

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

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SC Court of Appeals

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

REPLY TO RETURN TO THE PETITION FOR WRIT OF CERTIORARI
&
MOTION TO DISMISS THE PETITION FOR WRIT OF CERTIORARI

TURNER PADGET GRAHAM & LANEY, P.A.
David H. Keller
200 E. Broad Street
P.O. Box 1509 (29602)
Greenville, South Carolina 29201
Telephone: (864) 552-4622
(864) 552-4620 (facsimile)
dkeller@turnerpadget.com

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

BRIEF RESTATEMENT OF THE CASE1

ARGUMENTS.....2

 I. THE COURT OF APPEALS ERRED IN CITING A SINGLE CASE AS
 PRECEDENT, WHICH ITSELF WAS—AND STILL IS—PENDING
 BEFORE THE SOUTH CAROLINA SUPREME COURT2

 II. THE RESPONDENT INCORRECTLY ASSERTS THAT THE PENDENCY OF
 THE WILSON CASE IS BEYOND THE RECORD AND THAT THE ISSUE
 WAS NOT PROPERLY RAISED BEFORE THE COURT OF APPEALS3

 III. THE COURT OF APPEALS ERRED IN EVISCERATING § 42-17-90 OF
 ANY APPLICABILITY4

CONCLUSION.....6

TABLE OF AUTHORITIES

Cases

Allen v. Benson Outdoor Advertising Company, 236 S.C. 22, 112 S.E.2d 722 (1960)3, 5

Wilson v. Charleston County School District, 419 S.C. 442, 798 S.E.2d 449
(S.C. Ct. App. 2017). 2-5

Statutes

S.C. Code Ann. § 42-17-90.....4, 5

Rules

Rule 242, SCACR.....4

BRIEF RESTATEMENT OF THE CASE

In this Petition for Certiorari from the Court of Appeals' decision to reverse and remand the Appellate Panel of the Workers' Compensation Commission, Petitioners present a novel question of law wherein the Court of Appeals cited a single opinion as precedent despite the fact that the Petition for Review of that very opinion was still pending before the Supreme Court of South Carolina.

Even more problematic, the case which the Court of Appeals solely relied on has since been settled and the parties therein have jointly petitioned the Supreme Court to vacate the decision. Notably, the Court of Appeals failed to cite another case as the basis for its decision. Thus, the Court of Appeals' decision in this case, which had shaky legal footing from its inception, now has absolutely no precedential basis upon which to stand.

In addition to a lack of any proper legal authority, the substance of the Court of Appeals' decision is also rife with error as wholly violative of § 42-17-90. The Respondent sustained an admitted injury on May 2, 2011, and was award permanent partial disability compensation by the Commission on November 28, 2012. (App. 51-52, 147). Thus, the Respondent had only until November 28, 2013, to file a petition for change of condition.

On May 2, 2013, the Respondent filed a Form 50 "Notice of Claim," but did not request a hearing or take any other action to pursue an alleged change of condition. (App. 53-54). More than a year after this Form 50 and more than a year and seven months after his final award by the Commission, the Respondent finally filed a Form 50 requesting a hearing alleging a change of condition for the injury sustained on May 2, 2011. (App. 61-63). Petitioners timely filed an Answer and Pre-Hearing Brief denying a change of condition and asserting the Respondent's untimeliness in requesting such a hearing. (App. 65, 147-49).

The Single Commissioner agreed with Petitioners and held that the Respondent had failed to comply with the time frame provided in § 42-17-90. (App. 28-36). The Appellate Panel of the South Carolina Workers' Compensation Commission affirmed. (App. 37-48). In a matter of just two pages, the Court of Appeals reversed and remanded the Appellate Panel's decision on October 18, 2017, and this Petition for Writ of Certiorari followed. (App. 367-69). In response to Respondent's Return to the Petition for Writ of Certiorari and Motion to Dismiss the Petition for Writ of Certiorari, Petitioners respectfully submit this Reply. Petitioners also incorporate the arguments from the Petition for Writ of Certiorari as further support in opposition to Respondent's Return.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN CITING A SINGLE CASE AS PRECEDENT, WHICH ITSELF WAS—AND STILL IS—PENDING BEFORE THE SOUTH CAROLINA SUPREME COURT.

