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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2026-000284

Emitt R. Gunnells,.....Petitioner,

v.

Galey & Lord Industries, Employer, and
Arrowpoint Capital Corporation, Carrier,.....Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in declining to transfer the appeal to the circuit court?

II. Did the Court of Appeals err in its determination that appellate jurisdiction is not waivable?

III. Did the Appellate Panel of the South Carolina Workers' Compensation Commission err in permitting Respondents to stop payment of compensation to recoup a credit for unentitled benefits paid to Petitioner in accordance with S.C. Code Ann. § 42-9-210 and legal principles of estoppel?

COUNTER-STATEMENT OF THE CASE

Emitt Gunnells ("Petitioner") was employed with Galey & Lord Industries ("Employer") when he suffered a compensable injury causing physical brain damage on January 14, 2001, in Florence County, South Carolina. By Order dated January 7, 2003, the Workers' Compensation Commission ("Commission") awarded Petitioner lifetime indemnity benefits pursuant to section 42-9-10(C) of the South Carolina Code. Those benefits were to be paid by Arrowpoint Capital Corporation[1] ("Carrier"), pursuant to section 42-1-40, at his compensation rate of $510.65 per week.

After the award was issued, counsel for Petitioner filed Commission Form 61. This fee petition form is filed in order to seek approval of a partial lump sum attorney's fee, which was first recognized by this Court in *Glover by Cauthen v. Suitt Const. Co.*, 318 S.C. 465, 458 S.E.2d 535 (1995). The permissibility of this type of contingency fee, which provides that the attorney's fee is to be deducted from the end of a lifetime award, was also added to the Act by promulgation of Regulation 67-1207B(2). The Commission approved the Form 61 fee petition,

allowing for attorney's fees to be paid in the amount of $202,231.41 (1/3 of the commuted value of the lifetime award of $763,687.29). In addition, there were several weeks in which Petitioner received temporary total disability benefits from Carrier while also receiving a salary from Employer. The Commission granted Respondents credit for these weeks, also to be deducted from the end of the lifetime award.

After several years of payments being made in accordance with the Commission order, an accounting error with Carrier led to Petitioner receiving weekly benefits at an increased rate of $537.77. This overpayment occurred for several years before being recognized and corrected, at which time Carrier had overpaid Petitioner by $22,619.16.

Respondents filed a motion to address the overpayment pursuant to section 42-9-210 of the South Carolina Code. At a hearing, Petitioner's counsel contended that there was no legal process to recoup the overpayment and that Petitioner's weekly benefits could not be reduced. After hearing the parties, the Single Commissioner issued an Order dated August 16, 2021, ruling that Respondents were permitted to stop weekly benefits to Petitioner until the overpayment amount was satisfied and that the stoppage of the benefits would be deducted from the back end of the award in the same manner as was done with the prior award of the partial lump-sum attorney's fee.

Petitioner appealed the Single Commissioner's Order, and that Order was affirmed by an Appellate Panel of the Workers' Compensation Commission on May 9, 2022. Two days later on May 11, 2022, Appellant filed a Notice of Appeal with the South Carolina Court of Appeals. No notice of appeal, or any filing whatsoever, was filed with the Florence County Clerk of Court.

[1] Arrowpoint Capital Corporation is now insolvent. The South Carolina Insurance Guaranty Association has assumed the role of the carrier pursuant to S.C. Code Ann. § 38-31-60(b) (2015).

The parties proceeded with briefing before the Court of Appeals in accordance with the South Carolina Appellate Court Rules, and oral argument was scheduled before the Court of Appeals in June 2025. In the weeks prior to that oral argument, Respondents determined that the appeal was not proper before the Court of Appeals and filed a motion to dismiss the appeal. Petitioner filed a return to the motion, and Respondents filed a reply. The parties were heard on the motion at oral argument in June 2025. On December 10, 2025, the Court of Appeals issued an Order granting the motion of Respondents and dismissing the appeal. Petitioner filed a timely petition for rehearing, and the petition for rehearing was denied by the Court on January 15, 2026. Petitioner filed the present Petition for a Writ of Certiorari on February 10, 2026, and this Return follows.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act (APA) establishes the standard of review of decisions of the Workers' Compensation Commission." *Bass v. Isochem*, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005); *see also* S.C. Code Ann. § 1-23-380 (Supp. 2021). "An appellate court's review is limited to the determination of whether the Commission's decision is supported by substantial evidence or is controlled by an error of law." *Clemmons v. Lowe's Home Ctrs., Inc.-Harbison*, 420 S.C. 282, 287, 803 S.E.2d 268, 270 (2017). This Court "may reverse or modify the [Commission's] decision if substantial rights of the [petitioner] have been prejudiced because the [Commission's] findings, inferences, conclusions, or decisions are . . . affected by other error of law [or] clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *Frampton v. S.C. Dept. of Nat. Res.*, 432 S.C. 247, 256, 851 S.E.2d 714, 719 (Ct. App. 2020) (quoting 1-23-380(5)(d), (e)).

