IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

Opinion No. 2022-UP-316
Filed July 27, 2022
Appellate Case No. 2019-001141

Barry Adickes, Claimant, Respondent

v.

Philips Healthcare and Fidelity, Employer, and
Guarantee Insurance Company, Carrier, Petitioners.

PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioners hereby certifies that the Petition for Rehearing was made and ruled upon by the Court of Appeals by Order dated July 27, 2022.

QUESTIONS PRESENTED

I. Did the Court of Appeals err as a matter of law by disregarding the law of the case and affirming the Commission's failure to abide by the remand directive in *Adickes I?*

II. Did the Court of Appeals err as a matter of law by concluding that S.C. Code Ann § 42-9-20 entitled Respondent to wage loss benefits beyond 340 weeks from the date of accident?

III. Did the Court of Appeals err by concluding that Respondent is entitled to temporary benefits, a remedy he did not seek during the related proceedings?

IV. Did the Court of Appeals err as a matter of law in determining that Petitioners prematurely terminated Respondent's weekly benefits?

V. Did the Court of Appeals err as a matter of law by concluding that substantial evidence supported the imposition of sanctions on Petitioners, pursuant to S.C. Code Ann. § 42-3-175 for wilfully disobeying a prior Order?

STATEMENT OF THE CASE

Respondent, Barry Adickes, was employed by Petitioner, Philips Healthcare, when he sustained permanent injuries to his bilateral shoulders as the result of a work-related accident in March 2011. The Workers' Compensation Commission concluded that Respondent suffered a permanent loss of wage earning capacity resulting from said accident. (R. pp. 19 – 34). The Commission awarded Respondent disability compensation for a lump sum of 340 weeks. (R. pp. 19 – 34). However, S.C. Code Ann. § 42-9-20 strictly limits permanent partial disability ("PPD") benefits to 340 weeks from the date of injury. Petitioners appealed, arguing that the Commission

and Appellate Panel erred in not limiting the wage loss award to 340 weeks from the date of accident, consistent with the plain language of S.C. Code Ann. § 42-9-20. (R. pp. 147 – 148).

By Order filed January 17, 2018 (hereinafter referred to as "*Adickes I*"), the Court of Appeals reversed and held that the "plain language of [S.C. Code Ann. § 42-9-20] limits PPD benefits to 340 weeks from the date of injury, contrary to the Appellate Panel's interpretation and award. [S.C. Code Ann. § 42-9-20] explicitly mandates that in 'no case' will PPD benefits be available to a claimant beyond the term of 340 weeks 'from the date of injury." (R. pp. 37 – 39). The Court of Appeals further held that this is, "a limiting clause that restricts the time frame and amount of coverage and should be strictly interpreted." (R. p. 38). Ultimately, the Court of Appeals concluded that the Commission erred in extending the timeframe and award for PPD benefits, in contravention of the plain language of S.C. Code Ann. § 42-9-20 and legislative intent for compensation. (R. p. 39). The case was remanded to the Appellate Panel with the directive for a new calculation of benefits consistent with the plain language of S.C. Code Ann. § 42-9-20. (R. p. 39).

By Order filed January 17, 2019, Commissioner Susan Barden, to whom the matter had been assigned by the Appellate Panel, found that *Adickes I* did not reverse the commencement date of wage loss benefits. (R. pp. 806 – 819). Instead, Commissioner Barden reaffirmed the previous finding that Respondent's wage loss award commenced as of January 17, 2014, the date of his termination, and would extend beyond 340 weeks from the date of injury. (R. pp. 806-819). In so doing, Commissioner Barden held that the last sentence of S.C. Code Ann. § 42-9-20 operates to "prolong" a PPD award beyond the 340-week limitation, and extended Respondent's benefits by an additional seven weeks and five days (the period of TTD benefits received by Respondent). (R. p. 815). Petitioners appealed the Commissioner's award to the Appellate Panel, arguing that it had

been erroneously calculated, contrary to the guiding statutory authority and case law, as well as the *Adickes I* remand directive. (R. pp. 230 – 232).

By Order filed June 20, 2019, the Appellate Panel affirmed Commissioner Barden's award, holding that the Commissioner "followed the directions from the Court of Appeals on remand, and issued an Order that follows the plain reading of Section 42-9-20 and supporting case law." (R. pp. 62 – 63).

