THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUN 20 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 RESPONDENT

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And
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Attorneys for Respondent

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AS REPHRASED FOR PURPOSES OF ARGUMENT BY PETITIONERS:

I. DID THE COURT OF APPEALS ERR IN ITS INTERPRETATION OF §42-17-90, AND DID IT EVISCERATE THE PROVISION OF ANY APPLICABILITY WHATSOEVER?

   A. DOES THE COURT OF APPEALS INTERPRETATION LEAD TO AN ABSURD RESULT AND/OR AN INEFFECTUAL STATUTORY PROVISION AND IT IS IN ACCORD WITH CANONS OF STATUTORY INTERPRETATION?

   B. DOES THE COURT OF APPEALS INTERPRETATION CONFLICT WITH OR IS IT IN ACCORD WITH ALLEN V. BENSON OUTDOOR ADVERTISING COMPANY, 236 S.C. 22, 112 S.E.2d 722(1960)?

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CONTRA-STATEMENT OF THE CASE

Respondent's Statement of the Case and Statement of Facts in the Court of Appeals is set out hereinafter as Contra-Statements.

To update the Contra-Statement of the Case, when the Return was filed to the Petition for Writ of Certiorari, in this Unpublished Opinion case, Wilson v. Charleston County School District, 419 S.C. 442, 798 S.E. 2d 449 (S.C. App. 2017) was a published Opinion. On April 19, 2018, based on a settlement, per the agreement and request of the parties, the Petition in Wilson for a Writ of Certiorari was dismissed and the Wilson decision was vacated by Order of this Court, Wilson, Respondent v. Charleston County School District, Petitioners, Appellate Case No. 2017-001569, filed April 19, 2018. Also, on April 19th Cert was granted on Question III.

Respondent would submit the following Contra-Statement of the Case initially filed with the Court of Appeals:

Following a Commission Award wherein benefits were paid on November 28, 2012, on May 2, 2013 the Claimant filed a Form 50 filing a claim for both a, "change of condition and undiagnosed condition claim". (R., pp. 51-52). After repeated communications between the parties, as set forth in the Record on Appeal, on July 20, 2014 the Claimant filed a Form 50 requesting a hearing on the change of condition and the

undiagnosed condition claim. (R. pp. 57-60). On August 20, 2014 Defendants filed a Form 51 denying Claimant had sustained a change of condition for the worse; note the 51 contained no affirmative defenses (R., pp. 61-62), (emp. added). A hearing was set for October 21, 2014 and Claimant's Pre-Hearing Brief/ APA Submissions were filed October 6th and the Defendants filed their Pre-Hearing Brief/APA Submissions on October 10th. (R., p. 63; pp. 64-142; pp. 143-173; pp. 223-275). Four and one half (4 ½) months after the hearing, the Commissioner issued a Request for Proposed Order on February 18, 2015. (R., p. 305). A request for both time to review the proposed Order and requesting reconsideration prior to a final Order being issued was filed on March 27, 2015. (R., pp. 296-297). A revised proposed Order, revised as to certain issues, was submitted and that Order was issued on April 1st (R., pp. 16-24). That same day, April 1st, a request for both reconsideration of the revised proposed Order and the Order issued on April 1st was filed with the Commission via email. (R., pp. 301-303). The Commissioner sent an email acknowledging receipt of request for reconsideration of the revised proposed Order that same day, April 1st, (R., p. 304). Thereafter a further Amended Decision and Order was issued by the Hearing Commissioner on April 14, 2015. (R., pp. 25-33).

