

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2017-000753

RECEIVED

JUN 21 2017

SC Court of Appeals

Donnie Lowe, Employee, Claimant, Appellant,

v.

BMW Manufacturing Corporation, Employer, and Hartford Ins. Co. of the Midwest c/o
Sedgwick Claims Management Services, Inc., Carrier, Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

- I. WHETHER THE APPELLATE PANEL ERRED IN FINDING APPELLANT'S CHANGE OF CONDITION CLAIM WAS BARRED BY S.C. CODE ANN. § 42-17-90(A)?

STATEMENT OF THE CASE

This case involves an appeal from the South Carolina Workers' Compensation Commission. Donnie Lowe (Appellant) suffered an admitted injury to his back in the course of his employment with BMW. Following a hearing, he was awarded permanent partial disability benefits. He later filed a Form 50, alleging he sustained a change of condition for the worse to his back. Respondents argued that the change of condition claim was procedurally barred because it was not properly filed within one year of the date of last payment of compensation as required by section 42-17-90(A) of the South Carolina Code. Respondents further argued that even if the claim was properly filed, Appellant failed to meet his burden of proving a physical change of condition for the worse. Following a hearing, the Honorable R. Michael Campbell, II (single commissioner) found the claim was untimely and dismissed it as a matter of law. Appellant then filed a Form 30 Request for Commission Review with the Appellate Panel of the South Carolina Workers' Compensation Commission (Appellate Panel).

Following briefing, a hearing was held before the Appellate Panel on October 17, 2016. By Decision entered February 23, 2017, the Appellate Panel affirmed the single commissioner's order.¹ Specifically, the Appellate Panel found that the single commissioner did not err in dismissing the claim because it was not properly filed within one year of the date of last payment of compensation.

STATEMENT OF FACTS

Appellant worked as a production associate at BMW. On October 2, 2007, he suffered an admitted injury to his back. (Order of the Appellate Panel dated Feb. 23, 2017 p. 2). After receiving authorized medical treatment, he reached maximum medical improvement for this

¹ The Appellate Panel made one amendment to correct a scrivener's error in the single

injury on January 6, 2011. *Id.* Thereafter, Respondents sought to pay Appellant permanent partial disability benefits. The Honorable T. Scott Beck of the South Carolina Workers' Compensation Commission heard this case on May 9, 2012, and filed a Decision and Order on August 28, 2012. (Order of Commissioner T. Scott Beck dated Aug. 28, 2012). Commissioner Beck awarded Appellant 35% permanent partial disability (PPD) to his back along with future causally-related medical care per Dr. James Behr's recommendation. *Id.* On October 3, 2012, Respondents paid Appellant \$65,239.95, representing 105 weeks of PPD pursuant to Commissioner Beck's Order. (Order of the Appellate Panel dated Feb. 23, 2017, p. 2).

On July 3, 2013, Appellant filed a Form 50 Request for Hearing, alleging a change of condition for the worse. *Id.* He included a questionnaire from Dr. Behr, indicating Appellant had suffered a physical change of condition for the worse. On August 8, 2013, Appellant received an MRI of his lumbar spine. (Hr. Tr. dated December 10, 2015, p. 12, ll. 23-25). On September 9, 2013, Dr. Behr was deposed regarding whether Appellant suffered a change of condition. (Dr. Behr Dep. Tr. pp. 4-5). Dr. Behr was asked to compare two MRIs of Appellant's back: one dated February 24, 2010 and another dated August 8, 2013. (Dr. Behr Dep. Tr. p. 8, ll. 13-17). Dr. Behr explained that, in comparing the two MRIs, "[t]here are no large or significant changes from one MRI to the other." (Hr. Tr. dated Dec. 10, 2015, p. 7, ll. 2-11; Dr. Behr Dep. Tr. p. 8, ll. 18-19). When asked about why he had previously opined, in a questionnaire from Appellant's attorney that Appellant had sustained a change of condition, the following colloquy occurred:

Q: The questionnaire that we looked at, you indicated in the first question – the first question was: Has [Appellant]'s condition

commissioner's order.

resulting from his work-related injury in December 2008 and his actual work-related injury in December 2007, but has it changed for the worse, and you said yes?

