THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Appellate Case No.: 2015-002575

Johnny Tucker, Employee,..... Appellant,

v.

SC Department of Transportation, Employer,
and State Accident Fund, Carrier,.....Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Following an Award by the Commission wherein benefits were paid on November 28, 2012, on May 2, 2013 the Claimant filed a Form 50 filing a claim for both a, "change of condition and undiagnosed condition claim". (R., pp. 51-52). After repeated communications between the parties, as set forth in the Record on Appeal, on July 20, 2014 the Claimant filed a Form 50 requesting a hearing on the change of condition and the undiagnosed condition claim. (R. pp. 57-60). On August 20, 2014 the Defendants filed a Form 51 denying the Claimant had sustained a change of condition for the worse and containing no affirmative defenses (R., pp. 61-62). A hearing was set for October 21, 2014 and the Claimant's Pre-Hearing Brief and APA Submissions were timely filed on October 6th and the Defendants timely filed their Pre-Hearing Brief and APA Submissions on October 10, 2014. (R., p. 63; pp. 64-142; pp. 143-173; pp. 223-275). Four and one half (4 ½) months after the hearing, the Commissioner issued a Request for Proposed Order on February 18, 2015. (R., p. 305). Both a request for time to review the proposed Order and a letter requesting reconsideration prior to a formal Order being issued were filed on March 27, 2015. (R., pp. 296-297). A revised proposed Order, revised as to certain issues, was submitted

and that Order was issued on April 1, 2015 (R., pp. 16-24). That same day, April 1st, a letter requesting both reconsideration of the revised proposed Order that had been submitted and the Order issued on April 1st was filed with the Commission via email. (R., pp. 301-303). The Commissioner sent an email acknowledging receipt of request for reconsideration of the revised proposed Order that same day, April 1, 2015. (R., p. 304). Thereafter an Amended Decision and Order was issued by the Hearing Commissioner on April 14, 2015. (R., pp. 25-33).

A timely Form 30 was then filed to the Amended Decision and Order on April 21, 2015 setting forth the grounds for review. (R., pp. 174-176). The Claimant submitted a Brief with the Full Commission (R., pp. 177-191) and the Defendants filed a responsive Brief. (R., pp. 192-199). After the issues were joined, a hearing was held by a Full Commission Panel on July 21, 2015 on the Request for Review. (R., pp. 176-295). The Decision and Order of the Full Commission was issued on September 11, 2015 and a Motion and Request for Rehearing to the Order was filed on October 8, 2015. (R., pp. 210-215; p. 200-209). A response to the Motion was filed by the Defendants on October 16, 2015 and a Reply was filed to that Response by the Claimant on October 23, 2015. (R., 210-214; pp. 215-217).

Thereafter on November 16, 2015, a "Judicial Conference Decision" was issued by the Commission on the Motion for Rehearing listing all Commissioners including the Hearing Commissioner as having considered the Motion for Rehearing, which form Order "dismissed" the request. (R., p. 47).

Notice of Intent to Appeal the final Decisions of the SC Workers' Compensation Commission was timely filed on December 16, 2015 setting forth the Grounds for the appeal. (R., pp. 218-222). This appeal follows.

STATEMENT OF FACTS

Following an Award by the Commission, benefits were paid on November 28, 2012. On May 2, 2013, the Claimant filed a Form 50 filing a claim for both a, "**change of condition and undiagnosed condition claim**". Attached to the claim was the opinion of an authorized treating physician, Dr. Emmanuel O. Quaye, who found that Mr. Tucker had undergone a change of condition for the worse and had referred him to an orthopaedist, Dr. Christopher Mazoue. In his initial evaluation, in addition to the previous diagnoses and conditions, Dr. Mazoue stated that Mr. Tucker most likely had sustained a brachial plexus injury and possibly cervical spine pathology and recommended electro-diagnostic studies. The claim specifically requested authorization for the recommended medical care. (R., pp.

51-52).