ARGUMENTS

I. Did the Court of Appeals err in declining to transfer the appeal to the circuit court?

To better understand the present issue, Respondents believe it may be helpful to provide the Court with a brief summary of historical changes of the Workers' Compensation Act. For most of the Act's existence, appeals traveled from the Single Commissioner to Appellate Panel of the Full Commission to the Circuit Court. This changed with amendments passed in 2007. *See* Act No. 111, § 30, 2007 S.C. Acts 599, 630-31. Effective on July 1, 2007, injuries occurring on that date or later would have an appellate journey of Single Commissioner to Appellate Panel of the Full Commission to the Court of Appeals. *Id*.

The present case involves an injury occurring in January 2001—six and a half years before the amendment took effect. Accordingly, Respondents filed a motion to dismiss the appeal before the Court of Appeals because South Carolina jurisprudence requires this appeal to have been filed in the Circuit Court after the Appellate Panel of the Full Commission. *See Pee Dee Reg'l Transp. v. S.C. Second Inj. Fund*, 375 S.C. 60, 62, 650 S.E.2d 464, 465 (2007) ("The language of Act 111 is not ambiguous and clearly states that it applies only to injuries that occur on or after July 1, 2007. Therefore, the change regarding the appeal procedure, like all other provisions of the Act, is only applicable to Workers' Compensation cases in which the injury occurred on or after July 1, 2007.").

In response, Petitioner primarily alleged that the arguments within Respondents' motion were either incorrect or waived. However, in a footnote, Petitioner claims that Rule 204(a) of the South Carolina Appellate Court Rules establishes that the appropriate remedy for this circumstance is to transfer the case to the circuit court. Respondents disagree.

The Rule provides as follows: "In the event that the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed shall issue an order transferring the case to the appropriate appellate court." Rule 204(a), SCACR. In order to fully apprehend the rule, the remainder of the Appellate Court Rules must be consulted. Those rules provide that the Appellate Court Rules effectively replaced the Supreme Court Rules as of September 1, 1990. Rule 102, SCACR. The Rules are divided into six parts, and Rule 204 is found within "Part II," which "governs practice and procedure in appeals, petitions, and motions in the Supreme Court and the Court of Appeals." Rule 101(a), SCACR (emphasis added). Notably, the Rule does not refer to the Circuit Court to be among the appellate courts as it easily could have done. Our appellate courts have long recognized the legal maxim "*expressio unius est exclusion alterius,*" which means "to express or include one thing implies the exclusion of another, or of the alternative." *See South Carolina Workers' Compensation Commission v. WestPoint Home LLC*, Op. No. 6121 (S.C. Ct. App. filed September 17, 2025) (Howard Adv. Sh. No. 35 at 52); s*ee also Marlow v. E.L. Jones & Son, Inc.*, 248 S.C. 568, 571, 151 S.E.2d 747, 748 (1966). Moreover, Part II of the Appellate Court Rules expressly defines the circuit court to be a "lower court" and not as an "appellate court." *See* Rule 202(b)(1), SCACR. Thus, the only reasonable interpretation of Rule 204(a), SCACR, is that it refers to appeals that are filed in the Supreme Court when they should be filed in the Court of Appeals, and vice versa.

II. Did the Court of Appeals err in its determination that appellate jurisdiction is not waivable?

In response to Respondents' motion to dismiss Petitioner's appeal, he primarily argues that the procedural arguments were waived because they were not raised in our initial briefing

before the Court of Appeals. Respondents contend that the jurisdiction of the appellate court cannot be waived.

Notably, this precise issue was addressed by this Court in the aforementioned *Pee Dee Regional Transportation* case. In that case, the parties—very soon after the enactment of the 2007 amendments—questioned the applicability of the amendments to cases pending before the Commission and appellate courts at that time. In that appeal, the appellants filed a notice of appeal with both the circuit court and the court of appeals, which preserved the appeal while awaiting the Court's response to a "Motion to Determine Jurisdiction." The Order of the Supreme Court, published in both the state and regional reporters for guidance to the bench and bar, sets forth clearly that injuries occurring prior to 2007 are to proceed with an appeal to the circuit court.

This is not the only case addressing appellate jurisdiction. In *Allison v. W.L. Gore & Associates*, this Court determined that a workers' compensation party's failure to timely file a Form 30 deprived any reviewing court of jurisdiction over the case. 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). The opinion states "We now clarify that the question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction . . . , and overrule prior decisions to the extent that they pose the question of an executive agency's authority to hear an appeal as one of subject matter jurisdiction." *Id.* There, the Court recognized that "appellate jurisdiction" and "subject matter jurisdiction" are not mutually exclusive, and further recognized that when the Court lacks appellate jurisdiction, it cannot proceed to address the merits of the underlying appeal.

