THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

Appeal from the South Carolina
Worker's Compensation Commission

Appellate Case No. 2022-000519

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

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

v.

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

REPLY BRIEF OF THE PETITIONERS

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Davis alleges that at the October 24, 2017, pre-hearing conference before Hearing Commissioner Campbell she "*requested* leave to withdraw her Form 50 to obtain additional proof." (Respondent's Brief p.2) (emphasis added). Respectfully, this is allegation is untenable. The fact that Davis made no such *request* on October 24, 2017, is evinced by the statements of Davis's own attorney to Commissioner Campbell on November 9, 2017, he

> "… *advised* Commissioner Campbell that [she] was withdrawing [the] Form 50 to obtain additional medical evidence…." (A. p.82) (emphasis added).

Davis similarly *advised* the Petitioners of her unilateral decision to voluntarily withdraw her second Form 50 on October 24, 2017, and similarly made no *request* for the Petitioners' consent. (A.p.79). No hearing was held on October 24, 2017. Davis made no motion for leave to withdraw her Form 50 without prejudice and neither filed, nor served, any motion for a postponement. On October 30, 2017, the Workers' Compensation Commission recorded that the Form 50 had simply been "withdrawn." (A.p.139).

On November 2, 2017, Commissioner Campbell's administrative assistant sent an email to Davis's attorney stating, *in toto*, "Mr. Samuels, please advise if you will be submitting an Order for dismissal of the Form 21 from the hearing previously scheduled on October 24, 2017." (A. p.77). Commissioner Campbell did not issue any directives and at no time requested that Davis prepare any order with respect to the Form 50 withdrawal because no such order was necessary to effectuate Davis's unilateral request. This fact was confirmed by Davis's attorney upon questioning by Appellate Panel on February 20, 2018:

"Commissioner Taylor:	… the order was not requested on the issue of the withdrawal of the Form 50. Am I correct? It was about the 21. Isn't that correct?
Mr. Samuels:	It was requested on the 21." (A.p.129, l.24—p.130, l.3).

On November 7, 2017, Davis's attorney presented a proposed order to the Petitioners, which not only addressed Davis's request that the Form 21 be dismissed, but further purported to award past and future disability benefits, assessed a penalty, and concluded that Davis had withdrawn her second Form 50 "without prejudice." None of these issues (disability benefits, penalties, or the Form 50) were before Commissioner Campbell after the hearing was cancelled and the Petitioners had no notice that these issues, including "prejudice," would be argued, *ex parte*, in an order proposed by Davis weeks after the hearing was cancelled. Therefore, counsel for the Petitioners objected to the proposed order and further stated that

> "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).

Davis had no response. The Petitioners respectfully contend that even in a quasi-judicial administrative system, fundamental notions of justice, fairness, and due process should prohibit a litigant from obtaining desired relief or advantage simply by emailing an order to a hearing commissioner with a request for signature.

Not only did Davis not "request" leave to withdraw her Form 50 on October 24, 2017, Davis did not raise issues of "prejudice" or "good cause" at the October 24, 2017, conference where she unilaterally withdrew her Form 50.[1] On November 9, 2017, Davis's attorney informed Commissioner Campbell (by email) that "[t]his matter has become more complicated than initially realized at the hearing" after it was "pointed out to [him] that [he] had previously withdrawn a Form 50 in this case." (A.p.82). Davis then attempted to argue --- for the first time -- issues of "good cause" and "delay" under S.C. Code Reg. 67-609[2] and suggested that,

> "[a]s 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 … If Commissioner Campbell would prefer to discuss this with the parties, I will make myself available for an in-person or telephone conference at his convenience." (A.p.82).

[1] In her Brief, Davis baselessly states that Commissioner Campbell "easily understood that even if there was *no literal discussion* about 'with or without prejudice' in those precise terms, the request to withdraw … was *unquestionably* a withdrawal without prejudice." (Respondent's Brief p.29) (emphasis added). Not only was no "request" made, but Davis concedes that she, herself, did not believe the issue of "prejudice" was even relevant at that time. (Respondent's Brief, p.25, f.n. 6). This certainly begs the question how Commissioner Campbell (or the Petitioners) could have "unquestionably" understood that the "prejudice" issue had been raised by Davis when Davis admittedly did not. (*See* A.p.82)

[2] Davis's email of November 9, 2017, actually cites S.C. Code Reg. 67-611, which governs pre-hearing briefs, not S.C. Code Reg. 67-609, which governs the procedures for withdrawing a Form 50 hearing request. (A. p.82).

