89711

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM South Carolina
Workers Compensation Commission

Full Commission Order Dated April 28, 2017 affirming Commissioner Melody L. James orders dated January 04, 2013 And September 30, 2013

Case No.: 2017-001217

John C. McDaniel.....Appellant,

v.

Snelling Staffing Services and United Wisconsin Insurance Company c/o United Heartland .....Respondents.

Motion for Rehearing

---

1. Pursuant to Rule 221, SCACR the Appellant hereby moves to have the court rehear the following issues that have either been overlooked or misapprehended by the court: Appellant's issues six, eleven, twelve, thirteen and fifteen.

ISSUE SIX

DID THE COMMISSION VIOLATE THE APPELLANT'S RIGHTS IN FINDING "THE CLAIMANT'S AMENDED FORM 30 WAS NOT PROPERLY BEFORE THE PANEL?"

2. Appellant's issues six was disposed of by paragraph 4 of the court's order, "[a]s to issues five and **six**, the appellate panel did not err in finding McDaniel's form 30 was not properly before the panel... *Compare* S.C. Code Ann. Regs. 67-701 (2012) (explaining the procedure for

requesting a review hearing with form 30), *with* S.C. Code Ann, Regs. 67-609, 67-610 (2012) (providing for the amendment of a request for a single Commissioner hearing, form 50, or form 52)."

3. However, a statute "must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *CFRE, L.L.C. v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)).* As such, "we read the statute as a whole and in a manner consonant and in harmony with its purpose." *Id.* "We therefore should not concentrate on isolated phrases within the statute." *Id.* In addition, "we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.' " *Id. (quoting State v. Sweat, 379 S.C. 367, 382, 665 S.E.2d 645, 654 (Ct. App. 2008), aff'd, 386 S.C. 339, 688 S.E.2d 569 (2010)).*

4. S.C. Code Ann. Regs. 67-708 (2012) "A review hearing may be postponed for the reasons in § R.67-613." S.C. Code Ann. Regs. 67-613 B(4) (2012) "If the nature of the claim or the relief requested changes, file a new hearing request according to § R.67-207 unless § R.67-610 applies." S.C. Code Ann. Regs. 67-610(C) (2012). "An amended form must be timely filed and served. The Commission will determine **at the hearing** whether to allow a party to rely on new facts or defenses."

5. In this case, the Appellant did not rely on S.C. Code Ann. Regs. 67-701 (2012) solely but rather, in conjunction with S.C. Code Ann. Regs. 67-708 (2012).

6. The commission is required to rule at the hearing, which they did when the Commission instructed the Appellant to proceed after the Appellant stated, "I'm under the impression that this

hearing is based on an amended Form 30 and not on a form 30 filed in 2012 or at the beginning of 2013. Am I correct am I wrong?" (R. pp. 505). This was a ruling on the amended form 30.

7. Therefore, the court's order citing S.C. Code Ann. Regs. 67-701 (2012), while failing to address S.C. Code Ann. Regs. 67-708, 67-613, 67-610 (2012), and their incorporation by reference is a violation of statutory construction.

8. The result of the ruling would be that if a (single Commissioner) remand hearing is held, no issues arising in that (single Commissioner) remand hearing can then be heard when the Appellate Panel hearing is held .

9. In the interest of justice, and for the reasons above, the court should grant the Appellant's motion for rehearing on issue six.

ISSUE ELEVEN

DOES §42-9-90 STATUTORILY MANDATE THE COMMISSION TO APPLY PENALTIES AGAINST THE RESPONDENTS?

10. Appellant's issue eleven was disposed of by paragraph 2 of the courts order, "As to issue three, **eleven**, twelve, and eighteen, we find these issues not preserved for appellate review. *See Smith V. NCCI, Inc., 369 S.C. 236, 256, 631 S.E.2d 268, 279 (CT. App. 2006)* ('Only issues raised and ruled upon by the [Appellate Panel] are cognizable on appeal.')"

11. "There are four basic requirements to preserving issues at trial for appellate review. ... [T]he issue must have been (1) raised to and ruled upon by the [trial] court, (2) raised by the Appellant, (3) raised in a timely manner, and (4) raised to the [trial] court with sufficient

specificity." Jean H. Toal, Amelia W. Walker & Margaret E. Baker, *Appellate Practice in South Carolina 185* (3d ed. 2016).

