

RECEIVED

May 17 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Kenneth L. Barr, Claimant, Appellant,

v.

Darlington County School District, Employer, and
S.C. School Boards Insurance Trust, Carrier, Respondents.

Appellate Case No. 2018-001237

Appeal From The Workers' Compensation Commission

Opinion No. 5815 Heard February 2, 2021 – Filed April 7, 2021

BRIEF OF AMICUS CURIAE INJURED WORKERS ADVOCATES

Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelsreynolds.com

Attorney for Amicus Curiae
Injured Workers' Advocates

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL..... 1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS3

STANDARD OF REVIEW7

ARGUMENT8

 1.8

 A.9

 B.13

CONCLUSION..... 19

CERTIFICATE OF COUNSEL20

TABLE OF AUTHORITIES

CASES

<u>Brown v. Bi-Lo.,</u> 354 S.C. 436, 581 S.E.2d 836 (2003)	4-5, 9
<u>City of Columbia v. American Civil Liberties Union,</u> 323 S.C. 384, 475 S.E.2d 747 (1996)	9
<u>Cokeley v. Robert Lee, Inc.,</u> 197 S.C. 157, 14 S.E.2d 889 (1941)	2
<u>Hodges v. Rainey,</u> 341 S.C. 79, 533 S.E.2d 578 (2000)	2
<u>Hudson v. Lancaster Convalescent Ctr.,</u> 407 S.C. 112, 754 S.E.2d 486 (2014)	7
<u>James v. Anne's Inc.,</u> 390 S.C. 188, 701 S.E.2d 730 (2010)	2
<u>Joiner v. Rivas,</u> 342 S.C. 102, 536 S.E.2d 372 (2000)	2
<u>Liberty Mut. Ins. Co. v. S. C. Second Injury Fund,</u> 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005)	3
<u>Martin v. Rapid Plumbing,</u> 631 S.E.2d 547, 369 S.C. 278 (Ct. App. 2006)	7
<u>Muskego-Norway Consolidated Schools v. Wisconsin Employment Relations Board,</u> 32 Wis.2d 478, 145 N.W.2d 680 (1966)	7-8
<u>State v. Copeland,</u> 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996)	8
<u>Strother v. Lexington County Recreation Comm'n,</u> 332 S.C. 54, 504 S.E.2d 117 (1998)	2
<u>TNS Mills, Inc. v. South Carolina Dep't of Revenue,</u> 331 S.C. 611, 503 S.E.2d 471 (1998)	2

STATUTES

S.C. Code Ann. § 42-15-60 (2007)	6 n.4
S.C. Code Ann. § 42-15-80 (2007)	3, 6 n.4, 7
S.C. Code Ann. § 42-15-95 (2007)	<i>passim</i>

REGULATIONS

S.C. Code Reg. 67-1308 (2010)	6 N.5
-------------------------------	-------

STATEMENT OF ISSUE ON APPEAL

1. Whether the Court of Appeals erred in holding that, when a violation of § 42-15-95's prohibition on *ex parte* communication occurs between an employer and a health care provider engaged to provide examination or treatment, the Commission has discretion to admit such tainted evidence even though the statute provides "Any discussions, communications, medical reports, or opinions obtained in violation of this section must be excluded from any proceedings under the provisions of this title."

STATEMENT OF THE CASE

Injured Workers' Advocates

Injured Workers Advocates (IWA) is a nonprofit association of attorneys dedicated to protecting and advancing the rights and legal remedies for South Carolina workers who are victims of occupational injury or disease. IWA works to achieve these goals by advocating for the rights of the injured worker through education, litigation, and communication concerning goals and issues important to the protection of workers' rights in the state of South Carolina.

IWA moves for leave to appear as Amicus Curiae in this case pursuant to Rule 213, SCACR. IWA would submit to the Court that this case presents a novel and significant question of law regarding a key provision in the Workers' Compensation Act designed to promote open communication and fair dealing among injured workers, employers and medical providers. The decision of the Court of Appeals is contrary to the intent of the Legislature.