On February 6, 2019, pursuant to *Adickes I*, Petitioners suspended Respondent's weekly benefits after he received payment beyond the proper calculation of the permanent wage loss award. Subsequently, Respondent requested a Commission hearing in which he sought recommencement of weekly permanent benefits. (R. p. 268). A hearing was then held before a single commissioner, during which Petitioners argued that there was no obligation to continue payment of such benefits because 340 weeks from the date of injury had elapsed. (R. p. 269; R. p. 671, lines 10 – 17).

By Order filed June 19, 2019, the hearing commissioner held that Petitioners had illegally terminated benefits and willfully disobeyed a prior Order for a period of 27 days, and subjected Petitioners to fines of $200.00/day, pursuant to S.C. Code Ann. § 42-3-175. (R. pp. 56 – 58). Petitioners appealed the Order to the Appellate Panel, which upheld the decision, and increased the fine amount to $500.00/day. (R. pp. 65 – 72).

Petitioners appealed to the Court of Appeals, arguing that the Appellate Panel erred in: (1) the calculation of Respondent's permanent wage loss award; (2) holding that Petitioners had an obligation to continue payment of weekly permanent wage loss benefits following *Adickes I*; and (3) finding that Petitioners willfully disobeyed a prior order. (A. pp. 841 – 859).

By Order filed July 27, 2022 (hereinafter referred to as "*Adickes II*"), the Court of Appeals affirmed the Commission and concluded that nothing in *Adickes I* suggested a different start date for calculation of weekly benefits. (A. pp. 890 – 892). Petitioners respectfully contend that the Court of Appeals erred as a matter of law in its failure to abide by the *Adickes I* holding and remand directives. The Commission was bound by the directive in *Adickes I* as the law of the case; pursuant to the plain language of S.C. Code Ann. § 42-9-20, the period covered by compensation is not to exceed 340 weeks from the date of injury. However, instead of a new calculation born of the remand, the Commission erred in failing to properly apply the law as directed by *Adickes I*, and the Court of Appeals erred by affirming the Commission in *Adickes II.*

Therefore, Petitioners respectfully request that the Supreme Court grant the Petition for Writ of Certiorari, review the issues presented and reverse the Order of the Court of Appeals dated July 27, 2022, in accordance with the law of the case.

ARGUMENTS

I. The Court of Appeals erred as a matter of law by disregarding the law of the case and affirming the Commission's failure to abide by the remand directive in *Adickes I*.

On January 17, 2018, the Court of Appeals issued an unpublished opinion in *Adickes I*. The holding made clear that the plain language of S.C. Code Ann. § 42-9-20 limits permanent wage loss awards to 340 weeks from the date of injury. (R. p. 38). The Court went on to explain that the legislature's intent was for PPD benefits to compensate an injured claimant for the loss of earning capacity over the designated 340 weeks from the date of injury, rather than compensate an injured claimant with a 340-week "award." (R. p. 38). Most importantly, the last sentence of *Adickes I* set forth explicit directives to be followed on remand: "[W]e reverse the Appellate

Panel's award of 340 weeks' compensation commencing January 17, 2014, and remand for a new calculation of benefits consistent with the plain language of section 42-9-20." (R. p. 39).

Four years later, in *Adickes II*, the Court of Appeals failed to abide by the *Adickes I* holding and directive. (A. pp. 890-892). Though *Adickes I* is an unpublished opinion, it is undoubtedly the law of the case. Unpublished orders have no precedential value, except in proceedings in which they are directly involved. SCAR 268(d)(2).

Adickes I held that the pertinent statute, S.C. Code Ann. § 42-9-20, explicitly mandates that "in no case" will PPD benefits be available to a Claimant beyond the term of 340 weeks "from the date of injury." (R. p. 38). Yet, on remand, Commissioner Barden and the Appellate Panel issued Orders in direct contravention of this holding. (R. pp. 41 – 51, 59 – 64). Incredulously, the Appellate Panel concluded that *Adickes I* did not reverse the date that Respondent's wage loss began and reaffirmed the erroneous finding that the permanent wage loss award commenced as of the date of termination, not the date of injury. (R. p. 63). Further, the Appellate Panel's award extended beyond the 340-week limitation period by seven weeks and five days. (R. p. 63).

