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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. 2022-000409

SCWCC FILE NO. 1602438

Randy Jordan, Employee, Respondent,

v.

S. C. Department of Transportation, Employer, and State Accident Fund, Carrier, Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission.

The instant case was heard by the Single Commissioner on March 2, 2021. The Claimant's initial injuries were accepted, and the carrier provided all necessary causally related medical treatment. All parties agreed that the Claimant reached maximum medical improvement, settling the case *via* Form 16A on September 7, 2018. ROA ; Form 16A. The Form 16A cites the Form 14B Physicians' Statement dated July 11, 2017, showing no additional medical treatment was ordered by the Claimant's authorized treating providers. *Id*. On September 18, 2018, Commissioner Melody James issued an Order confirming what medical treatment Defendants would be responsible for going forward, and also specifically laying out a deadline and terms for filing a change of condition claim with the Commission. ROA; 9/18/18 Order. That order was not appealed.

On August 9, 2020, Claimant filed a Form 50, alleging a change of condition for the worse and seeking additional medical treatment and benefits. ROA ; 8/9/2020 Form 50. However, prior to the scheduled hearing, Claimant withdrew the hearing request. On September 30, 2019, Claimant asked that the Commission return the claim to General Files. ROA . General Files is where files without any pending action are stored. Thus, Claimant chose not to adjudicate his change of condition claim at that time, and all the claim sat stagnant.[1]

[1] There is no mechanism under the South Carolina Workers' Compensation Act allowing Defendants to seek a hearing where Claimant is not pursuing his claim, as happened here, and the Commission would not have entertained a Form

Without any adjudication of the change of condition claim, Claimant treated on his own with various providers including Dr. Jason O'Dell, Dr. Bruce Johnson, and Dr. William James Edwards without authorization from the carrier. ROA ; Claimant's APA pp. 211 – 313.

Some four hundred and thirty-eight (438) after Claimant withdrew his Form 50 Hearing Request, Claimant then filed a new Form 50, Requesting a Hearing. ROA ; 12/11/2020 Form 50. This filing was made on December 11, 2020. *Id*.

The Single Commissioner issued his Decision and Order on June 1, 2021. ROA ; 6/1/21 Order. The claim for a change of condition was denied because of a number or reasons, including Claimant's withdrawal of his hearing request, his failure to seek treatment through Defendants prior to the expiration of one (1) year, *res judicata*, and *laches*. ROA ; 6/1/21 Order. Claimant timely appealed. ROA ; Claimant's Form 30, dated June 9, 2021.

Though not noted in the Appellate Panel Order, the matter was heard by the Appellate Panel of the Full Commission on November 23, 2021. ROA ; Appellate Panel Order as a whole; Form 31. The Appellate Panel issued its Order on March 2, 2021. ROA ; Appellate Panel Order p. 1. The Appellate reversed the Single Commissioner's Findings and determined that Claimant had suffered a compensable change of condition. ROA ; Appellate Panel Order.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act sets forth the standard for judicial review of decisions of the Workers' Compensation Commission. *Lark v. Bi-Lo, Inc*., 276 S.C. 130, 276 S.E.2d 304 (1981); *Hargrove v. Titan Textile Co*., 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). Pursuant to this scope of review, the Court may not substitute its judgment for that of the appellate panel as to the weight of the evidence on questions of fact. *Gadson v. Mikasa*

21 seeking to compel Claimant to litigate his change of condition of claim when there was no Form 50 hearing request pending. *See Labouser v. Harleysville Mut. Ins. Co.*, 302 S.C. 540, 397 S.E.2d 526 (1990).

Corp., 364 S.C. 214, 221, 628 S.E.2d 262 (2006); *Grant v. Grant Textiles*, 361 S.C. 188, 603 S.E.2d 858 (Ct. App. 2004). Substantial evidence is described as, "not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached." *Pratt v. Morris Roofing, Inc.*, 357 S.C. 619, 622, 594 S.E.2d 727 (2004). Where the issue is jurisdictional, including whether the Court and Commission has subject matter to hear the case, the question is one of law. *Gray v. Club Group, Ltd.*, 339 S.C. 173, 183, 528 S.E.2d 435, 440 (Ct.App. 2000). On issues of law, "this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 216, 661 S.E.2d 395, 399 (Ct. App. 2008).