As is set out in the Record, both before and after filing the claim for a change of condition, the Claimant through his Counsel contacted prior Defense Counsel (hereinafter Ms. Alphin) first on March 18, 2013 and then a second request was made on April 8, 2013 requesting specifically:

> "I would appreciate your thoughts on this case and would appreciate it if you would get with the State Accident Fund and see how they want to proceed." (R., pp. 138-141).

Thereafter at the direction of Ms. Alphin, Counsel for the Claimant on May 2, 2013, in addition to serving the adjuster with the claim, wrote the assigned claims adjuster, Ms. Robin Oxner-King, requesting medical care. Again on July 26, 2013 in writing, Claimant's Counsel contacted the assigned adjuster, at the direction of Ms. Alphin, and again requested the medical care as found to be necessary pursuant to the medical reports already provided to the Defendants since March of 2013. (R., pp. 136-137).

Thereafter, Mr. Tucker made repeated requests for authorization for medical care or as to how the Defendants wanted to proceed. There was no reply and there is no evidence in the Record of any reply to those requests or communications, as required by Regulation, denying,

accepting or offering any further medical care. There being no reply, on July 30, 2014 the Claimant filed for a hearing on the change of condition claim previously filed on May 2, 2013 requesting the medical care, evaluations and treatment, that was being provided at that time by Dr. Christopher Mazoue and previously by an authorized treating physician, Dr. Quaye, and requesting temporary total weekly compensation as determined by the Commission to be due, and paid until maximum medical improvement. The Request for Hearing requested a hearing on the bases of both a, "**change of condition and undiagnosed condition**". (R., p. 58).

A responsive Form 51 was filed on August 20, 2014 which set out as to the reasons for denial: "Defendants deny the Claimant has sustained a change of condition for the worse." On the Form 51, "Employer's Answer to Request for Hearing", question #11: "Further contentions, **grounds of defense**, or unusual aspects:" was left blank. In other words, **no other defenses were listed.** (R., p. 62). (Emphasis added).

Subsequent to the Request for Hearing and the responsive Form 51, this matter came to be heard on October 21, 2014. In his Pre-Hearing Brief, Mr. Tucker specifically noted he was filing both a change of condition and an undiagnosed condition claim. On October 10, 2014,

the Defendants filed their Form 58 Pre-Hearing Brief and for the first time alleged a defense of, "whether the claimant timely filed a hearing request for change of condition".

At the hearing, the Defendants asserted the position that the Claimant must both file a claim and file for a hearing within twelve (12) months after the payment of compensation and the Claimant stated his position that only a "claim" needs to be filed within twelve (12) months and cited as authority, Allen v. Benson Outdoor Advertising Co., 236 S.C. 22, 112 S.E.2d 722 (1960).

Subsequent to the hearing on February 18, 2015, the Commissioner issued his notes for a proposed Order and on March 27, 2015 a proposed Order was forwarded to Counsel for the Claimant. On March 27, 2015, Claimant's Counsel filed both a request for additional time to review and a Request for Reconsideration before formal Order: 1) noting specifically that the Defendants had not raised the affirmative defense that the request for a change of condition had not been timely filed; 2) requesting the application of existing case law and requesting a liberal construction of the Act as the Commission is required to do; and 3) requesting a reversal and remand for a de novo hearing based on the violation of the Claimant's due

process rights for failure to give him notice of the issues to be heard at the hearing.

The Hearing Commissioner issued an Order on April 1, 2015. Immediately upon receipt of the signed Order on April 1st, Claimant's Counsel objected to the Order and specifically to the Statement of the Case and Defense Counsel's failure to include any reference in the Statement to the application (the claim) for a Change of Condition that had been filed on May 2, 2013. He specifically objected to the failure of Defense Counsel to refer to his numerous requests for medical care and his attempts to determine the position of the Defendants in reference to the application for a Change of Condition that had occurred between the filing of the "claim" and the date that the Claimant "requested a hearing" on the claim/application for a Change of Condition. He also objected to the inclusion of legal authority not referred to during argument by either party and to the inclusion of a Statement of Evidence of the Case presented at hearing since the Hearing Commissioner's decision was based only on the affirmative defense. Finally, the Claimant specifically objected to the failure to include any reference to established precedent that holds that a challenge or defense to timeliness based on a filing of a Change of Condition is an

affirmative defense under the Regulations and law that must be pled. An Amended Order was then filed on April 14, 2015. The revised Order struck the Evidence of the Case section; however, the legal precedents not referred to by either Counsel at argument before the Commissioner were still included in the Order and the Order made no reference to whether or not a defense based on timeliness of the filing of Change of Condition is an affirmative defense.

