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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

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

Appellate Case No. 2018-000076

Johnny Tucker, Employee, Respondent,

v.

S.C. Department of Transportation, Employer,
And State Accident Fund, Carrier,Petitioners.

RETURN TO THE PETITION FOR WRIT OF CERTIORARI

Preston F. McDaniel
McDANIEL LAW FIRM
SC Bar No. 3770
1315 Elmwood Avenue
Columbia, SC 29201
(803)771-7211

And

Gerald Malloy, Esquire
SC Bar No. 12033
MALLOY LAW FIRM
108 Cargill Way
Hartsville, SC 29201
Attorneys for Respondent

February 15, 2018

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QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR IN CITING THE CASE OF WILSON V. CHARLESTON COUNTY SCHOOL DISTRICT, OPINION NO. 5475, 419 S.C. 442, 798 S.E.2D 449 (S.C. CT. APP. FILED MARCH 22, 2017) IN VIOLATION OF THE SOUTH CAROLINA APPELLATE COURT RULES?

- II. 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?

- III. DID THE COURT OF APPEALS ERR IN ITS INTERPRETATION OF S.C. CODE ANN. §42-17-90?

CONTRA-STATEMENT OF THE CASE

Respondent's Statement of the Case and Statement of Facts in the Court of Appeals is set out verbatim hereinafter as a Contra-Statement. Further, in reference to the "INTRODUCTION" filed as part of the Petition, in the first part of that section, Petitioner accuses the Court of Appeals of relying on as precedent an Unpublished Opinion on which the Remittitur has not been issued and wherein a Petition for a Writ of Certiorari is pending. To the contrary, Wilson v. Charleston County School District is in fact a published Opinion No. 5475: 419 S.C. 442, 798 S.E.2d 449, (S.C. App. 2017), ReH. den. 6/23/17. Since this is not an Unpublished Opinion after the Petition for Rehearing is denied, it is precedential authority until further action is taken by this Court. SCACR, Rule 268(d)(1). Further in that paragraph, Petitioner makes a statement that there is a Petition pending in this Court in Wilson requesting that the Court of Appeals Opinion be vacated. That is not found in the Record and Respondent has not been served with a copy of the Appendix which is the only place outside the Record such should be considered. SCACR, Rule 242(e)(1-4), which specifies the contents of the Appendix, while not specifically addressing this, provides that an Appendix containing documents, which is what a Petition to

vacate the Court of Appeals decision would be, which are in addition to the specified Appendix documents, is to be served on Respondent. The Appendix was due and was to be filed on or before January 24th but a copy was not served on Respondent. Therefore, containing documents outside the Record and not served, it should not be considered.

Respondent would submit the following Contra-Statement of the Case initially filed with the Court of Appeals.

Following an Award by the Commission wherein benefits were paid on November 28, 2012, on May 2, 2013 the Claimant filed a Form 50 filing a claim for both a, "change of condition and undiagnosed condition claim". (R., pp. 51-52). After repeated communications between the parties, as set forth in the Record on Appeal, on July 20, 2014 the Claimant filed a Form 50 requesting a hearing on the change of condition and the undiagnosed condition claim. (R. pp. 57-60). On August 20, 2014 the Defendants filed a Form 51 denying the Claimant had sustained a change of condition for the worse and containing no affirmative defenses (R., pp. 61-62), (emp. added). A hearing was set for October 21, 2014 and the Claimant's Pre-Hearing Brief and APA Submissions were timely filed on October 6th and the Defendants timely filed their Pre-Hearing Brief and APA Submissions on October 10, 2014. (R., p. 63; pp. 64-142;

pp. 143-173; pp. 223-275). Four and one half (4 ½) months after the hearing, the Commissioner issued a Request for Proposed Order on February 18, 2015. (R., p. 305). Both a request for time to review the proposed Order and a letter requesting reconsideration prior to a formal Order being issued were filed on March 27, 2015. (R., pp. 296-297). A revised proposed Order, revised as to certain issues, was submitted and that Order was issued on April 1, 2015 (R., pp. 16-24). That same day, April 1st, a letter requesting both reconsideration of the revised proposed Order that had been submitted and the Order issued on April 1st was filed with the Commission via email. (R., pp. 301-303). The Commissioner sent an email acknowledging receipt of request for reconsideration of the revised proposed Order that same day, April 1, 2015. (R., p. 304). Thereafter an Amended Decision and Order was issued by the Hearing Commissioner on April 14, 2015. (R., pp. 25-33).

