

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No.: 1222136

Appellate Case No.: 2015 - 001277

RECEIVED
SEP 06 2017
SC Court of Appeals

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

vs.

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

SUCCESSIVE PETITION FOR REHEARING

This is an appeal involving a workers' compensation case. On March 29, 2017, this Court filed an opinion reversing the Full Commission's May 29, 2016 denial of benefits to Appellant. *Nero v. SCDOT*, Opinion No. 5477 (S.C. Ct. App. filed March 29, 2017). Respondents filed a Petition for Rehearing on April 13, 2017. On August 22, 2017, this Court issued an Order, granting Respondents' Petition for Rehearing and simultaneously withdrawing the March 29, 2017 opinion and substituting it with an attached August 23, 2017 opinion. *Nero v. SCDOT*, Opinion No. 5477 (S.C.Ct.App. filed March 29, 2017 – Withdrawn, Substituted, and Refiled August 23, 2017).

Although Respondent's original Petition for Rehearing was ruled on, out of an abundance of caution, Respondents', by and through their undersigned counsel, hereby files this Successive

Petition for Rehearing on the newly issued August 23, 2017 opinion, since the action of the Court on the previous petition has the effect of dismissing or finally deciding a party's appeal. (Rule 221(c), SCACR).

STATEMENT OF THE CASE:

As a brief matter of background, August 5, 2014, the Single 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 Full Commission Appellate Panel, and on May 29, 2015, the Full Commission 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 Full Commission found Respondents were prejudiced by the lack of notice and denied Appellant's entitlement to benefits.

Appellant appealed the Full Commission's decision to this Court, and on March 29, 2017, this Court reversed the Full Commission on the grounds that the substantial evidence in the record did not support the Full Commission's order 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.

On April 13, 2017, Respondents filed their first Petition for Rehearing, arguing that this

Court's March 29, 2017 opinion cited no error of law on the part of the Full Commission, and this Court may have misapprehended, or overlooked the law involving the "substantial evidence" standard of review, exceeding their role as an appellate court by substituting its judgment for that of the Commission, who are the appropriate fact finders. On August 22, 2017, this Court issued an Order granting the Petition for Rehearing, and withdrawing the March 29, 2017 opinion and substituting it with a new refiled August 23, 2017 opinion.

In the substituted August 23, 2017 opinion, this Court added an additional paragraph to the "Standard of Review" section of the opinion. This Court stated the following:

"Statutory interpretation is a question of law subject to de novo review." *Transp. Ins. Co. & Flagstar Corp.*, 389 S.C. at 428, 699 S.E.2d at 689. "The 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." *Id.* (quoting *Dunton v. S.C. Bd. of Exam'rs In Optometry*, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987) (citations omitted)). However, workers' compensation statutes are to be liberally construed in favor of coverage to serve the beneficent purpose of the Workers' Compensation Act; "only exceptions and restrictions on coverage are to be strictly construed." *James v. Anne's Inc.*, 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). Because the issue of timely notice is a jurisdictional question, "the [c]ourt may take its own view of the preponderance of the evidence." *Shatto v. McLeod Reg'l Med. Ctr.*, 406 S.C. 470, 475, 753 S.E.2d 416, 419 (2013) (quoting *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009)); *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 413, 63 S.E.2d 50, 52 (1951) (reversing award of compensation and noting hearing commissioner awarded compensation without discussion of "the jurisdictional defense of timely notice.").

This Court went on to remove the sentence from its March 29, 2017 opinion stating, "We find the substantial evidence in the record does not support the Appellate Panel's finding that Nero failed to put SCDOT on notice of a potential injury," and simply relied on the subsequent sentence "Because our Supreme Court has long held that the statutory notice provision is to be liberally construed in favor of claimants, we find the appellate panel erred in reversing the single Commissioner's determination that SC DOT received adequate notice under section 42-15-20(A)." *Nero*, (August 23, 2017 opinion at p.8). Finally, this Court replaced its March 29, 2017

opinion's sentence that "the substantial evidence in the record does not support the Appellate Panel's finding that Nero failed to provide a reasonable excuse for failing to provide timely notice pursuant to section 42-15-20(B), with a new sentence stating "the preponderance of the evidence in the record does not support the Appellate Panel's finding that Nero presented no reasonable excuse for failing to provide timely notice pursuant to section 42-15-20(B). *Id.* at p.10.

Essentially, this court made no substantive changes to its previous opinion, but instead replaced any statements that its decision was supported by the substantial evidence with a new standard of review, specifically the preponderance of the evidence.

ARGUMENT

The substituted opinion of this Court filed August 23, 2017 continues to exceed this Court's role as an appellate court and inserts the Court as the fact finder which established case law states should be reserved to the Commission. This Court's substituted opinion still fails to address any specific reason that it reversed the Full Commission's finding that Appellant failed to provide adequate notice in accordance with §42-15-20 and the accompanying case law, and instead simply recites the statement that the notice provision is to be liberally construed in favor of the injured worker and replaces the substantial evidence standard of review to the preponderance of the evidence standard of review.

