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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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WCC File No.: 1222136

Appellate Case No.: 2015 - 001277

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Otis Nero (Claimant).....Appellant,

vs.

S.C. Department of Transportation (Employer), and
State Accident Fund (Carrier).....Respondents.

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# PETITION FOR REHEARING

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This is an appeal involving a workers' compensation case. Respondents, by and through their undersigned counsel, hereby files this Petition for Rehearing pursuant to Rule 221, SCACR. On March 29, 2017, this Court filed an opinion reversing the May 29, 2015 Decision and Order of the South Carolina Worker's Compensation Full Commission Appellate Panel ("Appellate Panel"). Nero v. SCDOT, Opinion No. 5477 (S.C. Ct. App. filed March 29, 2017). As a matter of background, August 5, 2014, the initial Hearing Commissioner found that Appellant sustained a compensable injury by accident arising out of and in the course of his employment on June 20, 2012, "while pulling a squeegee board leveling concrete; and that, pursuant to S.C. Code Ann. §42-9-35, the accident aggravated the pre-existing cervical disc condition that was present in his neck." (R. p.32).

Respondents appealed the Hearing Commissioner's Order to the Appellate Panel, and on May 29, 2015, the Appellate Panel reversed the Hearing Commissioner's Order in full based on their findings that Appellant failed to provide Respondents with timely notice of his alleged accident in accordance with S.C. Code Ann. §42-15-60 or provide a reasonable excuse for failure to provide notice to the satisfaction of the Commission, and as a result, the Appellate Panel found Respondents were prejudiced and denied Appellant's entitlement to benefits under the Workers Compensation Act. Appellant appealed the Full Commission's decision, and on March 29, 201, this Court reversed the Full Commission on the grounds that the substantial evidence in the record did not support the Full Commission's finding that Appellant failed to put Respondent on notice of a potential injury. Nero, at p.7 (S.C.Ct. App. 2017). This Court further held that the substantial evidence in the record did not support the Full Commission's finding that Appellant failed to provide a "reasonable excuse" for failure to provide timely notice, and this Court held Respondents were not prejudiced by the lack of timely notice. Id at p.9.

As grounds for this Petition, Respondents would respectfully argue that this Court may have overlooked or misapprehended the evidence, law, or arguments involving the "substantial evidence" standard of review, and the Court exceed their role as an appellate court by substituting its judgment for that of the commission instead of deferring to the Commission as the appropriate fact finders. As our Courts have previously stated, "[u]nder the scope of review established in the APA, this Court may not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Stone v. Traylor Bros., Inc., 360 S.C. 271, 600 S.E.2d 551 (Ct.App.2004); Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct.App.2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct.App.1996); S.C.Code Ann. § 1-23-380(A)(6)(d)

(Supp.2003).

## ARGUMENT

Respondents first direct the Court's attention to the fact that this Court has cited no error of law in the case, and instead stated their decision to reverse based on the "substantial evidence" standard of review. Although normally the proper interpretation of a statute is a question of law subject to de novo review (*see* Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010)), "[t]he construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Dunton v. S.C. Bd. of Exam'rs In Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987).

Appellant attempted to argue in his Appellant's brief to this Court that there was an error of law because there were no facts in dispute, but this statement is incorrect. The facts of the claim were unquestionably in dispute with regard to (1) whether there were sufficient accompanying facts connecting the injury or illness with the employment to signify to a reasonably conscientious supervisor that the case might involve a potential claim, and (2) whether Appellant sustained his burden in proving that his injuries and resulting treatment were the result of a compensable work accident, including his pulling of the squeegee board as alleged in his pleadings or his subsequent syncope episodes at the job site and at home.

Therefore, since there was no finding of an error of law in the case, the question turns to whether the Court of Appeals appropriately applied the "substantial evidence" in reversing the Full Commission.

**I. The Court of Appeals may have overlooked or misapprehended the evidence, law, or arguments involving the "substantial evidence" standard of review and whether they exceeded their role as an appellate court by substituting their view of the evidence instead of correctly deferring to the Full Commission's role as the**

**appropriate fact finder in this case.**

The South Carolina Administrative Procedures Act (APA) governs the standard of judicial review in workers' compensation cases. Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this court's review is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by an error of law. Hargrove v. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." Shealy v. Aiken Cty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Therefore, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. Lowe v. Am-Can Transport Services, *Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

The requirement of a claimant to provide notice to an employer of an alleged work accident is controlled by S.C. Code Ann. §42-15-20, which states:

> (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to such giving notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.
>
> (B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

Since Appellant admittedly failed to tell his employer about his alleged work accident

During the multiple opportunities he had to speak with his supervisors, the question then turns to whether Respondents had "adequate notice" of a possible work related injury. In Etheredge v. Monsanto Co., this Court stated, " [f]or adequate notice, there must be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonable conscientious manager that the case might involve a potential compensation claim." 349 S.C. 451, 457 (S.C.Ct.App. 2002).

