

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

R. FERRELL COTHRAN, JR., Circuit Court Judge

Case No. 2012-CP-14-00024

ANDREAL HOLLAND,

Appellant,

v.

J.C. WITHERSPOON, INC.,
A.K. MULCH, LLC, and
CAPITAL CITY INSURANCE,

Respondents,

INITIAL REPLY BRIEF OF APPELLANT

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MAY 23 2013

SC Court of Appeals

ARGUMENTS

I.

In reply to the Brief of Respondent herein, numerous factual matters seem to get lost in the discussions of cases and arguments thereon. These facts remain and distinguish this case from *Callahan* and most others cited, to

wit:

1) The true employer in this case, A&K Mulch, Inc, was not made a party to the workers compensation action until September 29, 2009.

Respondents prefer to gloss over this all important fact and understandably so as all of their arguments in support of the lower Court become moot and without merit. There can be no election of remedies by a party who is not the employer, W.C Witherspoon, Inc, in this case

Likewise, whether Witherspoon and A&K had the same carrier is irrelevant. A&K was not the party to raise the election of remedies as argued by Respondents.

2) Respondents argue that Appellant with his brain injury could not avail himself of incompetency considerations. In doing so, they clearly overlook the motion for the appointment of the Guardian *Ad Litem* and that they, Respondents never objected to the appointment thereof on the grounds specified.

That Regulation 67-216 states that a “Guardian ad Litem shall represent the minor or mentally incompetent.” (from Motion to Appoint GAL)

In granting that motion, the Commission determined that Appellant was "mentally incompetent" and this was done without objection of Respondents.

3. Continuously Respondents overlook the major distinguishing fact between this case and *Callahan* and the statutory provisions discussed therein. This case was not one of filing suit within one (1) year. Rather this case is one of suit being filed after two (2) years.

4. Respondents recognize and concede in their brief that the provisions of §42-1-560, are mandatory. This is undisputed and the provisions thereof requiring the Respondents to do acts are likewise mandatory,, they did not give the notices required but yet want that overlooked while that attempt to avail themselves of the statutory provisions. This is clearly attempting to use the statute as both a sword and shield.

5. All of the grounds raised by Appellant are viable as applied to this case. The Respondents arguments regarding preservation of constitutional issues fail in the face of long established law that an administrative agency cannot rule on these issues herein. Likewise the lower erred in not recognizing this as an error of law.

We wish to reiterate that our decision today does not affect the ALC's inability to decide facial challenges to a statute or regulation; those are legal questions that are properly raised for the first time on appeal or in a declaratory judgment action before the circuit court. "

Travelscape, LLC v. S.C. Dept of Revenue,
391 SC 89, 705 SE 2D 28, (S.C. 2011)

Again September 9, 2009, is crucial in this case as that is the date the true Employer became a party to the case. Thereafter all things were done timely as regards A&K Mulch from Appellant's standpoint. On the other hand, at not time Respondents comply with the statutory provisions.

All other grounds for reversal have been discussed in the Appellant's brief.

CONCLUSION

Appellant requests that the Order lower Court be reversed

Respectfully submitted,



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Thursday, May 23, 2013

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CERTIFICATE OF SERVICE

I, the undersigned, of the Law Offices of Peake & Fowler Law Firm P.A., attorneys for the claimant do hereby certify that I have on this the 23RD day of May, 2013 served a copy of Appellant's REPLY upon attorneys of record, MARK CAUTHEN, ESQUIRE and PETER P. LEVENTIS, IV, ESQUIRE, in this action by having them hand delivered to:

Mark Cauthen, Esquire
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