

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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SEP 09 2013

WCC File No. 1009259

SC Court of Appeals

Jeffery L. McFadden, Appellant,

vs.

City of Lake City and South Carolina Municipal
Insurance Trust, Respondents.

**APPELLANT'S RETURN TO RESPONDENTS' MOTION FOR
COSTS ON APPEAL PURSUANT TO RULE 222, SCACR**

Rule 222 of the South Carolina Appellate Court Rules provides that "when an appeal is affirmed or reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court." The instant appeal was dismissed in part and reversed in part. Thus, the decision as to whether to award costs and against whom to award them is left in the discretion of this Court.

The case presented two issues. First, McFadden appealed the Workers' Compensation Commission's Order declining to impose sanctions against the City. At the threshold, this Court had to determine whether the Commission's Order declining to award sanctions was a final decision; appealable pursuant to the Administrative Procedures Act. As this Court noted, South Carolina Courts have held that for an order

to be final it must dispose of the whole subject matter of the action or terminate the particular proceeding or action leaving nothing to be done but to enforce what has already been determined. See, Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control, 387 S.C. 265 (2010).

At issue, therefore, was whether the Commission's ruling on penalties disposed of the entire subject matter of the ruling; leaving nothing to be done but to enforce the ruling. There was no precedent directly on point. Given the uncertainty in the law as to whether an award of sanctions was a final order, the Claimant was compelled to appeal this issue, or risk losing that right.

This Court ruled that the matter was not final and, thus, not yet ripe for appeal. The Court did not decide the issue on the merits in favor of the Respondents or dismiss it with prejudice. Our Courts have consistently declined to award attorney's fees and costs where an appeal is dismissed for lack of a final order. See, e.g., Peterkin v. Brigman, 319 S.C. 367 (1995); Johnson v. Paraplane Corp., 321 S.C. 316 (1996); Duncan v. Government Employees Insurance Co., 331 S.C. 484 (1994); and McLendon v. South Carolina Department of Highways & Public Transportation, 313 S.C. 525 (1994). Therefore, an award of attorney's fees and costs would not be appropriate.

The second issue presented on appeal involved the Claimant's appeal of the Commission's assessment of hearing costs against the undersigned for frivolous appeal. That decision was reversed in favor of the Appellant. Given that the Appellant won a reversal of the lower court's order, the Appellant could seek, pursuant to Rule 222, costs and attorney's fees.

Defendants argue that this portion of the appeal was “not against the Respondents but rather against the Workers’ Compensation Commission directly.” In fact, the Respondents are the only other party to this lawsuit. The Workers’ Compensation Commission is not a party.

The Appellant agrees that the Respondents took no position on this issue. That fact is not one that could have been foreseen by the Appellant when he filed his Notice of Appeal, nor would it have mattered; the Appellant’s only choice was to appeal the decision in which the Respondents were the only party. Thus, in any event, the Respondents would have had to filed a brief pursuant to the Appellate Court rules.

At any rate, the disposition of this case was a dismissal in part and a reversal in part. The Appellate Court rules leave the determination as to whether to award attorney’s fees and costs in such an instance to the discretion of this Court.

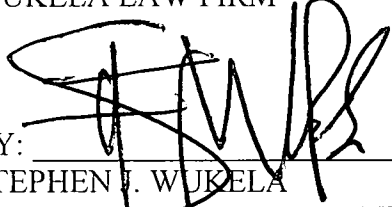
One issue on appeal was decided by dismissing on the grounds of ripeness. Given the absence of direct precedent on the question of whether an award of sanctions was immediately appealable as a final order, the Appellant was bound to appeal and receive a determination from the Court as to whether the matter was in fact final and appealable or else lose their ability to appeal in the future.


On the second issue on appeal, the Appellant prevailed and obtained a reversal of the lower courts decision.

Given these facts, no award of fees or costs of appeal against either party is warranted.

Respectfully submitted.

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September , 2013

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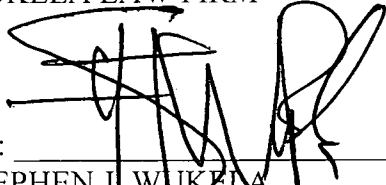
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PROOF OF SERVICE

I certify that the Appellant's Return to Respondents' Motion For Costs on Appeal Pursuant to Rule 222, SCACR was served on Respondents, by US Mail on September 5, 2013, addressed to their attorney of record, Grady L. Beard, at his office at PO Box 11449, Columbia, SC, 29211.

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