Procedural History.

Injured Workers' Advocates adopts the Statement of the Case and Statement of the Facts as set forth in the Brief of Respondent David B. Lemon. IWA files this brief specifically to address a single issue generated by the Court's Opinion filed on April 7, 2021.

STANDARD OF REVIEW

An appellate court has the power upon review to reverse or modify a decision of an administrative agency if the findings and conclusions of the agency are (1) affected by an error of law, (2) clearly erroneous in view of the reliable and substantial evidence on the whole record, or (3) arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion. James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010).

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998). If a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). It is well-settled that statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result. Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000).

Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue and obtain compensation is taken away, and such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted, and to avoid any incongruous or harsh results. Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941).

ARGUMENT

1. The Court's holding on the application of § 42-15-95 renders the mandatory exclusion language of the statute meaningless and ineffective.

In this appeal, the Court was asked to interpret § 42-15-95's requirement that "Any discussions, communications, medical reports, or opinions obtained in violation of this section must be excluded from any proceedings under the provisions of this title." S.C. Code Ann. § 42-15-95(C)(2007). Even though the Court acknowledged a violation had occurred, it nonetheless affirmed the Commission's admission of Dr. Pritchard's report into evidence. Barr v. Darlington County School District, Op. No. 5815 (S.C. Ct. App, Filed April 7, 2021) (Shearouse Adv. Sh. No. 12 at 17).

IWA contends that not only did the Commission and Court make an error of law in allowing Dr. Pritchard's report into evidence, but the Court's analysis renders the statute meaningless and ineffective. See Liberty Mut. Ins. Co. v. S. C. Second Injury Fund, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005) (noting a statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers). To understand why, one must consider the ill the legislature was trying to remedy and the carefully crafted solution it enacted to balance the interests of both employees and employers.

The Act has long included a provision whereby an employer can compel an injured worker to "submit himself to examination, at reasonable times and places, by a qualified physician or surgeon designated and paid by the employer or the commission."¹ S.C. Code Ann. § 42-15-80(A)(2007). The employer has this authority even in a denied case. The penalty for refusing is mandatory suspension of compensation and the right to proceed with the case:

¹This identical language appears in the pre-2007 version of § 42-15-80.

If the employee refuses to submit himself to or in any way obstructs the examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute a proceeding under this title must be suspended until the refusal or objection ceases and compensation is not payable at any time for the period of suspension unless in the opinion of the commission the circumstances justify the refusal or obstruction. Id.

Prior to the 2007 rewrite of § 42-15-95, communication between medical providers and employers² was limited to existing records. Nevertheless, employers would routinely engage in *ex parte* communication with medical providers – not merely to coordinate treatment, but also to influence and obtain opinions favorable to the employer’s interests.

The South Carolina Supreme Court addressed the issue in Brown v. Bi-Lo., 354 S.C. 436, 581 S.E.2d 836 (2003).³ In Brown, “a question arose whether medical treatment sought by Employee for subsequent falls was related to the work injury and, thus, whether Employer was required to pay for the medical treatment.” The employer hired a rehabilitation nurse to contact the employee’s treating physicians “regarding the nature of her condition and the cause of her falls.” The employee’s counsel objected, writing to the nurse asking her to cease and desist, and to the doctors advising them not to engage in *ex parte* communication with the employer and carrier.

The employer requested a hearing on the matter. The Commission ordered the employee’s attorney to “cease and desist from obstructing contact, including contact involving *ex parte* communications, meetings, correspondence, and/or answering questions in written and oral form,

²The reference to *employers* should be understood to include insurance adjusters, nurse case managers and insurance defense attorneys.

