THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
MAY 23 2018
S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2018-000076

Johnny Tucker, Employee/Respondent

v.

S.C. Department of Transportation, Employer,

and

State Accident Fund, Carrier/Petitioners

BRIEF OF PETITIONERS

David H. Keller (S.C. Bar # 3345)
Turner Padget Graham & Laney P.A.
200 E. Broad Street
P.O. Box 1509 (29602)
Greenville, South Carolina 29201
Telephone: (864) 552-4622
(864) 552-4620 (facsimile)
dkeller@turnerpadget.com

Evelyn A. Norton, Esq. (S.C. Bar # 102792)
Turner Padget Graham & Laney P.A.
200 E. Broad Street
P.O. Box 1509 (29602)
Greenville, South Carolina 29201
Telephone: (864) 552-4619
(864) 552-4620 (facsimile)
enorton@turnerpadget.com

ATTORNEYS FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SC State Cases

NC State Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. **DID THE COURT OF APPEALS ERR IN ITS INTERPRETATION OF § 42-17-90 WHEN THE RESULT OF THE COURT'S INTERPRETATION EVISCERATES THE PROVISION OF ANY APPLICABILITY WHATSOEVER?**

STATEMENT OF THE CASE

The South Carolina Department of Transportation and State Accident Fund ("Petitioners") hereby appeal from the Court of Appeals' decision to reverse and remand the Appellate Panel of the Workers' Compensation Commission. Petitioners contend that the Court of Appeals, in so reversing and remanding, erred in its interpretation of S.C. Code Ann. § 42-17-90 governing the review of claims for a change of condition.

Indeed, the Court of Appeals not only relied upon an opinion that has since been vacated, but also failed to cite any controlling case as the basis for its decision. Moreover, the Court of Appeals' decision directly conflicts with at least two prior decisions of the Supreme Court. Thus, the Court of Appeals' decision to reverse and remand the case *sub justice* impermissibly clashes with Supreme Court precedent and has absolutely no precedential basis upon which to stand. Accordingly, Petitioners respectfully request this Court reverse the decision of the Court of Appeals and affirm the decision of the Appellate Panel of the Workers' Compensation Commission.

This workers' compensation claim commenced on May 2, 2011, when Petitioners admitted the injury of, and thereafter provided benefits in accordance with the South Carolina Workers' Compensation Act to, Johnny Tucker ("Respondent"). (App. p. 51-52). The Commission awarded permanent partial disability compensation to Respondent minus a credit for overpayment to the Petitioners on March 26, 2012, and the decision was affirmed in full by the Appellate Panel of the South Carolina Workers' Compensation Commission on September 10, 2012. (App. p. 4-18). Petitioners made the last payment of compensation in accordance with the Commissioner's order, and the final compensation receipt documenting the same was

executed on November 28, 2012. (App. p. 51). Thus, under S.C. Code Ann. § 42-17-90, 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," alleging a change in condition under S.C. Code Ann. § 42-17-90. (App. p. 53-54). However, he did not request a hearing or take any other action to pursue the alleged change of condition. (App. p. 53-54). Not until July 30, 2014—more than a year after this Form 50 and more than a year and seven months after his final payment of compensation—did the Respondent finally filed a Form 50 requesting a hearing alleging a change of condition for the injury sustained on May 2, 2011. (App. p. 61-63). Petitioners timely filed an Answer and Pre-Hearing Brief denying a change of condition and asserting the Respondent's manifest untimeliness in requesting such a hearing. (App. p. 65, 147-49).

The Single Commissioner agreed with Petitioners in a Decision and Order dated April 1, 2015, holding that the Respondent had failed to comply with the time frame provided in § 42-17-90. (App. p. 28-36). The Appellate Panel of the South Carolina Workers' Compensation Commission affirmed on September 11, 2015. (App. p. 37-48). Despite the decisions of the Single Commissioner and Appellate Panel, in a matter of just two pages, the Court of Appeals reversed and remanded the Full Commission's decision on October 18, 2017. (App. p. 367-69). After, the Court of Appeals denied the Petition for Rehearing on December 14, 2017. (App. p. 379). The Petitioners subsequently submitted the Petition for Writ of Certiorari, which was granted by this Court on April 19, 2018.

