THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Appeal from the South Carolina
Workers' Compensation Commission

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Appellate Case No. 2022-000519

Opinion No. 2022-UP-081
(S.C. Ct. App. Filed February 23, 2022)

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Gena Cain-Davis, Claimant, . . . . . Respondent,

v.

SC Department of Corrections, Employer,
and State Accident Fund, Carrier, . . . . . Petitioners

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# BRIEF OF RESPONDENT

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Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland St.
Columbia, SC 29201
(803) 779-4000
Stephen@SamuelsReynolds.com
S.C. Bar No. 15394

ATTORNEY FOR RESPONDENT

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2. Whether the Court of Appeals correctly held that an administrative order allowing Respondent to withdraw a Form 50 without prejudice, thus effectively granting a continuance, was an unappealable interlocutory order such that the Appellate Panel lacked appellate jurisdiction to review and reverse the order.

3. Whether the Workers' Compensation Commission's Appellate Panel erred when it held the Hearing Commissioner had been divested of jurisdiction when he issued his administrative order allowing Respondent to withdraw a Form 50 without prejudice.

4. Whether the Workers' Compensation Commission's Appellate Panel finding that Respondent unilaterally dismissed her case with prejudice is supported by substantial evidence when the hearing commissioner stated "Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50 without prejudice, and with it being within his discretion to do so, allowed Mr. Samuels to do that" and counsel explained at oral argument that he requested withdrawal to obtain additional medical evidence.

5. Whether the Workers' Compensation Commission's Appellate Panel erred to the extent it held that an oral request to withdraw a Form 50 without prejudice made in open court before a commissioner and opposing counsel is automatically deemed a withdrawal with prejudice.

6. Whether the Court of Appeals erred in holding that "nothing prevents [Petitioners] from asserting at a future hearing that the single commissioner's decision was in error or that the claimant's Form 50 was withdrawn for the sole purpose of delay," when allowing collateral attack on the single commissioner's order would render that order meaningless and create a system where the pronouncements of trial judges and hearing commissioners have no affect and cannot be relied upon by litigants.

## STATEMENT OF THE CASE

This appeal arises from a work related accident suffered by the Respondent, Gena Cain-Davis, on July 14, 2016 at the Broad River Correctional Institute where she worked as a correctional officer for the Employer, South Carolina Department of Corrections (SCDC). The issues on appeal concern procedural aspects of withdrawal of a Form 50 and dismissal of a Form 21.

A hearing on a Form 50 filed by Respondent and a Form 21 filed by Petitioners was set before Commissioner Mike Campbell on October 24, 2017. Each party had already filed its Form 58 (Prehearing Brief) and Notice of APA Submissions. Respondent sought additional medical treatment. Petitioners sought to ratify their suspension of temporary compensation due to allegations of refusal of medical treatment..

Respondent moved for the Form 21 to be dismissed because Petitioners were not current on temporary total disability payments and had illegally suspended compensation.

The parties appeared before Commissioner Campbell on October 24, 2017 and made arguments off the record in a pretrial conference. During the conference, Commissioner Campbell indicated he would dismiss the Form 21. Respondent also requested leave to withdraw her Form 50 to obtain additional proof of her need for medical treatment. Commissioner Campbell issued an Administrative Order on November 14, 2017 dismissing the Form 21 and granting withdrawal of the Form 50 without prejudice. [A.P. 3].

Petitioners timely filed a Form 30 (Notice of Appeal) on November 20, 2017. The Appellate Panel denied Respondent's motion to dismiss as interlocutory. [A.P. 5]. Oral argument was held on February 20, 2018. [A.P. 111-138]. The Appellate Panel issued its Decision and Order on March 5, 2019, in which it affirmed in part and reversed in part. [A.P. 6-20].

Cain-Davis appealed to the Court of Appeals. The court issued an unpublished opinion on March 23, 2022. The court vacated the portion of the appellate panel's decision addressing the Form 50 and remanded for further proceedings consistent with the opinion.

Petitioners filed a Petition for Rehearing and Request for Oral Argument on March 9, 2022. On March 28, 2022, the court issued an order stating:

> The petition for rehearing and request for oral argument is denied. In an effort to clarify the mandate, the claim is remanded to the commission to proceed with whatever filings and hearing requests are pending, if any. As to respondents' argument that the single commissioner's decision denied them due process, nothing prevents them from asserting at a future hearing that the single commissioner's decision was in error or that the claimant's Form 50 was withdrawn for the sole purpose of delay.

[Order dated March 28, 2022].

Petitioners timely filed a Petition for Writ of Certiorari in this Court on April 27, 2022. The Petition was granted on February 10, 2023.

## STATEMENT OF THE FACTS

Gena Cain-Davis worked at the South Carolina Department of Corrections for over 17 years as a correctional officer. On Thursday, July 14, 2016, while working at the prison, she slipped and fell forward landing on her hands and knees. The accident was witnessed by numerous staff and inmates.

Petitioners accepted the claim and began providing treatment to the left knee. The authorized treating physician, Dr. Gee, noted reported symptoms of right knee and back pain, but indicated he was not authorized to examine or treat these injuries. Dr. Gee took Cain-Davis out of work.

The Fund filed a Form 15 (Section I) on August 3, 2016 starting temporary total disability compensation.

Cain-Davis has a past history of developing DVT's (deep vein thromboses) in her left leg. She did not have a DVT immediately before the accident, but developed a DVT almost immediately after. As to the DVT, Dr. Gee opined "In my opinion, this is related." Despite Dr. Gee's opinion and other evidence, Petitioners consistently denied the DVT throughout this claim. That dispute has not yet been litigated.

In late 2016, Dr. Gee retired due to health reasons. Cain-Davis was sent to Dr. Eric Byrd for follow-up on her admitted left knee injury. Due to the extensive swelling, pain and limited range of motion, Dr. Byrd was unable to diagnose the extent of the injury to her left knee. He ordered an MRI. Dr. Byrd opined Cain-Davis was not at MMI.

Cain-Davis went three times to have the MRI done. Unfortunately due to swelling and pain, the radiologist was not able to fully straighten her leg into a position where the MRI could be done. After the first two failed attempts, Dr. Hunt gave her a note to take to the radiologist explaining: "Patient with multiple DVT episodes and filter placement continues to have swelling and pain in her left leg which prevents her from stretching the leg totally straight. Hopefully an MRI can be performed in the face of this problem." Unfortunately, the radiologist could not perform the MRI even on the third attempt on March 15, 2017.[1]

## PROCEDURAL HISTORY

This case arises out of work-related injuries suffered by Claimant Gena Cain-Davis on July 14, 2016. Cain-Davis was written out of work by the authorized treating physician, Dr. Gee.

Claimant filed a Form 50 (Claim) on July 28, 2016 alleging injuries to her left knee/leg, right

[1]This Statement of the Facts is taken from Claimant's pre-hearing brief filed with the Commission. [A.P. 46-56]. As the hearing was continued by Commissioner Campbell before going on the record, no testimony or medical records were admitted into evidence.

knee/leg; and back affecting both legs. [A.P. 21].

On August 31, 2016, the adjuster, Kori Tabor, filed and served a Form 15 (Section I) starting temporary total disability compensation. [A.P. 39].