STATEMENT OF FACTS

This case was settled *via* Form 16A on September 7, 2018. ROA ; Form 16A. On September 18, 2018, Commissioner Melody James issued an Order confirming what medical treatment Defendants would be responsible for going forward, and also specifically laying out a deadline and terms for filing a change of condition claim with the Commission. ROA ; 9/18/18 Order. That order was not appealed.

Claimant filed a Form 50 on August 9, 2019, alleging a change of condition for the worse and seeking additional medical treatment and benefits. ROA ; 8/9/2020 Form 50. Claimant withdrew the hearing request on September 30, 2019, asking the Commission to return the claim to General Files. ROA . Accordingly, Claimant chose not to adjudicate his change of condition claim. The withdrawal of the Hearing Request took place just weeks prior to a scheduled hearing, about which time Claimant's Pre-Hearing Brief and APA Submissions were due. S.C. Code Reg.

67-611.

Over a year later, or four hundred and thirty-eight (438) after Claimant withdrew his Form 50, he filed a new Form 50, Requesting a Hearing, on December 11, 2020. ROA ; 12/11/2020 Form 50. There is no mechanism under the South Carolina Workers' Compensation Act allowing Defendants to seek a hearing where Claimant is not pursuing his claim, as happened here, and the Commission would not have entertained a Form 21 seeking to compel Claimant to litigate his change of condition of claim when there was no Form 50 hearing request pending. *Labouser v. Harleysville Mut. Ins. Co.*, 302 S.C. 540, 397 S.E.2d 526 (1990).

Only after Claimant withdrew his Form 50 did he set the deposition of Dr. O'Dell, in what amounts to his first attempts to obtain the necessary evidence presented to the Commission to prove a change of condition. Dr. O'Dell's deposition was taken on December 3, 2020, a little over one (1) week prior to the filing of the second Form 50. ROA ; Claimant's APA pp. 320. It was during this deposition that Claimant finally sought to obtain evidence to support his contention.

ARGUMENT

WHETHER THE COMMISSION ERRED IN DETERMINING THAT CLAIMANT SUFFERED A CAHNGE OF CONDITION UNDER S.C. CODE ANN. § 42-17-90?

A. Claimant Failed to Prove a Change of Condition per § 42-17-90.

The Appellate Panel determined that Claimant suffered compensable changes of condition for the worse to his left leg (ankle) and lumbar and cervical spine. ROA ; Appellate Panel Order, p. 27. Appellants assert this is both an error of law and fact. Even if the matter were properly before the Commission (which is discussed, *infra*), the Claimant failed to prove that his worsening condition originated after the last payment of compensation. In fact, the evidence shows that any worsening of Claimant's ankle condition occurred prior to the last payment of compensation, and

any worsening of the Claimant's back conditions occurred well over a year after the last payment of compensation.

The burden of proof in establishing a claim for a change of condition is upon the Claimant. *See Robbins v. Walgreens and Broadspire Services, Inc*., 375 S.C. 259, 652 S.E.2d 90 (Ct.App. 2007). Though this issue was fully briefed and argued before the Appellate Panel of the Full Commission, the Appellate Panel Order below fails to address this argument in any way other than the Panel's conclusory resolution that the Claimant suffered a change of condition.

S.C. Code Ann. §42-17-90 requires that the Claimant prove that the "change of condition [was] caused by the original injury, after the last payment of compensation." S.C. Code Ann. § 42-17-90(A). Claimant failed to prove that the onset of the alleged changes came about after the last payment of compensation. "A change in condition occurs when the claimant experiences a change in physical condition as a result of her original injury, *occurring after the first award*." *Gattis v. Murrells Inlet VFW No. 10420*, 353 S.C. 100, 109, 576 S.E.2d 191, 196 (Ct. App. 2003) (emphasis added). "Under section 42-17-90, the review is 'sharply restricted to the question of extent of improvement or worsening of the injury on which the original award was based.' *Owenby v. Owens Corning Fiberglas*, 313 S.C. 181, 183, 437 S.E.2d 130, 132 (Ct. App. 1993) (citing *Krell v. South Carolina State Hwy. Dept.,* 237 S.C. 584, 588-89, 118 S.E.2d 322, 324 (1961) *citing Cromer v. Newberry Cotton Mills,* 201 S.C. 349, 23 S.E.2d 19 (1942)).