A Form 30 Request for Commission Review was filed to the Amended Order on April 21, 2015 setting forth the grounds for review. (R., pp. 174-176). Thereafter, the Claimant and Defendants submitted Briefs to the Full Commission. (R., pp. 177-191; pp. 192-199) and a hearing was held by a Full Commission Panel on July 21, 2015 on the Request for Review. (R., pp. 176-295). The Decision and Order of the Full Commission was issued on September 11, 2015 and a Motion and Request for Rehearing to the Order was filed on October 8, 2015. (R., pp. 210-215; p. 200-209). A response to the Motion was filed by the Defendants on October 16, 2015 and a Reply was filed by the Claimant on October 23, 2015. (R., 210-214; pp. 215-217). Thereafter on November 16, 2015, a form order: "Judicial Conference Decision" (? not a Panel Decision) was issued by the Commission listing all Commissioners including the Hearing Commissioner as having considered the Motion for Rehearing, which "dismissed" the request? (R., p. 47).

Notice of Intent to Appeal the final Decisions of the SC Workers' Compensation Commission was timely filed on December 16, 2015 setting forth the Grounds for appeal. (R., pp. 218-222). The South Carolina Court of Appeals issued its Unpublished Opinion reversing and remanding this case to the South Carolina Workers' Compensation Commission due to the error of law committed by the Commission in its decision based on its

published Opinion in Wilson, supra, which in turn was based on this Court's decision in Allen v. Benson Outdoor Advertising Co., 236 S.C. 22, 112 S.E.2d 722 (1960). A Petition for Rehearing was filed and an Order denying the Petition for Rehearing was entered on December 14, 2017. A Petition for Writ of Certiorari was served/filed on January 16, 2018. A Return and Motion to Dismiss based on numerous violations of the Appellate Court Rules were filed. The Motion was denied and certiorari was granted on Question III.

STATEMENT OF FACTS

Following an Award by the Commission, benefits were paid on November 28, 2012. On May 2, 2013, the Claimant filed a Form 50 filing a claim for both a, "**change of condition and undiagnosed condition claim**". Attached to the claim was the opinion of an authorized treating physician, Dr. Emmanuel O. Quaye, who found that Mr. Tucker had undergone a change of condition for the worse and referring him to an orthopaedist, Dr. Christopher Mazoue. In his initial evaluation, in addition to the previous diagnoses and conditions, Dr. Mazoue stated that Mr. Tucker most likely had sustained a brachial plexus injury and possibly cervical spine pathology and recommended electro-diagnostic studies. The claim specifically requested authorization for the recommended medical care. (R., pp. 51-52).

As is set out in the Record, both before and after filing

the claim for a change of condition, the Claimant through his Counsel contacted prior Defense Counsel (hereinafter Ms. Alphin) first on March 18, 2013 and then a second request was made on April 8, 2013 requesting specifically:

> "I would appreciate your thoughts on this case and would appreciate it if you would get with the State Accident Fund and see how they want to proceed." (R., pp. 138-141).

Thereafter, at the direction of Ms. Alphin, Counsel for the Claimant on May 2, 2013, in addition to serving the adjuster with the claim, wrote the assigned claims adjuster, Ms. Robin Oxner-King, requesting medical care. Again, on July 26, 2013 in writing Claimant's Counsel contacted the assigned adjuster, at the direction of Ms. Alphin, and again requested the medical care as found to be necessary pursuant to the medical reports already provided to the Defendants since March of 2013. (R., pp. 136-137).

Thereafter, Mr. Tucker made repeated requests for authorization for medical care or as to how the Defendants wanted to proceed. There was no reply and there is no evidence in the Record of any reply to those requests or communications, as required by Regulation, denying, accepting or offering any further medical care. There being no reply, on July 30, 2014 the Claimant filed for a hearing on the change of condition claim previously filed on May 2, 2013 requesting the medical

care, evaluations and treatment, that was being provided at that time by Dr. Christopher Mazoue and previously by an authorized treating physician, Dr. Quaye, and requesting temporary total weekly compensation as determined by the Commission to be due, and paid until maximum medical improvement. The Request for Hearing requested a hearing on the bases of both a, "**change of condition and undiagnosed condition**". (R., p. 58).

A responsive Form 51 was filed on August 20, 2014 which set out as to the reasons for denial: "Defendants deny the Claimant has sustained a change of condition for the worse." On the Form 51, "Employer's Answer to Request for Hearing", question #11, "Further contentions, **grounds of defense**, or unusual aspects", was left blank. In other words, **no other defenses were listed.** (R., p. 62). (Emphasis added).

