

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from the
South Carolina Workers' Compensation Commission
Appellate Panel

W.C.C. No. 1000075

Martha Anne McDonald, Employee,

Respondent,

v.

Boys, Arnold & Company, Inc., Employer, and
Hartford Insurance Co. of the Midwest, Carrier,

Appellants,

PETITION FOR WRIT OF CERTIORARI

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SC Court of Appeals

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CERTIFICATION OF COUNSEL

Counsel for Petitioner certifies that a Motion for Reconsideration to the South Carolina Court of Appeals was made on December 7, 2012, and finally ruled upon on October 9, 2013.

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the Court of Appeals erred by dismissing the appeal as interlocutory where the matter on appeal was separate and distinct from the issue involved in the underlying workers' compensation case?
- II. Whether the Court of Appeals erred in dismissing the appeal where Appellants were fundamental due process rights were adjudicated without adequate opportunity to be heard on the matter?

This Petition for Writ of Certiorari (“Petition”) seeks a review of the Court of Appeals’ decision dismissing an appeal of a decision of the South Carolina Workers’ Compensation Commission (“Commission”) as interlocutory. As discussed more fully below, resolution of this matter requires the interpretation of this Court’s recent decision in Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013). Appellants have sought review of the Commission’s decision regarding Appellants’ subrogation rights to proceeds from the Respondent’s settlement of a third-party suit. In addition to involving the interpretation and scope of Bone, the matter on appeal directly involves Appellants’ constitutional rights to due process with respect to the summary adjudication of their statutory rights to subrogation without any meaningful opportunity to be heard or any meaningful review. This appeal does not involve any matters or issues directly involved in the underlying workers’ compensation case. For these reasons, Petitioners request that this Court grant this Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

On January 13, 2010, Respondent sustained a work-related injury and filed a claim with the Commission. (App. p. 5). Appellant Hartford Insurance Company was the workers’ compensation carrier for Respondent’s employer and paid workers’ compensation benefits to Respondent in accordance with the South Carolina Workers’ Compensation Act, S.C. Code Ann. §§ 42-1-10 *et seq.* (the “Act”).

Because Respondent’s injury was caused by a third-party, Respondent filed a separate civil suit in Circuit Court seeking recovery from the at-fault party. Respondent subsequently reached a settlement with the third-party defendants. By virtue of the workers’ comp benefits already paid, Appellants had a statutory lien on the settlement proceeds. Appellants and Respondent entered into negotiations with respect to that lien

and Appellants agreed to accept Fifty-Four Thousand Seven Hundred Ninety-Two and 00/100 Dollars (\$54,792.00) to resolve their then-existing subrogation lien. A consent order was entered into to memorialize the agreement. (“Consent Order”) (App. p. 5). The Consent Order stated that Appellants accepted the negotiated sum “as full and final settlement of their third party subrogation lien.” Id. At the time of the Consent Order, Respondent’s workers’ comp case was still open and Respondent continued to receive medical treatment and indemnity benefits paid by Appellants.¹

Appellants subsequently notified Respondent of their intent to assert their future credit rights under Breeden v. TCW Tennessee Express, 355 S.C. 112, 584 S.E.2d 379 (2003) against the remaining third-party settlement proceeds. (App. p. 7). In response, Respondent replied that it was her position that the settlement of the subrogation lien waived Appellants’ future credit rights. (App. p. 8).

Appellants subsequently filed a motion to compel seeking a set aside of a portion of the settlement proceeds pursuant to Breeden (“Motion”) before the Commission. (App. p. 1). In the Motion, Appellants sought an order requiring Respondent to set aside a portion of the proceeds from the third-party settlement to protect Appellants’ interests under Breeden for future credit rights stemming from additional benefits paid by Appellants in the workers’ compensation claim after the third-party settlement and settlement of the subrogation lien. Appellants also provided an affidavit from the adjuster regarding his intent and understanding that the terms of the settlement would not preclude Appellants from asserting future credit rights for benefits paid after the date of the lien settlement. (App. p. 9).

