not inconsistent with those attached hereto may also be included. Proposed Order shall be submitted within 35 days of the date of these order instructions. If you need a transcript order it immediately from court reporter Jan Whitworth in writing at Post Office Box 551, Roebuck, South Carolina 29376. Provide a copy of the proposed order to opposing counsel or *pro se* claimant at least five (5) days prior to the time one is submitted to the Commission. IN YOUR COVER LETTER TO ME, PLEASE INCLUDE A STATEMENT THAT THE OPPOSING PARTY HAS NO OBJECTION TO THE ORDER AS WRITTEN.



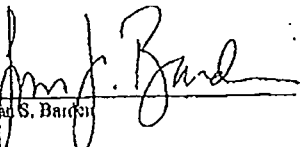
The Commission now requires the proposed order be e-mailed to klove@wcc.sc.gov and all parties in Word format.

FORMAT for DECISION & ORDER:

1. APA Submissions
2. Stipulations
3. Statement of Case (Contentions of parties, stated concisely)
4. Evidence of Case (synopsis of evidence, including testimony and medical reports)

Commissioner's Notes for Decision and Order
Page 3 of 4

5. Findings of Fact – numbered *(Do NOT delete any of the above findings; however, the prevailing party may add to support decision, except re: credibility.)*
6. Conclusions of Law *(Cite code sections and case law as applicable.)*
7. Award


Susan S. Barden

South Carolina Workers' Compensation Commission

Attachment G

DECISION AND ORDER
OF
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0726308

Shannon Cook, Employee
v.
Spartanburg Steel, Employer

HEARING: Held in Greenville, SC
September 27, 2013

APPEARANCES: Employee was represented by:

Ryan S. Montgomery, Esquire
Ryan Montgomery Attorney at Law, LLC
108 Mills Avenue
Greenville, South Carolina 29605

Employer/Carrier was represented by:
Brad B. Easterling, Esquire
Turner Padgett Graham & Laney
200 East Broad Street
Greenville, South Carolina 29601

PURPOSE OF THE HEARING: To determine only the issues on the
Form 50 Change of Condition Request
And/or Additional Medical Pursuant to
Commission Order

DECISION AND ORDER: The Honorable Susan Barden

DATE OF DECISION: November 25, 2014

I. APA SUBMISSIONS/EXHIBITS

Employee:

1.	Carolinas Center for Advanced Management of Pain	7/13/2011 - 9/13/13	1 - 128, 128A
2.	Carolina Health Professionals, LLC	2/16/2012	129 - 132
3.	Orthopedic Specialties of Spartanburg	8/15/2012 - 6/12/2013	133 - 146
4.	Piedmont Imaging	9/13/2012	147 - 148
5.	Southeastern Neurosurgical & Spine	12/14/2012 - 9/11/2013	149 - 155, 155A-E
6.	Greenville Radiology	7/25/2013	156 - 159
7.	Decision and Order	6/8/2011	160 - 175
8.	Prior Form 50	5/9/2012	176 - 181

Employer:

EXHIBIT#

1. Young v. Tide Craft, Inc. 270 S.C. 453; 242 S.E.2d 671 (1978)
2. Allen v. Benson Outdoor Advertising Co., 236 S.C. 22; 112 S.E.2d 722 (1960);
3. Deposition of Claimant
4. Deposition of Dr. Phillips;
5. Deposition of Dr. Kanos (withdrawn at hearing);
6. Surveillance Video

II. Stipulations

1. The South Carolina Workers' Compensation Commission has jurisdiction over this matter;
1. Hearing Venue is properly set in Greenville County per party stipulation as the parties hereto previously agreed to move this hearing from Spartanburg to Greenville County;
2. The date of injury is September 17, 2007;
3. Claimant's average weekly wage is \$846.64 yielding a compensation rate of \$564.46;
4. Defendants had previously sought an Order granting a continuance of the hearing in order to take the deposition of Dr. Charles Kanos. At the hearing, this request was withdrawn by the defendants and the parties elected to proceed under the current APA submissions

and legal arguments.

5. Both parties are subject to the provisions of the South Carolina Workers' Compensation Act.

III. STATEMENT OF CASE

A. Employee's Position

It was the position of the employee that he had sustained a change of condition for the worse to include a need for surgery. Procedurally, this matter was originally handled by attorney Tom Gagne of Greenville, South Carolina. The underlying matter went to hearing on June 8, 2011 at which time permanency and the need for future medical was addressed. Commissioner Williams awarded Claimant 25% permanent partial disability to the spine, which award was paid on June 27, 2011. On May 9, 2012, less than one year later, counsel for the claimant, Tom Gagne, filed a Form 50 (notice of claim only) alleging a change of condition for the worse and attached a medical report from Dr. Tony Rana indicating the claimant had sustained a change of condition for the worse. Between that filing and May 17, 2013, the claimant terminated his legal representation with Tom Gagne and retained, attorney Ryan Montgomery of Greenville, South Carolina. On May 17, 2013, Mr. Montgomery filed a supplemental Form 50 requested a hearing to address the change of condition for the worse previously filed by Tom Gagne.

From a medical perspective and once the claimant alleged a change of condition for the worse as of May 9, 2012, the defendants referred the claimant to Dr. Marco Rodriguez who opined that the claimant needed a lumbar fusion. The defendants then referred the claimant to Dr. Charles Kanos who opined that the claimant was in need of a CT myelogram to definitely determine whether or not the Claimant was in need of surgery. Dr. Kanos recommended against the lumbar fusion as recommended by Dr. Rodriguez. At this point the medical treatment from

defendants was discontinued except for the medical treatment with Dr. Phillip LaTourette, the claimant's authorized pain management physician. Claimant on his own obtained the CT myelogram and a return visit to Dr. Charles Kanos. At that appointment, it was the medical opinion of Dr. Kanos that the claimant needed surgery and that his condition had worsened. The claimant took the position on the date of the hearing that Drs. Latourette, Kanos, Rodriguez, and Rana had all opined that the claimant has sustained a change of condition for the worse.

Realizing that the defendants would argue that the case was a legal issue based upon the Form 50 Claim only and the case of the Allen v. Benson Outdoor Advertising, 236 S.C. 22 (1960), claimant responded to the case of Allen v. Benson but arguing the distinction in that case and the case at bar. In the Allen case, the issue was whether the case must be heard within the twelve month period. Allen timely filed an application but it was not heard within one year. That case did not address anything associated with filing the application for a claim only in order to toll the statutory one year requirement as required in §42-17-90. The Allen Court goes on to cite and incorporate additional jurisdictional opinions noting that "the filing of a claim for further compensation within the statutory period and partial but not complete development thereof with such period, with loss of jurisdiction by the Commissioner would be an absurd result which the legislature certainly did not have in mind...a claim if filed within the statutory period applicable to the nature of the claim filed." The Allen court held and only held that the application for review was made within one year and so they had jurisdiction to hear the claim. It did not go beyond that and extrapolating sentences out of context does not change that.

In addition, when claimant filed the Form 50 hearing request, the medical report of Dr. Tony Rana had already been filed in support of the change of condition.

B. Employer's Position

The employer argues claimant has not sustained a change of condition for the worse. However, the defendants' primary position(s) are that the Commission need not reach that decision as it lacks jurisdiction to hear the case based upon the following three arguments:

First, the defendants argue that the claimant's claim is barred by S.C. Code 42-17-90. The last sentence under 42-17-90 reads: "...the review [on a claim for change of condition] must not be made after twelve months from the date of the last payment of compensation pursuant to an award provided by this title." (emphasis added). Defendants submitted the case of Allen v. Benson Outdoor Advertising, 236 S.C. 22 (1960), which defendants contend requires that a Request for Hearing be filed within one year from the date of the last payment of compensation. Defendants argue this requires the filing of a Form 50, Request for Hearing, and not simply a Form 50 – Notice of Claim Only. On May 9, 2012, the claimant's prior counsel, Tom Gagne, only filed a Form 50 – Notice of Claim alleging a change of condition but did not request a hearing. Based on Allen, defendants contend the claimant is barred from proceeding under a change of condition argument and the undersigned Commissioner does not have jurisdiction over the claim.

Second, the defendants argue that, even if the Form 50 - Notice of Claim only did toll the statute of limitations, the claimant still cannot proceed with his change of condition request as the claimant's prior counsel relied upon (submitted with the May 9, 2012 Form 50 – Notice of Claim only) a medical report from Dr. Tony Rana, which defendants contend is nebulous in nature and gives no factual basis upon which the opinion is based. For this argument, defendants rely on the case of Young v. Tide Craft, 270 S.C. 453, 242 S.E.2d 671 (1978), which holds that expert opinion is inadmissible if its factual foundation is nebulous. In Dr. Rana's February 16,

2012 report, which claimant relies upon to support his claim for change of condition, relative to claimant's lumbar spine, Dr. Rana assigned the exact same medical impairment rating as his did in his earlier July 14, 2010 report. In his February 16, 2012 report, Dr. Rana, as he also did in his July 14, 2010 report, opines claimant remains at MMI for the injuries received as result of his September 17, 2007 work accident. Defendants submit that, inherently, there can be no change of condition if claimant's MMI status is unchanged subsequent to the last payment of compensation. The only difference noted in Dr. Rana's two IME reports is found in his February 16, 2012 report where he references claimant's thoracic disc herniation at the T8/T9 level. However, nowhere in his February 16, 2012 report does Dr. Rana causally relate claimant's thoracic condition to his September 17, 2007 work injury.

Finally, defendants argue that claimant's claim should be barred by South Carolina Workers' Compensation Regulation 67-602(C), which requires the moving party to attach to the hearing request form a medical report(s) indicating a change in claimant's condition. In this claim, there was no medical report attached to the May 17, 2013 Form 50 nor to the August 9, 2013 Form 50, the only two Forms 50 requesting a hearing.

IV. EVIDENCE OF CASE

A. From the Defendants

Defendants submitted the deposition transcript of Dr. LaTourette. The defendants submitted surveillance video which was admitted into evidence without objection.

B. From the Claimant

The claimant by way of previous counsel submitted a Form 50 Change of Condition Application (Claim Only). on and in number 11a of the application states "Claimant comes for a change of condition". See APA 8, pp. 176-177. Pursuant to §42-17-90, the previous counsel

included a medical report from Tony Rana, M.D., dated February 16, 2012. See APA 8, pp. 178-180. Dr. Rana notes that the claimant "returns for evaluation of a worsening of condition." *Id.* at 178. Dr. Rana went on to provide a basis for his opinion in that he identifies "treatment since his prior evaluation has included psychological counseling by Dr. Tollison and transforaminal epidural steroid injections by Dr. LaTourette" *Id.*

Following the application for a change of condition, Dr. Latourette referred Mr. Cook on August 15, 2012 for an evaluation with Dr. Marco Rodriguez at Orthopaedic Specialties which was authorized by the defendants. See Clmt. APA 3. Dr. Rodriguez opined that the claimant "shows a positive straight leg raise on the left side." *Id.* at 136. Dr. Rodriguez recommended and prescribed a MRI conducted at Piedmont Imaging on September 13, 2012. Clmt. APA 4, p. 14. Presumably, Dr. Rodriguez reviewed the MRI film studies and added to his report indicating the MRI showed "L5-S1 recurrent herniation compression the L5 and S1 nerve roots on the left side". *Id.* "It is truly a recurrent herniation". *Id.* Dr. Rodriguez further opined that the claimant should be scheduled for surgery to include a lumbar fusion." Dr. Rodriguez also opined that the recurrent herniation was causally related to his work injury of 9/17/07 and that Mr. Cook had sustained a change of condition for the worse. *Id.* at 146.

The employer/carrier referred Mr. Cook for another medical opinion. This time he was sent to Charles Kanos, M.D. of SouthEastern Neurosurgical. According to the Kanos report of December 14, 2012 "new patient is seen at the neurosurgical consultation at the request of WC for evaluation of low back pain." Clmt. APA 5, p. 149. Kanos noted he had positive straight leg raise on the left. Kanos saw the claimant again on February 27, 2013 on a "WC follow up on low back pain". *Id.* at 152. Claimant was noted to have post-surgical changes on L5-S1 and noted that the most appropriate treatment plan would be a Lumbar CT myelogram with emphasis

on film myelography looking for fill defects which if there was a defect then a decompression surgery would help. *Id.* at pp. 152-153.

Claimant terminated his relationship with previous counsel and hired Ryan Montgomery on May 16, 2013 (See record as a whole and claimant's testimony). Current counsel amended the previously filed Form 50 Claim only and filed an application for change of condition by way of a Form 50 requesting a hearing on May 17, 2013 and subsequently filed another Form 50 on August 9, 2013 (See Commission file).

On June 25, 2013, Dr. Kanos opined that the claimant's need for the CT Myelogram was medically necessary and causally related to his workers' compensation injury and that the claimant had sustained a change of condition for the worse. Clmt APA 5, p. 155. Despite the opinion from their own doctor, Dr. Kanos, the carrier failed to provide this CT Myelogram and the claimant underwent that examination on his own the results of which are located at Clmt. APA 6 and incorporated herein by reference.

The claimant then returned to the workers' compensation carrier-selected physician, Dr. Kanos, but this time at his own expense. Clmt. APA, p. 155e. In that appointment, Dr. Kanos opined that the claimant was in need of a L5-S1 decompression and a left L4-5 foraminotomy Clmt APA, p. 155c-d. In addition, Dr. Kanos completed another questionnaire indicating that Mr. Cook had sustained a change of condition for the worse as he needs additional medical treatment. See Clmt APA, p. 155a.

In addition to these authorized physicians (Dr. Rodriguez and Dr. Kanos), the claimant also treated with Dr. Phillip LaTourette, the authorized treating physician for Mr. Cook's pain management. After reviewing the reports from Rodriguez and Kanos, Dr. LaTourette concurred that Mr. Cook had sustained a change of condition for the worse. Clmt. APA, p. 128a.

The defendants submitted a surveillance video received without objection wherein the claimant works under the hood of a vehicle for approximately 1 hour and moves a commercial car jack in the video. The video was taken approximately 9-10 months prior to the hearing. See Defendants' APA and the Hr. Tr. testimony of the claimant generally.

On cross examination, claimant testified that he was offered a light duty position by the employer before the hearing with Commissioner Wilkerson June 8, 2011 but to date he has not contacted the employer with respect to that light duty position. See Hr. Tr. generally.

V. FINDINGS OF FACT

1. In an admitted accident on September 17, 2007, Claimant injured his back (resulting in bilateral radiculopathy) and sustained admitted psychological overlay. He alleges that (a) he has sustained a change of condition for the worse; or alternatively, (b) Defendants should be required to provide the surgery recommended for Claimant as a *Dodge*/future medical.
2. Claimant is 33 years of age (medical evidence establishing Claimant's date of birth as 4/26/80).
3. Prior to the hearing with Commissioner Wilkerson, Claimant (a) underwent two lumbar surgeries for a "large" herniated disc; and (b) failed a spinal cord stimulator trial (Claimant's APA #1, pages 3, 7, 11, and 19).
4. Commissioner Wilkerson awarded Claimant permanency benefits to the spine (25%) on June 8, 2011. I base this finding on the Commission's file (See also Claimant's APA #7).
5. Defendants paid the permanency award on June 27, 2011.
6. Claimant's counsel (Mr. Gagne) timely filed a Form 50 on May 9, 2012, alleging a change of condition for the worse. Attached to the Form 50 was an opinion from Dr. Rana that Claimant has sustained a change of condition for the worse (Claimant's APA #8).
7. On May 17, 2013, Claimant's current counsel (Mr. Montgomery) filed a Form 50 requesting a hearing on the change of condition for the worse (Claimant's APA #9).
8. Pursuant to Section 42-17-90 and a sequential review of the treatment records dated after the hearing before Commissioner Wilkerson, I find that Claimant's lumbar spine condition has significantly worsened: after the permanency award was paid; Claimant's

back and leg pain increased, and a cane was prescribed for "antalgic gait and leg weakness." Claimant's medications were no longer relieving his pain, and were therefore changed/increased. Treatment records note that (a) morphine was having "very little effect," (b) Claimant's Waddell's signs were consistently "0/5," and, most importantly, (c) Claimant has "*severe [post-surgical] scar tissue formation*." Claimant has also undergone multiple injections since the date of the permanency award, and he requested another surgical consult/opinion in December 2011. As all these records are from authorized providers, Defendants had notice of Claimant's worsening condition as well as notice of his request for another surgical opinion (e.g., Claimant's APA #1, pages 5-6, 8, 10, 13, 21, 26, 33, 36, 38-39, 45, 48, 50, 53, 57, 59, 75, 80, 85, 97, 102, 108, 110, 114, and 116; *See also* Claimant's APA #3, page 143).

9. Three authorized physicians state that Claimant has sustained a change of condition for the worse, and that Claimant needs further surgery. There is no competing questionnaire or evidence to the contrary (medical evidence in its entirety, including but not limited to Claimant's APA #1, pages 128-128A; Claimant's APA #3, pages 136, 143, and 146; Claimant's APA #5, pages 155, 155A, and 155D).
10. The questionnaires referenced *supra* are clearly supported by the treatment records in evidence, and I therefore accord the questionnaires great weight (medical evidence in its entirety).
11. At the hearing, Claimant appeared to be in genuine discomfort, a presentation which did not appear to be feigned or contrived. I considered the fact that Dr. Kanos found some "exaggerated response" during his exam of Claimant, but given the fact that there is objective pathology after both an MRI and a CT myelogram (such that three physicians, including Dr. Kanos, recommend surgery), I find that Claimant may be merely appealing for help. Moreover, Claimant has not exaggerated his condition to authorized treating physicians; in fact, the opposite is true. To treating physicians, Claimant volunteered the fact that he went out to dinner and a movie with his son, and that he is "trying to do some walking and he is praised." If Claimant were being untruthful about his condition, it would have been far more expedient for him to claim he cannot go anywhere or do anything (Claimant's APA #1, pages 122 and 126; observations of the undersigned; medical evidence in its entirety; Commission file containing pleadings and Orders).
12. Surgery was not a future medical ordered by Commissioner Wilkerson. Although there is no dispute that Claimant now needs surgery, I am unable to order surgery as a future medical under Commissioner Wilkerson's Order (See ORDER language, page 16 of Commissioner Wilkerson's Order, which limits future medicals to those listed on the Form 14B).
13. Claimant has not reached maximum medical improvement, a finding I base on the opinions of three authorized physicians (e.g., Claimant's APA #1, page 128A).
14. Claimant shall receive reimbursement for his \$25 filing fee, such that he is not charged or responsible for the cost of his Motion to Compel (Claimant's APA #10).
15. Claimant shall receive reimbursement for the CT Myelogram and visits with Dr. Kanos:

Dr. Kanos (Defendants' IME) requested a CT Myelogram prior to rendering a surgical opinion. Once Dr. Kanos reviewed the results of the CT Myelogram, he agreed that Claimant needs surgery, although Dr. Kanos does not recommend fusion surgery (Claimant's APA #5, pages 155, 155A, and 156; Claimant's APA #6, pages 156-157).

16. Dr. Kanos is hereby named the treating surgeon. He is very familiar with Claimant's spinal condition, and his surgical approach in Claimant's case is more conservative than that recommended by other physicians in this case.
17. Permanency is premature.
18. I find that the opinion from Dr. Rana is not inadmissible. Dr. Rana's physical examination mentions the lumbar spine no fewer than 5 times, and he opines that Claimant sustained a change of condition to the spine. Whether or not Dr. Rana found Claimant to be at maximum medical improvement is not dispositive any more than is a statement by a physician to a reasonable degree of medical certainty that a claimant has sustained a repetitive trauma injury. Otherwise, the Commission's involvement would be unnecessary. Dr. Rana does opine that Claimant has an "additional" problem of thoracic spine involvement; whether or not the Commission or any other physician agrees with that statement is a merits issue for adjudication. The undersigned is unwilling to "punish" Claimant for any deficiencies with regard to Dr. Rana's record/opinion, when the authorized treatment records clearly support an opinion of a worsened condition (Claimant's APA #2).
19. I considered Defendants' video surveillance, but it does nothing to persuade the undersigned to deviate or retreat from this decision.
20. Claimant's average weekly wage is \$846.64, yielding a compensation rate of \$564.46. I base this finding on the Order of Commissioner Wilkerson.
21. Any issue relating to TTD and permanency is held in abeyance, as the only issue before the undersigned was whether the claimant has sustained a change of condition for the worse.
22. Based upon the medical records as a whole to include Dr. Kanos' medical notes, I find that the claimant is entitled to additional medical treatment through Dr. Kanos, including but not limited to the recommended surgery, as it is causally related to the underlying injury, medically necessary and will tend to lessen the period of disability;

VI. CONCLUSIONS OF LAW

Pursuant to S.C. Code Ann. and based upon the above findings of fact, the APA submissions from all parties, I make the following Conclusions of Law:

1. Pursuant to §42-17-90, the evidence as a whole and the above findings of facts, the claimant has sustained a change of condition for worse;
2. Pursuant to §42-17-90, the evidence as a whole and the above findings of facts, claimant's previous counsel timely filed an application for a change of condition;
3. All applicable time limits in S.C. Code Ann., §42-17-90 were tolled, or satisfied, when claimant filed his Form 50 on or about May 9, 2012;
4. Pursuant to §42-17-90, the evidence as a whole, the above findings of fact and the case of Young v. Tide Craft, Inc. Dr. Rana's opinion was based enough on fact to create an issue as to the merits to be adjudicated at this hearing and does not preclude the claimant from now pursuing a change of condition request;
5. Pursuant to the South Carolina case of Allen v. Benson Outdoor Advertising Co. 236 S.C. 22; 112 S.E2d 722 (1960) this case at bar is not precluded from being brought for a change of condition. The undersigned Commissioner notes the language within the Allen case which allows for "the filing of a claim for further compensation within the statutory period" is enough and that loss of jurisdiction by the commission would be an *absurd* result which legislature certainly did not have in mind. Id. at 30;
6. Pursuant to §42-15-60, the claimant is entitled to additional medical treatment with Dr. Charles Kanos as this treatment is medically necessary, causally related and will tend to lessen the period of disability;
7. Pursuant to §42-15-60, all medical treatment with Dr. Kanos was causally related, medically necessary and would tend to lessen the period of disability. Claimant is entitled to reimbursement of any and all expenses and co-pays associated with this treatment;

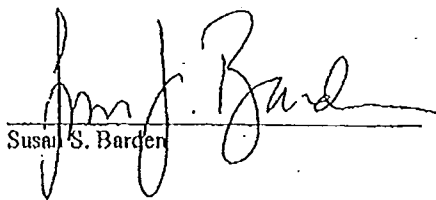
8. Pursuant to Title 42 of the South Carolina Code Annotated, et. seq., all issues not addressed herein are hereby held in abeyance, including but not limited to additional permanency.