Subsequent to the Request for Hearing and the responsive Form 51, this matter came to be heard on October 21, 2014. In his Pre-Hearing Brief, Mr. Tucker specifically noted he was filing both a change of condition and an undiagnosed condition claim. On October 10, 2014, the Defendants filed their Form 58 Pre-Hearing Brief and for the first time alleged a defense of, "whether the claimant timely filed a hearing request for change of condition".

At the hearing, the Defendants asserted the position that the Claimant must both file a claim and file for a hearing

within twelve (12) months after the payment of compensation and the Claimant stated his position that only a "claim", "application" needs to be filed within twelve (12) months and cited as authority, Allen v. Benson Outdoor Advertising Co., 236 S.C. 22, 112 S.E.2d 722 (1960).

Subsequent to the hearing on February 18, 2015, the Commissioner issued his notes for a proposed Order and on March 27, 2015 a proposed Order was forwarded to Counsel for the Claimant. On March 27, 2015, Claimant's Counsel filed both a request for additional time to review (App., p. 299-300) and a Request for Reconsideration (App., p. 301-302) before formal Order: 1) noting specifically that the Defendants had not raised the affirmative defense that the request for a change of condition had not been timely filed; 2) requesting the application of existing case law and requesting a liberal construction of the Act as the Commission is required to do; and 3) requesting a reversal and remand for a de novo hearing based on the violation of the Claimant's due process rights for failure to give him notice of the issues to be heard at the hearing.

The Hearing Commissioner issued an Order on April 1, 2015. Immediately upon receipt of the signed Order on April 1st, Claimant's Counsel objected to the Order and specifically to the Statement of the Case and Defense Counsel's failure to include

any reference in the Statement that to the, "application", (the claim) for a Change of Condition had been filed on May 2, 2013. He specifically objected to the failure of Defense Counsel to refer to his numerous requests for medical care and his attempts to determine the position of the Defendants in reference to the application for a Change of Condition that had occurred between the filing of the "claim" and the date that the Claimant "requested a hearing" on the claim/application for a Change of Condition. He also objected to the inclusion of legal authority not referred to during argument by either party and to the inclusion of a Statement of Evidence of the Case presented at hearing since the Hearing Commissioner's decision was based only on that affirmative defense. Finally, Claimant specifically objected to the failure to include any reference to established precedent that holds that a challenge or defense to timeliness based on a filing of a Change of Condition is an affirmative defense under the Regulations and law that must be pled. An Amended Order was then filed on April 14, 2015. The revised Order struck the Evidence of the Case section; however, the **legal precedents not referred to by either Counsel at argument or in the Record** before the Commissioner were still included in the Order and the Order made no reference as to whether a defense based to timeliness of the filing of a Change of Condition is an affirmative defense. Thereafter the Request for

Review by the Full Commission proceeded in the normal course of procedure and an Order affirming the Hearing Commissioner was issued.

Claimant then filed a Request for Rehearing/Reconsideration as to the Full Commission Decision. In that Request, Claimant specifically noted all of the various statutes, Regulations and precedents that require the Commission to address all issues that are presented to it for review. Claimant specifically noted that the Claimant had raised seven (7) Grounds for Review before the Full Commission, six (6) of which specifically involved errors of law by the hearing Commissioner and specifically that he had failed to comply with the Regulations and statutory law that require Findings of Fact and Conclusions of Law be made on each material issue raised. There was simply no decision made by the Full Commission on Claimant's legal errors. (App. 203-211).

Further in reference to the actual Decision entered by the Full Commission, the Motion before the Commission was a Motion/Petition for Rehearing but the Motion was not heard and decided by the Commission Panel but was submitted to and the decision was made by the Judicial Conference Committee and consisted of a one-page Form Order not denying Rehearing <u>but dismissing</u> the Motion for Rehearing. All seven (7) Commissioners <u>including</u> the original Hearing Commissioner are

listed as having concurred in that Decision. (App., p. 50).

