THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Court Of Common Pleas

WCC File No. 0920436

Susan M. Wright ..... Respondent,

v.

Siemens Energy & Automation, Employer, and
Liberty Mutual Insurance Company, Carrier ..... Petitioners.

APPENDIX

Timothy Clardy, Esquire
Carole M. Dennison, Esquire
The Dennison Law Firm, P.C.
301 Rutherford Street
P. O. Box 2468
Greenville, SC 29602-2468
Phone: (864) 242-1303

ATTORNEYS FOR RESPONDENT

Ms. Virginia L. Crocker, Judicial Director
S.C. Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202-1715
Phone: (803) 737-5739

O. Shayne Williams
Turner Padget Graham & Laney P.A.
Post Office Box 1509
Greenville, SC 29602
Phone: (864) 552-4621

Carmelo B. Sammataro
Turner Padget Graham & Laney P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200

ATTORNEYS FOR PETITIONERS

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
T. Scott Beck, Commissioner
G. Bryan Lyndon, Commissioner

WCC File Nos. 0920436 & 0920437

Susan M. Wright, ... Respondent,

v.

Siemens Energy & Automation, Employer, and
Liberty Mutual Insurance Company, Carrier . . . . . Appellants.

MOTION TO DISMISS APPEAL

Susan M. Wright is the respondent in this case and she requests that this Court immediately dismiss this appeal. The appellants have appealed an interlocutory order from the appellate panel of the South Carolina Workers' Compensation Commission. This order remands Ms. Wright's case to a single commissioner for a determination of benefits. Under the Administrative Procedures Act ("APA"), this order is not immediately appealable.

FACTUAL/PROCEDURAL BACKGROUND

Susan Wright alleges repetitive trauma injuries to her right arm, right shoulder, left arm, back, neck, and psyche related to the performance of her job as a brake operator

over a 15 year period. A single commissioner of the Workers' Compensation Commission held that Ms. Wright did not sustain compensable repetitive trauma injuries, did not satisfy the statutory notice requirement, and did not satisfy the statute of limitations for filing her claims. An appellate panel of the commission reversed this determination and remanded the case to the single commissioner to determine what benefits Ms. Wright is entitled to. This factual background is taken entirely from the appellate panel's order, which is attached to this motion as Exhibit 1.

ARGUMENT

Section 1-23-380 of the South Carolina Code is the provision of the APA that governs the appeals from decisions in administrative cases. The statute limits immediate appeal to "final decisions in contested cases" and provides that a party may appeal only after she "has exhausted all administrative remedies." *Id.* Section 42-17-60 of the Code, a provision the Workers' Compensation Act, also governs appeals in Workers' Compensation cases. Where this statute conflicts with the APA, the APA controls. *Williams v. South Carolina Dep't of Wildlife*, 295 S.C 98, 100, 367 S.E.2d 418, 419 (1987) (overruled on other grounds (statute does not circumscribe subject matter jurisdiction) by *Dove v. Gold Kist*, 314 S.C. 235, 239, 442 S.E.2d 598, 601 (1994)). Again, the rule is that in an administrative case, immediate appeal is limited to a "final order." That statute allows one exception, and that is when "review of the final agency decision would not provide an adequate remedy."

The order the appellants have appealed from is not a "final judgment." "A final judgment disposes of the whole subject matter of the action or terminates the particular proceedings or action, leaving nothing to be done but to enforce by execution what has

been determined." *Charlotte-Mecklenburg Hosp. Auth. v. South Carolina Dep't of Health and Evt'l Control*, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010) (citing *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942)).

The order the appellants have appealed does not dispose of the whole subject matter of this case, and there is much more in the case to be determined. The appellate panel's order makes this plain. It specifically instructs that the case is being *remanded* for the commission to *determine* Ms. Wright's benefits. For example, there has been no finding on whether Ms. Wright has reached maximum medical improvement, whether she needs additional medical treatment, or whether her injuries has taken her out of work so that she is entitled to total and permanent disability benefits. All of these are facts the commission has not addressed.

This Court's recent decision in *Long v. Sealed Air Corporation* discusses which types of agency orders are immediately appealable. 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011). In its discussion, *Long* cuts ties with some of this Court's previous decisions that inappropriately allowed the immediate appeal of interlocutory agency orders because those orders "involved the merits" or affected a "substantial right." *See* 391 S.C. at 485-487, 706 S.E.2d at 35-36 (noting the Supreme Court's direct over-ruling of two of this Court's decisions and the implicit over-ruling of another). Unless an appeal after a final decision will not provide an adequate remedy, an order remanding an administrative case for additional proceedings is not immediately appealable.

This Court's decision in *Long* makes quite clear that appellants' appeal in the instant matter is not appropriate. Just as in *Long*, "[i]n this case, the order on appeal remands the case to the commission for additional proceedings. Accordingly, it is not a

final judgment and the order is not immediately appealable." 391 S.C. at 487, 706 S.E.2d at 36.

CONCLUSION

The Administrative Procedures Act limits an immediate appeal in an administrative case to a final decision. The order the appellants have appealed is not a "final decision," the appellants have not exhausted all administrative remedies, and review after final judgment will provide a perfectly adequate remedy. Therefore, Ms. Wright respectfully requests the Court to dismiss the appeal.

Respectfully submitted,

January 12, 2012

By: _____

Timothy Clardy
Carole M. Dennison
THE DENNISON LAW FIRM, P.C.
Post Office Box 2468
Greenville, SC 29602
(864) 235-8435
(864) 235-8433 (facsimile)
timothy@dennisonlawfirm.com
carole@dennisonlawfirm.com

ATTORNEYS FOR RESPONDENT

EXHIBIT 1

APPELLATE PANEL DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

FILE NOS. 0920436 & 0920437

SUSAN WRIGHT,	)	
	)	
Claimant,	)	
	)	
v.	)	
	)	
SIEMENS ENERGY & AUTOMATION,	)	**REVERSED**
	)	**AND REMANDED**
Employer,	)	
	)	
and	)	
	)	
LIBERTY INSURANCE CORP.,	)	
	)	
Defendants.	)	

Appellate Panel Review held in Columbia, South Carolina, on December 13, 2010, timely and properly served upon all parties of interest.

Appellate Panel Decision and Order filed on 11/21/11

APPEARANCES: Appellant/Claimant represented by
Timothy Clardy, Esquire, of
Greenville, South Carolina

Respondents/Defendants Siemens Energy & Automation and Liberty Insurance Corp. represented by
O. Shayne Williams, Esquire, of
Greenville, South Carolina

STATEMENT OF CASE

A hearing was held on this case by Commissioner Derrick L. Williams on June 30, 2010, in Spartanburg, South Carolina. As a result of that hearing, the Single Commissioner issued an

Order dated September 7, 2010, from which the Appellant/Claimant ("Claimant") takes this appeal.