12. At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).* Pursuant to Rule 40 of the South Carolina Administrative Law Court (2009): "Issues raised on appeal but not addressed in the [final] order are deemed denied." Therefore, under the current version of the Administrative Law Rules, because these issues are deemed "denied" they satisfy the "ruled upon" preservation requirement. *Sierra Club v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010)*

13. In this case, issue eleven was Raised on Appellant's Form 30 issue 6 (R. pp. 77) and referenced in the Full Commission Order dated April 28, 2017 (R. pp. 45). Further Appellant raised this issue at the full commission hearing (R. pp. 493) by confirming the commission had read and reviewed his filings for the hearing. As cited above, pursuant to Rule 40 issues not specifically ruled on are deemed denied. The full commission order does not rule on the issue, with the result being deemed a denial of Appellant's request for fines and penalties.

14. Additionally, the court has formerly held the penalty as mandatory, "The language of section 42–9–260(G) is mandatory. The statute sets the time of the penalty as beginning with the failure to comply with section 42–9–260 and continuing for as long as the benefits are wrongfully withheld. The appellate panel did not have discretion to limit the duration of the penalty to a time other than the date when payment of benefits was resumed." *Martin v. Rapid Plumbing, 369 S.C. 278, 278, 631 S.E.2d 547, 553 (Ct.App.2006)*

15. The Appellant's former lawyer was inarticulate in issue number six of the original form 30. The Appellant's issue eleven is simply a more articulate statement of the same issue, namely that the defendants were subject to mandatory penalties.

16. Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue. *See State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001)* (finding issue was preserved even though defendant did not use exact words "corpus delicti" in his request for a directed verdict). Nonetheless, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge. *Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 733; see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007)* (finding that although SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial court to rule on the issue).

17. If the court's ruling on issue eleven stands, an issue raised and "ruled" upon, would not be properly preserved for appeal.

18. In the interest of justice, and for the reasons above, the court should grant the Appellant's motion for rehearing on issue eleven.

ISSUE TWELVE

DOES § 42-9-260 STATUTORILY BAR THE COMMISSION FROM GRANTING THE CREDIT TO RESPONDENTS IF PENALTIES ARE DUE?

19. Appellant's issue twelve was disposed of by Paragraph 2 of the Court's order, "[a]s to issue three, eleven, **twelve**, and eighteen, we find these issues not preserved for appellate review.

See Smith V. NCCI, Inc., 369 S.C. 236, 256, 631 S.E.2d 268, 279 (CT. App. 2006) ('Only issues raised and ruled upon by the [Appellate Panel] are cognizable on appeal.')"

20. "There are four basic requirements to preserving issues at trial for appellate review. ... [T]he issue must have been (1) raised to and ruled upon by the [trial] court, (2) raised by the Appellant, (3) raised in a timely manner, and (4) raised to the [trial] court with sufficient specificity." Jean H. Toal, Amelia W. Walker & Margaret E. Baker, *Appellate Practice in South Carolina 185* (3d ed. 2016).

21. At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).* Pursuant to Rule 40 of the South Carolina Administrative Law Court (2009): "Issues raised on appeal but not addressed in the [final] order are deemed denied." Therefore, under the current version of the Administrative Law Rules, because these issues are deemed "denied" they satisfy the "ruled upon" preservation requirement. *Sierra Club v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010)*

22. In this case, the issue was raised on Appellant's Form 30 issue 5 (R. pp. 77) and Appellant's Reply Brief (R. pp. 262) referenced in the Full Commission Order dated April 28, 2017 (R. pp. 045). Further the Appellant raised this issue at the full commission hearing (R. pp. 493) by confirming the commission had read and reviewed his filings for the hearing. The issue was ruled on in the Full Commission Order dated April 28, 2017 (R. pp. 52, 53).

23. In the interest of justice, and for the reasons above, the court should grant the Appellant's motion for rehearing on issue twelve.

ISSUE THIRTEEN

DID THE COMMISSION ERR IN FINDING THAT, *PURSUANT TO CURIEL*, THE RESPONDENTS MUST RECEIVE A CREDIT FOR ALL WEEKLY BENEFITS PAID AFTER THE DATE OF MAXIMUM MEDICAL IMPROVEMENT?

24. Appellant's issue thirteen was disposed of by Paragraph 6 of the court's order, "[a]s to issue thirteen, we find substantial evidence supports the Appellate Panels finding that Snelling Staffing was entitled to a credit of temporary total disability payments made after McDaniel reached MMI."

25. At the initial hearing, the single commissioner ruled the credit MUST be granted under Curiel. *See Curiel v. Envtl. Mgmt. Servs., 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007)* and R. pp. 272. This ruling removes the question from the purview of the fact finder, making any appeal from it, a question of law.