STATEMENT OF THE FACTS

Respondent sustained an admitted left shoulder injury on May 2, 2011. (App. p. 9). In accordance with the South Carolina Workers' Compensation Act, Petitioners provided treatment with multiple physicians. Respondent never required surgical intervention and only underwent conservative care. (App. p. 6). On November 7, 2011, Respondent reached maximum medical improvement and was assigned a zero percent impairment rating by Dr. Terence Hassler. (App. p. 7, 172). Dr. Timothy Wagner performed a second opinion evaluation and assigned only a one percent rating. (App. p. 7, 175). Respondent was released to return to work with no restrictions. (App. p. 8).

The Commission awarded permanent partial disability compensation of five percent to the left shoulder to Respondent, minus a credit for overpayment to the Petitioners on March 26, 2012. (App. p. 4-18). The decision was affirmed in full by the Appellate Panel of the South Carolina Workers' Compensation Commission on September 10, 2012. (App. p. 4-18). Petitioners made the last payment of compensation in accordance with the Commissioner's order, and the final compensation receipt documenting the same was executed on November 28, 2012. (App. p. 51). Thus, the Respondent must have filed an application for review due to a change of condition before November 28, 2013, to comply with S.C. Code Ann. § 42-17-90,

Three months after reaching maximum medical improvement, Respondent sought additional care independently with Dr. Emmanuel Quaye, who referred Respondent to Dr. Christopher Mazoue on January 10, 2012. (App. p. 74). More than a year later, on April 15, 2013, Dr. Quaye opined that Respondent had undergone a change of condition, yet Dr. Quaye had not examined Respondent since he made the referral to Dr. Mazoue in January 2012. (App. p. 74). In contrast to all Respondent's preceding physicians, Dr. Mazoue opined that

Respondent had not yet reached maximum medical improvement and determined that Respondent finally reached maximum medical improvement on September 29, 2014. (App. p. 75)

Two weeks after obtaining Dr, Quaye's statement, the Respondent filed a Form 50 "Notice of Claim" on May 2, 2013, alleging a change in condition under S.C. Code Ann. § 42-17-90. (App. p. 53-54). However, he did not request a hearing or take any other action to pursue the alleged change of condition. (App. p. 53-54).

Indeed, not until July 30, 2014—more than a year after this Form 50 and more than a year and seven months after his final payment of compensation—did the Respondent finally file a Form 50 requesting a hearing alleging a change of condition for the injury sustained on May 2, 2011. (App. p. 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 seven months after the one year statutory period expired. (App. p. 65, 147-49).

The Single Commissioner's Decision and Order dated April 1, 2015, held that the Respondent had failed to comply with the one year time frame provided in § 42-17-90. (App. p. 28-36). The Appellate Panel of the South Carolina Workers' Compensation Commission affirmed on September 11, 2015. (App. p. 37-48). By contrast, the Court of Appeals reversed and remanded the Full Commission's decision in a brief two-page order dated October 18, 2017. (App. p. 367-69). The Court of Appeals thereafter denied the Petition for Rehearing on December 14, 2017. (App. p. 379). The Petitioners subsequently submitted the Petition for Writ of Certiorari, which was granted by this Court on April 19, 2018.

STANDARD OF REVIEW

The Administrative Procedures Act, South Carolina Code Ann. § 1-23-380 establishes the "substantial evidence" rule as the standard of review for decisions of the Workers' Compensation Commission. Lark v. Bi-Lo, 276 S.C. 130, 133-34, 276 S.E.2d 304, 305-06 (1981) (citing S.C. Code Ann. § 1-23-380). Under this standard, the Court of Appeals' review "is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law." Gadson v. Mikasa Corp., 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006) (citing S.C. Code Ann. § 1-23-380). See also Hartzell v. Palmetto Collision, LLC, 415 S.C. 617, 622, 785 S.E.2d 194, 197 (2016) (same). "The commission's decision must be affirmed if the factual findings are supported by substantial evidence in the record." Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453, 458 (Ct. App. 1999)).

"Substantial evidence" is "evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached." Lark, 276 S.C. at 135, 276 S.E.2d at 306 (quoting Laws v. Richland Cnty. School Dist. No. 1, 270 S.C. 492, 243 S.E.2d 192 (1978). Appellate courts "may not substitute its judgement for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5). "Where there are conflicts in the evidence over a factual issue, the findings of the appellate panel are conclusive." Gadson, 368 S.C. at 221-22, 628 S.E.2d at 266. The Appellate Panel of the Workers' Compensation Commission is the ultimate finder of fact. Shealy v. Aiken Cnty., 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000).

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ITS INTERPRETATION OF § 42-17-90, WHICH EVISCERATED THE PROVISION OF ANY APPLICABILITY WHATSOEVER.