The Single Commissioner's Findings of Fact and Conclusions of Law are as follows:

FINDINGS OF FACT (Single Commissioner)

1. The Claimant has alleged a repetitive trauma injury to her right arm, right shoulder, left arm, and left shoulder occurring on September 16, 2009, and a repetitive trauma injury occurring on November 24, 2009, affecting her back, neck, and psyche. Claimant has not met her burden of proving compensable repetitive trauma injuries. Based on the evidence as a whole, specifically the host of medical evidence of her longstanding issues and complaints (see APA pp. 154, 155, 157, 159, 163, 239 as a few examples), the employee discovered that her condition was compensable, yet she never provided notice to her Employer until 2009. Based on the evidence as a whole, including her own testimony, Claimant thought her problems with her arms and neck came from work, well before 2009. Upon learning of a possible claim, the Employer satisfied their responsibility in sending Claimant for medical treatment, completing the Form 12A, and investigating her claims. The employer also provided the Claimant with light duty work, immediately upon receiving notice of Claimant's problems.

2. Claimant told her doctor that her job required her to bend and that she was having upper and lower back pain as far back as March 31, 1997. (APA p. 155).

3. On March 22, 2000, Claimant told her family doctor that her chronic low back pain radiated into both legs and that she stood at a machine all day at work. (APA p. 157).

4. On June 18, 2001, Claimant was treated for left arm and shoulder pain. She told her doctor that she worked as a brake operator and that her job was aggravating her left shoulder and arm. (APA p. 159). At that same time, she was diagnosed with a shoulder strain possibly related to work.

5. On July 24, 2002, Claimant was treated for a back strain aggravated by lifting at work. (APA p. 163). When Claimant reported her injuries in September of 2009 for the first time to her Employer, she told them that she was feeling discomfort around the joints of both shoulders and her lower back that she had been feeling for five years. She told the Employer that she attributed her pain to the repetitive nature of brake operation at her job. She also told her Employer in September of 2009 for the first time that she had been taking pain medication for years under the guidance of her personal physician for the conditions she thought were related to work. Claimant also acknowledged that five years before her hearing she went to a chiropractor because she was having problems with her back that she thought were related to work. (APA p. 32, ll. 13-16).

6. When the Claimant was evaluated by Dr. McCorkle, he stated "her neck never has really been as much as her shoulders.... She really does not have symptoms related to this and therefore once again I have not recommended surgery for the

cervical region, but I do feel she needs to be evaluated by an orthopedist for recommendations and treatment for her shoulders." (APA p. 208).

7. While Claimant indicated in her deposition that she was diagnosed with fibromyalgia in 2008, she specifically discounted the opinion of her doctor and stated unequivocally that she did not believe her doctor when he made that diagnosis. She thought her problems in her arms and neck were coming from work. (Hearing Testimony p. 26, ll. 20-25). She also testified unequivocally that it has been more than two years since she thought her problems that she described to the undersigned were related to her job. (Hearing Transcript p. 35, ll. 17-21). Claimant did not first file a claim for repetitive trauma injuries until March 8, 2010, and she filed Amended Forms 50 on April 27, 2010.

8. After reviewing the description of Claimant's job and the video of Claimant's job and the deposition of Dr. Michel Hoenig, I do not believe the Claimant sustained a compensable repetitive trauma injury under S.C. Code Ann. § 42-1-172, and she has not satisfied the notice requirement of S.C. Code Ann. § 42-15-20 the Statute of Limitations timeframe for filing her claim (S.C. Code Ann. § 42-15-40).

9. Although Dr. Hoenig, related Claimant's problems to her work, he was not persuasive in his deposition testimony. He appears not to have known about the Claimant's long history of the same problems she is now alleging. As such, no weight is given to his reports or testimony, in this instance.

10. Claimant's job requires her to operate a machine that uses two different dyes. The dyes can be changed often or infrequently, depending on the type of work that

needs to be performed. The dyes can range in weight from ½ pound to 100 pounds. The Claimant normally lifts no more than 30 pounds. Any time Claimant has to lift anything heavy, she has help. In addition to placing dyes on a machine, she also enters information into a keyboard, reviews blueprints, and takes dyes off a rack. In my view of the evidence, Claimant did not meet the requirements of S.C. Code Ann. § 42-1-172.

11. The Claimant continues to work for the Employer, albeit at a different job. On cross-examination, she admitted to her history and knowledge that her job was causing her problems as early as 1995 and certainly as of 2000 to 2001. The medical records show that the Claimant was relating her condition to work.

12. I find that the Defendants have met their burden in showing that Claimant's failure to report her injury caused them prejudice. Specifically, the Employer's own actions show that when an injury was reported, they immediately provided medical treatment and provided the Claimant with a different type of job. Had the Claimant reported her problems when she know they were compensable, as far back as 1999 or 2000 to 2001, the Employer could have taken steps at that point to prevent further injury.

13. Given the fact that Claimant knew of her problems being related to work in 1995, but certainly as of 2000 to 2001, Claimant did not file her claim timely when she filed a request for hearing in March of 2010.

14. Given that Claimant did not meet her burden of proving a compensable injury due to repetitive trauma, did not satisfy the notice requirement, and did not file her

claim timely within the Statute of Limitations, all benefits under the South Carolina Workers' Compensation Act are hereby denied.

CONCLUSIONS OF LAW (Single Commissioner)

1. Section 42-1-172 of the South Carolina Code of Laws (Cum. Supp. 2001) is applicable in defining "a repetitive trauma injury as an injury with is gradual in onset and caused by the cumulative effects of repetitive traumatic events. The preponderance of the evidence in this case does not show a causal connection between the condition under which Claimant worked and Claimant's ultimate conditions or "injuries."

2. Section 42-17-40 of the South Carolina Code of Laws (Cum. Supp. 2001) is applicable in governing the conduct of hearing and rendering of awards.

3. Section 42-15-20 of the South Carolina Code of Laws (Cum. Supp. 2001) is applicable in determining the timeframe within which an employee shall provide notice to the Employer of a repetitive trauma injury. Specifically, Claimant did not provide the Employer notice within 90 days of the date the employee discovered or could have discovered by exercising reasonable diligence that her condition was compensable or related to work and, the Employer was unduly prejudiced by Claimant's failure.

4. Section 42-15-40 of the South Carolina Code of Laws (Cum. Supp. 2001) is applicable for determining the timeframe within which a Claimant must file a

claim. As noted above, the Claimant in this matter did not file her claim within two years after she knew or should have known that her injury was compensable or related to work.

5. Under the Workers' Compensation Act, it is a well established principle of law that the Claimant must prove such facts as would render the injury compensable within the provisions of the Act. *See generally* S.C. Code Ann. § 42-1-160; Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E.2d 856 (1998); Lee v. Harborside Café, 350 S.C. 74; 564 S.E.2d 354 (Ct. App. 2002). A Claimant must prove her case by the preponderance of the evidence. Awards in workers' compensation are provided only after the Claimant has set forth sufficient evidence to support the allegation of injury or in this case repetitive trauma injury. Awards must not be base on surmise, conjecture, or speculation. Jennings v. Chambers Dev. Co., 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999).