The only reference in the record as to the timing of the onset of the alleged changes (outside of the medical records, which show that the worsening was going on since the original injuries) appears in Dr. O'Dell's deposition. Record as a whole. However, Dr. O'Dell's opinion on this matter was vague. ROA ; Claimant's APA 21, p. 19, lines 19 – 22. As noted in the Full Commission Order, Dr. O'Dell opined that the alleged changes to Claimant's ankle came about

sometime "after [Claimant was] released by Dr. Daily." ROA ; Appellate Panel Order, pp. 5 and 15. Claimant was released by Dr. Daily on June 29, 2017. ROA ; Claimant's APA p. 66. This was well before the last payment of compensation, which was made during the next year.

Claimant's first medical record following the settlement and last payment of compensation, is a June 18, 2019, note from Dr. O'Dell that reads, "[Claimant] states his ankle has been progressively getting worse *since the time of his initial injury*." ROA ; Claimant's APA p. 211 (emphasis added). This record is referenced in the Appellate Panel's Order at page 14 as support for the change of condition claim. ROA ; Appellate Panel Order p. 14. However, there is no reference to the statement quoted above. ROA ; Appellate Panel Order. In July of 2019, Claimant returned to Dr. O'Dell, and his complaints were the same as they were in June: "He states his symptoms are the same as they were at his last visit. His pain is more severe in the morning, related to start up pain. *He states this has been going on since his injury in 2016*." ROA ; Claimant's APA p. 218. Thus, Dr. O'Dell's notes show that the onset of the onset of the worsening was prior to the last payment of compensation.

The Appellate Panel directly relates all of the Claimant's claimed changes of condition to the left ankle: "As the condition of Claimant's left ankle worsened, the record reflects that the Claimant began developing increasing pain in his right hip and his low back as a result of the altered gait." ROA ; Appellate Panel Order p. 15. However, after the settlement, the first medical record referencing the right hip does not appear until November 21, 2019. ROA : Claimant's APA pp. 222 – 224. Again, the Form 16A was entered into on September 7, 2018. ROA ; Form 16A. This is over a year after the last payment of compensation. Further, after the settlement, the first medical record referencing low back pain is from January 16, 2020, again well after a year since the last payment of compensation. ROA ; Claimant's APA p. 225.

The Appellate Panel's Order noted that "Dr. Edwards did see the Claimant again on June 16, 2020, this time concerned about the worsening pain he was having in his cervical spine (also an admitted body part) and the radicular symptoms he was complaining of in his right upper extremity." ROA ; Appellate Panel Order p. 15. This is the first reference to potentially worsening cervical spine pain on June 16, 2020, it occurs one (1) year, nine (9) months, and nine (9) days after the last payment of compensation. ROA ; Claimant's APA Submission pp. 262 – 264. There is no evidence in the record relating the purported cervical worsening to Claimant's altered gait. Dr. Edwards noted Claimant's gait as "normal." ROA ; Claimant's APA p. 263. In fact, Dr. Edwards notes that the condition "started spontaneously". ROA ; Claimant's APA p. 262. Further, when Claimant saw Dr. Edwards relative to low back pain (and no complaints of cervical pain) just five (5) days earlier, Dr. Edwards noted that Claimant's "[g]ait [was] non-antalgic." ROA ; Claimant's APA p. 257.

Claimant did not treat for any other body part other than his left ankle prior to the expiration of the year following both the Form 16A and the Order of Commissioner James, outlining Claimant's timeline for filing a change of condition. Record as a whole. Therefore, the only worsening that could objectively could have occurred within that year was any worsening to the left ankle, which Dr. O'Dell notes to have begun well sooner.

