THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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WCC File No.: 1222136

Appellate Case No.: 2015 - 001277

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Otis Nero (Claimant).....Appellant,

vs.

S.C. Department of Transportation (Employer), and
State Accident Fund (Carrier).....Respondents.

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# PETITION FOR REHEARING

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This is an appeal involving a workers' compensation case. Respondents, by and through their undersigned counsel, hereby files this petition for rehearing pursuant to Rule 221, SCACR.

## PROCEDURAL HISTORY

This matter stems from an alleged injury by accident sustained by Appellant on June 20, 2012. On August 5, 2014, the Single Commissioner found that Appellant sustained a compensable injury by accident arising out of and in the course of his employment on June 20, 2012, "while pulling a squeegee board leveling concrete; and that, pursuant to S.C. Code Ann. §42-9-35, the accident aggravated the pre-existing cervical disc condition that was present in his neck, albeit asymptomatic until the accident" (R. pp.20-21). On May 29, 2015, the Full Commission reversed the Single Commissioner's Order in full based on its findings that

Appellant failed to provide Respondents with timely notice of his alleged work accident in accordance with S.C. Code Ann. §42-15-60 or provide a reasonable excuse for failure to provide notice to the satisfaction of the Commission, and as a result, Respondents suffered prejudice. (R. p.51)

On March 29, 2017, this Court reversed the Full Commission's Order on the grounds that the substantial evidence in the record did not support the Full Commission's finding that Appellant failed to provide a "reasonable excuse" for failure to provide timely notice, resulting in a prejudice to Respondents. *Nero v. SCDOT,* Opinion No. 5477 (Ct. App. filed March 29, 2017). On April 13, 2017, Respondents filed a petition for rehearing, arguing this Court overlooked or misapprehended the evidence, law, or arguments involving the substantial evidence standard of review, and this Court exceeded its role as an appellate court by substituting its judgment for that of the commission instead of deferring to the Commission as the appropriate fact finders.

On August 22, 2017, this Court issued an Order granting Respondents' petition for rehearing and attached an opinion substituting its previous opinion. *Nero v. SCDOT*, 420 S.C. 523, 804 S.E.2nd 269 (Ct. App. 2017). In the substituted opinion, this Court changed the substantial evidence standard of review to a de novo review, stating, "[b]ecause the issue of timely notice is a jurisdictional question, 'the [c]ourt may take its own view of the preponderance of the evidence.' *Shatto v. McLeod Reg'l Med. Ctr.,* 406 S.C. 470, 475, 753 S.E.2nd 416, 419 (2013)(quoting *Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 299, 676 S.E.2nd 700, 702(2009)); *Mintz v. Fiske-Carter Constr. Co.*, 218 S.C. 409, 413, 63 S.E.2nd 50, 52 (1951)." *Id.* at 529.

The South Carolina Supreme Court granted Respondents' petition for writ of certiorari,

and on April 4, 2018, the Supreme Court reversed the opinion of the Court of Appeals and remanded for a decision under the proper substantial evidence standard of review. *Nero v. SCDOT*, 422 S.C. 424, 812 S.E.2nd 735 (2018). The Supreme Court found that neither the *Shatto* nor *Mintz* cases relied on by the Court of Appeals supported the use of the de novo standard, and "until this case, the Court of Appeals has consistently applied the substantial evidence standard when reviewing decisions of the commission on the question of timely notice." *Id.* at 426. The Supreme Court concluded that court of appeals erred in applying the de novo standard, and under well settled law, the commission's determination of whether a claimant gave timely notice under section 42-15-20 was not a jurisdictional determination and must be reviewed on appeal under the substantial evidence standard. *Id.* at 427.

