THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

JUN 1 2 2015

S.C. SUPREME COURT

WCC Case No. 0726308

Shannon Cook, Claimant, ... Respondent,

v.

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

REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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Nothing in Respondent Shannon Cook's ("Claimant") Return to Petition for Writ of Certiorari ("Return") negates the critical need for this Court to accept Petitioner's Petition for Writ of Certiorari ("Petition"). At a minimum, this Court must review the Court of Appeals' dismissal of this appeal in order to clarify how finality rules under S.C. Code Ann. § 1-23-380 are applied to workers' compensation claims involving post-July 2007 injuries. Not only is the Court of Appeals' dismissal in conflict with this Court's decision in Shatto v. McLeod Reg. Med. Center, 406 S.C. 470, 753 S.E.2d 416 (2013), it is also in direct conflict with this Court's acceptance of the petition for certiorari review in Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014), which involved a substantive remand from the Court of Appeals to the Commission.

The issue that this Court needs to address is whether a Workers' Compensation Commission decision involving a post-2007 injury is a final decision for purposes of appellate review where the Commission decides all of the issues raised to and argued before it, where there is no remand, and where there is no proceeding remaining before the Commission to determine the rights of either party but, instead, any further determination of any issue would require the filing of a request for hearing.

In addition, Claimant's restatement of the issue on appeal should be rejected. It is narrowly and artificially tailored in an attempt to force the result Claimant desires, rather than to elucidate the statutory and appealability issues raised in the Petition. It ignores key facts and issues raised in the Petition and, therefore, should be rejected. Instead, Petitioner's statement of the Question Presented should be adopted by this Court.

I. Claimant incorrectly asserts that neither the APA nor this Court recognizes the distinction between a "final decision" as referenced in Section 1-23-380 and a "final judgment" as referenced in Section 1-23-390.

Claimant asserts there is no distinction between the phrase "final decision" as used in S.C. Code Ann. § 1-23-380 and the phrase "final judgment" as used in S.C. Code Ann. § 1-23-390. However, these sequential provisions in the APA use different terminology to address different appellate paths for administrative decisions. Patently, the legislature is presumed "to have intended to accomplish something by its choice of words and would not do a futile thing." Florence County Dem. Party v. Florence County Rep. Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012). Furthermore, where the legislature uses different terms in "proximate subsections of the same statute, courts are obligated to give that choice effect." Ex parte State ex rel. Wilson, 391 S.C. 565, 576-77, 707 S.E.2d 402, 408 (2011). The General Assembly easily could have used the phrase "final judgment" in both Sections 1-23-380 and 1-23-390; however, it did not do so. Instead, the legislature consciously chose to use the phrase "final decision" with respect to appeals of contested cases before administrative agencies, and "final judgment" with respect to appeals from the circuit court or the Court of Appeals.

Petitioner was not the first to note this difference – this Court clearly set this distinction out in Shatto. In fact, Claimant utterly fails to address the issues arising from this Court's footnote 2 in Shatto, which distinguishes between the appealability rules for "final judgments" under Section 1-23-390 and "final decisions" under Section 1-23-380 and Rule 242(a), SCACR. 406 S.C. at 474 n.2, 753 S.E.2d at 418 n.2. If, in fact, this distinction did not exist for post-July 2007 workers' compensation claims, this Court's grant of certiorari review of the Court of Appeals' decision in Fore would have been

incorrect, as the Court of Appeals remanded that case to the Commission for consideration of additional testimony and a reconsideration of the Commission's award. If the Court of Appeals' decision in Fore, which remanded for substantive rehearing, was final for purposes of appellate review, then the Commission Decision in this case, which decided all of the issues admittedly before it and involved no remand is also final for purposes of appellate review.

Claimant asserts that, because he sought "all of the benefits available under the law," the Commission Decision is not final for purpose of appellate review. First, a blanket statement that one seeks all the remedies available to it at law is not a specific claim for any particular remedy. Such a broad, generalized statement is insufficient to preserve an issue for appeal, Holly Woods Assoc. v. Hiller, 392 S.C. 172, 185, 708 S.E.2d 787, 794 (Ct. App. 2011); *see also* Busillo v. City of North Charleston, 404 S.C. 604, 607, 745 S.E.2d 142, 144 (Ct. Ap. 2013) (arguments not adequately presented to the trial court are not preserved for appellate review), nor can it serve to defeat the appeal of an otherwise final decision. Claimant has not and cannot identify any additional issues that were presented to the Commission for its consideration. Furthermore, the claimant in a workers' compensation proceeding bears the burden of proving he is entitled to benefits, *e.g.*, Coleman v. Quality Concrete Prods., Inc., 245 S.C. 625, 630-31, 142 S.E.2d 43, 45 (1965) (the burden is on the claimant to prove he is entitled to benefits, which award cannot be based "on surmise, conjecture or speculation"), and any failure to present argument and/or evidence on those other "benefits" to which he now intimates he is entitled falls on him.

