THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

Appellate Panel

Appellate Case No. 2012-211870
Opinion No. 5176 (S.C. Ct. App. filed October 9, 2013)

Richard A. Hartzell, Employee.....Petitioner

v.

Palmetto Collision, LLC, Employer,.....Respondent

and

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

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Kerry W. Koon
147 Wappoo Creek Drive, Ste. 203
Charleston, SC 29412
(843) 795-7000
Attorney for Petitioner

Other Counsel of Record:

Kirsten Barr, Esq.
Trask & Howell, LLC
P.O. Box 2167
Mt. Pleasant, SC 29465-2167
Attorney for Respondent

Lisa Glover, Esq.
State Accident Fund
PO Box 210039
Columbia, SC 29221-0039
Attorney for Respondent

INDEX

CERTIFICATION OF COUNSEL

The undersigned counsel for Petitioner hereby certifies that a Petition for Rehearing was made and ruled upon by the Court of Appeals on November 14, 2013.

QUESTIONS PRESENTED FOR REVIEW

I. ***Was the Decision and Order of the South Carolina Worker's Compensation Appellate Panel dated March 26, 2012, an appealable final order under South Carolina Code Ann. Section 1-23-380 (A) as interpreted in Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E. 2nd 552 (2013)?***

II. ***Does the record contain substantial evidence that the Petitioner reported a work related accidental injury to the owner of the Employer within ninety (90) days.***

STATEMENT OF THE CASE

Petitioner, Richard A. Hartzell, filed a From 50 Complaint on May 10, 2010, commencing the within action before the South Carolina Worker's Compensation Commission.

He alleged an injury by accident to his lower back occurring on or about February 25, 2009, while working in an automobile body shop operated by Palmetto Collision, LLC. He alleged the injury occurred while cleaning up the shop and moving a heavy automotive frame machine. He alleged that he reported the accident the following day to the owner of the company, Mike Stallings, who declined to provide any medical care. He subsequently sought care from a chiropractor at his own expense but discontinued treatment for financial reasons.

The Employer timely filed a Form 51 Answer dated June 8, 2010. The case was determined an uninsured case and an appearance was made by the South Carolina Worker's Compensation Uninsured Employer's Fund (now the State Accident Fund).

The matter was heard before Commissioner Andrea C. Roche on July 12, 2011. On September 8, 2011 Commissioner Roche ruled in favor of the Petitioner, ordering a medical evaluation to determine if Petitioner is in need of further treatment, and any other benefits necessarily resulting therefrom. The South Carolina Worker's Compensation Commission Appellate Panel, in a 2-1 decision, affirmed Commissioner Roche by its Decision and Order dated March 26, 2013. The Employer filed a timely appeal to the Court of Appeals. By Op. No. 5176 filed October 9, 2013, the Court of Appeals reversed the Appellate Panel. A Petition for Rehearing was denied by the Court of Appeals on November 14, 2013.

ARGUMENT

I. Was the Decision and Order of the South Carolina Worker's Compensation Appellate Panel dated March 26, 2012, an appealable final order under South Carolina Code Ann. Section 1-23-380 (A) as interpreted in Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E. 2nd 552 (2013)?

The appeal of the Decision and Order of the Worker's Compensation Appellate Panel is governed by the Administrative Procedures Act, Section 1-23-380 (A) which 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).

The order of the Worker's Compensation Appellate Panel, from which this appeal was taken, 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).

In Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E. 2nd 552 (2013), the circuit court had reversed the Worker's Compensation Commission's denial of benefits and remanded the case to the commission to determine the same issues that are unresolved in the instant case. The Supreme Court held the Circuit Court's remand was not a final order, stating :

> "To the contrary, there is no enforceable judgment at this stage as the Commission is tasked with the further obligations in determining the extent of Bone's compensation and in setting forth a final award that constitutes an executable judgment. 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 744 S.E. 2nd 552, 559.

The current case fits squarely within the Bone precedent. As in Bone, the Petitioner has not been determined at MMI and it is also undetermined whether he needs further medical treatment and to what benefits he may be entitled under the Worker's Compensation Act. Until those issues are decided, no final, appealable order has been issued by the Worker's Compensation Commission.

