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August 27, 2012

VIA HAND DELIVERY
Honorable Brenda F. Shealy
Deputy Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

RE: Donna L. McCall v. Sandvik, Inc. (2)
Trial Court Case No.: 2006-WC-40-27287
2007-WC-40-22895
WCC File No.: 0722895
Date of Accident: 11/29/07
Claim No.: 51C712118
Our File No.: 5431/8221

Dear Ms. Shealy:

We represent the Petitioners, Sandvik, Inc. and Sentry Insurance Company, in the above-referenced matter.

Please find enclosed for filing an original and seven (7) copies of a Reply to Respondent's Return to Petition for a Writ of Certiorari, as well as the Certificate of Service serving same. We would request a clocked-in copy be returned to us via our courier.

By copy of this letter and the aforementioned document to Larry C. Brandt, Esquire and Thad B. Ball, Esquire, we are serving them with a copy of the Reply to Respondent's Return to Petition for a Writ of Certiorari via regular U.S. Mail.

Should you have any questions or need anything further, please do not hesitate to contact me.

With kindest personal regards, I remain

Very truly yours,

Grady L. Beard

GLB:jlp
Enclosures
cc: The Honorable Jenny Abbott Kitchings, Clerk, South Carolina Court of Appeals (w/enclosure)
South Carolina Workers' Compensation Commission (w/o enclosure)
Larry C. Brandt, Esquire and Thad B. Ball, Esquire (w/enclosure)
Ms. Dietra Garland (w/enclosure)
Ms. Diana Denny (w/enclosure)

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Full Commission Appellate Panel Review

Unpublished Opinion No. 2012-UP-153 (S.C. Ct. App. Filed Mar. 7, 2012)

Donna L. McCall, Employee, ... Respondent,

v.

Sandvik, Inc., Employer, and
Sentry Insurance Company, Carrier, ... Petitioners.

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

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Argument

ARGUMENT

I. THE PETITION FOR A WRIT OF CERTIORARI PROPERLY PRESENTS A NOVEL ISSUE OF LAW.

The Respondent's primary contention in opposition to the Petition for a Writ of Certiorari is the Petitioners' alleged failure to present to the Supreme Court a novel issue of law. Interestingly, the Respondent subsequently concedes Appellate Rule 242 does not provide an exclusive list of issues by which a writ of certiorari will be granted, but nonetheless asserts the issues raised by the Petitioners are not of such nature to desire the Supreme Court's attention.

The Petitioners assert this appeal involves both a novel issue of law as specifically enumerated under Rule 242 as well as multiple clear violations of the substantial evidence standard of review by the Court of Appeals. Specifically, the novel issue raised in this appeal involves the application of the Notice requirement under Section 42-15-20 of the Workers' Compensation Act as it pertains to a repetitive trauma injury. See S.C. CODE ANN. § 42-1-172 (Law. Co-op. 1976 and Supp. 2007). Under Section 42-15-20, "[i]n the case of repetitive trauma, notice must be given by the employee within ninety days of the date the employee discovers, or could have discovered by exercising reasonable diligence, that his condition is compensable . . . ." S.C. CODE ANN. § 42-15-20 (Law. Co-op. 1976 and Supp. 2007).

This novel issue was recently but only partially addressed in King v. International Knife and Saw-Florence, 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011), *cert. pending*, cited by the Court of Appeals in this matter as controlling authority precedent, wherein the Court

of Appeals held "[a] work-related repetitive trauma injury does not become compensable, and the ninety-day reporting clock does not start, until the injured employee discovers or should discover he qualifies to receive benefits for medical care, treatment, or disability due to his condition." King, 395 S.C. 437, 718 S.E.2d 227. The Court of Appeals further found a distinction exists between work-related aches and pains and a compensable condition by stating:

> [A] mere work-related ache does not constitute a compensable condition, regardless of whether the employee later develops an injury. The Act requires an injured employee to be diligent, not prescient. King's condition was not compensable until it either required medical care or interfered with his ability to perform his job, whichever occurred first.