¹ As of the date of filing of this Petition, Respondent’s workers’ comp case remains open and she continues to receive medical and indemnity benefits.

On November 30, 2011, a Notice of Hearing was issued, setting the Motion for a December 28, 2011, hearing before Commissioner Derrick L. Williams. (App. p. 14). On December 2, 2011, Respondent filed a Reply to the Motion, arguing that the Consent Order precluded Appellants from asserting any further rights against the third-party proceeds and asserting that the issue was *res judicata*. (App. p. 11). The issue presented to the Single Commissioner was, in essence, a question of contract construction with respect to the scope and effect of the Consent Order.

On December 6, 2011, without a hearing, Commissioner Williams issued a summary order (“Administrative Order”) denying Appellants’ motion and holding that the parties had “already negotiated and consummated their settlement of the lien.” (App. p. 15). Appellant’s thereafter filed for a review of the Administrative Order by the Commission’s Appellant Panel. The Full Commission subsequently held a Judicial Conference and, on January 17, 2012, without a hearing or submission of briefs, issued an order dismissing the appeal as interlocutory. (App. p. 16).

On February 16, 2012, Appellants’ timely filed a Notice of Appeal to the Court of Appeals. (App. p. 17). On August 20, 2012², Respondent filed a Motion to Dismiss the appeal on the grounds that the Full Commission’s order was interlocutory. (App. p. 34). On August 31, 2012, Appellants filed a Reply arguing that (1) the issue of Appellants’ subrogation rights is not part of Respondent’s workers’ comp case, (2) the decision of the Single Commissioner was a final judgment as to Appellants’ rights to the third-party

² Consideration of Appellants’ appeal was subject to several extensions and was twice held in abeyance during the pendency of this Court’s initial consideration of the Bone case, and again during the pendency of the motion for reconsideration that was granted in that case. As a result, the timing between certain filings is atypical. There is no dispute that the filings in this case were all timely made.

settlement proceeds, and (3) that Appellants' due process rights were violated by an adjudication without any meaningful opportunity to be heard. (App. p. 48).

On December 3, 2012, the Court of Appeals issued an order granting Respondent's Motion to Dismiss. (App. p. 56). Appellant's filed a Motion to Reconsider on December 7, 2012. (App. p. 58). An order denying the Motion to Reconsider was finally issued on October 9, 2013. (App. p. 69).

ARGUMENT

I. The Court of Appeals erred by dismissing the appeal as interlocutory where the matter on appeal was separate and distinct from the issue involved in the underlying workers' compensation case and the order of the Single Commissioner made a final determination as to Appellants' ability to protect their future credit rights in subrogation.

In its December 3, 2012 order, the Court of Appeals erroneously found that the Full Commission's order was interlocutory not immediately appealable since it was not a "final judgment" as recently articulated by this Court in Bone. As this Court affirmed in that case, a "final judgment" is one where the order "disposes of the whole subject matter of the action or terminates the action, leaving nothing to be done but to enforce what has already been determined." Bone, 404 S.C. at 75, 744 S.E.2d at 557 (quoting Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env'tl. Control, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010)). As discussed below, the decision of the Single Commissioner and the Full Commission did "dispose of the whole subject matter" before them and, therefore, those orders are not interlocutory and are immediately appealable.

1. Carrier's subrogation rights under S.C. Code Ann. § 42-1-560 are not part of a Workers' Compensation Case.

S.C. Code Ann. § 42-1-560 provides a mechanism for claimants and carriers to recover against third-parties for damages and benefits that were paid as part of a workers'