The fact that the Appellate Panel issued an Order in stark contrast to the *Adickes I* remand directives is just as confounding as the plain-language-of-the-statute question that brought the case before the Court of Appeals in 2016. The remand directives were clear, the Appellate Panel was to perform a calculation of Respondent's permanent wage loss benefits based on the plain language of S.C. Code Ann. § 42-9-20, limited to 340 weeks from the date of injury. (R. pp. 38 – 39).

While on remand, Petitioners spent years defending the *Adickes I* decision as they awaited the new calculation. However, when Petitioners appealed the Appellate Panel's flawed ruling, the Court of Appeals itself made an about-face, and failed to abide by the law of the case. Under law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either

not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court. *Judy v. Martin,* 381 S.C. 455, 458–59, 674 S.E.2d 151, 153 (2009). "The rule of the law of the case means that what was decided on former appeal is, if evidence is the same on another trial, controlling on the trial court and an appellate court on another appeal, unless on reexamination the appellate court is convinced that the first decision was wrong." *Barth v. Barth*, 293 S.C. 305, 308, 360 S.E.2d. 309, 310 (1987).

For example, in *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 338 S.C. 171, 525 S.E.2d. 869 (2000), the trial court granted summary judgment for the respondent on fraud and negligence claims; however, the Court of Appeals reversed summary judgment and remanded the matter back to the trial court with a directive to further develop the facts *"needed to determine the extent of actual damages." Id*. at 173-174, S.E. 2d. at 871 (emphasis added); *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995) (*Charleston Lumber I*).

Nevertheless, on remand, the trial court again granted summary judgment on the fraud claim, ignoring the law of the case. *Id.* The petitioner appealed and the Court of Appeals affirmed the trial court, in 2-1 and en banc decisions. *Id.*; *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 329 S.C. 414, 496 S.E.2d 637 (Ct. App. 1998) (*Charleston Lumber II*). The petitioner then appealed to the Supreme Court which held that *Charleston I* had been remanded with an unappealed directive to calculate damages, which therefore was the law of the case. *Charleston Lumber Co.*, 318 S.C. at 175, 525 S.E.2d. at 871. Thus, the trial court was bound by the directive in *Charleston I* to determine the extent of damages, just as the Court of Appeals in *Charleston II* was bound by the directive in *Charleston I* as the law of the case. *Id.* at 175, 525 S.E.2d. at 872.

Here, like the trial court in *Charleston I*, the Appellate Panel issued a decision that was partially reversed and remanded by the Court of Appeals in *Adickes I*. Additionally, just as the trial court did in *Charleston I*, Commissioner Barden and the Appellate Panel failed to follow the remand directives, despite being bound by the law of the case. What is more, the Court of Appeals in *Adickes II* committed the same offense as the Court in *Charleston II*; in both instances the Court failed to follow the law of the case, without proffering a justification, or conducting a reexamination of the decision which adequately demonstrated a previous mistake.

Nothing has changed since the Court of Appeals issued *Adickes I*. There have been no modifications or amendments to S.C. Code Ann. § 42-9-20, nor have there been any subsequent cases which call into question the application of the statute. As it stands, *Adickes II* not only allows Respondent to make inconsistent arguments and assume contrary positions from those asserted in *Adickes I*, but provides him the benefit of not having to abide by the law of the case. It is manifestly unjust to permit a party to avoid the law of the case by arguing an adverse position *in the same case*.

Therefore, Petitioners respectfully request that the Supreme Court grant the Petition for Writ of Certiorari and reverse the Order of the Court of Appeals.

II. The Court of Appeals erred as a matter of law by concluding that S.C. Code Ann. § 42-9-20 entitled Respondent to wage loss benefits beyond 340 weeks from the date of accident.