Subsequent to Bone, the statutory procedure has changed such that the first appeal from the Worker's Compensation Appellate Panel is now to the Court of Appeals. The Circuit Court remand order in Bone and the Appellate Panel order here are procedurally indistinguishable because each was an order granting medical treatment to the employee. Had the Appellate Panel's order denied benefits it would have been final and appealable under Bone. Id. at 404 S.C. at 74, 744 S.E. 2nd at 556. Bone also determined that an order awarding medical benefits alone was not an interlocutory order of a type entitled to immediate review under Sec. 1-23-380(A) as an employer has an adequate remedy in that it may raise the issue of compensability on appeal of a final award. Id. at 404 S.C. at 74, 744 S.E.2d at 557.

Bone was decided by the Supreme Court after briefing in this case. Though this issue is 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, the Court of Appeals 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.

The appropriate remedy is a writ of certiorari to the Court of Appeals and an order dismissing the appeal pursuant to the precedent of Bone v. U.S. Food Service, Supra.

II. Does the record contain substantial evidence that the Petitioner reported a work related accidental injury to the owner of the Appellant within ninety (90) days.

The Court of Appeals held that the Appellate Panel's determination that Claimant provided Employer with adequate notice that he had suffered a work related injury is not supported by substantial evidence in the record. The Court of Appeals relied upon Etheredge v. Monsanto Co., 349 S.C. 451, 562 S.E. 2nd 679 (Ct. App. 2002) citing the following:

> For adequate notice, there must be "some knowledge of companying facts connecting the injury or illness with the employment and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." *Larson's Worker's Compensation Law* Section 126.03 [1] [b] (2001) (footnotes omitted). "Generally, in order that the knowledge be imputed to the employer, the person receiving it must be in some supervisory or representative capacity, such as foreman, supervisor....physician, or nurse." Id. at Section 126.03 [2] [a] (footnotes omitted). Id. at 457, 562 S.E. 2nd at 682.

The Court of Appeals concluded that Petitioner's testimony was not sufficiently specific to inform the Employer that his back injury was work related.

Mr. Hartzell testified that on or about February 25, 2009, he was engaged in cleaning up the employer's shop so that he could access his tool box more easily and was moving tires, rims and heavy frame equipment, posts and chains. He testified that the frame equipment was a large steel post about five (5) feet tall with hydraulic rams and a heavy steel base with wheels, weighing approximately 200-300 pounds. To move it, the post is pulled back and set on wheels in the nature of tilting a hand truck. He testified that later that afternoon he started having pain in

the lower back and realized that it was "part of the job" and figured it would go away "naturally." (Record p. 43, line 4 – p. 44, line 7). His initial testimony concerning his report of injury to Mike Stallings, the owner, was as follows:

"Q: Did you report that to anybody on that very day?

A: No. I did not say nothing that day, I just felt it was just, you know, being sore from doing that kind of work and then the next day is when I really felt very sore in my lower back and I just -- I couldn't bend over very much and it just progressively got worse. And bending over I had a hard -- I couldn't lift up heavy stuff basically.

Q: Did you report that pain in your lower back to anybody?

A: Yes. The next day I said something to Mike that I was pretty sore, I must have hurt myself.

Q: Ok. What was his response to you?

A: He said, "Well, if you are having problems" he said "go to the emergency room."

Q: Did he offer you any medical care at company expense?

A: No.

Q: Did he give you the name of any doctor to see?

A: No.

Q: Did he offer to pay for medical care for you?

A: No verbal response." (Tr. p. 44, line 14 – p. 45, line 13).

On cross-examination Petitioner testified as follows:

"Q: And you said you had some discussion, 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 I had somehow injured my back.

Q: Mike's around the shop and he's somebody when you worked at Palmetto Collision you talked to on a regular basis; is that fair to say?

A: Yes.

Q: He was always available to talk?

A: Yes. (Record p. 64, line 17 – p. 65, line 2)

And

"Q: After this one time you mentioned to Mike that -- that your low back was hurting did you ever have any discussions with him ever again about your back or your back injury?

A: Just in the time when I worked there the last couple of weeks, I mean we talked about it but there was never really nothing done about it. (Record p. 65, lines 16-22).

Petitioner only worked at Palmetto Collision for approximately two (2) weeks subsequent to his injury (Record p. 55, lines 2-8), so that all these conversations concerning the injury were well within the ninety (90) day statutory period.