26. It is error to apply a "substantial evidence" standard to a question of law.

27. Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo. *Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).*

28. S.C. Code Ann. 42-9-210 (2012) gives discretion to the commissioner to grant or deny the credit for payments not due when paid against an award for permanent disability. When the Commissioner believes that they lack discretion, that belief is error of law.

29. Whether or not the commissioner has discretion is a question of law, interpreting S.C. Code Ann. 42-9-210 (2012).

30. In the interest of justice, and for the reasons above, the court should grant the Appellant's motion for rehearing on issue thirteen.

ISSUE FIFTEEN

DOES §42-1-40 STATUTORILY MANDATE THAT THE COMMISSION CALCULATE WEEKS AND PARTS THEREOF WHEN DETERMINING THE AVERAGE WAGES OF THE APPELLANT, ATKINS, LAMPKIN AND CLARK?

31. Appellant's issue fifteen was disposed of by Paragraph 8 of the court's order, "[a]s to issue **fifteen** and sixteen, substantial evidence supports the Appellate panels determination of his average weekly wage. *See Hargrove V. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004).*"

32. Determining the proper interpretation of a statute is a question of law, and this Court reviews questions of law de novo. *Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).*

33. In this case, the issue concerns a statutory mandate under S.C. Code Ann. 42-1-40. This is a complex question of statutory construction, as opposed to a finding of fact. Issues concerning statutory construction are by their very nature exclusively questions of law.

34. It is error to apply a "substantial evidence" standard to a question of law.

35. The court should apply statutory construction principles, namely, the "rule against surplusage."

36. The rule against surplusage was recently addressed by the Supreme Court of South Carolina in *Senate v. McMaster, 425 S.C. 315 (2018).*

> "The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).* "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Id.* "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of

> statutory interpretation are not needed and the court has no right to impose another meaning." *Id.*
>
> However, a statute "must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect." *CFRE, L.L.C. v. Greenville Cty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (quoting S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)).* As such, "we read the statute as a whole and in a manner consonant and in harmony with its purpose." *Id.* "We therefore should not concentrate on isolated phrases within the statute." *Id.* In addition, "we must read the statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous,' for '[t]he General Assembly obviously intended [the statute] to have some efficacy, or the legislature would not have enacted it into law.' " *Id. (quoting State v. Sweat, 379 S.C. 367, 382, 665 S.E.2d 645, 654 (Ct. App. 2008), aff'd, 386 S.C. 339, 688 S.E.2d 569 (2010)).*

37. "When the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, as long as results fair and just to both parties will be obtained." S.C. Code Ann. 42-1-40 (2012).

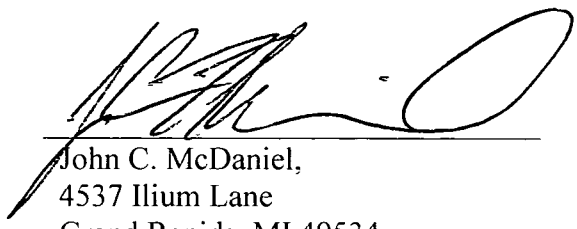
38. If an alternative method is used to determine average weekly wage, and that method fails to account for "weeks and parts thereof" that method would violate the rule against surplusage. The intent of the legislators was clearly to account for partial weeks when the length of employment used to calculate average weekly wage was less than 52 weeks.

39. Therefore, to avoid violating the rules of statutory construction, any alternative method that calculates average weekly wage over a length of less than 52 weeks must account for "weeks and parts thereof".

40. In this case, the finding by the commissioner that fails to account for "weeks and parts thereof" defeats the intent of the legislators that passed S.C. Code Ann. 42-1-40 (2012).

41. In the interest of justice, and for the reasons above, the court should grant the Appellant's Motion for Rehearing on issue fifteen.

For the above reasons, the Appellant respectfully prays that this honorable court grant the Motion for Rehearing on issues six, eleven, twelve, thirteen and fifteen.



John C. McDaniel,
4537 Ilium Lane
Grand Rapids, MI 49534
843-425-3000
Jmcdaniel1982@gmail.com

April 30, 2019

Memoranda of Authorities

S.C. Appellate Court Rules

Rule 221

S.C. Code Ann.

42-1-40 (2012)

S.C. Code Ann. Regs.