As to Claimant's having checked off the box on the Form 50 seeking TTD, it is important to note that he never completed that claim which asks the claimant to identify the period for which he or she is claiming compensation for lost time from work due to the injury. (Appx. pp. 31, 38). Thus, this issue was never properly identified or argued to the Commission.[1] Although Claimant argues that "[t]hose issues have not been decided," (Return p. 7), the truth is that those issues simply have not been litigated. As noted in the Petition, Claimant's counsel specifically objected to a line of cross-examination regarding whether Claimant had been offered a light-duty position with Petitioner following his compensable injury, asserting, "Objection. We're here on a change of condition. I don't know what relevance this has." (Appx. p. 73, lines 3-5). Claimant cannot take one position below (that the only issue raised to the Commission was change of condition) and an opposite position on appeal (that issues regarding TTD and Claimant's entitlement to "all of the benefits available under the law" were raised to the Commission). *See* Vaughan v. Kalyvas, 288 S.C. 358, 362, 342 S.E.2d 617, 619 (Ct. App. 1986) (refusing to allow a party to assert a position on appeal that is contrary to the position argued below); Holly Woods Assoc., 392 S.C. at 191, 708 S.E.2d at 798 (a party cannot acquiesce to an issue below and then object on appeal). Even now, Claimant admits that the only issues he "presented at the hearing were whether his change of condition claim was compensable and whether the petitioner should be ordered to pay for his medical treatment ..." (Return p. 2). Again, the burden was on Claimant to present his full case to the Commission. Coleman, 245 S.C. at 630-31, 142 S.E.2d at 45; S.C.

[1] Nonetheless, the Commission did find that Respondent's average weekly wage was $846.64 and his compensation rate was $564.46, based on a prior order by Commissioner Wilkerson. (Appx. p. 126). Thus, that issue is completely resolved.

Code Reg. § 67-613(A) (instructing that "[e]ach party shall arrange and present all evidence at the hearing").

Furthermore, there was no remand for a determination of either other potential benefits under the law or TTD. As noted in the Petition, there were no further proceedings anticipated at the Commission. Even more importantly, either Claimant or Petitioner would have to file a hearing notice in order for the Commission to determine any other issues. For all intents and purposes, this proceeding was ended by the Commission's May 20, 2014 Decision.

Interestingly, Claimant concedes that workers' compensation cases often go through numerous proceedings before every potential issue is resolved. At each stage, once the Commission has decided all of the issues raised to and litigated before it, its decision at that stage is final for purposes of appellate review. That has been the case in countless workers' compensation cases where compensability and entitlement to medical treatment are decided before the claimant reaches MMI – which determination typically is premature at that point. The very nature of workers' compensation cases means that permanent disability, if any, is not determined at that point in time. "Essentially, workers' compensation benefits accrue along a time continuum ..." Curiel v. Environmental Mgmt. Servs (MS), 376 S.C. 23, 29, 655 S.E.2d 482, 484 (2007). TTD is not always awarded at the time an injury is found to be compensable, depending on the facts of each case. For example, Section 42-9-260 requires that an employee be "out of work due to a reported work-related injury," and not due to some other reason. S.C. Code Ann. § 42-9-260. As noted above, Claimant presented no evidence regarding TTD and attempted to block any inquiry into any issue other than change of condition below.

(Appx. p. 73, lines 3-5). He cannot now say the decision is not final for purposes of appellate review because the Commission did not determine TTD. Vaughan, 288 S.C. at 362, 342 S.E.2d at 619; Holly Woods Assoc., 392 S.C. at 191, 708 S.E.2d at 798.

Claimant incorrectly asserts that the final judgment rule as applied to the Workers' Compensation Commission requires that "no more hearing request [will be made] at the agency level, no more administrative proceedings, and that everything in the case is done." (Return p. 8). As noted above and in the Petition, the vast majority of workers' compensation cases properly appealed to appellate forums involve the determination of rights at one stage or another of a worker's pursuit of compensation and/or medical care but do not necessarily resolve every issue or every right that potentially could be asserted under the Act.

