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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

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JUL 05 2018

Appellate Case No. 2018-000076

S.C. SUPREME COURT

Johnny Tucker,

Employee/Respondent

v.

S.C. Department of Transportation, Employer,

and

State Accident Fund,

Carrier/Petitioners

REPLY BRIEF OF PETITIONERS

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## ARGUMENT

In response to the Brief of Respondent, Petitioners respectfully submit this Reply concisely addressing certain points and incorporating all arguments from their initial brief as further support in opposition to Respondent's position.

### **I. THE COURT OF APPEALS, NOT THE SUPREME COURT, ERRED IN ITS INTERPRETATION OF § 42-17-90, WHICH EVISCERATED THE PROVISION OF ANY APPLICABILITY WHATSOEVER.**

First, Respondent states that "this Court has been eviscerating [§ 42-17-90] since at least 1960" because the first and last sentence in S.C. Code Ann. § 72-359 (1952) and S.C. Code Ann. § 42-17-90 (1976) are the same constitutes an irrational, deduction from the basis of Petitioners' argument. (Resp't Br. 10.) To be clear, Petitioners never stated that this Court eviscerated the statute in question. Indeed, by granting the Petition for Writ of Certiorari, the Supreme Court now has the opportunity to restore the intent and effect of § 42-17-90 in accordance with its decision in Allen v. Benson Outdoor Advertising Company. 236 S.C. 22, 112 S.E.2d 722 (1960). As explained in their initial brief to this Court, Petitioners contend only that **the Court of Appeals** eviscerated § 42-17-90 of any applicability in its interpretation as set forth in the Court of Appeals' decision dated October 18, 2017. (App. p. 367-69).

#### **A. The Act's guiding principle in no way justifies the Court of Appeals' interpretation, which leads to an absurd result and ineffectual statutory provision, both of which are plainly prohibited by canons of statutory interpretation.**

Second, the general principle of liberally interpreting the South Carolina Workers' Compensation Act in favor of coverage in no way justifies or invites interpretations which are so liberal that their result is an absurd outcome. The "liberal construction" of the Act to afford

coverage refers to including employees within the protections and jurisdiction of the Act, not to whether or not employees should receive compensation for injuries under the Act. See Harrison v. Owen Steel Co., 422 S.C. 132, 143, 810 S.E.2d 433, 438-39 (Ct. App. 2018) (“We acknowledge ... that the law must be construed in favor of coverage. However, this policy is not implicated because [claimant] has received compensation for ... his workplace injuries.”). Here, Respondent is already a covered employee under Title 42, and there has never been any dispute about that. Rather, this is an issue of whether Respondent, after already being a covered employee, met his obligation under the statute to request a hearing within one year of the final payment of compensation.

As such, the guiding principal of the Act does not override well-accepted canons of statutory interpretation. As stated by this Court:

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. The statutory language must be construed in light of the intended purpose of the statute, **This Court will not construe a statute in a way which leads to an absurd result or renders it meaningless.**

Florence Cnty. Democratic Party v. Florence Cnty. Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (citing cases) (emphasis added).

Yet, Respondent submits that his liberal construction of the statute not only should be adopted by the Court, but also that it comports with the interpretation of other provisions in the Act, such as § 42-15-20 or § 42-15-40. (Resp’t Br. 11.) Noticeably, Respondent wholly fails to cite to any case law illustrating how either provision has ever been interpreted to the liberal degree for which he advocates here with respect to § 42-17-90.

Instead, he relies upon cases that—much like Allen—apply an interpretation consistent with the Act’s guiding principal but that is also reasonably constrained so as to avoid an absurd result that strips the provision of any real effect. *Compare Allen*, 236 S.C. at 22, 112 S.E.2d at 722 (interpreting § 42-17-90 to allow for 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); *with Young v. Sunoco Prods. Co.*, 210 S.C. 146, 41 S.E.2d 860 (1947) (cited by Resp’t Br. 14) (interpreting precursor to § 42-15-40 to allow for a narrow carve out with applicability to only those situations in which an employer misled claimant so he or she would not file a claim).