In the August 24, 2017 opinion, this Court cites the *Transportation Co. & Flagstar* case in support of its statements the "statutory interpretation is a question of law subject to de novo review" and "the construction of a statute by the agency charged with its administration will be accorded the most respectful consideration will not be overruled absent compelling reasons." 389 S.C. 422, 699 S.E.2nd 687 (2010).

In *Transportation Co. & Flagstar*, this Court goes into more detail on the issue of an appellate court's review of workers compensation statutes, stating:

When reading a workers' compensation statute, this Court will strictly construe its terms, leaving it to the legislature to amend and define any ambiguities. *Wigfall v. Tideland Utils., Inc.*, 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted). The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will. See *id.* **"If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning."** *Strickland v. Strickland*, 375 S.C. 76, 88, 650 S.E.2d 465, 472 (2007) (citation omitted). "The Court will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation." *Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009) (citation omitted).

This case is not a case of statutory interpretation. The language of §42-15-20 is plain, unambiguous, and conveys a clear meaning. Further, this court has already interpreted §42-15-20 in the 2002 *Etheridge vs. Monsanto* case, wherein this Court stated, "for adequate notice, there must be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." 349 S.C. 451, 562 S.E.2nd 679 (S.C.App. 2002). Our Supreme Court has stated that although the notice statute is to be liberally construed in favor of the claimant, "there are limitations upon that rule and the statutory requirement cannot be disregarded altogether." *Mintz v. Fiske Carter Construction Co.* 218 S.C. 409, 63 S.E.2nd 50 (1951).

In the August 23, 2017 opinion, this Court again recited the conflicting factual evidence presented to the Full Commission Appellate Panel on the issue of whether there was some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential workers

compensation claim. Despite the conflicting evidence presented by both parties, and the Commission's interpretation and findings based on that conflicting evidence, this Court simply states that the Appellate Panel erred in reversing the single commissioner's decision on notice, but does not provide any evidence based support for its reversal. Instead, this Court simply disagreed with the Full Commission.

Respondents would further argue that this Court's reliance on the fact that Appellant's supervisors witnessed him pass out at the end of a work day does not support a finding of compensability. The evidence is clear after Appellant passed out at this work place, he drove himself home, and he passed out again in his own driveway before being taken to the emergency room. Appellant even admits to suffering from dizzy spells in the past. In order for this Court to reverse the Full Commission based on the fact that the Appellant's supervisors witnessed him fall at the end of the day would require them to find that the syncope episode at the worksite, and not the alleged raking incident or the subsequent syncope episode in his own driveway, was the mechanism of injury that aggravated his pre-existing cervical condition, even though it was the raking, and not the syncope episode that was pled by Appellant and awarded by the Single Commissioner. Such a finding would be speculative, and our courts have been clear that, "an award cannot be based on surmise, conjecture, or speculation." *Tiller v. National Health Care Center of Sumter*, 334 S.C. 333, 339, 513 S.E.2d 843, 845 (1999);

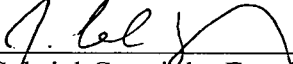
As the Supreme Court has previously stated, "In the review of a finding of the Worker's Compensation Commission, the reviewing court may not make findings of fact as to basic issues of liability for compensation, where, to do so, would impose upon the court the function of determining such facts from conflicting evidence. *Fox v. Newberry Co. Memorial Hospital*, 319 S.C. 278, 461 S.E.2nd 393 (1995).

Although this Court previously applied the substantial evidence standard of review in the *Etheredge* case, wherein it also interpreted §42-15-20, the new application of the preponderance of the evidence still does not support a reversal of the Full Commission. A reversal of the Full Commission's decision in this case would result in an almost impossible and impractical application of the notice statute to future workers compensation claims. If an injured worker refuses to tell his employer he was hurt at work, he submits formal paperwork to his employer stating he did not suffer a work accident and his condition pre-dated his alleged date of injury, and he denies any work injury in his medical reports to his doctors, it is unreasonable to expect a "reasonably conscientious" manager to disregard those facts and continue to investigate a potential work accident anyway. This heightened requirement on the employer does not exist in the Worker's Compensation Act.

CONCLUSION:

Respondents/Appellants respectfully submit that this Court's decision may have overlooked or misapprehended the evidence, law, or arguments involving the application of §42-15-60, and the appropriate standard of review on Full Commission's role as the appropriate fact finder on the issue of whether sufficient facts existed to show there was some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim. As a result, Respondents would respectfully request that this Court grant their Successive Petition for Rehearing.

[Signature Block on Following Page]



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September 6, 2017

THE STATE OF SOUTH CAROLINA
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Otis Nero (Claimant).....Appellant,

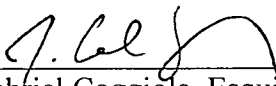
vs.

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

PROOF OF SERVICE

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

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September 6, 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
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Appellate Case No.: 2015-001277

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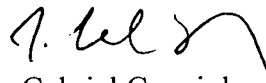
Dear Ms. Kitchings:

Pursuant to Rule 221, SCACR, please find enclosed for filing the original and six (6) copies of the Respondents' **Successive 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 **Successive 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
Page Snyder, State Accident Fund (via email)
Dennis Copeland, State Accident Fund (via email)