THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

WCC No. 062913
Appellate Case No. 2013-000437

Gloria Parker, Employee, ... Respondent,

v.

Fairfield County School System, Employer, and
S.C. School Boards Insurance Trust, Carrier, . . Appellants.

RETURN TO APPELLANT'S MOTION TO TRANSFER OR REMAND APPEAL

STATEMENT OF THE CASE

This is an appeal from a final decision by the Workers Compensation Commission that the appellants received on February 20, 2013. The appellants attempted to initiate their appeal in this Court on March 1, 2013, by serving a notice of appeal on counsel for the respondent. On May 23, the respondent filed and served a motion to dismiss, arguing that the court of appeals lacks jurisdiction because (1) the appellants failed to serve their notice of appeal on the Commission and (2) the circuit court, not the court of appeals, has appellate jurisdiction of compensation cases the age of this one.

The appellants did not respond to the motion to dismiss. Instead, on July 3, they belatedly served their notice of appeal on the Commission. In their cover letter, they conceded they had not previously served the Commission with the notice of appeal. The respondent alerted the Court to this concession by supplemental memorandum filed July 12.

Now the appellants have filed a motion dated July 16, 2013, styled Motion to Transfer / Remand Appeal to Circuit Court and to Except [sic] Motion in Lieu of Return to Respondent's Motion for Extension of Time to File Initial Brief on Appeal. They concede the court of appeals lacks jurisdiction because Ms. Parker's injury occurred before July 1, 2007. However, they argue their failure to serve the Commission within 30 days after they received its decision did not deprive the courts of jurisdiction.

DISCUSSION

1. The Court should deny the appellants' motion to transfer because it simply represents a belated return to the respondent's motion to dismiss.

Rule 240(e), SCACR, requires that any return to a motion be filed within ten days of service of the motion. Any reading of the appellants' motion to transfer, whether casual or detailed, reveals that it does nothing more than to address the specific jurisdictional arguments contained in the respondent's motion to dismiss. It is simply an untimely return to that motion, captioned as an independent motion. Because the appellants failed to respond to the motion to dismiss for almost two months after it was served, their current attempt to respond

is untimely and should be disregarded.

2. The appellants' failure to serve the Commission within 30 days prevents any appellate court from acquiring jurisdiction because the Administrative Procedures Act and appellate rule 203, as amended applicable to this appeal, make the requirement of timely service on the agency jurisdictional.

The appellants argue their failure to serve the Commission is not jurisdictional because the 2007 workers compensation law amendments[1] apply only to cases where the injury occurred after July 1, 2007. They are correct as to the dates of application of those amendments, and this is why they must concede this appeal is not properly before the court of appeals. But the jurisdictional requirement for service on the agency does not derive from workers compensation law. Instead, it results from amendments to the Administrative Procedures Act that were enacted in 2006 and were expressly made applicable to cases pending after they took effect.

By Act No. 387 of 2006, the General Assembly amended the Administrative Procedures Act in several respects. One of the changes amended section 1-23-380(1) to provide in relevant part:

> Proceedings for review [of an administrative decision] are instituted by serving and filing a notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency.

2006 Acts 387 § 2. The effective date section provided in part:

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[1] Specifically, S.C. Code Ann. § 42-17-60 (Supp. 2012) as amended in 2007 by Act No. 111, 2007 S.C. Acts 111, part I, § 30.

> This act takes effect on July 1, 2006, and applies to any actions pending on or after the effective date of the act.

Id. § 57. Obviously, this workers compensation claim was pending on or after July 2006. Therefore, irrespective of the date of injury in this case, the Rules of Appellate Practice govern the requirements for service and filing of the notice of appeal here.

As the next link in the chain, the question now becomes whether the rules for initiating an appeal that apply here include a jurisdictional requirement that the appellant serve the Commission within 30. The *Skinner* case, cited by both parties, clearly indicates that Rule 203(b)(6), SCACR, now makes timely service on the agency a jurisdictional requirement. *Skinner v. Westinghouse Elect. Corp.*, 380 S.C. 91, 96, 668 S.E.2d 795, 797 - 98 (2008). It is jurisdictional here because this current version of Rule 203 applies in this case.