compensation claim. This statute authorizes a claimant or carrier, by a separate proceeding in an appropriate court, to recover damages from an at-fault party for injuries that are nevertheless compensable under the Act. This statute also gives the carrier that was responsible for paying the workers' compensation benefits subrogation rights in any proceeds recovered from the at-fault third-party, whether by trial or settlement. The statute specifies the various requirements and rights with respect to the allocation of such recovered proceeds, including obtaining approval by the Commission of any settlement between the claimant and the carrier as to the distribution of such proceeds. S.C. Code Ann. § 42-1-560(e). While certainly related to and derivative of a workers' compensation claim, this subrogation procedure exists outside the scope of the pending workers' compensation case. See S.C. Code Ann. § 42-1-560(b) (providing that third party suit by claimant must be filed within one year *after* the carrier accepts liability or makes payment on an award under the Act); S.C. Code Ann. § 42-1-560(e) (providing that trial judge may approve agreement on distribution of funds if made during trial). In other words, proceedings involving third party recovery and subrogation matters are not a component of a contested workers' compensation claim. The issues of compensability, disability, impairment, treatment, etc. are not in any way relevant or impacted by any aspect of the subrogation issues. Conversely, the issues of recovery, allocation, attorneys fees, or future credit rights are separate and apart from the workers' compensation case.

Moreover, this subrogation statute distinguishes a carrier's subrogation lien (for payments made prior to any settlement) from a carrier's future credit rights (for payments made subsequent to any settlement). This distinction was unequivocally expressed by this Court in Breeden v. TCW Tennessee Express, 355 S.C. 112, 584 S.E.2d 379 (2003). In that case, this Court expressly held that a carrier's *lien* at the time of a settlement, does

not include *future* medical expenses. *Id.* at 119, 584 S.E.2d at 383 (“We find the Commission properly held that *the Carrier’s lien includes only those medical expenses paid or accrued but not yet paid at the time of the third party settlement, and does not include future medical expenses.*”) (emphasis added). The Court further explained:

[A carrier’s] lien is a separate pot of money that is not included in the same pool of money creating the fund under subsection (g)... Because *the statute clearly separates the carrier’s lien from the fund for future reimbursement*, and because there is no provision for the fund under subsection (g) to be reduced under subsection (f), we reverse the Court of Appeals to the extent that it held subsection (g) was subject to the reduction provisions under subsection (f).

Id. at 121, 584 S.E.2d at 384 (emphasis added).³ Thus, as expressed in *Breedon*, the South Carolina Workers’ Compensation Act clearly recognizes a difference between a carrier’s “lien” at the time of a settlement and a carrier’s “credit” for future payments.

It was under this statutory scheme that Appellants negotiated a settlement of their then-existing lien with Respondent and entered into the Consent Order to be approved by the Commission. The matter was brought to the Commission, not because it was part of Respondent’s pending comp claim, but because approval by the Commission is required by S.C. Code Ann. § 42-1-560(e). *See also* S.C. Code Ann. § 42-3-180 (granting the Commission exclusive jurisdiction over “all questions arising under” the Act); *Laboureur v. Harleysville Mut. Ins. Co.*, 298 S.C. 213, 379 S.E.2d 291 (Ct. App. 1989) (holding Commission had jurisdiction to determine questions of fact and law related to existence of insurance coverage and liability of the carrier). For these reasons, the issues of Appellants’ subrogation lien and future credit rights are necessarily separate and apart from an underlying comp claim.

³ Under Subsection (g), after satisfaction of a carrier’s lien, and payment of expenses (generally attorneys fees) in obtaining the recovery, the balance of the proceeds is to be placed in a fund to pay to Carrier for “future compensation as it becomes due.”

2. The Order on Appeal is a “final judgment” as to Appellants’ Subrogation Rights under S.C. Code Ann. § 42-1-560.

In this case, the determination by the Single Commissioner was, by its terms, a final adjudication as to any rights retained by the Carrier to subrogation for future medical and indemnity payments. As noted in the Motion, the Consent Order was expressly limited to settlement of the Carrier’s then-existing “subrogation lien.” (App. p. 5). No mention or reference is made with respect to the Carrier’s future credit rights. The Motion filed by Appellants was for the express purpose of creating the fund provided for in S.C. Code Ann. § 42-1-560(g) for the payment to Appellants for future compensation as it becomes due. (App. p. 1). By determining that no future credit rights existed, the Single Commissioner effectively ordered the distribution to Claimant of the entirety of the balance of the settlement proceeds. Since the entry of that order, Claimant has had unfettered access to and use (and perhaps deplete) those funds. All the while Respondent continues to receive additional medical and indemnity benefits from Carrier without consideration of Carrier’s statutory rights to recover for those payments against the third-party settlement.