Thereafter the Request for Review by the Full Commission proceeded in the normal course of procedure and an Order affirming the Hearing Commissioner was issued.

The Claimant then filed a Request for Rehearing or Reconsideration as to the Decision of the Full Commission. In that Request for Rehearing, the Claimant specifically noted all of the various law and statutes and Regulations that require the Commission to address all of the issues that are presented to it for review. The Claimant specifically noted that the Claimant had raised seven (7) Grounds for Review before the Full Commission, six (6) of which specifically involved errors of law by the Single Commissioner and specifically that the Commission had failed to note and comply with the Regulations and statutory law that requires Finding of Fact and Conclusions of Law to be made by the Commission on each material issue

raised. There was simply no decision made on the Claimant's legal errors by the Full Commission.

Further in reference to the actual Decision made and entered, the Motion that was before the Commission was a Motion/Petition for Rehearing but the Motion was not heard and decided by the original Hearing Panel but was submitted to and a decision on it was made by the Judicial Conference Committee and consisted of a one-page Form Order not denying the Motion for Rehearing but dismissing the Motion for Rehearing. All seven (7) Commissioners including the original Hearing Commissioner are listed as having concurred in that Decision.

ARGUMENTS

I. WHERE THE RECORD ESTABLISHES THAT THE CLAIMANT FILED A CLAIM AND APPLICATION FOR A CHANGE OF CONDITION WITH THE COMMISSION WITHIN ONE (1) YEAR OF THE DATE OF THE LAST PAYMENT OF COMPENSATION (LESS THAN SIX (6) MONTHS) AS REQUIRED BY THE ACT, THE COMMISSION ERRED AS A MATTER OF LAW BY DENYING THE CLAIMANT'S APPLICATION FOR A CHANGE OF CONDITION ON THE BASIS THAT A REQUEST FOR HEARING ON THE CHANGE OF CONDITION WAS NOT TIMELY FILED.

The Defendants do not question that the, "claim" for a change of condition was timely filed but that under their interpretation of the law, not only must a claim be filed but a hearing must be requested. Neither the Statute nor the Commission Rules, nor the prior interpretation of the

Statute by the Supreme Court and Court of Appeals require or support this interruption. The filing of a claim is all that is necessary and the Commission's decision to the contrary is contrary to the law.

The Commission's authority is derived "strictly" from the Act and its provisions which are in derogation of the common law. Price v. Peachtree Electrical Services, Inc., 396 S.C. 403, 721 S.E.2d 461 (SC App. 2011), aff. modified 405 S.C. 455, 748 S.E.2d 229. The Commission must liberally construe the Act in favor of benefits and coverage in order to serve the beneficial purposes of the Act. James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730, reh. den. (2010). This liberal interpretation principle of the wording of the Act in favor of benefits to the injured worker wherein the,

> "workers' compensation law must be resolved in favor of the claimants, its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed towards the end of providing coverage, rather than non-coverage,"

must be applied. Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). Contrary to the statement made during oral argument by a Commissioner, this liberal interpretation is required to be applied by the Commission to all aspects of the Act including any interpretation of

the wording in reference to benefits and any other provisions of the Act. This concept and the application of this fundamental construction principle which is required to be applied by the Commission is nowhere referenced in the Full Commission Order. Further, the Supreme Court has cautioned the Commission that the Act is required to be, "liberally" construed in favor of benefits and not, "literally" or narrowly construed to deny benefits. Hamm v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940).

In addition to the requirement that the Commission must liberally interpret the Act in favor of benefits to the injured worker and the previous Supreme Court decisions interpreting the law in reference to the various time limitations for filing any type of a claim with the Commission, the Commission has adopted Regulations to implement the provisions of the Act.

