THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate File No.: 2015-02093

Robert L. Harrison, Employee,..Appellant,

v.

Owen Steel Company, Inc., Employer, and
Old Republic Insurance Company
c/o Gallagher Bassett Services, Inc., Carrier,....................................Respondents.

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APR 23 2018
SC Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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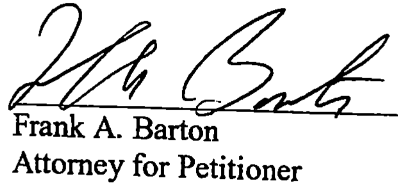
CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on and denied by the Court of Appeals on March 22, 2018.

April 23, 2018
West Columbia, South Carolina



Frank A. Barton
Attorney for Petitioner

QUESTIONS PRESENTED

1. Did the Court of Appeals err in determining claimant was barred from pursuing his workers compensation claim of September 17, 2008?

2. Did the Court of Appeals err in not specifically addressing Claimant – Appellant's arguments in regard to laches and subsequent accidents?

STATEMENT OF CASE

By Form 50 dated May 8, 2013, Appellant sought Worker's Compensation benefits for an admitted accident which occurred on September 17, 2008. The Employer had previously accepted the claim for injury to Claimant's back and provided treatment through Dr. Thomas Holbrook, a neurosurgeon. Dr. Holbrook subsequently performed surgery on November 10, 2009. On July 21, 2010, Dr. Holbrook released Claimant with permanent restrictions and a twenty-five (25%) percent permanent disability. Claimant sought disability benefits for the impairment and loss of use of his spine and future medical treatment.

At an initial hearing before a Single Commissioner held on August 8, 2013, Defendants argued and the Commissioner found Claimant had failed to file a claim within the applicable two year statute of limitations. The Commissioner ruled this way even though a notice of claim letter had been filed in September 2009. The initial decision of November 7, 2013, was appealed to the Full Commission. By the decision of the Appellate Panel issued May 12, 2014, the decision of the Hearing Commissioner was reversed. The Appellate Panel determined the claim had been timely filed and remanded the claim for rehearing.

A second hearing before a Hearing Commissioner was held on August 1, 2014, to address the issues on remand as ordered by the Appellate Panel. Again, Claimant sought benefits for the permanent injury suffered to his spine and medical benefits. This time the Employer argued the claim should be barred by the doctrine of latches and also argued benefits should be denied because of intervening causes. By decision issued February 12,

2015, the Hearing Commissioner ruled the claim was barred by the doctrine of latches and by subsequent accidents suffered by Claimant.

An appeal by Claimant was heard by the Appellate Panel on May 18, 2015. By Decision issued September 8, 2015, the Panel affirmed the Hearing Commissioners' determination the claim was barred by laches. The Panel also affirmed the Commissioners' rulings in regard to subsequent accidents. Notice of the Appellate Panel Decision was received by Claimant on September 8, 2015. Claimants' Notice of Appeal to the South Carolina Court of Appeals was filed on October 7, 2015.

Oral argument was held before the South Carolina Court of Appeals on October 3, 2017, and the Court issued its Opinion Number 5528, filed on January 10, 2018. In its decision the Court of Appeals did not fully address Appellant's arguments in regard to the issues of laches or subsequent accidents, although the Court did conclude laches was not applicable to bar the claim of Appellant with an explanation of its reasoning in Footnote 2.

Instead of addressing and ruling upon the issues briefed by the parties, the Court of Appeals addressed an issue not relied upon or argued by either party. Based upon the unbriefed issue the Court of Appeals affirmed the decision of the Workers Compensation Commission.

In its Opinion Number 5528, the Court of Appeals relied upon SC Code Section 42-9-170 to conclude Claimant was barred from pursuing his workers compensation claim. Claimant admittedly injured his spine in this workers compensation accident which occurred on September 17, 2008. Subsequently, Claimant suffered a second admitted workers compensation injury to his spine while working for the same Employer on

October 4, 2010. Claimant and Employer settled the 2010 workers compensation claim for the second injury to Claimant's spine in August 2011. The Court of Appeals, relying on Section 42-9-170, concluded Claimant was barred from pursuing the claim for his 2008 on the job spinal injury, because he settled the claim for the 2010 spinal injury first.