A: What I actually said was subjectively [Appellant] is reporting increased pain, so subjectively it has worsened. And what I later said is we wanted to look at these things, including the MRI, to see if objectively it has changed.

Q: And had it changed objectively?

A: No, not according to the MRI.

(Dr. Behr Dep. Tr. p. 13, ll. 7-20).

Thereafter, on October 7, 2013, after the one-year deadline in which to file a change of condition had expired,² and after Dr. Behr testified there had not been an objective change of condition, Appellant withdrew his Form 50. (Order of the Appellate Panel dated Feb. 23, 2017, p. 3). Nearly two years later, Appellant filed another Form 50 Request for Hearing on or about September 3, 2015, alleging a change of condition. *Id.* Appellant included questionnaires from Dr. Behr dated March 12, 2015, and Dr. Jason Kelly dated March 7, 2014, in support of this allegation. *Id.* Notably, these questionnaires were obtained outside of the one-year deadline in which to file a change of condition.

On December 10, 2015, a hearing on Appellant's Form 50 was held before the Honorable R. Mike Campbell, II of the South Carolina Workers' Compensation Commission (single commissioner). At the hearing, Respondents took the position that Appellant's claim for a change of condition was untimely because he did not refile it within one year of the date of last

² See S.C. Code Ann. § 42-17-90(A).

payment of compensation as required by section 42-17-90(A). (Hr. Tr. dated Dec. 10, 2015, pp. 8-9). Respondents further pointed out that Dr. Behr testified Appellant had **not** suffered a change of condition for the worse. (Hr. Tr. dated Dec. 10, 2015, p. 7, ll. 2-11).

In his Order dated July 15, 2016, the single commissioner dismissed the claim, finding it was barred by the one-year statute of limitations set forth in section 42-17-90(A). On July 28, 2016, Appellant filed a Form 30, Application for Commission Review, asserting that the single commissioner erred in concluding as a matter of law that he was barred from seeking review of the award on a change of condition claim.

A review hearing was held before the Appellate Panel on October 17, 2016, where both parties presented oral arguments in support of their positions. Specifically, Respondents argued that the legislative intent behind the one-year time limit in section 42-17-90 was to “limit employer liability indefinitely into the future or to not subject employers to liability indefinitely into the future: to somehow put a stop to it and bring it to conclusion so employers can . . . predict what . . . ongoing future liability is.” (Hr. Tr. dated Oct. 17, 2016 p. 14, ll. 13-22). In an order dated February 23, 2017, the Appellate Panel affirmed the single commissioner’s finding that Appellant’s change of condition claim was barred by section 42-17-90(A). This appeal followed.

STANDARD OF REVIEW

Judicial review of a Worker’s Compensation Commission decision is directed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5). A reviewing court should affirm the decision of the Appellate Panel unless it is clearly erroneous in view of the substantial evidence of the whole record. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981). The reviewing court may not substitute its own judgment for that of

the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code Ann. § 1-23-380(5).

Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. *Fishburne v. ATI Syst. Int'l*, 384 S.C. 76, 85, 681 S.E.2d 595, 600 (Ct. App. 2009). “The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission’s finding from being supported by substantial evidence.” *Sharpe v. Case Prod., Inc.*, 336 S.C. 154, 160, 519 S.E.2d 102, 105 (1999).

ARGUMENT

I. The Appellate Panel did not err in dismissing this claim for a change of condition because it was not properly filed within the one-year statute of limitations provided in section 42-17-90(A).

Defendants assert that the Appellate Panel did not err in dismissing this claim for a change of condition because it was not properly filed within the one-year statute of limitations provided in section 42-17-90(A).

A change in condition occurs when the claimant experiences a change in physical condition as a result of her original injury, occurring after the first award. Generally, an appeal of a workers' compensation order is concerned with the conditions prior to and at the time of the original award of the commission. Review for a change of condition is concerned with conditions that have arisen thereafter. The determination of whether a claimant experiences a

change of condition is a question for the fact finder.