These statements make it clear that such issues were not actually raised before Commissioner Campbell on October 24, 2017[3], (or at any time prior to November 9, 2017), and that Davis did not *request* leave to withdraw her Form 50 "without prejudice" at the October 24, 2017, pre-hearing conference, as her brief now claims.[4]

In fact, Davis admits that she did not "believe the prejudice issue was relevant" when she withdrew her Form 50 on October 24, 2017. (Respondent's Brief, p.25, f.n. 6).[5] These statement and admissions, in addition to those made by Davis's counsel to the Appellate Panel[6], stand in stark contrast to Davis's unfounded allegation in her Brief to the Supreme Court that "[a]ll present understood that the Form 50 was being withdrawn without prejudice." (Respondent's

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[3] To wit: why would Commissioner Campbell need to "judge" an issue on November 9 if that issue had already been decided on October 24?

[4] To the extent that Davis alleges that Commissioner Campbell's Order (or the email of his assistant) "cannot be challenged unless it were wholly false and without evidentiary support," the Petitioners respectfully contend that the record contains substantial evidentiary support, including admissions by Davis's own attorney (A. pp.13—16), for the Appellate Panel's finding of such falsity. (*See* Respondent's Brief p. 33, *see also* f.n. 6).

[5] Clearly, the Petitioners had no notice or any meaningful opportunity to be heard on issues that were not actually raised by Davis (or the Hearing Commissioner) on October 24, 2017, especially considering Davis's own admission that she did not even believe the issue was "relevant" to the withdrawal of her Form 50 on that date. Therefore, Davis's allegation that Petitioners "had the chance to be heard" on an issue that was neither raised, nor even thought to be relevant, is fundamentally without merit. (*See* Respondent's Brief p.25).

[6] The record contains the following transcript from the hearing before the Appellate Panel:

> "Commissioner Taylor: *...when you advised Commissioner Campbell that you were going to withdraw your Form 50, was there a discussion between either you and Commissioner or Ms. Barr and Commissioner Campbell about whether it was with or without prejudice?*
>
> Mr. Samuels: *There was not, your Honor.*" (A. p.138, ll.15--22).

Brief p.32). The Petitioners deny any such understanding, as evinced by their contemporaneous correspondence.

When Davis took the liberty of submitting a proposed order that "allows [Davis] to withdraw the Form 50 without prejudice and with leave to refile" (A.p.82) on November 9, 2017, the Petitioners immediately responded with their objection on the basis that such issues "were never discussed at our pre-trial conference with Commissioner Campbell..." (A.p.104). The Petitioners specifically requested to be heard on the issue "[i]f Commissioner Campbell believes that this issue is somehow before him at this time ...It would greatly prejudice my clients for the Commissioner to rule on this issue without giving us notice and opportunity to be heard." (A.p.101). Neither Davis, nor Commissioner Campbell responded to this request.

Commissioner Campbell signed Davis's proposed order on November 14, 2017, which states that Davis was "allowed to withdraw the Form 50 without prejudice." (A.p.3). The November 14, 2017, Order has no findings of fact, no conclusions of law, cites no authority, and contains no analysis or explanation. No hearing was ever held on the issues of prejudice or good cause. The Petitioners were never given any meaningful opportunity to be heard on these issues, despite making a specific request to be heard as soon as these issues were raised.

According to the Appellate Panel, because Davis admittedly did not make any "request that would allow her to withdraw her For 50 a second time without prejudice" and because "at the pre-hearing conference on October 24, 2017, the Hearing Commissioner made no ruling and otherwise made no mention of the issues of prejudice, good cause, or delay," these issues were "not raised by the [Davis] or ruled upon by the Hearing Commissioner on October 24, 2017" when Form 50 was withdrawn. (A.p.13). The Appellate Panel further determined that

> "it was prejudicial to [the Petitioners'] right of due process to allow [Davis] to make new arguments without proper and adequate opportunity to be heard on these novel issues, which had not previously been raised prior to the withdrawal of the second Form 50." (A.p.14).

