STATE OF SOUTH CAROLINA
IN THE SUPREME COURT



APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

OPINION NO: 2017-UP-379 (S.C. Ct. App., FILED October 18, 2017)

Johnny Tucker, Employee/Respondent

v.

S.C. Department of Transportation, Employer,

and

State Accident Fund, Carrier/Petitioners

# PETITION FOR WRIT OF CERTIORARI

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## CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on October 18, 2017. (App.) Counsel for Petitioner certifies that the petition for rehearing was timely made on November 2, 2017. (App.) and denied on December 14, 2017. (App.)

## QUESTIONS PRESENTED

1. Did the Court of Appeals err in citing the case of Wilson v. Charleston County School District, Opinion No. 4575, (S.C. Court App. filed March 22, 2017) in violation of the South Carolina Appellate Court Rules?

2. Did the Court of Appeals err in citing Wilson v. Charleston County School District, while a petition to vacate the Court of Appeals' opinion is currently pending?

3. Did the Court of Appeals err in its interpretation of S.C. Code Ann. Section 42-17-90?

## INTRODUCTION

This Petition for Certiorari seeks a review of the Court of Appeals opinion which was issued in violation of SCACR Rules 220 and 268. This petition also seeks to address the novel question of the validity of an opinion of the Court of Appeals which cites a case which is unpublished, and on which the Remittitur has not been issued, for precedent, when that case is currently on a petition for writ of certiorari. Further, in this particular case the parties to Wilson v. Charleston County School District, have settled the case and have filed a petition in the Supreme Court mutually requesting that the Order of the Court of Appeals be **vacated.**

This Petition also seeks to review the Court of Appeals' opinion in this matter which is in conflict with Krell v. South Carolina Hwy. Dept., 237 S.C. 584, 118 S.E. 2d 322 (1961) regarding a claimant filing for a change of condition as to a condition which was present at the time of the initial hearing. Further, this petition seeks to review the opinion of the Court of

Appeals which Petitioners contend eviscerates § 42-17-90 of any applicability. Petitioners further contend that the decision of the Court of Appeals is in direct conflict with Allen v. Benson Outdoor Advertising, 236 S.C. 22, 112 S.E.2d 722 (1960). In the current opinion, case the Court of Appeals has made three fatal errors: (1) they have cited as precedent, with no other basis of authority a matter which is unpublished under the SCACR, and currently on a petition for writ of certiorari in the Supreme Court, (2) in doing so they have led this case to its most illogical conclusion, in that the Wilson case cited as precedent by the Court of Appeals has been resolved and the parties thereto have filed a joint petition requesting the supreme Court to vacate the Wilson opinion in its entirety, and (3) they have ignored and/or misconstrued the applicable rules of appellate review and the standard of review, simply because the Court of Appeals disagreed with the opinion of the Appellate Panel of the Workers' Compensation Commission. The Appellate Panel is the ultimate fact finder in workers' compensation cases and their findings must be affirmed when supported by substantial evidence. This Petition for Certiorari should, therefore, be granted to correct these errors.

## STATEMENT OF THE CASE

This is an appeal involving a workers' compensation case. Petitioners have filed this Petition because there is a novel question of law involving the citation of an unpublished opinion and because the decision of the Court of Appeals is in direct conflict with at least two prior decisions of the Supreme Court.

Johnny Tucker received an admitted injury by accident to his left shoulder and scapula on March 2, 2011. (R. p. 144). As a result of this injury, Tucker was awarded permanent partial disability compensation by the Workers' Compensation Commission and received such compensation from the Petitioners on November 28, 2012. (R. pp. 48-49). On May 2, 2013,

Tucker, by and through his attorneys, filed a South Carolina Workers' Compensation Commission Form 50 "Notice of Claim," alleging he had sustained a change in condition under Section 42-17-90. (R. pp. 58-60). Importantly, Tucker did not request a hearing but merely attempted to file a claim.

Over one year later, on July 30, 2014, Tucker filed a new Form 50 requesting a hearing seeking additional medical care and treatment and temporary total disability compensation for a change of condition from the injury sustained on May 2, 2011. (R. p. 62). Petitioners timely filed an Answer denying Tucker's change of condition, and a hearing was held before a single commissioner on October 21, 2014. Subsequently, on April 1, 2015, a single commissioner issued a Decision and Order in which he found Tucker had failed to comply with the requirements of Section 42-17-90. Claimant filed a Petition for Rehearing, and a final Order was issued on April 14, 2015 (R. p. 25).

Claimant then appealed to the Appellate Panel of the South Carolina Workers' Compensation Commission, which held a review on July 21, 2015. On September 11, 2015, the full commission affirmed the single commissioner's ruling in full (R. pp. 34-46). On October 8, 2015, Tucker again filed a request for rehearing, which was dismissed on November 16, 2015. The Order denying the claim was appealed to the Court of Appeals by Respondent and the Order on which Petitioner seeks review was subsequently issued.