6. The Claimant has failed to prove a compensable injury by way of a repetitive trauma arising out of her employment with the Defendant Employer.

7. Even assuming the Claimant was able to show a compensable repetitive trauma injury, she did not file her claim timely and did not report her injury timely. Claimant is not entitled to any disability or medical benefits under the South Carolina Workers' Compensation Act accordingly.

Within the statutory period, counsel for the Claimant/Appellant filed an Application for Review in the case setting forth her assignments of error, copies of which were furnished to all

interested parties prior to oral argument presented before the Appellate Panel on December 13, 2010.

By appeal, it was respectfully submitted to the Full Commission that the Commissioner erred in:

1. Finding of Fact No. 1 in finding that Claimant has not met the burden of proving compensable repetitive trauma injury to her right arm, right shoulder, left arm, and left shoulder occurring on September 16, 2009, and a repetitive trauma injury occurring on November 24, 2009, affecting her back and neck with psychological overlay.

2. Finding of Fact No. 8 that Claimant did not sustain a compensable repetitive trauma injury under S.C. Code Ann. § 42-1-172, and that she had not satisfied the notice requirement of S.C. Code Ann. § 42-15-20 or the statute of limitations time frame for filing her claim of § 42-15-40.

3. Finding of Fact No. 10 that Claimant's job did not meet the requirements of S.C. Code Ann. § 42-1-172 as being repetitive.

4. Finding of Fact No.11 by rendering a general overall statement that the medical records show that the Claimant was relating her condition to work.

5. Finding of Fact No. 12 in finding that the Defendants had met their burden in showing that Claimant's failure to report her injury caused them prejudice.

6. Finding of Fact No. 13 that Claimant did not file her claim timely when she filed a request for hearing in March, 2010.

7. Finding of Fact No. 14 that Claimant had failed to meet her burden of proof of demonstrating compensable injuries due to repetitive trauma did not satisfy the notice

required and did not file her claim timely within the statute of limitations, thereby denying her claims.

8. Conclusion of Law No. 1 in finding that the preponderance of the evidence in this case did not show a causal connection between the condition under which Claimant worked and Claimant's ultimate condition or injuries.

9. Conclusion of Law No. 3 in finding that the Claimant did not provide the Employer with notice within ninety (90) days the Employee discovered or could have discovered by exercising reasonable diligence that her condition was compensable or related to work and the Employer was unduly prejudiced by Claimant's failure.

10. Conclusion of Law No. 4 in finding that the Claimant did not file her claim within two (2) years after she knew or should have known that her injury was compensable or related to work.

11. Conclusion of Law No. 6 in finding that the Claimant had failed to prove a compensable injury by way of repetitive trauma injury out of her employment with the Defendant Employer.

12. Conclusion of Law No. 7 by stating that even if she had shown a compensable repetitive trauma injury, she did not file her claim timely and did not report her injury timely, and, therefore, was not entitled to any benefits under the workers' compensation laws.

Pursuant to S.C. Code Ann. § 42-17-50, we, the Appellate Panel, have reviewed the Decision and Order of the Single Commissioner and weighed the evidence as presented at the

initial hearing. We have also considered all issues raised in the briefs of the Claimant and Respondents.

After careful review, the members of the Appellate Panel of the South Carolina Workers' Compensation Commission have determined that the Hearing Commissioner's Findings of Fact and Conclusions of Law are incorrect as stated. South Carolina Code Ann., Section 42-17-50 (1976, as amended) empowers the Full Commission to make its own findings of fact and to reach its own conclusions of the law consistent with or inconsistent with the Hearing Commissioner. The appellate panel, therefore, reverses the findings of the Single Commissioner and makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. All parties to this proceeding are subject to and bound by the terms and provisions of the South Carolina Workers' Compensation Act, as amended to date.

2. This matter is properly before the South Carolina Workers' Compensation Commission, which has both subject matter and personal jurisdiction, and venue is properly set in Spartanburg County. This is based upon the Commission's file and representations of the parties.

3. Employer was subject to the South Carolina Workers' Compensation Act by regularly employing four (4) or more employees within the State.

4. All parties had timely and proper notice of all proceedings.

5. Claimant has been an employee of Siemens Energy & Automation for approximately 16 years.

6. Claimant worked 15 years in the position of a brake operator for Defendant Employer.

7. Claimant's Average Weekly Wage is $759.06, with an applicable compensation rate of $506.06.

8. Claimant has alleged a repetitive trauma injury to her right arm, right shoulder, left arm, and left shoulder occurring on September 16, 2009, and a repetitive trauma injury occurring on November 24, 2009, affecting her back, neck, and psyche. Claimant has demonstrated by the greater weight and preponderance of the evidence that her injuries were the result of performing the brake operator job over a fifteen year period which was a repetitive job with continuous heavy lifting requirements and overhead movements by the operator. This is demonstrated by Claimant's description of her job duties, Employer's own job description, and the expert opinions of Claimant's treating physicians. Claimant has met her burden of proving compensable repetitive trauma injuries.

9. The medical records from Dr. Calvert McCorkle, a neurosurgeon, established by preponderance of the evidence that Claimant's neck and shoulder injuries are from constant repetitive activity from her job (see APA pp. 49-50, 208-209). The medical records and deposition of Dr. Michael Hoenig, an orthopedic surgeon, established by preponderance of the evidence that Claimant's bilateral shoulder injuries are related to her repetitive job activity (see APA pp. 61-68, Hoenig Deposition p. 22). The medical evaluation from Dr. C. David Tollison, a pain psychologist, established by a preponderance of the evidence that Claimant suffers from an adjustment disorder with depressed mood and a somatoform disorder, that are causally related to chronic pain secondary to Claimant's repetitive motion work injuries (APA pp. 8-9).

10. Claimant's repetitive trauma injuries occurred prior to July 1, 2007. Claimant told her doctor that her job required her to bend and that she was having upper and lower back pain as far back as March 31, 1997 (APA p. 155). On March 22, 2000, Claimant told her family doctor that her chronic low back pain radiated into both legs and that she stood at a machine all day at work (APA p. 157). On June 18, 2001, Claimant was treated for left arm and shoulder pain. She told her doctor that she worked as a brake operator and that her job was aggravating her left shoulder and arm. At that same time, she was diagnosed with a shoulder strain possibly related to work (APA p. 159). On July 24, 2002, Claimant was treated for a back strain aggravated by lifting at work (APA p. 163).

11. When Claimant reported her injuries in September of 2009 to her Employer, she told them that she was feeling discomfort around the joints of both shoulders and her lower back that she had been feeling for five years. She told the Employer that she attributed her pain to the repetitive nature of brake operation at her job. She also told her Employer in September of 2009 that she had been taking pain medication for years under the guidance of her personal physician for the conditions she thought were related to work. Claimant acknowledged that five years before her hearing she went to a chiropractor because she was having problems with her back that she thought were related to work (APA p. 32).