This Court granted Respondents' previous petition for rehearing on August 22, 2017. In granting the petition, this Court agreed with Respondents that the substantial evidence in the record supported the findings of the Full Commission; however, rather than affirm the Full Commission, this Court elected to adopt a revised de novo standard of review in order to arrive at its previous conclusion that the Full Commission's decision should be reversed. Based on the Supreme Court's reversal of this Court's de novo decision, along with this Court's previous acknowledgment of the existence of substantial evidence supporting the Full Commission's decision, it follows that the decision of the Full Commission should be affirmed. Now, without the addition of any new evidence, this Court has inexplicably reversed the Full Commission's decision again under the substantial evidence standard of review, despite its prior decision to grant Respondents petition for rehearing. As a result, Respondents respectfully request this Court adhere to their August 22, 2017 decision and grant Respondents petition for rehearing on the grounds that the substantial evidence supports the decision of the Full Commission.

## ARGUMENT

As grounds for this petition, Respondents again respectfully argue this Court may have overlooked or misapprehended the evidence, law, or arguments involving the substantial evidence standard of review, and this Court exceeded its role as an appellate court by substituting its judgment for that of the Commission instead of deferring to the Commission as the appropriate fact finders.

The South Carolina Administrative Procedures Act (APA) governs the standard of judicial review in workers' compensation cases. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). Under the APA, this Court's review is limited to deciding whether the Full Commission's decision is unsupported by substantial evidence or is controlled by an error of law. *Hargrove v. Titan Textile Co.,* 360 S.C. 276, 289, 599 S.E.2d 604, 610-11 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." *Shealy v. Aiken Cty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). Therefore, an appellate court may only overturn findings of fact of the Commission if there is no reasonable probability that the facts could be as related by the witnesses upon whose testimony the finding was based. *Lowe v. Am-Can Transport Services, Inc.*, 283 S.C. 534, 324 S.E.2d 87 (Ct. App. 1984).

As the Supreme Court stated in *Hartzell v. Palmetto Collision*, a case applying the substantial evidence standard of review to the question of timely notice, "[w]hile reasonable minds could have reached a different conclusion based on the record, we must not engage in fact-finding that would disregard the Commission's factual findings on these issues." 415 S.C. 617, 623, 785 S.E.2nd 194, 196 (2016).

The requirement of a claimant to provide notice to an employer of an alleged work accident is controlled by S.C. Code Ann. §42-15-20, which states:

> (A) Every injured employee or his representative immediately shall on the occurrence of an accident, or as soon thereafter, give or cause to be given to the employer a notice of the accident and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this title prior to such giving notice, unless it can be shown that the employer, his agent, or representative, had knowledge of the accident or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity or the fraud or deceit of some third person.
>
> (B) Except as provided in subsection (C), no compensation shall be payable unless such notice is given within ninety days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the commission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

As stated by the Supreme Court, "[p]ursuant to S.C. Code Ann. §42-15-20 (1985), notice to the employer must be given within 90 days after the occurrence of the accident upon which the employee is basing his claim." (emphasis added) *McCraw v. Mary Black Hosp.*, 350 S.C. 229, 237, 565 S.E.2nd 286, 290 (2002). It is significant to note the accident upon which Appellant based his claim, and upon which the Single Commissioner awarded compensability, was the pulling of a squeegee and not Appellant's subsequent passing out and falling at the end of the work day. It is further significant to note that Appellant admittedly passed out and fell a second time in his driveway at home before presenting to the hospital, an incident that would not be considered to arise out of and in the course of Appellant's employment.

Since Appellant admittedly failed to report to his employer about his alleged work accident during the multiple opportunities he had to speak with his supervisors, the question then turns to whether Respondents had "adequate notice" of a possible work related injury. In *Etheredge v. Monsanto Co.*, this Court stated," [f]or adequate notice, there must be some

knowledge of accompanying facts connecting the injury or illness with the employment and indicating to a reasonable conscientious manager that the case might involve a potential compensation claim." 349 S.C. 451, 457 (Ct. App. 2002).

In its current opinion, this Court states that the undisputed evidence demonstrates that Respondents had adequate notice since: (1) on the date of the incident, Appellant's supervisor became concerned about Appellant and temporarily pulled him off the squeegee board work; (2) later in the day as the crew was preparing to leave the job site, Appellant lost consciousness and fell to the ground, which was witnessed by Appellant's supervisors; (3) Appellant's supervisors called Appellant while he was in the hospital, and they were aware he needed to have neck surgery; and (4) Appellant's supervisors were aware that Appellant dd not return to work for Respondents following his surgery, and Appellant filled out necessary paperwork through Respondents' human resources department.