Russell v. Wal-Mart Stores, Inc., 415 S.C. 395, 399, 782 S.E.2d 753, 755 (Ct. App. 2016) (internal citations and quotation marks omitted).

Under South Carolina Code Section 42-17-90(A), a review for a change of condition must be made within “[12] months from the date of the last payment of compensation pursuant to an award provided by this title.” Moreover, “[i]n a claim involving a change of condition, the moving party must attach to the hearing request form a medical report(s) indicating a change in the claimant’s condition.” S.C. Code Ann. Regs. § 67-602(C).

The Supreme Court of South Carolina has strictly construed the one-year limitation provided by section 42-17-90(A) and held that claims filed more than one year after the date of last payment of compensation are procedurally barred. *See Wallace v. Campbell Limestone Co.*, 198 S.C. 196, 203, 17 S.E.2d 309, 311-12 (1941) (finding a claim was barred under the predecessor to section 42-17-90(A) when it was filed more than one year after the date of last payment of compensation).

In *Wallace*, the claimant was awarded medical and indemnity benefits for an injury to his left leg, the last payment of which was made on June 7, 1937. *Id.* On June 15, 1940, he claimed an additional award for disfigurement. *Id.* at 198-99, 17 S.E.2d at 310. The Supreme Court held the claimant’s request for additional benefits was untimely because it was filed more than three years after the date of last payment of compensation. The Court cited the predecessor to section 42-17-90, which provided identical language as the current language of section 42-17-90, noting “no such review shall be made after twelve months from the date of the last payment of compensation” The Court specifically stated, “[t]he conclusiveness of [this statute] is inescapable.” *Id.* at 201, 17 S.E.2d at 311. The Court further noted that “[s]uch statutes apply

with full force to the most meritorious claims.” *Id.* at 203, 17 S.E.2d at 311-12 (citing *Rudd v. Fairforest Finishing Co.*, 189 S.C. 188, 200 S.E.2d 727, 730 (1939) (“While we should give the Compensation Act a liberal construction, we are not justified in so construing it as to do violence to a specific requirement of the Act.”)). Thus, the Supreme Court dismissed the claimant’s request for additional benefits because it was not filed within the one-year limitation provided by the predecessor to section 42-17-90.

Respondents assert that *Wallace* illustrates that the Appellate Panel correctly found Appellant’s request for a change of condition was untimely. Here, Respondents paid Appellant \$65,239.95 on October 3, 2012, representing 105 weeks of permanent partial disability pursuant to Commissioner Beck’s Order. Under the one-year limitation prescribed by section 42-17-90(A), Appellant had to file a review for a change of condition within twelve months “from the date of last payment of compensation” or October 3, 2013. Although Appellant’s Form 50 was filed on July 3, 2013, he later withdrew his hearing request on October 7, 2013. He then refiled his Form 50 on September 3, 2015—nearly three years after the “date of last payment of compensation.” Although Appellant has leave to refile the Form 50 pursuant to Regulation 67-609 of the South Carolina Code, he did not do so within the one-year time limitation prescribed by section 42-17-90. Because Appellant’s Form 50 was not refiled until well after the one-year period in Section 42-17-90 had expired, Respondents assert that the Appellate Panel correctly dismissed the claim.

Appellant, however, argues that because the original Form 50 was filed within one year of the date of last payment of compensation, the statute of limitations was tolled and his claim was timely filed. He relies on the case of *Allen v. Benson Outdoor Advertising Company*, 236 S.C. 22, 112 S.E.2d 722 (1960). Respondents submit that Appellant’s reliance on *Allen* is

misplaced.

In *Allen*, the issue was whether the Commission had jurisdiction to hear a change of condition claim, which, although timely requested, was not *heard* within one year of the date of last payment of compensation. *Id.* at 29, 112 S.E.2d at 725. Because the application for review was filed within one year of the date of last payment of compensation, the Supreme Court held that the Commission had jurisdiction to hear the claim. *Id.* at 31, 112 S.E.2d at 726.