ARGUMENTS

I. AS REPHRASED FOR PURPOSES OF ARGUMENT, THE COURT OF APPEALS DID NOT ERR IN ITS INTERPRETATION OF §42-17-90 AND IT DID NOT EVISCERATE THE STATUTORY PROVISION OF ANY APPLICABILITY WHATSOEVER.

A. THE COURT OF APPEALS INTERPRETATION DOES NOT LEAD TO AN ABSURD RESULT AND/OR AN INEFFECTUAL STATUTORY PROVISION, AND IS IN ACCORD WITH THE CANONS OF STATUTORY INTERPRETATION.

[Note: The first sentence of S.C. Code Ann. 72-359 (1952)] [requiring an "application" and the last sentence] [allowing for no "review" after twelve months from the] [date of the last payment of compensation pursuant to the] [award. ..." and the first and last sentences of S.C.] [Code §42-17-90(A) (1976) are the same. So, if the] [Courts have eviscerated the statute, this Court has been] [eviscerating it since at least 1960.]

This Court should affirm the reasoning of the Court of Appeals in its Unpublished Opinion and should reiterate and restate its opinion in Allen v. Benson Outdoor Advertising Company, 236 S.C. 22, 112 S.E.2d 722 (1960) as reaffirmed by the Court of Appeals Opinion upon which the opinion in this case was based, that being Wilson v. Charleston County School District, 419 S.C. 442, 798 S.E.2d 449 (S.C. App. 2017) (Vacated due to settlement April 19, 2018). Neither this Court's opinion in Allen nor the Court of Appeals opinion in Wilson nor its

unpublished opinion in this case, do anything other than apply the general statutory construction principles applicable to a workers' compensation claim and give a liberal construction to the definition of, "application". Further, the interpretation by this Court in Allen and the Court of Appeals in Wilson and this unpublished opinion are in accord with the general principles of a liberal interpretation in favor of benefits to the injured worker under our Appellate Court Opinions interpreting other tolling statutes such as §42-15-20 (Notice) and the 2-year statute of limitations for filing a, "claim" under §42-15-40. They are also in accord with the intent of the Legislature and the recent statutory additions such as the addendum to the two-year statute of limitations statute S.C. Code §42-15-40 in reference to repetitive trauma injuries wherein the two-year limitation for filing a "claim" does not begin to run until the employee knew or should have known that his injury is compensable but not more than seven-years after the date of last injurious exposure.

First, the Court of Appeals decision in Wilson and the argument made by Respondent before the Court of Appeals on this issue mirror each other and are both simply restatements of this Court's opinion in Allen.

In Wilson, the Court of Appeals did nothing more and nothing less than restate the fundamental construction

principles that this Court applied in Allen and every other case under the Workers' Compensation Act: 1) A liberal construction of the Act in favor of benefits; and 2) since the Act is in derogation of common law rights, its wording is to be strictly construed. The Court of Appeals in Wilson then simply reiterated the holding in Allen that the only thing the statute, now S.C. Code §42-17-90(A), requires is that the, "application" must be filed within twelve (12) months of the last date of the payment of compensation benefits and then held those principles and Allen apply:

> "Although Wilson did not file the subsequent Form 50 requesting a hearing on her change of condition until March 29, 2011, we find her January 6, 2009 Form 50 Notice of Claim alleging a change of condition satisfied the statute's plain and unambiguous requirement that such a claim be filed within the twelve (12) month deadline. ..."

Because the Respondent's argument on this issue also mirrors the decision of the Court of Appeals in Wilson and this Court's decision in Allen which was applied by the Court of Appeals in Wilson, that argument on this issue is set out hereinafter:

The Appellants do not question that the, "claim" for a change of condition was timely filed but argue under their interpretation of the law, not only must a claim be filed but a hearing must be requested. Neither the Statute nor the Commission Rules, nor the prior interpretation of the Statute by the Supreme Court and Court of Appeals require or support this

interruption. The filing of a claim is all that is necessary and the Commission's decision to the contrary is contrary to the law.