Accordingly, the Appellate Panel concluded that "the Hearing Commissioner erred as a matter of law in addressing issues of prejudice and 'good cause,' as the issues were not raised by [Davis] prior to voluntarily withdrawing her Form 50 hearing request for a second time." (A. p.15). Therefore, the Appellate Panel reversed and vacated Commissioner Campbell's decision with respect to the Form 50.

The Order of the Court of Appeals does not address the Appellate Panel's findings and conclusions, or even the propriety Commissioner Campbell's Order. However, in the Order denying the Petition for Rehearing, the Court of Appeals stated, without explanation, that,

> "As to [Petitioners'] argument that [Commissioner Campbell's] decision denied them due process, nothing prevents them from asserting at a future hearing that [Commissioner Campbell's] decision was in error or that [Davis's] Form 50 was withdrawn for the sole purpose of delay." (A.p.247).

Essentially, the Court of Appeals has belatedly acknowledged the Petitioners' arguments but instead of addressing them presently, has suggested that Petitioners may collaterally attack Commissioner Campbell's Order in the future, though no legal theory or procedural vehicle was elucidated by the Court.

Arguments in Reply

I. Davis's Return supports reversal of the Court of Appeals.

Davis admits that she has "grave concerns about the Order denying the Petition for Rehearing" issued by the Court of Appeals on March 28, 2022. (Respondent's Brief p.33). Specifically, Davis claims that it was "error" and "enormously prejudicial" for the Court of Appeals to rule that "nothing prevents [the Petitioners] from asserting at a future hearing that [Commissioner Campbell's] decision was in error or that [Davis's] Form 50 was withdrawn for the sole purpose of delay." (A.p.247, Respondent's Brief p.33). Davis further concedes that this ruling "makes this entire appeal pointless." (Respondent's Brief p.33).

As a result, Davis argues that the Supreme Court should "reverse" the March 28, 2022, Order of the Court of Appeals but not address the Petitioners' arguments. The Petitioners respectfully contend that Davis's admissions, concessions, and *request for reversal* clearly support reversal of the March 28, 2022, Order of the Court of Appeals, and further contend that their due process and substantive arguments should be addressed presently by the Supreme Court.

II. Davis did not request a continuance and did not file any motion.

In her Brief, Davis repeatedly advances arguments about the law governing continuances and motions; however, none of these arguments or citations are germane, because Davis never requested a postponement, nor did she ever file any motion[7] in accordance with S.C. Code Reg.

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[7] Davis baselessly argues that it is "not true" that she didn't request a stipulation or file a motion and that it is "undisputed – even by Petitioners -- that she made an oral *request* to withdraw her Form 50." (Respondent's Brief p.31, f.n.8) (emphasis added). These arguments are untenable. Even Davis's attorney has admitted he simply "*advised* Commissioner Campbell that [he] was withdrawing [the] Form 50 …." (A. p.82) (emphasis added). Respectfully, "advising" a

67-613, and the Workers' Compensation Commission neither granted, nor denied, a continuance of the hearing Davis had requested. (A.pp.6—20, p.3). Respectfully, it is specious to suggest that Davis's informal, untimely, and improper request *via* email on November 9, 2017 -- after she unilaterally withdrew her claim on October 24, 2017 and the hearing was cancelled -- is in any way analogous to a proper motion for a continuance.[8]

Under Regulation 67-613, "a party requesting a postponement shall file and serve a motion pursuant to R. 67-215 at least ten days prior to the hearing" (in the absence of an emergency). Regulation 67-215 requires that motions be made in writing, specify the grounds of the motion and relief sought, and that the Commission afford the opposing party ten days' notice and an opportunity to reply before ruling on the motion. Davis did not file any motion requesting a postponement or continuance ten days prior the October 24, 2017, hearing date or at any time thereafter, and the Petitioners were never given notice or opportunity to be heard on any motion.

Even if Davis had actually filed a motion, the record reveals no evidence of "good cause" to postpone the hearing on October 24, 2017, as S.C. Code Reg. 67-613 requires. Davis withdrew her hearing request because she did not have medical evidence sufficient to prove her

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Commissioner of a unilateral decision is not the same as making an actual motion or "requesting" a continuance or stipulation from an opposing party with actual words. Both motions and requests for stipulations must be expressly made -- mere retrospective innuendo is insufficient for affirmative relief, proper notice, or issue preservation.