67-207 (2012)
67-609 (2012)
67-610 (2012)
67-613 (2012)
67-701 (2012)
67-708 (2012)

Table of Cases

Catawba Indian Tribe v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).
CFRE, L.L.C. v. Greenville Cty. Assessor, 395 S.C. 67, 716 S.E.2d 877 (2011)
Curiel v. Envtl. Mgmt. Servs., 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007)
Hargrove V. Titan Textile Co., 360 S.C. 276, 289, 599 S.E.2d 604, 611 (Ct. App. 2004)."
Martin v. Rapid Plumbing, 369 S.C. 278, 278, 631 S.E.2d 547, 553 (Ct.App.2006)
Senate v. McMaster, 425 S.C. 315 (2018).
Sierra Club v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 424, 693 S.E.2d 13 (Ct. App. 2010)
Smith V. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (CT. App. 2006)
S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 641 S.E.2d 903 (2007)
S.C. State Ports Auth. v. Jasper Cty., 368 S.C. 388, 629 S.E.2d 624 (2006)
See State v. Russell, 345 S.C. 128, 546 S.E.2d 202 (Ct.App.2001)
State v. Sweat, 379 S.C. 367, 382, 665 S.E.2d 645, 654 (Ct. App. 2008), aff'd, 386 S.C. 339, 688 S.E.2d 569 (2010)
Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)

Secondary sources

Jean H. Toal, Amelia W. Walker & Margaret E. Baker, *Appellate Practice in South Carolina 185* (3d ed. 2016).

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM South Carolina
Workers Compensation Commission

Full Commission Order Dated April 28, 2017 Affirming Commissioner Melody L. James orders dated January 04, 2013 And September 30, 2013

Case No.: 2017-001217

John C. McDaniel, Employee, Claimant, Appellant.....Appellant,

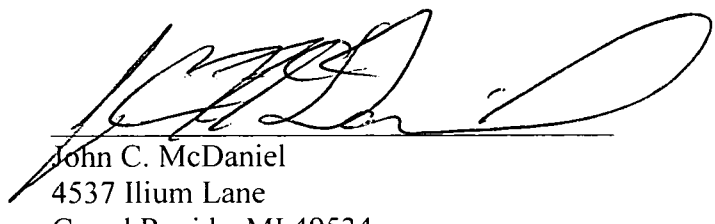
v.

Career Employment Professional d/b/a Snelling Staffing, Employer and United Wisconsin Insurance Co., Carrier, Respondents. .....Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Motion to Rehear by depositing a copy in the U.S. Mail, postage paid on May 1, 2019 addressed to the below:

Helen F. Hiser
R. Mark Davis
McAngus Goudelock & Courie, LLC
735 Johnnie Dodds Blvd., Suite 200
Mt. Pleasant, SC 29465



John C. McDaniel
4537 Ilium Lane
Grand Rapids, MI 49534
Phone Number: 843-425-3000
Email: jmcdaniel1982@gmail.com

May 1, 2019

John C. McDaniel

4537 Ilium Lane, Grand Rapids MI 49534
Phone Number: 843-425-3000
Email: jmcdaniel1982@gmail.com

May 1, 2019

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

McAngus Goudelock & Courie, LLC
735 Johnnie Dodds Blvd., Suite 200
Mt. Pleasant, SC 29465

RE: John C. McDaniel v. Career Employment Professional d/b/a Snelling Staffing
DOI: 11/21/2011
WCC File: 1116275
Appellant Case No: 2017-001217

Dear Ms. Kitchings,

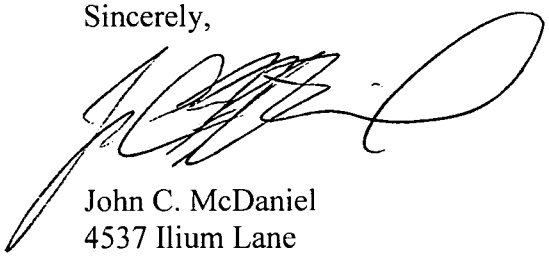
Enclosed for filing, please find the Original Appellant's Motion to Rehear, Original Certificate of Service, along with 6 copies of each, and a $50 check for the fee.

Also, please be advised that my address is 4537 Ilium Lane, Grand Rapids, MI 49534. Please have this updated in your records.

By copy of this letter, I am serving counsel of record with same.

Please call me if you have any questions about the enclosed. Thank you for your time.

Sincerely,



John C. McDaniel
4537 Ilium Lane
Grand Rapids, MI 49534
Phone Number: 843-425-3000
Email: jmcdaniel1982@gmail.com