³The issues in Brown were significant enough to warrant amicus briefs from the South Carolina Trial Lawyers’ Association (now the South Carolina Association for Justice), the South Carolina Self-Insurers’ Association, and the South Carolina Defense Trial Attorneys’ Association, Inc.

between the treating physician and the defendant's representatives." Brown v. Bi-Lo., 354 S.C. 436, 581 S.E.2d 836 (2003)

The employee appealed. This Court affirmed. The South Carolina Supreme Court reversed. While agreeing that permitting employers to communicate "directly with physicians may, in some instances, promote 'sure and swift compensation,'" the Supreme Court held the statute must be strictly construed to prohibit *ex parte* communication. The court reasoned that section 42-15-95 limited direct contact to disclosure of existing written medical records and documents. "The statute does not authorize other '*ex parte*' methods of communication between an insurance carrier, employer, or their representatives and the claimant's health care provider." Id. Thus, if the employer wanted to write or speak directly with a doctor, it would have to take a deposition or obtain the employee's consent.

The Brown decision was addressed in the 2007 amendments to the Act. The legislature sought to craft legislation balancing the disparate interests of injured workers and employers. Injured workers needed protection from behind the scenes *ex parte* communication with medical providers by employers, adjusters, rehabilitation nurses and defense attorneys seeking to deny or limit treatment and compensation. Employers needed the ability to swiftly expedite communication with medical providers to coordinate evaluations and treatment without the need for expensive and time consuming depositions.

The legislature crafted an elegant solution favoring openness and transparency. The amended statute provides:

A health care provider who provides *examination or treatment* for any injury,⁴ disease, or condition for which compensation is sought under the provisions of this title may discuss or communicate an employee's medical history, diagnosis, causation, course of treatment, prognosis, work restrictions, and impairments with the insurance carrier, employer, their respective attorneys or certified rehabilitation professionals, or the commission without the employee's consent.

S.C. Code Ann. § 42-15-95 (B)(2007).

This provision allows the employer to communicate directly with any health care provider without the employee's consent. At first blush, the provision would seem to allow the *ex parte* communication Employer engaged in with Dr. Pritchard prior to the examination. In reality, it is not that simple.

The Legislature further provided that the employee “**must be**”

(1) notified by the employer, carrier, or its representative requesting the discussion or communication with the health care provider in a timely fashion,⁵ in writing or orally, of the discussion or communication and may attend and participate. This *notification must occur prior to the actual discussion or communication* if the health care provider knows the discussion or communication will occur in the near future;

(2) advised by the employer, carrier, or its representative requesting the discussion or communication with the health care provider of the nature of the discussion or communication prior to the discussion or communication; and

(3) provided with a copy of the written questions at the same time the questions are submitted to the health care provider. The employee also must be provided with a copy of the response by the health care provider.

S.C. Code Ann. § 42-15-95 (B)(2007)(emphasis added).

⁴The Legislature's use of the terms “*examination or treatment*” separated by “*or*” confirms that section 42-15-95 applies equally to compulsory medical examinations under section 42-15-80 and to compulsory medical treatment under section 42-15-60. S.C. Code Ann. § 42-15-95 (A)(2007).

⁵The Commission enacted regulations providing that the claimant **must** receive the notification “in a timely fashion, but *no less than ten days* notice unless the parties agree otherwise. S.C. Code Reg. 67-1308 B (1)(2010)(emphasis added).

There is no question the required notification was not provided to Appellant in the instant case. This Court held “we acknowledge Employer failed to communicate with Employee pursuant to section 42-15-95(B) . . .” Barr v. Darlington County School District, Op. No. 5815 (S.C. Ct. App, Filed April 7, 2021) (Shearouse Adv. Sh. No. 12 at 30). Nonetheless, the Court affirmed the admission of Dr. Pritchard’s report, reasoning there was no prejudice to the Employee because he “agreed to the examination by Dr. Pritchard, participated in the deposition of Dr. Pritchard, and received the report of Dr. Pritchard seven months before the rescheduled hearing date.” Id.

This ruling puts an injured worker in an untenable position. The employee *cannot* refuse to “submit himself to examination . . .” on pain of having his right to prosecute the case suspended. S.C. Code Ann. § 42-15-80(A)(2007). By the same token, he would be foolish not to participate in the deposition of Dr. Pritchard in the event the Commission allowed the report into evidence.