On October 19, 2016, Claimant filed a Form 50 (Request for Hearing), seeking additional medical examination and treatment for "back affecting both legs; DVT." [A.P. 22]. On November 16, 2016, Petitioners filed a form 51 admitting Claimant gave notice of an injury, but denying the employee suffered an injury. The case was set for a hearing before Commissioner Scott Beck on January 31, 2017.

On January 20, 2017, Petitioners filed a Motion to Leave the Record Open to take the deposition of Dr. Rajesh Bajaj (Cain-Davis's treating hematologist). [A.P. 23-35]. Respondentt consented to the continuance. Commissioner Beck's office was notified of the agreement and reset the hearing for February 23, 2017. Dr. Bajaj was deposed on February 2, 2017.

On February 6, 2017, Respondent advised Commissioner Beck's office by email that she was withdrawing her Form 50.

On March 21, 2017, Petitioners suspended temporary compensation based on an alleged refusal of medical treatment. On April 5, 2017, Petitioners filed a Form 21 stating (inaccurately) that:

> Compensation payments are current as of 04/04/17 (m/d/yy) and shall continue until otherwise ordered or until Form 17 is signed by the Claimant.

Attached to the Form 21 was a Form 18 showing payment of TTD from 7/15/2016-3/27/2017. [A.P. 30-32]. The last check received by Cain Davis paid the period of 03/14/17 - 03/20/17.

On April 11, 2017, Claimant filed a Form 22 requesting additional compensation and

penalties, alleging "claimant has been compliant with all treatment. Defendants have denied causally-related treatment which would lessen the period of disability." [A.P. 32].

On April 13, 2017, Claimant filed a Form 50 (Request for Hearing). [A.P. 33]. Also on April 13, 2017, Claimant filed a Motion to Compel Compliance with Subpoena. The subpoena had been served on January 12, 2017. [A.P. 34-38].

On May 12, 2017, Respondents filed a Form 51 stating "Defendants deny any and all injuries." [A.P. 40].

A hearing was set before Commissioner Campbell for July 19, 2017. On July 5, 2017, Claimant filed her prehearing brief, in which she amended her Form 50 to add Dr. Phillip Baldwin as an examining physician. Petitioners responded by filing a Motion to Leave Record Open to depose Dr. Baldwin. Claimant filed a Return consenting to leave the record open for the deposition.

Dr. Baldwin was deposed on September 20, 2017.

The parties appeared before Commissioner Campbell at the reset hearing on October 24, 2017. At the pretrial conference, Claimant's counsel inquired as to whether Petitioners' counsel was taking the position that Claimant was not entitled to additional medical treatment under Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016)("To hold an employer liable for medical expenses beyond this [10 week] time period, the Appellate Panel must decide that, based upon a heightened standard of medical evidence, additional treatment would tend to lessen the claimant's period of disability."). Petitioners' counsel stated that was her position.[2] Claimant's counsel then expressed concern over the need to obtain a specific statement from the doctor and requested leave to withdraw the Form 50 to obtain such a medical statement. Commissioner

[2]Ms. Barr represented the employer in Hartzell.

Campbell agreed. No objection was made by Petitioners' Counsel.

Commissioner Campbell's office sent an email to the parties requesting Respondent's Counsel to draft a proposed order. [A.P. 77]. On November 7, 2017, Claimant's counsel submitted a proposed Order via email to Petitioners' Counsel for her review prior to submission to Commissioner Campbell. [A.P. 101-106]. On November 9, 2017, on her own initiative, Petitioners' Counsel submitted her own proposed Order directly to Commissioner Campbell's office, with a copy to Respondent's counsel. The Commissioner's assistant, Barbara Cheeseboro, responded with an email stating "Please advise if all parties are in agreement for Comm. Campbell to sign this Order." Respondent's counsel responded stating "I have not seen Ms. Barr's proposed Order, as it was not sent to me first. I will review and get back to you shortly."

Later that day, Respondent's counsel submitted a revised proposed Order to Ms. Cheeseboro. In the email, he wrote:

> This matter has become more complicated than initially realized at the hearing because Ms. Barr is now seeking to dismiss the claim pursuant to Regulation 67-611. Ms. Barr has pointed out to me that I had previously withdrawn a Form 50 in this case, such that the October 24th withdrawal is, in her view, a voluntary dismissal of the claim. At the pretrial, Ms. Barr expressed her position that additional medical treatment would be contested under Hartzell (to obtain medical treatment beyond 10 weeks, the claimant must produce medical evidence stated to a reasonable degree of medical certainty that such treatment would tend to lessen the period of disability). In light of her position and over concern that there may not be sufficient proof in the record, I advised Commissioner Campbell that I was withdrawing my Form 50 to obtain additional medical evidence to meet the Hartzell standard. I believe this met the "good cause" standard in the regulation. The 50 was withdrawn to obtain proof; not "merely for the purpose of delay."
>
> As Commissioner Campbell heard the parties at the pretrial conference, he is in the best position to judge that the 50 was not withdrawn merely for the purpose of delay. For that reason, I have asked that the proposed order make it clear that each party is restored to where they were before the hearing and can move forward towards resolving the case on the merits.

In response to this email, Petitioners' counsel wrote:

> Again, I am quite taken aback that Mr. Samuels would make such new arguments and draft an order addressing issues that were never discussed at our pre-trial conference with Commissioner Campbell. No hearing was held. No motion to withdraw the Form 50 without prejudice was made. No order for costs or reinstatement of ttd was issued by Commissioner Campbell, nor could it have been because, again, we had no hearing. None of these issues are before the Commissioner to decide today. The sole issue decided by Commissioner Campbell was a pro forma dismissal of the Form 21.
>
> In addition, with all due respect, the sole purpose of the Form 50 withdrawal was delay. Both Forms 50 filed by the Claimant are identical. Apparently, the Claimant was unprepared to go forward at either scheduled hearing. This is not "good cause." More importantly, this issue is not properly before Commissioner Campbell to decide. While it is unfortunate that Mr. Samuels only now realizes the issue created by his second Form 50 withdrawal, this does not give Commissioner Campbell authority or jurisdiction to excuse this action. [A.P. 101-107].

On November 14, 2017, Commissioner Campbell issued an Administrative Order ruling:

> This matter was scheduled for a hearing on October 24, 2017 before the undersigned Commissioner pursuant to the Defendants's Form 21, as well as, the Claimant's Form 50 and Defendants' Form 51. **After a pre-hearing conference, the Claimant was allowed to withdraw the Form 50 without prejudice.**
>
> Furthermore, because temporary total disability compensation was suspended prior to the hearing and not current at the time of the hearing, pursuant to S.C. Code Ann. § 42-9-260 (F), I find that the Form 21 hearing request was not properly before the Commission. Therefore, the Form 21 was dismissed and the October 24, 2017 hearing was cancelled. No penalties were assessed. The claim is hereby returned to the Commission's general files.

[A.P. 6-20 (emphasis added)].