VII. ORDER

IT IS, THEREFORE, ORDERED that the Findings of Fact and Conclusions of Law are incorporated herein verbatim and this Order is based upon the above cited Findings of Fact and Conclusions of Law. It is further Ordered:

1. The defendants shall reimburse the claimant his \$25.00 fee associated with the Motion to Compel and previously ordered by Order of the Commission;
2. The defendants shall reimburse the claimant for any and all expenses associated with the medical treatment as directed by or provided by Dr. Charles Kanos;
3. The defendants shall provide ongoing medical care through Dr. Charles Kanos;
and
4. All other issues not addressed herein are hereby held in abeyance pending a final order of the Commission.

AND IT IS SO ORDERED.


Susan S. Barden

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies):
November 25, 2013

By: Kristi Love, Administrative Assistant to Commissioner Barden

Attachment H

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 0726308

SHANNON COOK,	)	
	)	FULL COMMISSION HEARING
CLAIMANT,	)	PANEL B
vs.	)	
	)	COMMISSIONER McCASKILL
SPARTANBURG STEEL	)	COMMISSIONER WILKERSON
PRODUCTS,	)	COMMISSIONER ROCHE - CHAIR
	)	
AND	)	
	)	
SELF INSURED,	)	
	)	
DEFENDANT.	)	



THE WORKERS' COMPENSATION HEARING, TAKEN BEFORE
CORA ELLIS BRUTON, A NOTARY PUBLIC IN AND FOR THE
STATE OF SOUTH CAROLINA, COMMENCING AT THE HOUR OF
3:44 P.M., MONDAY, MARCH 17, 2014, SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION, 1333 MAIN STREET,
COLUMBIA, SOUTH CAROLINA 29202.

CORA ELLIS BRUTON
COURT REPORTER
131 BROWNING COURT
LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

APPEARANCES

FOR THE CLAIMANT
RYAN S. MONTGOMERY, ESQUIRE
ATTORNEY AT LAW, LLC
108 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-373-7333

FOR THE DEFENDANT
BRAD B. EASTERLING, ESQUIRE
MCANGUS, GOUDELOCK & COURIE, LLC
POST OFFICE BOX 2980
GREENVILLE, SOUTH CAROLINA 29602
843-239-6736

REPORTED BY
CORA ELLIS BRUTON
COURT REPORTER
131 BROWNING COURT
LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

INDEX

BY MR. EASTERLING 3
BY MR. MONTGOMERY 10
BY MR. EASTERLING 15
CERTIFICATE 17

EXHIBITS

(No Exhibits Proffered)

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 THE COURT REPORTER: Today is March 17, 2014.

2 This is South Carolina Workers' Compensation Case
3 Number 0726308. This is the case of Shannon Cook,
4 Claimant, versus Spartanburg Steel Products, Employer
5 and they are self employed.

6 The Appellant is the Defendant, represented by
7 Attorney Brad B. Easterling. The Respondent is
8 represented by Attorney Ryan S. Montgomery.

9 Each side is allowed ten minutes for oral
10 argument and Appellant three minutes in reply. You
11 are requested to argue the grounds of exception and
12 stay within the record.

13 THE COURT: All right. Mr. Easterling.

14 BY MR. EASTERLING: May it please the Commission.

15 I'm here representing Spartanburg Steel. As brief
16 background; this case involves an admitted injury to
17 Mr. Cook's lumbar spine that occurred back in
18 September of 2007. As Commissioner Wilkerson already
19 stated he heard the underlying claim and issued an
20 Order in June of 2011 wherein he awarded the Claimant
21 25 percent disability to the spine. In addition to
22 that PPD award he gave the Claimant ongoing medical
23 per the Form 14-B that was completed by Dr. Latourette
24 and dated June 16th, 2010. On that Form 14-B the
25 medical that was awarded was pain medication, spinal

 CORA ELLIS BRUTON - COURT REPORTER
 131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
 803-397-0189

1 injections and physical therapy and potentially
2 psychological evaluation and treatment. From the date
3 of that Order -- of Commissioner Wilkerson's Order the
4 Defendant has -- did provide and has continued to
5 provide and still provides the medical as outlined on
6 the Form 14-B. The Defendants paid the 25 percent
7 disability award on June 27th, 2011. The Claimant,
8 while represented by different counsel, filed a Form
9 50, Notice of Claim Only on May 9th, 2012 alleging a
10 Change of Condition. To that May 9th, 2012 Notice of
11 Claim Only he attached an IME report of Dr. Tony Rana
12 which was dated February the 16th of 2012. In that
13 IME report from Dr. Rana which was in support of his
14 Change of Condition claim he had attached to the back
15 a check the box questionnaire which said Claimant had
16 sustained a Change of Condition. On May 17th, 2013
17 more than one year later and two years from the date
18 of the original award, Claimant retained new counsel,
19 Mr. Montgomery, and for the first time filed a request
20 for hearing. No mention was made in that May 2013
21 Form 50 that the Claimant was alleging a Change of
22 Condition. He had only asked, I believe, for more
23 medical, TTD and what have you. Mr. Montgomery filed
24 an Amended Form 50 in August 2013 which did state or
25 ask or allege for a Change of Condition. A hearing

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 was held before Commissioner Barden and by Order dated
2 November 25th, 2013 Commissioner Barden found the
3 Claimant did, in fact, sustain a Change of Condition
4 and she found the Claimant was not at MMI and was
5 entitled to additional medical treatment as directed
6 by Dr. Kanos. The Defendants timely filed a Form 30
7 and we're before this Honorable Commission denying
8 that the Claimant has sustained a Change of Condition.
9 Our Supreme Court has recognized that the purpose of
10 permitting an action for a Change of Condition is to
11 "increase compensation where the facts of the case
12 reveal that the Change in Condition is for the worse,
13 and to allow Defendants to diminish compensation where
14 the change is for the better." Here the facts of this
15 case do not support a Change of Condition for the
16 worse. As you, of course know, the Statute that we
17 rely on is 42-17-90 which provides the -- in essence,
18 the Statute of Limitations for filing a Change of
19 Condition claim or a time restriction, and it states
20 and I quote, "The review must not be made after 12
21 months from the date of the last payment of
22 compensation." The case of Allen v. Benson which was
23 handed up to Commissioner Barden, which I have a copy
24 here if it's not in the file, is the only case that we
25 have -- the only court of record case that we have

CORA ELLIS BRUTON -- COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 that addresses this issue of filing a Change of
2 Condition or requesting a hearing, as it were, within
3 the 12 months from the last payment of compensation.
4 That case, an older case obviously, was interpreted
5 though that the hearing for a Change of Condition
6 doesn't have to take place within 12 months because
7 obviously Claimants can't control the docket, they
8 can't control scheduling. But the application for
9 review has to be filed within 12 months from the date
10 of last compensation -- payment of last compensation.
11 Now Mr. Montgomery will likely argue 42-15-40 versus
12 42-17-90 and ask what's the difference, why can we
13 file a Form 50 Notice of Claim and toll 42-15-40 but
14 we can't do it in 42-17-90 cases. Well, if you look
15 at 42-15-40 it states clearly and uses the language,
16 "filing a claim", whereas in 42-17-90 makes no such
17 mention of filing a claim and clearly says that an
18 application for review must be filed. For that reason
19 a Notice of Claim Only, which was filed here in May of
20 2012, it does not toll the Statute of Limitation and
21 would only subject Employers to unreasonable amounts
22 of indefinite ongoing liability if we allowed this
23 practice to continue. You have to obviously ask
24 yourself why did the Legislature come up with 42-17-90
25 in the first place. I mean what was their theory,

CORA ELLIS BRUTON - COURT REPORTER /
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 what was their -- what were they thinking? Obviously
2 it was to limit the liability to Employers and not
3 have them subjected to ongoing medical indefinitely
4 into the future, not allowing Claimants to file a
5 Notice of Claim Only, toll -- effectively toll the
6 Statute of Limitations and then, you know, develop a
7 claim however many years, months later when a Change
8 of Condition may or may not occur. And our point
9 again, is that it would subject Employers to
10 unreasonable liability. Now, in regards to the IME
11 report that was attached to the Claimant's original
12 Notice of Claim Only from Dr. Tony Rana, we will
13 obviously argue that the claim is barred procedurally
14 per the arguments that I just made, but more -- or in
15 addition is the fact that Dr. Rana's report -- his IME
16 report that was issued in support of Change of
17 Condition is nebulous or has -- and it's not based on
18 any fact. In the underlying claim that Commissioner
19 Wilkerson heard, previous counsel sent his client to
20 Dr. Rana originally and that IME report was dated July
21 of 2010. In support of his Change of Condition claim
22 previous counsel sent the Claimant back to Dr. Rana
23 who issued another report dated February 16th, 2012
24 and again, as I mentioned before, this is the report
25 that had him check the box, "has the Claimant

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 sustained a Change of Condition?" and that check the
2 box was, of course, checked "yes". But if you look at
3 the two reports, the one from the underlying claim and
4 then the one supporting the Change of Condition,
5 they're almost identical reports save for the check
6 the box. In the -- in the IME -- in the subsequent
7 report that's submitted to support the Change of
8 Condition Dr. Rana opines that the Claimant is still
9 at MMI, remains at MMI and has the exact same
10 impairment rating that he had in the underlying claim.
11 All he did was attach a statement that said -- or
12 check the box that said the Claimant has sustained a
13 Change of Condition for the worse. Our South Carolina
14 Courts have said in the case of Young v. Tidecraft,
15 which was also handed up at the original -- at the
16 Change of Condition hearing, it says, "It is well
17 established in our law that opinions of an expert must
18 be based upon facts sufficient to form a basis for an
19 opinion. Expert evidence is inadmissible if its
20 factual foundation is nebulous." If you look at these
21 two reports they're exactly the same and I can't
22 understand how a Claimant can change -- can claim a
23 Change of Condition claim for the worse when he has an
24 IME report in support of that contention that says
25 he's still at MMI. And also says that he has the same

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 impairment rating as he had before. That is also --
2 Commissioner Barden highlighted that fact in her Order
3 and she also had problem with the report of Dr. Rana
4 at Finding of Fact 18 she's quote -- and the Order
5 quotes, "I'm unwilling to punish the Claimant for any
6 deficiencies in Dr. Rana's report." So -- I mean in
7 the Order itself Commissioner Barden acknowledges the
8 weakness or the nebulousness, for lack of a better
9 word, in Dr. Rana's report. And my client cannot be
10 punished for a Claimant's poor choice in IME
11 physicians. Dr. Rana's report is based in no way on
12 any fact and again, is essentially the same report as
13 he -- as he had in the underlying claim. I would also
14 point out that this is, in effect, not a Change of
15 Condition. That the Claimant has not sustained a
16 Change of Condition and is -- and this is merely a
17 continuation of his problems that he's had. And
18 again, the Defendants are not making light of the
19 condition -- I mean of the Claimant's injury; he
20 sustained a significant injury. He was diagnosed with
21 post laminectomy syndrome which is a diagnosis that
22 Dr. Latourette gave him very early on; obviously much
23 before a Change of Condition claim was filed. And in
24 his deposition -- his deposition was actually -- Dr.
25 Latourette who is the treating physician, who

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 continues to treat the Claimant now, in his deposition
2 that was taken once in July of 2012 and his deposition
3 again was taken in August of 2013. Once it was taken
4 while Mr. Montgomery -- I'm sorry, while Mr. Gagne
5 represented the Claimant and again subsequently when
6 Mr. Montgomery got involved. And after he -- after
7 his deposition was taken the first time after the
8 Notice of Claim for Change of Condition was filed Dr.
9 Latourette --

10 THE COURT: Finish your thought.

11 MR. EASTERLING: I'm sorry?

12 THE COURT: Finish your thought. You're out of
13 time but you can finish your thought.

14 MR. EASTERLING: Oh, okay. I can't hear that,
15 I'm sorry. He testified in that deposit that the
16 Claimant had not sustained a Change of Condition and
17 that testimony came in after the Notice of Claim was
18 filed. In his August 2013 deposition --

19 THE COURT: Okay. Thank you.

20 MR. EASTERLING: -- he said the same thing.

21 THE COURT: Mr. Montgomery.

22 BY MR. MONTGOMERY: Thank you. May it please the
23 Commission. Ryan Montgomery on behalf of Mr. Shannon
24 Cook, the Claimant. I'm going to take Mr.
25 Easterling's arguments and go in reverse if that's

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 okay with you, because I think the greater weight is
2 probably with his first argument, so I want to address
3 the other one upfront. The Form 50 with the medical
4 report, I think this Appellate Commission will
5 recognize and has held in the past that while the
6 Regulation requires a medical record be attached, that
7 actually strengthens the law, makes it harder on the
8 Claimant and that's been taken up at the Circuit Court
9 before in the case of Backman v. CVS, which basically
10 says while the medical documentation is requested it's
11 not -- can't be required because it makes the Statute
12 stricter in its essence. Now that all being said I
13 think the main thrust of this is whether the Claim 50
14 -- the Form 50 claim only is enough to toll the
15 Statute or whether it's not. That's how I see it in
16 my simple thought process. I think the Legislature's
17 intent is to put all parties on notice of whether a
18 party intends to pursue a Change of Condition for the
19 worse. The timeline is important in this case,
20 because as Mr. Easterling states the facts, he is
21 correct, it -- the claim was filed prior to the date
22 of the Statute of Limitations run; the Claim Only with
23 the required medical record attached. Following that,
24 though, the Defendants sent the Claimant back to Dr.
25 Latourette, the authorized treating physician, who

GORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 sent him to Dr. Marco Rodriguez, an orthopedic. And
2 not only did he go there one time, he went there three
3 times, all paid for by the Defendants. Dr. Rodriguez
4 requested an MRI be prescribed and approved; it was.
5 It was then determined by Dr. Rodriguez that the
6 Claimant needed a lumbar fusion. Now that was in
7 December -- I'm sorry, on October 1st of 2012, long
8 after the Change of Condition Statute would have run,
9 but for the fact that the application was filed. The
10 Defendants didn't stop there. They then sent him to
11 Dr. Kanos for a second opinion to determine whether
12 the lumbar fusion was medically necessary -- was
13 medical and necessary. And he saw Dr. Kanos on
14 December 4th, 2012. Dr. Kanos said, you know what, I
15 need the benefit of an MRI and he waited for the
16 report or the disc to come over from Dr. Rodriguez.
17 He goes back to see the Claimant in February 27th of
18 2013, now with the benefit of the MRI. Okay? So here
19 we are, filed this Form 50 in May 9th of 2012 and here
20 we are February 27th, of 2013. Had he filed for a
21 hearing then the hearing would have long occurred and
22 they're still sending him to a doctor to determine and
23 fully develop whether he's had a Change of Condition;
24 the Defendants are, not the Claimant. Okay? Kanos
25 then recommends a CT Myelogram to tell definitively

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 whether he needs a surgery. At that point and only at
2 that point was the medical treatment then denied and a
3 Form 50 Request for Hearing on Change of Condition
4 submitted. Now, to that point Mr. Easterling is
5 correct in that he cites the Allen case, but what he
6 doesn't draw your attention to is what the Allen case
7 says in the anecdotes. They cite a West Virginia case
8 and quote, "The filing of a claim for further
9 compensation within the statutory period and partial
10 but not complete development thereof within such
11 period with loss of jurisdiction", which is what he's
12 asking for, "by the Commissioner during the progress
13 of the case would be an absurd result." Okay? So
14 normally I could stand up here and say I just want you
15 to affirm the findings. I want you to affirm the
16 finding. In fact, I want an additional finding in
17 this case; I want a proactive step by the Commission
18 that the Defendants are estopped from arguing this,
19 because when he put them on notice of a potential
20 Change of Condition they sent him to three doctors to
21 determine that. And for him to now say there's no
22 Change of Condition when Dr. Marco Rodriguez has said
23 he needs a fusion and Dr. Kanos has said he has a
24 laminectomy and Dr. Latourette, the treating
25 physician, agrees with both and all three of the

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0169

1 Defendants' selected physicians have said he had a
2 Change of Condition for the worse, would be that, it
3 would be an absurd result. Now, to that point, two
4 out of the three Commissioners on this Panel have sat
5 on the case of Xena Fletcher versus Dick's Sporting
6 Goods where a Form 50 Request for Hearing was filed.
7 It went before the single Commissioner and that Form
8 50 Request for a Hearing was withdrawn thereby leaving
9 only the Claim Only pending. That came before you,
10 Commissioner Wilkerson, and Commissioner Roche, at
11 which point you said that was enough. The claim was
12 still pending and the Statute was tolled. So there
13 has to be consistency in the sense that there's only
14 one form to file to toll that application, and it's
15 the Form 50. There's no special application for
16 review and as we sit here in armchair quarterback of
17 1965 -- or sorry, 1960 case, the Commission's
18 Regulations and the Commission's Forms are very -- are
19 just that, a Form 50; it's the only application we
20 have. That being said, in liberally construing the
21 Workers' Comp Act, the tie, if there is a tie, goes to
22 the Claimant in this case; and that's what
23 Commissioner Barden meant. "I'm not going to punish
24 the Claimant", I'm going to liberally construe the Act
25 and a tie goes to the Claimant. Nevertheless, the

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 thrust of the argument is that the Defendants are
2 estopped from arguing this because of their proactive
3 actions. They sent him to all of those physicians,
4 not me. And all of those physicians say he has a
5 Change of Condition for the worse. To this day he
6 sits at home waiting on the surgery as Ordered by
7 Commissioner Barden.

8 Thank you.

9 THE COURT: Okay. Mr. Easterling.

10 BY MR. EASTERLING: Briefly. It should be
11 pointed out that prior counsel, Tom Gagne, never
12 called or never requested that Defendant send the
13 Claimant back to the doctor during that one year
14 period of time after the original award was made. The
15 Notice of Claim was the first time that we heard from
16 the Claimant about whether -- about wanting another
17 opinion about whether Change of Condition had gone --
18 had taken place. During that entire time we had
19 continued to send the Claimant to Dr. Latourette as
20 you -- as Commissioner Wilkerson's Order required,
21 continued to pay for the injections and his -- his
22 psychological evaluation. Gagne then deposed
23 Latourette after he filed his Notice of Claim alleging
24 a Change of Condition. And Dr. Latourette testified,
25 "He has not sustained a Change of Condition." That

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

1 was the treating physician's testimony. And then he
2 says it again in August of 2013 when Mr. Montgomery
3 represented the Claimant. "I can't say that the
4 Claimant has sustained a Change of Condition." The
5 three questionnaires that were submitted at the
6 hearing that say, yes he has, in fact, sustained a
7 Change of Condition for the worse, didn't come until
8 two years after the original award was made. And it
9 -- it always -- I always get amused when a Claimant
10 stands up here and says, well, the Defendant should be
11 punished because they were -- they were -- they
12 provided the treatment to the Claimant, they were
13 trying to do the right thing. The point is, is that
14 Latourette, after his deposition said, well, to be
15 sure let me send him to Rodriguez and we'll find out.
16 Well Rodriguez says he needs a fusion. And at that
17 point Defendants said, well, we deny Change of
18 Condition.

19 THE COURT: All right. Thank you. That
20 concludes the hearing.

21 (The hearing concluded at 4:02 p.m.)
22
23
24
25

CORA ELLIS BRUTON - COURT REPORTER
131 BROWNING COURT - LEXINGTON, SOUTH CAROLINA 29073
803-397-0189

Attachment I

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO: 0726308

Shannon Cook	)	
	)	
Claimant/Respondent	)	
	)	
v.	)	<u>APPELLATE PANEL DECISION AND ORDER</u>
	)	
Spartanburg Steel Products, Inc.	)	
	)	
Defendant/Appellant	)	

A hearing before the Single Commissioner, Susan S. Barden, was heard September 27, 2013. The Claimant/Respondent, Shannon Cook, was represented by attorney Ryan Montgomery of Ryan Montgomery Attorney at Law, LLC. The Defendant/Appellant, Spartanburg Steel Products, Inc. was represented by Brad B. Easterling of McAngus, Goudelock and Couric. The matter was set on the claimant's Form 50 request for a Change of Condition. At that hearing, the Single Commissioner found that the claimant had sustained a change of condition for the worse as identified in the Single Commissioner Findings of Fact herein and below. Defendants' timely filed a Form 30 request for Appeal. This matter came before the Appellate Panel of the Full Commission on March 17, 2014 to address the issues raised in the Form 30.

I. STATEMENT OF CASE

A. Employee's Position

It was the position of the employee that he had sustained a change of condition for the worse to include a need for surgery. Procedurally, this matter was originally handled by attorney Tom Gagne of Greenville, South Carolina. The underlying matter went to hearing on June 8, 2011 at which time permanency and the need for future medical was addressed. Commissioner Wilkerson awarded Claimant 25% permanent partial disability to the spine, which was paid on

June 27, 2011 On May 9, 2012 less than one year later, counsel for the claimant, Tom Gagne, filed a Form 50 (claim only) alleging a change of condition for the worse and attached a medical report from Dr. Tony Rana indicating the claimant had sustained a change of condition for the worse. Between that filing and May 17, 2013, the claimant terminated his legal representation with Tom Gagne and retained, attorney Ryan Montgomery of Greenville, South Carolina. On May 17, 2013 Mr. Montgomery filed a supplemental Form 50 requested a hearing to address the change of condition for the worse previously filed by Tom Gagne.

From a medical perspective and once the claimant alleged a change of condition for the worse as of May 9, 2012, the defendants referred the claimant to Dr. Marco Rodriguez who opined that the claimant needed a lumbar fusion. The defendants then referred the claimant to Dr. Charles Kanos who opined that the claimant was in need of a CT Myelogram to definitely determine whether or not the Claimant was in need of surgery. Dr. Kanos recommended against the lumbar fusion as recommended by Dr. Rodriguez. At this point the medical treatment from defendants was discontinued except for the medical treatment with Dr. Phillip LaTourette, the claimant's authorized pain management physician. Claimant on his own obtained the CT Myelogram and a return visit to Dr. Charles Kanos. At that appointment it was the medical opinion that Dr. Kanos that the claimant needed surgery and that his condition had worsened. The claimant took the position on the date of the hearing, Drs. Latourette, Kanos, Rodriguez and Rana had all opined that the claimant has sustained a change of condition for the worse.

Realizing that the defendants would argue that the case was a legal issue based upon the Form 50 Claim only and the case of the Allen v. Benson Outdoor Advertising, 236 S.C. 22 (1960), claimant responded to the case of Allen v. Benson but arguing the distinction in that case and the case at bar. In the Allen case, the issue was whether the case must be heard within the twelve month period. Allen timely filed an application but it was not heard within one year.

2.