A timely Form 30 was then filed to the Amended Decision and Order on April 21, 2015 setting forth the grounds for review. (R., pp. 174-176). The Claimant submitted a Brief with the Full Commission (R., pp. 177-191) and the Defendants filed a responsive Brief. (R., pp. 192-199). After the issues were joined, a hearing was held by a Full Commission Panel on July 21, 2015 on the Request

for Review. (R., pp. 176-295). The Decision and Order of the Full Commission was issued on September 11, 2015 and a Motion and Request for Rehearing to the Order was filed on October 8, 2015. (R., pp. 210-215; p. 200-209). A response to the Motion was filed by the Defendants on October 16, 2015 and a Reply was filed to that Response by the Claimant on October 23, 2015. (R., 210-214; pp. 215-217).

Thereafter on November 16, 2015, a "Judicial Conference Decision" was issued by the Commission on the Motion for Rehearing listing all Commissioners including the Hearing Commissioner as having considered the Motion for Rehearing, which form Order "dismissed" the request. (R., p. 47).

Notice of Intent to Appeal the final Decisions of the SC Workers' Compensation Commission was timely filed on December 16, 2015 setting forth the Grounds for the appeal. (R., pp. 218-222). The South Carolina Court of Appeals issued its Opinion reversing and remanding this case to the South Carolina Workers' Compensation Commission due to the error of law committed by the Commission in its decision. A Petition for Rehearing was filed and an Order denying the Petition for Rehearing was entered on December 14, 2017. While SCACR Rule 242(c) provides that a Petition for Writ of Certiorari shall be served on opposing counsel and filed with Proof of Service with the Court of Appeals and the

Clerk of the Supreme Court within thirty (30) days, after the Petition for Rehearing or reinstatement is finally decided by the Court of Appeals, January 14th was a Sunday, the 15th was a State holiday and the Petition was not served and filed by regular mail until January 16, 2018.

STATEMENT OF FACTS

Following an Award by the Commission, benefits were paid on November 28, 2012. On May 2, 2013, the Claimant filed a Form 50 filing a claim for both a, "**change of condition and undiagnosed condition claim**". Attached to the claim was the opinion of an authorized treating physician, Dr. Emmanuel O. Quaye, who found that Mr. Tucker had undergone a change of condition for the worse and had referred him to an orthopaedist, Dr. Christopher Mazoue. In his initial evaluation, in addition to the previous diagnoses and conditions, Dr. Mazoue stated that Mr. Tucker most likely had sustained a brachial plexus injury and possibly cervical spine pathology and recommended electro-diagnostic studies. The claim specifically requested authorization for the recommended medical care. (R., pp. 51-52).

As is set out in the Record, both before and after filing the claim for a change of condition, the Claimant through his Counsel contacted prior Defense Counsel

(hereinafter Ms. Alphin) first on March 18, 2013 and then a second request was made on April 8, 2013 requesting specifically:

"I would appreciate your thoughts on this case and would appreciate it if you would get with the State Accident Fund and see how they want to proceed." (R., pp. 138-141).

Thereafter at the direction of Ms. Alphin, Counsel for the Claimant on May 2, 2013, in addition to serving the adjuster with the claim, wrote the assigned claims adjuster, Ms. Robin Oxner-King, requesting medical care. Again on July 26, 2013 in writing, Claimant's Counsel contacted the assigned adjuster, at the direction of Ms. Alphin, and again requested the medical care as found to be necessary pursuant to the medical reports already provided to the Defendants since March of 2013. (R., pp. 136-137).