As this Court well knows, the sole authority for the Appeals decision below—Wilson v. Charleston County School District—was under review by the Supreme Court at the time of the Court of Appeals decision to remand. 419 S.C. 442, 798 S.E.2d 449 (S.C. Ct. App. 2017). Thus, the ultimate outcome in Wilson was unknown. But, in his Return, Respondent oversimplified this issue by narrowing focusing his argument on the fact that the Court of Appeals decision in Wilson was technically already published. Notably, the Respondent entirely missed the salience of, and failed to address, the Petitioners' point that the Wilson decision was still pending before the Supreme Court. As shown by the most recent Advance Sheets for February 2018 published by the South Carolina Judicial Department, the Wilson Petition is still pending before this Court as of the date of this Reply.

The Respondent's failure to address the unsettled nature of the Wilson case becomes even more problematic when considering the events that have unfolded since the Appeals decision was filed in this case last October. Indeed, during the interim, the parties in Wilson settled their case and jointly petitioned the Supreme Court on January 12, 2018, to vacate the Wilson decision in full. Again, as shown by the Advance Sheets, this request continues to pend before this Court. Regardless of any argument of Respondent, the fact that Wilson will likely be vacated was unknown to Petitioners until January 2018.

Moreover, despite the fleeting nature of the Wilson decision, which will in all likelihood vacated, the Respondent boldly asserted in his Return that there is no complication caused by the Court of Appeals' sole reliance on this single case simply because the Wilson case was ultimately based on this Court's decision in Allen v. Benson Outdoor Advertising Company, 236 S.C. 22, 112 S.E.2d 722 (1960). That the Wilson case relied on a case before it is hardly shocking as that is the very idea of precedential case law. But, at the same time, the fact that the Wilson case may be well-cited in no way proves that the Court of Appeals decision in this case was equally well-grounded in precedent.

Here, the situation is markedly different: in just two pages, the Court of Appeals decided to reverse and remand based exclusively on Wilson v. Charleston County School District. Because Wilson is without a doubt still pending, and in all reality will probably be vacated by this Court, the Court of Appeals decision in this case has no legal footing and should be reversed.

II. THE RESPONDENT INCORRECTLY ASSERTS THAT THE PENDENCY OF THE WILSON CASE IS BEYOND THE RECORD AND THAT THE ISSUE WAS NOT PROPERLY RAISED BEFORE THE COURT OF APPEALS.

Even though the pendency of the Wilson decision is public information and readily available to anyone on the South Carolina Judicial Department's website, the Respondent

protests the Petitioners' reference to the unsettled nature of the Wilson case and asserts that Petitioners are noncompliant with SCACR Rule 242 because this information is not in the Record and was not raised before the Court of Appeals. This is patently untrue and demands the impossible.

First, Rule 242 provides that the Appendix shall include only the Record on Appeal, Briefs of the parties, the Court of Appeals decision on which certiorari is sought, the Petition for Rehearing, and the court's ruling on that petition. Here, all above items were properly provided in the Appendix.

Second, the Record on Appeal contained within the Appendix was filed on June 6, 2016. But, the Court of Appeals did not hear the Wilson case until November 3, 2016. Thus, it was impossible to include any information regarding the Supreme Court's consideration of the Wilson case at the time of this Record's inception. Indeed, Wilson had yet to be heard by even the Court of Appeals. Respondent knows this to be true as his certificate of counsel to the Record on Appeal was also signed and dated June 6, 2016.

Third, even if it were possible to include any information regarding the Wilson case before the Supreme Court in the Record on Appeal—which it plainly was not because no such documents were in existence at that time—the Petitioners also had no way of predicting in June 2016 that the Court of Appeals would base its decision in October 2017 on the pending Wilson case.

Finally, Wilson manifestly became part of the Record when the Court of Appeals not only incorporated the decision in its opinion, but based its entire opinion on the Wilson case. At that moment, the Wilson decision became central to the case at hand. Thus, only then, could

Petitioners take issue with its use here or point to its unsettled path before the Supreme Court since that time.

For all these reasons, Petitioners are compliant with the Rules and properly raised the issues stated herein as soon as at all possible.