In ruling against Claimant, the Court of Appeals admitted it was unable to find any case law which addressed the unique posture and facts of this case in which a claim for a second injury was settled first. Claimant would respectfully submit the Court of Appeals erred in concluding Claimant was barred from pursuing his injury claim from 2008 based upon the application of SC Code Section 42-9-170. Furthermore, the decision of the Court of Appeals was based upon a novel question of law.

Petitioner requests the South Carolina Supreme Court grant certiorari to address the issues raised by Claimant before the Court of Appeals and the additional arguments in regard to SC Code Section 42-9-170. Claimant would also request he be allowed to supplement the Record on Appeal to include the transcript of hearing before the Workers Compensation Commission at which the accident of October 4, 2010, was settled. Claimant respectfully submits that transcript would help show whether the settlement for the second spinal injury was intended to conclude the initial injury of September 17, 2008. This transcript was not included in the Record on Appeal before the Court of Appeals as the issue was not raised on appeal by either party. When the issue was raised by the Court of Appeals Claimant – Appellant did request, at oral argument and in his Petition for Rehearing, that he be allowed to supplement the Record to include the settlement hearing transcript, but such request was denied.

STATEMENT OF FACTS

On September 17, 2008, Claimant–Appellant Robert Harrison was working as a gantry welder for Owen Steel Company. On that date he suffered an admitted on the job injury to his back. The Employer accepted the claim and provided medical treatment through Dr. Thomas Holbrook, a neurosurgeon. Dr. Holbrook performed an anterior cervical discectomy with fusion on November 10, 2009. On July 21, 2010, Dr. Holbrook released Claimant with permanent restrictions and a twenty-five (25%) percent permanent disability. Dr. Holbrook noted Claimant had reached maximum medical improvement and had sustained a permanent disability rating of a twenty-five (25%) percent to the whole person as a result of the spinal injury. (R., p. 86).

Dr. Donald R Johnson conducted an independent medical evaluation of Claimant's workers compensation injury on September 29, 2010. Dr. Johnson also placed Claimant at maximum medical improvement with permanent work restrictions and a twenty-five (25%) percent whole person impairment rating. (R., p. 90). Mr. Harrison returned to work with Owen Steel in a supervisory position. This position provided him with lighter duty work. It also provided him with a higher wage than he was earning at the time of his accident of September 17, 2008. (R., p. 193, line 12)

At the hearing before the Single Commissioner held on August 1, 2014, evidence submitted by Employer showed Claimant had been involved in other accidents. Employer submitted evidence Claimant was involved in a motorcycle accident in April 2010. (R., p. 138). Mr. Harrison testified he suffered a broken clavicle, but denied any injury to the area of his spine injured in his worker's compensation accident of September 17, 2008.

Employer provided no testimony or medical evidence Claimant injured his back or neck in the April 2010 accident.

Employer also provided evidence Claimant had suffered a second on the job injury to his spine on October 4, 2010. Treatment was provided by Dr. Raymond Sweet who stated in a Compensation Form 14B , dated November 23, 2010, Claimant had sustained a 15% impairment as a result of the of October 4, 2010. (R., p. 283). Based upon that impairment rating Claimant and Employer reached a settlement agreement in September 2011 with Claimant receiving compensation based on a loss of use of 28% to his back. (R., p. 121). The Court of Appeals determined that settlement barred Claimant from pursuing recovery for his earlier accident of September 17, 2008. Employer also presented evidence of two other accidents suffered by Claimant, but these incidents were well after the reports of impairment ratings issued by Dr. Holbrook and Dr. Johnson.

ARGUMENT I

THE COURT OF APPEALS ERRED IN DETERMINING CLAIMANT WAS BARRED FROM PURSUING HIS WORKERS COMPENSATION CLAIM OF SEPTEMBER 17, 2008.

The Court of Appeals relied upon SC Code Section 42-9-170 to conclude the prior settlement of Claimant's workers compensation accident of October 4, 2010, barred Claimant's pursuit of his earlier workers compensation accident of September 17, 2008. Section 42-9-170 specifically provides that in cases in which an employee has one or more injuries while employed with the same employer, the employer is entitled to a credit for disability compensation paid in the first claim. In other words, if an employee was compensated for 250 weeks of disability payments for an initial injury, the most

employee could recover for a second injury with the same employer would be 250 weeks of disability payments for a maximum of 500 weeks. The statute is intended to ensure an employer is not required to pay more than the 500 week maximum for multiple injuries when it elects to retain an injured employee.