Even if Petitioner's initial testimony was not as specific as it might have been, any question that he reported that he hurt himself working was resolved when he was specifically asked on cross-examination ".... you said you mentioned that your back was sore from working one day; is that what you told him?" and he answered, "Yes, that was the next day after I had realized I somehow had hurt my back." (Record p. 64, lines 17-21).

Mike Stallings testified that the shop was "...a close group, your friends and family..." (Record p. 112, line 15-17) and that he purchased breakfast and lunch for "the guys" every day. (Record p. 113, lines 10-12).

Based upon the cited testimony, it is inconceivable that Mike Stallings would not have known that Petitioner's injury was work related.

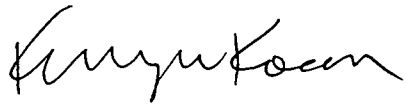
Petitioner respectfully submits the above cited testimony is substantial evidence of notice of "facts connecting to the injury or illness with the employment, and indicating to a reasonably

conscientious manager that the case might involve a potential compensation claim." Id. at 349 S.C. at 457, 562 S.E. 2nd at 682.

CONCLUSION

Petitioner respectfully submits that the Supreme Court should grant a writ of certiorari to the Court of Appeals and either dismiss the appeal pursuant to Bone v. U.S. Food Service, Supra or consider the record as a whole to determine the existence of substantial evidence sufficient to affirm the Worker's Compensation Appellate Panel.

Respectfully submitted,



December 12, 2013

Kerry W. Koon
147 Wappoo Creek Drive, Ste. 203
Charleston, SC 29412
(843) 795-7000
ATTORNEY FOR PETITIONER RICHARD A. HARTZELL

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and

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PROOF OF SERVICE

I certify that I have served Petitioner Richard A. Hartzell's Petition for Writ of Certiorari by depositing a copy of same in the United States mail, postage prepaid, on December 12, 2013, addressed to their attorney of record, Kirsten Barr, Esq. and to the attorney for the S.C. Uninsured Employers Fund, Lisa Glover, Esq., as follows:

Kirsten Barr, Esq.
Trask & Howell, LLC
P.O. Box 2167
Mt. Pleasant, SC 29465

Lisa Glover, Esq.
State Accident Fund
P.O. Box 210039
Columbia, SC 29221-0039

Jenny Kitchings, Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

December 12, 2013

Kerry W. Koon
147 Wappoo Creek Drive, Ste 203
Charleston, SC 29412
(843) 795-7000
ATTORNEY FOR PETITIONER

Telephone: Bus: (843) 795-7000
Fax: (843) 762-5276

KERRY W. KOON
Attorney at Law
147 Wappoo Creek Drive
Wappoo Centre, Suite 203
Charleston, South Carolina 29412

December 12, 2013

VIA FED EX # 8043 3720 2218
Daniel E. Shearouse, Clerk of Court
South Carolina Supreme Court
Supreme Court Building
1231 Gervais Street
Columbia, SC 29201

RE: Richard A. Hartzell v. Palmetto Collision, LLC
Appellate Case #: 2012-211870
Opinion No.: 5176 (S.C. Ct. App. filed October 9, 2013)

Dear Mister Clerk,

Please find enclosed for filing an original and six (6) copies of a Petition for Writ of Certiorari to the Court of Common Pleas in the above referenced matter together with a Proof of Service of the same, a check for the required fee and two (2) copies of the Appendix.

With kindest regards, I am

Very truly yours,

Kerry W. Koon

KWK:mm
Enclosures

cc: Kirsten Barr, Esq.
Lisa Glover, Esq.
South Carolina Court of Appeals

Telephone: Bus: (843) 795-7000
Fax: (843) 762-5276

KERRY W. KOON
Attorney at Law
147 Wappoo Creek Drive
Wappoo Centre, Suite 203
Charleston, South Carolina 29412

December 12, 2013

Jenny Kitchings, Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

RE: Richard A. Hartzelll v. Palmetto Collision, LLC
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Dear Madam Clerk,

Please find enclosed for service upon you, a copy of a Petition for Writ of Certiorari to the Court of Common Pleas regarding the above referenced matter.

With kindest regards, I am

Very truly yours,

Kerry W. Koon

KWK:mm
Enclosures

cc: Kirsten Barr, Esq.
Lisa Glover, Esq.