That case did not address anything associated with filing the application for a claim only in order to toll the statutory one year requirement as required in §42-17-90. The Allen Court goes on to cite and incorporate additional jurisdictional opinions noting that "the filing of a claim for further compensation within the statutory period and partial but not complete development thereof with such period, with loss of jurisdiction by the Commissioner would be an absurd result which the legislature certainly did not have in mind...a claim if filed within the statutory period applicable to the nature of the claim filed". The Allen court held and only held that the application for review was made within one year and so they had jurisdiction to hear the claim. It did not go beyond that and extrapolating sentences out of context does not change that.

In addition, when claimant filed the Form 50 hearing request, the medical report of Dr. Tony Rana had already been filed in support of the change of condition.

During the argument on appeal in front of the Full Commission Appellate panel, claimant by and through his attorney specifically requested a finding that the defendants were estopped from arguing a statute of limitations issue as their actions of providing medical caused the claimant to detrimentally rely upon those actions and reasonable inferred that the Defendants were going to provide medical treatment for the change of condition. See Full Commission Tr., pp. 13-14.

B. Employer's Position

The employer argues claimant has not sustained a change of condition for the worse. However, the defendants' primary position(s) are that the Commission need not reach that decision as it lacks jurisdiction to hear the case based upon the following three arguments:

First, the defendants argue claimant's claim is barred by S.C. Code 42-17-90. The last sentence under 42-17-90 reads: "...the review [on a claim for change of condition] must not be

made after twelve months from the date of the last payment of compensation pursuant to an award provided by this title." (emphasis added). Defendants submitted the case of Allen v. Benson Outdoor Advertising, 236 S.C. 22 (1960), which defendants contend requires that a Request for Hearing be filed within one year from the date of the last payment of compensation. Defendants argue this requires the filing of a Form 50, Request for Hearing, and not simply a Form 50 - Notice of Claim Only. On May 9, 2012, claimant's prior counsel, Tom Gagne, only filed a Form 50 - Notice of Claim alleging a change of condition but did not request a hearing. Based on Allen, defendants contend the claimant is barred from proceeding under a change of condition argument and the undersigned Commissioner does not have jurisdiction over the claim.

Second, the defendants argued that, even if the Form 50 - Notice of Claim only did toll the statute of limitations, the claimant still cannot proceed with his change of condition request as the claimant's prior counsel relied upon (submitted with the May 9, 2012 Form 50 - Notice of Claim only) a medical report from Dr. Tony Rana, which defendants contend is nebulous in nature and gives no factual basis upon which the opinion is based. For this argument, defendants rely on the case of Young v. Tide Craft, 270 S.C. 453, 242 S.E.2d 671 (1978), which holds that expert opinion is inadmissible if its factual foundation is nebulous. In his February 16, 2012 report, which claimant relies upon to support his claim for change of condition, relative to claimant's lumbar spine, Dr. Rana assigned the exact same medical impairment rating as his did in his earlier July 14, 2010 report. In his February 16, 2012 report, Dr. Rana, as he also did in his July 14, 2010 report, opines claimant remains at MMI for the injuries received as result of his September 17, 2007 work accident. Defendants submit that, inherently, there can be no change of condition if claimant's MMI status is unchanged subsequent to the last payment of compensation. The only difference noted in Dr. Rana's two IME reports is found in his February 16, 2012 report where he references claimant's thoracic disc herniation at the T8/T9 level.

However, nowhere in his February 16, 2012 report does Dr. Rana causally relate claimant's thoracic condition to his September 17, 2007 work injury.

Finally, defendants argue that claimant's claim should be barred by South Carolina Workers' Compensation Regulation 67-602 C., which requires the moving party to attach to the hearing request form a medical report(s) indicating a change in claimant's condition. In this claim, there was no medical report attached to the May 17, 2013 Form 50 nor to the August 9, 2013 Form 50, the only two Forms 50 requesting a hearing.

II. EVIDENCE OF CASE

The claimant by way of previous counsel submitted a Form 50 Change of Condition Application (Claim Only) on and in number 11a of the application states "Claimant comes for a change of condition". See APA 8, pp. 176-177. Pursuant to §42-17-90, the previous counsel included a medical report from Tony Rana, M.D. dated February 16, 2012. See APA 8, pp. 178-180. Dr. Rana notes that the claimant "returns for evaluation of a worsening of condition". Id. at 178. Dr. Rana went on to provide a basis for his opinion in that he identifies "treatment since his prior evaluation has included psychological counseling by Dr. Tollison and transforaminal epidural steroid injections by Dr. LaTourette" Id.

Following the application for a change of condition, Dr. Latourette referred Mr. Cook on August 15, 2012 for an evaluation with Dr. Marco Rodriguez at Orthopaedic Specialties which was authorized by the defendants. See Clmt. APA 3. Dr. Rodriguez opined that the claimant "shows a positive straight leg raise on the left side". Id. at 136. Dr. Rodriguez recommended and prescribed a MRI conducted at Piedmont Imaging on September 13, 2012. Clmt. APA 4, p. 14. Presumably, Dr. Rodriguez reviewed the MRI film studies and added to his report indicating the MRI showed "L5-S1 recurrent herniation compression the L5 and S1 nerve roots on the left

side". Id. "It is truly a recurrent herniation". Id. Dr. Rodriguez, further opined that the claimant should be scheduled for surgery to include a lumbar fusion". Rodriguez also opined that the recurrent herniation was causally related to his work injury of 9/17/07 and that Mr. Cook had sustained a change of condition for the worse. Id. at 146.

The employer/carrier referred Mr. Cook for another medical opinion. This time he was sent to Charles Kanos, M.D. of SouthEastern Neurosurgical. According to the Kanos report of December 14, 2012 "new patient is seen at the neurosurgical consultation at the request of WC for evaluation of low back pain". Clmt. APA 5, p. 149. Kanos noted he had positive straight leg raise on the left. Kanos saw the claimant again on February 27, 2013 on a "WC follow up on low back pain". Id. at 152 Claimant was noted to have post-surgical changes on L5-S1 and noted that the most appropriate treatment plan would be a Lumbar CT myelogram with emphasis on film myelography looking for fill defects which if there was a defect then a decompression surgery would help. Id. at pp. 152-153.

Claimant terminated his relationship with previous counsel and hired Ryan Montgomery on May 16, 2013. See record as a whole and claimant's testimony. Current counsel amended the previously filed Form 50 Claim only and filed an application for change of condition by way of a Form 50 requesting a hearing on May 17, 2013 and subsequently filed another Form 50 on August 9, 2013. See Commission file.

On June 25, 2013, Dr. Kanos opined that the claimant's need for the CT Myelogram was medically necessary and causally related to his workers' compensation injury and that the claimant had sustained a change of condition for the worse. Clmt. APA 5, p. 155. Despite the opinion from their own doctor, Dr. Kanos, the carrier failed to provide this CT Myelogram and the claimant underwent that examination on his own the results of which are located at Clmt. APA 6 and incorporated herein by reference.

The claimant then returned to the workers' compensation carrier selected physician, Dr. Kanos, but this time at his own expense. Clmt. APA, p. 155e. In that appointment, Dr. Kanos opined that the claimant was in need of a L5-S1 decompression and a left L4-5 foraminotomy Clmt APA, p. 155e-d. In addition, Dr. Kanos completed another questionnaire indicating that Mr. Cook had sustained a change of condition for the worse as he needs additional medical treatment. See Clmt. APA, p. 155a.

In addition to these authorized physicians (Dr. Rodriguez and Dr. Kanos), the claimant also treated with Dr. Phillip LaTourette, the authorized treating physician for Mr. Cook's pain management. After reviewing the reports from Rodriguez and Kanos, Dr. LaTourette concurred that Mr. Cook had sustained a change of condition for the worse. Clmt. APA, p. 128a.

The defendants submitted a surveillance video received without objection wherein the claimant works under the hood of a vehicle for approximately 1 hour and moves a commercial car jack in the video. The video was taken approximately 9-10 months prior to the hearing. See Defendants' APA and the Hr. Tr. testimony of the claimant generally.

On cross examination, claimant testified that he was offered a light duty position by the employer before the hearing with Commissioner Wilkerson June 8, 2011 but to date he has not contacted the employer with respect to that light duty position. See. Hr. Tr. generally.

III. SINGLE COMMISSIONER FINDINGS OF FACT

Based upon a review of the above evidence as well as the entire record, the Single Commissioner made the following Findings of Fact:

1. In an admitted accident on September 17, 2007, Claimant injured his back (resulting in bilateral radiculopathy) and sustained admitted psychological overlay. He alleges that (a) he has sustained a change of condition for the worse; or alternatively, (b) Defendants should be required to provide the surgery recommended for Claimant as a *Dodge*/future medical.

2. Claimant is 33 years of age (medical evidence establishing Claimant's date of birth as 4/26/80).
3. Prior to the hearing with Commissioner Wilkerson, Claimant (a) underwent two lumbar surgeries for a "large" herniated disc; and (b) failed a spinal cord stimulator trial (Claimant's APA #1, pages 3, 7, 11, and 19).
4. Commissioner Wilkerson awarded Claimant permanency benefits to the spine (25%) on June 8, 2011. I base this finding on the Commission's file (See also Claimant's APA #7).
5. Defendants paid the permanency award on June 27, 2011.
6. Claimant's counsel (Mr. Gagne) timely filed a Form 50 on May 9, 2012, alleging a change of condition for the worse. Attached to the Form 50 was an opinion from Dr. Rana that Claimant has sustained a change of condition for the worse (Claimant's APA #8).
7. On May 17, 2013, Claimant's current counsel (Mr. Montgomery) filed a Form 50 requesting a hearing on the change of condition for the worse (Claimant's APA #9).
8. Pursuant to Section 42-17-90 and a sequential review of the treatment records dated after the hearing before Commissioner Wilkerson, I find that Claimant's lumbar spine condition has significantly worsened: after the permanency award was paid, Claimant's back and leg pain increased, and a cane was prescribed for "antalgic gait and leg weakness." Claimant's medications were no longer relieving his pain, and were therefore changed/increased. Treatment records note that (a) morphine was having "very little effect;" (b) Claimant's Waddell's signs were consistently "0/5;" and; most importantly, (c) Claimant has "severe [post-surgical] scar tissue formation." Claimant has also undergone multiple injections since the date of the permanency award, and he requested another surgical consult/opinion in December 2011. As all these records are from authorized providers, Defendants had notice of Claimant's worsening condition as well as notice of his request for another surgical opinion (e.g., Claimant's APA #1, pages 5-6, 8, 10, 13, 21, 26, 33, 36, 38-39, 45, 48, 50, 53, 57, 59, 75, 80, 85, 97, 102, 108, 110, 114, and 116; See also Claimant's APA #3, page 143).
9. Three authorized physicians state that Claimant has sustained a change of condition for the worse, and that Claimant needs further surgery. There is no competing questionnaire or evidence to the contrary (medical evidence in its entirety, including but not limited to Claimant's APA #1, pages 128-128A; Claimant's APA #3, pages 136, 143, and 146; Claimant's APA #5, pages 155, 155A, and 155D).
10. The questionnaires referenced *supra* are clearly supported by the treatment records in evidence, and I therefore accord the questionnaires great weight (medical evidence in its entirety).
11. At the hearing, Claimant appeared to be in genuine discomfort, a presentation which did not appear to be feigned or contrived. I considered the fact that Dr. Kanos found some

"exaggerated response" during his exam of Claimant, but given the fact that there is objective pathology after both an MRI and a CT myelogram (such that three physicians, including Dr. Kanos, recommend surgery), I find that Claimant may be merely appealing for help. Moreover, Claimant has not exaggerated his condition to authorized treating physicians; in fact, the opposite is true. To treating physicians, Claimant volunteered the fact that he went out to dinner and a movie with his son, and that he is "trying to do some walking and he is praised." If Claimant were being untruthful about his condition, it would have been far more expedient for him to claim he cannot go anywhere or do anything (Claimant's APA #1, pages 122 and 126; observations of the undersigned; medical evidence in its entirety; Commission file containing pleadings and Orders).

12. Surgery was not a future medical ordered by Commissioner Wilkerson. Although there is no dispute that Claimant now needs surgery, I am unable to order surgery as a future medical under Commissioner Wilkerson's Order. (See ORDER language, page 16 of Commissioner Wilkerson's Order, which limits future medicals to those listed on the Form 14B).
13. Claimant has not reached maximum medical improvement, a finding I base on the opinions of three authorized physicians (e.g., Claimant's APA #1, page 128A).
14. Claimant shall receive reimbursement for his \$25 filing fee, such that he is not charged or responsible for the cost of his Motion to Compel (Claimant's APA #10).
15. Claimant shall receive reimbursement for the CT Myelogram and visits with Dr. Kanos: Dr. Kanos (Defendants' IME) requested a CT Myelogram prior to rendering a surgical opinion. Once Dr. Kanos reviewed the results of the CT Myelogram, he agreed that Claimant needs surgery; although Dr. Kanos does not recommend fusion surgery (Claimant's APA #5, pages 155, 155A, and 156; Claimant's APA #6, pages 156-157).
16. Dr. Kanos is hereby named the treating surgeon. He is very familiar with Claimant's spinal condition, and his surgical approach in Claimant's case is more conservative than that recommended by other physicians in this case.
17. Permanency is premature.
18. I find that the opinion from Dr. Rana is not inadmissible. Dr. Rana's physical examination mentions the lumbar spine no fewer than 5 times, and he opines that Claimant sustained a change of condition to the spine. Whether or not Dr. Rana found Claimant to be at maximum medical improvement is not dispositive any more than is a statement by a physician to a reasonable degree of medical certainty that a claimant has sustained a repetitive trauma injury. Otherwise, the Commission's involvement would be unnecessary. Dr. Rana does opine that Claimant has an "additional" problem of thoracic spine involvement; whether or not the Commission or any other physician agrees with that statement is a merits issue for adjudication. The undersigned is unwilling to "punish" Claimant for any deficiencies with regard to Dr. Rana's record/opinion, when the authorized treatment records clearly support an opinion of a worsened condition (Claimant's APA #2).

19. I considered Defendants' video surveillance, but it does nothing to persuade the undersigned to deviate or retreat from this decision.
20. Claimant's average weekly wage is \$846.64, yielding a compensation rate of \$564.46. I base this finding on the Order of Commissioner Wilkerson.
21. Any issue relating to TTD and permanency is held in abeyance, as the only issue before the undersigned was whether the claimant has sustained a change of condition for the worse;
22. Based upon the medical records as a whole to include Dr. Kanos' medical notes, I find that the claimant is entitled to additional medical treatment through Dr. Kanos, including but not limited to the recommended surgery, as it is causally related to the underlying injury, medically necessary and will tend to lessen the period of disability.

IV. SINGLE COMMISSIONER CONCLUSIONS OF LAW

Based upon a review of the above evidence and Findings of Fact as well as the entire record, the Single Commissioner made the following Conclusions of Law:

1. Pursuant to §42-17-90, the evidence as a whole and the above findings of facts, the claimant has sustained a change of condition for worse;
2. Pursuant to §42-17-90, the evidence as a whole and the above findings of facts, claimant's previous counsel timely filed an application for a change of condition;
3. All applicable time limits in S.C. Code Ann., §42-17-90 were tolled, or satisfied, when claimant filed his Form 50 on or about May 9, 2012;
4. Pursuant to §42-17-90, the evidence as a whole, the above findings of fact and the case of Young v. Tide Craft, Inc. Dr. Rana's opinion was based enough on fact to create an issue as to the merits to be adjudicated at this hearing and does not preclude the claimant from now pursuing a change of condition request;
5. Pursuant to the South Carolina case of Allen v. Benson Outdoor Advertising Co. 236 S.C. 22; 112 S.E2d 722 (1960) this case at bar is not precluded from being brought for a

change of condition. The undersigned Commissioner notes the language within the Allen case which allows for "the filing of a claim for further compensation within the statutory period" is enough and that loss of jurisdiction by the commission would be an *absurd* result which legislature certainly did not have in mind. Id. at 30;

6. Pursuant to §42-15-60, the claimant is entitled to additional medical treatment with Dr. Charles Kanos as this treatment is medically necessary, casually related and will tend to lessen the period of disability;
7. Pursuant to §42-15-60, all medical treatment with Dr. Kanos was causally related, medically necessary and would tend to lessen the period of disability. Claimant is entitled to reimbursement of any and all expenses and co-pays associated with this treatment;
8. Pursuant to Title 42 of the South Carolina Code Annotated, et. seq., all issues not addressed herein are hereby held in abeyance, including but not limited to additional permanency.

V. SINGLE COMMISSIONER ORDER

IT IS, THEREFORE, ORDERED that the Findings of Fact and Conclusions of Law are incorporated herein verbatim and this Order is based upon the above cited Findings of Fact and Conclusions of Law. It is further Ordered:

1. The defendants shall reimburse the claimant his \$25.00 fee associated with the Motion to Compel and previously ordered by Order of the Commission;
2. The defendants shall reimburse the claimant for any and all expenses associated with the medical treatment as directed by or provided by Dr. Charles Kanos;
3. The defendants shall provide ongoing medical care through Dr. Charles Kanos; and
4. All other issues not addressed herein are hereby held in abeyance pending a final order of the Commission;

VI. FULL COMMISSION FINDINGS OF FACT

After considering all of the evidence contained in the record, by unanimous Affirmation, we affirm the Single Commission Order in its entirety and therefore make the following Findings of Fact:

1. In an admitted accident on September 17, 2007, Claimant injured his back (resulting in bilateral radiculopathy) and sustained admitted psychological overlay. He alleges that (a) he has sustained a change of condition for the worse; or alternatively, (b) Defendants should be required to provide the surgery recommended for Claimant as a *Dodge* future medical.
2. Claimant is 33 years of age (medical evidence establishing Claimant's date of birth as 4/26/80).
3. Prior to the hearing with Commissioner Wilkerson, Claimant (a) underwent two lumbar surgeries for a "large" herniated disc; and (b) failed a spinal cord stimulator trial (Claimant's APA #1, pages 3, 7, 11, and 19).
4. Commissioner Wilkerson awarded Claimant permanency benefits to the spine (25%) on June 8, 2011. We base this finding on the Commission's file (See also Claimant's APA #7).
5. Defendants paid the permanency award on June 27, 2011.
6. Claimant's counsel (Mr. Oagne) timely filed a Form 50 on May 9, 2012, alleging a change of condition for the worse. Attached to the Form 50 was an opinion from Dr. Rana that Claimant has sustained a change of condition for the worse (Claimant's APA #8).
7. On May 17, 2013, Claimant's current counsel (Mr. Montgomery) filed a Form 50 requesting a hearing on the change of condition for the worse (Claimant's APA #9).
8. Pursuant to Section 42-17-90 and a sequential review of the treatment records dated after the hearing before Commissioner Wilkerson, we find that Claimant's lumbar spine condition has significantly worsened: after the permanency award was paid, Claimant's back and leg pain increased, and a cane was prescribed for "antalgic" gait and leg weakness. Claimant's medications were no longer relieving his pain, and were therefore changed/increased. Treatment records note that (a) morphine was having "very little effect," (b) Claimant's Waddell's signs were consistently "0/5," and, most importantly, (c) Claimant has "severe [post-surgical] scar tissue formation." Claimant has also

undergone multiple injections since the date of the permanency award, and he requested another surgical consult/opinion in December 2011. As all these records are from authorized providers, Defendants had notice of Claimant's worsening condition as well as notice of his request for another surgical opinion (e.g., Claimant's APA #1, pages 5-6, 8, 10, 13, 21, 26, 33, 36, 38-39, 45, 48, 50, 53, 57, 59, 75, 80, 85, 97, 102, 108, 110, 114, and 116; *See also* Claimant's APA #3, page 143);

9. Three authorized physicians state that Claimant has sustained a change of condition for the worse, and that Claimant needs further surgery. There is no competing questionnaire or evidence to the contrary (medical evidence in its entirety, including but not limited to Claimant's APA #1, pages 128-128A; Claimant's APA #3, pages 136, 143, and 146; Claimant's APA #5, pages 155, 155A, and 155D).
10. The questionnaires referenced *supra* are clearly supported by the treatment records in evidence, and I therefore accord the questionnaires great weight (medical evidence in its entirety).
11. At the hearing, Claimant appeared to be in genuine discomfort, a presentation which did not appear to be feigned or contrived. We considered the fact that Dr. Kanos found some "exaggerated response" during his exam of Claimant, but given the fact that there is objective pathology after both an MRI and a CT myelogram (such that three physicians, including Dr. Kanos, recommend surgery), we find that Claimant may be merely appealing for help. Moreover, Claimant has not exaggerated his condition to authorized treating physicians; in fact, the opposite is true. To treating physicians, Claimant volunteered the fact that he went out to dinner and a movie with his son, and that he is "trying to do some walking and he is praised." If Claimant were being untruthful about his condition, it would have been far more expedient for him to claim he cannot go anywhere or do anything (Claimant's APA #1, pages 122 and 126; observations of the undersigned; medical evidence in its entirety; Commission file containing pleadings and Orders).
12. Surgery was not a future medical ordered by Commissioner Wilkerson. Although there is no dispute that Claimant now needs surgery, we are unable to order surgery as a future medical under Commissioner Wilkerson's Order. (See ORDER language, page 16 of Commissioner Wilkerson's Order, which limits future medicals to those listed on the Form 14B).
13. Claimant has not reached maximum medical improvement, a finding we base on the opinions of three authorized physicians (e.g., Claimant's APA #1, page 128A).
14. Claimant shall receive reimbursement for his \$25 filing fee, such that he is not charged or responsible for the cost of his Motion to Compel (Claimant's APA #10).
15. Claimant shall receive reimbursement for the CT Myelogram and visits with Dr. Kanos: Dr. Kanos (Defendants' IME) requested a CT Myelogram prior to rendering a surgical opinion. Once Dr. Kanos reviewed the results of the CT Myelogram, he agreed that Claimant needs surgery, although Dr. Kanos does not recommend fusion surgery

(Claimant's APA #5, pages 155, 155A, and 156; Claimant's APA #6, pages 156-157).