After the Order was issued, the following exchange occurred between Petitioners' Counsel and Commissioner Campbell's assistant, Barbara Cheeseboro:

| | |
|---|---|
| Ms. Barr: | Respectfully, on what basis does the Commissioner allow the Claimant to withdraw the form 50 without prejudice? |
| Ms. Cheeseboro: | Please be advised that I put your email before the Commissioner. He said that Mr. Samuels asked in the pre-hearing conference to be |

allowed to withdraw his Form 50 without prejudice, and with it being within his discretion to do so, allowed Mr. Samuels to do that.

Thanks,

Ms. Barr: Mr. Samuels did no such thing. This is patently false. Mr. Samuels simply withdrew the Form 50 because he did not have sufficient evidence. At no time did he ever ask that it be withdrawn without prejudice, as evinced by the fact that the Form 50 was noted as withdrawn on ecase prior to Mr. Samuels's request regarding prejudice.

I apologize, but this is simply wrong and entirely unfair to my clients -- the State of South Carolina -- and on their behalf I must express my vehement objection.

[A.P. 107-108].

Petitioners filed a Form 30 (Notice of Appeal) appealing Commissioner Campbell's order on November 20, 2017. [A.P. 60-64]. Prior to the filing of the Form 30, Respondent filed a Form 15 (Section III) seeking a hearing to address the illegal termination of her weekly benefits. [A.P. 59]. A hearing was scheduled for December 18, 2017 before a single commissioner on the Form 15. The commission postponed that hearing indefinitely due to the filing of the Form 30. [A.P. 66].

Oral argument was held before the Appellate Panel on February 20, 2018. The Appellate Panel issued a Decision and Order on March 5, 2019, wherein it REVERSED IN PART and AFFIRMED IN PART. [A.P. 6-20].

The Appellate Panel affirmed the dismissal of the Form 21, but reversed the Hearing Commissioner's ruling that the Form 50 was withdrawn without prejudice. The Appellate Panel reasoned: "The hearing was cancelled by the Hearing Commissioner on Otober [sic] 24, 2017 prior to going on the record, after which time the Hearing Commissioner's authority and jurisdiction to adjudicate this claim ended." [A.P. 19, Finding of Fact 7]. The Appellate Panel also made

additional findings of fact and conclusions of law addressing the withdrawal of the Form 50 and the suspension of temporary compensation. [A.P. 6-20]. Most particularly, the Appellate Panel found as a fact that:

> Prior to going on the record at a hearing on October 24,2017, the Claimant informed the Hearing (Single) Commissioner and the Defendants that she was withdrawing her second Form 50. Claimant's counsel admits in oral argument before the undersigned Commissioners that there was no discussion about whether the From 50 withdrawl [sic] was with or without prejudice. [A.p. 28, Finding of Fact 5].

The Appellate Panel made this finding notwithstanding the Single Commissioner confirming that "Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50 without prejudice . . ." Moreover, in that oral argument, Cain-Davis's counsel reiterates that "No, Your Honor, I wasn't silent. Because I said I – I am withdrawing the Form 50 to obtain additional evidence [to get more medical treatment]. . . to obtain additional proof, which clearly is not an intent to dismiss." [A.P. 132, lines 8-14].

Cain-Davis timely appealed to the Court of Appeals. The court vacated the portion of the appellate panel's decision addressing the Form 50 and remanded for further proceedings.

Petitioners filed a Petition for Rehearing and Request for Oral Argument on March 9, 2022. On March 28, 2022, the Court of Appeals issued an order stating:

> The petition for rehearing and request for oral argument is denied. In an effort to clarify the mandate, the claim is remanded to the commission to proceed with whatever filings and hearing requests are pending, if any. As to respondents' argument that the single commissioner's decision denied them due process, nothing prevents them from asserting at a future hearing that the single commissioner's decision was in error or that the claimant's Form 50 was withdrawn for the sole purpose of delay.

[Order dated March 28, 2022].

This Court granted Petitioners' Petition for a Writ of Certiorari.

## 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

The entire thrust of Petitioners' argument – indeed their entire defense of this case – has been reliance on technicalities, rather then dealing directly with the merits of their obligation to care for their injured employees. Two essential principles overshadow the issues raised in this appeal. The first is that it is not the place of the courts (nor litigants) "to play a 'gotcha' game with attorneys by showcasing their alleged mistakes, at the expense of their clients." Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012)(Toal, C.J., dissenting)("This practice ignores the fact that behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests."); see, also In re Nov. 4, 2008 Bluffton Election, 686 S.E.2d 683, 385 S.C. 632 (2009)("we are guided by the principle that courts should not interpret procedural rules to create a trap for unwary lawyers."); McCall v. Ikon, 611 S.E.2d 315, 363 S.C. 646 (2005)("A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice . . .").

The second is that our State has a strong preference for deciding cases on the merits, rather than on procedural technicalities. Lewis v. Congress of Racial Equality and/or C. O. R. E., Inc., 274 S.E.2d 287, 275 S.C. 556 (1981). Cf. Capital City Ins. Co. v. Bp Staff, Inc., 674 S.E.2d 524, 382 S.C. 92 (Ct. App. 2009)(considering whether "circuit court abused its discretion in ordering dismissal of the case over some less drastic remedy, such as a continuance or stay . . ."). These sentiments are particularly relevant where, as here, the technicalities are not real and cause no impediment to this claim's viability.

In this case, the Petitioners appealed an Administrative Order from a hearing commissioner who granted Respondent's request to withdraw a Form 50 without prejudice so as to obtain

additional proof. Every party has the right to rely on the pronouncements of a hearing commissioner or trial judge as to whether a continuance will be granted. It is improper and prejudicial for *any* appellate body – whether this Court or the Appellate Panel – to disregard the hearing commissioner's inherent authority to manage his docket. See Trotter v. Trane Coil Facility, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011)("The granting or refusal of a request for a continuance rests in the sound discretion of the hearing commissioner, whose ruling will not be disturbed unless a clear abuse of discretion is shown."). Moreover, where, as here, the hearing commissioner explicitly stated that "Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50 without prejudice" it is legal error for the Appellate Panel to overrule, reverse or contradict that statement.

### 1. The Court of Appeals had appellate jurisdiction because the Appellate Panel's Decision and Order was a "final order" affecting a substantial right [In Response to Petitioners' Argument at pages 8-11].

Petitioners ask this Court to vacate the opinion of the Court of Appeals and reinstate the Appellate Panel's Order. Petitioners do not make this argument out of a desire to promote the integrity of our judicial system; rather they seek to have Cain-Davis's entire case dismissed on a procedural technicality. Make no mistake. If the Appellate Panel's findings on withdrawal of the Form 50 are restored, Petitioners fully intend to argue those findings are the law of the case and move for dismissal with prejudice.

Although Petitioners kept silent when the request to withdraw the Form 50 was made, their tactics were openly revealed in an email to Commissioner Campbell and Cain-Davis's attorney in an email sent 17 days later. Counsel wrote:

> Furthermore, your Form 50 was withdrawn WITH PREJUDICE, as this is the second time you have withdrawn your Form 50. There is no order by Commissioner Campbell, nor consent by my clients, that would allow you to withdraw your Form

50 a second time – at the hearing no less –without prejudice attaching. [A. P. 79 (emphasis in original)].