Furthermore, § 42-15-20, on its face, provides for a “reasonable excuse” by a claimant for failure to comply with the deadline set forth therein—a markedly liberal and explicit allowance which was not repeated by the Legislature at § 42-17-90. S.C. Code Ann. § 42-15-20(B), § 42-17-90(A)-(C). Thus, Respondent’s comparison, at best, supports interpreting § 42-17-90 far less liberally than § 42-15-20. (Resp’t Br. 11, 14-15.) And, at worst, Respondent’s comparison is simply inapposite to the inquiry at hand and should be wholly disregarded by this Court.

Moreover, Respondent mistakenly conflates the purpose of the requirements in § 42-15-20 and § 42-15-40 with those set forth in § 42-17-90. (Resp’t Br. 14-15.) Without citing any legal authority to substantiate his claim, Respondent opines that the purpose of all three statutory provisions is to “simply place the employer and its insurance carrier on notice of the claim.” (Resp’t Br. 14-15.) The legislature could have said the employee must give notice within one year after the past payment of compensation as they did on § 42-15-20. But, § 42-17-90 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”).

Plainly, the provision does not limit itself to providing an employer notice. Instead, § 42-17-90 sets forth the timeframe within which the claimant may request a review by the Commission. If the statute did simply act as a method for providing an employer notice, as Respondent argues, then every single claimant would file a “notice” that he or she may, at some time in the undefined future, request a review by the Commission without any obligation to ever do so at any point in time. Clearly, § 42-17-90 contemplates no such “wait and see” method for leaving a claim hanging open so long as there is a possibility, albeit slight, that a claimant may decide to request a review by the Commission sometime in the indeterminate future. Twisting § 42-17-90’s explicit one-year cut-off into a means to extend claims so that they are extinguished only at a claimant’s death subverts the Legislature’s intent entirely.

In reality, no authority justifies an overly liberal interpretation of § 42-17-90—or any other provision of the Act. Again, the Court of Appeals in its decision below supported its overly liberal interpretation by citing only a single case, Wilson v. Charleston County School District, but Wilson was under review by the Supreme Court at the time of the Court of Appeals decision to remand and has since been entirely vacated. 419 S.C. 442, 798 S.E.2d 449 (Ct. App. 2017), vacating, App. No. 2017-001569 (Apr. 19, 2018). Thus, the Court of Appeals’ decision—and Respondent’s position—is without any legal authority whatsoever to support the desired interpretation. Id. And, Allen advocates only for a reasonable, narrow carve out when exigent circumstances arise (none of which ever arose in the case at bar). 236 S.C. at 22, 112 S.E.2d at 722.

Simply put, a liberal interpretation consistent with the Act's guiding principle is antithetical to the unrestrained interpretation for which Respondent advocates. Therefore, the Supreme Court should reverse the Court of Appeals' decision which 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.

**B. The Court of Appeals' interpretation directly conflicts with the narrow holding in Allen v. Benson Outdoor Advertising Company.**

Respondent feigns to find it "ludacris" that the Court of Appeals' decision in this case is in direct conflict with Allen. (Resp't Br. 16.) Yet, Respondent then proceeds to quote numerous segments from Allen that state precisely the point Petitioners' make above: while "under the well settled rule a liberal construction is required," sustaining the party's "contention would lead to a rather unreasonable result clearly not within the intent of the Legislature." 236 S.C. at 30, 112 S.E.2d at 725. For the aforementioned reasons, Respondent's interpretation of § 42-17-90 also leads to an unreasonable, absurd result "clearly not within the intent of the Legislature." Indeed, Respondent advocates for a complete subversion of the Legislature's drafting power by flipping § 42-17-90's deadline into the endless extension of a claim.

At the same time, Respondent entirely ignored the fact that Allen constitutes the only case in which our courts have found any flexibility within the one year requirement provided in § 42-17-90 and that flexibility was limited to the unique facts of that case, which are not present here. (Resp't Br. 15-17.) Unlike in this case, the claimant in Allen 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. 236 S.C. at 25, 112 S.E.2d at 723. However, the review itself did not take place until a

mere twelve days after the expiration of the one year period. Id. Thus, the Allen Court interpreted § 72-359 (now codified at § 42-17-90) to avoid the absurd result of the Commission no longer having jurisdiction over the claim due to a delay in scheduling the hearing on the part of the Commission—at no fault of the parties. Id. at 30, 725.