12. Claimant last performed the brake operator job on or about October 1, 2009.

13. Claimant gave timely and proper notice to the Employer of her bilateral shoulder injuries on September 16, 2009. Connie Morse, the Nurse Case Manager, gave timely and proper notice of Claimant's back and neck injuries to Dan Scott, the Employer's safety engineer, on December 15, 2009.

14. Claimant timely filed both claims with the Commission on March 8, 2010 and amended on April 26, 2010.

CONCLUSIONS OF LAW

1. Claimant is an "Employee" under the S.C. Workers' Compensation Act (1976, as amended). S.C. Code Ann. § 42-1-130. The Defendant is an "Employer" under the Act. S.C. Code Ann. § 42-1-140.

2. Claimant is entitled to "Compensation." S.C. Code Ann. § 42-1-100.

3. S.C. Code Ann. Section 42-17-40 governs the "Conduct of Hearing" and the "Award."

4. Claimant has sustained compensable injuries by accident arising out of and in the course of her employment. S.C. Code Ann. 42-1-160.

5. A repetitive trauma injury is compensable under the Workers' Compensation Act. A repetitive trauma injury meets the definition of injury by accident in that it is an unforeseen injury caused by trauma. *Pee v. AVM, Inc.*, 352 S.C. 167, 174, 573 S.E.2d 785, 789 (2002).

6. The Workers' Compensation statutes were amended in 2007, to include amendments specifically addressing repetitive trauma injuries. These amendments became effective on July 1, 2007, and are applicable to injuries that occur on or after that date. The specific amendments addressing repetitive trauma injuries include: S.C. Code Ann. § 42-15-20(C) regarding the notice requirement; S.C. Code Ann. § 42-15-40 regarding the statute of limitations for filing a claim; and S.C. Code Ann. § 42-1-172 which defines "repetitive trauma

injury." Pre-2007 case law governs the application of the notice requirement and statute of limitations for claims of repetitive trauma injuries that occurred prior to July 1, 2007.

7. Claimant's repetitive trauma injuries occurred prior to July 1, 2007, and therefore, pre-2007 case law is the governing law of this case.

8. When applying the 90 day notice requirement of the pre-2007 version of S.C. Code Ann. § 42-15-20 to repetitive trauma injuries, the Workers' Compensation Commission shall determine the statutory notice requirement from the time of disablement of the claimant. Notice begins to run when the employee becomes disabled and could discover with reasonable diligence her condition is compensable. *Bass v. Isochem*, 365 S.C. 454, 481, 617 S.E.2d 369, 383 (Ct. App. 2005). Claimant clearly notified the Employer of her repetitive trauma injuries within ninety days of becoming disabled, on September 16, 2009 and December 15, 2009, when she could no longer perform her brake operator job on October 1, 2009.

9. When applying the two year statute of limitations of the pre-2007 version of S.C. Code Ann. § 42-15-40 to repetitive trauma injuries, the statute of limitations begins to run the last day of exposure (i.e., the last day worked). *Schurlknight v. City of North Charleston*, 352 S.C. 175, 178-79, 574 S.E.2d 194, 195-96 (2002). Claimant's last day of exposure to her job as a brake operator was on or about October 1, 2009, the last day she worked that job. Claimant clearly filed her claims within the two year statute of limitations on March 18, 2010 and amended on April 26, 2010.

ORDER

The Order of the Single Commissioner from which this appeal has been taken is hereby **reversed** by the Appellate Panel. Claimant is entitled to benefits under the South Carolina Workers' Compensation Act for her repetitive trauma injuries and this case is **remanded** to the Jurisdictional Commissioner for a determination of benefits in accordance with the Findings of Fact and Conclusions of Law herein.

IT IS THEREFORE ORDERED that this case be remanded to the Jurisdictional Commissioner for determination of benefits.

IT IS SO ORDERED.

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner

T. Scott Beck, Commissioner

G. Bryan Lyndon, Commissioner
Chairman, Appellate Panel

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

This 24 day of November, 2011

By Valerie D. Beiler

Administrative Assistant to the Commissioner

OShayne Williams
Carole M. Dennison
Timothy Clardy

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Court Of Common Pleas

WCC File No. 0920436

Susan M. Wright ..... Respondent,

v.

Siemens Energy & Automation, Employer, and
Liberty Mutual Insurance Company, Carrier ..... Appellants.

RESPONSE OF APPELLANTS IN OPPOSITION TO
MOTION TO DISMISS APPEAL

I. THE FULL COMMISSION ORDER IS SUBJECT TO IMMEDIATE REVIEW.

The order challenged on appeal concludes as a matter of law that Respondent Susan M. Wright ("Wright") is entitled to benefits and is silent with regard to the need to make any other findings on remand. Thus, the primary issue, and the core issue on appeal, is the determination that Wright is entitled to benefits. Nevertheless, she urges this Court to determine erroneously that the challenged order is interlocutory and not immediately appealable pursuant to S.C. Code Ann. § 1-23-390. Wright's argument fails because she relies upon a misperceived distinction between interlocutory appeals in workers' compensation proceedings and appeals of interlocutory orders in the broader class of civil actions in general where no such distinction exists. Careful examination compels the conclusion that dispositive orders in workers' compensation cases like this

one are equally subject to the final judgment rule and immediate review where they involve the merits or affect a party's substantial rights.

A. The Administrative Procedures Act Affords Immediate Review.

It is uncontested that S.C. Code Ann. §§ 1-23-380 and -390 govern appellate review of final administrative agency decisions. At the same time, these provisions clearly permit review of an interlocutory order in a workers' compensation proceeding where that order reaches the merits or affects a substantial right. For example, Section 1-23-380 authorizes review of "a final decision in a contested case" and "does not limit utilization of or the scope of judicial review, redress, relief or trial de novo provided by law." Further, Section 1-23-390 provides that "[a]n aggrieved party ***may obtain a review of a final judgment of the circuit court*** or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules ***as in other civil cases***." (Emphasis added) Thus, a plain reading of the relevant statutory provisions supports immediate review of the order challenged in this appeal, and neither provision should be read to signal a departure from or modification of the final judgment rule.

As the South Carolina Supreme Court recently recognized, there is insufficient tension between §§ 1-23-380 and -390 on the one hand and 42-17-60 on the other to warrant dismissal of this appeal pending remand to the agency. To the contrary, "[p]ursuant to § 42-17-60 (1990), an appeal from the Commission may be taken to circuit court 'under the same terms and conditions as govern appeals in ordinary civil actions.'" *Allison v. W.L. Gore*, Op. No. 27031 (S.C.Sup.Ct. filed August 22, 2011) (Shearouse Adv.Sh. 28 at 79), *reh'g denied* (Sept. 22, 2011). The *Allison* Court recognized that an

order denying a party's motion to dismiss is not subject to immediate review in part because it did "not affect the merits." *Id.* This Court reached a similar result in *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005) in relying on the "involves the merits" framework because it relied upon § 1-23-390, as well as "case law cited by our supreme court in *Montjoy* to interpret 1-23-390."[1] The same result followed in *Charlotte-Mecklenburg Hosp. Auth. v. South Carolina Dep't. of Health & Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010). There, the supreme court overruled a number of cases to the extent the lower courts applied S.C. Code Ann. § 14-3-330 to "permit the appeal of interlocutory orders of the ALC or an administrative agency. . . ." *Id.*, 387 S.C. at 266, 692 S.E.2d at 894) (collecting cases). It did not, however, reject the traditional "rights of the parties" framework. *Id.*, 387 S.C. at 267, 692 S.E.2d at 894-895 ("A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment.").