From that point forward, Petitioners continued to urge dismissal with prejudice. In their appeal to the Appellate Panel, Petitioners "request that the Appellate Panel conclude that Claimant's withdrawal of her second Form 50 on October 24, 2017 acted as a voluntary dismissal with prejudice." [A P. 74]. In their Brief to the Court of Appeals, Petitioners argued "when Davis announced she was withdrawing her second Form 50 on October 24, 2017, this was tantamount to a voluntary dismissal with prejudice." [A.P. 207].

Petitioners argue the "Appellate Panel's Order neither awarded, nor denied, any workers' compensation benefits and did not finally decide any issue." [Brief of Petitioner, page 8]. If Petitioners did not believe the Appellate Panel's Order effectively dismissed Cain-Davis's case, they would not have sought review from this Court. As they plainly intend to persist in this argument – notwithstanding their incomplete and misleading characterization of the event – the Appellate Panel's Order leaves Cain-Davis without an adequate remedy on appeal and is manifestly prejudicial. *Cf.* Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 290-291, 826, S.E.2d 863 (2019)("We find the commission's unreasonable delay in making a final decision leaves Russell without an adequate remedy on appeal under section 1-23-380. Therefore, we find the appellate panel's remand order is immediately appealable.").

Following the initial pronouncement in Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013), limiting appealability of the Commission's orders, this Court has attempted to elucidate clear standards in light of a series of cases highlighting the prejudice engendered by multiple arbitrary procedural rulings from the Commission. See, e.g., Russell; Hilton v. Flakeboard America

Limited, 418 S.C. 245, 791 S.E.2d 719 (2016)("Under these unique circumstances where the Commission has ordered the relitigation of the entire dispute without regard to the matters raised by the appealing party, we find that requiring Hilton to wait until the final agency decision to appeal would not provide him an adequate remedy."); Tucker v. S.C. Dep't of Transp., 427 S.C. 299, 831 S.E.2d 426 (2019)(reversing commission's denial of change of condition claim on procedural technicality because "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 the instant case, the Appellate Panel made three significant errors: (1) allowing Petitioners to appeal the Single Commissioner's interlocutory order allowing the Form 50 to be dismissed without prejudice; (2) holding the Single Commissioner lacked jurisdiction to issue an Order; and (3) making findings of fact which would allow Petitioner to have the case dismissed with prejudice at a future hearing. The Court of Appeals correctly vacated all findings related to the withdrawal of the Form 50 "[b]ecause the single commissioner's decision to allow Davis to withdraw her Form 50 hearing request without prejudice was not immediately appealable . . .." [A.p. 246].

The Full Commission's finding that the Single Commissioner lacked jurisdiction to grant the request for withdrawal without prejudice is effectively a final order. If a subsequent single commissioner agrees with Petitioners' argument or its anticipated corollary (res judicata or law of the case based on Finding of Fact 5), then Cain-Davis's case will be dismissed with prejudice. As dismissal is the ultimate sanction, it should not be imposed so cavalierly. See McComas v. Ross, 626 S.E.2d 902, 368 S.C. 59 (Ct.App. 2006)("In those cases where our supreme court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple

opportunities to proceed with trial, and only then upon a finding of unreasonable neglect.").

The post Bone cases show that significant procedural errors by the Commission must be subject to immediate appeal, lest the procedural errors frustrate the underlying purpose of swift and sure justice. Here the problem is more acute, for the Appellate Panel's decision does not merely delay the proceedings; it could result in dismissal of the entire case. The Court of Appeals implicitly recognized that requiring Cain-Davis to wait until the final agency decision to appeal would not provide her an adequate remedy. See S.C. Code Ann. § 1-23-380 (2007)("A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.").

Petitioners further argue "the decision of the Court of Appeals should be vacated, and the appeal dismissed" because under Torrence " respect for separation of powers demand that judicial review of an administrative decision not occur until the decision is . . . truly final." [Brief of Petitioners, page 10, *quoting* Torrence v. S.C. Dept. of Corrections, 433 S.C. 224, 857 S.E.2d 549 (2021). Torrence provides no comfort for Petitioners. This Court held the administrative order in Torrence was an appealable final order even though a remand was ordered.

Torrence is an important case as the Court recognized how "it is often challenging to determine when a seemingly interlocutory order is, in fact, a final decision and thus appealable. It is our hope today to provide some clarity." Torrence at 227, 857 S.E.2d at 550.

The Torrence court held "The case before us today presents an exception to the typical situation, in that – despite the presence of a remand – the ALC's decision was, in fact, final. *This is because the ALC ruled as a matter of law on the dispositive issues and granted the claimant the very relief he sought.*" Id. (emphasis added). This meant that the "the remand may be viewed as

ministerial or clerical, for SCDC was divested of any agency discretion; rather, it was SCDC's sole duty to enter the judgment as ordered by the ALC. Thus, here, the ALC 'determin[ed] the rights of the parties' with finality." Id.

As to the case at bar, Torrence shows that the mere presence of a remand does not turn a final order into an interlocutory order. Rather, the court must analyze whether the decision below "determined the rights of the parties with finality." Id.

The Appellate Panel found as a fact that:

> Prior to going on the record at a hearing on October 24, 2017, the Claimant informed the Hearing (Single) Commissioner and the Defendants that she was withdrawing her second Form 50. Claimant's counsel admits in oral argument before the undersigned Commissioners that there was no discussion about whether the From 50 withdrawl [sic] was with or without prejudice. [A.p. 28, Finding of Fact 5].

This finding, along with other findings and conclusions of law, means that Petitioners may have what they need to dismiss the case with prejudice. It is apparent from their arguments that they believe so. Conversely, restoring Commissioner Campbell's order means the parties can proceed to litigate the case on the merits. And, not insignificantly for bench and bar, it means that when a trial judge grants a continuance the moving party need not fear that an appellate court or appellate panel will overturn that ruling and dismiss the case with prejudice. See McLaughlin v. Strickland, 279 S.C. 513, 309 S.E.2d 787 (Ct. App. 1983)(finding that an order that effectively forecloses a party from contesting the case on the merits affects a substantial right and is immediately appealable).

The Court of Appeals was correct in vacating the Appellate Panel's Order. Therefore the Court should hold the Court of Appeals had appellate jurisdiction to review the order of the Appellate Panel.

## 2. The Court of Appeals correctly held an administrative order from a hearing commissioner granting a continuance or dismissing a pleading without prejudice is not directly appealable as a matter of law [In Reply to Petitioner's' Argument at pages 11-15].

An administrative order granting a continuance and allowing a claimant to withdraw a Form 50 without prejudice is not appealable – not to the Appellate Panel nor to a higher court. The Court of Appeals correctly held the Hearing Commissioner's order was not appealable and vacated the Full Commission's order. The court reasoned:

> The appellate panel commonly reviews intermediate orders that decide important issues in a contested workers' compensation case. It does so even though other parts of the case remain in active litigation or are not ripe for decision. This is not one of those orders. The single commissioner's order allowing Davis to withdraw the Form 50 without prejudice and returning the claim to the commission's general files is analogous to an order granting a continuance or denying a motion to dismiss. An order granting a continuance or denying a motion to dismiss is generally not immediately appealable.[3] [A.P. 245].