Here, there was no scheduling issue on the part of the Commission which resulted in failure to review the claim within twelve months of the final payment of compensation. (App. p. 61-63). Instead, the Respondent entirely failed to request that the Commission review the award at all until more than a year and seven months after his final payment of compensation. Before that, he merely gave notice of a vague intention to possibly request a review by the Commission sometime in the indeterminate future. (App. p. 61-63). Consistent with Allen, his failure to request that the Commission review the award within one year of the last payment of compensation is fatal.

Respondent further failed to acknowledge that the Allen Court made it abundantly clear that this narrow carve out had 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. 236 S.C. at 30, 112 S.E.2d at 725. (Resp't Br. 15-17.) The Allen 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." 236 S.C. at 30, 112 S.E.2d at 730. In all other aspects, the Court upheld the requirement to request that the Commission review the award within twelve months.

In sum, Allen renders Respondents' untimeliness a complete bar, and thus, the decision of the Appellate Panel wholly comported with controlling law. In turn, the Court of Appeals' decision should be reversed by this Court.

**C. The Court of Appeals' interpretation directly conflicts with not only § 42-17-90 and Supreme Court Precedent, but also Regulation 67-602(C).**

Finally, Respondent's distinction between a "claim" and a "request for a hearing" is precisely the issue driving this protracted litigation because the Respondent only filed a notice of a "claim" for a change of condition within twelve months. (App. p. 53-54). But, filing a "claim" without review is simply not enough. Instead, Respondent was required, but utterly failed, to file a request for a review by the Commission of his claim within twelve months pursuant to § 42-17-90.

Yet, even if Respondent had properly requested a review by the Commission within twelve months instead of simply filing a claim providing vague notice of an intent to maybe file for a review by the Commission later, Respondent is still barred due to his failure to provide credible medical evidence of a change of condition at the time the review was allegedly requested pursuant to Regulation 67-602(C). (App. p. 53-54).

Importantly, the Appellate Panel of the Workers' Compensation Commission never found that the Respondent fulfilled Regulation 67-602(C) requirements. However, the Court of Appeals concluded that Respondent had successfully made a timely request for a review by the Commission under § 42-17-90 while simultaneously disregarding the fact that Respondent lacked the requisite credible medical evidence needed to complete the request for a review by the Commission under Regulation 67-602(C).

Obviously, if this Court concludes that Respondent violated § 42-17-90 by failing to request a review by the Commission within twelve months of the last date of payment of compensation, then this Court need never reach Respondent's violation of Regulation 67-602(C) because § 42-17-90 serves as a complete bar. However, assuming *arguendo* that this Court does

conclude that Respondent somehow complied with the requirements set forth in § 42-17-90, then the Court should still conclude Respondent is barred under Regulation 67-602(C).

Respondent contends that Dr. Quaye, the physician who opined that the Respondent had suffered a change of condition, did so after having seen Respondent since referring Respondent out to Dr. Mazoue fifteen months earlier. (Resp't Br. 19.) But, in fact, nothing in the Appendix indicates whether this is true, and if it is, whether or not Dr. Quaye actually treated Respondent and/or evaluated him more than once. (App. p. 74). The Appendix is devoid of medical records documenting any such treatment or evaluation during those fifteen months.

The only other physician upon which the Respondent relied, Dr. Mazoue, never opined that the Respondent underwent a change of condition. Instead, Dr. Mazoue 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). To state it simply, if Respondent was never at maximum medical improvement, then how could he have had a change of condition? The two concepts are inapposite.

In sum, this Court should reverse the Court of Appeals decision because Respondent wholly failed to satisfy the requirements set forth in § 42-17-90, which is a sufficient basis, alone, on which to reverse. Moreover, Respondent also failed to comply with Regulation 67-602(C), which further bolsters the Supreme Court's reversal.

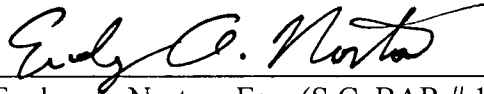
CONCLUSION

This case actually involves the failure of the Respondent's attorney to comply with the plainly written one-year requirement in § 42-17-90. For the foregoing reasons, the Petitioners respectfully therefore 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 well-settled canons of statutory interpretation and established Supreme Court precedent and has absolutely no precedential basis upon which to stand.

Respectfully submitted,



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July 2, 2018

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CERTIFICATE OF MAILING

I certify that I have served the Reply Brief of the Petitioners on counsel by depositing copies of the same in the United States Mail, postage prepaid, on July 2, 2018, addressed to its attorneys of record.



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