In its current opinion, this Court recited the conflicting factual evidence presented to the Commission Appellate Panel in order for them to make a decision on whether Appellant provided timely notice in accordance with the law. This Court cited several facts raised by Appellant in support of the position that although Appellant stipulated to never reporting his alleged accident to his supervisor, Respondents still had adequate notice of his injury in accordance with the Etheridge case, including the following facts:

1. That on the day of the alleged accident, Appellant's supervisor briefly pulled him from the squeegee board for a to rest as a result of his age and the heat;
2. That after finishing their work for the day, though still on the clock, Appellant lost consciousness and fell to the ground, and his supervisors, Mr. Durant and Mr. Bostick, both witnessed the fall;
3. That Appellant regained consciousness and drove home, where he passed out for a second time in his driveway, and was taken by his wife to the hospital where he was admitted, treated by a neurosurgeon, and diagnosed with cervical stenosis;
4. That appellant underwent neck surgery approximately two months later, and both Mr. Durant and Mr. Bostick were aware of Appellant's hospitalization and surgery, and in fact, both supervisors spoke with appellant while he was in the hospital;
5. That Appellant never returned to work for Respondent.

The Court then then went on to recite facts argued by Respondents that contraindicated a finding that sufficient accompanying facts existed to put Respondent Employer, as a reasonably

conscientious supervisor, on notice that the case might involve a potential claim. Specifically, this Court referenced the following facts:

1. On July 9, 2012, only one (1) month after his alleged accident, Appellant submitted to Human Resources a "Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)", signed by Appellant and his family doctor. The document submitted by Appellant to Respondent's HR department made no mention of his alleged work accident, and instead stated that the date Appellant's condition commenced was "several years -- neck and syncope";
2. Appellant prepared and signed a "Patient Health History Questionnaire" for his neurosurgeon, Dr. Naso, wherein he stated his problems were not related to his job and this was not a workers compensation injury.
3. Appellant had multiple opportunities to talk to both Mr. Bostick and Mr. Durant following his accident, and during their visits to him at the hospital, and Appellant chose to never report any work accident involving the pulling of a squeegee board as alleged in his pleadings and the Hearing Commissioner's finding of compensability.
4. There was conflicting medical evidence regarding medical causation since Dr. Naso commented, "I don't think his syncope related to cervical spine pathology.," but, Dr. Ritchie testified Appellant's pre-existing cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Appellant's work in the heat, caused the syncope episodes.

Without further explanation, this Court goes on to state that after weighing the same arguments and evidence presented to the Appellate Panel, this Court did not agree that the substantial evidence supported the conclusions reached by the Commission Appellate Panel, and instead this Court substituted its own judgment on the weight on the conflicting evidence and facts. As stated above, these were conflicting factual determinations to be made by the Commission as the fact finder in the case. Instead this Court weighed the same facts, evidence, and supporting law, and came to their own conclusion in substitution for that of the Commission.

The APA requires that "[a] final decision . . . include findings of fact and conclusions of law, separately stated. Findings of Fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C. Code Ann. § 1-23-350 (2005). Moreover, the Appellate Panel's findings of fact must be sufficiently detailed to enable the appellate court to determine whether the evidence supports the findings and whether the law was properly applied to those findings. Frame v. Resort Servs. Inc., 357 S.C. 520, 531, 593 S.E.2d 491, 497 (Ct. App. 2004).

In this case, the Appellate Panel did exactly that. Specifically, the Appellate Panel stated the following Findings of Fact:

> FOF #10: We find that the only actual or in formal notice the employer had of an injury was the claimant, who previously suffered from dizzy spells on the job, passed out in front of his supervisors at the shed after the conclusion of the workday.(R. p.52).

With respect to this finding, our Supreme Court held in Sanders v. Richardson, that "the employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted on a compensable injury." 251 S.C. 325 (1968).

In addition, the Appellate Panel went on to state several additional pertinent Findings of Fact, including the following:

> FOF #15: We find that pursuant to S.C. Code Ann. §42-15-20, claimant failed to provide a reasonable excuse made to the satisfaction of the commission for failure to provide timely notice is required by the statute. Although claimant supervisors witness claimant sync up episode, claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork to the human resources department indicating that his problems lasted for several years instead of requesting workers compensation. (R. p. 53)

> FOF #16: We find that pursuant to SC code annotated section 42 – 15 – 20, defendants suffered a prejudice as a result of claimant's third provide timely notice. Defendants were unable to fully investigate whether claimants alleged squeegee accident cause sync up episode, or whether the alleged squeegee accident or sink a fall cause the aggravation of his cervical condition. As a result of the prejudice against defendants caused by claimant's failure to provide timely notice, claimant's request for benefits is denied. (R. p.53)

Application of the appropriate standard of review is imperative in this case. The case presented questions of conflicting facts over whether Appellant's supervisors were presented with sufficient accompanying circumstances that should have triggered a supervisor's effort to investigate a potential claim despite Appellant's failure to report it to them and instead turn in HR paperwork denying that his condition was related to any recent alleged accident, and conflicting facts over the medical causation of the Appellant's injuries and resulting treatment.. The Appellate Panel found that Appellant failed to provide a reasonable excuse for his failure to give timely notice, and as a result, Respondents were prejudiced. The Appellate Panel's findings were sufficiently detailed to enable the Appellate Court to determine whether the evidence supported the findings and whether the law was properly applied to those findings.