Respondents respectfully assert that *Allen* is inapposite to the case at bar. Here, the issue is not whether the claim was *heard* within one year, but whether Appellant properly *filed* his application for review within one year. Moreover, the claimant in *Allen* actually had evidence supporting his change of condition within the one-year period unlike this case where Appellant waited until nearly two years after the statute of limitations expired to present evidence supporting a change of condition. 236 S.C. at 28, 112 S.E.2d at 725. More importantly, in *Allen*, unlike this case, the delay in hearing the case was attributable to a crowded docket, inaction by the Commission, or other factors outside of the claimant's control. *See id.* at 30, 112 S.E.2d at 725-26 ("An application might be seasonably made but due to crowded dockets or other causes could not be heard within the statutory period. Nor could it have been reasonably intended that the Industrial Commission intended that *the Industrial Commission by inaction* could in effect destroy its jurisdiction to hear an application timely filed." (emphasis added)). That is entirely different from the case at bar where the approximately two-year delay in refiling the claim was due to *Appellant's inaction* as a result of having no evidence to support a change of condition for the worse.

Appellant relies on the following language from *Allen* in support of his argument that by filing his original Form 50 within the one-year limitation period, he effectively tolled the statute

of limitations:

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 all 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."

Id. at 30, 112 S.E.2d at 726.

Respondents assert that the facts in *Allen* indicate that the Supreme Court was referring to "partial . . . development" of the claim by the Commission as opposed to the claimant. The crux of the holding in *Allen* is that a claimant should not be penalized for the Commission's delay in holding a timely hearing on an otherwise timely-filed claim. In short, the policy implications in *Allen* are not present here and *Allen* is clearly distinguishable from the present case.

Appellant next argues that his original Form 50 timely filed his change of condition claim because S.C. Code Regulation 67-206 "specifically states that filing a Form 50 satisfies the claim requirement." (App. Br. 6). Appellant never raised this argument in his pre-hearing brief or at the hearing before the single commissioner. Therefore, Respondents assert that this issue is not preserved for this Court's review. See *Jones v. Anderson Cotton Mills*, 205 S.C. 247, 256-57, 31 S.E.2d 447, 450 (1944) (finding an issue could not be addressed for the first time before the

Appellate Panel where it was not raised to nor ruled on by the single commissioner). Regardless, Respondents assert that even if Appellant's July 3, 2013 Form 50 originally did file a claim, his subsequent withdrawal of the Form 50 served as a withdrawal of his claim, and he was required under section 42-17-90 to refile the Request for a Hearing within one year of the date of last payment of compensation. Because he failed to do so, the Appellate Panel properly dismissed the claim as untimely.

Much of Appellant's brief focuses on the recent case of *Sarah Y. Wilson v. Charleston County School District*, 798 S.E.2d 449, Op. No. 5475 (Shearouse Adv. Sh. No. 12 at 13) (S.C. Ct. App. filed Mar. 22, 2017), *petition for rehearing pending*. In *Wilson*, the claimant suffered a work-related injury to her back and neck. *Id.* at 451. She thereafter sought permanent and total disability benefits at a hearing. *Id.* The single commissioner awarded her 45% PPD to the back. *Id.* The Form 19 reflecting the date of last payment of compensation was filed January 25, 2008, and an Amended Form 19 signed by the claimant was filed May 7, 2008. *Id.* She then filed a Form 50, Not Requesting a Hearing on January 6, 2009, alleging a change of condition for the worse. *Id.* On March 29, 2011, she then filed a Form 50 Request for Hearing. *Id.* The Appellate Panel found the claimant failed to prove a compensable change of condition. *Id.* at 452. Specifically, the Appellate Panel found "no doctor has opined that the Claimant's work related depression began after October 2, 2007, or worsened between January 25, 2008 and January 25, 2009." Thus, it concluded Wilson "failed to meet her burden of establishing the change of her condition necessary to satisfy the timing requirements of section 42-17-90(A) and Allen." *Id.* at 457. The circuit court affirmed these rulings. *Id.* at 452.