A. The Court of Appeals' interpretation leads to an absurd result and ineffectual statutory provision, both of which are plainly prohibited by canons of statutory interpretation.

The Supreme Court should reverse the Court of Appeals' decision because the lower court interpreted and applied § 42-17-90 to allow an endless tolling of the one year time limit explicitly placed on claims for a change of condition. As a result, the statutory provision was relegated to mere words thrown together without any purpose or effect.

Section 42-17-90 clearly states that "on the application of a party in interest on the ground of a change in condition, the commission may review an award," but 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. See also BLACK'S LAW DICTIONARY (9th ed.) (defining "application" as a "request or petition"). Noticeably, the statute does not provide for a more relaxed standard of, e.g., merely requiring that a party give notice within one year that it may choose to, at some time in the near or very distant future, file for an actual review of the Commission. But, that is precisely what Respondent did here. Now, he is forced to advocate for a flexible standard not provided in our statute lest his entire claim be barred by his idleness.

Moreover, construing § 42-17-90 to impose a more malleable standard would produce an absurd result rendering the statue meaningless and ineffectual. Indeed, taken to the logical extreme, the relaxed standard for which Respondent argues extends the one year period allowed to request a hearing for a claim of a change of condition by not only years, but decades. So long as a claimant filed a Form 50 notice within a year from the last date of payment of compensation,

the potential for filing for a hearing to pursue a claim for a change of condition would be extinguished only by *death* of the claimant. Surely, if our legislature intended for workers' compensation claims to endure for decades and only end when a claimant has passed away many years later, then our legislature would have never gone to the trouble of drafting and enacting § 42-17-90 into law.

Along the same lines, the relaxed standard for which Respondent argues also invites a flood of prophylactic filing of Form 50 notices without any consequence to the filer. Every single claimant could, and in all likelihood would, file a Form 50 notice without any serious intention of pursuing a claim for a change in condition. Then, every single claimant would simply "wait and see" if he or she ever actually needed to request an actual hearing to pursue a claim for a change in condition.

In the case of younger claimants, the filing of a preemptory Form 50 notice would extend the one year period for requesting a hearing up to 80 years or more. As humans live longer and longer, this "deadline" for filing will extend farther and farther out. By all accounts, such an extension renders the intended cut off for filing claims under § 42-17-90 entirely artificial and the statutory provision meaningless.

But, our courts are prohibited from employing a means of statutory construction leading to such illogical ends. See Florence Cnty. Democtratic Party v. Florence Cnty. Republican Party, 398 S.C. 124, 727 S.E.2d 418 (2012). Instead, a court should seek a construction that gives effect to every word of the statute and abstain from adopting an interpretation that renders portions of it meaningless. Hinton v. S.C. Dept. of Probation, Parole, and Pardon, 357 S.C. 327, 592 S.E.2d 335 (Ct. App. 2009). Yet in this case, the Court of Appeals interpreted § 42-17-90 to

allow an illogical, endless tolling of the one year time limit explicitly placed on claims for a change of condition wholly depriving the statutory provision of any meaning.

Here, the Respondent was awarded for pursuing an otherwise barred claim under the above nearly unending time frame. The Respondent was paid the final payment of compensation and the receipt documenting the same was executed on November 28, 2012. (App. p. 51-52, 147). This allowed the Respondent until November 28, 2013, to file for a review for a claim of a change of condition. (App. p. 51-52, 147). However, within the twelve months following, the Respondent only filed a Form 50 notice on May 2, 2013. (App. p. 53-54). He did not request a hearing, review, or any other action by the Commission to pursue an alleged change of condition either on May 2, 2013, or any other time thereafter and before November 28, 2013. (App. p. 53-54). But, under the malleable standard for which he advocates, Respondent had successfully tapped into the extended "deadline" for filing a request for a hearing to pursue his claim, which would only be extinguished by his own death.

Under Respondent's artificial "deadline," it was entirely acceptable for him to then "wait and see" months on end after merely giving notice of the possibility that he may, at some time in the near or very distant future, file for review by the Commission. Meanwhile, the Respondent was under no obligation to actually pursue his claim or take any real action. As a result, when he finally did change his mind and request a hearing more than a year after this Form 50 notice was filed, the Respondent suffered no repercussions whatsoever for the delay. (App. p. 61-63).