16. Dr. Kanos is hereby named the treating surgeon. He is very familiar with Claimant's spinal condition, and his surgical approach in Claimant's case is more conservative than that recommended by other physicians in this case.
17. Permanency is premature.
18. We find that the opinion from Dr. Rana is not inadmissible. Dr. Rana's physical examination mentions the lumbar spine no fewer than 5 times, and he opines that Claimant sustained a change of condition to the spine. Whether or not Dr. Rana found Claimant to be at maximum medical improvement is not dispositive any more than is a statement by a physician to a reasonable degree of medical certainty that a claimant has sustained a repetitive trauma injury. Otherwise, the Commission's involvement would be unnecessary. Dr. Rana does opine that Claimant has an "additional" problem of thoracic spine involvement; whether or not the Commission or any other physician agrees with that statement is a merits issue for adjudication. The undersigned is unwilling to "punish" Claimant for any deficiencies with regard to Dr. Rana's record/opinion, when the authorized treatment records clearly support an opinion of a worsened condition (Claimant's APA #2).
19. We considered Defendants' video surveillance, but it does nothing to persuade the undersigned to deviate or retreat from this decision.
20. Claimant's average weekly wage is \$846.64, yielding a compensation rate of \$564.46. We base this finding on the Order of Commissioner Wilkerson.
21. Any issue relating to TTD and permanency is held in abeyance, as the only issue before the undersigned was whether the claimant has sustained a change of condition for the worse;
22. Based upon the medical records as a whole to include Dr. Kanos' medical notes, we find that the claimant is entitled to additional medical treatment through Dr. Kanos, including but not limited to the recommended surgery, as it is causally related to the underlying injury, medically necessary and will tend to lessen the period of disability.

VII. FULL COMMISSION CONCLUSIONS OF LAW

After considering all of the evidence contained in the record, by unanimous Affirmation, we affirm the Single Commission Order in its entirety and therefore make the following Conclusions of Law:

2. Pursuant to §42-17-90, the evidence as a whole and the above findings of facts, claimant's previous counsel timely filed an application for a change of condition;
3. All applicable time limits in S.C. Code Ann., §42-17-90 were tolled, or satisfied, when claimant filed his Form 50 on or about May 9, 2012;
4. Pursuant to §42-17-90, the evidence as a whole, the above findings of fact and the case of Young v. Tide Craft, Inc. Dr. Rana's opinion was based enough on fact to create an issue as to the merits to be adjudicated at this hearing and does not preclude the claimant from now pursuing a change of condition request;
5. Pursuant to the South Carolina case of Allen v. Benson Outdoor Advertising Co. 236 S.C. 22; 112 S.E2d 722 (1960) this case at bar is not precluded from being brought for a change of condition. The undersigned Commissioner notes the language within the Allen case which allows for "the filing of a claim for further compensation within the statutory period" is enough and that loss of jurisdiction by the commission would be an *absurd* result which legislature certainly did not have in mind. Id. at 30;
6. Pursuant to §42-15-60, the claimant is entitled to additional medical treatment with Dr. Charles Kanos as this treatment is medically necessary, casually related and will tend to lessen the period of disability;
7. Pursuant to §42-15-60, all medical treatment with Dr. Kanos was causally related, medically necessary and would tend to lessen the period of disability. Claimant is entitled to reimbursement of any and all expenses and co-pays associated with this treatment;

8. Pursuant to Title 42 of the South Carolina Code Annotated, et. seq., all issues not addressed herein are hereby held in abeyance, including but not limited to additional permanency.

VIII. FULL COMMISSION ORDER

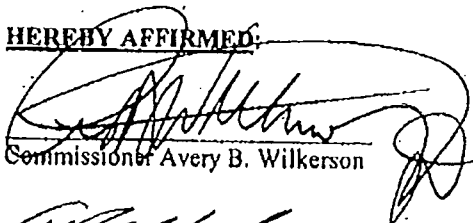
After considering all of the evidence contained in the record, by unanimous Affirmation, we affirm the Single Commission Order in its entirety and hereby Ordered, Adjudged and Decreed that:

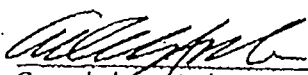
1. The defendants shall reimburse the claimant his \$25.00 fee associated with the Motion to Compel and previously ordered by Order of the Commission;
2. The defendants shall reimburse the claimant for any and all expenses associated with the medical treatment as directed by or provided by Dr. Charles Kanos;
3. The defendants shall provide ongoing medical care through Dr. Charles Kanos;
4. All other issues not addressed herein are hereby held in abeyance pending a final order of the Commission; and
5. The Single Commissioner Findings of Fact, Conclusions of Law, and Order is hereby affirmed by unanimous affirmation.

(signatures to follow)

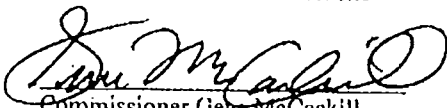
SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION

HEREBY AFFIRMED:


Commissioner Avery B. Wilkerson


Commissioner Andrea C. Roche

Date: May 20, 2014
Columbia, SC


Commissioner Gene McCaskill

Copies to:
Ryan S. Montgomery, Esquire
Brad Easterling, Esquire

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kim Falls on May 20, 2014

RECEIVED¹⁷

SEP 11 2014

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

SEP 22 2014

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

SC Court of Appeals

173604

W.C.C. File No. 0726308

Shannon Cook Respondent,

v.

Spartanburg Steel Products, Inc. Appellant.

RETURN AND MOTION TO STRIKE

This return is filed pursuant to Rule 240(e), SCACR. The portion of this filing that contains the motion to strike is filed pursuant to the same general rule, which governs motions and petitions generically.

The Court should deny rehearing. The decision to dismiss this appeal was correct.

I. The appellant has filed a "petition for rehearing" -- not a "motion to reinstate."

The petition cites to Rule 260 of the appellate court rules as part of its underlying authority. The implication of this citation is that the Court administratively dismissed this appeal because of a failure to comply with the appellate court rules.

This is not true. The present appeal was dismissed because the order in question is not immediately appealable. The appellant's filing is a petition for rehearing. It is *not* a motion to reinstate as contemplated by Rule 260.

II. The Court should strike the attachments to the petition.

The Court should strike the attachments to the appellant's petition. If the appellant believed that these attachments would be helpful in deciding the motion to dismiss, the attachments should have been included with the return to the motion to dismiss rather than being submitted for the first time on rehearing. The rules describe that the purpose of rehearing is to discern whether the court may have overlooked or misapprehended any point. See Rule 240(a), SCACR. It does not describe submitting new arguments or documents to the record. See, e.g., *Kennedy v. South Carolina Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001) (noting that the purpose of rehearing is not to present points which lawyers overlooked or misapprehended); *Moore v. Trimmier*, 32 S.C. 511, 11 S.E. 552 (1890) (declining to consider things that were not in the original record).

III. The decision to dismiss this appeal was correct.

The central thrust of the petition is that the commission's decision is a "final decision" because it decides all of the issues that the respondent presented to the commission in his request for a hearing. It does not matter that there are more issues in the claim (as the order expressly recognizes), and it does not matter that there may be more hearings and more intermediate rulings in the claim. According to this argument, a "final decision" happens whenever the commission decides the issues that were raised in a Form 50 (a claimant's request for a hearing) or a Form 21 (a defendant's request).

The upshot of this argument is that parties get to create multiple "final decisions" by requesting hearings from the commission on selective issues. The issue in *this* hearing was whether the respondent had sustained a change of condition, but other such requests could

include a dispute about how to calculate someone's average weekly wage, whether to make an insurance carrier participate in a claim, or whether to allow an independent medical evaluation. It seems obvious that a request for a hearing on any of these would be analogous to a request for partial summary judgment on the issue in question, but the appellant seems to disagree. By the appellant's reasoning, a full commission's decision on any of these issues is going to be immediately appealable.

This view is not correct. As the *Bone* decision recognizes, one of the central features of the Administrative Procedures act was to treat administrative cases differently. *Bone v. U.S. Food Serv.*, 404 S.C. 67, 80-81, 744 S.E.2d 552, 559-560 (2013). A party can ordinarily seek an immediate appeal of a decision that grants partial summary judgment, but that is because such an order involves the merits within the meaning of the appealability statute that governs appeals in civil cases. See S.C. Code Ann. § 14-3-330.

That statute does not apply here. And while it is fair to say that this case differs from *Bone* in that this case does *not* involve a remand, it is inaccurate to say that this distinction makes any difference whatsoever. The appellant is advancing a view that would allow many kinds of piecemeal appeals. This view is wrong, and this Court was correct in rejecting it.

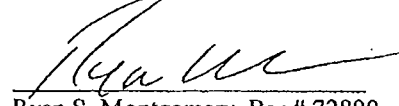
Conclusion

This order is not a final order. It expressly (and accurately) acknowledges that there are other issues in this case and that these issues are unresolved. The Court should deny the petition for rehearing, and it should strike the attachments from the appellant's filing.

/Signature page attached

September 17, 2014

Respectfully submitted,



Ryan S. Montgomery, Bar # 72890
108 Mills Avenue
Greenville, SC 29605
(864) 373-7333
(864) 373-7334 (facsimile)
ryan@RyanMontgomeryLaw.com

Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC Case No. 0726308

RECEIVED

SEP 25 2014

SC Court of Appeals

Shannon Cook, Claimant, ...Respondent,

v.

Spartanburg Steel Products, Inc., Defendant, ...Appellant.

APPELLANT'S REPLY TO RESPONDENT'S
RETURN AND MOTION TO STRIKE

Respondent Shannon Cook has presented no valid or persuasive reasons why this Court should deny Appellant's Motion for Rehearing and/or to Reinstate Appeal ("Motion"). As a result, and based on the reasons set forth below and in the Motion, this Court should reinstate this appeal.

1. Appellant properly sought reinstatement of its appeal.

Respondent first argues that Appellant's citation to and reliance on Rule 260, SCACR, was incorrect, asserting that the appeal was not dismissed because of a failure to comply with appellate court rules. Respondent is incorrect. Appellant's request that this appeal be reinstated pursuant to Rule 260, SCACR, was proper and should be granted.

Rule 201, SCACR, states that, “[a]ppeal may be taken, as provided by law, from any final judgment, appealable order or decision.” The fact that this Court looks to statutory and case law to determine what constitutes a “final judgment, appealable order or decision” in a particular case does not mean that an appeal dismissed on the basis that the decision below is not immediately appealable was not dismissed for failure to comply with appellate court rules. Instead, Rule 201 addresses this specific issue. “It is a fundamental rule of appellate procedure that a judgment or order must be final before it can be appealed. [citation omitted] Rule 201(a) SCACR, provides: ‘Appeal may be taken, as provided by law, from any final judgment or appealable order.’ To promote judicial efficiency and orderly adjudication of disputes on appeal, this rule seeks to prevent multiple appeals of non-final matters.” Jean H. Toal, Shahin Vafai & Robert Muckenfuss *APPELLATE PRACTICE IN SOUTH CAROLINA* 83 (2d Ed. 2002). Thus, a dismissal on the basis of lack of finality is clearly a dismissal for failure to comply with appellate court rules, and Appellant’s Motion was properly styled in the alternative as a motion for reinstatement and/or rehearing.

Respondent did not present any substantive arguments as to why Appellant’s appeal should not be reinstated. Therefore, Appellant’s Motion on this point is unopposed substantively and should be granted. *See, e.g., First Union Nat. Bank v. FCVS Commc’ns*, 321 S.C. 496, 502, 469 F.E.2d 613, 217 (Ct. App. 1996) (a party’s failure to respond to an argument may be deemed a concession that the other party’s position is correct).

2. This Court should deny Respondent’s motion to strike the attachments to Appellant’s Motion.

Respondent has presented no valid reason why this Court should strike the attachments to the Motion. In fact, Rule 240(c) specifically directs that “[w]here the Record on Appeal ... has not been filed ... the parties shall file affidavits and other documents in support of their

positions.” Rule 240(c), SCACR. There is no limitation or requirement that supporting documentation must be filed or can only be filed with a party’s opposition to a motion to dismiss. Respondent’s attempt to create such a rule runs counter to this Court’s long-standing position that all portions of a record should be reviewed in the interest of reaching the correct result and in the interests of justice. *See, e.g., Poston v. Barnes*, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987) (explaining that “[t]he search for the truth, in order to give justice to the litigants, is the primary duty of the courts”).

Furthermore, although Respondent correctly points out the standard for rehearing, he does not and cannot point to any rule that prohibits a party from citing to new or different parts of the record below in a motion for rehearing, so long as those portions of the record are relevant, were presented to the forum below and are properly presented to this Court, all of which are the case here. The cases presented by Appellant are inapposite, as they address different issues. *Kennedy v. South Carolina Ref. Sys.*, 349 S.C. 5321, 532, 564 S.E.2d 322, (2001) (refusing to address an argument on rehearing “because it was never presented to this Court”); *Moore v. Trimmier*, 32 S.C. 511, 11 S.E. 548 (1890) (refusing to consider on rehearing evidence of an alleged release on a judgment lien that the petitioner failed to present to the circuit court). Here, the arguments presented to this Court in Appellant’s Motion were raised previously and the attachments unarguably were part of the record before the Commission. As Respondent has not alleged that the attachments to the Motion were not presented to and part of the record before the Commission, his arguments are little more than an attempt to preclude this Court’s ability to understand fully the precise posture of this case.

In addition, the bases for moving to strike materials presented to this Court are that either the material is irrelevant or was not presented to the forum below. Rules 209(b) & 210(c),

SCACR. Neither applies here, where the attachments were clearly presented to the Commission and are indisputably relevant to the issues raised in Appellant's Motion.

Even if Respondent's position were valid with respect to a motion for rehearing, which Appellant does not concede, the attachments are clearly permissible as part of its Motion for reinstatement and, therefore, should be considered. For all of the reasons set forth above, this Court should deny Respondent's request to strike the attachments to the Motion.

3. The decision to dismiss this appeal was incorrect and should be reversed.

Respondent presents no valid reason why this Court should not grant Appellant's Motion. The fact that Respondent resorts to mischaracterizing and misconstruing Appellant's arguments in order to frame arguments he can then knock down reveals the weakness in his position. For example, Appellant did not argue simply that a Commission Decision is final for purposes of appellate review because it decided the issues on a Form 50 or a Form 21 request for hearing. Instead, the Commission Decision in this case is final for purposes of review because it decided all of the issues pending before the Commission, a fact both the Commission and Respondent's counsel acknowledged. (Att. G, p. 11) (Att. I, p. 14) (Att. E, p. 28, lines 3-5). Respondent argues that, although the "issue in *this* hearing was whether the respondent had sustained a change of condition," other cases might raise other issues, which he equates to a motion for partial summary judgment on that issue.

Respondent's argument is both misplaced and nonsensical. First, he again acknowledges and concedes in his Return that the **only** issue raised in the proceeding below was whether he sustained a change of condition for the worse. Second, it is nonsensical to compare a final decision in a single-issue case to a decision on a motion for partial summary judgment. By its very nature, a motion for **partial** summary judgment requests the court to rule on one or some,

but not all of the issues pending before it. Partial summary judgment assumes there is more than one issue pending. If a single issue is pending before a lower tribunal, a motion for summary judgment, however styled, would completely resolve the matter. Here, the Commission decided the single issue raised and argued to it and is, therefore, final for purposes of appellate review.¹

As noted in the Motion, it is common for workers' compensation cases to be resolved over time through a series of proceedings, each with one or more issues that is resolved by the Commission in a final decision. Under Respondent's theory, no issue could ever be appealed to this Court until every single issue that possibly could be raised to the Commission had been raised and resolved. This process could span years, and parties would be unsure whether the claimant or the employer might find some other issue to raise to the Commission in a new proceeding, thereby blocking any appeal of a previously final decision of the Commission. Such a result is completely unworkable, would work hardships on both employees and employers, and could not be what the Legislature intended.

As explained in the Motion, both Respondent's and this Court's reliance on Bone v. U.S. Food Serv., 399 S.C. 566, 733 S.E.2d 200 (2012) in this case is misplaced. The specific holding in Bone is that, "[i]n agency appeals, the APA is controlling over general provisions that conflict with its terms. In this case, there is a specific statute in the APA that governs appeals from the circuit court in Commission cases, *section 1-23-390*, and it limits appeals to those from final judgments." 399 S.C. at 576-77, 733 S.E.2d at 205. Although Section 1-23-390 still limits appeals to those from final judgments, this case is governed by Sections 42-17-60 (providing for appeals directly to the Court of Appeals) and 1-23-380 (providing for appeals from a final

¹ As noted in Appellant's Motion, to the extent the issue of whether Claimant is entitled to TTD is viewed as having been raised to the Commission, it can and should be resolved by this Court in Appellant's favor because the only evidence in the record shows Respondent never responded in any way to Appellant's offer of a light duty position. See Pack v. South Carolina Dept. of Transp., 381 S.C. 526, 534, 673 S.E.2d 461, 465 (Ct. App. 2009); see also (Att. E. p. 27, lines 17 – 29, line 3).

agency decision). S.C. Code Ann. §§ 42-17-60 & 1-23-380. Section 1-23-390 addresses appeals from final judgments of the circuit court and, as this case does not involve any proceeding before the circuit court, simply does not apply in this appeal. The Supreme Court recognized this distinction in Shatto v. McLeod Reg. Med. Ctr., 406 S.C. 470, 474 n.2, 753 S.E.2d 416, 418 n.2 (2013).

Although Respondent asserts that it is irrelevant that this case does not involve a remand, he fails to point to any case, including Bone, that dismissed an appeal on lack of finality where the single issue pending before the Commission was finally decided and there was no remand. That is because there are none.

Finally, because Respondent did not address many of the points raised in Appellant's Motion, this Court should accept those arguments as unopposed. For example, Respondent did not contest the assertion that he did not present any evidence whatsoever to the Commission concerning either TTD or permanency. Nor did he take any position with regard to Appellant's argument that, to the extent this Court believes the issue of permanency was raised to the Commission, this Court can decide that issue as a matter of law because there is no conflicting evidence on this issue. Further, Respondent did not dispute that both he and the Commission specifically acknowledged that the only issue pending before the Commission in this case is whether Respondent sustained and proved a change of condition for the worse.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0726308

Shannon Cook Respondent,

v.

Spartanburg Steel Products, Inc. Appellant.

MOTION TO DISMISS

This motion is filed pursuant to Rule 240, SCACR.

This is an appeal in a workers' compensation case. The court should dismiss this appeal because the order of the Workers' Compensation Commission is not a "final order."

Argument

The Administrative Procedures Act generally limits a party's right to appeal an administrative case until after there has been a "final" decision. See S.C. Code Ann. § 1-23-380. This term is a term of art; it describes an order that disposes of all of the issues in a case and leaves nothing to be done but to enforce by execution what has been determined. See *Bone v. U.S. Food Service*, 404 S.C. 67, 83, 744 S.E.2d 552, 561 (2013).

There is much more to be done in the present workers' compensation case. The commission's decision specifically notes this; it describes that issues like an award of

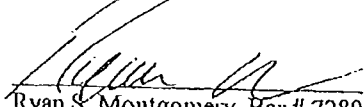
temporary benefits and an award of permanent benefits are being held in abeyance for future proceedings. See Attachment 1, p.10 ¶21. The decision *does* find that the claimant has experienced a "change of condition," but the decision also acknowledges that it is an intermediate order and not a final order. It instructs that "[a]ll other issues not addressed herein are hereby held in abeyance pending a final order of the Commission[.]" *Id.* at 11 ¶4.

CONCLUSION

This appeal should be dismissed. The dismissal should be without prejudice and with leave to re-file once the commission has entered a final decision.

July 17, 2014

Respectfully submitted,


Ryan S. Montgomery, Bar # 72890
108 Mills Avenue
Greenville, SC 29605
(864) 373-7333
(864) 373-7334 (facsimile)
ryan@RyanMontgomeryLaw.com

Attorney for Respondent

9

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

Appellate Case No. 2014-001372

WCC Case No. 0726308

Shannon Cook, Claimant, Respondent,

v.

Spartanburg Steel Products, Inc., Defendant, Appellant

RECEIVED

AUG 01 2014

SC Court of Appeals

APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS

Appellant, Spartanburg Steel Products, Inc., by and through its undersigned attorney, hereby submits this Return to Respondent's Motion to Dismiss. Appellant respectfully requests that this Court deny Respondent's Motion based upon the following:

1. By order dated May 20, 2014, the South Carolina Workers' Compensation Commission found Respondent sustained a compensable change of condition, such that he was entitled to additional medical treatment, including, but not limited to, lumbar spine surgery, in addition to reimbursement of any expenses associated with treatment

from Dr. Charles Kanos. This decision is a final decision of the Commission and is immediately appealable.

2. Judicial review of this Commission decision is governed by S.C. Code Ann. § 1-23-380 which provides that a party is entitled to judicial review of any final agency decision. S.C. Code Ann. § 1-23-380 (Supp. 2013), Martinez v. Spartanburg Cnty., 406 S.C. 532, 533, 753 S.E.2d 436, 436 (2014).

3. Respondent cites Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552 (2013) in his Motion to Dismiss to support his erroneous contention that the Commission's order is not a "final order." In Bone, the Supreme Court analyzed the meaning of "final judgment" under S.C. Code Ann. § 1-23-390, which permits further appellate review of a final judgment of the circuit court or the court of appeals. Appellant submits the instant case is distinguishable from Bone, as there has been no judgment by an appellate court nor has there been any order remanding the case for further proceedings. See Bone, 404 S.C. at 82, 744 S.E.2d at 561 ("the only relevant question here is whether or not the case has been remanded to the administrative agency.") However, even if the analysis in Bone were applicable to the instant case, the Commission's Decision and Order comports with the definition of "final judgment" set forth by our Supreme Court.

4. A "final judgment" is "something that finally disposes of the whole subject matter of the action, leaving nothing to be done but to execute the judgment." 404 S.C. at 83, 744 S.E.2d at 561. The Commission's May 20, 2014 Order disposes of the whole subject matter of the action, namely whether Respondent sustained a change of condition for the worse such that he was entitled to additional medical benefits. No other questions were before the Commission, and all that is left to be done is to enforce the judgment.

5. Respondent correctly notes that the Commission held in abeyance issues that were not addressed in the Commission's order, such as temporary benefits and an award of permanent benefits (Finding of Fact No. 21, Conclusion of Law No. 8). However, the decision to hold in abeyance issues that were not before the Commission does not render the decision interlocutory or non-final.

6. It is quite common in workers' compensation cases that there are multiple proceedings, each of which addresses different aspects of an injured worker's entitlement to benefits. For example, there may be one hearing before the Commission that finally determines whether an injury arose out of and in the course of employment. There may be a subsequent hearing that finally determines a claimant's entitlement to future medical and permanent disability benefits. Just because there are various issues brought before the Commission at various times does not render the decisions concerning those issues any less final. The instant case presents no different scenario. Although the Commission may anticipate there being a subsequent determination of Respondent's entitlement to additional indemnity benefits, the Commission has finally determined that Respondent sustained a change of condition for the worse and is entitled to medical benefits.

7. Just recently this honorable Court considered an appeal from the South Carolina Workers' Compensation Commission concerning a change of condition, without regard to permanent benefits. See Carter v. Verizon Wireless Southeast, 407 S.C. 641, 757 S.E.2d 528 (2014) (considering whether the claimant suffered a change of condition to her knee as opposed to suffering a condition due to natural progression of a preexisting disease and making a determination as to the claimant's entitlement to future medical treatment). This Court also recently has reviewed Commission decisions concerning

compensability without regard to permanency. See, e.g., Nicholson v. S.C. Dep't of Soc. Servs., 405 S.C. 537, 748 S.E.2d 256 (Ct. App. 2013). The instant appeal similarly leaves permanency yet to be determined, and it is reviewable at its current procedural posture.