Citing *Allen*, the claimant argued that "as long as a change of condition claim is filed by the proper deadline, it can encompass a problem still in the process of turning serious." *Id.* at

457. The employer argued that this court should affirm the denial of benefits because the change of condition did not occur within one year of the date of the last payment of compensation. *Id.* The Court of Appeals reversed, noting it would not accept a “construction of [section 42-17-90], which seeks to impose a requirement upon claimants not intended by the Legislature.” *Id.* The Court reasoned that:

Although Wilson did not file the subsequent Form 50 requesting a hearing on her change of condition claim until March 29, 2011, we find her January 6, 2009 Form 50 Notice of Claim alleging a change of condition satisfied the statute's plain and unambiguous requirement that such a claim be filed within the twelve month deadline. As the Appellate Panel's contrary determination is controlled by an error of law, we reverse the circuit court's order affirming this finding.

Id. at 458.

Respondents would respectfully assert that *Wilson* is distinguishable from the present case. Notably, according to the Court of Appeals' opinion, the claimant's “psychological condition worsened at some point after the initial hearing and prior to her filing of the January 6, 2009 Form 50 alleging the change of condition.” *Id.* at 455. Thus it appears that, in *Wilson*, the claimant presented evidence within one year of the date of last payment of compensation showing a change of condition. That is not the case here. As previously stated, Dr. Behr testified approximately eleven months after the “date of the last payment of compensation” that Appellant had not suffered an objective change of condition. Although Appellant included a medical questionnaire from Dr. Behr that supported a change of condition, that questionnaire

was rebutted by Dr. Behr's later testimony that Appellant had not suffered a change of condition.

Alternatively, should the Court find *Wilson* controlling, we would respectfully request oral argument in which to argue against precedent. A review of the South Carolina Worker's Compensation Act and applicable Regulations demonstrates a legislative intent that a change of condition actually occur within one year of the date of last payment of compensation. In addition to section 42-17-90(A), South Carolina Code Regulation 67-602(C) provides that, "[i]n a claim involving a change of condition, the moving party must attach to the hearing request form a medical report(s) indicating a change in the claimant's condition." Respondents would submit that requiring a claimant to submit evidence "indicating a change in the claimant's condition" at the time of filing a change of condition indicates that the change of condition need actually occur within the one-year period. This interpretation is further supported by numerous decisions from the Appellate Panel, which have consistently held that Regulation 67-602(C) requires a claimant to attach medical evidence supporting a change of condition to her hearing request in order to properly file a claim for a change of condition. *See e.g., Weiss v. Sea Island Painters*, LEXIS 1 (Full Commission May 5, 1999) ("Regulation 67-602(c) requires that the Claimant attach a medical certificate with the Form 50 when he files a change of condition in order to perfect a claim."); *Richardson v. Pine Grove School*, LEXIS 325 (Full Commission May 25, 2001) ("The filing of a Form 50 . . . constitutes a request for review if there exists bona fide medical evidence supporting the Claimant's position a change of condition has occurred." (emphasis added)); *Sligh v. Hanson Briack America*, LEXIS 198 (Full Commission Oct. 19, 2010) ("Regulation 67-602 (C) provides that when a Form 50, Hearing Request, for a change of condition for the worse is filed, the moving party must attach to the hearing request form a medical report(s) indicating the change in the Claimant's condition.").