There is nothing novel in this holding. It is based on firmly established law. See, e.g., Levi v. N. Anderson Cnty. EMS, 409 S.C. 374, 385, 762 S.E.2d 44, 50 (Ct.App. 2014)(single commissioner's order denying an employer's motion to dismiss not immediately appealable); Walker v. Springs Industries, Inc., 298 S.C. 249, 379 S.E.2d 729, (Ct.App. 1989)(single commissioner's order allowing

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[3]Workers' compensation differs fundamentally from civil cases in that there may be multiple hearings with multiple decision over the life of a case (and indeed, some cases continue for the life of the injured worker). In civil cases, there is one trial and one verdict. In workers' compensation, there may be an initial Form 50 hearing on compensability, temporary compensation and medical treatment; a Form 15 hearing on whether temporary compensation was legally suspended; a Form 21 or Form 50 hearing to determine the extent of permanent disability and post-MMI medical treatment; or any of the myriad possible combinations. Our courts have consistently held orders from such hearings are final orders which may be immediately appealed from. See, e.g., Martin v. Rapid Plumbing, (Form 15 hearing where temporary compensation was illegally suspended). In the instant case, the Single Commissioner's administrative order was an unappealable interlocutory order as it merely granted a continuance. The fact the Appellate Panel reviewed and reversed that order effectively dismissing Cain-Davis's case means the Appellate Panel's order was immediately appealable.

a claimant to withdraw her hearing request without dismissing her underlying claim and returning the claim to the commission's files was interlocutory because it constituted an indefinite continuance of the case); Temples v. Ramsey, 285 S.C. 600, 330 S.E.2d, 558 (Ct. App.1985)("it is well-established that orders granting or denying motions for a continuance or a mistrial are not directly appealable.").

Petitioners argue, with no sense of irony, that the Appellate Panel had appellate authority to reverse Commissioner Campbell's administrative order yet simultaneously argue the Court of Appeals lacked appellate authority to review the Appellate Panel's Order. The essence of Petitioners argument is that § 42-17-50 and Regulation 67-701 give the Appellate Panel appellate jurisdiction to immediately review *any* "decision" made by a hearing commissioner. They accuse the Court of Appeals of "rewrit[ing] S.C. Code Ann. 42-17-50 and inject[ing] matters into it which are not in the legislature's language, which is plain error." The error, according to Petitioners, is to limit appeals within the Commission to "'final orders' or 'intermediate awards that decide important issues.'" [Brief of Petitioners, pages 13-14].

While it is true that the appellate courts give some level of deference to an agency's construction of its own regulations, this deference does not extend to abandoning the duty to correct the agency's errors of law. The Appellate Panel did not interpret either § 42-17-50 or regulation 67-701. It simply reversed the administrative order without addressing the propriety of hearing an appeal of an interlocutory order.

True to its moniker, the Appellate Panel sits in an appellate capacity. As with the appellate courts, "appeals from the single commissioner to the Appellate Panel must be from final orders." Levi v. N. Anderson Cnty. EMS, 409 S.C. 374, 762 S.E.2d 44 (Ct. App. 2014). Levi confirms that

Petitioners' argument is wholly misguided and incorrect.

To be immediately appealable, an order must involve the merits. An order which involves the merits is one that "must finally determine some substantial matter forming the whole or a part of some cause of action or defense." Mid-State Distribs., Inc. v. Century Importers, Inc., 310 S.C. 330, 336, 426 S.E.2d 777, 780 (1993). Any order, leaving some further act to be done by the commission before the rights of the parties are determined, is interlocutory and not final. Id. The order here is no more than an interim docketing order.

In Levi, the court addressed an appeal arising out of a motion to dismiss. Levi was involved in a work related car accident where she was rear-ended by a third party. Her employer accepted her claim, paid temporary total disability compensation, and provided back surgery. Levi accepted a payment of $550.00 to settle her "pain and suffering" from the third party liability carrier.

Her employer filed a motion to dismiss her claim arguing the $550.00 settlement without notice to the carrier as required by § 42-1-560 meant she had elected her remedy, thus barring her from recovering workers' compensation benefits. The Single Commissioner denied the motion to dismiss and ordered a hearing to determine if she had reached MMI or required additional medical treatment.

The employer appealed to the Appellate Panel. The Appellate Panel reversed, finding Levi had elected her remedy by settling the third-party case without complying with the notification statute.

Levi appealed to the Court of Appeals. In an extensively detailed opinion surveying case law from multiple jurisdictions, the court held "appeals from the single commissioner to the Appellate Panel must be from final orders." Levi v. N. Anderson Cnty. EMS, 409 S.C. 374, 762 S.E.2d 44 (Ct.

App. 2014)(emphasis added). The court noted that the term *award* means a "final judgment or decision." Id. at 381, 762 S.E.2d at 380. The court also noted that the APA permits appeals only from "a final decision in a contested case." Id. The court reasoned that to be a final order, an order must "establish the law of the case . . ." Levi noted that our supreme court "clarified that the issue is properly couched as one of appellate jurisdiction rather than subject matter jurisdiction." Allison v. W.L. Gore & Associates, 394 S.C. 185, 187, 714 S.E.2d 547, 549 (2011). Neither the courts nor the Full Commission has jurisdiction to hear an appeal of an interlocutory order.

The Levi court concluded by stating:

> The appeal from the single commissioner to the Appellate Panel was not from a final judgment and was interlocutory. The applicable statute provides for appeals from an award, which Black's Law defines as a final decision, mandating that appeals only be from a final decision. Although the applicable regulation uses the term decision instead of award, a regulation cannot add to the statute. Therefore, an appeal must be from an award, not simply any decision.
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> * * *
>
> In the case of Pait from North Carolina, after which our workers' compensation system was originally modeled, the court affirmed the Appellate Panel's dismissal of the appeal from the single commissioner for the order being interlocutory until the single commissioner issues a final opinion and award. Our supreme court has made clear in recent years with Bone that the circuit court (under the former statute), this court, and the supreme court cannot hear appeals from the Appellate Panel if it does not constitute a final decision. **A plain reading of the statute supports that appeals from the single commissioner to the Appellate Panel must be from final orders as well. . . . Accordingly, we vacate the Appellate Panel's order and remand this matter to it for it to enter an order vacating Employer's appeal to it.** Levi at 384-385, 762 S.E.2d at 50 (emphasis added).

Consistent with Levi, the Court of Appeals correctly held the Appellate Panel lacked appellate jurisdiction over Commissioner Campbell's administrative order.

Petitioners further argue that their appeal to the Appellate Panel raised "important issues." The granting of a continuance is far removed from an important issue. It is the very archetype of an

interlocutory order as it causes no prejudice to either party, excludes no evidence, and does not touch the merits of the case in any way, shape or form. The sole affect is to postpone a trial. As the Court of Appeals stated, "Interlocutory appellate tinkering tends to disrupt litigation's forward progress." This is why our courts uniformly hold such an order is not appealable.

The Court of Appeals correctly vacated the Appellate Panel's order as the panel lacked appellate jurisdiction as a matter of black letter law.