Thereafter, Mr. Tucker made repeated requests for authorization for medical care or as to how the Defendants wanted to proceed. There was no reply and there is no evidence in the Record of any reply to those requests or communications, as required by Regulation, denying, accepting or offering any further medical care. There being no reply, on July 30, 2014 the Claimant filed for a hearing on the change of condition claim previously filed on May 2, 2013 requesting the medical care, evaluations and

treatment, that was being provided at that time by Dr. Christopher Mazoue and previously by an authorized treating physician, Dr. Quaye, and requesting temporary total weekly compensation as determined by the Commission to be due, and paid until maximum medical improvement. The Request for Hearing requested a hearing on the bases of both a, "**change of condition and undiagnosed condition**". (R., p. 58).

A responsive Form 51 was filed on August 20, 2014 which set out as to the reasons for denial: "Defendants deny the Claimant has sustained a change of condition for the worse." On the Form 51, "Employer's Answer to Request for Hearing", question #11: "Further contentions, grounds of defense, or unusual aspects:" was left blank. In other words, no other defenses were listed. (R., p. 62).

(Emphasis added).

Subsequent to the Request for Hearing and the responsive Form 51, this matter came to be heard on October 21, 2014. In his Pre-Hearing Brief, Mr. Tucker specifically noted he was filing both a change of condition and an undiagnosed condition claim. On October 10, 2014, the Defendants filed their Form 58 Pre-Hearing Brief and for the first time alleged a defense of, "whether the claimant timely filed a hearing request for change of condition".

At the hearing, the Defendants asserted the position that the Claimant must both file a claim and file for a hearing within twelve (12) months after the payment of compensation and the Claimant stated his position that only a "claim" needs to be filed within twelve (12) months and cited as authority, Allen v. Benson Outdoor Advertising Co., 236 S.C. 22, 112 S.E.2d 722 (1960).

Subsequent to the hearing on February 18, 2015, the Commissioner issued his notes for a proposed Order and on March 27, 2015 a proposed Order was forwarded to Counsel for the Claimant. On March 27, 2015, Claimant's Counsel filed both a request for additional time to review and a Request for Reconsideration before formal Order: 1) noting specifically that the Defendants had not raised the affirmative defense that the request for a change of condition had not been timely filed; 2) requesting the application of existing case law and requesting a liberal construction of the Act as the Commission is required to do; and 3) requesting a reversal and remand for a de novo hearing based on the violation of the Claimant's due process rights for failure to give him notice of the issues to be heard at the hearing.

The Hearing Commissioner issued an Order on April 1, 2015. Immediately upon receipt of the signed Order on

April 1st, Claimant's Counsel objected to the Order and specifically to the Statement of the Case and Defense Counsel's failure to include any reference in the Statement to the application (the claim) for a Change of Condition that had been filed on May 2, 2013. He specifically objected to the failure of Defense Counsel to refer to his numerous requests for medical care and his attempts to determine the position of the Defendants in reference to the application for a Change of Condition that had occurred between the filing of the "claim" and the date that the Claimant "requested a hearing" on the claim/application for a Change of Condition. He also objected to the inclusion of legal authority not referred to during argument by either party and to the inclusion of a Statement of Evidence of the Case presented at hearing since the Hearing Commissioner's decision was based only on the affirmative defense. Finally, the Claimant specifically objected to the failure to include any reference to established precedent that holds that a challenge or defense to timeliness based on a filing of a Change of Condition is an affirmative defense under the Regulations and law that must be pled. An Amended Order was then filed on April 14, 2015. The revised Order struck the Evidence of the Case section; however, the legal precedents not referred to by

either Counsel at argument before the Commissioner were still included in the Order and the Order made no reference to whether or not a defense based on timeliness of the filing of Change of Condition is an affirmative defense.

Thereafter the Request for Review by the Full Commission proceeded in the normal course of procedure and an Order affirming the Hearing Commissioner was issued.

The Claimant then filed a Request for Rehearing or Reconsideration as to the Decision of the Full Commission. In that Request for Rehearing, the Claimant specifically noted all of the various law and statutes and Regulations that require the Commission to address all of the issues that are presented to it for review. The Claimant specifically noted that the Claimant had raised seven (7) Grounds for Review before the Full Commission, six (6) of which specifically involved errors of law by the Single Commissioner and specifically that the Commission had failed to note and comply with the Regulations and statutory law that requires Finding of Fact and Conclusions of Law to be made by the Commission on each material issue raised. There was simply no decision made on the Claimant's legal errors by the Full Commission.