In this case, the Commission did not merely determine the applicable law. Indeed, is misapplied inapplicable law to reach its incorrect determination that Wright is entitled to benefits. What the Commission decided, and why this appeal should be permitted to proceed, is that there was no other possible conclusion but that Wright is entitled to benefits. Thus, absent immediate review in the appellate courts, there is "nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 895, citing *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942). Like the decision addressed by the

[1] *Montjoy v. Astern-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994). Moreover, the supreme court denied *certiorari* in *Brown*, which, for the reasons stated herein, employed the correct analytical framework and should be viewed as persuasive authority in the instant proceedings.

dissent in *Long v. Sealed Air Corp.*, the Commission's determination that Wright sustained a compensable injury as a matter of law "is a final decision on the merits, and the remand language in the order has no effect on the finality of that decision." 391 S.C. 483, 493, 706 S.E.2d 34, 39 (Ct. App. 2011) (Geathers, J., dissenting). Also like the order at issue in *Long*, the appellate panel's order in this case "does not allow the Commission to pursue the issue . . . any further, and thus the decision is the law of the case unless immediately appealed." *Id.* Respectfully, Appellants urge this Court to conclude, consistent with its holdings in prior cases, the dissenting judge in *Long* was correct in his assertion that "the legislature could not have possibly intended to preclude the immediate appeal of a determination that will otherwise become the law of the case when such a result would deny parties to administrative proceedings a meaningful opportunity to be heard." *Id.*

Here, the full commission order absolutely decides the central questions as to whether Wright's injury is work-related and whether she provided timely notice of her injuries. To adopt the rationale employed in *Long* would prevent further litigation of this contested issue on remand, subject Appellants to immediate liability for the payment of benefits they contend are not due and owing, and deprive Appellants of immediate and meaningful review to which they are entitled by both the Administrative Procedures and Workers' Compensation Acts in contravention of existing statutory and case law precedent. For these reasons, any order dismissing this appeal consistent with the holding in *Long*, would unduly prejudice Appellants. Accordingly, Wright's motion should be denied.

B. A Delayed Appeal Is Not A Sufficient Remedy.

Wright's arguments to the contrary notwithstanding, the full commission order in this case clearly constitutes a final judgment. It is, therefore, subject to immediate review. Any argument that Appellants may have the right to seek restitution in the event the award is ultimately overturned is irrelevant. Here, the parties do not contest jurisdiction and instead find themselves involved in a legitimate dispute as to whether or not Wright sustained a compensable injury, and there is no mechanism in place to ensure that funds paid in benefits to Wright will be available in the event the award is later overturned. Barring immediate appeal of the final judgment in this case will deprive Appellants of the review to which they are entitled and require them to pay large sums of money to Wright during an unnecessarily delayed resolution of this matter.

As has been noted, the full commission order finds as a matter of law that Wright sustained a work-related injury. The challenged order is by its very nature subject to immediate appeal because it determines a question necessarily affecting the merits (*i.e.*, whether substantial evidence supports an award of benefits) and makes a final determination that cannot be adequately addressed after final administrative agency decision (*i.e.*, that Respondent is entitled to benefits). Furthermore, Appellants contend the full commission decided this case by applying outdated statutory law; thus, this appeal presents an important legal issue that should be decided now (and that cannot be re-visited by the single commissioner on remand). To proceed differently would require multiple appeals and subvert the interests of judicial economy. Nothing in the APA or authority construing that statute militates in favor of delayed review, and this Court should deny Wright's motion and proceed to a consideration of the merits of the instant

appeal.

III. THIS COURT SHOULD STAY ITS RULING PENDING THE OUTCOME OF *BONE v. U.S. FOOD SERVICE AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.*

By Order dated July 7, 2011, and attached as Exhibit A, the South Carolina Supreme Court granted *certiorari* in the matter of *Bone v. U.S. Food Service and Indemnity Insurance Company of North America.* The issue in that case is directly on point; to wit, did this Court err in dismissing appellants' notice of appeal of the circuit court's determination that respondent is entitled to benefits as a matter of law. *See* June 30, 2010 Order of the South Carolina Court of Appeals (Trial Court No. 2008-CP-32-02876) (Case Tracking No. 2009125246) (Attached as Exhibit B). In the interests of judicial economy, this Court should stay a ruling on Wright's motion pending the outcome of the *Bone* appeal, which is scheduled for argument in the supreme court Thursday, January 26, 2012.

CONCLUSION

For all of the reasons stated herein, the full commission order is subject to immediate appellate review and should be reversed. Alternatively, this Court should stay a ruling on Respondent's Motion to Dismiss pending the outcome of the *Bone* matter above-cited.

(Signature page to follow.)

January 23, 2012 By: _____

O. Shayne Williams
Turner Padget Graham & Laney P.A.
Post Office Box 1509
Greenville, SC 29602
Phone: (864) 552-4621

Carmelo B. Sammataro
Turner Padget Graham & Laney P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR APPELLANTS

The Supreme Court of South Carolina

Cathy C. Bone, Respondent,

v.

U.S. Food Service and
Indemnity Insurance Company
of North America, Petitioners.

ORDER

We grant the petition for a writ of certiorari to review the Court of Appeals' decision in Bone v. U.S. Food Service, S.C. Ct. App. Order dated June 30, 2010. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 242(i), SCACR.

C. J.

J.

J.

J.

J.

Columbia, South Carolina

July 7, 2011

EXHIBIT A

The South Carolina Court of Appeals

Cathy C. Bone, Respondent,

v.

U. S. Food Service and Indemnity
Insurance Company North America, Appellants.

The Honorable G. Thomas Cooper, Jr.
Lexington County
Trial Court Case No. 2008-CP-32-02876

ORDER

Cathy Bone initiated this workers' compensation action against Appellants, seeking workers' compensation benefits for an alleged workplace injury. Appellants denied Bone's request for benefits, concluding Bone did not suffer a compensable work related injury. After a hearing, the single commissioner denied benefits to Bone, and the Appellate Panel affirmed. Bone appealed to the circuit court, which reversed, finding Bone injured her back while moving pallets at work. Because the circuit court found Bone's injury was compensable, the circuit court remanded the action to the Appellate Panel "for proceedings consistent with [the circuit court's] order." Appellants then appealed the circuit court's order to this Court.

Bone first filed a motion to dismiss in October 2009, arguing the circuit court's order is not immediately appealable. This Court issued an order allowing the appeal to proceed and instructing the parties to brief the issue of appealability. Our Supreme Court subsequently issued an order in the case of Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl.