**3. The Hearing Commissioner retained Jurisdiction over the case at the time he issued the Administrative Order [in response to Petitioner's argument at pages 15-23].**

Petitioners combine two arguments: (1) whether the Hearing Commissioner had been divested of jurisdiction when he issued his administrative order; and (2) whether the Full Commission's findings and conclusions are supported by substantial evidence and the applicable law.[4]

A. The Hearing Commissioner retained jurisdiction until he issued an order.

The Appellate Panel held: "The hearing was cancelled by the Hearing Commissioner on Otober [sic] 24, 2017 prior to going on the record, after which time the Hearing Commissioner's authority and jurisdiction to adjudicate this claim ended."[A.P. 19, Finding of Fact 7]. This was error, for a hearing commissioner, like a trial judge, "has jurisdiction to hear a matter and the matter having been heard before him, he entertains jurisdiction until his decision is rendered." First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 191 S.C. 384, 410, 1 S.E.2d 797, 808 (1939). Cf. First Union Nat'l Bank of S.C. v. Hitman, Inc., 308 S.C. 421, 422, 418 S.E.2d 545, 545

[4]The Court of Appeals did not reach these issues "because our determination on appealability is dispositive." Cain-Davis v. S.C. Dept. of Corrections, Opinion No. 2022-UP-081 (S.C. Ct. App. Filed February 23, 2022)

(1992) ("[A] judge is not bound by [a] prior oral ruling and may issue a written order which is in conflict with the oral ruling.").

This rule is further confirmed by the language in the regulation stating whether withdrawal of a Form 50 voluntarily dismisses the claim is to be determined if "in the *opinion of the Commissioner*, the form is withdrawn merely for the purpose of delay." S.C. Code Ann. Regs. 67-609 (2017). The reference to "the Commissioner" in the singular shows this decision is to be made by the Hearing commissioner; not the Appellate Panel. Cf. Spruill v. Richland County School Dist. 2, 363 S.C. 61, 609 S.E.2d 524 (2005)(affirming authority of hearing commissioner to retain jurisdiction to deny request to withdraw Form 50 "after the hearing had been held and a decision rendered" but before the actual signed Order had been written and filed)

It is axiomatic that a trial court retains jurisdiction over a pending matter unless and until it is divested of jurisdiction by operation of law, such as removal to another tribunal or a timely appeal to a higher body (which could be an appellate court or the Appellate Panel). This rule applies to the Workers' Compensation Commission with equal force as it does to circuit court. Once a case is assigned to a commissioner, the commissioner retains jurisdiction until a final order is issued disposing of the matters raised in the pleadings – or, in some situations, administratively returned to the general files.[5]

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[5]Petitioners wrote "Workers' Compensation Commissioners should not issue orders simply because a litigant e-mails them with a plaintive request, as Davis did here." [Petition, page 18]. This is a false statement. Commissioner Campbell's assistant inquired about a proposed order on November 2, 2017. [A. P. 7]. Cain-Davis's counsel emailed the proposed order to Petitioners' counsel on November 7, 2017. Petitioners' counsel responded by sending her own (unsolicited) proposed order directly to the commissioner's assistant on November 9, 2017. Later that same day, Cain-Davis sent the proposed order requested by Commissioner Campbell. This then led to the e-mail exchanges whereon Commissioner Campbell ultimately stated: "Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50

Petitioners argue that allowing Cain-Davis to withdraw her Form 50 without prejudice is not equivalent to granting a continuance because "[w]hen a Hearing Commissioner grants a continuance it necessarily means that a proper motion has been filed . . ." [Petition, page 15]. Not only do Petitioners overlook the case law on this issue, they also misapprehend the authority of a hearing commissioner to manage his docket. A hearing commissioner has plenary authority to entertain pretrial motions, including granting or denying continuances. See Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011)("Every reasonable presumption in favor of a proper exercise of the trial court's discretion will be made."), *quoting* 17 C.J.S. Continuances § 5 (2011).

Petitioners' counsel knew exactly what she was doing at the hearing. At no time did counsel object to Commissioner Campbell's action, point out that a Form 50 had previously been withdrawn or otherwise put Claimant on notice that she would seek to have the case dismissed. She had the ability to object and request that Cain-Davis try her case on the existing evidence, yet chose to remain silent with the obvious intent of profiting later when Claimant filed a new Form 50. "If one remains silent where in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent." Smith v. Williams, 141 S.C. 265, 282, 139 S.E. 625, 630 (1927). "It is a general rule of law, as well as of good morals and fair dealing, that if a party is silent when he should speak, or supine when he should act, he will not afterwards be permitted to either speak when he should be silent, or to act when he failed to do so at the first proper and opportune moment. 'Silence always implies consent,' says another cardinal maxim of the law." King v. Ligon, 180 S.C. 224, 185 S.E. 305 (1936). Petitioners' attempt to gain a strategic advantage was properly

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without prejudice, and with it being within his discretion to do so, allowed Mr. Samuels to do that." [A.P. 76-84, 101-108].

denied by the Hearing Commissioner.

Petitioners further argue "[R]einstating the Order of the Hearing Commissioner in this case violates notions of fundamental fairness and the constitutional rights of the Petitioners . . ." [Brief of Petitioners, page 19]. The acute observer might note that the parties are in this morass in no small part because Petitioners elected not to speak up in front of Commissioner Campbell, instead hoping to lure Cain-Davis into a procedural trap.[6]

Petitioners have the temerity to argue that "they were given no opportunity to answer such a claim [of withdrawal without prejudice] or raise defenses, as is their right under S.C. Code Reg. 67-703." Indeed, the fatal flaw in Petitioners' fairness and constitutional argument is that *they had the chance to be heard.* Counsel for Petitioners was present in the court room when Respondent's counsel made his request to withdraw the 50 for the stated purpose of obtaining additional proof of the need for medical treatment. It is preposterous to presume that Cain-Davis's attorney deliberately elected to dismiss her case in open court rather than ask for a continuance. Had Petitioners' counsel voiced an objection, Cain-Davis could have been compelled to try the case with the evidence at hand.

Petitioners argue that Commissioner Campbell's administrative order suffers from "legal, factual, procedural, and even constitutional flaws . . ." [Brief of Petitioners, page 22]. In so arguing, Petitioners fail to understand that the order was merely an administrative order – dismissing both the Form 21 and Form 50 without prejudice. It is an unappealable interlocutory order precisely because it included no findings of fact or conclusions of law, nor did it determine the rights of any of the

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[6]Petitioners point out that Davis "did not even believe the prejudice issue was relevant until 17 days after the Form 50 was withdrawn . . ." [Brief of Petitioners, page 17]. Petitioners are correct. Dismissal with prejudice was not relevant because Petitioners' counsel remained silent, thus implicitly acquiescing to the request to obtain additional medical proof.

parties. Hearing commissioners, like trial judges, make all sorts of orders addressing continuances, discovery, the mode of trial and other procedural matters necessary to the administration of a trial docket. As the rulings here were made prior to the record being opened, Commissioner Campbell was correct in memorializing his rulings in an administrative order.

The Appellate Panel simply got it wrong in concluding the Hearing Commissioner had been divested of jurisdiction when he issued the Administrative Order addressing the issues before him on the pleadings. The Appellate Panel's order should be reversed on this issue.