Further in reference to the actual Decision made and entered, the Motion that was before the Commission was a

Motion/Petition for Rehearing but the Motion was not heard and decided by the original Hearing Panel but was submitted to and a decision on it was made by the Judicial Conference Committee and consisted of a one-page Form Order not denying the Motion for Rehearing but dismissing the Motion for Rehearing. All seven (7) Commissioners including the original Hearing Commissioner are listed as having concurred in that Decision.

ARGUMENTS

I. THE COURT OF APPEALS DID NOT ERR IN CITING THE PUBLISHED OPINION IN WILSON V. CHARLESTON COUNTY SCHOOL DISTRICT AS PRECEDENT.

First, this Argument is without merit because the Court of Appeals decision in Wilson is not an Unpublished Opinion but is in fact a published Opinion and was a published Opinion at the time that the Unpublished Opinion in this case was entered. See: Wilson v. Charleston County School District, 419 S.C. 442, 798 S.E.2d 449 (S.C. App. 2017), ReH. den. 6/23/17. The Unpublished Opinion in this matter was entered by the Court of Appeals on October 18, 2017.

The Petitioners further are just simply in error, in that the Opinions of the South Carolina Court of Appeals become final regardless of whether or not a Petition for Certiorari is filed pursuant to SCACR Rule 220(a) which

specifically provides that,

“published opinions shall be sent to the official reporter ... when ... a Petition for Rehearing has been filed, when a Petition has been finally decided by the Appellate Court.” (emp. added).

Until action on a formal Opinion is taken by this Court, the Opinions of the South Carolina Court of Appeals as filed and upon which Rehearing has been denied are the law in our State and may be cited as precedential authority.

Contrary to Petitioners' Argument, the reference to SCACR Rule 242(c) refers to the fact, and the legal principle, that a decision of the Court of Appeals is not final and is not subject to review until after the Petition for Rehearing has been considered by the Court of Appeals. At the time of the decision in this case, that had already happened in the Wilson case. Contrary to Petitioner's Argument, that subsection has absolutely nothing to do with whether the Court of Appeals decision is final for purposes of being cited as a precedent whether that is by a party or any court including the Court of Appeals.

Finally, there is absolutely no merit to an alleged “complication” caused by the Court of Appeals citation only to the Wilson decision. As the Court will find based on a review of the Wilson opinion, (which again is published), it is based specifically on this Court's decision in Allen

v. Benson Outdoor Advertising Company, 236 S.C. 22, 112 S.E.2d 722 (1960). This issue is patently without merit.

II. THE COURT OF APPEALS DID NOT ERR IN CITING WILSON V. CHARLESTON COUNTY SCHOOL DISTRICT ASSUMING THAT A PETITION TO VACATE THE COURT OF APPEALS OPINION WAS OR IS CURRENTLY PENDING BEFORE THIS COURT.

While this argument is based on facts outside of the Record, the question in reference to any Published Opinion that has been issued by the Court of Appeals as in Wilson is what was the status of that Opinion as of the date and time that the Opinion in this matter was issued by the Court of Appeals. Wilson was a Published Opinion No. 5475 at the time the Unpublished Opinion was entered in this case and it is totally appropriate for the Court of Appeals to enter its decision based on its Published Opinion. As pointed out in Argument I the Wilson decision is nothing but a recitation of this Court's decision in Allen and is totally and specifically based on that decision which has always been considered black letter law in reference to the filing of an "application" for a change of condition before the Workers' Compensation Commission.

Quite frankly, Respondent does not know how to respond to the statement, which is not supported by anything in the Record nor by separate Affidavit, wherein the Petitioners state that, "counsel for the Petitioner was advised by the

attorney for the Charleston County School District on, Friday, January 12, 2018 that the Wilson case has been settled." This is not in the Record and none of this was presented to the Court of Appeals as is required by SCACR Rule 242(d)(2). There has been no Motion to Supplement the Record nor is there even an Affidavit of Counsel supporting this assertion and quite frankly, it is a universal principle that both the Court and the parties are to stay within the Record. No further response will be made to this unsupported assertion but again this is not the situation that existed at the time the Petition for Rehearing was denied and the Unpublished Opinion in this matter was entered. This issue is patently without merit and is actually in violation of every fundamental appellate rule and principle as to appellate review.