Control, S.C. Sup. Ct. Order filed April 8, 2010 (Shearouse Adv. Sh. No. 14 at 85). Pursuant to the reasoning set forth in the Charlotte-Mecklenburg Hospospital Authority order, Bone has filed a second motion to dismiss. Appellants have filed a Return, and Bone has filed a Reply.

After careful consideration of the parties' filings and applicable case law, we hereby dismiss Appellants' appeal. The order on appeal remands the matter to the Appellate Panel for further proceedings; thus, it is not a final judgment, and it is not immediately appealable. See Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 52, 446 S.E.2d 618, 618 (1994) (stating our courts "have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable"); Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control, S.C. Sup. Ct. Order filed April 8, 2010 (Shearouse Adv. Sh. No. 14 at 85-87) (reiterating that appeals from administrative agencies may only be sought from final decisions, explaining the general appealability statute, section 14-3-330 of the South Carolina Code (1976 & Supp. 2009), does not apply to appeals from administrative agencies, and overruling this court's opinion in Canteen v. McLeod Regional Medical Center, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009), to the extent it relied on § 14-3-330 to permit the appeal of interlocutory orders of the administrative law court or an administrative agency); Adickes v. Allison & Bratton, 21 S.C. 245, 259 (1884) (holding if there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory); Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 41, 21 S.E.2d 209, 212 (1942) (holding if a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment).

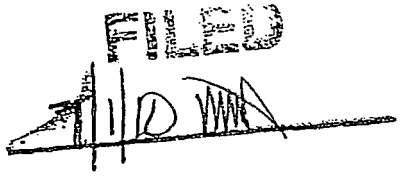
AND IT IS SO ORDERED.

John Cannon Fine C.J.

Columbia, South Carolina

June 30, 2010

cc: Michael E. Chase, Esquire
Carmelo B. Sammataro, Esquire
Blake Alexander Hewitt, Esquire
William L. Smith, II, Esquire



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
T. Scott Beck, Commissioner
G. Bryan Lyndon, Commissioner

WCC File Nos. 0920436 & 0920437

Susan M. Wright, ... Respondent,

v.

Siemens Energy & Automation, Employer, and
Liberty Mutual Insurance Company, Carrier ..... Appellants.

**RESPONDENT'S REPLY TO
RESPONSE OF APPELLANTS IN OPPOSITION TO
MOTION TO DISMISS APPEAL**

I. THIS COURT'S DECISION IN *LONG V. SEALED AIR CORPORATION* REQUIRES DISMISSAL.

This Court's decision in *Long v. Sealed Air Corporation*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011), controls the present appeal. The instant case is nearly identical, factually, to that of *Long*: "In this case, the order on appeal remands the case to the commission for additional proceedings. Accordingly, it is not a final judgment and the order is not immediately appealable." 391 S.C. at 487, 706 S.E.2d at 36. If the decision in *Long* stands, then Respondent's Motion to Dismiss must be granted as a

matter of law. In fact, this Court's decision to dismiss the appeal in *Bone v. U.S. Food Service and Indemnity Insurance Company of North America* (attached to Appellants' Response), which is based upon the South Carolina Supreme Court's decision in *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010), dictates the same conclusion.

II. THIS COURT SHOULD NOT STAY ITS RULING PENDING THE OUTCOME OF *BONE V. U.S. FOOD SERVICE AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.*

There is no reason to stay the Court's ruling on Respondent's motion while the case of *Bone v. U.S. Food Service and Indemnity Insurance Company of North America* is pending. Dismissal of the appeal would be without prejudice. *See e.g., Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984); *Hunt v. Whitt*, 279 S.C. 343, 306 S.E.2d 621 (1983). Thus, Appellants may re-file their appeal at a later time, when a "final judgment" in this matter is reached or upon an intervening change in the law. Furthermore, upon appeal, "the court may review any intermediate order involving the merits and necessarily affecting the judgment." S.C. Code Ann. § 18-1-130. Therefore, Appellants will not be prejudiced for this Court to proceed with the decision on Respondent's Motion to Dismiss.

CONCLUSION

The Administrative Procedures Act limits an immediate appeal in an administrative case to a final decision. The order the appellants have appealed is not a "final decision," the appellants have not exhausted all administrative remedies, and review after final judgment will provide a perfectly adequate remedy. Therefore, Ms. Wright respectfully requests the Court to dismiss the appeal.

Respectfully submitted,

January 27, 2012

By: _____

Timothy Clardy
Carole M. Dennison
THE DENNISON LAW FIRM, P.C.
Post Office Box 2468
Greenville, SC 29602
(864) 235-8435
(864) 235-8433 (facsimile)
timothy@dennisonlawfirm.com
carole@dennisonlawfirm.com

ATTORNEYS FOR RESPONDENT

The South Carolina Court of Appeals

Susan M. Wright, Respondent,

v.

Siemens Energy & Automation, Employer, and Liberty Mutual Insurance Company, Carrier, Appellants.

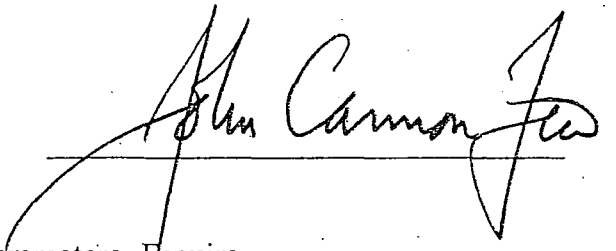
Appellate Panel
South Carolina Workers' Compensation Commission
Case No. 2011-WC-40-20436

ORDER

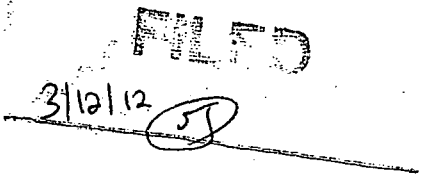
Susan M. Wright initiated this workers' compensation action against Appellants, seeking workers' compensation benefits for an alleged workplace repetitive trauma injuries. The single commissioner denied the claim. The Appellate Panel reversed the commissioner's decision and remanded the case to the single commissioner for a determination of Wright's entitlement to benefits. Appellants appealed, and Respondent has filed a motion to dismiss.

After careful consideration of the parties' filings, we dismiss this appeal. Appeals from the Workers' Compensation Commission are governed by section 1-23-380 of the South Carolina Code (Supp. 2010). See Long v. Sealed Air Corp., 391 S.C. 483, 486, 706 S.E.2d 34, 35 (Ct. App. 2011). Section 1-23-380 limits review to "a final decision . . . ." See Long, 391 S.C. at 486, 706 S.E.2d at 35-36. Because the Appellate Panel remanded Wright's action to the single commissioner for a determination of benefits, the order is not a final decision and is not immediately appealable.

IT IS SO ORDERED.



cc: Carmelo Barone Sammataro, Esquire
O. Shayne Williams, Esquire
Timothy Clardy, Esquire
Carole M. Dennison, Esquire
Virginia L. Crocker



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Court Of Common Pleas

WCC File No. 0920436

Susan M. Wright ..... Respondent,

v.