In this Court’s recent decision in Bone, the Court held that an order of the Commission is interlocutory and unappealable if it “does not decide the merits of a contested case.” Bone, 404 S.C. at 73, 744 S.E.2d at 556 (*citing* S.C. Code Ann. § 1-23-380(A)). In determining whether an administrative order is appealable, this Court specifically adopted the definition of “final judgment” as one where the order “disposes of the whole subject matter of the action or terminates the action, leaving nothing to be done but to enforce what has already been determined.” Id. at 75, 744 S.E.2d at 557 (*quoting* Charlotte-Mecklenburg Hosp. Auth., 387 S.C. at 267, 692 S.E.2d at 895). In

dismissing this appeal as interlocutory, the Court of Appeals failed to recognize the import of the first of the above two clauses. A final judgment can be either, (1) a judgment that disposes of the whole subject matter of the action; or (2) one that terminates the action. The sole issue or “subject matter” before the Single Commissioner was Appellant’s continued subrogation rights with respect to the proceeds of a third-party settlement. In issuing an administrative order denying Appellants’ Motion, the Single Commissioner made a full and final judgment as to the existence of Appellant’s future credit rights, leaving nothing left to be done but for Respondent to exhaust the corpus of the settlement proceeds as she sees fit. Similarly, the ruling by the Full Commission that the Administrative Order was interlocutory and unappealable is also a final judgment as it precludes any further review of the Administrative Order and similarly left nothing to be done but for Respondent to spend the money. No issue of fact or law arising out of Claimant’s pending workers’ comp claim would have any impact or effect on this determination.

This case is clearly distinguishable from Bone in which the order on appeal was one remanding the case to the Commission for further proceedings related to the Commission’s determination that the injury was not compensable. The order in that case, clearly did not resolve the subject matter or terminate the proceeding. By its terms, the order required additional findings by the Commission on an issue fundamental to the underlying workers’ comp case; namely compensability. Bone, 404 S.C. at 72, 744 S.E.2d at 555. Moreover, allowing an appeal in this case, does not in any way impact the purpose of the workers’ compensation scheme as was argued in Bone. According to this Court:

[A] “case-by-case” determination, as urged by Petitioners, would frustrate the main goals of both the workers’ compensation scheme, which is to streamline the process for providing benefits to injured worker in exchange for the employee’s release of the employer from tort liability, and that of the APA, which is to provide clear and uniform procedures in agency cases.

Id. at 84, 744 S.E.2d at 561. In this case, the employee is and has been receiving benefits under the Act since the day of her injury. Nothing at issue in this appeal will have any impact or effect on her continued receipt of those benefits. The sole issue here is the ancillary and separate issue of the carrier’s subrogation rights under S.C. Code Ann. § 42-1-560.

In her pleadings in this matter, Claimant has suggested that Appellants would be free to relitigate this issue after a final judgment on Claimant’s worker’s compensation claim is entered. This is an illusory argument as there is no way of knowing when her claim will be concluded and no assurance that any of the settlement proceeds will be available if Appellants are ultimately successful. In this case, the Administrative Order does dispose of the whole subject matter (Appellants future credit rights) and there is nothing left to be done but to enforce what has already been determined (that Appellants have no future claim to the settlement proceeds).

For these reasons, certiorari should be granted in this case to allow this Court to fully review the issues involved in this matter and, to the extent deemed appropriate, to elaborate and clarify the Court’s Bone decision with respect to appeals of orders wholly separate and apart from a contested administrative proceeding.

II. The Court of Appeals erred in dismissing the appeal where Appellants fundamental due process rights were adjudicated without adequate opportunity to be heard on the matter.