III. THE COURT OF APPEALS DID NOT ERR IN ITS APPLICATION OF THE PRIOR DECISIONS OF THIS COURT INTERPRETING S.C. CODE §42-17-90.

Before addressing this issue, the Respondent would be remiss if he did not point out factual inaccuracies and that certain arguments made within this argument were simply not presented to the Court of Appeals in the Petition for Rehearing.

In reference to the factual issues, Petitioners make the statement which is totally inaccurate that, "Dr. Quaye

opined Tucker had undergone a change of condition in April, 2013 but had not seen him since January, 2012. (R. p. 71)." (emp. added.). This is totally inaccurate based on the evidence from Dr. Quaye before the Commission. Quoting from p. 71 of the Record.

"I have reviewed my original report recommending a referral of Mr. Tucker to Dr. Mazoue which I issued on 1/10/2012. I have reviewed my treatment records of Mr. Tucker since that time and my recent referral of him to Dr. Christopher Mazoue and I have reviewed Dr. Mazoue's report. Based on that review, it is my opinion to a reasonable degree of medical certainty that Mr. Tucker's condition has worsened since January, 2012 when I recommended that he be referred to Dr. Mazoue for evaluation and treatment of his shoulder." (emp. added.)

There is no contradictory evidence in the Record to the fact that Dr. Quaye continued to treat his patient and had seen his patient repeatedly after January of 2012.

In reference to the legal issues which were not presented to the Court of Appeals, the Respondent would ask the Court to review the Petition for Rehearing as filed in the Court of Appeals and would submit that the Court will not find arguments concerning; the doctrine of res judicata; competing opinions regarding the issue of a change of condition versus lack of maximum medical improvement; or that the Court of Appeals had ignored the Krell v. S.C. Hwy. Dept., 237 S.C. 584, 118 S.E.2d 322

(1961) decision.

As to the only issue raised in the Petition that was possibly presented for or at least encompassed within the Petition for Rehearing was the Court of Appeals decision and the basis for its decision, wherein the Court reiterated the various issues presented for decision as to why the Appellate Panel decision should be reversed. The first of those and the basis for decision was the Appellate Panel erred by affirming the decision of the Hearing Commissioner's denial of the application for a change of condition, "on the basis that his application was not timely filed, ..." The Court then reversed and remanded based on that error of law. Because the Appellate Panel's error on that issue required the Court to reverse and remand for a decision on the merits as to the other issues, "we decline to address Tucker's remaining issues on Appeal." The Court of Appeals based its decision on Wilson v. Charleston County School District, supra. However, that decision was in turn based simply and strictly upon this Court's prior decisions and specifically in Allen v. Benson Outdoor Advertising Co., supra. The Court of Appeals decision in Wilson and the argument made by Respondent before the Court of Appeals on this issue in the case mirror each other and both simply restate this Court's

opinion in Allen.

In Wilson, the Court of Appeals did nothing more and nothing less than restate the fundamental construction principles that this Court applied in Allen and every other case under the Workers' Compensation Act: 1) A liberal construction of the Act in favor of benefits; and 2) that since the Act is in derogation of common law rights, its wording is to be strictly construed. The Court then simply reiterated the holding in Allen that the only thing the statute, now S.C. Code §42-17-90(A), requires is that the, "application" must be filed within twelve (12) months of the last date of the payment of compensation benefits and then held those principles and Allen apply:

"Although Wilson did not file the subsequent Form 50 requesting a hearing on her change of condition 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 (12) month deadline. ..."

Because the Respondent's argument on this issue mirrors the decision of the Court of Appeals in Wilson and this Court's decision in Allen which was applied by the Court of Appeals in Wilson, the argument on this issue applicable to the facts in this case is set out hereinafter as the Return on this issue before the Court:

The Defendants do not question that the, "claim" for a change of condition was timely filed but argue under their interpretation of the law, not only must a claim be filed but a hearing must be requested. Neither the Statute nor the Commission Rules, nor the prior interpretation of the Statute by the Supreme Court and Court of Appeals require or support this interruption. The filing of a claim is all that is necessary and the Commission's decision to the contrary is contrary to the law.