[8] It is unclear how or why the Commission would continue or postpone a hearing that had already been cancelled weeks earlier. What is clear is that no such motion for postponement was ever filed by Davis pursuant to S.C. Code Reg. 67-215, Davis did not "ask for a continuance" (*See* Respondent's Brief p.25), and Davis never requested the Petitioners' consent to withdraw her Form 50 without prejudice.

claim and she wished to find another doctor.[9] Davis offered no justification for her failure to obtain such evidence prior to the scheduled hearing and having been represented by counsel since at least July 28, 2016 (A. pp.21—22), cannot claim ignorance of the law. Davis made no showing of due diligence or matters beyond her control preventing her from proving her claim at the second scheduled hearing. *See* S.C. Code Reg. 67-613(B); Trotter v. Trane Coil, 393 S.C. 637, 714 S.E.2d 289 (2011) (requiring a showing of due diligence for a continuance and holding there is no "unfettered right to postpone the hearing simply to implement a better strategy"). Therefore, the Petitioners respectfully contend that even if Davis had filed a Motion to Postpone, such that the case law upon which she relies might be relevant, she was not entitled to a continuance in the absence of any evidence or showing of "good cause" or due diligence."[10]

III. Davis unilaterally and unconditionally withdrew her claim by notice.

While Davis could have moved for a continuance pursuant to S.C. Code Reg. 67-613, she did not. Perhaps it is because Davis believed the Commission would not grant a continuance that Davis instead "advised" Commissioner Campbell and the Petitioners of her unilateral decision to

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[9] Davis's ill-preparedness was not the product of incomplete discovery or an obstinate witness. Davis belatedly decided she no longer wished to rely on the opinions of Dr. Hunt, Dr. Bajaj, Dr. Winkler, and Dr. Baldwin, as she had in her pre-hearing brief. (A.pp.47-53; pp.57—58).

[10] Davis argues that Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985) stands for the proposition that when a claimant in a workers' compensation claim "omits proof of causation … an opportunity should be afforded the claimant to supply such proof in the interest of justice." In reality, the claimant in *Brown* "inadvertently failed to request the case be left open" for a deposition that the Commission had specifically authorized and subsequently moved to reopen the record for that deposition, which was granted. Brown does not stand for the proposition for which it is cited and does not authorize a claimant to repeatedly delay adjudication to hire new experts to replace those who have been discredited.

notice the withdrawal of her Form 50 under S.C. Code Reg. 67-609 on October 24, 2017. (A. p.82). Respectfully, the procedure for withdrawing a workers' compensation claim by notice under Regulation 67-609 is analogous, not to a motion for continuance, but to notice of a voluntary dismissal under Rule 41(a)(1), though without the same time constraints.[11] 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."[12] As explained in *Moore's Federal Practice*, once a notice of dismissal is filed, the court may not entertain the matter further:

> "A court order dismissing an action 'without prejudice' following a dismissal by notice is superfluous. Furthermore, whether the second voluntary dismissal is subject to the two dismissal rule so that it operates with prejudice as an

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[11] *See* Spruill v. Richland County School Dist. 2, 363 S.C. 61, 609 S.E.2 524 (2005) (holding that an employee is entitled to withdraw a Form 50 at any time prior to a hearing); *compare* Rule 41(a)(1), S.C.R.C.P. (requiring that notice of a voluntary dismissal be filed prior to service of an answer or motion for summary judgment); *accord* Rule 41(a)(1), F.R.C.P.. 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, Davis did not request any such stipulation and did not file any such motion.

[12] The immediate and automatic effect of Davis's notice of withdrawal is evidenced by the fact that the October 24, 2017, hearing was cancelled instantly. The Commission posted notice on October 30, 2017, that the Form 50 had been withdrawn. (A.p.139, p.13, ll..10—11). *See generally* J. Flannagan, *South Carolina Civil Procedure* (2nd Ed. 1996) (p.343) (stating that "notice of dismissal is effective upon its filing and no action is required by the court); *see also* Marex Titanic, Inc., v. The Wrecked & Abandoned Vessel, 2 F3d 544, 546 (4th Cir. 1993) (holding that notice of a voluntary dismissal is "self-executing, *i.e.*, it is effective at the moment notice is filed with the clerk and no judicial approval is required." (internal citations omitted)).

adjudication on the merits can be determined only in a third action, if and when one is filed." 8 Moore's Federal Practice § 41.33[6][e][13].