III. THE COURT OF APPEALS ERRED IN EVISCERATING § 42-17-90 OF ANY APPLICABILITY.

Not only did the Court of Appeals improperly rely on a pending case as the basis for its decision below, but the court also misapplied § 42-17-90 to allow an endless tolling of the statute of limitations. The statute clearly states that **“the review must not be made after twelve months from the date of the last payment of compensation.”** S.C. Code Ann. § 42-17-90. Thus, because the Respondent was award permanent partial disability compensation by the Commission on November 28, 2012, he had until November 28, 2013, to file for a review for a claim of a change of condition. (App. 51-52, 147). Noticeably, the statute does not say “the Form 50 filing a Notice” must be filed within one year.

However, while the Respondent filed a Form 50 “Notice of Claim” on May 2, 2013, he did not request a hearing, review or any other action to pursue an alleged change of condition until **more than one year and seven months after his final award** by the Commission. (App. 53-54, 61-63). To validate his untimeliness, Respondent quotes Allen ad nauseam in his Return. But, Allen only reinforces the statute by continuing to require that a request for a hearing be filed within one year of the last date of payment. Allen only extends the statutory period if the Commission’s docket does not allow the case to be tried within that one year. This is a narrow carve out with limited applicability.

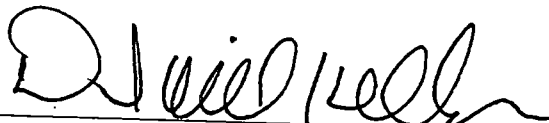
Unlike in Allen, the Respondent did not request a hearing within one year of the final payment. Thus, Allen is clearly distinguishable and fails to excuse the Respondent’s

unexplained delay. Yet, Respondent further asserts that Allen case could simply stand in place of the pending and possibly soon-to-be-vacated Wilson decision. However, this is an unsatisfactory substitution as the Allen decision, at best, only bolsters the Petitioners' argument for untimeliness. In reality, Allen militates against the Court of Appeals decision below.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant the Petition for Certiorari to reverse the Court of Appeals' Order and to affirm the Commission's original decision because the Court of Appeals improperly based its decision on a case which was and is continuing as of the date of this Reply, to pend before this Court.

Respectfully submitted,



TURNER PADGET GRAHAM & LANEY, P.A.
David H. Keller
200 E. Broad Street
P.O. Box 1509 (29602)
Greenville, South Carolina 29201
Telephone: (864) 552-4622
(864) 552-4620 (facsimile)
dkeller@turnerpadget.com

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Johnny Tucker,Employee/Respondent
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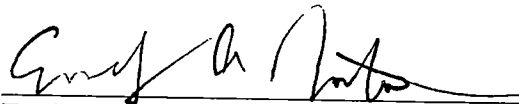
S.C. Department of Transportation, Employer and
State Accident Fund,Carrier/Petitioners
of which

State Accident Fund isCarrier

CERTIFICATE OF MAILING

I certify that I have served the Reply to Return to the Petition for Writ of Certiorari on
counsel by depositing copies of the Carrier/Petitioners' Reply the United States Mail, postage
prepaid, on February 26th, 2018, addressed to its attorneys of record.

TURNER PADGET GRAHAM & LANEY, P.A.



Evelyn A. Norton
200 E. Broad Street
P.O. Box 1509 (29602)
Greenville, South Carolina 29201
Telephone: (864) 552-4622
(864) 552-4620 (facsimile)
dkeller@turnerpadget.com

Turner | Padget

David H. Keller

REPLY TO:

E-Mail: DKeller@turnerpadget.com
Writer's Direct Dial: (864) 552-4622
Writer's Direct Fax: (864) 282-5979

February 26, 2018

The Honorable Linda Allen
Clerk of Court
South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211

RECEIVED
FEB 28 2018
SC Court of Appeals

Re: Johnny Tucker, Employee/Respondent v. South Carolina Department of
Transportation, Employer, and State Accident Fund, Carrier Petitioners
TPGL File No.: 04206.00162

Dear Ms. Allen:

Enclosed is Petitioners', South Carolina Department of Transportation and State Accident Fund's, Reply to Return to the 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 Reply.

I have also attached hereto a copy of certificate of service on opposing counsel and on the Court of Appeals. As always, I truly appreciate your assistance in this matter, and should you have any questions, please feel free to contact me.

Sincerely,

TURNER PADGET GRAHAM & LANEY P.A.



David H. Keller

DHK

cc: Preston F. McDaniel, Esquire
Gerald Malloy, Esquire
Jenny Abbott Kitchings

Turner | Padgett

P.O. Box 1509, Greenville, SC 29602

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SC Court of Appeals

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

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