The Commission's authority is derived "strictly" from the Act and its provisions which are in derogation of the common law. Price v. Peachtree Electrical Services, Inc., 396 S.C. 403, 721 S.E.2d 461 (SC App. 2011), aff. modified 405 S.C. 455, 748 S.E.2d 229. The Commission must liberally construe the Act in favor of benefits and coverage in order to serve the beneficial purposes of the Act. James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730, reh. den. (2010). This liberal interpretation principle of the wording of the Act in favor of benefits to the injured worker wherein the,

"workers' compensation law must be resolved in favor of the claimants, its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed towards the end of providing coverage, rather than non-coverage,"

must be applied. Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). Contrary to the statement made during oral argument by a Commissioner, this liberal interpretation is required to be applied by the Commission to all aspects of the Act including any interpretation of the wording in reference to benefits and any other provisions of the Act. This concept and the application of this fundamental construction principle which is required to be applied by the Commission is nowhere referenced in the Full Commission Order. Further, the Supreme Court has cautioned the Commission that the Act is required to be, "liberally" construed in favor of benefits and not, "literally" or narrowly construed to deny benefits. Hamm v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940).

In addition to the requirement that the Commission must liberally interpret the Act in favor of benefits to the injured worker and the previous Supreme Court decisions interpreting the law in reference to the various time limitations for filing any type of a claim with the Commission, the Commission has adopted Regulations to implement the provisions of the Act.

Regulation 67-206 deals with the filing of any type

of, "claim" with the Commission and specifically does not require that a request for hearing be filed at the same time that a claim is filed and the Rule basically allows for a bifurcated process. Note: that Regulation also requires that the employer's representative upon the filing of any type of a claim, "shall immediately contact the claimant" in regard to the claim.

The Commission has adopted separate and distinct Regulations concerning when matters will be set for hearing. In addition to the provisions of the Act and the APA concerning the requirement that there must be issue(s) in controversy or in other words, a, "contested case" for a hearing to be set, Regulation 67-601(B) specifically provides that a hearing will not be set until a conflict arises. Regulation 67-602 deals with the setting of hearings and subsection (C) specifically refers to the setting of a hearing on,

"a claim involving a change of condition . .
 . . ."

Therefore, not only are the filing of, "claims" and "requests for hearing" dealt with under separate sections of the Regulations, but based on a clear reading of the Commission's own Regulations, there is no requirement that the request for a hearing must be filed on a change of

condition within twelve (12) months; only that a "claim" must be filed. Under the Regulations, a "request for hearing" is separate and distinct from the filing of any, "claim".

The Commission is an Administrative Body that is charged with administering the Workers' Compensation Act and has absolutely no authority to interpret the law except where the law has been interpreted by our Courts which the Commission must follow. The Commission must apply the plain and ordinary meaning of the Statutes, and is duty bound to interpret the law in reference to the best interest of the injured worker and under that principle must resolve any ambiguities in favor of the injured worker. In addition, while the Commission is given deference to the interpretation of the law and as to its Regulations, where the Commission's interpretation is contrary to the law, this is an error of law. The Commission has already interpreted the word, "application" to mean a "claim". Regulation 67-206(B); 67-602(C); and the Commissioner's reinterpretation or contrary interpretation is an error of law. An Agency's interpretation of its own Regulation that is contrary to that Regulation's plain language is an error of law. Brown v. SC Dept. of Health and Environmental Control, 348 S.C. 507, 560 S.E.2d 410 (2002). In this case,

there is no Statute, Regulation or Supreme Court decision interpreting the word "application" to mean anything other than filing of a claim.

When one adds to this the Supreme Court's specific holding in Allen, supra, (wherein the Court specifically held that the hearing does not have to be held within the one year, only that the application for review must be filed within one (1) year), under any interpretation of the Statute, the Commission's Regulations and the previous rulings of the Supreme Court and Court of Appeals the filing of a request for hearing is separate from the required filing of a claim to toll the statute. Quoting from Allen:

"Appellants (the insurance carrier in that case) say that the forgoing statutory limitations 'is directed to the Industrial Commission rather than to the parties to the action', and that it is not sufficient for the application for review to be made within one year after the last payment of compensation but the application must be heard by the Commission within that period."