Regulation 67-206 deals with the filing of any type of, "claim" with the Commission and specifically does not require that a request for hearing be filed at the same time that a claim is filed and the Rule basically allows for a bifurcated process. Note: that Regulation also requires that the employer's representative upon the filing of any type of a claim, "shall immediately contact the

claimant" in regard to the claim.

The Commission has adopted separate and distinct Regulations concerning when matters will be set for hearing. In addition to the provisions of the Act and the APA concerning the requirement that there must be issue(s) in controversy or in other words, a, "contested case" for a hearing to be set, Regulation 67-601(B) specifically provides that a hearing will not be set until a conflict arises. Regulation 67-602 deals with the setting of hearings and subsection (C) specifically refers to the setting of a hearing on,

> "**a claim** involving a **change of condition** . . . ."

Therefore, not only are the filing of, "claims" and "requests for hearing" dealt with under separate sections of the Regulations, but based on a clear reading of the Commission's own Regulations, there is no requirement that the request for a hearing must be filed on a change of condition within twelve (12) months; only that a "claim" must be filed. Under the Regulations, a "request for hearing" is separate and distinct from the filing of any, "claim".

The Commission is an Administrative Body that is charged with administering the Workers' Compensation Act

and has absolutely no authority to interpret the law except where the law has been interpreted by our Courts which the Commission must follow. The Commission must apply the plain and ordinary meaning of the Statutes, and is duty bound to interpret the law in reference to the best interest of the injured worker and under that principle must resolve any ambiguities in favor of the injured worker. In addition, while the Commission is given deference to the interpretation of the law and as to its Regulations, where the Commission's interpretation is contrary to the law, this is an error of law. The Commission has already interpreted the word, "application" to mean a "claim". Regulation 67-206(B); 67-602(C); and the Commissioner's reinterpretation or contrary interpretation is an error of law. An Agency's interpretation of its own Regulation that is contrary to that Regulation's plain language is an error of law. Brown v. SC Dept. of Health and Environmental Control, 348 S.C. 507, 560 S.E.2d 410 (2002). In this case, there is no Statute, Regulation or Supreme Court decision interpreting the word "application" to mean anything other than filing of a claim.

When one adds to this the Supreme Court's specific holding in Allen, supra, (wherein the Court specifically held that the hearing does not have to be held within the

one year, only that the application for review must be filed within one (1) year), under any interpretation of the Statute, the Commission's Regulations and the previous rulings of the Supreme Court and Court of Appeals the filing of a request for hearing is separate from the required filing of a claim to toll the statute. Quoting from Allen:

> "Appellants (the insurance carrier in that case) say that the forgoing statutory limitations 'is directed to the Industrial Commission rather than to the parties to the action', and that it is not sufficient for the application for review to be made within one year after the last payment of compensation but the application must be heard by the Commission within that period."
>
> * * *
>
> "We do not agree with Appellant's view. It represents a literal and strict construction of §72-359 when under the well settled Rule a liberal construction is required. To sustain Appellant's contention would lead to a rather unreasonable result clearly not within the intent of a Legislature".

Quoting further from the Allen decision:

> "In Wilkes v. State Compensation Commissioner, supra, the Court said [120 W.Va. 424, 198 S.E. 871]:
>
> '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 Commission 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 a statutory period applicable to the nature of the claim filed." (Emphasis added).

The Defendants interpretation would also result in unnecessary litigation, discourage resolution of issues, and add a requirement to the Act not within its clear meaning. Therefore, under the statute the Commission's Regulations, and the interpretation of that Statute by the Supreme Court and Court of Appeals, the Commission erred by interpreting the Statute and Regulations to require that the Claimant has to, in addition to filing a claim timely, request a hearing on that claim within the 12-month period. The decision must be reversed and this case remanded for a de novo hearing.

II. WHERE THE DEFENSE THAT THE CLAIM WAS NOT TIMELY FILED IS AN AFFIRMATIVE DEFENSE THAT MUST BE PLED AND IT WAS NOT PLED, THE COMMISSION ERRED AS A MATTER OF LAW BY DENYING THE CLAIM FOR A CHANGE OF CONDITION BASED ON THE AFFIRMATIVE DEFENSE THAT THE CLAIMANT DID NOT TIMELY FILE FOR A HEARING FOR A CHANGE OF CONDITION WITHIN 12 MONTHS OF THE LAST PAYMENT OF COMPENSATION.