Thus, there was no change of condition that developed within one year of the last payment of compensation. Claimant and the Appellate Panel blame the alleged worsening condition of multiple body parts on the condition of the ankle and alleged altered gait ("the record reflects that the Claimant began developing increasing pain in his right hip and his low back as a result of the altered gait") ROA ; Appellate Panel Order p. 14. However, there was no change of condition in the ankle that was caused by the original condition within a year of the last payment of

compensation. Since there was no change in the condition of the ankle (per Claimant's own statements to Dr. O'Dell), there could have been no changes of conditions in the other body parts during that timeframe, either.

Since the statute requires that the review be made within twelve (12) months of the last payment of compensation, it would defy logic for the Commission to allow Claimant to be awarded benefits for a condition in Claimant's ankle that was present at the time of the original award (the condition of the ankle) leading to alleged worsening of other body parts well after the year had expired. It would further defy logic to award benefits for conditions (back) for which there is no medical evidence of them existing prior to the expiration of that year.

Because Claimant failed to prove a change of condition with an onset date after the last date of compensation and/or within one year of the same, the Single Commissioner's ruling should be affirmed. Further, the Order of the Single Commissioner should be affirmed.

B. <u>Timing and Effect of Withdrawal of Form 50.</u>

As alternate grounds for reversal, Appellants assert that this case must be reviewed on its own facts and urges this Honorable Court not to summarily dismiss the arguments of Appellants, as the Commission apparently did. Appellants urge this Court to review the actions and inactions taken by Claimant in pursuing his change of condition claim, and to conclude that these actions/inactions were the very "improper effort[s]" discussed in *Tucker* that "should have no chance at success." *Tucker v. S.C. DOT*, 427 S.C. 299, 304, 831 S.E.2d 426, 428 (2019). If the actions/inactions of the Claimant in this matter are not considered to be relevant to the timing requirement in S.C. Code Ann. § 42-17-90, then the timing requirement is wholly ineffective and useless and the words of the Supreme Court, above, are meaningless. Appellants assert that the

Supreme Court's dicta should bear weight on the analysis of this case and the timing requirement in § 42-17-90.

Per S.C. Code Ann. § 42-17-90(A), "the review [on a change of condition] must not be made after twelve months from the date of the last payment of compensation pursuant to an award provided by this title." The Supreme Court in *Tucker* called this timing requirement "ambiguous." *Tucker v. S.C. DOT*, 427 S.C. 299, 301, 831 S.E.2d 426, 427 (2019). Nevertheless, the Supreme Court has held "that the timing requirement is satisfied upon the filing of a Form 50 to initiate the claim." *Tucker v. S.C. DOT*, 427 S.C. 299, 300, 831 S.E.2d 426, 426 (2019). However, in that same case, the Supreme Court wrote:

> The fact a claimant does not request a hearing does not mean the claim will sit unattended. In *Russell v. Wal-Mart Stores, Inc.*, 426 S.C. 281, 826 S.E.2d 863 (2019), we pointed out a "primary goal of the Workers' Compensation Act is to provide quick and efficient resolution of work-related injury claims." 426 S.C. at 285, 826 S.E.2d at 865. The commission shares with the parties the responsibility to meet that goal. 426 S.C. at 287, 826 S.E.2d at 866. We stated, "In most instances, . . . a claim filed with the commission will be assigned to one commissioner who must promptly conduct a hearing and 'determine the dispute in a summary manner.'" 426 S.C. at 288, 826 S.E.2d at 866 (quoting S.C. Code Ann. § 42-17-40(A) (2015)). If the parties reasonably need time to prepare, or to negotiate in good faith, the assigned commissioner – or an appellate panel on review – should allow it. *In ordinary circumstances, however, no claim may be allowed to sit while the commission waits for a party to request a hearing.* In other words, even if a claimant checks the line 13a box indicating "I am not requesting a hearing at this time," the commission must act reasonably to move the claim toward a "quick and efficient resolution."
>
> At oral argument, we discussed with counsel *the possibility a claimant may file a Form 50 within twelve months, and then intentionally delay a hearing in the hope that evidence will later develop to support a change of condition claim*. In the case before us, there is no indication whatsoever Tucker or his counsel attempted to do this. *Such an improper effort, as we have explained, should have no chance of success.* However, if an employer suspects this, and the commission does nothing to move the claim toward resolution, the employer may request a hearing or in some other fashion seek to protect its interests.