The remand directives in *Adickes I* could not have been clearer: "[W]e reverse the Appellate Panel's Award of 340 weeks' compensation commencing January 17, 2014, and remand for a new calculation of benefits consistent with the plain language of section 42-9-20." (R. p. 39). However, on remand, Respondent misled the Commissioners by claiming that *Adickes I* did not reverse the finding and that his disability began January 17, 2014. (R. pp. 224 – 225). Respondent

went so far as to assert that "the Court of Appeals expressly affirmed the date benefits began," and that it was "the law of the case." (R. p. 225). If that was the "law of the case," as argued by Respondent, the matter would not have been remanded.

In reality, *Adickes I* did not establish that Respondent's wage loss award began on the date of his termination. (R. pp. 38 – 39). Rather, *Adickes I* discussed the date of Respondent's termination to illustrate that the Commission's lump sum award of 340 weeks improperly entitled Respondent to weekly benefits during the years that he continued working. (R. pp. 38 – 39). On this point, *Adickes I* held that Respondent, "cannot be compensated for 'lost wages' while he worked full-time and earned a full-time salary." (R. p. 38).

Adickes I clearly held that the Commission's interpretation and application of S.C. Code Ann. § 42-9-20 amounted to an error of law and admonished the Appellate Panel's "interpretation" that the statute provided for a lump sum of 340 weeks, in contravention of its plain language and the legislature's intent for compensation. (R. pp. 38 – 39).

In contrast, *Adickes II* held that the last sentence of S.C. Code Ann. § 42-9-20 operates to extend a wage loss award. (A. pp 890 – 892). It further held that the following sentence operates to provide a claimant with double recovery of temporary total disability ("TTD") benefits: "[I]n case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability." (A. pp. 890 – 892). Interestingly, *Respondent presented that exact same argument in his final brief in Adickes I:*

> [T]he last sentence of [S.C. Code Ann. § 42-9-20 clearly states that 'in case the partial disability begins after a period of total disability, the latter period shall not be deducted from a maximum period allowed in this section for partial disability.' This means that 340 weeks is the maximum Claimant could receive because the *last sentence of § 42-9-20 extends the period*. The 340-week period from the date of injury only applies where no temporary total disability benefits were paid.
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> (R. pp. 144 – 145) (emphasis added).

Adickes I unequivocally rejected that argument, instead concluding that S.C. Code Ann. § 42-9-20 provides an explicit mandate that *"in no case"* will PPD benefits be available to a claimant beyond the term of 340 weeks "from the date of injury." (R. pp. 38 – 39). Yet, following *Adickes I*, and while on remand, Respondent filed a pre-hearing brief *again* reciting the argument above. (R. p. 229). Respondent's argument that the last sentence of S.C. Code Ann. § 42-9-20 operates to extend a wage loss award, was an inappropriate attempt to relitigate the same issue. (R. 640). Still, regardless of whether Respondent was judicially estopped from even making this argument, having been barred from doing so by the law of the case, there is no sensical basis for the decision that the last line of the statute operates to extend wage loss awards.

The legislature included that final sentence to distinguish the differences between calculation of permanent total disability ("PTD") awards and PPD awards. Both PTD benefit awards and PPD wage loss benefits are predicated upon a demonstrated loss of earning capacity, total versus partial, but differ significantly as to calculation. Wage loss awards are much more restricted than PTD awards. The legislature applied this safeguard to S.C. Code Ann. § 42-9-20 in order to protect the award from additional reductions. The sentence in question is for the protection of claimants, but was certainly not meant to be interpreted as providing for double recovery of temporary benefits received during the claim.

When PTD is awarded under S.C. Code Ann. § 42-9-10(A), a claimant is entitled to a payout of 500 <u>total</u> weeks of total disability benefits — temporary and permanent combined. Thus, when the Commission issues a PTD award, it notes that the award is for 500 weeks *less the number of weeks of benefits paid to date*. In contrast, PPD wage loss awards are limited by the timeframe in which a claimant could potentially be entitled to the same, 340 weeks from the date of accident. Application is best understood by way of illustration:

> PTD Award Calculation: A Claimant receives 200 weeks of TTD benefits continuously from the date of accident before reaching Maximum Medical Impairment ("MMI"). The Claimant is awarded PTD benefits. The Claimant would be entitled to an award of 500 weeks of benefits *less the amount of TTD benefits received*, amounting to a **PTD award of 300 weeks**.
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> PPD Award Calculation: Same Claimant is found entitled to a PPD wage loss award. The Claimant is now entitled to **140 weeks of PPD benefits**, since partial disability benefits cannot extend beyond 340 weeks from the date of injury. If calculated like a PTD award, the Claimant's PPD award would be 340 weeks from the date of accident *less the amount of weeks of TTD benefits received*. This would amount to a PPD award limited to 140 weeks from the date of accident (which has already passed), illustrating the very purpose of this sentence.