B. The Appellate Panel's findings and conclusions are incorrect and were properly vacated.

Petitioners also argue that the "Substantial evidence supports the Appellate Panel's finding 'that there was no discussion about whether the Form 50 withdrawal was with or without prejudice' . . ." [Brief of Petitioners, page 16]. This argument misstates the inquiry. As the Court of Appeals explained, "There is also no dispute that Davis then withdrew her hearing request and *did so for the purpose of obtaining additional evidence supporting her claim for further medical evaluation and treatment.*" [A.P. 244 (emphasis added)].

Petitioners now seek to create a factual dispute where none exists. They base this argument on their own mischaracterization of the underlying events. They – as did the Appellate Panel – completely overlook (or deliberately ignore) Commissioner Campbell's statement that: "Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50 without prejudice, and with it being within his discretion to do so, allowed Mr. Samuels to do that." [A.P. 107]. And they overlook the undisputed fact that the request was made for the specific purpose of obtaining additional medical evidence. See Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348

(Ct.App.1985) (when the claimant in a workers' compensation case inadvertently omits proof of causation, the case should be reopened and an opportunity should be afforded the claimant to supply such proof in the interest of justice).

Instead, Petitioners focus on the (literally correct) response by Cain-Davis's counsel to follow-up questions from the Appellate Panel as to whether there was a "discussion between either you and Commissioner Campbell or Ms. Barr and Commissioner Campbell about whether it was with or without prejudice?" Counsel responded truthfully "There was not, your Honor." This was after Counsel had previously explained that the discussion did not include a *literal* discussion about whether it was with or without prejudice (using those specific terms) – because it was apparent from the context that the purpose was to obtain additional proof, ergo the request to withdraw the Form 50 was necessarily without prejudice. [A.P. 127, line 10 - 129, line 14]. The Appellate Panel's attempt to wring some sort of concession from counsel on the verbiage has the appearance of setting a procedural trap. See In re Nov. 4, 2008 Bluffton Election, 686 S.E.2d 683, 385 S.C. 632 (2009)("we are guided by the principle that courts should not interpret procedural rules to create a trap for unwary lawyers."); Cf. Trowell v. S.C. Dept. of Public Safety, 681 S.E.2d 893, 384 S.C. 232 (Ct. App. 2009)("The agency's decision here arbitrarily created a trap for the unwary petitioner.").

As a precise recounting of the pretrial conference is not possible because it was off the record, the parties and the Full Commission must rely on the Hearing Commissioner's recounting of the pretrial conference. Commissioner Campbell's assistant explained: "Please be advised that I put your email before the Commissioner. **He said that Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50 without prejudice, and with it being within his discretion to do so, allowed Mr. Samuels to do that.** " [Exhibit E (emphasis added)].

The Appellate Panel entirely disregards Commissioner Campbell's explanation of his reasoning. Instead, the Appellate Panel found:

> Claimant's counsel admits in oral argument before the undersigned Commissioners that there was no discussion about whether the Form 50 withdrawal was with or without prejudice. [FC Order, page 13, Finding of Fact 5].

For members of the workers' compensation bar, it is disconcerting that the Appellate Panel would take a candid statement from counsel so completely out of context (and contrary to that of the Hearing Commissioner) and use the resulting finding to effectively dismiss a meritorious claim.

The transcript shows the following exchange:

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| **Mr. Samuels:** | I understand I withdrew the 50 on that day. |
| **Commissioner Taylor:** | Okay. |
| **Mr. Samuels:** | Without prejudice. And the Commissioner memorialized that - - - |
| **Ms. Barr:** | Objection. |
| **Commissioner Barden:** | Was there a discussion - - - |
| **Mr. Samuels:** | - - - in an Order. |
| **Commissioner Barden:** | - - - with Ms. Barr and Commissioner Campbell about whether it was with or without prejudice? |
| **Commissioner Taylor:** | On the day. |
| **Mr. Samuels:** | There was a discussion as to the reasons why the Form 50 was being withdrawn. |
| **Commissioner Barden:** | Right, because you wanted some more medical evidence. |
| **Mr. Samuels:** | I was concerned – you know, normally, what most lawyers will do and say, if a Claimant is not at MMI we want to provide medical treatment because we want to get that person to MMI. Ms. Barr was the attorney in our case and she took the unusual position of insisting on that relatively new case and language of that specific language – specific language to a reasonable degree of medical certainty, ten months comparative disability [*sic*]. |
| **Commissioner Taylor:** | And so you felt like maybe you may not get there. |
| **Mr. Samuels:** | I was – correct. |
| **Commissioner Taylor:** | I understand. And so, when you advised Commissioner Campbell that you were going to withdraw your Form 50, was there a discussion between either you and Commissioner or and Ms. Barr and Commissioner Campbell about whether it |

was with or without prejudice?

**Mr. Samuels:** There was not, Your Honor.

**Commissioner Taylor:** Okay.

**Mr. Samuels:** And I think that is an important point. Because I think you've got to consider what's going on. Is it my intention to withdraw the Form 50 to obtain additional evidence as we had discussed, or am I intentionally dismissing my case so I would walk outside to may client and tell her I just voluntarily dismissed your case? So, you can sue me for legal malpractice. Because that would be absurd if I were to do that. Ms. Barr didn't raise the issue of a dismissal until a Proposed Order was submitted to her. She then responded with that email and copied it to Commissioner Campbell's administrative assistant - - -

**Commissioner Taylor:** Okay.

[A.P. 127, line 10 - P. 129, line 14].

The argument then moves to a discussion over the Form 21 dismissal before returning to the issue over the Form 50. [A.P. 130, line 24 - P. 132, line 18]. In that argument, Cain-Davis's counsel reiterates that "No, Your Honor, I wasn't silent. Because I said I – I am withdrawing the Form 50 to obtain additional evidence [to get more medical treatment]. . . to obtain additional proof, which clearly is not an intent to dismiss." [A.P. 132, lines 8-14].

As is readily apparent from the contemporaneous email exchanges, the reason for the request to withdraw the Form 50 was explained to the Hearing Commissioner and Petitioners' counsel. The Hearing Commissioner is not a fool. He easily understood that even if there was no literal discussion about "with or without prejudice" in those precise terms, the request to withdraw the Form 50 to procure additional proof is unquestionably a withdrawal without prejudice. It beggars belief to suggest than any attorney present at trial with his witnesses and hundreds of pages of written evidence would simply throw in the towel and voluntarily dismiss the case.[7] Cf. Trowell v. S.C.

[7]In the Discussion portion of the Appellate Panel's Decision and Order, it states the regulation allowing withdrawal of a second Form 50 for good cause "is modeled on the common

Dept. of Public Safety, 681 S.E.2d 893, 384 S.C. 232 (Ct. App. 2009)("The agency's decision here arbitrarily created a trap for the unwary petitioner."). Had Commissioner Campbell denied the request (or Petitioners' counsel raised an objection or forced the issue), then the only alternative for Cain-Davis would have been to proceed with the evidence at hand.

The Appellate Panel had no appellate jurisdiction to make any findings. To the extent it did, those findings are inherently arbitrary and capricious, let alone unsupported by substantial evidence. An appellate body cannot reject the statements of a trial judge or hearing commissioner on the reasoning behind granting a continuance. The Appellate Panel's order should be reversed.