8. Moreover, this honorable Court considered an appeal from the Commission where certain issues were held in abeyance by the Commission but other issues were considered on appeal. In Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct. App. 2013), this Court considered whether the claimant sustained compensable injuries to his neck, left shoulder, and left arm and whether he was entitled to temporary total disability compensation. In the decision below, the Commission decided to hold in abeyance the claimant's claims for injuries to his right shoulder, right arm, and lower back. Although this Court noted the Commission should have decided the entire claim, this Court still considered the issues that had been decided by the Commission.

9. In the instant case, the Commission found Respondent had not reached maximum medical improvement and found permanency was premature. (Findings of Fact Nos. 13 and 17.) However, the Commission issued a final decision that Respondent's lumbar spine condition had worsened and that he was entitled to surgery. Considering the decision in Lee v. Bondex, Appellants submit that this Court has jurisdiction to consider this final decision of the Commission.

10. Furthermore, several of Appellant's grounds for appeal concern the fact that the Commission did not have jurisdiction to consider Respondent's change of condition claim. Appellants submit that Respondent did not meet the procedural requirements for filing an application for review on a change of condition, pursuant to S.C. Code Ann. §

42-17-90 and S.C. Code Ann. Regs. 67-602. The Commission's decision to disregard the procedural requirements set forth in S.C. Code Ann. § 42-17-90 and S.C. Code Ann. Regs. 67-602 was a final decision. In particular, its decision allowed Respondent to come before the Commission over two years after he received his initial award, a time period well outside of that set forth by the South Carolina legislature.

11. If Respondent's position were taken to its logical conclusion, parties would be unable to appeal questions of compensability until after a final permanency award. Employers and carriers would thus face substantial liability while waiting for maximum medical improvement (MMI) when the ultimate question of compensability had not been finally determined by the appellate courts. Similarly, in the instant case, Appellant is faced with providing a lumbar spine surgery and additional rehabilitative medical treatment pending a finding of MMI when it is Appellant's position that the Commission improperly exercised jurisdiction over the change of condition claim and erroneously found that Respondent's condition had worsened. Appellants contend the Supreme Court's decision in Bone does not contemplate this result. Although Bone noted the issue of compensability could be raised on appeal of the final award, there had been no findings concerning the severity of Bone's injury, whether or not she had reached MMI, or if she should be provided medical treatment. 404 S.C. at 74, 744 S.E.2d at 556. The instant case is distinguishable in that medical benefits have been ordered.

Given the reasons set forth above, Appellant respectfully requests that this Court deny Respondent's Motion to Dismiss.

Respectfully submitted,

July 30, 2014

Ashley Ann for BBE
Brad B. Easterling, SC Bar # 70328
McANGUS GOUDELOCK & COURIE, LLC
Post Office Box 2980
55 East Camperdown Way, Suite 300 (29601)
Greenville, South Carolina 29602
(864) 239-4000

Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 0726308

RECEIVED
AUG 08 2014
SC Court of Appeals

Shannon Cook Respondent,

v.

Spartanburg Steel Products, Inc. Appellant.

REPLY

This reply is filed pursuant to Rule 240(f), SCACR.

I. The commission's order is not a "final order."

The commission's order is not a "final order." The terms "final order" and "final judgment" have established meanings. They refer to an order that decides all of the issues in a case and leaves nothing left for decision. See *Bone v. U.S. Food Serv.*, 404 S.C. 67, 83, 744 S.E.2d 552, 561 (2013); see also *Charlotte-Mecklenburg Hosp. Auth. v. South Carolina Dep't of Health and Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 894-95 (2010); and *Link v. Sch. Dist. of Pickens County*, 302 S.C. 1, 5 n.3, 393 S.E.2d 176; 178 n.3 (1990).

The commission's decision is not this sort of order. It expressly notes that issues are being held in abeyance. A "final order" does not hold issues in abeyance. When a final order is entered, there are no more issues in a case. A final order is the end of the road.

II. The order is comparable to a grant of partial summary judgment.

The order in question is akin to a grant of partial summary judgment. It decides some of this claim's issues, but like a grant of partial summary judgment, there are more issues on the horizon. While a partial grant of partial summary judgment is ordinarily immediately appealable, this is because a grant of partial summary judgment "involves the merits" within the meaning of the general appealability statute, which is section 14-3-330 of the South Carolina Code. See, e.g., *Nauful v. Milligan*, 258 S.C. 139, 143, 187 S.E.2d 511, 513 (1972) (involving a grant of partial summary judgment).

Section 14-3-330 does not apply to workers' compensation cases. This matter is governed by the Administrative Procedures Act. *Bone*, 404 S.C. at 84, 744 S.E.2d at 561-62.

III. The argument the appellant is making has already been rejected.

The gist of the appellant's argument is that as long as an order decides one or some of the issues in a case—again, like a grant of partial summary judgment—the order is a "final order" and is immediately appealable. That was the approach followed in *Canteen v. McLeod Reg'l Med. Ctr.*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009); *Foggie v. Gen. Elec. Co.*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008); and *Green v. City of Columbia*, 311 S.C. 78, 79-80, 427 S.E.2d 685, 687 (Ct. App. 1993).

These cases all trace their appealability analysis to section 14-3-330 and to law that pre-dates (and has been over-ruled by) *Bone*.

IV. None of the cases the appellant references involved appealability.

The appellant contends that the present case is comparable to recent cases in which this Court has addressed the merits of a matter and has not dismissed the appeal. See (Return

pp.3-4) (citing *Carter v. Verizon Wireless*, 407 S.C. 641, 757 S.E.2d 528 (Ct. App. 2014); *Nicholson v. South Carolina Dep't of Social Services*, 405 S.C. 537, 748 S.E.2d 256 (Ct. App. 2013); and *Lee v. Bondex, Inc.*, 406 S.C. 97, 749 S.E.2d 155 (Ct. App. 2013)). But none of these other matters even addressed the issue of appealability.

This approach has been tried before. In *Woodard v. Westvaco Corp.*, this Court attempted to discern a particular rule of appealability (relating to the denial of a demurrer) from Supreme Court decisions that did not address the topic. 315 S.C. 329, 433 S.E.2d 890 (Ct. App. 1993). In reversing this Court's decision, the Supreme Court explained that appealability had not been raised in those decisions and that "the fact that an appellate court may have decided an appeal of a particular type of order on the merits is not dispositive of whether the order is appealable when the issue of appealability was not raised." 319 S.C. 240, 242, 460 S.E.2d 392, 393 (1995) (citing *Wallace v. Interamerican Trust Co.*, 246 S.C. 563, 144 S.E.2d 813 (1965)). Because none of these cases discuss appealability, they are not informative on this point.

V. Appealability is not impacted by the argument that this claim is time-barred.

The appellant suggests that immediate appealability is impacted by its argument that the commission did not have jurisdiction over this claim. No authority is given in support of this premise.

If this were true, one would expect the jurisprudence on the appealability of demurrers or denials of motions for summary judgment to be different. The appellant is arguing that this claim is time-barred. This is functionally equivalent to a defendant's argument based on the statute of limitations or that a particular forum lacks personal

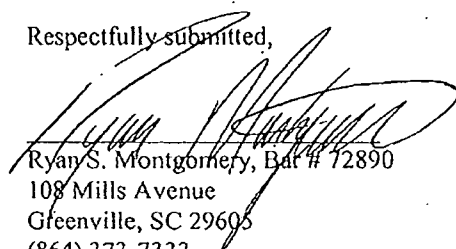
jurisdiction. But if a defendant files a motion to dismiss or a motion for summary judgment based on either of these arguments and loses, precedent dictates that neither sort of order is immediately appealable. Instead, these issues will be reviewed once there is an appealable order in the case. See *Woodard*, 319 S.C. at 242-43, 460 S.E.2d at 393-94 (denial of a motion to dismiss is not immediately appealable); *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994) (denial of summary judgment is not immediately appealable).

Conclusion

The final judgment rule is designed to prevent piecemeal appeals, and the upshot of the appellant's argument is that parties may circumvent this rule by filing limited proceedings in front of the commission—by requesting hearings on some but not all issues. This is a slippery slope argument, and like all slippery slope arguments, it can be inverted with equal force in the opposite direction. This order is *not* a final order. It expressly acknowledges that there are other issues in this case and that these issues are unresolved. This appeal should be dismissed, and that dismissal should be without prejudice.

August 5, 2014

Respectfully submitted,



Ryan S. Montgomery, Bar # 72890
108 Mills Avenue
Greenville, SC 29605
(864) 373-7333
(864) 373-7334 (facsimile)
ryan@RyanMontgomeryLaw.com

Attorney for Respondent

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov



WCC File #: 0726308

Carrier File #: YDS65635

Carrier Code #:

Employer FEIN #:

Claimant's Name: Shannon Cook, RESPONDENT SSN: _____ Employer's Name: Spartanburg Steel Products, Inc., APPELLANT
Address: _____ Address: 1290 New Cut Road
City: _____ State: SC Zip: 29373 City: Spartanburg State: SC Zip: 29303
Home Phone: _____ Work Phone: _____ Insurance Carrier: Sedgwick Claims Management Services
Preparer's Name: Brad Easterling, Esq. Law Firm: Turner Padget Graham & Laney, P.A. Preparer's Phone #: (864) 552-4619

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by ☐ claimant ☒ employer (check one) Date of Injury: September 17, 2007

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

See attached addendum.

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

☐ Mediation

☐ Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to

Ryan S. Montgomery, Esquire
Ryan Montgomery Attorney at Law, LLC
108 Mills Avenue
Greenville, SC 29605

Ms. Virginia Crocker, Judicial Director
S.C. Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202

on the 9th day of December by ☒ first class mail ☐ personal service ☐ certified mail.

Preparer's Signature

Attorney
Title

BEasterling@TurnerPadget.com
Email

December 9, 2013
Date

Check this box if you are not represented by an attorney ☐

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov.

If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

Addendum to Form 30: Defendants' Grounds for Appeal

Shannon Cook

WCC File No. 0726308

Date of Injury: September 17, 2007

1. Whether the Hearing Commissioner erred in Finding of Fact No. 6, wherein she states "Claimant's counsel (Mr. Gagne) timely filed a Form 50 on May 9, 2012, alleging a change of condition for the worse. Attached to the Form 50 was an opinion from Dr. Rana that Claimant has sustained a change of condition for the worse (Claimant's APA #8)," when such a factual finding is against the greater weight and preponderance of the evidence in the record.
2. Whether the Hearing Commissioner erred in Finding of Fact No. 7, wherein she states "On May 17, 2013, Claimant's current counsel (Mr. Montgomery) filed a Form 50 requesting a hearing on the change of condition for the worse (Claimant's APA #9)," when such a factual finding is against the greater weight and preponderance of the evidence in the record.
3. Whether the Hearing Commissioner erred in Finding of Fact No. 8, wherein she states "Pursuant to Section 42-17-90 and a sequential review of the treatment records dated after the hearing before Commissioner Wilkerson, I find that Claimant's lumbar spine condition has significantly worsened: after the permanency award was paid, Claimant's back and leg pain increased, and a cane was prescribed for "antalgic gait and leg weakness." Claimant's medications were no longer relieving his pain, and were therefore changed/increased. Treatment records note that (a) morphine was having "very little effect," (b) Claimant's Waddell's signs were consistently "0/5," and, most importantly, (c) Claimant has "*severe [post-surgical] scar tissue formation.*" Claimant has also undergone multiple injections since the date of the permanency award, and he requested another surgical consult/opinion in December 2011. As all these records are from authorized providers, Defendants had notice of Claimant's worsening condition as well as notice of his request for another surgical opinion (e.g., Claimant's APA #1, pages 5-6, 8, 10, 13, 21, 26, 33, 36, 38-39, 45, 48, 50, 53, 57, 59, 75, 80, 85, 97, 102, 108, 110, 114, and 116; *See also* Claimant's APA #3, page 143)," when such a factual finding is against the greater weight and preponderance of the evidence in the record.
4. Whether the Hearing Commissioner erred in Finding of Fact No. 9, wherein she states "Three authorized physicians state that Claimant has sustained a change of condition for the worse, and that Claimant needs further surgery. There is no competing questionnaire or evidence to the contrary (medical evidence in its entirety, including but not limited to Claimant's APA #1, pages 128-128A; Claimant's APA #3, pages 136, 143, and 146; Claimant's APA #5, pages 155, 155A, and 155D)," when such a factual finding is against the greater weight and preponderance of the evidence in the record.
5. Whether the Hearing Commissioner erred in Finding of Fact No. 10, wherein she states "The questionnaires referenced *supra* are clearly supported by the treatment records in evidence, and I therefore accord the questionnaires great weight (medical evidence in its

entirety)," when such a factual finding is against the greater weight and preponderance of the evidence in the record.

6. Whether the Hearing Commissioner erred in Finding of Fact No. 11, wherein she states "At the hearing, Claimant appeared to be in genuine discomfort, a presentation which did not appear to be feigned or contrived. I considered the fact that Dr. Kanos found some "exaggerated response" during his exam of Claimant, but given the fact that there is objective pathology after both an MRI and a CT myelogram (such that three physicians, including Dr. Kanos, recommend surgery), I find that Claimant may be merely appealing for help. Moreover, Claimant has not exaggerated his condition to authorized treating physicians; in fact, the opposite is true. To treating physicians, Claimant volunteered the fact that he went out to dinner and a movie with his son, and that he is "trying to do some walking and he is praised." If Claimant were being untruthful about his condition, it would have been far more expedient for him to claim he cannot go anywhere or do anything (Claimant's APA #1, pages 122 and 126; observations of the undersigned; medical evidence in its entirety; Commission file containing pleadings and Orders)" when such a finding is against the greater weight and preponderance of the evidence.
7. Whether the Hearing Commissioner erred in Finding of Fact No. 12, wherein she states "there is no dispute that Claimant now needs surgery" when such a finding is against the greater weight and preponderance of the evidence.
8. Whether the Hearing Commissioner erred in Finding of Fact No. 13, wherein she states "Claimant has not reached maximum medical improvement, a finding I base on the opinions of three authorized physicians (e.g., Claimant's APA #1, page 128A)," when such a finding is against the greater weight and preponderance of the evidence.
9. Whether the Hearing Commissioner erred in Finding of Fact No. 15, wherein she states "Claimant shall receive reimbursement for the CT Myelogram and visits with Dr. Kanos: Dr. Kanos (Defendants' IME) requested a CT Myelogram prior to rendering a surgical opinion. Once Dr. Kanos reviewed the results of the CT Myelogram, he agreed that Claimant needs surgery, although Dr. Kanos does not recommend fusion surgery (Claimant's APA #5, pages 155, 155A, and 156; Claimant's APA #6, pages 156-157)," when the greater weight and preponderance of the evidence suggests Claimant has reached maximum medical improvement and has not sustained a change of condition for the worse.
10. Whether the Hearing Commissioner erred in Finding of Fact No. 16, wherein she states "Dr. Kanos is hereby named the treating surgeon. He is very familiar with Claimant's spinal condition, and his surgical approach in Claimant's case is more conservative than that recommended by other physicians in this case," when the greater weight and preponderance of the evidence suggests Claimant has reached maximum medical improvement and has not sustained a change of condition for the worse.
11. Whether the Hearing Commissioner erred in Finding of Fact No. 17, wherein she states "Permanency is premature" when the greater weight and preponderance of the evidence

suggests Claimant has reached maximum medical improvement and has not sustained a change of condition for the worse.

12. Whether the Hearing Commissioner erred in Finding of Fact No. 18, wherein she states "I find that the opinion from Dr. Rana is not inadmissible. Dr. Rana's physical examination mentions the lumbar spine no fewer than 5 times, and he opines that Claimant sustained a change of condition to the spine. Whether or not Dr. Rana found Claimant to be at maximum medical improvement is not dispositive any more than is a statement by a physician to a reasonable degree of medical certainty that a claimant has sustained a repetitive trauma injury. Otherwise, the Commission's involvement would be unnecessary. Dr. Rana does opine that Claimant has an "additional" problem of thoracic spine involvement but; whether or not the Commission or any other physician agrees with that statement is a merits issue for adjudication. The undersigned is unwilling to "punish" Claimant for any deficiencies with regard to Dr. Rana's record/opinion, when the authorized treatment records clearly support an opinion of a worsened condition (Claimant's APA #2)," when such a finding is against the greater weight and preponderance of the evidence.
13. Whether the Hearing Commissioner erred in Finding of Fact No.19, wherein she states "I considered Defendants' video surveillance, but it does nothing to persuade the undersigned to deviate or retreat from this decision" when such a finding is against the greater weight and preponderance of the evidence.
14. Whether the Hearing Commissioner erred in Finding of Fact No. 22, wherein she states "Based upon the medical records as a whole to include Dr. Kanos' medical notes, I find that the claimant is entitled to additional medical treatment through Dr. Kanos, including but not limited to the recommended surgery, as it is causally related to the underlying injury, medically necessary and will tend to lessen the period of disability," when the greater weight and preponderance of the evidence suggests Claimant has reached maximum medical improvement and has not sustained a change of condition for the worse.
15. Whether the Hearing Commissioner erred in Conclusion of Law No. 1, wherein she states "Pursuant to §42-17-90, the evidence as a whole and the above findings of facts, the claimant has sustained a change of condition for worse" when such a Conclusion of Law is against the greater weight and preponderance of the evidence in the record and is based upon erroneous factual findings.
16. Whether the Hearing Commissioner erred in Conclusion of Law No. 2, wherein she states "Pursuant to §42-17-90, the evidence as a whole and the above findings of facts, claimant's previous counsel timely filed an application for a change of condition," when such a Conclusion of Law is against the greater weight and preponderance of the evidence and is based upon erroneous factual findings.
17. Whether the Commissioner erred in Conclusion of Law No. 3, wherein she states "All applicable time limits in S.C. Code Ann., §42-17-90 were tolled, or satisfied, when claimant filed his Form 50 on or about May 9, 2012," when such a Conclusion of Law is

against the greater weight and preponderance of the evidence and is based upon erroneous factual findings.

18. Whether the Hearing Commissioner erred in Conclusion of Law No. 4, wherein she states "Pursuant to §42-17-90, the evidence as a whole, the above findings of fact and the case of Young v. Tide Craft, Inc. Dr. Rana's opinion was based enough on fact to create an issue as to the merits to be adjudicated at this hearing and does not preclude the claimant from now pursuing a change of condition request" when such a Conclusion of Law is against the greater weight and preponderance of the evidence and is based upon erroneous factual findings.
19. Whether the Hearing Commissioner erred in Conclusion of Law No. 5, wherein she states "Pursuant to the South Carolina case of Allen v. Benson Outdoor Advertising Co. 236 S.C. 22; 112 S.E2d 722 (1960) this case at bar is not precluded from being brought for a change of condition. The undersigned Commissioner notes the language within the Allen case which states "the filing of a claim for further compensation within the statutory period" is enough and that loss of jurisdiction by the commission would be an *absurd* result which the legislature certainly did not have in mind. *Id.* at 30" when such a Conclusion of Law is against the greater weight and preponderance of the evidence and is based upon erroneous factual findings.
20. Whether the Hearing Commissioner erred in Conclusion of Law No. 6, wherein she states "Pursuant to §42-15-60, the claimant is entitled to additional medical treatment with Dr. Charles Kanos as this treatment is medically necessary, casually related and will tend to lessen the period of disability," when such a Conclusion of Law is against the greater weight and preponderance of the evidence and is based upon erroneous factual findings.
21. Whether the Hearing Commissioner erred in Conclusion of Law No. 7, wherein she states "Pursuant to §42-15-60, all medical treatment with Dr. Kanos was causally related, medically necessary and would tend to lessen the period of disability. Claimant is entitled to reimbursement of any and all expenses and co-pays associated with this treatment," when such a Conclusion of Law is against the greater weight and preponderance of the evidence and is based upon erroneous factual findings.
22. Whether the Hearing Commissioner erred in ordering that "defendants shall reimburse the claimant for any and all expenses associated with the medical treatment as directed by or provided by Dr. Charles Kanos," when such an order is against the greater weight and preponderance of the evidence in the record and is based upon erroneous factual findings and conclusions of law.
23. Whether the Hearing Commissioner erred in ordering that "defendants shall provide ongoing medical care through Dr. Charles Kanos" when such an order is against the greater weight and preponderance of the evidence in the record and is based upon erroneous factual findings and conclusions of law.
24. Whether the Hearing Commissioner erred in failing to find as a fact and as a conclusion of law that the Commission lacked jurisdiction to hear Claimant's change of condition

- claim, when such a finding is supported by the preponderance of the evidence in the record.
25. Whether the Hearing Commissioner erred in failing to find as a fact and as a conclusion of law that Claimant's change of condition claim is barred by South Carolina Code § 42-17-90, when such a finding is supported by the preponderance of the evidence in the record.
 26. Whether the Hearing Commissioner erred in failing to find as a fact and as a conclusion of law that the medical report of Dr. Tony Rana, dated February 16, 2012, which Claimant relies upon to support his change of condition relative to his lumbar spine, was nebulous and inherently indicated no change of condition, when such a finding is supported by the preponderance of the evidence in the record.
 27. Whether the Hearing Commissioner erred in failing to find as a fact and as a conclusion of law that Claimant's change of condition claim was barred by South Carolina Regulation 67-602, when such a finding is supported by the preponderance of the evidence in the record.
 28. Whether the Hearing Commissioner erred in failing to find as a fact that Defendant Spartanburg Steel Products made an offer for Claimant to return to light duty work but Claimant made no attempt to go back to work at Spartanburg Steel.
 29. Whether the Hearing Commissioner erred in failing to find as a fact and as a conclusion of law that Claimant failed to sustain his burden of proof in establishing that he sustained a compensable change of condition related to his September 17, 2007 workplace accident, when such a finding is supported by the preponderance of the evidence in the record.
 30. Whether the Hearing Commissioner erred in failing to find as a fact and as a conclusion of law that Claimant's change of condition claim is barred by the doctrine of *res judicata*, when such a finding is supported by the preponderance of the evidence in the record.
 31. Whether the Hearing Commissioner erred in failing to order that the Claimant's change of condition claim is barred, when such an order is supported by the preponderance of the evidence in the record.