Therefore, the Petitioners respectfully contend that after Davis "*advised* Commissioner Campbell that [she] was withdrawing [her] Form 50" (A. p.82), Commissioner Campbell had no jurisdiction or authority to consider the matter further and his Order of November 14, 2017, was a superfluous nullity, as properly determined by the Appellate Panel. (A. p.19 #6)). As a result of that well-reasoned decision by the Appellate Panel, if Davis files a third Form 50, the question of whether her claim is barred under S.C. Code Reg. 67-609(C) can be decided at that time with the parties having actual notice and opportunity to be heard, prejudicing neither party and preserving the Petitioners' right to due process.

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[13]*Citing, inter alia,* O.F. Mossberg & Sons, Inc. v. Timney Triggers, L.L.C., 955 F.3rd 990, 993 (Fed. Cir. 2020) (holding that a dismissal order entered after a notice of voluntary dismissal "had no legal effect"); Janssen v. Harris, 321 F.3rd 998, 1000 (10th Cir. 2003) (holding that plaintiff's request for voluntary dismissal was self-executing and judge's subsequent order granting dismissal was "superfluous, a nullity, and without procedural effect"); and Commercial Space Mgmt. Co. v. Boeing Co., 193 F.3d 1074, 1080 (9th Cir. 1999) (holding that "once a notice of voluntary dismissal is filed, the district court in which the action is pending loses jurisdiction and cannot exercise discretion with respect to the terms and conditions of the dismissal. Nor may it rule at the defendant's request on whether the plaintiff's notice of dismissal in a second action is with prejudice or without prejudice … whether the second voluntary dismissal is subject to the two dismissal rule such that it operates with prejudice as an adjudication upon the merits is an issue that becomes ripe (and can be determined) only in a third action, if and when one is filed.").

IV. The Court of Appeals did not acquire appellate jurisdiction simply because Davis fears a future decision by the Commission.

S.C. Code Reg. 67-609(C) provides that if Davis files a third Form 50, the Petitioners are entitled to argue that Davis's second voluntary notice of withdrawal effectively bars her claim. However, the Workers' Compensation Commission has not yet addressed this argument, finding that it "was not properly before the Hearing Commissioner following the cancellation of the October 24, 2017, hearing and [was] not properly before the Appellate Panel..." (A.p.16). Because the Workers' Compensation Commission has not actually issued any decision barring Davis's claim, her argument that the Appellate Panel's March 5, 2019, Order "is effectively a final order" that "could result in dismissal of the entire case" (such that she is such that she was entitled to an immediate appeal) is without merit. *See* 8 Moore's Federal Practice §41.33[6][e]; *see also* fn.11, *supra*. Of course, it is fundamental that courts "cannot review a decision that has not been made." Lee v. Bondex, Inc., 406 S.C. 97, 103, 749 S.E.2d 155, 158 (Ct. App. 2013).

As previously argued in the Petition, the Appellate Panel's March 5, 2019, Order neither awarded, nor denied, any workers' compensation benefits and; therefore, was not subject to immediate review by the Court of Appeals pursuant to the plain terms of S.C. Code Ann. § 1-23-380, which require finality. Indeed, the decision of the Court of Appeals to assume appellate jurisdiction *sub judice* directly conflicts with the Court's own previous determination that there exists no appellate jurisdiction to review the withdrawal of a Form 50.[14] Therefore, the Orders of the Court of Appeals should be vacated.

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[14] In Walker v. Springs Industries, 298 S.C. 249, 379 S.E.2d 729 (Ct. App. 1989), the claimant requested to withdraw her Form 50 and the claim was returned to the Commission's general files pending a new hearing request. Springs sought review by the Commission's Appellate Panel, which affirmed. The Walker Court did not question the *Appellate Panel's* authority to review pursuant to S.C. Code Ann. § 42-17-50 or S.C. Code Reg. 67-701, but instead held that the "case

V. Davis's estoppel argument is neither relevant, nor preserved for appeal.

According to the Respondent's Brief (at p.24), the Petitioners should be estopped from raising any argument under S.C. Code Reg. 67-609(C), because

> "At no time did counsel object to Commissioner Campbell's action, point out that a Form 50 had previously been withdrawn or otherwise put Cain-Davis on notice that she would seek to have the case dismissed …with the obvious intent of profiting later…."