While the statute plainly does not allow for this extension and interpreting the provision as allowing this leads to a particularly absurd result and renders the provision meaningless, the Court of Appeals cited only a single case, Wilson v. Charleston County School District, in an attempt to justify this implausible outcome. But, Wilson 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 (Ct. App. 2017), vacating, App. No. 2017-001569 (Apr. 19. 2018). And, since that time, the Wilson decision has been entirely vacated, leaving the Court of Appeals without any legal authority whatsoever to support its illogical decision. Id.

Thus, as if defying canons of statutory interpretation was not already sufficient justification for reversing the Court of Appeals' decision, the recent loss of the single supporting authority on which the decision was based further requires that the Court of Appeals' decision be reversed. As set forth above, it is the Court of Appeals' decision the Court of Appeals' decision –not the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission—that is controlled by an error of law. Therefore, this Court should affirm the Commission's decision in accordance with the applicable standard of review for agency decisions.

B. The Court of Appeals' interpretation directly conflicts with Allen v. Benson Outdoor Advertising Company.

While the aforementioned basis is sufficient, alone, to justify reversing the decision of the Court of Appeals, the Supreme Court should also reverse the Court of Appeals' decision because the order is in direct conflict with Allen v. Benson Outdoor Advertising Company. 236 S.C. 22, 112 S.E.2d 722 (1960). Notably, Allen constitutes the only case in which our courts have found any flexibility within the one year requirement provided in § 42-17-90.

"Because South Carolina workers' compensation law is fashioned after North Carolina's statute, our courts often rely on North Carolina precedent for guidance in interpreting the South Carolina Workers' Compensation Act." Hernandez-Zuniga v. Tickle, 374 S.C. 235, 248-49, 647 S.E.2d 691, 698 (Ct. App. 2007). Elsewhere, our courts, guided by North Carolina case law,

have firmly stated that "the conclusiveness of this provision is inescapable" and the "effect must be given to the limitations written in the act and the wisdom of them is manifest." Wallace v. Campbell Limestone Co., 198 S.C. 196, 196, 17 S.E.2d 309, 311 (1941) (citing Lee v. Rose's 5-10-25 Cent Stores, 1933, 205 N.C. 310, 171 S.E. 87 (N.C 1933)) (looking to North Carolina Courts' strict construction of practically identical language before holding claim barred where more than three years had elapsed since the last payment of compensation). See also Watkins v. Central Motor Lines, Inc., 279 N.C. 132, 181 S.E.2d 588 (N.C. 1971) (citing cases) (holding claimant's request for a hearing regarding a change of condition filed 17 months after his last payment of compensation was too late).

In Allen, the claimant filed a request for the Commission to review the award on account of a change in condition approximately ten months after the last payment of compensation and execution of the final compensation settlement receipt. Id. at 25, 723. However, the review itself did not take place until approximately twelve days after the expiration of the one year period. Id. In resolving this scheduling issue, the Allen Court interpreted § 72-359 (now codified at § 42-17-90) to avoid an absurd result and stated that to conclude that the Commission no longer had jurisdiction over the claim due to a delay in scheduling the hearing twelve days after the one year period "would lead to a rather unreasonable result clearly not within the intent of the Legislature." Id. at 30, 725.

However, the Allen Court made clear that this allowance constituted a narrow carve out with limited applicability to only those situations in which the Commission's docket does not allow the case to be tried before the one year period set forth in § 42-17-90. Id. at 30, 725. The Court specifically stated that it went "no further than to hold that the application for review must be made within one year after the last payment of compensation." Id. at 30, 726. Thus, the Allen

Court's review of legislative intent and the potential for absurd results allowed only for a small exception when the Commission's busy docket, at no fault to the parties, causes a delay in setting the hearing within the one year time frame. Otherwise, the Allen Court fully reinforced the requirement to strictly adhere to the twelve month period allowed by statute.

Here, markedly unlike the claimant in Allen, the Respondent did not apply for a review within one year of the final payment of compensation—he merely gave notice of a vague intention to do so in the indeterminate future. Thus, it is only at his fault, and at no fault on the part of either the Commission or Petitioners, that the one year period expired well before he decided to apply for a review in accordance with the statute. Moreover, the burden of proof in establishing a claim for a change of condition is upon the claimant and not upon the Commission or the Petitioners. See, e.g,. Robbins v. Walgreens and Broadspire Servs., Inc., 375 S.C. 259, 652 S.E.2d 90 (Ct. App. 2007). Thus, neither the Commission nor the Petitioners had the parallel burden of setting or requesting a hearing for review.