Id. at 445, 718 S.E.2d at 231. As a petition for a writ of certiorari in King is currently pending, the Supreme Court has never addressed when a repetitive trauma injury under Section 42-1-172 "becomes compensable" under Section 42-15-20 and, therefore, the issue undoubtedly constitutes a novel issue of law. Moreover, and of equal importance, neither the Court of Appeals in King nor the Supreme Court have addressed the novel issue of what constitutes the exercise of reasonable diligence to discover compensability under Section 42-15-20.

Accordingly, the Respondent's contention that the Petitioners have failed to present to the Supreme Court a novel issue of law is wholly without merit and, therefore, should not be considered as dispositive of the Petition for a Writ of Certiorari.

II. **ADHERENCE TO THE SUBSTANTIAL EVIDENCE RULE OF APPELLATE REVIEW REQUIRES BOTH AN ACCURATE REVIEW OF THE EVIDENCE IN THE RECORD AND THAT THE APPELLATE COURT NOT IMPROPERLY APPLY ITS OWN WEIGHT TO THE EVIDENCE.**

The Respondent asserts the Petition filed by the Petitioners constitutes "nothing more than a claim that the Court of Appeals missed the call." In fact, the Respondent maintains, and the Petitioners certainly agree, that the Court of Appeals exercised its authority to review the record and consider whether substantial evidence supports the award of the Workers' Compensation Commission. See S.C. CODE ANN. § 1-23-380 (Law. Co-op. 1976 and Supp.); Ellis v. Spartan Mills, 276 S.C. 216, 277 S.E.2d 590 (1981); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).

Unfortunately, however, the Court of Appeals in exercising its authority under the APA has clearly failed to accurately identify the evidence or consider the record as a whole. Specifically, the Court of Appeals has misstated and mistakenly ignored substantial evidence that the requirements triggering Claimant's obligation to provide notice of her alleged repetitive trauma injury under Section 42-15-20 and the standard adopted by the Court of Appeals in King occurred prior to November 29, 2007, the date on which the Court of Appeals unilaterally determined the Claimant was first diagnosed with CTS. No such finding was ever made by the final fact finder, the Full Commission. In fact, had the Court of Appeals conducted an accurate and complete review of the record as a whole, the requirements of notice under Section 42-15-20 and King were not timely met within 90 days by the Claimant.

Without restating the meritorious arguments presented in the Petition, the Petitioners

believe it nonetheless necessary and probative to address the "substantial evidence" referenced by the Respondent. Specifically, the Respondent asserts the Court of Appeals correctly relied upon a letter from Dr. Amaya which only provided a "general assessment or impression" of her condition, but did not formally diagnose the Claimant with CTS. In addition, the Respondent notes the Claimant was not having symptoms at the time of the letter. Finally, the Respondent asserts there is no evidence the Claimant was actually notified of Dr. Amaya's impression of CTS. Interestingly, the Respondent fails to provide this Court with the date of the referenced letter of Dr. Amaya, which is a critical issue raised by the Petitioners.

The Court of Appeals, in its Opinion, mistakenly referred to the letter of Dr. Amaya dated November 30, 1999, as the letter dated December 10, 1999, to support the Court's conclusion that the Claimant was not diagnosed with CTS by Dr. Amaya in 1999. (See R. pp. 767, 771). Admittedly, the letter of Dr. Amaya dated November 30, 1999, did constitute only an "assessment" of the Claimant's condition, and Dr. Amaya did report the Claimant was "now without [symptoms]." (See R. p. 767). Importantly, however, on December 10, 1999, Dr. Amaya authored a handwritten report wherein he clearly diagnosed the Claimant with mild right CTS. (R. p. 771). In a corresponding letter of the same date, Dr. Amaya again diagnosed the Claimant with right CTS, advised her to assume a light-duty job with no heavy lifting for six to eight weeks, and provided her with a right wrist splint to wear for six to eight weeks. (R. p. 769). This formal diagnosis by Dr. Amaya was subsequently confirmed by Dr. Jay Patel in a deposition secured by counsel for the Claimant. (R. p. 522, ll. 12-24). Moreover, and contrary to the holding of the Court of Appeals, the Claimant does

