

THE STATE OF SOUTH CAROLINA
In the Supreme Court of the State of South Carolina

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appellate Panel Order

WCC File No. 1222136

RECEIVED

APR 26 2018

S.C. SUPREME COURT

Otis Nero, Respondent,

vs.

South Carolina Department of Transportation,
and State Accident Fund, Petitioner.

RESPONDENT 'S REPLY

STEPHEN J. WUKELA
S.C. BAR NO. 68351
ATTORNEY FOR RESPONDENT
WUKELA LAW FIRM
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I. BACKGROUND

This is a Workers' Compensation case arising from a decision of the Workers' Compensation Commission reversing an award of benefits on the basis of notice. The Court of Appeals reversed, found notice and reasonable excuse, and applied de novo standard of review based on its finding that notice was jurisdictional. This Court reversed, found that notice was not jurisdictional, and remanded to the Court of Appeals with instructions to apply the substantial evidence standard. Respondent filed a Petition for Rehearing; arguing that the Court overlooked or misapprehended Respondent's argument that de novo review applies because no relevant facts as to notice are in dispute. Respondent asked the Court to instruct the Court of Appeals on remand that, if it found no relevant facts as to notice in dispute, it should apply the de novo standard. Petitioners filed a Return in which they did not disagree with the legal proposition that de novo review applies if no relevant facts are in dispute. Petitioners argue, instead, that relevant facts are in dispute. In particular, Petitioners cite "dispute over causation of the alleged accident ..." (Petitioner's Return, p. 2).

The Respondent's Reply follows:

II. ARGUMENT

PETITIONERS DO NOT DISPUTE THAT DE NOVO REVIEW IS APPLICABLE WHERE RELEVANT FACTS ARE UNCONTRADICTED. THE COURT SHOULD REMAND TO THE COURT OF APPEALS FOR DETERMINATION OF WHETHER RELEVANT FACTS AS TO NOTICE ARE IN DISPUTE.

The question before the Court of Appeals was notice, not causation.¹ Specifically, the Court

¹The Single Commissioner found medical causation based, to a large extent, on the testimony of the Respondent's treating physician Dr. Robert Richey. (App. pp. 124-127). The Appellate Panel reversed the Single Commissioner's award on the issue of notice alone. (App. pp. 159-160). The parties briefed and argued this case to the Court of Appeals on the issue of notice. (App. pp. 52, 81). It is well established that a party cannot raise a new argument, such as medical causation, on a Petition for Rehearing, or Petition for Certiorari as the Petitioners seek to

of Appeals decided whether the facts establishing the supervisor's knowledge connecting the Respondent's injury to the employment were sufficient as a matter of law to indicate "to a reasonably conscientious manager that the case might involve a potential compensation claim," Etheredge v. Monsanto Co., 349 S.C. 451, 457 (emphasis added), or, if not, whether, based on those facts, the Respondent's excuse for lack of more formal notice was reasonable.

The Court of Appeals never explicitly ruled on whether the facts relevant to notice were in dispute.

The Court of Appeals did, however, base its ruling on the undisputed facts that the Respondent did not notify the Petitioners that he had pain in his neck while pulling the squeegee board within ninety (90) days, that the Petitioners were aware that the Respondent passed out and fell to the ground in the presence of his lead man and supervisor after pulling the squeegee board during the heat of the day, that he was hospitalized later that day and required neck surgery, and that he never returned to work thereafter. The Petitioners did not dispute these facts, in fact, they are based on the testimony of the Respondent's lead man and supervisor, (App. pp. 298-303), and upon representations of defense counsel at trial and on appeal. (App. pp. 172-175, 211).

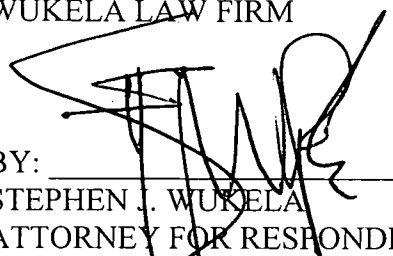
Given that the de novo standard of review would properly apply to the Court of Appeals' decision on notice, based on undisputed facts, the Court should instruct the Court of Appeals, on

do here. See Kennedy v. S.C. Pet. Sys., 349 S.C. 531 (2001).

remand to determine whether the relevant facts as to notice are in dispute.

Respectfully submitted,

WUKELA LAW FIRM


BY: _____
STEPHEN J. WUKELA
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April 25th, 2018

THE STATE OF SOUTH CAROLINA
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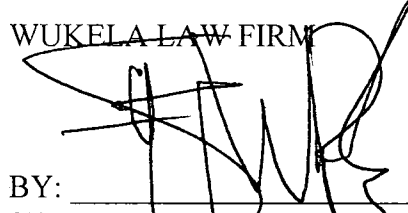
vs.

South Carolina Department of Transportation,
and State Accident Fund, Petitioners.

PROOF OF SERVICE

I certify that I have served the Petitioners with the Respondent's Reply by depositing a copy of it in the United States Mail, postage prepaid, on April 25th, 2018, addressed to the Appellants' attorney of record, J. Gabriel Coggiola, at his office at Willson, Jones, Carter & Baxley, PA, 3600 Forest Drive, Suite 204, Columbia, SC 29204.

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S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia SC 29201

Re: Otis Nero v. South Carolina Department of Transportation, et al
WCC File No. 1222136
Appellate Case No. 2017-001970

Dear Mr. Shearouse:

Enclosed please find for filing the original and six (6) copies of Respondent's Reply. By copy of this letter, I am serving a copy on Petitioners' counsel.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM

STEPHEN J. WUKELA

SJW:jpb

Enclosures

cc: John Gabriel Coggiola, Esquire