In sum, nowhere does § 42-17-90 or Allen contemplate allowing a claimant to: (1) file a Form 50 giving indefinite notice failing to request a hearing within the year of final payment of compensation; and (2) wait any additional extended period of time desired before actually requesting a hearing. Just the opposite is true; under both, failing to file a timely application for a hearing or review within one year of the last payment of compensation is fatal.

In sum, § 42-17-90 and Allen categorically militate against the Court of Appeals' decision below and render Respondents' untimeliness a complete bar. Accordingly, the decision of the Appellate Panel of the South Carolina Workers' Compensation Commission was in no way controlled by an error of law upon which the Court of Appeals could reverse under the

standard of review applicable to agency decisions. Instead, the decision of the Appellate Panel wholly comported with controlling law, and thus, should be affirmed by this Court.

C. The Court of Appeals' interpretation directly conflicts with Regulation 67-602(C).

The Supreme Court has further basis for reversing the Court of Appeals' decision as violative of Regulation 67-602(C), which requires Respondent provide credible medical evidence of a change of condition at the time the hearing is requested. While the Appellate Panel of the Workers' Compensation Commission never made such a finding, the Court of Appeals concluded that Respondent had successfully made a timely claim for a change in condition without acknowledging that his allegedly valid request for a hearing entirely lacked the requisite credible medical evidence needed to complete the request.

The burden of proof in establishing a change of condition under § 42-17-90 is on the workers' compensation claimant. See Robbins, 375 S.C. 259, 652 S.E.2d 90. And, the claimant must 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). Here, Dr. Quaye, the physician opining that the Respondent had suffered a change of condition, did so without even examining the Respondent. (App. p. 74). In fact, he had not evaluated the Respondent in more than fifteen months. (App. p. 74).

The only other physician upon which the Respondent relied, Dr. Mazoue, never opined that the Respondent underwent a change of condition, but instead, opined that Respondent had not yet reached maximum medical improvement. Plainly, the issue of maximum medical improvement was already decided by the Commission in 2012, and is therefore barred from

being re-litigated by the doctrine of *res judicata*. Price v. City of Georgetown, 297 S.C. 185, 275 S.E.2d 335 (Ct. App. 1988). (App. p. 4-18).

Nevertheless, the Court of Appeals ignored requirements in the Regulations and allowed the baseless opinion of Dr. Quaye to somehow constitute the requisite credible medical evidence needed to complete the allegedly timely request for a hearing. But, such a determination is strictly forbidden by Regulation 67-602(C).

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court reverse the decision of the Court of Appeals and affirm the decision of the Appellate Panel of the Workers' Compensation Commission. The Court of Appeals' decision to reverse and remand the decision of the Appellate Panel of the Workers' Compensation Commission directly contradicts established Supreme Court precedent and has absolutely no precedential basis upon which to stand.

Respectfully submitted,

May 18, 2018

DAVID H. KELLER (S.C. BAR # 3345)
Turner Padget Graham & Laney P.A.
200 E. Broad Street
P.O. Box 1509 (29602)
Greenville, South Carolina 29201
Telephone: (864) 552-4622
(864) 552-4620 (facsimile)
dkeller@turnerpadget.com

Evelyn A. Norton, Esq. (S.C. BAR # 102792)
Turner Padget Graham & Laney P.A.
200 E. Broad Street
P.O. Box 1509 (29602)
Greenville, South Carolina 29201
Telephone: (864) 552-4619
(864) 552-4620 (facsimile)
enorton@turnerpadget.com

ATTORNEYS FOR PETITIONERS

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
MAY 23 2018
S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSIONS
APPELLATE PANEL

Appellate Case No. 2018-000076

Johnny Tucker, ...Employee/Respondent
vs.

S.C. Department of Transportation, Employer and
State Accident Fund, ...Carrier/Petitioners
of which
State Accident Fund is .....Carrier

CERTIFICATE OF MAILING

I certify that I have served the Brief of the Petitioners on counsel by depositing copies of the same in the United States Mail, postage prepaid, on May 21st, 2018, addressed to its attorneys of record.

David H. Keller (S.C. Bar # 3345)
Turner Padget Graham & Laney P.A.
200 E. Broad Street
P.O. Box 1509 (29602)
Greenville, South Carolina 29201
Telephone: (864) 552-4622
(864) 552-4620 (facsimile)
dkeller@turnerpadget.com

ATTORNEY FOR PETITIONERS