The Commission Decision in this case is not an intermediate decision – instead, it decided all of the issues raised to it that were ripe for decision. As such, it is a final decision for purposes of appellate review pursuant to Section 1-23-380. Respondent's suggestion that, in order for this case to be appealable, Section 1-23-380 would have to be rewritten is simply incorrect. All that is required is for the agency decision to be final – meaning all of the issues raised to the agency at that time have been adjudicated. That is precisely the posture of the present case.

Under Claimant's theory, no Commission decision would be final for purposes of appellate review until every possible issue had been litigated and the time for raising new claims (based on change of condition or other provisions of the Workers' Compensation Act) had expired. Alternatively, Claimant's position would allow a claimant to check off various boxes on a Form 50, pick and choose his strongest arguments to actually present

to the Commission, but then argue that the ensuing Commission decision was not final because he had not presented every possible claim to the Commission yet. Such a result is both unfair and untenable. Note that that game could be "played" by both sides, leaving the losing party, whether employee or employer, sitting for years before important rights are determined.

Claimant's incorrect assertion that the "reason the petitioner did not argue that this order qualifies as an interlocutory order that is immediately appealable," is because if Petitioner had made such an argument, it "would still have to provide Mr. Cook's medical treatment while the appeal was pending," is as perplexing as it is wrong. (Return p. 5). Regardless of how a Commission decision is characterized on appeal, Section 42-17-60 provides, in pertinent part, that "[i]n case of an appeal from the decision of the commission on questions of law, the appeal does not operate as a supersedeas and, after that time, the employer is required to make weekly payments of compensation and to provide medical treatment ordered by the commission involved in the appeal or certification until the questions at issue have been fully determined in accordance with the provisions of this title." S.C. Code Ann. § 42-17-60. Thus, any appeal of legal conclusions reached by the Commission is subject to the requirement that the employer/carrier pay compensation and provide medical treatment during the pendency of the appeal. Which is what has occurred here – Petitioner was ordered to and is obligated to provide medical care through Dr. Kanos during the pendency of the appeal. There has been no attempt to circumvent Section 42-17-60.

This is not a "back-door" attempt to determine compensability before monetary benefits are awarded. As Claimant acknowledges, Petitioner is responsible for payment

for medical care as ordered by the Commission during the pendency of the appeal. In addition, Claimant completely fabricates the argument that Petitioner somehow is making the same arguments made in Bone – that immediate review is necessary because of the obligation to comply with the Commission Decision to provide medical treatment during the appeal – and then proceeds to knock it down. (Return pp. 10-11). Telling, Claimant does not cite to any pleading where this argument was raised, precisely because Petitioner has never raised it. Thus, Claimant's comments on this point can and should be disregarded.

II. Petitioner's arguments were sufficiently and properly raised to the Court of Appeals.

Claimant asserts that various arguments were not timely raised to the Court of Appeals. First, Claimant suggests that Petitioner failed to challenge the Commission's finding that permanency was premature. Petitioner specifically raised the issue of "[w]hether the Hearing Commissioner erred in Finding of Fact No. 17, wherein she states 'Permanency is premature' ..." (Appx. p. 154). This statement in the attachment to Petitioner's Form 30 is sufficient to preserve this issue for appeal.

Next, Claimant argues that Petitioner did not raise the distinction between a final judgment and a final decision until their petition for rehearing. However, Petitioner clearly addressed the different language in Section 1-23-380 and 1-23-390 in their Appellant's Return to Claimant's Motion to Dismiss. (Appx. pp. 142-143) (asserting the Commission's final decision is immediately appealable, that Bone v. U.S. Food Serv., 399 S.C. 566, 733 S.E.2d 200 (2012), which was decided under the "final judgment" language found in Section 1-23-390 does not apply and that, even if it did, would not render this case non-final for purposes of review). Oddly enough, in his counter-

statement of the case Claimant acknowledges that this argument was raised. (Return p. 4).

Finally, Petitioner's description of the language added to the Commission Decision by Claimant's counsel as "boilerplate" language is not a new argument, but rather employment of an accurate descriptor. Although Commissioner Barden's request for a proposed order indicated "Permanency is premature," (Appx. p. 78), the language "all issues not addressed herein are hereby held in abeyance, including but not limited to additional permanency," was added by Claimant's counsel. (Appx. p. 128). Of course permanency was premature at that point – as is the case in every other workers' compensation case where compensability is determined but the claimant has not reached MMI. If compensability is all that is sought at a hearing and compensability is addressed in a Commission decision, then that decision is final for purposes appeal even though the claimant has not reached MMI. This Court has heard many such appeals. *See, e.g.*, Nicholson v. South Carolina Dept. of Soc. Servs., 405 S.C. 537, 748 S.E.2d 256 (Ct. App. 2013), *rev'd* 769 S.E.2d 1, 2015 S.C. LEXIS 3 (2015) and (Appx. pp. 168-175). This appeal should be treated no differently.