In the present matter, an additional seven weeks and five days of benefits seems relatively inconsequential. However, a macroanalysis reveals that *Adickes II's* flawed interpretation of this one sentence will allow for PPD wage loss awards totaling more than the maximum number of weeks allowed under a PTD award. Below is an example of how the *Adickes II* decision applies to the same fact pattern presented in the preceding paragraph:

> The Claimant would receive 200 weeks of TTD benefits and a wage loss award of 140 weeks of benefits. On top of that, the Claimant would receive a "credit" for the initial 200 weeks of TTD benefits, therefore entitling the Claimant to **540 weeks of total benefits**.

These examples clearly elucidate the absurd results *Adickes II* will render, and cannot possibly be in harmony with the statute's legislative intent. Accordingly, Petitioners respectfully request that the Supreme Court grant a Writ of Certiorari to reverse the decision of the Court of Appeals and remand the matter back to the Commission for a finding consistent with the proper application of S.C. Code Ann. § 42-9-20.

III. The Court of Appeals erred as a matter of law by concluding that Respondent was entitled to temporary benefits, a remedy he did not seek during the related proceedings.

Respondent has sought permanent partial disability ("PPD") benefits, and only permanent partial disability benefits, throughout the pendency of this claim. In the initial pleadings, all of which are unamended or stricken, Respondent specifically indicated that he was seeking permanent disability benefits without once setting forth a claim for temporary benefits. Yet, *Adickes II* awarded Respondent with permanent and temporary partial disability ("TPD") benefits, extending his ***permanent*** wage loss award on the front end by way of awarding temporary benefits, even though temporary benefits were never sought by Respondent. This is evidenced in the remand directives laid out in *Adickes I* —"Accordingly, we reverse Adickes's Award of ***PPD*** benefits and remand to the Appellate Panel for a new calculation." (R. p. 38) (emphasis added).

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d. 629, 631 (2004). "The purpose of the doctrine is to ensure the integrity of the judicial process." *Id*. The following elements are necessary for the doctrine to apply:

> (1) [T]wo inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.
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> *Id*. at 215-215, S.E.2d. at 632.

Here, the record in this matter satisfies all five elements. In Respondent's first pleading, filed September 23, 2014, he indicated that TTD benefits had already been paid. (R. p. 73). In

that same document, Respondent noted that he sought a ***permanency*** disability resulting in wage loss. (R. p. 73). Likewise, in a pre-hearing brief to the commission, dated January 6, 2015, Respondent identified the following issues as those pertinent to his claim: (1) the extent of permanent wage loss under § 42-9-20; (2) lump sum payment; and (3) Dodge medicals under § 42-15-60. (R. p. 76). At no point did Respondent seek temporary disability benefits. (R. p. 76).

Following Commissioner McCaskill's Order, dated August 27, 2015, Respondent maintained his request for permanent benefits throughout Petitioners' appeal to the Appellate Panel. (R. pp. 1 – 18; R. p. 144 – 145). Then, contrary to this position, and in a veiled attempt to recover benefits for which he did not initially seek, Respondent later argued that § 42-9-20 makes no distinction between temporary and permanent benefits. Therefore, Respondent asserted, he was entitled to wage loss benefits from the date of disability. (R. p. 256). In support of his position, Respondent referenced the definition of "disability" provided in S.C. Code Ann. § 42-1-120 as not distinguishing between temporary or permanent disability. (R. p. 256).

Petitioners do not disagree with Respondent that the language of § 42-1-120 is devoid of the words "temporary" and "permanent;" because both words are unnecessary. The distinction between temporary and permanent benefits has already been contemplated by the courts. The rationale for ceasing temporary benefits upon a finding of MMI is to permit entry of a permanent award. *See generally Gilliam v. Woodside Mills*, 319 S.C. 385, 461 S.E.2d. 818 (1995) (noting that termination of temporary benefits and replacement with permanent benefits is proper upon finding of MMI); *see also Hines v. Hendricks Canning Co.*, 263 S.C. 399, 211 S.E.2d. 220 (1975) (holding that degree of permanent disability cannot be determined prior to MMI).

