

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION  
APPELLATE PANEL

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NOV 02 2017

SC Court of Appeals

Appellate Case No.: 2015-002575

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Johnny Tucker, Employee.....Appellant,

v.

SC 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, SCARC. On October 18, 2017, this Court filed an opinion reversing the September 11, 2015 Decision and Order of the South Carolina Workers' Compensation Full Commission Appellate Panel ("Appellate Panel"). Tucker v. SCDOT, Opinion No. 2017-UP-379 (S.C. Ct. App. filed October 18, 2017). As a matter of background, the Single Commissioner denied Appellant's request for a change of condition for the worse within the statutorily required time period because the filing of a Form 50 Notice of Claim was not a sufficient "application" within the meaning of S.C. Code Ann. §42-17-90. Specifically, the Single Commissioner found that "application" within the meaning of the statute required the Appellant to request the Commission take action on the request instead

of simply putting the Commission on notice of a claim. The Appellate Panel affirmed in full on September 11, 2015, and this Court subsequently reversed on October 18, 2017.

As grounds for this Petition, Respondent would respectfully argue that this Court may have overlooked or misapprehended the law and arguments and effectively eliminated the legislature's statutory requirement under S.C. Code Ann. §42-17-90.

### ARGUMENT

An injured worker's right to seek benefits for a change of condition is set forth in S.C. Code Ann. §42-17-90. A successful request for a change of condition requires the injured worker to do the following: (1) make an application on the ground of a change in condition; (2) prove by a preponderance of the evidence that there has been a change of condition after last payment of compensation; and (3) review must not be made after twelve months from date of last payment of compensation. S.C. Code Ann. §42-17-90. The statute specifically dictates the time within which a change of condition claim must be asserted, stating "the review must not be made after twelve months from the date of the last payment of compensation pursuant to an award by this title." (Id.)

The South Carolina Supreme Court interpreted this language to mean an application for review must be made within one year after the last payment of compensation. Allen v. Benson Outdoor Advertising Co., 236 S.C. 22, 112 S.E.2d 722 (1960). Based on the holding in Allen, S.C. Code Ann. §42-17-90 establishes a one year statutory requirement for filing a request for hearing on a change of condition and allowing hearing requests to be filed after this established statutory period violates the statute. Although the proper interpretation of a statute is normally 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).

**I. The Court misapprehended or overlooked the evidence, law, or arguments involving requirement that an application for review must be made within twelve months from date of last payment of compensation as statutorily mandated by S.C. Code Ann. §42-17-90.**

Appellant failed to make an application for review on the ground of change of condition within twelve months from last payment of compensation, and therefore, he does not meet the statutory requirements of S.C. Code Ann. §42-17-90. The canons of statutory construction dictate that unless the language of a statute is ambiguous, the court’s analysis should rest on the ordinary meaning of the statutory language as it is written. Strickland v. Strickland, 375 S.C. 76, 88, 650 S.E.2d 465, 472 (2007). S.C. Code Ann. §42-17-90(A) is clear in stating that a party must make an “application” for review on change of condition within twelve months from last payment of compensation.

The word “application” signifies that an injured worker must petition the Commission to take action. Indeed, Black’s Law Dictionary defines the term application to mean a “request or petition.” Black’s Law Dictionary 108 (8th ed. 2004). Similarly, a motion is defined as a written or oral application requesting a court to make a specified ruling or order. Id. at 1036. Thus, the statute is clear that in order for an injured worker to seek the Commission’s review of a previous award based on a change of condition, he must request a hearing on the matter.

In its current opinion, this Court finds that simply filing a claim for a change of condition within twelve months from last payment of compensation, without requesting

the Commission to take action, constitutes a timely “application” for review. Such an interpretation effectively nullifies the one year statutory filing requirement and is in complete dereliction to the legislature’s intent. The purpose of the twelve month requirement is to limit a reopening of a claim for benefits to changes that have occurred within the twelve months. Accepting this Court’s interpretation means an injured worker only has to file a claim within twelve months from last payment of compensation and allege that a change of condition has occurred without seeking any relief for such an allegation, eliminating the need to even have a limit on a change of condition. It is inconceivable that the legislature included the twelve month application period merely to test claimants’ acumen for filing paperwork. This Court’s interpretation of time for filing of a change of condition renders such time limit meaningless. Such interpretation would allow claimants to file meaningless claim notices to meet a time requirement and then sit idle for years to come before asking the Commission to take some action. The legislature did not intend claimants to circumvent the clear time period in such a way, as evidenced by the fact that there is a time period at all.

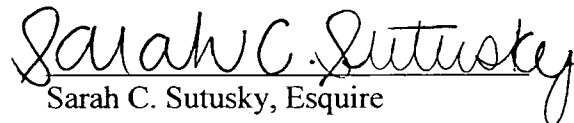
Furthermore, in its opinion, this Court has failed to give deference to the Commission’s interpretation of the statute. The Commission construed the legislature’s use of the work “application” set forth in S.C. Code Ann. §42-17-90 to require an injured worker to make a request or petition, by filing a hearing request, to satisfy the statute. Statutory construction of workers’ compensation statutes made by the S.C. Workers’ Compensation Commission should be given respectful consideration and not be overturned without compelling reasons as the Commission is the agency charged with the

administration of workers' compensation statutes. Dunton v. S.C. Bd. Of Exam'rs In Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987).

**CONCLUSION**

Respondents respectfully submit that this Court's decision may have overlooked or misapprehended the law or arguments regarding the twelve month limitation for making an application for review and that Commission's statutory construction of the same. Respondents respectfully request that this Court grant their Motion for Rehearing.

Respectfully submitted,



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Attorneys for Respondents

November 2, 2017  
Columbia, South Carolina

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In The Court of Appeals

APPEAL FROM SOUTH CAROLINA  
Workers' Compensation Commission

Appellate Case No.: 2015-002575

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v.

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

**PROOF OF SERVICE**

I certify that I, Sarah C. Sutusky, have properly served an original and six (6) copies of **Respondents' Petition for Rehearing**, by hand delivery to the following on November 2, 2017:

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

  
Sarah C. Sutusky, Esquire  
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PROOF OF SERVICE

I certify that I, Mary Jo Lawracy, legal assistant to Sarah C. Sutusky, have properly served **Respondents' Petition for Rehearing**, by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses on November 2, 2017:

Presenton F. McDaniel, Esquire  
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November 2, 2017  
Columbia, South Carolina

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November 2, 2017

**(via hand delivery)**

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

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SC Court of Appeals

Re: Johnny Tucker v. S.C. Department of Transportation  
WCC File No.: 1106689  
**Appellate Case No.: 002575**

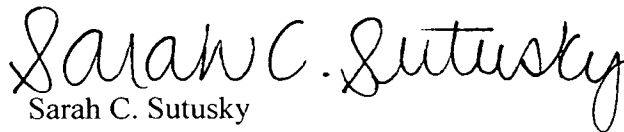
Dear Ms. Kitchings:

Pursuant to Rule 221, SCACR, please find enclosed for filing an original and six (6) copies of Respondents' Petition for Rehearing, along with Proof of Service for the same. Pursuant to Rule 240(d), no filing is required as this Petition is being filed by an agency of the state of South Carolina.

By copy of this letter, I am also serving a copy of Respondents' Petition for Rehearing on the attorneys for the Appellant by United States Mail with first class postage prepaid.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



Sarah C. Sutusky  
Bar No.: 78645

Enclosures

cc: Ms. Meredyth Harden (via email)  
Mr. Preston McDaniel, Esquire  
Mr. Gerald Malloy, Esquire