In fact, the Court of Appeals rendered a decision on the merits in Lee v. Bondex, Inc., 406 S.C. 97, 749 S.E.2d 155 (Ct. App. 2013), despite the fact that the Commission only decided whether certain body parts were compensable and whether the claimant was entitled to TTD, but held in abeyance any decision as to whether injuries to other body parts were compensable. Rather than dismissing the appeal as interlocutory, the Court of Appeals decided the two issues raised to it, and remanded for the Commission to dispose of the rest of the claimant's claim, specifically finding that it was improper for the

Commission to have held those issues in abeyance. 406 S.C. at 103-104, 749 S.E.2d at 158. The fact that the Court of Appeals heard the appeal in Lee but dismissed the appeal in the instant case as interlocutory only highlights the need for this Court to accept this appeal and clarify the issue of finality in worker compensation claims involving post-July 2007 injuries.

III. A number of facts asserted by Claimant are incorrect and unsupported by the record.

Claimant's Return is marred by numerous factual inaccuracies and allegations that are unsupported by the record in this case. For example, Claimant avers that Petitioner continues to refuse to authorize surgery that the Commission ordered. (Return p. 2). There is not a shred of evidence in this record that supports any suggestion that Petitioner has not complied with the Commission's order to "provide ongoing medical care through Dr. Charles Kanos." (Appx. pp. 127-128).

Similarly, Claimant's suggestion that Petitioner has failed to provide the ordered medical care is both unwarranted and wrong. In fact, at some point, Commissioner Roche determined that Petitioner had not been "dilatory" in providing the care that had been ordered. (*See* Appx. p. 55, lines 13-21; Appx. p. 68, lines 12-24). Such allegations are diversionary tactics inserted solely for inflammatory purposes and should be disregarded.

Claimant also asserts that he had to pay for a CT mylogram ordered by Dr. Kanos out of his own pocket. (Return pp. 2, 10). However, he testified before Commissioner Barden that Medicare paid for that test. (Appx. p. 70, lines 18-22). At most, Claimant paid a co-pay fee for this test. He testified that the carrier paid for his treatment with Dr. Rodriguez. (Appx. 62, lines 4-11).

Contrary to Claimant's repeated assertion otherwise, Petitioner did defend this claim at the Commission level on the merits, as well as raising procedural issues. (*See, e.g.*, Appx. p. 56, lines 11-15; Appx. p. 57, line 7 – 58, line 14; Appx. p. 68, line 25 – 26, line 21; Appx. p. 100, lines 14-16; Appx. p. 102, line 14 – 105, line 20; Appx. p. 110, line 10 – 111, line 18;). Conversely, Claimant admits in his Return that the only issues he presented to the Commissioner were "whether his change of condition claim was compensable and whether the petitioner should be ordered to pay for his medical treatment ..." (Return p. 2).

Claimant's assertions that the Commission "knew a final order was yet to come" and that the Commission Decision "recognizes that other issues are pending," (Return pp. 7, 9), are incorrect and should be rejected. In taking that position, Claimant disregards the explanatory portion of the sentence on which he relies: "[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."** (Appx. 126) (emphasis added). Indeed, when an appellate court construes an order from a lower tribunal, it must discern the decision-maker's intent from the order as a whole, and not from an isolated portion, and particularly not based on language that is "not necessary to the decision of the issues presented." White's Mill Colony, Inc. v. Williams, 363 S.C. 117, 124 n.1, 609 S.E.2d 811, 815 n.1 (Ct. App. 2005). Here, as was the case in White's Mill, there is a conflict between the Commission statement that certain issues are held in abeyance and its recognition, buttressed by all of the pleadings in this claim and the lack of any remand, that it had finally decided the sole issue before it. This Court should hear

this appeal and hold that the Commission Decision is a final decision for purposes of appeal.

CONCLUSION

For all the reasons stated herein and in Petitioner's Petition, this Court should grant certiorari review of the Court of Appeals' Orders dismissing this appeal, and hold that the Commission Decision in this case is final for purposes of appellate review.

Respectfully submitted,
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June 9, 2015

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PROOF OF SERVICE

I certify that on the 9th day of June 2015, I served the Petitioner's **Reply to Respondent's Return to Petition for Writ of Certiorari** on Shannon Cook by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorneys of record:

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