By dismissing Appellant's appeal of the Full Commission's order, the Court of Appeal deprived Appellants of any meaningful opportunity to be heard regarding the scope of the prior release and has deprived them of any opportunity to assert their statutory rights to the settlement proceeds. Dismissal of the appeal has resulted in no adequate remedy for Appellants in the face of Claimant having no duty to consider Appellants' future credit rights to the proceeds.

As this Court has stated, "[t]he fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." S.C. Ambulatory Surgery Ctr. Ass'n v. The S.C. Workers' Comp. Comm'n, 389 S.C. 380, 391, 699 S.E.2d 146, 152 (2010). In this case, the Single Commissioner failed to enforce Appellants' right to due process by deciding a contested issue of contract construction and intent of the parties without a hearing and without argument or examination of witnesses. In fact, it is clear from the face of the Administrative Order that Appellants' rights to due process were infringed. S.C. Code Ann. § 1-23-350 specifically requires that orders of the Commission, as an administrative agency with the power to interpret contested cases under its jurisdiction, contain findings of fact that are "sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence in the record and whether the law has been properly applied." Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of S.C., 338 S.C. 92, 525 S.E.2d 863, 865 (1999). The Administrative Order, however, contained only a one-line statement of the Single Commissioner's decision on the case without providing any findings of fact, conclusions of law, or analysis revealing the reasoning behind the Single Commissioner's decision.

An order such as this prejudices Appellants in their ability to appeal the order as there is not adequate detail for the reviewing body to assess the nature of the issues nor the reasoning on which the decision is based. The inadequacy of the Single Commissioner's order became clear when the Full Commission dismissed the appeal in Judicial Conference as interlocutory even though the Administrative Order, on its face, makes a final determination of Appellants' rights on the subject matter before the Single Commissioner. Similarly, the Full Commission's order was issued summarily without even an opportunity to brief the issues or argue the merits of the case.

These errors are compounded by the Court of Appeals' decision to dismiss the appeal as interlocutory. Appellants are entitled to due process, which requires the parties be given an opportunity to be heard. The Court of Appeals, and by extension the Commission, have failed to provide Appellants with any meaningful opportunity to be heard or judicial review of the underlying adjudication of Appellant's substantive statutory rights as established by S.C. Code §42-1-560 and Breeden. If the Full Commission will not hear an appeal of the Administrative Order and the Court of Appeals will not hear an appeal of that decision, the Appellants are effectively denied any forum for adjudication of these issues. This denial of any meaningful opportunity to be heard and any judicial review whatsoever is a denial of Appellant's constitutional due process rights.

For these reasons, Appellants request that this Court grant certiorari to hear this case and determine the issue in controversy.

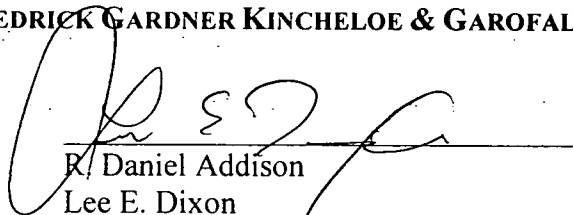
CONCLUSION

As set forth above, the order of the Single Commissioner makes a final determination as to Appellants' ability to protect their rights in subrogation against

Respondent's third-party recovery. Therefore, the Full Commission erred in dismissing an appeal of that order as interlocutory. The Court of Appeals compounded that error by dismissing as interlocutory the appeal of the Full Commission's order. As a result of these orders, Appellants have been denied any forum in which to have a meaningful opportunity to be heard with regard to their rights under the Act. As such, Appellants have been denied due process as guaranteed under the United States and South Carolina Constitutions. This case represents one involving the substantive rights of a carrier to recovery of future compensation and a novel issue of law regarding the scope of this Court's Bone decision. As such, certiorari is warranted and respectfully requested.

Respectfully submitted this, the 8th day of November, 2013.

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I certify that I have served the Petition for Writ of Certiorari on Respondent,
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