**Issue 1: Did the Court of Appeals err in citing an unpublished opinion as precedent?**

This case presents a novel question in two regards. The first is whether the Court of Appeals may violate the South Carolina Rules of Appellate Practice when it issues an opinion. The Court of Appeals cited as precedent Wilson v. Charleston County School District, which it noted at the time of the opinion was on a Petition for Certiorari, the same having been filed on

July 24, 2017. Because Wilson is under a Petition for Review, it is not an officially-published case. A review of the South Carolina Judicial Department webpage reveals that the Opinion is not yet listed as a published opinion. SCACR Rule 220 states, "Published opinions shall be sent to the official reporter and other reporters or publishers when the time for rehearing has expired or, if a petition for rehearing has been filed when the petition has been finally decided by the Appellate Court."

SCACR Rule 242(c) states, "(a) decision of the Court of Appeals is not final for the purpose of review by the Supreme Court until the petition of rehearing or reinstatement has been acted on by the Court of Appeals".

Petitioners are now in the untenable position of having to file a Petition for Writ of Certiorari because we have no way of knowing whether Wilson has or will have precedential value and what the status of the claim will be once the Petition for Writ of Certiorari is ruled upon. Pursuant to SCACR Rule 242, the Supreme Court can reverse and/or completely vacate the opinion in Wilson.

The situation in this case is complicated by the fact that the Court of Appeals did not cite as precedent for overturning the decision of the Workers' Compensation Commission any other decision than Wilson. It is therefore respectfully submitted that the Opinion of the Court of Appeals needs to be reversed or vacated.

**Issue 2: Did the Court of Appeals Err in Citing Wilson v. Charleston County School District While a Petition to Vacate the Court of Appeals' Opinion is Currently Pending?**

Initially, Petitioners intended to request that the Supreme Court hold this matter in abeyance until such time as the Petition for Writ of Certiorari was decided in the Wilson case. However, counsel for Petitioners was advised by the attorney for Charleston County School

District, on Friday, January 12, 2018 that the Wilson case has been settled. The Petitioner and Respondent in Wilson have joined in a motion to the Supreme Court to completely vacate the Opinion in Wilson. If the Supreme Court grants the joint petition of Charleston County School District in Wilson, then the opinion of the Court of Appeals has no value or efficacy.

It is therefore respectfully submitted that on this ground the Opinion of the Court of Appeals be reversed and/or vacated. In the alternative, Respondents would request that this matter be held in abeyance until the Supreme Court acts upon the Petition to Vacate and, thereafter, reverse this matter under Issue 1.

**Issue 3: Did the Court of Appeals err in its interpretation of S.C. Code Ann. Section 42-17-90??**

Tucker's original injury occurred on May 2, 2011 (R p. 144). The original injury was awarded by the Workers' Compensation Commission and Claimant received the same on November 28, 2012. (R. pp. 14, 48-29). At the time Tucker was injured, he was originally treated by Dr. Emmanuel Quaye who referred him to Dr. Mazoue on January 10, 2012. (R. p. 71). Dr. Quaye opined Tucker had undergone a change of condition in April 2013 but had not seen him since January 2012. (R. p. 71) The Treating physician, Dr. Mazoue, opined that Tucker was not at maximum medical improvement. However, the original, unappealed Order of the Workers' Compensation Commission found that he reached maximum medical improvement on November 7, 2011. (R. p 6)

The burden to prove a change of condition is on the workers' compensation claimant. Krell. Further, it is the burden of the workers' compensation claimant to provide credible medical evidence of a change of condition both at the time the hearing is requested and at the time of the hearing itself. Regulation 67-602 C. In this case the doctor who opined the Claimant had suffered a change of condition had not even seen the Claimant. The actual treating physician

did not state Tucker had undergone a change of condition but stated that he was not at maximum medical improvement. (R. pp. 72-75) Dr. Mazoue may have felt that Tucker was not at maximum medical improvement but this issue was *res judicata.*

The Doctrine of *Res Judicata* applies to all issues which are actually litigated and to any issues which might have been litigated in the first action. Price v. City of Georgetown, 297 S.C. 185, 275 S.E.2d 335 (Ct. App. 1988).

Since there were two arguably competing opinions regarding the issue of change of condition versus lack of maximum medical improvement it is the duty and responsibility of the commission to make findings of fact regarding the same. Sharpe v. Case Produce, Inc., 336 S.C. 154, 519 S.E.2d 102 (1999). When the substantial evidence on the whole record supports the finding of the commission that there was no proper application for a change of condition, then the determination of the commission must be affirmed on appeal. Sharpe.

Further, in this instance, by the very admission of the treating physician, Dr. Mazoue, the Claimant had had ongoing and continuing problems since the very beginning. (R. pp. 72-75). This does not constitute a "change of condition, under § 42-17-90."