Siemens Energy & Automation, Employer, and
Liberty Mutual Insurance Company, Carrier ..... Appellants.

PETITION FOR REHEARING BY APPELLANTS SIEMENS ENERGY & AUTOMATION AND LIBERTY MUTUAL INSURANCE COMPANY

Appellants Siemens Energy & Automation and Liberty Mutual Insurance Company (hereinafter "Appellants") hereby petition this Court for rehearing, pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, of its Order filed March 12, 2012. That order dismissed the instant workers' compensation appeal as interlocutory pursuant to *Long v. Sealed Air Corp.*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011). Appellants' petition seeks rehearing and reconsideration of the Court's order to the extent that the dismissal of this appeal rests upon an overly broad, incorrect reading of the South Carolina Supreme Court precedent addressing finality of agency orders and to the extent that it relies upon *Long*, which Appellants respectfully submit was wrongly decided.

FACTUAL AND PROCEDURAL BACKGROUND

The order challenged on appeal concludes as a matter of law that Respondent Susan M. Wright ("Wright") is entitled to benefits and is silent with regard to the need to make any other findings on remand. Thus, the primary issue, and the core issue on appeal, is the determination that Wright is entitled to benefits. Nevertheless, this Court determined that the challenged order is interlocutory and not immediately appealable pursuant to S.C. Code Ann. § 1-23-380 and its prior holding in *Long v. Sealed Air*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2010).

ARGUMENT

I. THE ORDER CHALLENGED ON APPEAL IS IMMEDIATELY APPEALABLE AS A FINAL JUDGMENT.

This Court's reliance on *Long* is misplaced because it relies upon a misperceived distinction between interlocutory appeals in workers' compensation proceedings and appeals of interlocutory orders in the broader class of civil actions in general where no such distinction exists. Moreover, *Long* establishes an overly formulaic approach that requires dismissal in any appeal where the underlying order remands for any reason, even a purely ministerial one. The more reasonable approach compels the conclusion that dispositive orders in workers' compensation cases like this one are equally subject to the final judgment rule and immediate review where they involve the merits or affect a party's substantial rights. For these reasons, the Court should reconsider its order and permit this appeal to proceed.

A. The Administrative Procedures Act Affords Immediate Review.

It is uncontested that S.C. Code Ann. §§ 1-23-380 and -390 govern appellate review of final administrative agency decisions. At the same time, these provisions clearly permit review of an interlocutory order in a workers' compensation proceeding where that order reaches the merits or affects a substantial right. For example, Section 1-23-380 authorizes review of "a final decision in a contested case" and "does not limit utilization of or the scope of judicial review, redress, relief or trial de novo provided by law." Further, Section 1-23-390 provides that "[a]n aggrieved party ***may obtain a review of a final judgment of the circuit court*** or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules ***as in other civil cases.***" (Emphasis added) Thus, a plain reading of the relevant statutory provisions supports immediate review of the order challenged in this appeal, and neither provision should be read to signal a departure from or modification of the final judgment rule.

As the South Carolina Supreme Court recently recognized, there is insufficient tension between §§ 1-23-380 and -390 on the one hand and 42-17-60 on the other to warrant dismissal of this appeal pending remand to the agency. To the contrary, "[p]ursuant to § 42-17-60 (1990), an appeal from the Commission may be taken to circuit court 'under the same terms and conditions as govern appeals in ordinary civil actions.'" *Allison v. W.L. Gore*, Op. No. 27031 (S.C.Sup.Ct. filed August 22, 2011) (Shearouse Adv.Sh. 28 at 79), *reh'g denied* (Sept. 22, 2011). The *Allison* Court recognized that an order denying a party's motion to dismiss is not subject to immediate review in part because it did "not affect the merits." *Id.* This Court reached a similar result in *Brown v.*

Greenwood Mills, Inc., 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005) in relying on the "involves the merits" framework because it relied upon § 1-23-390, as well as "case law cited by our supreme court in *Montjoy* to interpret 1-23-390."[1] The same result followed in *Charlotte-Mecklenburg Hosp. Auth. v. South Carolina Dep't. of Health & Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010). There, the supreme court overruled a number of cases to the extent the lower courts applied S.C. Code Ann. § 14-3-330 to "permit the appeal of interlocutory orders of the ALC or an administrative agency. . . ." *Id.*, 387 S.C. at 266, 692 S.E.2d at 894 (collecting cases). It did not, however, reject the traditional "rights of the parties" framework. *Id.*, 387 S.C. at 267, 692 S.E.2d at 894-895 ("A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment.").

In this case, the Commission did not merely determine the applicable law. Indeed, it misapplied inapplicable law to reach its incorrect determination that Wright is entitled to benefits. What the Commission decided, and why this appeal should be permitted to proceed, is that there was no other possible conclusion but that Wright is entitled to benefits. Thus, absent immediate review in the appellate courts, there is "nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 895, citing *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942). Like the decision addressed by the dissent in *Long v. Sealed Air Corp.*, the Commission's determination that Wright sustained a compensable injury as a matter of law "is a final decision on the merits, and

[1] *Montjoy v. Astern-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994). Moreover, the supreme court denied *certiorari* in *Brown*, which, for the reasons stated herein, employed the correct analytical framework and should be viewed as persuasive authority in the instant proceedings.

the remand language in the order has no effect on the finality of that decision." 391 S.C. 483, 493, 706 S.E.2d 34, 39 (Ct. App. 2011) (Geathers, J., dissenting). Also like the order at issue in *Long*, the appellate panel's order in this case "does not allow the Commission to pursue the issue . . . any further, and thus the decision is the law of the case unless immediately appealed." *Id.* Respectfully, Appellants urge this Court to conclude, consistent with its holdings in prior cases, that the dissenting judge in *Long* was correct in his assertion that "the legislature could not have possibly intended to preclude the immediate appeal of a determination that will otherwise become the law of the case when such a result would deny parties to administrative proceedings a meaningful opportunity to be heard." *Id.*

Here, the full commission order absolutely decides the central questions as to whether Wright's injury is work-related and whether she provided timely notice of her injuries. To adopt the rationale employed in *Long* would prevent further litigation of this contested issue on remand, subject Appellants to immediate liability for the payment of benefits they contend are not due and owing, and deprive Appellants of immediate and meaningful review to which they are entitled by both the Administrative Procedures and Workers' Compensation Acts in contravention of existing statutory and case law precedent. For these reasons, the order dismissing this appeal consistent with the holding in *Long* unduly prejudices Appellants. Accordingly, this Court should grant rehearing and permit this appeal to proceed to a determination of the merits.

B. A Delayed Appeal Is Not A Sufficient Remedy.

The full commission order in this case clearly constitutes a final judgment. It is, therefore, subject to immediate review. Any argument that Appellants may have the right

to seek restitution in the event the award is ultimately overturned is irrelevant. Here, the parties do not contest jurisdiction and instead find themselves involved in a legitimate dispute as to whether or not Wright sustained a compensable injury, and there is no mechanism in place to ensure that funds paid in benefits to Wright will be available in the event the award is later overturned. Barring immediate appeal of the final judgment in this case will deprive Appellants of the review to which they are entitled and require them to pay large sums of money to Wright during an unnecessarily delayed resolution of this matter.