Moreover, the Appellate Panel has dismissed change of condition claims when the claimant failed to attach a medical report to the hearing request providing a change of condition. See e.g., *Miller v. BMW Manufacturing Corp.*, LEXIS 76 (Full Commission April 3, 2013) (dismissing a change of condition as barred when none of the medical records attached to his hearing request “established, as required by Regulation 67-602(C) that Claimant had actually experienced a change of condition for the worse”); *Fetherson v. Northern Tool & Equipment*, LEXIS 220 (Full Commission Nov. 26, 2013) (“The claimant failed to attach supporting medical documentation indicating a change of condition on her Form 50 filed with the Commission which is required by the Act.” (emphasis added)); *Dunbar v. Gallman Personnel Services, Inc.*, LEXIS 163 (Single Commissioner Nov. 16, 1998), *affirmed by* LEXIS 878 (Full Commission April 1, 1999) (dismissing a change of condition claim because “[u]nder Regulation 67-602 (C), the Form 50 claiming additional benefits based on an alleged change of condition for the worse and requesting a hearing is defective in that it did not attach a medical certificate stating that the Claimant had sustained a change of condition”).

Finally, and perhaps most importantly, the public policy implications of Appellant’s position should persuade the Court to reject it. Respondents assert that it would lead to absurd results if a claimant was allowed to (1) file a Form 50 alleging a change of condition; (2) withdraw that request after the one-year limitation in section 42-17-90 has expired and there is no evidence to support the claim; and (3) come forward with evidence supporting the claim almost two years later. If this process were allowed to occur then it would eviscerate the one-year limitation period set forth in section 42-17-90. Nearly all claimants would simply file for a change of condition, regardless if there is evidence to support it, in the hope of later discovering evidence to support the claim. Defendants respectfully assert that the Legislature did not intend

this when it proscribed the one-year limitation period to file an application for a change of condition. By enacting the one-year period to file for a change of condition, the Legislature intended that the change of condition actually occur within the one-year period. Moreover, allowing Appellant to proceed with this claim when he refiled the Request for Hearing nearly two years after the state of limitations expired would contravene the purpose of the Act's statute of limitations, which is to "protect employers and insurance carriers against 'long delayed demands.'" *Gold v. Moragne*, 202 S.C. 281, 288, 24 S.E.2d 491, 493 (1943) (quoting *Wallace v. Campbell Limestone Co.*, 198 S.C. 196, 17 S.E.2d 309, 311 (1941)). Therefore, Respondents respectfully submit that the Appellate Panel did not err in finding this claim was barred by the one-year statute of limitations under section 42-17-90(A).

CONCLUSION

Respondents respectfully assert that the Appellate Panel did not err in dismissing this claim due to Appellant's failure to properly file a change of condition claim within one year as required by section 42-17-90. Therefore, we request that the Court affirm the Appellate Panel's order.

Respectfully submitted,



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June 19, 2017

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THE STATE OF SOUTH CAROLINA
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JUN 21 2017

SC Court of Appeals

Donnie Lowe, Employee, Claimant, Appellant,

v.

BMW Manufacturing Corporation, Employer, and Hartford Ins. Co. of the Midwest c/o
Sedgwick Claims Management Services, Inc., Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal on the attorney of record for Donnie Lowe, by depositing a copy of it in the United States Mail, postage prepaid, on the 19th day of June, 2017, addressed to his attorney of record,

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June 19, 2017

The Honorable Jenny Abbott Kitchings
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JUN 21 2017

SC Court of Appeals

Re: Donnie K Lowe vs. BMW Manufacturing Co. LLC
Appellate Case No. 2017-000753
Claim No.: YMG72538C
Our File No.: 20194.14123

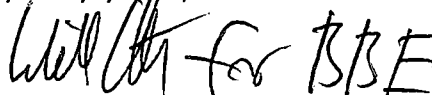
Dear Ms. Kitchings:

Enclosed for filing please find the following documents:

1. original and one copy of Initial Brief of Respondents;
2. original and one copy of Designation of Matter to be Included in the Record on Appeal; and
3. original and one copy of Respondents' Proof of Service concerning items one and two.

Please file these documents and return a clocked copy to me in the enclosed self-addressed, stamped envelope.

Very truly yours,



Brad B. Easterling

BBE/ma
Enclosures

cc: Mitchell K. Byrd, Jr., Esquire, The Carolina Law Group
Francine Proulx, Sedgwick Claims Management Services, Inc. (via facsimile)
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