Respectfully, Commissioner Campbell took no "action" on October 24, 2017, other than to immediately and unconditionally cancel the hearing at Davis's request. (A.p.129, l.24—p.130, l.3). Respectfully, the Petitioners had no right to object to Davis's unilateral decision to withdraw her claim, even had it been in their interest to do so, and otherwise had no right to direct or control the strategic decisions of an adverse party.[15] Respectfully, the Petitioners had no reason to believe that Davis, or her attorney, were unfamiliar with the procedural history of the claim. Respectfully, the Petitioners had no duty to advise Davis of the potential implications of her unilateral strategic decisions. Respectfully, Davis has absolutely no evidence of the

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does not qualify for direct appeal" to the *Court of Appeals* because the Appellate Panel's decision was "interlocutory and unappealable." The same is true here – the Appellate Panel's Order is interlocutory and unappealable pursuant to S.C. Code Ann. § 1-23-380 because it neither involves the merits of the claim, nor affects any substantial right, nor discontinues any action, leaving such questions to be determined in the future should Davis file a third Form 50.

[15] Davis alleges that she "could have been *compelled* to try the case" by the Petitioners. (Respondent's Brief p.25) (emphasis added). Respectfully, Petitioners are aware of no such legal authority and Davis cites none.

Petitioners' "intent," much less evidence that the Petitioners' "intent" was inappropriate in any way, at any time.

Moreover, the Petitioners did, in fact, "request" that Davis "try her case on the existing evidence" on October 24, 2017. (*See* Respondent's Brief p.24). Not only did the Petitioners file a Form 21 hearing request for this purpose, but they went to the expense of preparing for and appearing at a hearing on the merits on October 24, 2017, after completing discovery, cross-examining witnesses at depositions, filing pre-hearing briefs, and serving both documentary and testimonial evidence in accordance with the law. (A. pp.30; pp.57—58). It was Davis alone who insisted that, not only was she withdrawing her own claim, but that the Petitioners had no independent right to a hearing on the merits. Davis cannot seriously claim that the Petitioners are in any way responsible for the fact that there was no hearing on October 24, 2017.[16] Furthermore, when Davis emailed Commissioner Campbell on November 9, 2017, requesting for the first time that he address the prejudice issue, the Petitioners immediately and "vehemently" objected. (A. p.79; p.101; p.104; p.107). At no time did the Petitioners "consent" to Davis withdrawing her claim "without prejudice," by silence or otherwise.[17]

Clearly, the elements of equitable estoppel do not apply in the case *sub judice,* and the issue is otherwise not relevant at this juncture because it has not been properly raised or ruled upon by the Workers' Compensation Commission.[18] (A.p.16). Furthermore, the essential

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[16] Davis complains that the Petitioners' arguments rely on procedural technicalities, not the merits of the claim. Respectfully, questions of jurisdiction and due process are not mere "procedural technicalities" and the only reason the merits of the claim have not been addressed because Davis has repeatedly refused the opportunity.

[18] Davis's allegation that "Petitioners' attempt to gain a strategic advantage was properly denied by the Hearing Commissioner" (Respondent's Brief pp.24--25) is without merit. The Hearing Commissioner's Order does not address any such argument. (A.p.3).

elements of estoppel include "conduct amounting to a false representation or concealment of material facts," as well as a "reasonable reliance" on such false representation or concealment. Southern Dev. Land and Golf Co. v. South Carolina Pub. Serv. Auth., 311 S.C. 29, 426 S.E.2d 748 (1993). Here, the Petitioners did not make any false representation to Davis, did not conceal any material facts from Davis, and Davis otherwise had no right to rely on the Petitioners -- an adverse party in an adversarial system -- for legal advice or guidance on how best to proceed with her workers' compensation claim.