The Commission's authority is derived "strictly" from the Act and its provisions which are in derogation of the common law. Price v. Peachtree Electrical Services, Inc., 396 S.C. 403, 721 S.E.2d 461 (SC App. 2011), aff. modified 405 S.C. 455, 748 S.E.2d 229. The Commission must liberally construe the Act in favor of benefits and coverage in order to serve the beneficial purposes of the Act. James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730, reh. den. (2010). This liberal interpretation principle of the wording of the Act in favor of benefits to the injured worker as stated by the Court,

> "workers' compensation law must be resolved in favor of the claimants, its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed towards the end of providing coverage, rather than non-coverage,"

must be applied. Cokely v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941). This liberal interpretation is required to be applied by the Commission to all aspects of the Act including any interpretation of the wording in reference to benefits and any other provisions of the Act. This concept and the application of this fundamental construction principle which is required to be applied by the Commission is nowhere referenced

in any of the Commission Orders. Further, this Court has cautioned the Commission that the Act is required to be, "liberally" construed in favor of benefits and not, "literally" or narrowly construed to deny benefits. Hamm v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940).

This interpretation is also in accordance with the multiple decisions by this Court interpreting other limitations statutes. For example, under §42-15-40, since at least 1947, in the case of Young v. Sunoco Products Company, 210 S.C. 146, 41 S.E.2d 860 (1947), this Court has expanded the time period under the statute of limitations for filing, "a claim" based on equitable principles that the employer or carrier are estopped from taking advantage of the time period for filing, "a claim" where it is delayed based on their conduct. Again, under that Code section, the claimant only needs to file a, "claim" to toll the statute. There is no requirement that they request a hearing.

Interpreting that section in the context of an occupational disease "claim" in Golf v. Mills, 279 S.C. 382, 308 S.E.2d 778 (1983), the Court held the statute did not begin to run until 18-years after the commencement of his occupational disease where he was not definitively diagnosed with an occupational disease until that time. As set out in the Young case and the litany of cases decided by this Court and the Court of Appeals, the purpose of the statute of limitations whether it be under

the two-year statutory period for filing a "claim", again simply filing a "claim", or the filing of an, "application", again an application for a change of condition, is to simply place the employer and its insurance carrier on notice of the, "claim" so that they may investigate it and see whether or not they are simply going to accept it. There is no question Respondent clearly timely filed his application for a change of condition. The only issue is whether or not he was required to also file for a hearing. Under a liberal interpretation, and really any interpretation, the statute does not require that.

Also, as set forth in the Additional Sustaining Grounds not reached by the Court of Appeals, set forth hereinafter, after the filing of a claim, the Claimant was bounced back and forth between the adjuster and the defense attorney as to acceptance of the claim thus delaying the filing of a request for hearing.

B. THE COURT OF APPEALS INTERPRETATION DOES NOT CONFLICT WITH AND IS IN ACCORD WITH THIS COURT'S DECISION IN ALLEN V. BENSON OUTDOOR ADVERTISING COMPANY.

Most respectfully, the assertion and argument that the Court of Appeals reasoning in this case and in Wilson are in conflict with Allen is quite frankly ludicrous. One need only quote from Allen and look at the Court of Appeals interpretation of the word, "application" based on Allen in reference to there being no necessity for filing for a hearing, to prove this. To

let the Allen decision speak for itself, quoting from Allen:

> "Appellants (the insurance carrier in that case) say that the forgoing statutory limitations 'is directed to the Industrial Commission rather than to the parties to the action', and that it is not sufficient for the application for review to be made within one year after the last payment of compensation but the application must be heard by the Commission within that period."
>
> * * *
>
> "We do not agree with Appellant's view. It represents a literal and strict construction of §72-359 when under the well settled Rule a liberal construction is required. To sustain Appellant's contention would lead to a rather unreasonable result clearly not within the intent of our Legislature".