Here, Respondent did not reach MMI until January 2015. (R. p. 36). The relevant case law marks a clear distinction between permanent and temporary and demonstrates that Respondent's argument for permanent benefits was wholly inconsistent with his later assertion that he was entitled to temporary benefits. *Adickes II* provided Respondent with TPD and PPD benefits, despite the fact that Respondent did not seek TPD benefits at any point during these proceedings. The remedy listed in each of Respondent's filings, and the arguments made at each level of litigation, has been for permanent benefits. This Court need look no further than Respondent's Final Brief to the Court of Appeals in *Adickes I*, where the word permanent was used eight times. (R. pp. 152 – 165). Still, Respondent avows that he has not sought the sole remedy of permanent benefits while the case was on remand.

Adickes II relies upon Respondent's inapposite argument to extend his wage loss award, by also entitling him to TPD. Respondent should have been judicially estopped from asserting contrary positions in the same case, so it was legal error for the Court of Appeals to rely on his argument supporting entitlement. Accordingly, Petitioners respectfully request that the Supreme Court grant a Writ of Certiorari to reverse the Court of Appeals' decision awarding TPD benefits because Respondent was judicially estopped from asserting a new position while the matter was on remand.

IV. The Court of Appeals erred as a matter of law in determining that Petitioners prematurely terminated Respondent's weekly benefits.

Adickes II erred in holding that Petitioners were obligated to continue making weekly wage loss payments to Respondent following *Adickes I*. Petitioners agree that an appeal does not act as a supersedeas, which is why Petitioners properly commenced payment of weekly permanent wage loss benefits when the case was first on appeal in 2016. There is no dispute that Petitioners

properly commenced weekly benefits pursuant to the February 2016 Full Commission Order and continued providing medical treatment during appeal.

In *Case v. Hermitage Cotton Mills,* 236 S.C. 515, 115 S.E.2d 57 (1960), the Supreme Court performed an extensive analysis of its prior decisions concerning the application of the supersedeas provision in order to remove any confusion as to an employer's payment obligations following an appeal. At the time of the *Hermitage* decision, the pertinent statute[1] read:

> In case of an appeal from the decision of the commission on questions of law, such appeal shall operate as a supersedeas for thirty days only and thereafter the employer shall be required to make payment of the award involved in the appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this Title.
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> S.C. Code 1952 § 72-356.

With regard to payments to be made, the *Hermitage* court recognized that the language, "make payment of the award," was susceptible to different interpretations. The Court noted that, on the one hand, the phrase could refer only to weekly continuing payments awarded to the claimant but, on the other, that it might also refer to all benefits awarded to the claimant in the award, including disfigurement, medical expenses, and accrued weekly compensation from the date of accident. *Id.* at 533. The Court acknowledged that the 30-day supersedeas was indicative of the legislative intent to provide an employee with financial aid, in excess of weekly benefits, so long as the award remained in force. *Id.* at 531. Concurrently, the Court was keenly aware of an employer's concern of paying an award that could be reversed on appeal while having no way to recover overpayment. *Id.* at 533. As such, the Court held that the statute should be construed in fairness to both the employee and employer; therefore, employers appealing a Full Commission

[1] The *Hermitage* court analyzed this question under § 72-356, the predecessor to S.C. Code Ann. § 42-17-60.

Award are only required to pay the *weekly benefits accruing after the Full Commission decision*. *Id.* at 533-534 (emphasis added).

S.C. Code Ann. § 42-17-60 was modified in 2007 to further clarify that an employer is only obligated to pay weekly compensation and medical benefits while a matter is on appeal. The applicable statute reads:

> In case of an appeal from the decision of the commission on questions of law, the appeal does not operate as a supersedeas and, after that time, the employer is required to make weekly payments of compensation and to provide medical treatment ordered by the commission involved in the appeal or certification until the questions at issue have been fully determined in accordance with the provisions of this title.