In addition, it is well-established that "[o]ne with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been misled." *Id.* (citations omitted). Can Davis reasonably be heard to complain that she did not know that "a Form 50 had previously been withdrawn" by her own attorney?[19] Is Davis suggesting that she lacked the means by which to learn that withdrawing her claim a second time could potentially bar a future claim under S.C. Code Reg. 67-609? Certainly, such arguments have no merit and; therefore, estoppel, whether by silence or otherwise, is inapplicable to these facts and appears to have been raised at this juncture for no purpose other than a veiled attempt to shift blame to the Petitioners for Davis's own unilateral, albeit potentially regrettable, strategic decisions.

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[19] The Court of Appeals has previously held that the "[l]ack of familiarity with legal proceedings is unacceptable" in the context of excusable neglect under Rule 60(b)(1), S.C.A.C.R.. *See* Goodson v. American Bankers Ins., 295 S.C. 400, 368 S.E.2d 687 (Ct. App. 1988).

VI. Davis's invective innuendo about the Petitioners, Petitioners' counsel, and the Appellate Panel are impertinent, improper, and irrelevant.

According to the Respondent's Brief to the Supreme Court, "it is not the place of the courts (nor litigants) to play a 'gotcha game' with attorneys by showcasing their alleged mistakes." (p.12) (internal citations omitted). Davis goes on to suggest that the Petitioners, counsel for the Petitioners, and even the Workers' Compensation Commission's Appellate Panel have somehow engaged in such a "gotcha" or "children's game." Davis alleges that "Petitioners elected not to speak up in front of Commissioner Campbell, instead hoping to lure Cain-Davis into a procedural trap." (Respondent's Brief p.25). Davis further specifically alleges that when the Appellate Panel asked whether the issue of prejudice was discussed at the pre-hearing conference on October 24, 2017, it was an "attempt to wring some sort of concession from counsel on the verbiage" and "has the appearance of setting a procedural trap." (Respondent's Brief p.27). Davis also previously claimed on the record that counsel for the Petitioners "apparently wants to lay a trap." (A.p.131, l.25—p.132, l.3). The Petitioners deny these baseless, impertinent, uncivil accusations in the strongest possible terms. There is no evidence that the Petitioners or the Appellate Panel have played "games" or set "traps" or engaged in any such unethical conduct. The Petitioners respectfully contend that their conduct has conformed with the requirements of the Rules of Professional Conduct, including Rule 3.3 and 3.4, R.P.C. (Rule 407, S.C.A.C.R.) governing candor toward the tribunal and fairness to opposing parties and their counsel.

Davis further charges that the "Petitioners do not make this [jurisdictional or due process] argument out of a desire to promote the integrity of our judicial system." (Respondent's Brief p.13). The Petitioners emphatically reject this unfounded accusation. The Petitioners respectfully contend that their arguments -- including that the Court of Appeals does not have

appellate jurisdiction over non-final orders pursuant to the Administrative Procedures Act and that Commissioner Campbell's Order was rendered upon unlawful procedure, without authority or jurisdiction, and prejudicial to the Petitioners' right of due process -- are absolutely intended to advance not only their own legal position, but the integrity of the judicial (and quasi-judicial) system, which relies on adherence to the law and established procedures to promote fairness and integrity for all litigants. Arguments raised by the Petitioners and ruled upon by the Appellate Panel were based on the record and the applicable law, nothing else – not "games" or "traps," not innuendo or invective, and without distracting assignments of blame or proverbial table-pounding.

VII. Commissioner Campbell abused his discretion.

Davis requests that the Supreme Court "reverse the Order on Rehearing to the extent that it allows Petitioners to collaterally attack Commissioner Campbell's order," but also reinstate Commissioner Campbell's order despite its many shortcomings. (Respondent's Brief p.34). Essentially, Davis believes the Supreme Court should place its *imprimatur* on an Order issued as a result of an untimely and improper request by email from Davis; without notice to, or opportunity to be heard from the Petitioners; in absence of jurisdiction; and premised upon a clear abuse of discretion. Respectfully, the abuse of discretion inherent in Commissioner Campbell's November 14, 2017, Order is clear. "An abuse of discretion occurs when the decision is controlled by some error of law or is based on findings of fact that are without evidentiary support." Eason v. Eason, 384 S.C. 473, 479, 682 S.E.2d 804, 807 (2009). As explained by the Appellate Panel, Commissioner Campbell lacked authority to even exercise discretion on November 14, 2017, and otherwise committed an error of law when he signed