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5739 www.wcc.sc.gov



PRE-HEARING BRIEF
WCC File No: 0726308

Claimant's Name: Shannon Cook Employer's Name: Spartanburg Steel Products, Inc.
Address: _____ Address: 1290 New Cut Road
City _____ State: SC Zip: 29373 City Spartanburg State: SC Zip: 29303
Home Phone: _____ Work Phone: _____ Carrier: Sedgwick Claims Management Services
Preparer's Name: Brad B. Easterling, Esq. Preparer's Phone #: (864) 552-4619

A claim for workers' compensation benefits is made based on the following grounds:

☒ Injury ☐ Illness ☐ Repetitive Trauma

1. Compensation Rate: \$564.46 2. AWW: \$846.64 Date of Injury: 9/17/2007
3. Type of Injury and body part(s): Low back
4. Facts in controversy: Whether claimant has sustained a change condition per S.C. Code § 42-17-90.
5. Legal issues involved: S.C. Code § 42-17-90.
6. Unusual aspects: The deposition of Dr. Kanos is scheduled for September 23, 2013.
7. Witnesses (designate if expert):* Claimant; John Nelson; Jon Tuck; other private investigators who performed surveillance; Dr. Phillip Latourette* (by deposition); Dr. Charles Kanos* (by deposition to be taken 9/23/13).
8. Exhibits: Depositions of claimant; deposition of Dr. Latourette; deposition of Dr. Kanos; surveillance videos; corresponding reports; Facebook printouts and videos.
9. Medical evidence (Indicate report pursuant to R.67-612; deposition or appearance): _____
10. Name, address, and specialty, if any, of the treating physician: Dr. Phillip Latourette
11. Impairment rating(s); body part(s); physician and date of opinion: 14% whole person by Dr. Hodge 3/6/09; 14% whole person by Dr. Latourette 6/16/10.
12. I am amending my Form 50/51 in the following manner: _____

☐ **Mediation**

- ☐ a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
☐ b. Mediation is required pursuant to Reg. 67-1802.
☐ c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
☐ d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I verify the contents of this form are accurate and true to the best of my knowledge.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to (see attached certificate of service) on the 15th day of August 2013 by: ☒ first class postage ☐ certified mail ☐ personal service.

Signature: _____ Email: BEasterling@TurnerPadgett.com
Date of hearing: August 26, 2013 Time needed for hearing: 30 minutes

Questions about the use of this form should be directed to the Jurisdictional Commissioner. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615; as well as Regulation 67-1801. File this form and proof of service on the opposing party according to R.67-611 and R.67-212. Do not send medical reports. * Commissioners reserve the right to admit expert witnesses at hearings.

WCC Form # 58
Revised 7/13

58

PRE-HEARING BRIEF



RYAN MONTGOMERY

ATTORNEY AT LAW, LLC

March 3, 2014

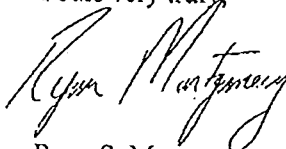
The Honorable Virginia L. Crocker
Judicial Director
SC Workers' Compensation Commission
PO Box 1715
Columbia, SC 29202-1715

Re: Claimant: Shannon Cook
Employer: Spartanburg Steel Products, Inc.
Carrier: Shannon Cook
WCC File No.: 0726308
Claim No.: YDS656635C
D.O.L.: 9/17/2007

Dear Director Crocker:

Please find enclosed our original and three (3) copies of the Respondents' Brief To Full Commission Appellate Panel. By copy of this letter to the Defense Attorney, I am serving him with a copy of same. A certificate of service accompanies this correspondence.

Yours very truly,



Ryan S. Montgomery

cc: Mr. Shannon Cook
Brad Easterling, Esq.

108 MILLS AVENUE • GREENVILLE • SOUTH CAROLINA 29605 • (864) 373-7333 • (864) 373-7334 (FAX)

www.RYANMONTGOMERYLAW.com

THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC# 0726308

Shannon Cook	)	
	)	
Employee	)	
	)	
Claimant/Respondent	)	
	)	
v.	)	RESPONDENTS' BRIEF
	)	TO FULL COMMISSION
	)	APPELLATE PANEL
Spartanburg Steel Products	)	
	)	
Employer	)	
	)	
and	)	
	)	
Sedgwick Claim Management Services,	)	
	)	
Carrier	)	
	)	
Defendants/Appellants.	)	

I. STATEMENT OF THE CASE

This matter arises out of an appeal on the part of the employer/carrier wherein the employer/carrier makes two arguments: 1. the claimant did not sustain a change of condition and 2. the hearing Commissioner, The Honorable Susan Barden, lacked jurisdiction to consider the claimant's change of condition claim. The underlying Order must be affirmed in full as the only evidence before the single Commissioner was that the claimant did in fact sustain a change of condition. The South Carolina Workers' Compensation Act is to be construed liberally in favor of providing treatment to the claimant and the hearing Commissioner properly retained jurisdiction and ruled accordingly. The claimant needs surgery as indicated by all of the doctors to which he was referred by the appellants in this

case. In the alternative, the defendants' actions created an expectation that his medical treatment would be "taken care of" such that the claimant detrimentally relied upon the treatment provided and the defendants are estopped from asserting a statute defense.

II. RESPONDENTS' POSITION

- A. It is uncontroverted that the claimant sustained a change of condition for the worse in that every single physician opined that the claimant sustained a change of condition for the worse and needs additional surgery.

Typically we are bound to argue that there was *substantial weight of the evidence* to warrant the hearing Commissioner's findings. In this case the level of evidence goes above and beyond substantial evidence in that the all of the evidence supports a change of condition for the worse. The claimant has two authorized medical groups, the Carolina Centers for Advanced Management of Pain and South Eastern Neurosurgical Group. The multiple authorized treating physicians and the defendants' IMB doctors all indicated that Mr. Cook's condition has worsened such that he needed surgery. It is important to note that the undersigned attorney never referred the claimant for an independent medical examination as it was unnecessary given he defendants' doctors' opinions:

Carolina Centers for Advanced Management of Pain/ Dr. Phillip LaTourette the claimant "has sustained a change of condition for the worse", APA p. 128A;

Carolina Centers for Advanced Management of Pain/ Dr. Phillip LaTourette the claimant "has sustained a change of condition for the worse", APA p. 128;

South Eastern Neurosurgical / Dr. Charles Kanos- "Mr. Cook has a causally related recurrent herniation at the identical level in his spine, he has sustained a change of condition for the worse in that he is no longer at MMI and needs additional medical treatment" APA, p. 155;

Orthopedic Specialties / Dr. Marco Rodriguez "Schedule for surgery. I discussed the options with him [claimant] including repeat laminectomy and discectomy but given this is the fact that this is the third time it has herniated and his pain is severe...I think these all require a fusion" APA. P. 143;

Orthopedic Specialties / Dr. Marco Rodriguez- "I agree that Mr. Cook has sustained a change of condition for the worse because he is not at MMI and I have recommended a lumbar fusion" APA, p. 146.

There is absolutely no evidence to suggest that the claimant has not sustained a change of condition for the worse and this must be affirmed.

B. The Hearing Commissioner properly addressed the issue of change of condition as the statute of limitations was tolled in this case.

The appellants have extrapolated a lone sentence from Allen v. Benson Outdoor Adver. Co., 236 S.C. 22, 112 S.E.2d 722 (1960) and interpreted it in their favor as the Achilles heel of this case. However, when the appellate panel considers the full context of the case, then the Appellate panel has absolutely no other option but to affirm the hearing Commissioner's Order.

On its own motion or on the **application of a party** in interest on the ground of a change in condition, the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded, on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation. . . . [T]he review must not be made after twelve months from the date of the last payment of compensation pursuant to an award provided by this title.

S.C. Code Ann. § 42-17-90(A)(2010). Concerning that last sentence of the statute, the Supreme Court has held that so long as the change of condition claim is filed with the Commission within the one-year period, the actual hearing on the issue need not be heard during the one year. Allen v. Benson Outdoor Adver. Co., 236 S.C. 22, 112 S.E.2d 722 (1960). In so doing, the Court approvingly quoted and adopted the following language from a West Virginia case:

'The filing of a claim for further compensation within the statutory period and partial but not complete development thereof within such period, with loss of jurisdiction by the commissioner during the progress of the case, would be an absurd result which the legislature certainly did not have in mind, and we feel warranted in holding that the statute in question should be given a construction which permits the commissioner to hear and pass upon any application in writing for a further adjustment of a claim, if filed within the statutory period applicable to the nature of the claim filed.' Allen, 112 S.E.2d at 726 (quoting Wilkins v. State Comp. Comm'r, 198 S.E. 871 (W.Va. 1938)).

In the case at bar, the application-- the Form 50 with the requisite attached medical documentation -- was filed within one year from the date of the original Order.¹

C. Defendants are barred from alleging lack of jurisdiction as their actions created reliance on the part of the claimant thereby providing reasonable excuse.

If the appellate does in fact find that the claimant failed to satisfy the statute of limitations, then the claimant falls under an exception to this rule as the defendants' actions indicated that they were going to provide medical treatment and created a reliance on the part of the claimant. In so addressing this issue, the claimant would direct the Appellate panel to the timeline of this claim.

¹ The Commission's regulation concerning filing a claim specifically states that filing a Form 50 satisfies the claim requirement which was also adopted in the Allen case cited supra. S.C. Code Reg. 67-206. Therefore, since claimant filed his Form 50 within the one year the statute of limitation is tolled as is routinely observed by the Commission when a Form 50 is filed on compensability issues.

On June 27, 2011 the defendants paid permanency on the original claim. Then on May 9, 2012 (within the 1 year change of condition statute), previous claimant counsel filed a Form 50 alleging a change of condition for the worse and attaching medical documentation that mentions the lumbar spine on five different occasions and supports change of condition within a reasonable degree of medical certainty. See Findings of Fact 18. The claimant continued to treat with the authorized treating physician, Phillip LaTourette who referred Mr. Cook to Dr. Marco Rodriguez, an orthopedic surgeon, for his lumbar spine condition. The appellants then directed the claimant to Dr. Marco Rodriguez who treated the claimant first on August 15, 2012. Dr. Rodriguez recommended a MRI for the claimant's lumbar spine. This MRI was approved by, scheduled, paid by the appellants and ultimately performed on September 13, 2012 with Piedmont Imaging. See APA 4, p. 147-148. The claimant then returned again to Dr. Marco Rodriguez on October 1, 2012 the authorized treating physician. Dr. Rodriguez recommended a lumbar fusion. See APA p. 143. In response to that recommendation, the appellants then scheduled the claimant for yet another medical appointment this time with Dr. Charles Kanos. This appointment occurred on December 14, 2012 wherein Dr. Kanos noted that the claimant was "markedly impaired" but would need to see his most recent MRI to decide whether or not he agreed with the surgery recommendation of Dr. Rodriguez. APA, p. 150. Dr. Kanos then saw the claimant for a "WC follow up on low back pain" on February 27, 2013 now with the benefit of the MRI report. See APA, p. 152. Dr. Kanos opined that the claimant would need a C'T Myelogram. Upon this recommendation additional medical treatment was denied and the claimant then filed a Form 50 request for hearing.

The defendants are estopped from arguing the statute based upon what may reasonably be inferred from their actions. Estoppel arises from the conduct of the employer/carrier from which

it may reasonably be inferred that the claimant was misled or deceived whether intentional or not and believes that the claim will be taken care of. See Clements v. Greenville County, 246 S.C. 20, 142 SE2d 212 (1965); Hucks v. Green's Fuel of South Carolina, 247 S.C. 457 (1966). Once it was determined in this case that the claimant could no longer rely upon the defendants to "take care of" him he filed for a hearing². Any reasonable person should have inferred that providing the claimant with 5 medical appointments one of which was an MRI would indicate that the defendants would "take care of" the claimant. Based upon what a reasonable person could infer from these actions, the defendants are estopped from asserting a statute of limitations defense. The appellate panel is also reminded that all of the authorized treating surgeons have opined that Mr. Cook needs surgery.

D. The South Carolina Workers' Compensation Commission Form 50 is the same Form for establishing claims and/or requesting a hearing.

In the Allen case, the Court held that an application must be filed within twelve months from the date of the last payment of compensation. Should the appellate panel consider the jurisdictional argument, which it should not, then there is a tacit admission of an issue within the forms of the South Carolina Workers' Compensation Commission as there is only one application that is able to be completed -the Form 50 which was filed within twelve months. Should the Commission or legislature wish to differentiate between the forms, then a revised form Application for Review on Change of Condition could be created but for the fifty-four (54) years since the Allen case, they have not created such a document so there is only one

² Estoppel as may have been created thereby could continue only such reasonable length of time as would be sufficient to enable employee, in exercise of due diligence, to realize that he could no longer rely upon it. DuPont v. E.I. DuPont De Nemours & Co., (S.C. 1957) 231 S.C. 295, 98 S.E.2d 528. Upon learning of the denial of the CT myelogram this claimant hired new counsel who filed a Form 50 request for hearing.

application- the Form 50. Retroactively interpreting a form now is nothing more than arm chair quarterbacking their own forms, operating outside of liberal interpretation of the Act for inclusion versus exclusion and the hearing Commissioner herself indicated she was not willing to "punish" a claimant which is what that would do.

Wherefore, the approved grounds considered the hearing Order must be affirmed in all respects so Mr. Cook may proceed with his claim, medical treatment and ultimately his life.

Respectfully submitted,



Ryan S. Montgomery, Esq.
Ryan Montgomery Attorney At Law, LLC
108 Mills Avenue
Greenville, South Carolina 29605
(864) 373-7333

Attorney for the Respondent,
Mr. Shannon Cook

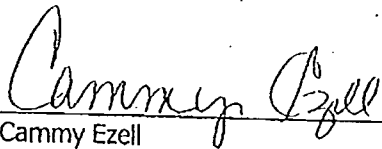
CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee at Ryan Montgomery, Attorney at Law, LLC, and that the attached **Respondents Brief To Full Commission Appellate Panel** was served this 3rd day of March, 2014, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

The Honorable Virginia L. Crocker
Judicial Director
S.C. Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202

Mr. William E. Shaughnessy
Mr. Brad Easterling
McAngus Goudelock & Courie, LLC
PO Box 2980
Greenville SC 29602

Mr. Shannon Cook
4849 Cannons Campground Road
Cowpens, SC 29330


Cammy Ezell
Paralegal for Ryan S. Montgomery



3 of 4 DOCUMENTS

CAROLYN M. NICHOLSON, Claimant, Appellant,
v.
S.C. DEPT OF SOCIAL SERVICES, Employer, and STATE ACCIDENT FUND,
Carrier, Defendants, Respondents

File No.: 0901585

DECISION AND ORDER of the APPELLATE PANEL of the SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

2011 SC Wrk. Comp. LEXIS 321

September 20, 2011, Decided

December 29, 2011, Filed

HISTORY: Hearing: Columbia, South Carolina on September 20, 2011, per notice timely and properly served upon all parties of interest.

Purpose: Appellate Panel Review of issues set forth on the Form 30

COUNSEL:

Kathryn Williams, Esq. of Kathryn Williams, P.A. for claimant-appellant

L. Brenn Watson, Esq. of Willson, Jones, Carter & Baxley, P.A. for defendants-respondents

JUDGES: T. SCOTT BECK, COMMISSIONER

OPINIONBY: T. SCOTT BECK, AVERY B. WILKERSON, JR., SUSAN S. BARDEN

OPINION:

[*1]

STATEMENT OF THE CASE

Claimant seeks benefits for injury by accident she alleges she sustained on or about February 26, 2009 while she was working for employer-defendant. She specifically contends that she sustained injuries to her neck, back, and left shoulder as a result of the accident, and she seeks payment of past and continuing medical treatment and also temporary total disability compensation benefits for the period from February 26, 2009 through April 13, 2009. Defendants admit claimant fell at work but deny that fall constitutes a compensable injury by accident.

By Order dated April 26, 2011, Commissioner Derrick L. Williams determined claimant fell when her shoe scuffed

the carpet while she was walking to a meeting with a stack of files in her hands; however, citing *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 444, 88 S.E.2d 611 (1955), he found that the claim was not compensable. The Commissioner's specific findings, in pertinent part, are as follows:

3. Claimant was a credible witness. This finding is based on the undersigned's observations of Claimant at the hearing.

4. Claimant's job with Defendant Employer required her [*2] to supervise employees and to regularly attend internal audit meetings. This finding is based on Claimant's testimony.

5. Claimant's accident occurred when she fell while walking to a scheduled audit meeting on February 26, 2009.

6. While walking to her scheduled audit meeting, Claimant's shoe scuffed the carpet causing her to fall and injure her back and neck. This finding is supported by Claimant's testimony.

7. The floor Claimant fell on was carpeted, level, and free from any defect. This finding is based on Claimant's testimony.

8. At the time of her fall, Claimant was carrying 10 files that weight approximately 15 pounds; however, the files that Claimant was carrying did not cause or contribute to her fall on February 26, 2009. This finding is supported by Claimant's testimony.

9. The facts in the present case are analogous to the facts in *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 444, 88 S.E.2d 611. In *Bagwell*, the claimant, while in the performance of his duties on the premises of his employer, suddenly fell backward on a concrete floor, lost consciousness, and later died as a result of a subdural hemorrhage. The Court in *Bagwell* [*3] denied compensability on the basis that the claimant's accident did not arise out of his employment with his employer. The Court held that there was no causal connection between the claimant's fall and the claimant's employment and that the claimant's employment was not a contributing cause. The Court further held that even though the claimant fell on a concrete floor, the claimant's employment did not contribute to the effect of the fall. The Court stated, "We are not prepared to accept the contention that, in the absence of special condition or circumstance, a level floor in a place of employment is a hazard." The Court further noted that cement floors or other hard floors are as common outside industry as within it and that the floor in the instant case did not create a hazard which would not be encountered on a sidewalk or street or in a home where a hard surface of the ground or a hard floor existed.

10. Claimant has failed to prove a causal connection between her fall on February 26, 2009 and her employment with Defendant Employer. While Claimant's fall on February 26, 2009 occurred in the course of her employment, Claimant's fall was wholly unrelated to her employment with [*4] Defendant Employer. Claimant's fall occurred while she was walking down a normal, level floored hallway. The floor Claimant was walking on at the time of her fall was carpeted, and the carpet was free from defect. While Claimant was carrying 10 files weighing approximately 15 pounds at the time of her fall, Claimant testified that the files she was carrying did not contribute to or cause her fall. Claimant admitted that her fall could have happened on any level, carpeted surface outside of Defendant Employer's building and that there was nothing peculiar about the floor at Defendant Employer's building that caused her to fall. Claimant specifically testified that the sole reason for her fall was that her shoe scuffed the carpet. Thus, Claimant's employment with Defendant Employment was not a contributing cause. This finding is supported by Claimant's testimony.

11. Claimant's employment did not contribute to the effect of her fall on February 26, 2009. While Claimant fell on a carpeted floor in Defendant Employer's building, Claimant's fall would have carried the same consequences had she fallen on a carpeted floor outside of Defendant Employer's building. There was no special condition [*5] or special circumstance about the level, carpeted floor in Defendant Employer's building that contributed to Claimant's injuries. The carpeted floor in Defendant Employer's building did not create a hazard or risk which would not be encountered in any other building or home with a level, carpeted floor.

12. Claimant has failed to prove by a preponderance of the evidence that her injury arose out of her employment with Defendant Employer. This finding is based on the evidence in the record as a whole. Accordingly, Claimant's claim for benefits is denied.

Within the statutory period, claimant filed an Application for Review in the case, copies of which were furnished to all parties prior to briefing and oral argument before the Appellate Panel. By appeal, claimant contended the Commissioner erred as a matter of fact and law in failing to find the claim compensable.

All proffered testimony and documentary evidence was taken and delivered to the individual members of the Appellate Panel for their study and consideration, and following briefing, an appellate hearing was held on September 20, 2011.

EVIDENCE OF THE CASE

At the hearing in Greenville on March 16, 2011, claimant testified [*6] that she is 50 years old and has a B.S. in business management. She was employed by employer-defendant for about 20 years, though she was no longer working there at the time of the hearing for reasons unrelated to this claim. Claimant stated that she worked in the child protective services area and was a supervisor of investigations.

Claimant testified that on February 26, 2009 she was preparing for an in-house audit of her files. She stated that she left her office carrying a stack of files for the meeting and was walking down the hall when "the friction from my foot caught me and I fell, files and all, [onto] my left side." (tr. p. 8, lines 7-13) She stated that her leg did not give way, that she is in good health, and had not any previous problems with her legs giving way. Claimant was asked specifically what she thought caused her to fall, and she answered as follows:

Q. So, what is it that you think caused you to fall?

A. Friction from the carpet.

Q. Did your foot get stuck?

A. Yes, from the friction. As I went to walk, the friction from the carpet just grabbed me and I fell.

(tr. p. 8, lines 20-24)

Claimant further testified that employer-defendant sent her to Exigent for medical [*7] treatment for pain in her left side, left shoulder, neck, and leg. She eventually underwent an MRI examination of her neck, was evaluated by neurosurgeon Dr. Philip Hodge, and received a cervical epidural steroid injection from Dr. John Haasis. Claimant stated that she was out of work from February 26, 2009 until April 13, 2009, when she returned to her regular work duties. She specifically asked the Commission for compensation for her time out of work and for payment of her medical treatment.

The medical records show that claimant reported to Exigent--Wade Hampton on February 26, 2009 complaining of pain in her left side, left shoulder, neck, and leg after "she tripped on the carpet, fell and landed on her left side." She was diagnosed with contusions and strains, treated with medications, and restricted to light duty work. Claimant continued to attend appointments at Exigent for treatment of problems with her left shoulder, left arm, and neck through March 24, 2009, though on March 16, 2009, the notes indicate that the workers' compensation insurance company had denied the claim and bills were being sent to claimant's health insurance provider.

A cervical spine MRI performed on [*8] March 24, 2009 was read to show multi-level disc degeneration and protrusions but no acute herniation.

Claimant reported to her primary care physician, Dr. Stanley Coleman, on March 25, 2009 for continued care, and

Dr. Coleman noted on that date that she was complaining of left arm and shoulder pain after falling at work. After noting continued neck and arm pain on April 6, 2009 and reviewing the MRI scan, Dr. Coleman referred claimant for evaluation with neurosurgeon Dr. Philip Hodge.

Dr. Hodge saw claimant on May 18, 2009 and noted that she was complaining of continued neck and left arm pain after she "[t]ripped and fell on floor" while at work on February 26, 2009. After evaluation, Dr. Hodge diagnosed cervical radiculopathy and recommended an epidural steroid injection. He later opined that claimant's problems "were caused and/or aggravated by her fall at work on February 23, 2009."

Pain management physician Dr. John Haasis saw claimant on May 28, 2009 for evaluation on referral from Dr. Hodge. Dr. Haasis noted claimant complained of neck, left shoulder, and left upper extremity pain after "she fell at work." He recommended a trial of physical therapy before attempting an injection. [*9] On June 20, 2009, Dr. Haasis noted that claimant reported "minimal benefit" from the therapy, and he then provided the epidural steroid injection.