Tucker v. S.C. DOT, 427 S.C. 299, 303-04, 831 S.E.2d 426, 428 (2019) (emphasis added).

Claimant herein filed a Form 50 on August 9, 2019, alleging a change of condition for the worse. ROA ; 8/9/2019 Form 50. This was within the time period prescribed by S.C. Code Ann. § 42-17-90. Because of his subsequent actions, Defendants assert that Claimant filed this Form 50 only in an attempt to toll the statute. Claimant withdrew the hearing request on September 30, 2019, asking the Commission to return the claim to General Files. ROA . Accordingly, Claimant chose not to adjudicate his change of condition claim.

The withdrawal of the Hearing Request took place just weeks prior to a scheduled hearing, at which time Claimant's Pre-Hearing Brief and APA Submissions would have been due. S.C. Code Reg. 67-611. Defendants assert that the Form 50 was not withdrawn because the parties "reasonably need[ed] time to prepare, or to negotiate in good faith." *Tucker v. S.C. DOT*, 427 S.C. 299, 303, 831 S.E.2d 426, 428 (2019). Defendants assert that this delay was orchestrated intentionally to delay a hearing in the hope that evidence would later develop to support a change of condition claim. Defendants assert this conduct by the Claimant should have no chance at success, pursuant to the language of the South Carolina Supreme Court in *Tucker v. S.C. DOT*, 427 S.C. 299, 831 S.E.2d 426 (2019).

Over a year after Claimant withdrew the first Form 50, he finally set the deposition of Dr. Jason O'Dell, seeking to gather evidence for the change of condition claim. This deposition was taken on December 3, 2020, which, not coincidentally, was just prior to the filing of the second Form 50. ROA ; Claimant's APA pp. 320. This deposition amounts to Claimant's first attempts to obtain the necessary evidence to prove a change of condition. The Appellate Panel's Order references, at length, the deposition testimony of Dr. O'Dell. ROA ; Appellate Panel Order pp. 4, 5, 15, 22, and 23. The Appellate Panel's Order quotes the deposition testimony of Dr. O'Dell. ROA ; Appellate Panel Order pp. 4 – 5, 15 – 17. Dr. O'Dell's opinions, as stated in his deposition,

form the basis of the Appellate Panel's decision that Claimant suffered a change of condition. ROA ; Appellate Panel Order. For inexplicable reasons, this deposition was not taken by Claimant for four hundred and thirty (430) following the withdrawal of the Form 50.

The Commission determined that *Tucker v. S.C. DOT*, 427 S.C. 299, 831 S.E.2d 426 (2019) is on point. ROA ; Appellate Panel Order pp. 20 – 21. This is true only insofar as the *Tucker* court was aware that the filing of a Form 50 to toll the statute only and then seeking evidence to support a change of condition claim should not result in an award for further benefits. The Supreme Court in *Tucker* addressed the type of file and delay tactic present in this case:

> At oral argument, we discussed with counsel the possibility a claimant may file a Form 50 within twelve months, and then intentionally delay a hearing in the hope that evidence will later develop to support a change of condition claim. . . . Such an improper effort, as we have explained, should have no chance of success.

Tucker v. S.C. DOT, 427 S.C. 299, 304, 831 S.E.2d 426, 428 (2019). Because Claimant did not gather or was unable to gather the requisite standard of proof prior to the expiration of the year filing requirement, he withdrew his Form 50 and then sought to obtain the same. This is the very factual situation that the Supreme Court has said "should have no chance of success." Outside of this explanation, there is simply no justification as to why a Claimant would delay such an extended period of time to pursue a claim. This argument is bolstered by the Claimant waiting almost the same length of time to obtain a doctor's opinion to support his claim (which is necessary to prove a change of condition claim).