Quoting further from the Allen decision:

> "In Wilkes v. State Compensation Commissioner, supra, the Court said [120 W.Va. 424, 198 S.E. 871]:
>
> 'The filing of a **claim** for further compensation within the Statutory period and partial but not complete development thereof within such period, with loss of jurisdiction by the Commission during the progress of the case, **would be an absurd result which the Legislature certainly did not have in mind** and we feel warranted in holding that the Statute in question should be given a construction which permits the Commissioner to hear and pass upon any application in writing for a further adjustment of a claim, if filed within a statutory period applicable to the nature of the **claim** filed." (emp. added.)

The interpretation argued by the Petitioners would do just that, create an absurd result in contravention of the general liberal construction principles of interpreting the Act in favor

of benefits to the injured worker; and as to expanding tolling statutes where possible and so long as the expansion does not do violence to the law. However, there is no need for expansion here. The Claimant filed his, "application" within twelve (12) months of the last payment of compensation under the Commission's Award. It was supported by an opinion by his family doctor that he had undergone a change of condition for the worse and there is simply no requirement that the Commission hold a hearing within twelve (12) months. Never has been, is not and hopefully never will be.

C. THE COURT OF APPEALS INTERPRETATION DOES NOT CONFLICT WITH REG. 67-602(C).

The Commission under its statutory authority has adopted Regulations to implement the provisions of the Act and under that authority, it has adopted <u>two</u> distinct provisions, one for dealing with the filing of a "<u>claim</u>" and the other dealing with a "<u>request for hearing</u>." (emp. added.)

Regulation 67-206 deals with the filing of any type of, "<u>claim</u>" with the Commission and specifically does not require that a request for hearing be filed at the same time that a, "<u>claim</u>", is filed. (emp. added.) That Regulation also requires that the employer's representative upon the filing of any type of a claim, "shall immediately contact the claimant" in regards to the claim. Thus, setting up a bifurcated process of filing a

"claim"; determining if there is a controversary; and then setting a hearing if there is a, "controversary". Reg. 67-601.

The Commission then adopted separate and distinct Regulations concerning when matters will be set for hearing. In addition to the provisions of the Act and the APA concerning the requirement that there must be issue(s) in controversy or in other words, a, "contested case" for a hearing to be set, Regulation 67-601(B) specifically provides that a hearing will not be set, "until" a conflict arises. Regulation 67-602 deals with the setting of hearings and subsection (C) specifically refers to setting a hearing on,

"**a claim** involving a **change of condition** . . . ."

Therefore, not only are the filing of, "claims" and requests for "hearing" dealt with under separate sections of the Regulations, but based on a clear reading of the Commission's own Regulations, there is no requirement that the request for a hearing must be filed on a change of condition within twelve (12) months; only that a "claim" must be filed. Just because a claim is filed does not mean there is a controversary. Therefore, under the Regulations, a request for "hearing" is separate and distinct from the filing of any, "claim".

In reality under this argument, I.C., Petitioners first argue there is no credible medical evidence to support a claim for a change of condition at the time of hearing and then argue

that Dr. Quaye did not see Mr. Tucker for fifteen (15) months.

First, and something that has been lost in the mist of time, is that the statute does not require medical opinion evidence; only the Commission Regulation does. S.C. Code §42-17-90 only requires proof by a preponderance of the evidence that a change of condition caused by the original injury has occurred within twelve (12) months of the last payment of compensation.

Regardless, an authorized physician, Dr. Emmanuel Quaye issued his opinion stated to a reasonable degree of medical certainty within twelve (12) months of the last payment of compensation to Mr. Tucker and he meet both his statutory and regulation burden of proof.

The argument concerning Dr. Quaye and the allegation that he had not seen the Claimant for fifteen (15) months is absurd and not supported by the Record. There is simply nothing in the Record to substantiate that assertion. Dr. Quaye's report of April 13th is set out verbatim. Quoting from p. 74 of the Appendix Record.