This Court goes on to state that the undisputed documentary evidence in the record further established notice since: (1) as early as July 13, 2012, Respondents received written notification from Appellant's family doctor, Richey, that Appellant had been out of work since the date of his collapse and needed neck surgery; (2) in July and August 2012, Respondents received correspondence from Florence Neurosurgery and Spine confirming Dr. Naso was treating Appellant for cervical radiculopathy; (3) Respondents corresponded with the medical provider in November 2012 regarding whether Appellant would be able to return to work.

Despite what this Court considers to be undisputed evidence, Respondents respectfully submit that the substantial evidence in the record supports the Full Commission's finding that Appellant failed to provide Respondents with adequate notice.

Respondents point first to the fact that on July 9, 2012, only one (1) month after his alleged

accident, Appellant submitted to Respondents' human resources department a "Certification of Health Care Provider for Employee's Serious Health Condition (Family Medical Leave Act)", signed by Appellant and his family doctor, which not only fails to reference any alleged work accident, but states that the date Appellant's condition commenced was "several years -- neck and syncope." (R. p.420) Further, on June 28, 2012, Appellant prepared and signed a "Patient Health History Questionnaire" for his neurosurgeon, Dr. Naso, wherein he explicitly stated his problems were not related to an injury and this was not workers compensation. (R. p.331). In its current opinion, this Court references a medical questionnaire prepared by Appellant and signed for Dr. Naso on Auguist 22, 2012, wherein Appellant left blank the lines "Complaints related to injury?____ and Workers Compensation?____. "(R. p.343). Respondents argument relies instead on the medical questionnaire prepared and signed by Appellant on June 28, 2012, wherein Appellant did not leave this line blank, but instead wrote "no" in both blanks. (R. p.331).

Appellant had multiple opportunities to talk to both Mr. Bostick and Mr. Durant following his alleged accident, and during their visits to him at the hospital, and Appellant chose not to report any work accident involving the pulling of a squeegee board as alleged in his pleadings and awarded in the Single Commissioner's finding of compensability. There was conflicting medical evidence regarding medical causation since Dr. Naso commented, "I don't think his syncope related to cervical spine pathology," but Dr. Ritchie testified Appellant's pre-existing cervical spine condition was aggravated by his pulling of the squeegee board and that this, along with Appellant's work in the heat, caused the syncope episodes.

As stated above, these were conflicting medical opinions to be weighed by the Commission as the fact finder in the case. Instead this Court weighed the same evidence and came to its own

conclusion in substitution for that of the Commission.

The APA requires that "[a] final decision . . . include findings of fact and conclusions of law, separately stated. Findings of Fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C. Code Ann. § 1-23-350 (2005). Moreover, the Full Commission's findings of fact must be sufficiently detailed to enable the appellate court to determine whether the evidence supports the findings and whether the law was properly applied to those findings. *Frame v. Resort Servs. Inc.,* 357 S.C. 520, 531, 593 S.E.2d 491, 497.(Ct. App. 2004).

In this case, the Full Commission did exactly that. Specifically, the Full Commission stated the following Findings of Fact:

> FOF #10: We find that the only actual or informal notice the employer had of an injury was the claimant, who previously suffered from dizzy spells on the job, passed out in front of his supervisors at the shed after the conclusion of the workday.(R. p.52).

With respect to this finding, our Supreme Court held in *Sanders v. Richardson*, that "the employer's knowledge of the fact that an employee becomes ill while at work does not necessarily, of itself, serve the employer with notice that such illness constituted or resulted on a compensable injury." 251 S.C. 325, 328, 162 S.E.2nd 257, 258 (1968).