Medical records from Dr. Coleman's office dated prior to the incident at work show that claimant was treated for low back pain in 2001, syncope in 2002, chest pain in 2002, a pulled muscle in her arm in 2006, and bilateral knee pain in 2006.

Based upon its review of all the evidence on the record, the Panel hereby reverses the Order of the Hearing Commissioner by majority vote and enters the following findings and conclusions:

FINDINGS OF FACT

1. Employee, employer, and carrier are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended, with Carolyn Nicholson as employee-claimant, S.C. Department of Social Services as employer-defendant, and State Accident Fund as carrier-defendant.
2. The parties stipulated to an average weekly wage of \$ 747.95, for a compensation rate of \$ 498.66.
3. Claimant alleged she sustained compensable injury to her neck, left shoulder, and back by accident arising out of and in the course of her employment on February 26, 2009; however, defendants specifically [*10] denied the accident arose out of her employment.
4. A hearing on the issues was held before Commissioner Derrick L. Williams on March 16, 2011.
5. Based on his observations of claimant at the hearing, Commissioner Williams found she was a credible witness and that finding was not appealed by either party.
6. Claimant's job with employer-defendant required her to supervise employees and regularly attend internal audit meetings. This finding is based on all the evidence on the record, including but not limited to claimant's testimony.
7. Claimant's accident occurred when her shoe fractioned the carpet causing her to trip and fall while walking to a scheduled audit meeting on February 26, 2009. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Exigent--Wade Hampton, Dr. Coleman, Dr. Hodge, and Dr. Haasis.
8. While walking to her scheduled audit meeting, claimant's shoe scuffed the carpet causing her to trip, fall onto her left side, and injure her neck, back, left shoulder, and left arm. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the [*11] medical records of Exigent--Wade Hampton, Dr. Coleman, Dr. Hodge, and Dr. Haasis.
9. At the time of her fall, claimant was carrying ten files that together weighed approximately 15 pounds; however,

these files did not cause or contribute to her fall. This finding is based on all the evidence on the record, including but not limited to claimant's testimony.

10. The floor on which claimant fell was carpeted, level, and free from any apparent defect. This finding is based on all the evidence on the record, including but not limited to claimant's testimony.

11. There was a specific, non-internal reason for claimant's fall in that she tripped when her foot scuffed or caught in the carpet due to the friction of the carpet against her shoe. This finding is based on all the evidence on the record, including but not limited to claimant's testimony.

12. There is no evidence claimant suffered any internal breakdown which caused her fall, as the medical records do not suggest any personal medical reason for the fall and claimant testified she is in good health and her leg did not give way or anything of that nature. This finding is based on all the evidence on the record, including but not limited [*12] to claimant's testimony and the medical records of Exigent--Wade Hampton, Dr. Coleman, Dr. Hodge, and Dr. Haasis.

13. Medical records submitted by defendants from Dr. Coleman's office dated prior to the incident at work show claimant was treated for low back pain in 2001, syncope in 2002, chest pain in 2002, a pulled muscle in her arm in 2006, and bilateral knee pain in 2006; however, there is no evidence that any of these prior conditions had anything to do with her fall at work on February 26, 2009. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Dr. Coleman.

14. Claimant's fall was not an "idiopathic fall" as there is no evidence that a non-occupational heart attack, epileptic fit, fainting spell, or any other personal medical problem caused the fall. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Exigent--Wade Hampton, Dr. Coleman, Dr. Hodge, and Dr. Haasis.

15. Claimant's fall was not an "unexplained fall" as she identified a specific, non-internal reason for her fall, specifically that she tripped when her [*13] foot scuffed or caught in the carpet due to the friction of the carpet against her shoe. This finding is based on all the evidence on the record, including but not limited to claimant's testimony.

16. Claimant has proven that a causal connection exists between her fall on February 26, 2009 and her employment with employer-defendant. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Exigent--Wade Hampton, Dr. Coleman, Dr. Hodge, and Dr. Haasis.

17. Claimant's fall on February 26, 2009 arose out of her employment in that it bore a special relation to her work and the conditions under which her work was performed, specifically that she was required to work in a carpeted area, while walking across the carpet her foot scuffed or caught in the carpet due to the friction of the carpet against her shoe, and this scuffing or catching in the carpet caused her to trip and fall. This finding is based on all the evidence on the record, including but not limited to claimant's testimony.

18. Claimant's fall on February 26, 2009 occurred in the course of her employment with employer-defendant in that she was then [*14] at her place of employment and engaged in the performance of her regular work duties. This finding is based on all the evidence on the record, including but not limited to claimant's testimony.

19. Claimant's employment with employer-defendant was a contributing cause to her fall and subsequent injuries. This finding is based on all the evidence on the record, including but not limited to claimant's testimony.

20. It is irrelevant that this circumstance could have occurred and this fall could have happened on any other level, carpeted surface outside of employer-defendant's building as the fall did not happen in any other place but happened in employer-defendant's building as a result of a risk associated with the conditions under which claimant was required to work, specifically that she was required to work in a carpeted area, while walking across the carpet her foot scuffed or caught in the carpet due to the friction of the carpet against her shoe, and this scuffing or catching in the carpet caused

her to trip and fall. This finding is based on all the evidence on the record, including but not limited to claimant's testimony.

21. It is also irrelevant that claimant's fall would [*15] have carried the same consequences had she fallen on any other level, carpeted surface outside of employer-defendant's building, as the same can be said of a great many compensable workplace injuries such as a knee injury occurring when standing after bending to tighten a bolt on a machine or a back injury when bending over to pick up a filter rack.

22. Claimant has proven by a preponderance of the evidence that her injury arose out of her employment with employer-defendant. This finding is based on all the evidence on the record, including but not limited to claimant's testimony.

23. Claimant timely reported her accident to employer-defendant. This finding is based on defendants' admission and all the evidence on the record, including but not limited to claimant's testimony.

24. Claimant sustained injuries to her neck, back, and left shoulder as a result of the compensable injury by accident. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Exigent--Wade Hampton, Dr. Coleman, Dr. Hodge, and Dr. Haasis.

25. Claimant has received medical treatment since and because of her compensable injury by accident [*16] which was designed to and has tended to effect a cure or give relief, including but not limited to medical treatment provided by Exigent--Wade Hampton, Dr. Coleman, Dr. Hodge, and Dr. Haasis, and she is in need of additional such medical treatment because of her injury by accident. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Exigent--Wade Hampton, Dr. Coleman, Dr. Hodge, and Dr. Haasis.

26. Claimant has not reached maximum medical improvement from her injuries. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Exigent--Wade Hampton, Dr. Coleman, Dr. Hodge, and Dr. Haasis.

27. Claimant was temporarily unable to work and totally disabled because of her compensable injury by accident from February 26, 2009 through and including April 13, 2009. This finding is based on all the evidence on the record, including but not limited to claimant's testimony and the medical records of Exigent--Wade Hampton, Dr. Coleman, Dr. Hodge, and Dr. Haasis.

RULINGS OF LAW

1. Under S.C. Code Ann. § 42-17-50, the Commission's Appellate [*17] Panel is empowered to review the appealed award, weigh the evidence as presented at the initial hearing, and, if good grounds are shown therefore, make its own findings and conclusions consistent with or inconsistent with those of the Hearing Commissioner.

2. Under S.C. Code Ann. § 42-1-130, claimant was a covered employee at the time in question; and under § 42-1-140, employer-defendant was a covered employer.

3. Under S.C. Code Ann. § 42-1-40 and S.C. Code Reg. 67-1603, claimant's average weekly wage is \$ 747.95, for a compensation rate of \$ 498.66.

4. Under S.C. Code Ann. § 42-1-160, claimant sustained compensable injury by accident causing compensable injuries to her left lower extremity, left shoulder, and back.

5. Claimant has proven that her injuries arose out of and in the course of her employment with employer-defendant. See *Owings v. Anderson Co. Sheriffs Dep't*, 315 S.C. 297, 433 S.E.2d 869 (1993) ("In order to be entitled to workers'

compensation benefits, the employee must show he or she sustained an 'injury by accident arising out of and in the course of employment.'"); *Clade v. Champion Lab.*, 330 S.C. 8, 496 S.E.2d 856 (1998) [*18] ("arising out of" refers to the origin of the cause of the accident; "An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury."); *Beam v. State Workers' Comp. Fund*, 261 S.C. 327, 200 S.E.2d 83 (1973) ("An accident 'arises out of employment' when the employment is a contributing proximate cause."; an injury "arises 'in the course of employment' . . . when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto.")

6. The single Commissioner made his decision based on *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 444, 88 S.E.2d 611 (1955), determining the injuries were not compensable because claimant fell on a level floor; however, the facts of the present case make clear that this is not an "idiopathic" injury -- as there is no evidence claimant suffered any internal breakdown but [*19] there is rather a specific, non-personal and work-related reason for her fall -- and, for that reason, the "level floor" jurisprudence is irrelevant to this case.

7. Furthermore, contrary to the facts in *Bagwell*, the facts in the present case show the cause of the fall was related to the work or the working conditions in that the evidence shows claimant was required to work in a carpeted area, while walking across the carpet her foot scuffed or caught in the carpet due to the friction of the carpet against her shoe, and this scuffing or catching in the carpet caused her to trip and fall. See *Bagwell*, 88 S.E.2d at 613 ("It must be shown that the cause of the fall . . . bore some special relation to the work or to the conditions under which it was performed.").

8. The facts in the present case are more analogous to the facts in the Court of Appeals' decisions in *Sigmon v. Dayco Corp.*, 316 S.C. 260, 449 S.E.2d 497 (Ct.App.1994) and *Creech v. Ducane Co.*, 320 S.C. 559, 467 S.E.2d 114 (Ct.App.1995). In *Sigmon*, it was determined that the injured [*20] worker sustained a compensable injury when his knee locked when he stood after bending to tighten a bolt on a machine, and in *Creech*, it was determined that the injured worker sustained a compensable injury by accident where he injured back when bending over to pick up one pound filter rack. Both of these injuries could have happened if the workers had performed similar activities at home or at some other place, but the injuries were compensable because they happened at work due to actions the employees undertook to perform their required work duties and because of the conditions under which they were required to work. Here, claimant's injuries happened at work, while she was performing her work duties in walking to a meeting carrying files in her hands, and the injury occurred because of the condition under which she was required to work, specifically she was required to work in a carpeted area, while walking across the carpet her foot scuffed or caught in the carpet due to the friction of the carpet against her shoe, and this scuffing or catching in the carpet caused her to trip and fall.

9. The Supreme Court's decision in *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 689 S.E.2d 615 (2010) [*21] forecloses defendants' argument that claimant's fall is not compensable because it could have happened on any carpeted floor at home or in some other place. In *Pierre*, the Commission determined that the injured worker's injuries were not compensable because, among other reasons, "the risk was not associated with [his] employment because the sidewalk [on which he fell] was no different in character from other sidewalks." However, the Court rejected that finding as not supported by substantial evidence since "the source of the injury was a risk associated with the conditions under which the employees were required to live." *Pierre*, 689 S.E.2d at 622-623. In doing so, the Court noted that *Pierre* slipped and fell on a wet sidewalk outside the employer's housing facility, the sidewalk was wet because another employee was using the sink and water ran across the sidewalk, and the employer's placement of the sink and apparent lack of drainage created the conditions that caused him to fall. Here, claimant testified that she fell because her foot caught in the carpet due to the friction of the carpet against her shoe. Thus, as in *Pierre*, [*22] the source of the injury was a risk associated with a condition under which claimant was required to work, specifically she was required to work in a carpeted area, while walking across the carpet her foot scuffed or caught in the carpet due to the friction of the carpet against her shoe, and this scuffing or catching in the carpet caused her to trip and fall.

10. Claimant has not reached maximum medical improvement from her injuries. *Dodge v. Brucoli, Clark, Layman, Inc.*, 334 S.C. 574, 514 S.E.2d 593 (Ct.App.1999); *O'Banner v. Westinghouse Elec. Corp.*, 319 S.C. 24, 459

S.E.2d 324 (Cl.App.1995).

11. Under S.C. Code Ann. §§ 42-1-120 and 42-9-10, claimant is entitled to and defendants are responsible for temporary total disability compensation benefits at the rate of \$ 498.66 per week for claimant's temporary total disability from February 26, 2009 through and including April 13, 2009.

12. Under S.C. Code Ann. § 42-15-60, claimant is entitled to and defendants are responsible for all causally related medical treatment and expenses from February 26, 2009 to the present and continuing.

ORDER [*23]

IT IS, THEREFORE, ORDERED that the Order of the Hearing Commissioner is hereby reversed by majority vote.

IT IS FURTHER ORDERED that the defendants shall make the following payments:

1. All causally related medical treatment and expenses from February 26, 2009 to the present and continuing.
2. Temporary total disability compensation in an amount equal to \$ 498.66 per week for claimant's temporary total disability from February 26, 2009 through and including April 13, 2009.

AND IT IS SO ORDERED.

CONCURBY: AVERY B. WILKERSON, COMMISSIONER

CONCUR:

[MISSING TEXT IN ORIGINAL]

DISSENTBY: SUSAN S. BARDEN, COMMISSIONER

DISSENT:

Commissioner Barden voted to affirm.

Legal Topics:

For related research and practice materials, see the following legal topics:

Workers' Compensation & SSDIAdministrative ProceedingsJudicial ReviewGeneral OverviewWorkers' Compensation & SSDICompensabilityInjuriesAccidental InjuriesWorkers' Compensation & SSDICompensabilityInjuriesNormal Exertion

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
OCT 24 2013
SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION
COMMISSION

The Honorable Avery B. Wilkerson, Commissioner

Appellate Case No. 2013-001322
W.C.C. 1112328

Samuel A. Rose, Claimant.....Respondent,

v.

JJS Trucking, LLC, Unisured Employer, and
Chris Thompson Services, LLC, Upstream Contractor, and
Bridgefield Casualty Ins. Co., Carrier, and South Carolina
Uninsured Employers' Fund,.....Defendants,

of whom JJS Trucking, LLC, Uninsured Employer, and
the South Carolina Uninsured Employers' Fund are.....Respondents,
and

Chris Thompson Services, LLC, Upstream Contractor,
and Bridgefield Casualty Ins. Co., Carrier are the.....Appellants.

FINAL BRIEF OF THE APPELLANTS

Kirsten L. Barr
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465
(843) 881-4228
Attorneys for Appellants

Table of Contents

Table of Authorities	ii
Statement of the Issues on Appeal	1
Statement of the Case	1
Facts	4
Arguments	6
I. The Workers' Compensation Commission erred	
as a matter of law in concluding that the request to	
transfer liability to the Uninsured Employers' Fund	
is not "ripe" for adjudication.....	6
II. The Workers' Compensation Commission erred as a	
matter of law in failing to transfer continuing liability	
to the Uninsured Employers Fund.....	9
Conclusion	11

Table of Authorities

Cases

<u>Barton v. Higgs</u> , 381 S.C. 367, 674 S.E.2d 145 (2009).....	10
<u>Colleton County Taxpayers Ass'n v. Sch. Dist. Of Colleton County</u> , 371 S.C. 224, 638 S.E.2d 685 ,(2006).....	8
<u>Gibson v. Spartanburg Sch. Dist. No. 3</u> , 338 S.C. 510, 526 S.E.2d 725, (Ct. App. 2000)	9
<u>Harrell v. Pineland Plantation, Ltd.</u> , 337 S.C. 313, 523 S.E.2d 766 (1999).....	9
<u>Hitter v. McLeod</u> , 274 S.C. 616, 619, 266 S.E.2d 418, 420 (1980).....	8

Statutes

S.C. Code Ann. § 42-1-415.....	passim
--------------------------------	--------

Regulations

S.C. Code Reg. 67-415.....	9, 10
----------------------------	-------

Statement of the Issues on Appeal

- I. Did the Workers' Compensation Commission err as a matter of law in concluding that the request to transfer liability to the Uninsured Employers' Fund is not "ripe" for adjudication?
- II. Did the Workers' Compensation Commission err as a matter of law in failing to transfer continuing liability to the Uninsured Employers Fund?

Statement of the Case

On December 6, 2011, the Claimant filed a Form 50 alleging various injuries by accident on August 20, 2011. (R. p. 23). The Form 50 named the Claimant's direct employer, JJS Trucking, LLC, and its upstream contractor, Chris Thompson Services, LLC, as Defendants in the claim. The Appellants, Chris Thompson Services and Bridgefield Casualty, denied the claim by Form 51 and also filed a Petition to Transfer Liability to the South Carolina Uninsured Employers Fund (UEF) on January 24, 2012. (R. p. 25, p. 27-55)

A hearing was held in Summerville, South Carolina on May 15, 2012 before Commissioner Gene McCaskill. Following that hearing, Commissioner McCaskill issued a Decision and Order dated August 23, 2012 (R. pp. 1-11), where he found and concluded, *inter alia*,

1. *Samuel Rose was an employee of JJS Trucking on August 10, 2011.*
2. *On August 10, 2011, Samuel Rose sustained an injury by accident to his head, knee, leg back and neck arising out of and in the course of his employment with JJS Trucking.*

5. *As a result of his accident, Claimant is entitled to temporary total disability benefits beginning on August 10, 2011 and continuing until such time as he reaches maximum medical improvement.*
6. *As a result of his accident, Claimant is entitled to an evaluation to determine the extent of his injuries and is entitled to ongoing medical treatment as prescribed by an authorized treating physician to be selected by the carrier.*
7. *On or about October 8, 2010, JJS Trucking, LLC represented to Chris Thompson Services, LLC that it had workers' compensation insurance.*
8. *On August 10, 2011, JJS Trucking was operating without proper insurance as required by the Workers' Compensation Act.*
9. *On August 10, 2011, JJS Trucking was operating as a subcontractor for Chris Thompson Services, LLC. Chris Thompson Services, LLC, is an "upstream employer" pursuant to §42-1415.*
10. *Thompson Services, LLC is liable to pay Claimant all benefits to which he is entitled under the Act.*

CONCLUSIONS OF LAW

1. *On August 10, 2011 Samuel Rose was an "employee" of JJS Trucking as defined in S.C. Code Ann. § 42-1-130 (1976).*

4. *Claimant is entitled to temporary total disability benefits beginning on August 10, 2011 pursuant to § 42-9-10 until such time as he is able to return to work.*
5. *Claimant is entitled to medical treatment causally related to his injury pursuant to §42- 15-60...*
6. *Claimant was an employee of JJS Trucking which, at the time of his accident, was an uninsured subcontractor. Pursuant to § 42-1-415(A) Chris Thompson Services, LLC, as the higher tier contractor, shall pay all benefits due the Claimant under the Workers' Compensation Act.*
7. *Chris Thompson Services, LLC, asserted in its pleadings and at the Hearing that liability for this claim should be transferred to the South Carolina Uninsured Employer's Fund. § 42-1415 only permits the higher tier contractor to petition the Commission to transfer responsibility for benefits to the UEF after it has paid all benefits due the Claimant under the Act. The evidence in the record indicates that Claimant has not received all benefits he is due under the Act from Chris Thompson Services, LLC, or its carrier. Therefore, the issue of transfer of responsibility to the UEF is not ripe for adjudication at this time.*
8. *Chris Thompson Services, LLC is entitled to credit for any compensation paid to the Claimant prior to the date of this Order...*

The Appellants, Chris Thompson Services and Bridgefield Casualty filed a Form 30, seeking review and reversal of Commissioner McCaskill's Decision and

Order by the Workers' Compensation Commission's Appellate Panel. (R. pp. 72-84). On May 15, 2013, the Appellate Panel issued an Order summarily affirming Commissioner McCaskill's conclusion that the Petition for Transfer of Liability was "not ripe for adjudication," without any discussion. (R. pp. 12-22).

The Appellants respectfully contend that the Workers' Compensation Commission erred as a matter of law in concluding that the Petition to Transfer Liability to the UEF was "not ripe" and in failing to actually transfer liability to the UEF pursuant to S.C. Code Ann. § 42-1-415 based upon the undisputed evidence in the record and the applicable law.

Facts

Chris Thompson testified that JJS Trucking was operating as a subcontractor of Chris Thompson Services, LLC, at the time in question. (R. p. 96). Chris Thompson Services engaged JJS Trucking to haul woodchips from a sawmill in Summerville to a paper mill in North Charleston on a regular basis, beginning in 2008. (R. pp. 96-97). Mr. Thompson testified that he obtained a Certificate of Insurance from JJS Trucking at the time his relationship with the JJS Trucking began in 2008 and that he has requested and obtained updated Certificates of Insurance from JJS Trucking on a yearly basis since that time to insure that JJS Trucking had continuous workers' compensation coverage. (R. p. 97).

Mr. Thompson identified the October 18, 2010 Certificate of Insurance contained in the Record as the one presented to him in October 2010 to verify that JJS Trucking's workers' compensation coverage was current. (R. p. 97, p. 141). This Certificate shows that JJS Trucking had workers' compensation

coverage through Travelers Insurance for the period from October 8, 2010 through October 8, 2011. (R. p. 141). The Certificate of Insurance shows Chris Thompson Services as the Certificate Holder and the Certificate is signed by David W. Hayes, whom Mr. Thompson identified as the owner of the Producer, the Swamp Fox Agency. (R. p. 97, p. 141). Mr. Thompson testified that after receiving this Certificate of Insurance, he was never given any reason to believe that JJS Trucking did not have workers' compensation coverage until after the Claimant's accident. (R. p. 98).

The record reveals that Travelers Insurance did, in fact, insure JJS Trucking for a period after the Certificate of Insurance was issued, but the policy lapsed without notice to Chris Thompson Services by any person or entity. (R. p. 159). Cedric Smalls, the owner of JJS Trucking, confirmed that he did not ever inform Chris Thompson Services that his workers' compensation insurance had lapsed and further testified that Chris Thompson would not allow him to work as a subcontractor if his workers' compensation insurance ever lapsed. (R. p. 132, p. 139).

At the time of the hearing before Commissioner McCaskill, the Appellants were voluntarily paying weekly temporary total disability compensation to the Claimant, as reflected on the Form 18. (R. p. 117). However, prior to the hearing before Commissioner McCaskill, the Claimant had not yet proven the extent of his alleged injuries or his entitlement to any medical or compensation benefits. In fact, all parties, including the UEF, denied the claim in its entirety.

Arguments

- I. The Workers' Compensation Commission erred as a matter of law in concluding that the request to transfer liability to the Uninsured Employers' Fund is not "ripe" for adjudication.

Chris Thompson Services and its carrier petitioned the Commission for a transfer of liability to the Uninsured Employers' Fund ("UEF") pursuant to S.C. Code Ann. § 42-1-415. (R. p. 27-55). According the terms of § 42-1-415,

"upon the submission of documentation to the commission that a ... subcontractor has represented himself to a higher contractor...as having workers' compensation insurance at the time the ...subcontractor was engaged to perform work, the higher tier...contractor...must be relieved of any and all liability under this title." (emphasis added).