* * *

"We do not agree with Appellant's view. It represents a literal and strict construction of §72-359 when under the well settled Rule a liberal construction is required. To sustain Appellant's contention would lead to a rather unreasonable result clearly not within the intent of our Legislature".

Quoting further from the Allen decision:

"In Wilkes v. State Compensation Commissioner, supra, the Court said [120 W.Va. 424, 198 S.E. 871]:

'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 Commission during the progress of the case, would be an 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 a statutory period applicable to the nature of the claim filed." (Emphasis added).

The Defendants interpretation would also result in unnecessary litigation, discourage resolution of issues, and add a requirement to the Act not within its clear meaning. Therefore, under the statute the Commission's Regulations, and the interpretation of that Statute by the Supreme Court and Court of Appeals, the Commission erred by interpreting the Statute and Regulations to require that the Claimant has to, in addition to filing a claim timely, request a hearing on that claim within the 12-month period. The decision must be reversed and this case remanded for a de novo hearing.

IV. ADDITIONAL SUSTAINING GROUNDS, THIS COURT SHOULD DENY THE PETITION FOR WRIT OF CERTIORARI BASED ON SCACR RULE 220(c) .

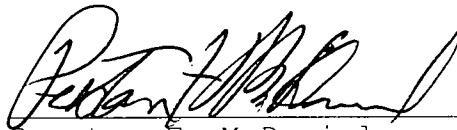
As is noted from the Court of Appeals Opinion, the Court made its decision based on an error of law and as the Court stated in its Opinion because it found the Commission had made an error of law by denying the Claimant's application for a change of condition on the basis that it had not been timely filed and reversed and remanded to the Single Commissioner for a decision on the merits that the Court declined to address Mr. Tucker's remaining issues on appeal. SCACR Rule 220(c) Affirmance on Any Ground Appearing in Record, allows this Court or an Appellate Court to affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal. The Petitioner would submit as additional sustaining grounds, that the Court should deny the Petition on the basis of the remaining issues as presented to but not reached by the Court of Appeals.

CONCLUSION

For all the foregoing reasons, the Court should deny the Petition for Certiorari. Because this is a Petition for a Writ of Certiorari from an Unpublished Opinion and because the Opinion of the Court of Appeals was based on this Court's decision in Allen v. Benson Outdoor

Advertising Co., supra, in denying the Petition, the
Petitioner, if the Court deems it appropriate, would
request the Court to refer to its decision in Allen v.
Benson Outdoor Advertising Co., supra as controlling
authority per the Court of Appeals Opinion in this matter.

Respectfully submitted,



Preston F. McDaniel
SC Bar No. 3770
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

and

Gerald Malloy, Esquire
SC Bar No. 12033
Malloy Law Firm
108 Cargill Way
Hartsville, South Carolina 29551
(843) 339-3000

Attorneys for Respondent

February 15, 2018

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

OPINION NO: 2017-UP-379 (S.C. Ct. App., FILED October 18,
2017
Appellate Case No. 2018-000076

Johnny Tucker, Employee,.....Respondent,

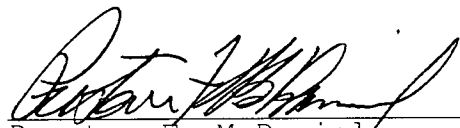
v.

SC Department of Transportation, Employer,
and State Accident Fund, Carrier,.....Petitioners.

PROOF OF SERVICE

I certify that I have served the **RETURN TO THE PETITION FOR WRIT OF CERTIORARI** by depositing a copy of it in the United States Mail, postage prepaid, on February 15, 2018 addressed to:

David H. Keller
TURNER PADGET GRAHAM & LANEY, P.A.
200 E. Broad Street
Greenville, South Carolina 29601



Preston F. McDaniel

SC Bar No. 3770
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

And
Gerald Malloy, Esquire
SC Bar No. 12033
MALLOY LAW FIRM
108 Cargill Way
Hartsville, SC 29201
Attorneys for Respondent

Dated: February 15, 2018