The Court of Appeals has also discussed this very concept more recently in *Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 762 S.E.2d 44 (Ct. App. 2014). In that case, a party sought to

appeal an order denying a motion to dismiss. Such an order is not appealable, and the opinion from Judge Konduros states that "[t]he right to appeal is a jurisdictional matter and, even if the parties do not raise the issue of appealability, we must dismiss the appeal on our own motion if we conclude we do not have jurisdiction." 409 S.C. at 379, 762 S.E.2d at 47. Further, "South Carolina, as well as other states, has made clear appellate jurisdiction can be raised by appellate courts even if none of the parties have raised it." *Id*. at 390, 762 S.E.2d at 47.

It is clear that this case's viability involves compliance with a statute (*i.e.* S.C. Code Ann. § 42-17-60), rendering it appellate jurisdiction under *Allison* and non-waivable under *Levi*. Therefore, the Court of Appeals correctly determined that the issue of jurisdiction was properly before it and that the Court of Appeals lacked jurisdiction to address the appeal.

III. Did the Appellate Panel of the South Carolina Workers' Compensation Commission err in permitting Respondents to stop payment of compensation to recoup a credit for unentitled benefits paid to Petitioner in accordance with S.C. Code Ann. § 42-9-210 and legal principles of estoppel?

A. The Court Need Not Reach This Argument

Petitioner's final argument pertains to the underlying merits of the appeal. Preliminarily, Respondents note there has been no appellate review of this issue to-date. Furthermore, we contend it would be improper for an appellate court to reach this issue because a notice of appeal was never filed with the appropriate circuit court, thus ending the appellate life of the case. *See Pringle v. Builders Transport*, 298 S.C. 494, 495, 381 S.E.2d 731, 732 (1989) ("The circuit court lacks jurisdiction of the appeal if the notice [of appeal] is insufficient.").

B. The Commission's Decision Complies with S.C. Code Ann. § 42-9-210

Should the court reach the issue, the rulings of the Commission are legally sound and should not be reversed. Petitioner contends that the law of the case doctrine requires him to continue receiving weekly benefits for the remainder of his life, full stop. This position is inconsistent with the happenings of this case in several respects. First, the law of the case only entitles Petitioner to a weekly indemnity amount at his statutory compensation rate of $510.65. He is not entitled to any overpayment of that amount. Once the overpayment was made and discovered, there is a provision in the Act, section 42-9-210, which expressly provides Respondents with a remedy to collect that overpayment. In pertinent part, it provides:

> Any payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this title were not due and payable when made may, subject to the approval of the commission, be deducted from the amount to be paid as compensation; provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.

S.C. Code Ann. § 42-9-210 (2015) (emphasis added).

Without question, the overpaid benefits were paid to Petitioner when they were not due and not payable, and are thereby recoverable under section 42-9-210. Further, the express terms of the statute do not permit the weekly benefits to be reduced to recoup the payment, and the benefits can only be recovered by limiting the number of weeks the benefits are paid. This is precisely what was done by the Commissioner and the Appellate Panel. That ruling should not be disturbed.

C. Judicial and Equitable Estoppel Also Bar Petitioner's Claims

Aside from the completely permissible decision of the Commission to permit Respondents to recover the excess benefits, it is completely inconsistent for Petitioner to now object to this process when his own attorney availed himself of the benefit of a similar provision

when he obtained his attorney's fee in the amount of $202,231.41, as provided in his contingency fee documented in the Commission Form 61.

The *Glover* case, referenced above, expressly recognizes the possibility of calculating a lump sum attorney's fees in lifetime benefits cases by calculating an estimated life expectancy based on the statutory mortality tables found in section 19-1-150. Applying that calculation to this case, Petitioner was 46 years old at the time of his lifetime award. Section 19-1-150 provided that his estimated remaining life expectancy would be 28.76 years (1,495.52 weeks). The net present value of 1,492.52 weeks multiplied by the applicable compensation rate of $510.65 provided the attorney's fee of $202,231.41. Pursuant to *Glover*, and Commission regulation, this amount would be deducted from the back end of Petitioner's life expectancy. As a result, weekly benefits would have to stop at that time as those benefits had already been pre-paid to Petitioner's counsel back in 2003.

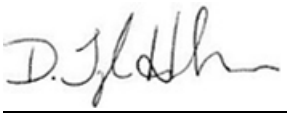
Moreover, Petitioner acquiesced to a prior deduction from the back end of the lifetime award to account for a period of time in which he received both his salary while employed and also his weekly temporary compensation. In the Decision and Order from 2003, these benefits were ordered to be deducted from the back end of the award. No exception or appeal was taken by Petitioner at that time.

CONCLUSION

Respondents contend that the Petition for a Writ of Certiorari should be denied on all four questions raised by Petitioner.

Respectfully submitted,

MCANGUS GOUDELOCK & COURIE LLC

By: 

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