In general, when rules of appellate procedure are amended, the rules applicable to a particular appeal are those in effect when the appeal was commenced. *See, e.g.*, *State v. Ladiges*, 63 Wash.2d 230, 386 P.2d 416 (1963). South Carolina law is consistent with this principle. For example, when the supreme court replaced the old Supreme Court Rules with the South Carolina Appellate Court Rules, it provided that the new rules apply to all appeals where the notice of appeal was filed after their effective date.[2] In fact, where there are

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[2] The Rules of Appellate Practice "take effect on September 1, 1990 . . . [but] shall not apply in any appeal where a notice of intent to appeal was served prior to

multiple appeals in the course of a single case, different rules may apply to each appeal, as determined by the date of the notice of appeal. *Pinckney v. Winn-Dixie Stores, Inc.*, 311 S.C. 1, 426 S.E.2d 327 (Ct. App. 1992), *reh. denied* Dec. 30, 1992, *cert. denied* Jun. 9, 1993.

In *Pinckney*, the defendant appealed from trial court decisions at two separate stages of the same litigation. The court of appeals held that, after the defendant filed its first appeal, the trial judge lacked jurisdiction to hold a retrial on the issue of damages because the appellate rules in effect when the notice of appeal was filed provided an automatic stay on all proceedings in the court below. The court of appeals carefully observed that the appeal was served the day before the new rules became effective. 311 S.C. at 7 n.2, 426 S.E.2d at 330 n.2. The court thus made it clear that the date of the notice of appeal, and not any earlier event in the case, determines the applicability of the procedural rules for an appeal.

In its current form, Rule 203(b)(6) was adopted on a permanent basis[3] on May 3, 2007. The rule became effective immediately. Order No. 2007-05-03-01 (S.C. Supreme Court dated May 3, 2007). So the current rule, and its jurisdictional requirement of timely service on the administrative agency, was fully in effect in

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the effective date of these rules; if a notice was served before the effective date, the appeal shall proceed to conclusion under the Supreme Court Rules." Rule 102(a), SCRCP.

[3] The supreme court earlier adopted the same rule on an emergency basis, effective August 15, 2006. Order No. 2006-08-15-01 (S.C. Supreme Court dated Aug. 15, 2006).

March 2013, when the appellants attempted to initiate this appeal. Thus, their failure to serve the Commission timely is a fatal jurisdictional defect.

Contrary to the appellants' argument, *Skinner* supports, not refutes, the jurisdictional effect of their failure to serve the Commission. There the supreme court held the failure to serve the Commission was not jurisdictional because the APA, as applicable to that appeal, did not supply a clear deadline to serve the agency. 380 S.C. 91, 95, 668 S.E.2d 795, 797. "For the benefit of the bench and bar," the court admonished, "we note that the same result would not be reached under the current law." 380 S.C. at 96, 668 S.E.2d at 797. The court then proceeded to explain, as we have here, that the APA amendments, effective July 1, 2006, incorporate the filing and service requirements of the appellate court rules, and that Rule 203(b)(6), effective May 3, 2007, makes timely service on the agency jurisdictional. 380 S.C. at 96, 668 S.E.2d at 797 - 98.

The appellant in *Skinner* filed its notice of appeal with the court on August 2, 2006, before the effective date of Rule 203(b)(6) in either its emergency or permanent iteration. The rules governing that appeal thus antedated the jurisdictional requirement of timely service on the agency. Here, by contrast, the appellants served their notice to this Court well after those effective dates, and as a result, they are bound by the jurisdictional requirements of Rule 203(b)(6).