Further, the Claimant had not developed even any potential worsening in his back prior to the filing of the initial Form 50, as shown by the evidence presented at the hearing and discussed *supra*. Given that the so-called worsening of the ankle was present since the original injury and that the Claimant hadn't even seen a doctor for his back until well after the expiration of a year,

Defendants assert that the original filing of Form 50 was a farce simply to give himself time to develop evidence to prove a change of condition.

Of course, in *Tucker*, the Supreme Court wrote that the Employer bears some burden of bringing the case to an end ("if an employer suspects this, and the commission does nothing to move the claim toward resolution, the employer may request a hearing or in some other fashion seek to protect its interests." *Tucker v. S.C. DOT*, 427 S.C. 299, 304, 831 S.E.2d 426, 428 (2019)). The difficulty with this is that there is no statutory mechanism for the Employer to request a hearing to bring the matter to an end when a Claimant is not actively pursuing a claim. The Commission will not entertain Motions that address the merits of a case[2] and the Form 21, the form the Commission requires Employers and Carriers to use to request a merits hearing, does not allow for a hearing in such a situation. The Form 21 allows Employers and Carriers to request hearings in only six (6) circumstances: (1) to stop payment of compensation after a claimant achieves maximum medical improvement (MMI); (2) to address suspension, reduction, or reduction of temporary total disability (TTD) benefits; (3) to determine if permanent partial disability is due after Claimant has reached MMI; (4) to request payment for overpayment of TTD; (5) to determine the amount of compensation in death claims; and (6) to request mediation. *See* WCC Form 21. None of these situations is present in this case, and none of those avenues for relief were appropriate. After the Claimant withdrew the hearing request, there was no way for the Employer/Carrier to bring this matter to a close with the Workers' Compensation Commission.

If the Commission's ruling is allowed to stand, there is no meaning at all to the timing requirement in § 42-17-90(A), allowing workers' compensation cases to linger indefinitely, which

[2] S.C. Code Reg. 67-215(B).

is surely not a quick and efficient resolution for any party, and is contrary to public policy and legislative intent.

In its Order, the Appellate Panel found that "[e]ven if the Claimant had unreasonably delayed in requesting a hearing, the Employer can establish no prejudice." ROA ; Appellate Panel Order p. 26. On the contrary, the very fact that the Panel determined that both the lumber and cervical spine was subject to a change of condition for the worse is evidence of prejudice: had a hearing request been made timely, the Claimant would have not had the medical records from January 16, 2020, and June 16, 2020, the first times after September 2018 settlement that the lumbar and cervical spine appear in medical records.

Because of the reasons set forth herein and that may be heard at oral arguments, Appellants respectfully submit that the Order of the Appellate Panel of the Full Commission should be reversed, and the claim for a change of condition should be denied.

CONCLUSION

Based upon the foregoing arguments and authorities, Appellants respectfully request that this Honorable Court determine that Claimant did not prove that he suffered a compensable change of condition for the worse under S.C. Code Ann. 42-17-90, the Order of the Appellate Panel should be reversed, and the claim for a change of condition should be denied.

[SIGNATURE BLOCK FOLLOWS]

RESPECTFULLY SUBMITTED,

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v.

S. C. Department of Transportation, Employer, and State Accident Fund, Carrier, Appellants.

PROOF OF SERVICE

I hereby certify that I have served Appellants' Initial Brief and Designation of Matter to be included in the Record on Appeal of the attorney for Respondent by email on June 8, 2022, addressed as follows:

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June 8, 2022

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Re: Randy Jordan, Employee, Respondent,
v.
S.C. Department of Transportation, Employer, and State Accident Fund, Carrier, Appellants.
Appellate Case No. 2022-000409

Dear Ms. Kitchings:

I am enclosing herewith the following documents to be filed in your office:

1. One copy of the Initial Brief of the Appellants; and
2. Appellants' Designation of Matter to be Included in Record on Appeal; and
3. Certificate of Counsel; and
4. Proof of Service upon counsel for the Respondent.

Respectfully,

HOLDER PADGETT LITTLEJOHN + PRICKETT, LLC

Michelle A. Adams
Paralegal to Timothy B. Killen

MAA
cc: Stephen Wukela, Esquire (via email)
Amy Bracy, WCC Judicial Director (via email)
Traci Brunson (via email)