Instead, this Court reversed the fact finding conclusion of the Commission Appellate Panel and substituted its judgment in coming to the conclusion that Respondents had adequate notice. In addition to exceeding their role as the appellate court, this court's decision would result in an almost impossible and impractical application of the law to future workers compensation claims. If an injured worker refuses to tell his employer he was hurt at work, and he then submits formal paperwork confirming it was not a work accident and his condition predated his alleged date of injury, it is unreasonable to expect a manager to disregard the signed statement from the injured worker and continue to investigate any potential work accident anyway. This heightened requirement on the employer does not exist in the Worker's

Compensation Act.

This Court states in its opinion, without referencing any supporting case law, that because the Supreme Court has long held that the notice provision is to be liberally construed in favor of claimants, they therefore found the Appellate Panel erred in reversing the Hearing Commissioner's determination that Respondents had "adequate notice." Even if the notice requirement is to be construed liberally in favor of the injured worker, the notice statute is there for a reason and there must be some limitation on an injured worker's ability to satisfy notice when he does not report his injury to his employer. The General Assembly has placed the burden upon the claimant to prove entitlement to worker's compensation benefits. *See* Clade v. Champion Labs., 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998) ("The claimant has the burden of proving facts that will bring the injury within the workers' compensation law, and such award must not be based on surmise, conjecture[,] or speculation.").

When Appellant failed to tell his employer about his alleged accident, told his doctor it was not related to any work injury, and submitted formal paperwork to Respondent Employer denying his condition was related to a recent work injury and instead has existed for years, it is illogical to find that the injured worker has satisfied his burden.

Finally, this Court held that Respondents were not prejudiced by Appellant's failure to provide notice in accordance with the statute. As discussed above, there were disputed facts and competing medical opinions regarding whether Appellant's aggravated cervical stenosis or his syncope episodes were causally related to his accident he described while operating the squeegee board, and Respondents were deprived of the right to timely investigate the causation of Appellant's injuries, the extent of Appellant's pre-existing conditions, and whether Appellant sustained his burden improving a compensable aggravation of a pre-existing condition pursuant

to S.C. Code Ann. §42-15-35.

## CONCLUSION:

Respondents/Appellants respectfully submit that this Court's decision may have overlooked or misapprehended the evidence, law, or arguments involving the standard of review and the Full Commission's role as the appropriate fact finder in the case, and Respondents/Appellants would respectfully request that this Court grant their Motion for Rehearing.

J. Gabriel Coggiola, Esquire
Willson, Jones, Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, South Carolina 29204
(803) 227-2889
jgcoggiola@wjlaw.net
Attorneys for Respondents

April 13, 2017

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**PROOF OF SERVICE**

Respondents/Appellants, by and through their undersigned counsel, certify that on the date indicated below, he served counsel of record with a copy of the **Petition for Rehearing** by mailing copies of the same by United States Mail with first class postage prepaid the following addresses:

Stephen J. Wukela
Wukela Law Firm
P.O. Box 13057
Florence, South Carolina 29504
Attorney for Respondent

J. Gabriel Coggiola, Esquire
Willson Jones Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, South Carolina 29204
(803) 227-2889
Attorneys for Respondents

April 13, 2017
Columbia, South Carolina

# WILLSON JONES CARTER & BAXLEY, P.A.

ATTORNEYS AT LAW

GREENVILLE CHARLESTON COLUMBIA CHARLOTTE RALEIGH ATLANTA

John Gabriel Coggiola
Direct (803) 227-2889
Fax (803) 782-2527
jgcoggiola@wjlaw.net

3600 Forest Drive, Suite 204
Columbia, SC 29204
www.wjcblaw.com

April 13, 2017



**Via Hand Delivery**
The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Otis Nero vs. SC Department of Transportation
WCC File No.: 1222136 DOI: 6/20/2012
**Appellate Case No.: 2015-001277**

Dear Ms. Kitchings:

Enclosed for filing, please find the original and six (6) copies of the Respondents' **Petition for Rehearing**. Pursuant to Rule 240 (d), no filing fee is required as this Petition is being filed on behalf of the State of South Carolina or its departments or agencies.

By copy of this letter and enclosure to Stephen J. Wukela, counsel of record for the Appellant, I am serving him with a copy of our **Petition for Rehearing** as indicated by the enclosed **Proof of Service**. Thank you for your consideration in this manner. Please do not hesitate to contact me with any questions or if additional information is needed from our office.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

John Gabriel Coggiola

JGC/jgc

Enclosure(s)
cc: Mr. Stephen J. Wukela
Brittany Melvin, State Accident Fund