S.C. Code Section 42-9-150, also mentioned in the decision of the Court of Appeals, addresses workers compensation injuries to employees who had pre-existing permanent injuries. This Section provides that an employer is only responsible for additional impairment specifically resulting from a workers compensation accident suffered while working for that subsequent employer. The scheme of the Workers Compensation Act shows the employer should only be responsible for permanent injuries specifically caused by a workers compensation accident incurred in the current employment, without requiring payment for prior permanent injuries or impairments.

Claimant respectfully submits the Court of Appeals misconstrued SC Code Section 42-9-170 and its application to the current factual circumstances. This Section addresses only subsequent accidental injuries with the same employer and is clearly intended to prevent a claimant from receiving total compensation in excess of 500 weeks if a second injury occurs with the same employer. Its language addresses only compensation available for a second workers compensation accident and provides no direction or limitations on compensation that can be received from an initial accident such as the current Claimant suffered in September 2008. Section 42-9-170 simply has no applicability to Claimant's on the job injury claim of September 17, 2008.

In concluding Section 42-9-170 would bar Claimant's pursuit of his claim which is the subject of this appeal the Court of Appeals also discussed the effect of the opinion

rendered by Dr. Raymond Sweet. After conservative treatment to the spine with no further surgery, Dr. Sweet, the authorized treating physician for the October 2010 accident, issued a Form 14B, dated November 23, 2010, stating Claimant had reached maximum medical improvement and assigned a fifteen percent (15%) impairment to the total body as a result of his spinal injury. Dr. Sweet also changed Appellant's lifting restrictions from not over fifty (50) pounds to not over thirty (30) pounds. Furthermore, the statement noted that the date of injury or illness was October 4, 2010. (Form 14B, R., P. 283). Dr. Sweet's impairment rating was issued less than two months after the second accident. It must also be remembered the impairment report of Dr. Holbrook was issued on July 21, 2010, and the impairment report of Dr. Johnson had just been issued on September 29, 2010, less than two months before Dr. Sweet's Form 14B.

In its opinion the Court of Appeals discussed the possibility the rating by Dr. Sweet was intended to show Claimant's spinal condition had actually improved after the second spinal accident of October 4, 2010. In other words, even though Dr. Holbrook and Dr. Johnson had issued opinions prior to October 4, 2010, stating Claimant had suffered a 25% whole person impairment as a result of his spinal injury resulting from the September 17, 2008, workers compensation accident, the Form 14B showing a 15% whole person impairment completed by Dr. Sweet on November 23, 2010, for the accident of October 4, 2010, could be interpreted to indicate the condition of Claimant's spine had actually improved after the second workers compensation accident involving his spine.

Claimant respectfully submits the Court of Appeals misconstrued the evidence in considering Claimant's spinal condition may have improved. Even the Employer did not

take the position before the Commission or the Court of Appeals the Claimant's spinal condition improved as a result of the accident of October 4, 2010. The Court of Appeals also misconstrued the purpose of the Form 14B. The Form 14B was promulgated by the Workers Compensation Commission to provide an impairment rating for a specific workers compensation accident. The Form is intended to assist in the resolution of claims. If the Form simply provided an overall assessment of impairment without reference to a specific accident the Form would be useless.

Again, even the Employer did not argue or take the position Dr. Sweet's opinion was intended to show Claimant's spine injury had improved after the accident of October 4, 2010. Such an argument is untenable as it would require a determination the second workers compensation accident actually improved the cervical discectomy with fusion performed by Dr. Holbrook. Employer did not take this position and no medical evidence was submitted to indicate the second accident actually improved claimant's spinal discectomy with fusion. In fact, Dr. Sweet changed Claimant's lifting restrictions from not over fifty (50) pounds to not over thirty (30) pounds. This is a clear indication Claimant's spinal condition was worse after second accident.

For all of the above reasons Claimant would respectfully submit certiorari should be granted to address the above issues.

ARGUMENT II

THE COURT OF APPEALS ERRED IN NOT SPECIFICALLY ADDRESSING CLAIMANT – APPELLANT'S ARGUMENTS IN REGARD TO LACHES AND SUBSEQUENT ACCIDENTS.