**4. The Appellate Panel erred in finding Cain-Davis's oral request in open court to withdraw her Form 50 to obtain additional proof was a withdrawal with prejudice [in response to Petitioner's argument at pages 23-25].**

Petitioners argue that Cain-Davis's oral request to withdraw her Form to obtain additional proof was not equivalent to a motion for a continuance. Petitioners did not raise this new issue to the Court of Appeals nor to this Court in their Petition for Writ of Certiorari. As such, the issue is not preserved. Rule 242(d)(2), SCACR.

To the extent the argument is preserved, the argument has no merit. Withdrawing a Form 50 without prejudice is equivalent to a continuance. See Walker v. Springs Industries, Inc., 379 S.E.2d

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law doctrine of *retraxit*, which holds that once a case has been voluntarily dismissed, if it is brought to court again a dismissal in this second case will mean the case can never be brought back to court." [A.P. 16]. This discussion seems to indicate that the Commission's Decision and Order is a final one, preventing Cain-Davis from ever moving forward. However, as *retraxit* is not discussed in the Findings of Fact and Conclusions of Law, it appears not to be part of the actual holding.

To the extent *retraxit* is relevant, the regulation does not follow the doctrine of *retraxit*, for it provides a case can only be dismissed if the hearing commissioner explicitly finds the second withdrawal is "merely for the purpose of delay." S.C. Code Ann. Reg. 67-609 (2017) The federal court rule contains no such proviso. Rule 41, FRCP.

729, 298 S.C. 249 (Ct. App. 1989)("Moreover, the appealed order [withdrawing the Form 50 without prejudice] effected an indefinite continuance of this case. Orders granting continuances are not directly appealable.").

Petitioners argue that "Like a notice of voluntary dismissal, a notice of withdrawal under Regulation 67-609 is immediate, automatic, and self-executing, with no action by the Commission other than the ministerial act of 'removing the case from the docket.'" [Brief of Petitioners, page 23]. Had Cain-Davis withdrawn her Form 50 by filing an electronic notice with the Commission, Petitioners would have a point. However, we know that is not what happened.[8] As the Court of Appeals found, "There is also no dispute that Davis then withdrew her hearing request and *did so for the purpose of obtaining additional evidence supporting her claim for further medical evaluation and treatment.* [A.P. 244 (emphasis added)].

Petitioners argue that once the withdrawal of the Form 50 was denoted on the Commission's electronic docketing system (eCase), the withdrawal was final and divested Commissioner Campbell of jurisdiction. Under the facts of this case, that argument is incorrect. eCase is akin to a trial docket. The eCase listing merely denoted the status of the case in the same way a jury roster would show whether a case was up for trial, continued or settled.

Semantics aside, Commissioner Campbell had two decisions to make. He had to rule on the motion to dismiss the Form 21 (as it was not voluntarily withdrawn by Petitioners). And he had to

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[8]In a footnote, Petitioners state "Under the civil rules, a voluntary dismissal may also be obtained by stipulation or a motion requesting leave to withdraw her claim for a second time without prejudice and the Commission rules permit the same. However, [Cain-]Davis did not request any such stipulation and did not file any such motion." [Brief of Petitioners, page 23 n.15]. This is simply not true. While Cain-Davis did not file a written motion prior to the hearing, it is undisputed – even by Petitioners – that she made an oral request to withdraw her 50 to obtain additional medical evidence.

confirm his granting leave to Respondent to withdraw her Form 50 without prejudice. For those decisions to become effective, he needed to sign an Order – which is exactly what he did. It is remarkable that Petitioners would make this argument when they were the ones who first submitted a proposed Order to the hearing commissioner. They did not raise the jurisdictional issue until Commissioner Campbell rebuffed their belated attempt to bootstrap a dismissal through gamesmanship.

Petitioners write at length about the procedural aspects of withdrawing the Form 50. It is true that a party can unilaterally withdraw a Form 50 simply by notifying the Commission. Cain-Davis did exactly this when she withdrew her first Form 50 – as she was able to do as a matter of right. However, she did not unilaterally withdraw her second Form 50. That withdrawal took place in open court in a discussion with the hearing commissioner and Petitioners' counsel. All present understood that the Form 50 was being withdrawn without prejudice to obtain additional medical proof. See Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct.App.1985) (when the claimant in a workers' compensation case inadvertently omits proof of causation, the case should be reopened and an opportunity should be afforded the claimant to supply such proof in the interest of justice). In the case of a second withdrawal, a party should ensure it takes place at a hearing where opposing counsel has the opportunity to object and argue that the hearing must go forward on the existing evidence. And that is what happened.

## 5. The Court of Appeals properly remanded the case, although it erred to the extent the remand allows Petitioners to collaterally attack Commissioner Campbell's order [in response to Petitioner's argument at pages 25-26].

Petitioners object to the Court of Appeals remanding the case "for proceedings consistent with this opinion." [Petition, page 22, A.P. 246]. Respondent has no concerns about the original Opinion. Given that there are undecided issues pending before the Commission,[9] a general remand makes sense.

Nonetheless, Respondent has grave concerns about the Order denying the Petition for Rehearing. The Court of Appeals states "nothing prevents [Petitioners] from asserting at a future hearing that the single commissioner's decision was in error or that the claimant's Form 50 was withdrawn for the sole purpose of delay." [A.P. 247]. This is error and enormously prejudicial to Cain-Davis. Commissioner Campbell's administrative order precludes any such second bite of the apple. His pronouncement that the Form 50 was withdrawn without prejudice must be the end of this issue. To allow Petitioners' to relitigate the issue makes this entire appeal pointless. Moreover, it would mean parties can no longer rely on pronouncements from the trial bench because an appellate court (or appellate panel) can simply disregard what it disagrees with.

Once Commissioner Campbell ruled that the Form 50 was withdrawn without prejudice, that was the end of the issue. And once he explained his reasoning in an email to Petitioners' counsel, his word cannot be challenged unless it were wholly false and without evidentiary support. Whilst

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[9]In her brief, Cain-Davis stated she had filed a Form 15 seeking reinstatement of her temporary total disability compensation (TTD). She also stated she intends to file a Form 50 seeking a hearing regarding her medical treatment. Petitioner needs to file a Form 21 to stop compensation, although the statute will require them to certify that they have paid the arrearage and brought the payments current. S.C. Code Ann. § 42-9-260(G)(2007).

the prehearing conference was not transcribed, the evidence is overwhelming as to what transpired.

This Court should reverse the Order on Rehearing to the extent it allows Petitioners to collaterally attack Commissioner Campbell's order. His order is the law of the case as to the withdrawal of the second Form 50.

## CONCLUSION

For the foregoing reasons, the Opinion of the Court of Appeals should be affirmed in part and reversed in part. The underlying Opinion should be affirmed, but the Court should reverse the Order denying rehearing to the extent it allows Petitioners to relitigate the issue of withdrawing the Form 50 without prejudice. The Decision and Order of the Appellate Panel should be reversed.

Stephen B. Samuels
SAMUELS REYNOLDS LAW FIRM, LLC
1320 Richland St.
Columbia, SC 29201
(803) 779-4000
Stephen@SamuelsReynolds.com
S.C. Bar No. 15394

ATTORNEY FOR RESPONDENT

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