In addition, the Commission went on to state several additional pertinent Findings of Fact, including the following:

> FOF #15: We find that pursuant to S.C. Code Ann. §42-15-20, Claimant failed to provide a reasonable excuse made to the satisfaction of the commission for failure to provide timely notice as required by the statute. Although Claimant's supervisors witnessed Claimant's syncope episode, claimant never reported the alleged accident pulling the squeegee board, which was the basis of his claim. Claimant was given several opportunities to report his work accident and even submitted FMLA paperwork to the human resources department indicating that his problems lasted for several years

instead of requesting workers compensation. (R. p. 53)

> FOF #16: We find that pursuant to S.C. Code Ann. §42-15-20, Defendants suffered a prejudice as a result of Claimant's failure to provide timely notice. Defendants were unable to fully investigate whether Claimant's alleged squeegee accident cause syncope episode, or whether the alleged squeegee accident or syncope fall cause the aggravation of his cervical condition. As a result of the prejudice against Defendants caused by Claimant's failure to provide timely notice, Claimant's request for benefits is denied. (R. p.53)

Application of the appropriate standard of review is imperative in this case. The case presented questions of conflicting evidence over whether Appellant's supervisors were presented with sufficient accompanying circumstances that should have triggered a supervisor's effort to investigate a potential claim despite Appellant's failure to report it to them and instead turn in human resources paperwork stating that his condition predated any recent alleged accident, as well as conflicting medical evidence over the causation of the Appellant's injuries and resulting treatment. The Commission found that Appellant failed to provide a reasonable excuse for his failure to give timely notice, and as a result, Respondents were prejudiced by their inability to fully investigate the causation of Appellant's alleged accident and resulting injuries. The Commission's findings were sufficiently detailed to enable the appellate court to determine whether the evidence supported the findings and whether the law was properly applied to those findings.

Instead, this Court reversed the fact-finding conclusions of the Commission and substituted its judgment to reach the conclusion that Respondents had adequate notice. In addition to exceeding its role as the appellate court, this Court's decision would result in an almost impossible and impractical application of the law to workers' compensation claims. If an injured worker refuses to tell his employer he was hurt at work, and he then submits formal paperwork confirming it was not a work accident and his condition predated his alleged date of

injury, it is unreasonable to expect a manager to disregard the signed statement from the injured worker and continue to investigate any potential work accident anyway. This heightened requirement on the employer does not exist in the Worker's Compensation Act.

Finally, this Court held that Respondents were not prejudiced by Appellant's failure to provide notice in accordance with the statute. As discussed above, there is disputed medical evidence regarding whether Appellant's aggravated cervical stenosis or his syncope episodes were causally related to the alleged accident, and Respondents were deprived of the right to investigate timely the causation of Appellant's injuries, the extent of Appellant's pre-existing conditions, and whether Appellant sustained his burden improving a compensable aggravation of a pre-existing condition pursuant to S.C. Code Ann. §42-15-35.

## CONCLUSION:

Respondents respectfully submit that this Court may have overlooked or misapprehended the evidence, law, or arguments involving the substantial evidence standard of review and the Full Commission's role as the appropriate fact finder in the case, and Respondents would respectfully request this Court adhere to its previous decision on August 22, 2017 and grant Respondents' petition for rehearing.

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July 11, 2019
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July 11, 2019



**Via Hand Delivery**
The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Otis Nero vs. SC Department of Transportation
**Appellate Case No.: 2015-001277**

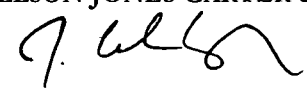
Dear Ms. Kitchings:

Enclosed for filing, please find the original and six (6) copies of the **Respondents' Petition for Rehearing**. Pursuant to Rule 240 (d), no filing fee is required as this petition is being filed on behalf of the State of South Carolina or its departments or agencies.

By copy of this letter and enclosure to Stephen J. Wukela, counsel of record for the Appellant, I am serving him with a copy of our **Petition for Rehearing** as indicated by the enclosed **Proof of Service**. Thank you for your consideration in this manner. Please do not hesitate to contact me with any questions or if additional information is needed from our office.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



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Enclosure(s)
cc: Mr. Stephen J. Wukela
Hanna Bourne, State Accident Fund (via email)

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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**PROOF OF SERVICE**

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Respondents, by and through their undersigned counsel, certify that on the date indicated below, he served counsel of record with a copy of the **Petition for Rehearing** by mailing copies of the same by United States Mail with first class postage prepaid the following addresses:

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