not deny receiving this diagnosis. (R. p. 866, ll. 13-19, and p. 880, ll. 12-23). It is clear in reviewing the Opinion of the Court of Appeals that the Court simply failed to review the actual letter of Dr. Amaya dated December 10, 1999, and moreover, applied its own weight to the evidence contrary to the requirements of the substantial evidence standard.

In sum, the Respondent attempts to summarily conclude the Opinion of the Court of Appeals is based upon an accurate review of the record as a whole; however, the Respondent incredibly fails to even provide this Court with the date of the evidence relied upon, perhaps because the error of the Court of Appeals as to the date of Dr. Amaya's letter is indisputable.

Additionally, the Respondent asserts the Court of Appeals correctly found the Claimant did not and should not have had knowledge of her CTS until November 27, 2007, when she was diagnosed by Dr. Rogers. Like the Respondent's inexcusable failure to identify and correct the date of Dr. Amaya's report, the Respondent has also failed to address the Petitioners' contention that the Court of Appeals failed to address several prior medical reports of Dr. Charles Kanos and Dr. Jay Patel, all of which clearly provide substantial evidence the Claimant was diagnosed with CTS prior to November 29, 2007. On August 29, 2007, Dr. Kanos reported the Claimant complained of "numbness in both upper extremities with symmetrical involvement." (R. p. 90). On September 19, 2007, Dr. Patel examined the Claimant after a referral by Dr. Kanos, and ultimately recommended the Claimant undergo an "electrodiagnostic study of bilateral upper extremities." (R. p. 97). On October 17, 2007, 104 days prior to the date of notice, Dr. Patel diagnosed the Claimant with bilateral moderate to severe CTS. (R. at 126). Dr. Patel restated his diagnosis on October 22, 2007, 99 days prior to the date of notice. (R. at 135). Again, the Respondent chose not to address or

explain the blatant inconsistencies between these reports and the Opinion of the Court of Appeals, but instead simply indicated the Petitioners were seeking "another bite at the proverbial apple."

The Petitioners are not requesting "another bite at the apple" or simply asserting the Court of Appeals "missed the call," but are only requesting, in the interest of justice, that the Opinion by which the claim is determined is based upon accurate information and a complete review of the evidence in the record, as well as a proper review of under the substantial evidence standard. What Respondent improperly received was actually "another bite at the apple" from the Court of Appeals.

CONCLUSION

The application of the Notice requirement under Section 42-15-20 of the Workers' Compensation Act as it pertains to a repetitive trauma injury constitutes a novel issue of law before the Supreme Court of South Carolina. Moreover, the Full Commission's finding that the Claimant failed to provide timely notice of her repetitive trauma injury pursuant to the provisions of § 42-15-20 was supported by substantial evidence in the record and was correct as a matter of law. Therefore, the Court of Appeals' improper reversal of the Full Commission's decision based upon a lack of substantial evidence to support the decision was wrong. Based upon the above-cited arguments, statutes and case law, the Petitioners respectfully request that this Honorable Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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Sandvik, Inc., Employer, and
Sentry Insurance Company, Carrier, ...Petitioners.

CERTIFICATE OF SERVICE

I certify that I have served a copy of the Respondent's Return to Petition for a Writ of Certiorari dated August 27, 2012, on Donna L. McCall, by depositing a copy in the United States Mail, postage prepaid, on August 27, 2012, addressed to her attorneys of record, Larry C. Brandt, Esquire and Thad B. Ball, Esquire, Larry C. Brandt, P.A., 3691 Blue Ridge Boulevard, Walhalla SC 29691.

By: Judith L. Putnam

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