The record is clear that JJS Trucking "represented himself" to Chris Thompson Services "as having workers' compensation insurance" at the time he was engaged to perform work and yearly thereafter, most recently on October 18, 2010. The Hearing Commissioner made a specific finding regarding this representation, which was not appealed or otherwise disturbed by the Appellate Panel and is now the law of the case: *"On or about October 8, 2010, JJS Trucking, LLC represented to Chris Thompson Services, LLC that it had workers' compensation insurance."* (Finding of Fact #7, R. p. 8).

Under the plain terms of the statute, having submitted proper documentation that JJS Trucking had represented itself as having workers'

compensation coverage, along with a Petition to Transfer Liability, the Appellants should been "relieved of any and all liability" without further delay. According to S.C. Code Ann. § 42-1-415,

"In the event that employer is uninsured ... the higher tier subcontractor, contractor, project owner, or his insurance carrier shall in the first instance pay all benefits due under this title. The higher tier subcontractor, contractor, project owner, or his insurance carrier may petition the commission to transfer responsibility for continuing compensation and benefits to the Uninsured Employers' Fund." (emphasis added).

Prior to the hearing before Commissioner McCaskill, the Appellants had paid and were continuing to pay the Claimant temporary total disability compensation benefits. (R. p. 117). However, the Claimant had not yet proven his entitlement to any other medical or compensation benefits. Following the May 15, 2012 Hearing, Commissioner McCaskill awarded the Claimant continuing compensation and medical benefits, which, of course, were not due before this award was made on August 23, 2012. Prior to the August 23, 2012 Decision and Order, the Appellants had paid all benefits "due" to the Claimant under the Act at that time.

Having awarded the Claimant additional benefits pursuant to the August 23, 2012 Decision and Order, the Commission went on to conclude in the same Order that the "Claimant has not received all benefits he is due under the Act" and; therefore, the Petition to Transfer Liability was not "ripe." Respectfully, the

Appellants' Petition was not contingent, hypothetical, or abstract and; therefore, to suggest that it was not "ripe" was an error of law. See Colleton County Taxpayers Ass'n v. Sch. Dist. Of Colleton County, 371 S.C. 224, 242, 638 S.E.2d 685 , 694 (2006) (stating that "an issue that is contingent, hypothetical, or abstract is not ripe for judicial review."); Hitter v. McLeod, 274 S.C. 616, 619, 266 S.E.2d 418, 420 (1980) (declining to rule on an issue that was not "ripe" for adjudication, noting it "presents [the court] with nothing more than a vehicle for rendering an advisory opinion").

Furthermore, it is wholly illogical to interpret S.C. Code Ann. § 42-1-415 as requiring anything other than payment of benefits presently due at the time the Petition is filed and the hearing is held. In fact, the language of S.C. Code Ann. § 42-1-415 clearly contradicts the Commission's interpretation (*e.g.*, requiring a petitioner to pay all benefits that may become due in the future as a condition precedent to the transfer of continuing), as the statute plainly states that the higher tier contractor may "petition the commission to transfer liability for continuing compensation and benefits to the Uninsured Employers' Fund." (emphasis added). By employing this language, "continuing compensation," the legislature clearly envisioned that additional benefits may be due in the future ("liability for continuing compensation"); however, if compensation is current as of the time of the Petition and hearing on that Petition, the Petition should be considered "ripe" for adjudication. Having paid all benefits that were "due" at the time the Petition was made in this case and at the time the hearing was held, the Appellants respectfully contend that the Commission should have transferred liability for "continuing compensation" to the UEF.

II. The Workers' Compensation Commission erred as a matter of law in failing to transfer continuing liability to the Uninsured Employers Fund.

According to the South Carolina Supreme Court,

"Under section 42-1-415(A), a statutory employer is no longer directly liable for workers' compensation payments whenever documentation is presented to the commission that a contractor or subcontractor represented himself to the statutory employer as having workers' compensation insurance."

Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 523 S.E.2d 766 (1999). Here, the Commission conclusively found that JJS Trucking, the subcontractor, represented himself to the statutory employer, Chris Thompson Services, as having workers' compensation insurance and this finding is the law of the case. (R. p. 8).

The Appellants further contend that proper documentation of this representation was provided to the Workers' Compensation Commission in accordance with S.C. Code Ann. § 42-1-415 and S.C. Code Reg. 67-415. In fact, the evidence regarding this documentation is undisputed, rendering the issue one of law that can be decided by the Court of Appeals. See Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 517, 526 S.E.2d 725, 729 (Ct. App. 2000) (holding that where the essential facts are undisputed, the question before the appellate court is one of law).

In particular, it is undisputed that the record contains an Acord Form 25-S, Certificate of Liability Insurance, which was collected by Chris Thompson Services, indicating that JJS Trucking had workers' compensation coverage from October 8, 2010 through October 8, 2011 through Travelers. (R. p. 141). Pursuant to S.C. Code Reg. 67-415, the

"Acord Form 25-S, Certificate of Insurance... is acceptable documentation of insurance provided the Certificate of Insurance indicates a valid South Carolina Address for the insured, is dated, signed and issued by an authorized representative of the insurance carrier for the insured."

See also Barton v. Higgs, 381 S.C. 367, 674 S.E.2d 145 (2009) (holding that if the Certificate of Insurance is dated, signed, and issued by an authorized representative of the carrier, it "shall serve as documentation of insurance" for purposes of S.C. Code Ann. § 42-1-415.).

Here, it is undisputed that the Certificate of Insurance submitted by the Appellants shows a valid South Carolina address for JJS Trucking: *137-A Gordon Street, Charleston, SC 29403*. (R. p. 141). It is undisputed that the Certificate of Insurance is dated: *October 18, 2010*. (R. p. 141). Finally, it is undisputed that the Certificate of Insurance is signed and issued by an authorized representative of Travelers Insurance: *David W. Hayes, owner of the Swamp Fox Agency, the producer of the policy*. (R. p. 141). In fact, Travelers Insurance stipulated that it covered JJS Trucking, as stated on the October 18, 2010 Certificate of Insurance at the time the Certificate was issued. (R. p. 141).

Chris Thompson Services reasonably relied on this Certificate of Insurance and it is undisputed that Chris Thompson Services was never given any notification of a lapse in coverage or other reason to believe that JJS Trucking did not have workers' compensation insurance. (R. p. 97). JJS Trucking admits that it did not notify Chris Thompson Services of this lapse prior to the Claimant's accident. (R. p. 139). Therefore, because the evidence on the seminal elements of S.C. Code Ann. § 42-1-415 is undisputed, the Appellants respectfully request that the Court of Appeals conclude that "responsibility for continuing compensation and benefits" should be transferred to the UEF in accordance with the mandatory language of § 42-1-415.

Conclusion

Based upon these arguments, the Appellants respectfully request that the Workers' Compensation Commission's Decision and Order be reversed and that the Court of Appeals conclude that the Appellants are entitled to transfer liability for continuing benefits to the Uninsured Employers' Fund in accordance with S.C. Code Ann. § 42-1-415.

Respectfully submitted,

TRASK & HOWELL, L.L.C.
P. O. Box 2167
Mt. Pleasant, SC 29465

By Kirsten L. Barr
Kirsten Leslie Barr
Attorney for the Appellants

October 22, 2013
Mt. Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

The Honorable Avery B. Wilkerson, Commissioner

Appellate Case No. 2013-001322
WCC File No. 1112328

Samuel A. Rose, Claimant, ... Respondent,

v.

JJS Trucking, LLC, Uninsured Employer, and
Chris Thompson Services, LLC, Upstream Contractor,
And Bridgefield Casualty Insurance Company, Carrier,
And South Carolina Uninsured Employers' Fund Defendants,

Of whom JJS Trucking, LLC, Uninsured Employer, and
The South Carolina Uninsured Employers' Fund are Respondents,

And

Chris Thompson Services, LLC, Upstream Contractor,
and Bridgefield Casualty Insurance Co., Carrier are the Appellants.

FINAL BRIEF OF RESPONDENT, SC UNINSURED EMPLOYERS' FUND

RECEIVED

OCT 23 2013

SC Court of Appeals

Amy V. Cofield
Cofield Law Firm
809 South Lake Drive
Lexington, SC 29072
(803) 951-0389
Attorney for the Respondent, SC Uninsured
Employers' Fund

Table of Contents

Table of Authorities	ii
Statement of the Issues on Appeal	1
Statement of the Case	2,3
Facts	4
Arguments	5-10
Conclusion	11

Table of Authorities

Cases

<u>Barton v. Higgs</u> , 381 S.C. 367, 674 S.E.2d 145(2009).....	8
<u>Cincinnati Ins. Co. v. South Carolina Second Injury Fund</u> , 297 S.C. 372, 377 S.E.2d 130 (Ct. App. 1989)	6
<u>Miller v. Robinson Trucking</u> , 333 S.C. 576, 510 S.E.2d 431 (Ct. App. 1998).....	7
<u>Unisys Corp. v. S.C. Budget and Control Bd.</u> , 346 S.C. 158, 551 S.E.2d 263 (2001).....	8
<u>Hopper v. Terry Hunt Construction</u> , 373 S.C. 475, 646 S.E.2d 162 (Ct. App. 2007) aff'd, 383 S.C. 310, 680 S.E.2d 1 (2009)	8

Statutes

S.C. Code Ann. Section 42-1-415	passim
---------------------------------------	--------

Regulations

S.C. Code Regulation 67-415	6
-----------------------------------	---

STATEMENT OF ISSUES ON APPEAL

1. Whether or not the Commission correctly ordered that the issue of transferring liability to the SC Uninsured Employers' Fund was not ripe for adjudication.
2. Whether or not the Appellant met all requirements of SC Code Ann. §42-1-415 to transfer liability to the SC Uninsured Employers' Fund which is denied.

STATEMENT OF THE CASE

This matter was before the Single Commissioner pursuant to an amended Form 50 (ROA, p. 23) filed by the Claimant as a result of an alleged injury by accident on August 10, 2011. A Form 51 and an amended Form 51 (ROA, p. 24) was filed by Kirsten Barr on behalf of Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company. A Form 51 (ROA, p. 25) was also filed by the SC Uninsured Employers' Fund (hereinafter "UEF"). Both Defendants denied each and every allegation.

On January 24, 2012, Defendant Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company filed a Petition to Transfer Liability to the SC Uninsured Employers' Fund pursuant to SC Code Ann. §42-1-415. The UEF filed a Return to the Petition denying that Petition had met all requirements of SC Code Ann. §42-1-415.

A hearing was held in this matter on May 15, 2012 before Commissioner McCaskill and an Order was issued on August 23, 2012 (ROA, p. 1). The Order held, among other things, that the Claimant's accident was a compensable injury and awarded the Claimant temporary total benefits beginning August 10, 2011, and continuing until he reached maximum medical improvement and further ordered a medical evaluation. The Commissioner held that JJS Trucking (immediate employer) was operating as a subcontractor for Chris Thompson Services, LLC, and as such, Chris Thompson Services, LLC was an upstream employer pursuant to §42-1-415. The Commissioner found Chris Thompson Services, LLC liable to pay the Claimant benefits in which he was due under the Act as JJS Trucking was uninsured at the time of the accident. Finally, as to the Petition to Transfer Liability to the SC Uninsured Employer's Fund, the Commission ruled that it was not ripe for adjudication because the higher tier contractor had not "paid all benefits due to the Claimant under the Act". Chris Thompson Services, LLC and its

carrier, Bridgefield Casualty Insurance Company appealed this Order by Form 30 filed on September 5, 2012 (ROA, p. 72). A Full Commission hearing was held on January 23, 2013 and Order issued on May 15, 2013 (ROA, p. 12) affirming the Order of the Single Commissioner. This appeal followed.

FACTS

At the hearing, it was the Claimant's testimony that he was injured on August 10, 2011 while an employee at JJS Trucking, LLC who was subcontracting for Chris Thompson Services, LLC. When the Claimant discovered that JJS Trucking, LLC did not have any workers' compensation insurance, he attempted to go upstream to Chris Thompson, the statutory employer, but benefits were denied. The Claimant alleged his compensation rate to be \$433.34. Because none of his medical bills have been paid, the Claimant sought a finding of compensability, entitlement to medical treatment and payment of medical bills as well as temporary total benefits. The Claimant stipulated that he had recently been receiving \$75.00 per from Chris Thompson Services, LLC.

It was the position of Chris Thompson Services, LLC and Bridgefield Casualty Insurance Company, that the Claimant was a direct employee of JJS Trucking who was subcontracting for Chris Thompson Services. This Defendant disputed the severity or permanency of any injury or the need for future treatment. Appellant argued that they were entitled pursuant to §42-1-415 to transfer liability to the UEF. This argument was based on a certificate of insurance dated October 18, 2010 (ROA, p. 148).

The SC Uninsured Employers' Fund denied that the carrier was entitled to transfer liability to the UEF as all the statutory and legal requirements of SC Code Ann. §42-1-415 had not been met.

ARGUMENT

The carrier in this instance petitioned to transfer liability to the South Carolina Uninsured Employers' Fund pursuant to §42-1-415. For the reasons set forth herein, the Petition for Transfer of Liability was properly denied.

To warrant the granting of a Petition to Transfer Liability, the Carrier must meet all statutory and legal requirements. §42-1-415 provides:

(A) Notwithstanding any other provision of law, upon the submission of documentation to the commission that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability under this title except as specifically provided in this section. In the event that employer is uninsured, regardless of the number of employees that employer has, the higher tier subcontractor, contractor, project owner, or his insurance carrier shall in the first instance pay all benefits due under this title. The higher tier subcontractor, contractor, project owner, or his insurance carrier may petition the commission to transfer responsibility for continuing compensation and benefits to the Uninsured Employers' Fund...

(B) To qualify for reimbursement under this section, the higher tier subcontractor, contractor, or project owner must collect documentation of insurance as provided in subsection (A) on a standard form acceptable to the commission. The documentation must be collected at the time the contractor or subcontractor is engaged to perform work and must be turned over to the commission at the time a claim is filed by the injured employee.

(C) The knowing and willful falsifying of information contained in standard forms submitted pursuant to this section must be considered fraud as provided by law. Knowing and willful failure to notify, by certified mail, the higher tier subcontractor, contractor, or project owner who originally was provided documentation of workers' compensation coverage of a lapse in coverage within five days after the lapse is considered fraud and

subject the contractor or subcontractor who represented himself as having workers' compensation insurance to the penalties for fraud by law. Additionally, a contractor or subcontractor who knowingly and willfully falsely documents workers' compensation insurance or knowing and willfully fails to provide notice of lapse in workers' compensation coverage as specified in this section, or any contractor or subcontractor who refuses to reimburse the Uninsured Employers' Fund for a claim paid on its behalf shall suffer the revocation of his license or certificate as a contractor or residential home builder under applicable provisions of Title 40; provided, however, notwithstanding any other provision of law, the license or certificate of a contractor or residential home builder shall be revoked for a period of two years when the contractor or subcontractor knowingly and willfully falsely documents workers' compensation coverage as specified in this section. Upon expiration of the two-year revocation period, or when the license or certificate of any contractor or subcontractor is revoked for refusal to reimburse the Uninsured Employers' Fund for a claim paid on its behalf, the licensing entity of the contractor or subcontractor may reissue the license or certificate of the contractor or residential home builder in the same manner as any other revoked license.

The Commission, by its own Regulation (R. 67-415 (A)) established that:

(A) For the purposes of §42-1-415, the ACORD Form 25-S, Certificate of Insurance, as published by the ACORD Corporation, and as issued by the carrier for the insured, shall serve as documentation of insurance. The Certificate of Insurance must be dated, signed, and issued by an authorized representative of the insurance carrier for the insured.

The right of a statutory employer, such as Chris Thompson Services, LLC, to avoid liability under the statute, depends upon compliance with the specific terms and conditions imposed for transferring liability. Herein, Chris Thompson has failed to comply with statutory and legal requirements and is not entitled to transfer liability to the UEF. Cincinnati Ins. Co. v. South Carolina Second Injury Fund, 297 S.C. 372, 377 S.E.2d 130 (Ct. App. 1989).

Appellant argues that the Single Commissioner erred in finding that the carrier was not entitled to pass liability to the UEF as it had not paid "all benefits due" and therefore, the issue was not ripe for adjudication. The intrinsic problem with this argument is that being "ripe for adjudication" is not the only part of SC Code Ann. §42-1-415 that is crucial for the carrier to establish to pass liability to the Fund. It is only the first step.

First, Respondent would counter that the finding of the Single and Full Commission was proper and must be affirmed. Support of this is set forth below.

Second, even if this court disagrees with the finding by the Commission, the carrier has failed to prove, and the Commission has failed to find any findings of fact that all statutory and legal requirements of SC Code Ann. §42-1-415 have been met. If this Court were to reverse the Commissioner's Order, then the only remedy is to remand the case to the Commission for proper findings of fact as to all the statutory and legal requirements to transfer liability.

Prior to the enactment of §42-1-415, it was long-established and well-settled that a statutory employer bore absolute liability to the injured workers of a subcontractor and a statutory employer and could not shift that liability to the Uninsured Employers' Fund, even if the subcontractor was uninsured. See, generally, Miller v. Robinson Trucking, 333 S.C. 576, 510 S.E.2d 431 (Ct. App. 1998); S.C. Code Ann. Section 42-1-400, Annotations 1 -6; and Section 42-1-410, Annotations 1 - 3. By enacting Section 42-1-415, the legislature carved out a narrow exception to a statutory employer's absolute liability. This exception provides remedy and relief to statutory employers misled or defrauded into believing a subcontractor is insured. The language of Section 42-1-415 clearly sounds in fraud ----- "... subcontractor has

represented himself . . . as having insurance . . . knowing and willful falsifying . . .,” and subsection (c) provides for criminal and administrative penalties. This exception creates a new liability on the State, and should be carefully applied. Unisys Corp. v. S.C. Budget and Control Brd., 346 S.C. 158, 551 S.E.2d 263 (2001). It should be given a strict, narrow application, based on the wrong it attempts to relieve, but should not lead to an absurd result. Miller, supra.

South Carolina Law, in interpreting §42-1-415, has demonstrated that it was not the intent of the Legislature to create a liability for the state without requiring a defrauded statutory employer to exercise the minimally-reasonable steps of reading the certificate and reacting accordingly before liability can be transferred to the South Carolina Uninsured Employers' Fund.

For example, in the recent case of Barton v. Higgs, 381 S.C. 367, 674 S.E.2d 145(2009), the upstream employer failed to recognize that the certificate of insurance presented to it lacked a signature from an authorized agent of the insurance company. The Court held “liability may be transferred from the higher tier contractor to defend only after the higher tier contractor has properly documented the subcontractor’s claim that it retains workers’ compensation insurance. This statutory scheme provides an ultimate safety for general contractors against the subcontractors act of fraud.” The Barton Order explained that the upstream contractor “could have easily investigated the absence of the signature and determined that the immediate employer did not have a valid policy. In our view, public funds should not be expended where Respondent could have discovered the mistake by acting in accordance with the Regulation.”

In another case, Hopper v. Terry Hunt Construction, 373 S.C. 475, 646 S.E.2d 162 (Ct. App. 2007) affd, 383 S.C. 310, 680 S.E.2d 1 (2009), the Court declared that in order to transfer

liability the certificate of insurance presented to the upstream contractor must be fully completed. In this case, the ACCORD Form was incomplete, the Court held that the Employer "submitted an incomplete document purporting to show that it had workers' compensation policy... In our view, accepting an incomplete ACCORD Form does not constitute proper documentation." The Court specifically stated that one of the omissions on the certificate of insurance in the Hopper case was the section for "Description of Operations."

✓ Chris Thompson Services, LLC, has failed to meet the requirements as set forth in §42-1-415 in the following ways:

1. §42-1-415(A) requires the upstream contractors to initially pay **all benefits** due to the subcontractor's injured employee. Then, the contractor may petition to transfer the responsibility of future payments to the Fund. The purpose of this section is principally concerned with protecting a subcontractor's injured employee in need of treatment and benefits pending a court determination of liability that could take months or years. The Statutory Employer's failure to take care of the Claimant herein may have caused the Claimant's condition to deteriorate and ultimately causing further costs than necessary. The purpose of the statute has not been served.

At the time of the hearing, the Carrier had only recently started paying some minimal temporary total benefits. It had not paid the correct amount due, and it had not provided medical treatment.

2. Once the Single Commissioner issued its order, then the carrier should have paid what was due and then it could petition the court to transfer liability. A cursory review of the certificate of insurance presented by the Statutory Employer shows that the certificate only

CONCLUSION

Based on the arguments set forth herein, Respondent respectfully requests that the Decision and order of the SC Workers' Compensation Commission be affirmed. In the alternative, if this Court finds that this single requirement of §42-1-415 was met and that the issue was ripe for adjudication, then this matter must be remanded to the Commission for proper and full findings of fact as to the remaining requirements set forth in statute and law in order to determine whether or not the carrier can to pass liability to the UEF.

South Carolina Workers' Compensation
Uninsured Employers' Fund

BY: _____


Amy V. Cofield

Cofield Law Firm
809 South Lake Drive
Lexington, SC 29072
Ph: (803) 951-0389
Email: amy@cofieldlaw.com

October 11, 2013
Lexington, South Carolina

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC Case No. 0726308

Shannon Cook, Claimant, ...Respondent,

v.

Spartanburg Steel Products, Inc., Defendant, ...Petitioner.

CERTIFICATE OF COUNSEL

The undersigned certifies that this **Appendix** complies with Rule 242(e), SCACR. The undersigned also certifies that this **Appendix** complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

McANGUS GOUDELOCK & COURIE, LLC

April 9, 2015



Helen F. Hiser

S.C. Bar No.: 76124

P.O. Box 650007

Mount Pleasant, South Carolina 29465

(843) 576-2900

Attorneys for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

APR 14 2015

WCC Case No. 0726308

S.C. Supreme Court

Shannon Cook, Claimant, ... Respondent,

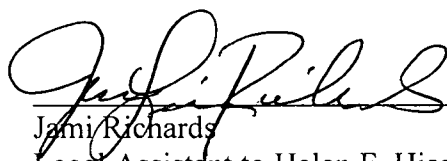
v.

Spartanburg Steel Products, Inc., Defendant, ... Petitioner.

PROOF OF SERVICE

I certify that on the 9th day of April 2015, I served the **Appendix** on Shannon Cook by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

Ryan S. Montgomery, Esq.
Ryan Montgomery Attorney At Law, LLC
108 Mills Ave.
Greenville, SC 29605



Jami Richards
Legal Assistant to Helen F. Hiser
McAngus, Goudelock & Courie LLC

Attorneys for Petitioner