On this point the statute is specific: “Any discussions, communications, medical reports, or opinions obtained in violation of this section **must be excluded** from any proceedings under the provisions of this title.” S.C. Code Ann. § 42-15-95 (C)(2007)(emphasis added). Once the violation has been found to have occurred – as the Court did – all evidence obtained in violation **must be excluded** from the case. This language is mandatory. The Commission has no discretion to engage in a prejudice analysis or otherwise admit the tainted evidence. See Hudson v. Lancaster Convalescent Ctr., 407 S.C. 112, 754 S.E.2d 486 (2014)(when statute uses mandatory language “Appellate Panel abused its discretion in removing the ten-percent penalty.”); Martin v. Rapid Plumbing, 631 S.E.2d 547, 369 S.C. 278 (Ct. App. 2006)(when statute uses mandatory language, “[t]he 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.”); Muskego-Norway Consolidated Schools v.

Wisconsin Employment Relations Board, 32 Wis.2d 478, 145 N.W.2d 680, 683 (1966)(“Generally, a mandatory provision must be strictly complied with and there is no discretion in the agency or public official.”).

The statutory language mirrors that of the “fruit of the poisonous tree” cases in criminal law. When a statutory violation occurs, the tainted evidence must be excluded as a matter of law. See, e.g., State v. Copeland, 321 S.C. 318, 323, 468 S.E.2d 620, 624 (1996) (providing evidence generally *must be excluded* as “fruit of the poisonous tree” if it would not have come to light but for illegal police action)(emphasis added). When the government obtains evidence illegally in a criminal case, that evidence must be excluded even though it means a guilty person will go unpunished. We as a society have determined that questions of due process and fundamental fairness outweigh the societal interest in punishing the guilty.

Similar considerations apply here. The amended statute is based on open and honest disclosure, balancing the employer’s need to coordinate treatment and evaluations with the employee’s right to participate in his care and ensure his doctors remained neutral and objective.

All the employer has to do is comply with the statute. Compliance is simple – one merely need copy the claimant or his attorney on all communication with any health care provider engaged to provide examination or treatment. This is not an onerous burden, yet in the instant case the Employer chose to disregard the statutory requirements.

The provision mandating exclusion is not meant to be punitive. It is merely the method of enforcing the Legislature’s prohibition on *ex parte* communication between a medical provider and the employer. The violation cannot be cured by the employee’s submission to the examination, participation in a deposition or any other means (short of explicitly consenting to the admission of

the evidence).⁶ Once the violation occurs, the evidence is irrevocably tainted and “must be excluded from any proceedings under the’ Workers’ Compensation Act.” S.C. Code Ann. § 42-15-95 (C)(2007).

The Court’s decision removes the enforcement mechanism from section 42-15-95 and gives the Commission discretion it does not have under the statute. Respectfully, this is a misreading of the statute which entirely frustrates the Legislature’s plainly stated intent. When the language of a statute is “plain and unambiguous, and conveys a clear and definite meaning,” there is no need to employ rules of statutory construction, and an appellate court “has no right to look for or impose another meaning.” City of Columbia v. American Civil Liberties Union, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996). “This Court cannot construe a statute without regard to its plain and ordinary meaning, and may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope.” Id. at 388, 475 S.E.2d at 749.

IWA asks the Court to reconsider and reverse its opinion on the application of § 42-15-95. Although a change of opinion may not change the result of the instant case, the opinion as currently written will have far-reaching implications on current and future cases pending before the Commission. Allowing the current opinion to stand will bring back the rampant abuse addressed by Brown and eliminate the protections for both parties enacted by the Legislature.

⁶An objection to tainted evidence cannot be made until it is offered into evidence at a hearing before a commissioner. The employee opposing the evidence cannot refuse to submit to the examination nor waive cross-examination of the medical provider without risking adverse consequences in the event a commissioner (rightly or wrongly) admits the tainted evidence into the record.