As noted in the Statement of the Case, in the responsive Form 51 filed to the Claimant's request for a hearing, the Defendants did not raise any affirmative

defense and specifically the defense that the Claimant was time barred under SC Code §42-17-90. (R., p. 62).

Commission Reg. 67-603(B) specifically provides that the Form 51 must be filed within 30 days and that,

> "the employer's attorney **shall fully state** his position and **defenses**, if any, replying to each specification in the Form 50 ....".

Under subsection (C) where a Defendant fails to do this and fails to place the Claimant on notice of certain affirmative defenses, those defenses not pled are forfeited. Subsection (C) states in pertinent part:

> "shall forfeit each special and affirmative defense allowed by the Act including the Defenses available in §42-9-60, §42-15-20, §42-15-40 and **§42-17-90** of the Act." (Emphasis added).

The Supreme Court specifically ruled in Chapman v. Foremost Dairies, Inc., 249 S.C. 438, 154 S.E.2d 846 (1967) that such defenses not pled are waived; citing to 100 C.J.S. Workers' Compensation Section 500 that,

> "An objection that the claim for compensation was not made or filed in the requisite time **must be raised by the pleadings before the hearing."**

Chapman further recognized the authority of the Commission to adopt Rules and Regulations implementing the provisions of the Act. In the case of Lowe v. Am-Can Transport Services, Inc., 283 S.C. 534, 324 S.E.2d 87 (SC App. 1984),

this Court reaffirmed the holding in Chapman that affirmative defenses must be pled in the responsive Form 51 (the Defendants' pleading) or they are waived.

Since the Defendants did not raise in its pleading the affirmative defense in this case that the change of condition was not timely filed under §42-17-90, it was waived. The Decision of the Commission must be reversed and this matter remanded for a de novo hearing.

III. THE COMMISSION ERRED AS A MATTER OF LAW BY DENYING THE CLAIMANT'S APPLICATION FOR A CHANGE OF CONDITION ON THE BASIS IT WAS NOT TIMELY FILED WHERE THE DEFENDANTS ARE ESTOPPED FROM ALLEGING THIS DEFENSE UNDER THE FACTS OF THIS CASE.

In this case, on March 18, 2013, six (6) weeks before the Claimant filed a claim for a change of condition on May 2, 2013, Counsel for the Claimant forwarded a copy of the medical report establishing a change of condition to Counsel for the Defendants and requested that Defense Counsel get in touch with the State Accident Fund and see how they wanted to proceed with a repeat, follow-up second request being sent on April 8, 2013. Then simultaneously with the filing of the claim on May 2nd, and at the direction of Defense Counsel, Ms. Alphin, the adjuster for the State Accident Fund was contacted concerning the medical reports (at that point involving two medical reports; one stating the Claimant had undergone a change of

condition), and was specifically asked as to how the Defendants wanted to proceed concerning the request for medical care. Thereafter as is specifically reflected in the Record on July 26, 2013 the Claimant again contacted the adjuster assigned to the file stating that Ms. Alphin had advised that she had closed her file and that she had not yet been retained on the change of condition and that again she had instructed Counsel to contact the adjuster. Claimant's Counsel expressed the feeling that possibly he had not been contacted before concerning the request for additional medical care by the adjuster because he had, "sent a copy to her (Ms. Alphin) and you". Counsel requested that the adjuster, "please let us know whether you accept the change of condition and will authorize treatment so we can get this man treated." Between the filing of the claim on 5/2/13 and the hearing request on 7/30/14, there is simply no evidence in the Record that the Claimant was ever advised whether the claim was being accepted or being denied.

What the Record clearly establishes is that Ms. Alphin who represented the Defendants on the initial claim and who advised the Claimant multiple times to contact the adjuster concerning obtaining medical care, and who knowing the Form 51 had not raised the defense, then raised the issue of an

untimely hearing request for the first time at the hearing. (Again there is no evidence in the Record reflecting any denial or position in any way denying the claim or any evidence at all that the Claimant was advised that they were rejecting the change of condition.)