S.C. Code Ann. § 42-17-60.

In 2016, the Appellate Panel ordered Petitioners to commence benefits as of January 17, 2014, for a period of 340 weeks, entitling Respondent to weekly benefits until July 24, 2020. (R. pp. 33 – 34). Thus, when Petitioners appealed in March 2016, Petitioners were under an Order to provide ongoing weekly benefits to Respondent, and properly commenced payment. However, *Adickes I* explicitly held that Respondent was not entitled to weekly benefits beyond 340 weeks from the date of accident, which fell on September 24, 2017. (R. pp. 38 – 39). Thus, as of January 17, 2018, the date *Adickes I* was issued, the 340-week limitation had already passed. As such, Petitioners were not obliged to continue payment of weekly wage loss benefits to Respondent while the case was on remand.

The Supreme Court's holding in *McLeod v. Piggly Wiggly Carolina Co.,* 280 S.C 466, 313 S.E.2d 38 (Ct. App. 1984), is instructive when seeking to understand an employer's payment obligations when a case is on remand from the Court of Appeals. In *McLeod*, the Full Commission deemed McLeod's back condition compensable and awarded TTD benefits for a period of time before the Full Commission Award was issued, as well as PPD benefits of 25% for loss of use of

his back. While on appeal, the Circuit Court ordered Piggly Wiggly to make weekly payments of PPD benefits accruing *after* the date of the Full Commission award, pursuant to *Case v. Hermitage*. *Id.* at 472. The Supreme Court affirmed the compensability of the back injury, as well as McLeod's entitlement to TTD, but reversed the 25% PPD award under § 42-9-20. *Id*. at 471. The matter was remanded for a determination regarding the degree of partial loss of use and proper dates for the TTD award. *Id.* at 471 – 472.

Citing *Hermitage*, the Court held that it was proper for the employer to make payment of the PPD award accruing after the Full Commission Order and while on appeal, since those payments are in the nature of support. *Id.* at 472. The Full Commission was also tasked with determining the proper period of TTD and the degree of partial loss of use of the back — both of which are benefits considered to be in the nature of support. *Id*. In that regard, the Supreme Court held the following:

> Accordingly, all issues on appeal are affirmed except the ones related to the extent of partial loss of use and the award of Temporary Total Disability benefits. Those two issues are remanded for further factual findings in accordance with this opinion. Because of the remand, no payments shall be required until the expiration of the thirty-day period following the Commission's decisions on the remanded issues.
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> *Id.*

In other words, the supersedeas payment obligations were suspended unless or until the employer chose to appeal the Full Commission's determination of the issues following remand.

As detailed above, *McLeod* held that an employer is not obligated to continue payment of weekly benefits under S.C. Code Ann. § 42-9-20 while the issue is on remand to the Full Commission. In *Adickes I*, Respondent was entitled to benefits under S.C. Code Ann. § 42-9-20 and the matter was remanded for a calculation of the same. (R. pp. 37 – 39). Petitioners commenced payment of the PPD award as of the date of the Full Commission award. Accordingly,

the remaining issue on remand was the calculation of benefits under S.C. Code Ann. § 42-9-20. Thus, Petitioners were under no obligation to continue payment of weekly benefits following *Adickes I*.

Additionally, pursuant to the *Adickes I* directives, Petitioners expected the Full Commission to perform the calculation and issue an order shortly after the remand. Therefore, rather than suspending, Petitioners continued payment of Respondent's weekly benefits as a courtesy. Petitioners paid weekly benefits to Respondent for 70 weeks beyond the date of *Adickes I*. As it became evident that Respondent would receive an overpayment, Petitioners suspended Respondent's weekly benefits on February 5, 2019. Petitioners did so to avoid the situation contemplated in *Hermitage,* where they would be unable to recover benefits which were in excess of the actual entitlement.

Respondent has no legal entitlement to ongoing weekly benefits as there is no Order in the case awarding the same. Accordingly, it cannot be said that Petitioners have broken any laws by discontinuing those benefits which have been paid voluntarily. As such, Petitioners respectfully request that the Supreme Court grant the Petition for Writ of Certiorari and reverse the decision of the Court of Appeals.