CONCLUSION

For the foregoing reasons, IWA respectfully requests that the Court reconsider and reverse its holding as to the application and interpretation of § 42-15-95, specifically holding that the mandatory exclusion provision of tainted evidence must be scrupulously followed by the Commission.

Respectfully Submitted,



Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelsreynolds.com

Attorney for Amicus Curiae
Injured Workers' Advocates

Columbia, South Carolina
May 17, 2021

RECEIVED

May 17 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No. 2018-001237

Kenneth L. Barr, Claimant, Appellant,

v.

Darlington County School District, Employer,
and S.C. School Boards Insurance Trust, Carrier, Respondents.

PROOF OF SERVICE

I certify that I, Wanda Powell, Paralegal for the Samuels Reynolds Law Firm, LLC, have served the **Motion of Amicus Curiae Injured Workers' Advocates for Leave to File Amicus Brief** and **Brief of Amicus Curiae Injured Workers' Advocates** upon counsel for the parties and the South Carolina Workers' Compensation Commission by depositing a copy of it in the United States Mail, postage prepaid, on May 17, 2021 and Via Email, addressed as follows:

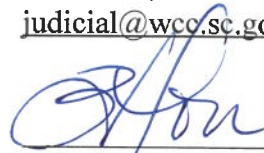
Kirsten L. Barr, Esquire
Trask & Howell, LLC
PO Box 2167
Mt. Pleasant, South Carolina 29465
kbarr@trask-howell.com
ATTORNEY FOR RESPONDENTS

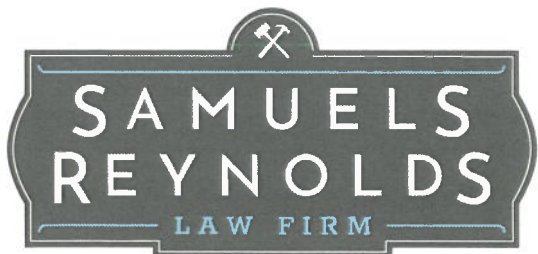
Preston F. McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201
preston@pfmcdlaw.com
ATTORNEY FOR APPELLANT

Gerald Malloy, Esquire
Malloy Law Firm
PO Box 1200
Hartsville, South Carolina 29551
gmalloy@bellsouth.net
ATTORNEY FOR APPELLANT

Amy Bracy, Judicial Director
SC Workers' Compensation Commission
PO Box 1715
Columbia, South Carolina 29202-1715
judicial@wcc.sc.gov

May 17, 2021
Columbia, South Carolina


Wanda Powell, Paralegal



STEPHEN B. SAMUELS
P. JASON REYNOLDS
ATTORNEYS AT LAW

May 17, 2021

RECEIVED
May 17 2021
SC Court of Appeals

Via Hand Delivery

Via email: ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Kenneth L. Barr v. Darlington County School District
Appellate Case No.: 2018-001237

Dear Ms. Kitchings:

Enclosed for filing please find attached our **Motion Of Amicus Curiae Injured Workers' Advocates For Leave To File Amicus Brief** in the above-referenced appeal along with our firm's check in the amount of Fifty Dollars (\$50.00) Dollars as payment of the required filing fee for the motion.

By copy of this letter and enclosure(s), we are serving a copy of our **Motion Of Amicus Curiae Injured Workers' Advocates For Leave To File Amicus Brief** and **Brief Of Amicus Curiae Injured Workers' Advocates** upon the counsel of record in this matter as indicated by the attached Affidavit of Service.

Thank you for your consideration in this matter. Please contact us with any questions or if further information is needed from our office.

With kindest regards, I am

Yours very truly,

A handwritten signature in blue ink, appearing to read "SBS", is written over a horizontal line.

Stephen B. Samuels

SBS/wp

Enclosure (s)

cc w/encl.: Kirsten L. Barr, Esquire
Gerald Malloy, Esquire
Preston F. McDaniel, Esquire

Amy Bracy, SC Workers' Compensation Commission
WE WORK FOR THE PEOPLE WHO WORK