> "I have reviewed my original report recommending a referral of Mr. Tucker to Dr. Mazoue which I issued on 1/10/2012. I have reviewed my treatment records of Mr. Tucker **since that time** and my recent referral of him to Dr. Christopher Mazoue and I have reviewed Dr. Mazoue's report. Based on that review, it is my opinion to a reasonable degree of medical certainty that Mr. Tucker's **condition has worsened since January, 2012 when I recommended** that he be referred to Dr. Mazoue for evaluation and treatment of his shoulder." (emp. added.)

There is no contradictory evidence in the Record to the fact that Dr. Quaye continued to treat his patient and had seen his patient repeatedly after January of 2012.

Since this argument, at most, actually only goes to the weight of the evidence from Dr. Quaye, (in addition to the fact that there is no evidence contradicting Dr. Quaye's statement that he had reviewed his treatment records, "since January of 2012"), the records of Dr. Mazoue support Dr. Quaye's statement when he first saw Mr. Tucker on February 20, 2013 wherein he stated that, "he was referred here by Dr. Quaye."; and then by Dr. Quaye's subsequent statement on April 15th that based on, "my recent referral of him to Dr. Mazoue, and I have reviewed Dr. Mazoue's report." App. p. 84; and that he needs, "additional medical care". (App., p. 77). The argument and insinuation that Dr. Quaye had not seen the patient for fifteen (15) months is both factually and legally frivolous as is the argument that Mr. Tucker and the medical opinion evidence from Drs. Quaye and Mazoue did not meet his statutory and/or regulatory burden of proof.

II. ADDITIONAL SUSTAINING GROUNDS, THIS COURT SHOULD AFFIRM THE DECISION OF THE COURT OF APPEALS BASED ON SCACR RULE 220(c).

As is noted from the Court of Appeals Opinion, the Court made its decision based on an error of law, and as the Court of

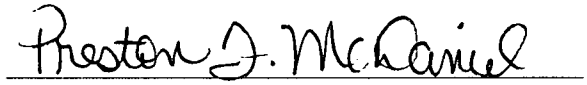
Appeals stated in its Opinion, because it found the Commission had made an error of law by denying the Claimant's application for a change of condition on the basis that it had not been timely filed and the Court of Appeals reversed and remanded to the Commission for a decision on the merits and declined or did not address Mr. Tucker's remaining issues on appeal. SCACR Rule 220(c) Affirmance on Any Ground Appearing in Record, allows this Court or an Appellate Court to affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal. The Respondent would submit as Additional Sustaining Grounds, that the Court should affirm the Court of Appeals on the basis of the remaining issues as presented by Respondent to, but not reached by, the Court of Appeals.

CONCLUSION

For all the foregoing reasons, the Court should enter a decision affirming the decision of the Court of Appeals and should reaffirm its decision in Allen v. Benson Outdoor Advertising Co., supra, due to the fact that the well-reasoned decision of the Court of Appeals in Wilson v. Charleston County School District was vacated due to the settlement of that case. The law is and has been settled in this area for over 58 years (Allen filed 2/10/60) and simply needs to be restated as unfortunately must be done every so often. In the alternative, if the Court decides to issue a new opinion or change its

opinion in reference to S.C. Code §42-17-90 for the reasons as set forth in the Additional Sustaining Grounds which should not be reached but if they are, the Court should affirm the decision of the Court of Appeals and reverse the decision of the Commission for the reasons set forth therein.

Respectfully submitted,



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and State Accident Fund, Carrier,.....Petitioners.

PROOF OF SERVICE

I certify that I have served the **BRIEF OF RESPONDENT** on the Petitioners by depositing a copy of it in the United States Mail, postage prepaid, on June 18, 2018, addressed to its attorneys of record:

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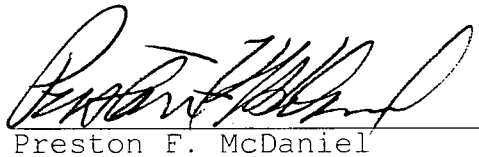

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June 20, 2018