V. The Court of Appeals erred as a matter of law by concluding that substantial evidence supported the imposition of sanctions on the Petitioners, pursuant to S.C. Code Ann. § 42-3-175, for willfully disobeying a prior Order.

It is well-established that the Commission has the ability to impose sanctions on either party under certain circumstances. Specifically, under S.C. Code Ann. § 42-3-175, the Commission is allowed to impose sanctions based on "willful disobedience" of an Order; however, "willful disobedience" is a high bar, and should not be attributed in most situations.

The party seeking contempt has the burden of proving the necessary elements by clear and convincing evidence. *Durlach v. Durlach*, 359 S.C. 64, 596 S.E.2d 908, 912 (2004); *see also Miller v. Miller*, 375 S.C. 443, 457, 652 S.E.2d 754, 761 (Ct. App. 2007). The conduct proscribed or prescribed by the Order must be set forth in "clear and certain" terms; it must be stated specifically and definitely rather than by implication. *Welchel v. Boyter*, 260 S.C. 418, 421, 196 S.E.2d 496, 498 (1973). The contemptuous conduct must be a *"*willful disobedience*"* of the Order, contempt is not appropriate for a violation resulting from mistake, misunderstanding, confusion, or negligence. *Henderson v. Henderson*, 298 S.C. 190, 197, 379 S.E.2d 125, 129 (1989).

To be "willful," the disobedience must be done, "voluntarily and intentionally with the specific intent to fail to do something," that is required by Order. *State v. Sowell*, 370 S.C. 330, 336, 635 S.E.2d 81, 83 (2006) (quoting *Spartanburg County DSS v. Padgett*, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988)).

Here, the commissioner assigned to the matter, Commissioner James, imposed sanctions for willful disobedience of an Order. (R. pp. 52 – 57). Interestingly, this was not the first matter in which Commissioner James imposed sanctions for willful disobedience. In *Richie v. Propel Peo, d/b/a Sonic Drive-In*, WCC No. 1300421, 2014 WL 7927738 (S.C. Work Comp. Comm. Feb. 11, 2014), which was later affirmed by the Full Commission in *Richie v. Propel Peo, d/b/a Sonic-Drive-In*, WCC No. 1300421, 2015 WL 851340 (S.C. Work Comp. Comm. Jan 6, 2015), Commissioner James found that "willful contempt is an act with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law." *Id.*

Petitioners admit there was a short delay in the authorization of Respondent's medication. However, during that time, Petitioners remained in communication with Respondent's counsel

regarding the status of approval. The delayed authorizations were not intentional and in no way meant to disregard the law.

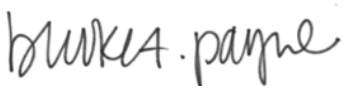
In addition, because Respondent raised the issue of contempt, it was his burden to prove that Petitioners acted with willful intent. Respondent provided no such evidence and therefore failed to meet the requisite standard. As such, Petitioners respectfully request that the Supreme Court grant the Petition for Writ of Certiorari and reverse the decision of the Court of Appeals consistent with the proper application of S.C. Code Ann. § 42-3-175.

CONCLUSION

Based upon the arguments presented herein above, Petitioners, Philips Healthcare and Fidelity and Guarantee Insurance Company, respectfully request that the Supreme Court grant the Petition for Writ of Certiorari, review the issues presented, reverse the Order of the Court of Appeals dated July 27, 2022, and remand the matter for a decision in accordance with the applicable law.

Respectfully submitted,

October 21, 2022
Mt. Pleasant, SC



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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

Opinion No. 2022-UP-316
Filed July 27, 2022
Appellate Case No. 2019-001141

Barry Adickes, Claimant, Respondent

v.

Philips Healthcare and Fidelity, Employer, and
Guarantee Insurance Company, Carrier, Petitioners.

PROOF OF SERVICE

The undersigned hereby certifies that the Respondent was served with a copy of the Petition for Writ of Certiorari and a copy of the Appendix filed by the above Petitioners, this 21st day of October 2022, by depositing the same in the United States Mail, first class postage prepaid, addressed to his attorney of record, as follows:

Bill Smith
Chappell, Smith & Arden
PO Box 12330
Columbia, SC 29211

October 21, 2022

brooke.payne

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