

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION
COMMISSION

Appellate Panel

Appellate Case No. 2012-211870

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OCT 22 2013

SC Court of Appeals

Richard A. Hartzell,

Employee.....Respondent

v.

Palmetto Collision, LLC, Employer,.....Appellant

and

the S.C. Uninsured Employers Fund.....Respondent

PETITION FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Respondent Richard A. Hartzell Petitions
this Court
to Rehear and Reconsider its opinion in Hartzell v. Palmetto Collision, LLC and S.C.
Uninsured Employers Fund, Op. No. 5176, filed October 9, 2013.

I. In reversing the decision of the Workers' Compensation Commission, the
Court may have overlooked or misapprehended the fact that the Worker's Compensation

Commission's order was not a final order within the meaning of the Administrative Procedures Act. Section 1-23-380 (A) of the APA provides:

“A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1.”

and

“A preliminary, procedural, or intermediate agency, action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.” S.C. Code Ann. Section 1-23-380 (A).

In Bone v. U.S. Food Service, 404 S.C. 67, 744, S.E. 2nd 552 (2013), which was decided after briefing in this case, the South Carolina Supreme Court determined that an Order of the Circuit Court reversing the Worker's Compensation Commission's denial of benefits to a Claimant was not a final judgment under Section 1-23-380 (A), stating; “An order as to compensability without addressing the claimant's current medical status and specific benefits to be awarded, is not a final judgment disposing of the entirety of the action and leaving nothing further to be done but execution of the judgment.” Id. at 404 S.C. 64, 79, 744 S.E. 2nd 552, 559.

Here, the order of the Worker's Compensation Commission Appellate Panel fits squarely within the Bone rule. The Order/Award provided as follows:

“IT IS HEREBY ORDERED that the Claimant be provided an evaluation to determine whether he is at MMI and whether he is in need of any additional medical treatment, together with any benefits under the Act necessarily resulting from such evaluation and determination. IT IS FURTHER,

ORDERED, that the Employer and South Carolina Worker's Compensation Uninsured Fund may choose the provider.

No hearing costs are assessed in this instance.

AND IT IS SO ORDERED!” (Record page 18).

Thus, whether Hartzell should be provided treatment after initial evaluation, MMI, the existence and degree of permanent impairment and any financial award flowing therefrom have not been decided. This case is, in this respect, factually undistinguishable from Bone. Appellants may appeal the issue of compensability if they choose to appeal the final award.

Though a matter of appellate rather than subject matter jurisdiction, see Great Games, Inc. v. South Carolina Department of Revenue, 339 S.C. 79, 83, 529 S.E. 2nd 6, 8 (2000), the issue is nonetheless jurisdictional and may be raised at any stage of the proceedings. Both the Supreme Court and the Court of Appeals have raised the lack of appellate jurisdiction on the Court’s own motion. South Carolina Department of Transportation v. McDonald’s Corporation, 375 S.C. 90, 650 S.E. 2nd 473 (2007); Leviner v. Sonoco Products Company, 339 S.C. 492, 530 S.E. 2nd 127 (2000); Ashenfelder v. City of Georgetown, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010). In Ashenfelder, this Court stated: “Even if not raised by the parties, this Court may address the issue of appealability, *ex mero motu*.” Id. at 389 S.C. 568, 571, 698 S.E. 2nd 856, 858.

II. The Court may also have overlooked or misapprehended that Hartzell’s testimony concerning notice of injury was substantial evidence, sufficient to affirm the Worker’s Compensation Commission.

Palmetto Collision was a small shop, at the relevant time employing only four (4) employees plus the owner, Mike Stallings. Stallings and the shop employees were a close group akin to friends and family (R. p. 112, lines 15-22). Stallings daily brought breakfast

and lunch “for the guys” (R. p.113, lines 10-12). Hartzell testified that he told Stallings that he had hurt himself the day after he became sore from moving the frame machine and that Stallings’ reply was that if he was having problems he should go to the emergency room (R. p. 44, line14- p. 45, line 4). Stallings’ response is proof that the notice given was enough to indicate “...to a reasonably conscientious manager that a case might involve a potential compensation claim.” Etheredge v. Monsanto Co., 349 S.C. 451, 457, 562 S.E. 2nd 679, 682 (Ct. App. 2002).

Etheredge requires only that the notice to convey the “potential” of a compensable injury. Particularly in light of the relaxed atmosphere described by Stallings, the record as a whole would allow reasonable minds to reach the conclusion the Commission reached.

Mr. Hartzell testified that in addition to the discussion with Stallings the day after the injury there were subsequent discussions between the date of the injury and the end of his employment. (R. p. 65, lines 16-22).

The Respondent further contends that the Court misapprehended the importance of Mr. Hartzell’s cross examination testimony found on page 64 of the Record, lines 17- page 65, line 15. The entire premise of the discussion was framed by counsel in the initial question beginning on line 17:

“Q: And you said you had some discussions, you said you mentioned that your back was sore from working one day; is that what you told him?

A: Yes, that was the next day after I had realized that I had somehow injured my back.”

After that question and answer, counsel went on to demonstrate Mr. Stallings availability to discuss such issues and his knowledge that Hartzell had arthritis in his shoulders which was not work related, thereby distinguishing it from the work related back injury.

A judgment upon which reasonable persons might differ, or from which two (2) inconsistent conclusions could be drawn from the same evidence, does not prevent the agency's finding from being supported by substantial evidence. Hanks v. Blair Mills, Inc., 286 S.C. 378, 383, 335 S.E. 2nd ,91, 94 (Ct. App. 1985).

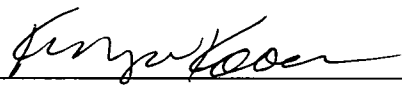
Respondent respectfully submits that the evidence of Mr. Hartzell's next day report to Mr. Stallings, the close knit nature of the shop, the subsequent discussions testified to by Mr. Hartzell, the knowledge of Hartzell's unrelated shoulder problems and the line of testimony based upon the entire premise that Mr. Hartzell's report to Mr. Stallings was concerning a work injury, provides substantial evidence of notice of an injury to a "to a reasonably conscientious manager" that the case might involve a potential compensation claim." Etheredge Supra at 349 S.C. 457, 562 S.E. 2nd at 682.

Conclusion

This Court should grant this Petition for Rehearing, and pursuant to the above cited authority, withdraw its opinion, dismiss the appeal without prejudice, and remit the case for further proceedings before the Workers' Compensation Commission.

Respectfully Submitted,

October 21, 2013



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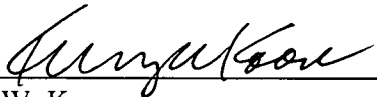
and

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PROOF OF SERVICE

I certify that I have served Respondent Richard A. Hartzell's Petition for Prehearing on appellants by depositing a copy of same in the United States mail, postage prepaid, on October 21, 2013, addressed to their attorney of record, Kirsten Barr, Esq and to attorney for the S.C. Uninsured Employers Fund, Lisa Glover, Esq.

October 21, 2013



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