The appellants argue that footnote 3 of the *Skinner* opinion suggests the old law applied there because of the date of injury, not the date of the appeal. 380 S.C.

at 5 n.3, 668 S.E.2d at 95 n. 3. That note, while hardly a model of clarity, does indicate that the applicability of the 2007 workers compensation amendments turns on the date of the injury. But again, the *Skinner* opinion, read as a whole, makes it clear that those amendments are not the source of the jurisdictional rule; the earlier APA amendments are.[4]

It would be anomalous, and would appear to represent no rational policy, for the requirements for initiating a judicial appeal to turn on the date of an extrajudicial event in the distant past such as a workplace injury. The reallocation of workers compensation appeal jurisdiction from the circuit court to the court of appeals is governed by the date of injury only because, in the 2007 workers compensation amendments, the General Assembly expressly made it so. 2007 Acts 111, part IV, § 2. The 2006 APA amendments, however, include no such provision. *Compare* 2006 Acts 387 § 57. And in any event, to the extent the workers compensation amendments may be construed to imply procedural rules conflicting with those of the Administrative Procedures Act, the APA rules govern. *Pringle v. Builders Transport*, 298 S.C. 494, 381 S.E.2d 731 (1989); *see also* 2006 Acts 387 § 53. So the 2007 workers compensation amendments do not

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[4] See the discussion at 380 S.C. at 96, 668 S.E.2d at 797 - 98, explaining that the current law making 30-day service on the agency jurisdictional is based on the 2006 version of S.C. Code Ann. § 1-23-380(1) and Rule 203(b)(6), SCACR. "The current version of section 1-23-380(A)(1) . . . became effective on July 1, 2006." *Id.* (A 2008 amendment changed the numbering of subsection (A)(1) to simply (1). 2008 Acts 334 § 5.)

negate, or delay the effectiveness of, the 2006 APA amendments – which, by incorporating Rule 203(b)(6), made timely service on the agency jurisdictional.

Because the APA as amended in 2006 mandates service of the notice of appeal as required by Rule 203(b)(6), and because that rule makes timely service on the agency jurisdictional, no court can properly acquire jurisdiction of this appeal.

3. The court should deny the appellants' motion to transfer this appeal to circuit court because, absent statutory authority, a court may not transfer an appeal of which it lacks jurisdiction.

A court's jurisdiction is primarily determined by statute.[5] In the initial motion to dismiss, we argued that no statute authorizes the court of appeals to transfer mistakenly filed administrative appeals to the circuit court and that the Court therefore lacks jurisdiction to do so. *See Ross v. Richland County*, 270 S.C. 100, 240 S.E.2d 649 (1978); *compare* S.C. Code Ann. § 14-8-260 (Supp. 2012) (authorizing reciprocal transfer between court of appeals and supreme court). This jurisdictional bar prevents the Court from employing Rule 204(a), SCACR, to transfer the appeal as the appellants request.

The appellants never attempt to refute this point. For this additional reason, then, this appeal must be dismissed.

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[5] *North Carolina Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp.*, 289 S.C. 480, 347 S.E.2d 97 (1986).

CONCLUSION

For the foregoing reasons, the Court should deny the appellants' motion to transfer and should instead dismiss this appeal.

July 24,2013

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CERTIFICATE OF SERVICE

Personally appeared before me, Cynthia S. Reynolds, who being duly sworn, deposes and says that she is the secretary for Lex A. Rogerson, Jr., attorney, with offices at 111 East Main Street, Suite C, Lexington, South Carolina, that on the 24th day of July, 2013, she served the RETURN TO APPELLANT'S MOTION TO TRANSFER OR REMAND APPEAL in the above captioned matter on the appellants by depositing a copy of same in the United States Mail with sufficient postage affixed to the following persons, to-wit:

Adrianne L. Turner
Boykin & Davis, L.L.C.
P.O. Box 11844
Columbia, SC 29211

Cynthia S. Reynolds

SWORN TO before me this
24th day of July, 2013.

Notary Public for South Carolina
My commission expires: 6/23/18