Further, for a change of condition, the Commission's determination is sharply restricted to a question of the extent of worsening of the injury on which the original award was based. Krell. In this case, the Court of Appeals ignored Krell and determined rather, that the opinion of Dr. Quaye should have been believed by the commission. This is strictly forbidden by both Krell and by the substantial evidence rule. Sharpe.

Finally, the court of appeals' interpretation of § 42-17-90 allows an endless tolling of the statute of limitations. The Court of Appeals, unfortunately erred in misapprehending how this court in Allen v. Benson Outdoor Advertising, interpreted § 42-17-90's predecessor.

The Claimant cited Allen to demonstrate to the Court that this Court has been receptive to the lengthening of the time in which a change of condition must occur. This Court, in Allen, simply found that it would be unfair to prejudice a Claimant by requiring that the actual hearing on the change of condition be held within 1 year. However, the court noted clearly that it was "enough" for the application for review to be filed within one year even if the Commission's docket did not allow the case to actually be tried within one year. *Id.* Allen stands for the proposition that the Claimant will not be held responsible if the hearing itself does not take place within the one year provided, but that a timely **request for a hearing** must be filed within one year of the last payment of compensation. The Claimant must still request a hearing within a year of the last date of the payment compensation with medical proof of a change of condition. *Id.*

Allowing the Claimant to file a form 50 not requesting a hearing within the year of final payment of compensation and then allowing him to wait an additional extended period to request an actual hearing is neither contemplated by § 42-17-90 or Allen. The Allen court noted "an application might be seasonably made but due to crowded dockets or other causes could not be heard within the statutory period." 112 S.E. 2d at 725-26. The Allen court, however, found it unreasonable that the inaction of the **Commission** can destroy the commission's jurisdiction to hear an application for a hearing, timely filed. *Id.* 112 S.E. 2d at 726.

This situation, however, is not the case here. Failing to file a timely application for a hearing or review of his condition within 12 months of the last payment of compensation is fatal under Allen. The delay in hearing this case was not due to the inaction of the commission, but was rather due to the inaction of the claimant. Neither the commission nor the DOT had the burden of proving the claimant's claim thus, they did not have a burden to request a hearing.

To construe Section 42-17-90 in the manner proposed by the Court of Appeals renders the language of the statute meaningless. A court should not construe a statute in a way which leads to an absurd result or renders it meaningless. Florence County Democratic Party v. Florence County Republican Party, 398 S.C. 124, 727 S.E.2d 418 (2012). The court should seek a construction that gives effect to every word of the statute rather than adopting an interpretation that renders portions of it meaningless. Hinton v. S.C. Dep't of Probation, Parole and Pardon, 357 S.C. 327, 592 S.E.2d 335 (Ct. App. (2009).

## CONCLUSION

For the foregoing reasons the Petitioners respectfully request this Court to grant the Petition for Writ of Certiorari to reverse the Court of Appeals' Order and to affirm the Commission's original Decision. The Petitioners, further request this Court to state clearly that in a determination of the Court of Appeals cannot be based on a decision of the court which is pending before the Supreme Court and has not been finalized under the Rules of Appellate Procedure.

Respectfully submitted,

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELATE PANEL

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Johnny Tucker,

Employee/Respondent

v.

S.C. Department of Transportation, Employer,

and

State Accident Fund,

Carrier/Petitioners

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**CERTIFICATE OF SERVICE**

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I do certify that I David H. Keller, on January 16, 2018, served a copy of the Petitioners' Petition for Certiorari, by mailing a copy of the same by USPS with first class postage affixed in the above-referenced matter to:

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January 16, 2018



The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

Re: Johnny Tucker, Employee/Respondent v. S.C. Department of Transportation, Employer,
and State Accident Fund, Carrier Petitioners
Turner Padget File No.: 00002.00903

Dear Mr. Shearouse:

Enclosed is Petitioners', South Carolina Department of Transportation and State Accident Fund's Petition for Writ of Certiorari in the above-referenced matter. Pursuant to the rule, I have attached hereto an original and six copies of the Petition. Further, because the Petitioners are the South Carolina Department of Transportation and the South Carolina State Accident Fund, pursuant to S.C. A.C.R. Rule 242(c) which states "no filing fee shall be required in ... petitions filed by the State of South Carolina or its agencies or departments." Therefore, no filing fee is necessary.

I have also attached here to a copy of certificate of service on opposing counsel and on the Court of Appeals. I am also filing, under separate cover, an Emergency Motion for late filling of the appendix due to my wife having been admitted to the hospital on today's date for emergency testing for symptoms of leukemia.

Should you have any questions, please feel free to contact me.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.

David H. Keller

DHK:pam
Enclosures

Hasler
01/16/2018
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# First Class Mail

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