Because the Court of Appeals relied upon its interpretation of S.C. Code Section 42-9-150 to affirm the Commission it did not specifically address Claimant – Appellant's arguments in regard to laches or subsequent accidents. The Court of Appeals did state, "we find latches does not apply", and in its Footnote 2 did agree with Claimant's argument Employer could not show any prejudice because the opinions of Dr. Holbrook and Dr. Johnson were issued before any of the subsequent accidental injuries suffered by Claimant. Although not addressed in detail it is clear the Court of Appeals agreed latches was not applicable to bar compensation for the accident of September 17, 2008.

For the same reasons stated in Footnote 2 of the Court of Appeals decision the issue of subsequent accidents or intervening causes should not prevent Claimant from recovering on his claim of September 17, 2008. The Workers Compensation Commission concluded Claimant was barred from recovery on his first claim because of the subsequent accidents. As made clear by Footnote 2, however, the opinions of Dr. Holbrook and Dr. Johnson as to impairment to the spine were issued prior to any of the other accidents with the exception of the April 2010 motorcycle accident. Evidence and testimony of record showed Claimant injured only his clavicle in that accident. Employer produced no testimony or medical evidence Claimant injured his neck or back in that accident.

As the Court of Appeals noted the reports of Dr. Holbrook and Dr. Johnson both indicated Claimant suffered a 25% whole person impairment as a result of his September

2008 workers compensation injury. No medical evidence was provided by Employer to show any of the subsequent accidents would for some reason require work show the opinions of Dr. Holbrook or Dr. Johnson should be disregarded.

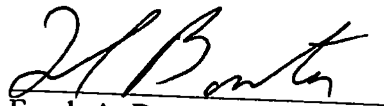
For the above reasons Claimant – Appellant respectfully submits the Court of Appeals concluded the doctrine of latches was not applicable. Furthermore, the reasoning of the Court of Appeals also supports Claimant's arguments showing subsequent accidents or intervening causes were not applicable to deny recovery for Claimant's workers compensation injury of September 17, 2008.

CONCLUSION

Claimant – Appellant respectfully submits the Court of Appeals mistakenly concluded S.C. Code Section 42-9-170 bars recovery of Claimant's claim of September 17, 2008, because he settled his claim for the accident of October 4, 2010, prior to the pursuit of this action. Section 42-9-170 simply does not address the current situation and certainly does not preclude recovery on the earlier claim. Claimant respectfully submits this issue presents a novel question of law. Furthermore, Claimant would request to be allowed to supplement the record to include the transcript of hearing for the settlement of the October 4, 2010. The Court of Appeals did not address the issues of laches or subsequent accidents in detail, but did state laches was not applicable to bar the first claim. For the same reasoning use by the Court of Appeals in regard to laches, the issues of subsequent accidents and intervening causes should not bar Claimant from recovery on his workers compensation accident of September 17, 2008.

For all of the above reasons Claimant – Appellant would request certiorari be granted to review the decision of the Court of Appeals and that a decision be issued directing Robert Harrison is entitled to recover for the loss of use of his spine and the additional medical treatment as a result of his workers compensation accident of September 17, 2008.

Respectfully submitted,



April 23, 2018

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WORKERS' COMPENSATION COMMISSION

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W.C.C. File No.: 0824526

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Owen Steel Company, Inc., Employer, and
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c/o Gallagher Bassett Services, Inc., Carrier,......................................Respondents.

CERTIFICATE OF SERVICE

The undersigned does hereby certify one copy of the **PETITION FOR WRIT OF CERTIORARI** was served in the foregoing action by regular mail on April 23, 2018, to the following address:

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April 23, 2018
West Columbia, S.C.

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April 23, 2018

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SC Court of Appeals

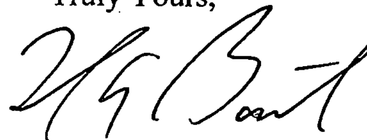
VIA HAND DELIVERY
Clerk Daniel E. Shearouse
The South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29211

RE: Robert L. Harrison v. Owen Steel Company
Appellate Case No.: 2015-02093

Dear Clerk Shearouse:

Enclosed for filing please find the original and six copies of the Petition for Writ of Certiorari in the above referenced matter. By copy of this letter I am also serving opposing counsel and filing a copy of the Petition with the Court of Appeals. I have also enclosed two copies of the Appendix.

Truly Yours,



Frank A. Barton

FAB/lfm

cc: Clerk Jenny Abbott Kitchings, The South Carolina Court of Appeals
Helen F. Hiser, Esquire