The State Accident Fund was served with the May 2, 2013 claim and Commission Reg. 67-206 in reference to any, "claim" that is filed provides under subsection (E) that upon notice to the employer's representative of the filing of a claim that:

> **"The employer's representative shall immediately contact the Claimant."**

There was no required contact by the adjuster.

Assuming for the point of argument that the 12-month limitation under §42-17-90 requires not only the filing of a claim but a request for hearing, the Supreme Court and Court of Appeals have both held that the Defendants may be deemed to have waived and/or be estopped from asserting such a defense based on their actions. Chapman v. Foremost Dairies, Inc., supra; Lovell v. C.A. Timbes, Inc., 263 S.C. 384, 210 S.E.2d 610 (1974); Bilton v. Best Western Royal Motor Lodge, 282 S.C. 634, 321 S.E.2d 63 (S.C. App. 1984). Under the doctrine of estoppel, for estoppel to apply the essential elements are that:

1. The party asserting estoppel lacks knowledge and/or the means of knowledge of the truth as to the facts in question;

2. Relies upon the conduct of the party estopped; and

3. Any action taken by the party alleging estoppel is based upon that action and that his action is of such character as to change his position prejudicially. It is the essence of equitable estoppel that the party entitled to invoke the principle, "shall have been misled to his injury".

As to the doctrine of waiver, while equitable estoppel and waiver are distinct propositions and principles of law, in many cases they may be indistinguishable. Strickland v. Strickland, 375 S.C. 76, 650 S.E.2d 465 (2007). However, waiver is the voluntary and intentional relinquishment of a known right and may be expressed or implied from a party's conduct and may be applied to bar a statute of limitations defense. Parker v. Parker, 313 S.C. 482, 443 S.E.2d 388 (1991). Our Courts have specifically held in reference to a statute of limitations defense, as we have here, that waiver of the right to allege or claim the defense may result from either express agreement,

> "or by an action or **inaction** manifestly inconsistent with an intention to insist on the statute"

being applied. Mende v. Conway Hospital, Inc., 304 S.C. 313, 404 S.E.2d 33 (1991). (Emphasis added).

In this case, there is no question that the claim for a change of condition was timely filed. The evidence establishes that thereafter the Defendants did not contact the Claimant as required by Regulation concerning the claim for a change of condition. Also, the evidence establishes that the Claimant repeatedly contacted both Ms. Alphin (who ultimately became the Defense Counsel that tried this case and who belatedly raised this issue) and the adjuster to try to obtain medical care. Most importantly like Mende, supra, Ms. Alphin, instructed the Claimant to contact the adjuster about medical care which is totally inconsistent with the intention to assert the twelve (12) month statute of limitations. The evidence is uncontested that at no time up until ten (10) days before the date of the hearing did the Defendants ever notify the Claimant that they would take any position other than that the Claimant had not established that he had undergone a change of condition for the worse. The Defendants then for the first time, and again not even in their Form 51, but ten (10) days before the hearing alleged a legal argument that they were

interpreting the law to require both the filing of a claim and a request for hearing. Therefore, where the Defendants: did not raise this legal issue at the time of filing the claim or at any time during the twelve (12) months when medical care was being requested and even up to and including in their Form 51 pleadings; and where they did not ever contact the Claimant per Regulation after notice and did not take or give any indication by their conduct that they would take this position within the one (1) year of the payment of compensation, the Defendants should be estopped from asserting and should be deemed to have waived this defense, especially in light of the guiding principle of the Workers' Compensation Act in that all provisions of the Act and the Regulations must be read and applied on the basis of a liberal interpretation in favor of benefits to the injured worker.

IV. THE COMMISSION ERRED AS A MATTER OF LAW BY NOT SUBMITTING THE MOTION AND PETITION FOR REHEARING TO THE APPELLATE PANEL THAT ISSUED THE INITIAL DECISION AND BY NOT MAKING DETAILED FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED BY LAW ON ALL OF THE ESSENTIAL ISSUES PRESENTED TO IT FOR DECISION.