Davis's proposed order stating that she had withdrawn her Form 50 "without prejudice" because he had

> "no proper motion before him, no hearing request was pending, and [Commissioner Campbell] otherwise lacked jurisdiction to adjudicate [Davis's] untimely request. In addition … it was prejudicial to [the Petitioners'] right of due process to allow [Davis] to make new arguments without proper notice and adequate opportunity to be heard on these novel issues, which had not previously been raised..." (A.pp.13-14).

The Petitioners respectfully contend that Appellate Panel's reversal of Commissioner Campbell's improper exercise of discretion and commission of legal error should be affirmed by the Supreme Court based upon substantial evidence in the record and the applicable law if the decision of the Court of Appeals is not vacated for want of appellate jurisdiction.

While Davis raises arguments about Commissioner Campbell's inherent authority to manage his own docket[20], this does not justify his exercise of jurisdiction over claims that had

[20] Davis further argues that the case of First Carolina Joint Sock Limited Bank v. Knotts, 191 S.C. 384, 1 S.E.2d 797 (1939) supports Commissioner Campbell's assumption of jurisdiction because that case states that "where a Judge has jurisdiction to hear a matter and the matter being heard before him, he entertains jurisdiction until his decision is rendered." (internal citations omitted). At issue in First Carolina was whether a motion filed with a judge while he was in Orangeburg could be decided by that judge in Darlington. The Supreme Court held that, having properly assumed jurisdiction over the motion in Orangeburg, the judge retained jurisdiction to hear the motion in Darlington because the parties voluntarily appeared there. Therefore, First Carolina provides no support for the proposition for which it is cited by Davis and does not authorize Commissioner Campbell to retain jurisdiction over motions that are not filed or claims that he has not "heard" because the hearing request has already been withdrawn.

already been withdrawn or over issues that were not timely or properly raised. Similarly, the ability to manage a docket does confer authority to issue orders without giving opposing parties notice or opportunity to be heard. Moreover, case law governing similar situations in civil courts makes clear that Davis's withdrawal of her Form 50 was self-executing and that Commissioner Campbell had no authority to reconsider the nature of Davis's voluntary withdrawal of the Form 50, rendering his subsequent Order on November 14, 2017, superfluous and void. *See* 8 Moore's Federal Practice § 41.33[6][e] (stating that a "court order dismissing an action 'without prejudice' following a dismissal by notice is superfluous"); *see also* fn. 11, *supra*. Quite simply, the discretion to manage his docket did not empower Commissioner Campbell to reanimate a corpse.

In addition, Commissioner Campbell utterly failed to elucidate the basis for his decision, as his November 14, 2017, Order contains no findings of fact, no conclusions of law, no citation of authority, and no discussion or analysis. For these reasons, the Appellate Panel concluded that Commissioner Campbell's Order was "impermissibly vague" and otherwise violates the requirements of both the Administrative Procedures Act and the Workers' Compensation Act, citing S.C. Code Ann. § 42-17-40(A) and Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970). In Hill, this Court held that in "the absence of a sufficient statement of the factual basis and reasons for its decision," appellate review is impossible, and remand is required. For these reasons, affirmation of the merits of Commissioner Campbell's November 14, 2017, Order by the Supreme Court, as requested by Davis, would be improper.

Conclusion

Therefore, the Petitioners, the South Carolina Department of Corrections and the South Carolina State Accident Fund, respectfully request that the Supreme Court reverse and vacate the decision of the Court of Appeals in accordance with S.C. Code Ann. § 1-23-380 and for the reasons stated in the Petitioners' Brief and herein above.

Respectfully submitted,

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May 22, 2023

THE STATE OF SOUTH CAROLINA

In the Supreme Court

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May 22 2023

S.C. SUPREME COURT

Appeal from the South Carolina
Worker's Compensation Commission

Appellate Case No. 2022-000519

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

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Reply Brief of the Petitioners complies with Rule 211(b), SCACR, and Supreme Court Order 2007-08-16-02, dated August 13, 2007, requiring redaction of personal data identifiers.

May 22, 2023

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