As has been noted, the full commission order finds as a matter of law that Wright sustained a work-related injury, which entitles her to the payments she requested in her Form 50, Request for Hearing. The challenged order is by its very nature subject to immediate appeal because it determines a question necessarily affecting the merits (*i.e.*, whether substantial evidence supports an award of benefits) and makes a final determination that cannot be adequately addressed after final administrative agency decision (*i.e.*, that Respondent is entitled to benefits). Nothing in the APA or authority construing that statute militates in favor of delayed review. To that end, this Court should proceed to a consideration of the merits of the instant appeal.

II. THIS COURT SHOULD HAVE STAYED ITS RULING PENDING THE OUTCOME OF *BONE v. U.S. FOOD SERVICE AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA*.

By Order dated July 7, 2011, and attached as Exhibit A to Appellants' return in opposition to the motion to dismiss, the South Carolina Supreme Court granted *certiorari* in the matter of *Bone v. U.S. Food Service and Indemnity Insurance Company of North America*. The issue in that case is directly on point; to wit, did this Court err in

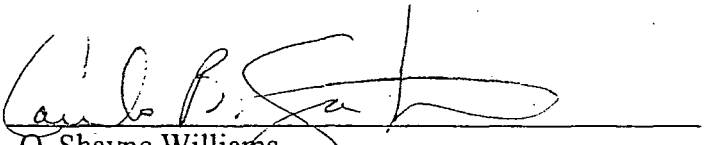
dismissing appellants' notice of appeal of the circuit court's determination that respondent is entitled to benefits as a matter of law. *See* June 30, 2010 Order of the South Carolina Court of Appeals (Trial Court No. 2008-CP-32-02876) (Case Tracking No. 2009125246) (Attached as Exhibit B to Appellants' return). In the interests of judicial economy, this Court should have stayed a ruling on Wright's motion pending the outcome of the *Bone* appeal, which was argued in the supreme court Thursday, January 26, 2012, and has not yet been decided.

CONCLUSION

For all of the reasons stated herein, the full commission order is subject to immediate appellate review. This Court should therefore permit rehearing and allow the appeal in this matter to proceed.

TURNER PADGET GRAHAM & LANEY P.A.

March 27, 2012

By: 

O. Shayne Williams
Turner Padget Graham & Laney P.A.
Post Office Box 1509
Greenville, SC 29602
Phone: (864) 552-4621

Carmelo B. Sammataro
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ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
T. Scott Beck, Commissioner
G. Bryan Lyndon, Commissioner

WCC File Nos. 0920436 & 0920437

Susan M. Wright, ... Respondent,

v.

Siemens Energy & Automation, Employer, and
Liberty Mutual Insurance Company, Carrier ..... Appellants.

RESPONSE OF RESPONDENT IN OPPOSITION TO APPELLANTS' MOTION FOR REHEARING

Susan M. Wright is the Respondent in this case. Appellants appealed an interlocutory order from the appellate panel of the South Carolina Workers' Compensation Commission (the "Commission"), which remanded Ms. Wright's case to a single commissioner for a determination of benefits. Ms. Wright then filed Motion to Dismiss Appeal on the ground that the Commission's order was not a final judgment and therefore not immediately appealable under the Administrative Procedures Act ("APA"). The parties briefed their arguments on the motion. By Order filed March 12, 2012, this Court rejected Appellants' arguments and granted Ms. Wright's motion to dismiss the appeal. In their Petition for Rehearing, Appellants merely restate the same arguments

that were presented in their Response in opposition of Respondent's Motion to Dismiss Appeal, which this Court has already considered and rejected. Therefore, Ms. Wright simply restates herein her same arguments as presented in her briefs on the motion to dismiss which warrant denying Appellant's petition and upholding this Court's decision to dismiss the appeal.

I. THIS COURT'S DECISION IN *LONG V. SEALED AIR CORPORATION* REQUIRES DISMISSAL.

This Court's decision in *Long v. Sealed Air Corporation*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011), controls the present appeal. The instant case is nearly identical, factually, to that of *Long*: "In this case, the order on appeal remands the case to the commission for additional proceedings. Accordingly, it is not a final judgment and the order is not immediately appealable." 391 S.C. at 487, 706 S.E.2d at 36. If the decision in *Long* stands, then the present appeal must be dismissed as a matter of law. In fact, this Court's decision to dismiss the appeal in *Bone v. U.S. Food Service and Indemnity Insurance Company of North America* (attached to Appellants' response in opposition to the motion to dismiss), which is based upon the South Carolina Supreme Court's decision in *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 265, 692 S.E.2d 894 (2010), dictates the same conclusion.

II. THIS COURT SHOULD NOT STAY ITS RULING PENDING THE OUTCOME OF *BONE V. U.S. FOOD SERVICE AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.*

There is no reason to stay the Court's ruling to dismiss the present appeal while the case of *Bone v. U.S. Food Service and Indemnity Insurance Company of North America* is pending. Dismissal of the appeal is without prejudice. *See e.g., Owens v.*

Canal Wood Corp., 281 S.C. 491, 316 S.E.2d 385 (1984); *Hunt v. Whitt*, 279 S.C. 343, 306 S.E.2d 621 (1983). Thus, Appellants may re-file their appeal at a later time, when a "final judgment" in this matter is reached or upon an intervening change in the law. Furthermore, upon appeal, "the court may review any intermediate order involving the merits and necessarily affecting the judgment." S.C. Code Ann. § 18-1-130. Therefore, Appellants are not prejudiced by this Court's dismissal of the appeal.

CONCLUSION

The Administrative Procedures Act limits an immediate appeal in an administrative case to a final decision. The order the appellants have appealed is not a "final decision," the appellants have not exhausted all administrative remedies, and review after final judgment will provide a perfectly adequate remedy. Therefore, Ms. Wright respectfully requests the Court to Deny Appellant's petition for rehearing and to dismiss the appeal.

Respectfully submitted,

April 2, 2012

By: _____

Timothy Clardy
Carole M. Dennison
THE DENNISON LAW FIRM, P.C.
Post Office Box 2468
Greenville, SC 29602
(864) 235-8435
(864) 235-8433 (facsimile)
timothy@dennisonlawfirm.com
carole@dennisonlawfirm.com

ATTORNEYS FOR RESPONDENT

The South Carolina Court of Appeals

Susan M. Wright, Respondent,

v.

Siemens Energy & Automation, Employer, and Liberty Mutual Insurance Company, Carrier, Appellants.

Appellate Case No. 2012-205568

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

John Cannon Jr. C.J.

Thomas E. Huff J.

Paul G. Short, Jr. J.

Columbia, South Carolina

FILED
5/25/12

cc: Carole Marie Dennison
O. Shayne Williams
Timothy Clardy
Carmelo Barone Sammataro