The initial Decision in this matter based on a Request for Review filed with the Full Commission was entered by a Three-Commissioner Panel appointed by the Chairman of the Commission with the consent of a majority of the other

Commissioners. Our Appellate Courts have held that under the Administrative Procedures Act, SC Code §1-23-380 as specifically affirmed in the case of Rhame v. Charleston County School District, 412 S.C. 273, 772 S.E.2d 159 (2015), the Claimant has a specific right to request rehearing of that decision. As noted, this was a Petition for Rehearing and was addressed to the Commission as such but in this circumstance in actuality it was being addressed to the Three-Member Panel that made the initial decision on behalf of the Full Commission pursuant to law. However, instead of being heard by that same Three-Member Panel, the Motion was submitted to what is referred to as a Judicial Conference wherein all seven (7) Commissioners apparently voted on the Motion including the original Hearing Commissioner whose Decision had been appealed. The actual final Decision of the Commission on the Motion did not deny the Motion but in fact, "dismissed" the Motion. Therefore, from a procedural standpoint, the Commission did not properly handle the Motion for Rehearing, did not submit it to the Panel that originally heard this matter, and did not take an appropriate action on the Motion, meaning that they did not either grant or deny the Motion, but instead dismissed the Motion.

Next, in the Petition for Rehearing the Claimant reiterated that in the Request for Review by the Full Commission, the Claimant had raised seven (7) specific issues to be addressed, six (6) of which were specific errors of law that were alleged to have been committed by the Hearing Commissioner. As set forth in that Petition and as the Court is aware, both the Commission's Regulations and several statutes, including SC Code §42-17-40, §1-23-350 and §1-23-340 all require that the Commission make specific findings of fact and rulings of law on all of the questions or essential issues raised before the Commission for decision.

In addition, our Appellate Courts have repeatedly held that the Commission is required to make detailed Findings of Fact and Conclusions of Law on each contested and essential issue of fact and on each issue of law that is presented to it for decision and it is specifically an error of law for the Commission not to make a decision on each specific issue of law or fact which is presented to it for decision. See specifically: Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962); Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970); etc.

As noted from the other three arguments made in this case and as noted from the Decision of the Commission, the

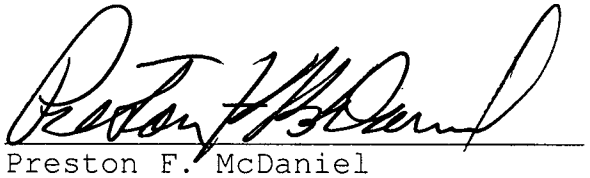
Decision of the Hearing Commissioner was based specifically on legal issues and the Commission was duty bound to rule on those specific legal issues and errors of law that were alleged and upon which review was requested. The Commission did not address whether or not the Defendants had failed to raise the affirmative defense that served as the basis for decision; the Full Commission did not address whether or not the concepts and legal doctrines of estoppel and/or waiver applied; and the Commission did not address our Appellate Courts' determinations on the application of the law and the meaning of the law and its decisions as to the actual wording of the statute applying the concept of a liberal interpretation in favor of benefits to the injured worker, all of which the Commission is required to do under law.

The Commission erred procedurally in the way it handled the Motion for Rehearing and in addition, erred by not making detailed Findings of Fact and Conclusions of Law on the essential issues of law and fact that were presented to it for decision. This requires reversal of the decision.

CONCLUSION

For all the foregoing reasons, the Decision of the Commission should be reversed and remanded to the Commission for a hearing on the claim for a change of condition and for an undiagnosed condition.

Respectfully submitted,



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June 27, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Appellate Case No.: 2015-002575

Johnny Tucker, Employee, ... Appellant,

v.

SC Department of Transportation, Employer,
and State Accident Fund, Carrier, ...Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR.

Dated: June 27, 2016

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PROOF OF SERVICE

I certify that I have served the **FINAL BRIEF OF APPELLANT** by depositing a copy of it in the United States Mail, postage prepaid, on June 27, 2016 addressed to:

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