

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

Appellate Panel Order

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WCC File No. 1222136

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**RECEIVED**  
JUL 22 2019  
SC Court of Appeals

Otis Nero, ..... Appellant,

South Carolina Department of Transportation, Employer,  
and State Accident Fund, Carrier, ..... Respondents.

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**APPELLANT'S RETURN TO  
RESPONDENTS' PETITION FOR REHEARING**

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The Respondents, in their Petition for Rehearing of the Court's Order of June 26, 2019, argue that in granting a previous Petition for Rehearing on August 22, 2017:

... 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 decision of the Full Commission should be affirmed.  
(Resp. Pet. for Rehearing, p. 3)(emphasis added).

The Appellant respectfully contends that the Respondents have misconstrued this Court's Order of August 23, 2017. This Court never "agreed with Respondents that the substantial evidence in the record supported the findings of the Full Commission." No such language is found anywhere in the Court's Order of August 23, 2017.

To the contrary, this Court found by Orders of March 29, 2017, August 23, 2017, and now June 26, 2019, that the undisputed evidence of the record does not support the Commission's finding that the SCDOT lacked adequate notice of the Appellant's work place injury under S.C. Code §42-15-20(a), nor does that evidence support the conclusion that the Appellant failed to establish a reasonable excuse for the lack of more formal notice or that SCDOT was prejudiced by the lack of more formal notice.

Such has been this Court's finding in three separate orders now, irrespective of what standard of review is applied to the evidence of the record.

The facts of the case have been oft repeated, including at length in this Court's Order of June 26, 2019, and they do not bear repetition again here. Similarly, the legal standard that:

... notice is adequate, when there is some knowledge of accompanying facts connecting the injury or illness with the employment, and signifying to a reasonably conscientious supervisor that the case might involve a potential compensation claim.

Etheredge v. Monsanto Co., 349 S.C. 451, 454(Ct. App. 2002)

is also well-established in the law, and not disputed.

The Respondents have variously attempted to cast the legal finding of adequate notice or excuse based on these undisputed facts as a factual finding by the Commission which requires this Court's deference to the Appellant Panel, or to conflate factual determinations on unrelated issues, (such as causation<sup>1</sup>), with the concept of notice.

Those attempts, however, do not change the undisputed facts that the Employer's supervisor and lead men were aware that the Appellant passed out and fell to the ground after pulling a squeegee board during the heat of the day, that he was hospitalized later that day, and that he required neck surgery shortly thereafter.

That knowledge, as a matter of law, was sufficient to make the Employer aware that the case might involve a potential compensation claim alerting them to the need for investigation. Pursuant to Etheredge that was adequate notice as a matter of law. Moreover, the Appellant, on the undisputed facts, established reasonable excuse for not providing more formal notice, given the fact that his lead man and supervisor were present at the time of the fall and were aware that he was in the hospital and required neck surgery. In fact, this was precisely the same excuse the lead man gave for not giving formal notice to his supervisor. When asked why he had not told his supervisor about

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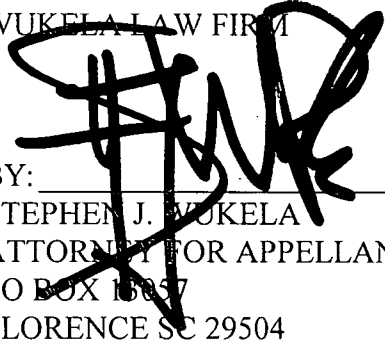
<sup>1</sup>The Single Commissioner found medical causation based, to a large extent, on the testimony of the Claimant's treating physician Dr. Robert Richey. ( App. pp. 124-127). The Appellate Panel reversed the Single Commissioner's award on the issue of notice alone. (App. pp. 159-160). The parties 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 Employer seeks to do here. See Kennedy v. S.C. Pet. Sys., 349 S.C. 531 (2001).

Mr. Nero passing out, the lead man testified “he was right there.” (R. p. 24-28). Moreover, the undisputed evidence is that the Employer suffered no prejudice in its ability to investigate or furnish medical care, given they were aware of Mr. Nero’s treatment by a qualified neurosurgeon very shortly after the accident and Appellant’s supervisors testified at deposition with clarity as to their recollection of the facts. Neither the Employer, nor the Appellant Panel findings, cite any evidence indicating what further investigation the Employer was unable to do because of the absence of more formal notice.

For the foregoing reasons, the Petition for Rehearing should be denied.

Respectfully submitted,

WUKELA LAW FIRM

  
BY: \_\_\_\_\_  
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July 19<sup>th</sup>, 2019

THE STATE OF SOUTH CAROLINA  
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WCC File No. 1222136

Otis Nero, ..... Appellant,


vs.

SC Department of Transportation, Employer,  
and State Accident Fund, Carrier, ..... Respondents.

**PROOF OF SERVICE**

I certify that I have served the Appellant's Return to Respondents' Petition for Rehearing on Respondents by depositing a copy of it in the United States Mail, postage prepaid, on July 19<sup>th</sup>, 2019, addressed to their attorney of record, John Gabriel Coggiola, Esquire, 3600 Forest Drive, Suite 204, Columbia SC, 29204.

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July 19, 2019

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JUL 22 2019

SC Court of Appeals

Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
PO Box 11629  
Columbia SC 29211

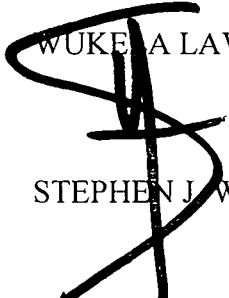
Re: Otis Nero v. South Carolina Department of Transportation, et al  
WCC File No. 1222136  
Appellate Case No. 2015-001277

Dear Ms. Kitchings:

With regard to the above, please find enclosed for filing in your office the original and six (6) copies of Appellant's Return to Respondents' Petition for Rehearing. By copy of this letter, I am serving Respondents' counsel with a copy of this Return.

With kind regards, I am

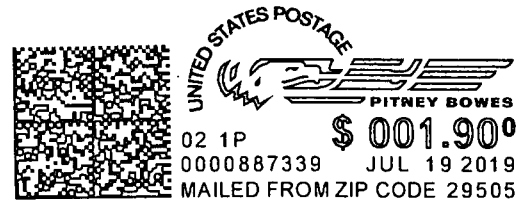
Yours truly,

WUKELA LAW FIRM  
  
STEPHEN J. WUKELA

SJW:jpb

Enclosures

cc: John Gabriel Coggiola, Esquire  
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Columbia SC 29204



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**To:**  
**Honorable Jenny Abbott Kitchings**  
**Clerk, South Carolina Court of Appeals**  
**PO Box 11629**  
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