

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2011-CP-20-436

Case Tracking No. 2012-212898

James Clark, Jr.,

v.

Pyramid Masonry Contractors, Inc., and
Hartford Accident Insurance Company,

Respondent,

Appellants.

PETITION FOR REHEARING

J. Kevin Couch
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
(864) 527-3286
Attorney for Appellants

71395

PETITION FOR HEARING

Pursuant to Rules 221 and 240, SCACR, Appellants hereby petition for rehearing of the Court's Order, filed February 12, 2014, dismissing this appeal as interlocutory, pursuant to *Bone v. U.S. Food Service*, 404 S.C. 67, 744 S.E.2d 552 (2013). Appellants submit that the Court overlooked or misapprehended the Appellants' arguments on appealability of the Circuit Court's Order, and *Bone* does not bar Appellants' current appeal. Appellants assert that the rule from *Bone* is 1) unconstitutional as applied in this matter; and 2) inapplicable pursuant to the Appellants' right to appeal under South Carolina Code of Laws Section 1-23-380 when the final agency decision would not provide an adequate remedy.

MEMORANDUM IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING

I. DISMISSAL WITHOUT AN ORDER ON THE MERITS IMPLICATES SIGNIFICANT DUE PROCESS INTERESTS.

Appellants assert that continued payment of benefits, in this case, represents a significant due process issue and the application of *Bone* deprives Appellants of a constitutional right to judicial review. Appellants are under order to pay disability benefits but continue to dispute legal responsibility to pay those benefits. Those benefits are currently payable because the appeal does not act as a supersedeas. See S.C. Code Ann. § 42-171-60. Indeed the Circuit Court realized the error in ordering payment of temporary total disability benefits. (R. at 22-24.) Article I, Section 22 of the South Carolina Constitution provides certain rights regarding procedures before administrative bodies:

No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and

an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.

(emphasis added). Judicial review of a workers compensation proceeding is a constitutional right in South Carolina. The rights provided under Article I, Section 22 extend to the limits of due process.

[W]hen discussing Article I, Section 22, we have consistently indicated that the protections provided under this section are the equivalent of those afforded by the Due Process Clause of our state and federal Constitutions.

S.C. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n, 389 S.C. 380, 699 S.E.2d 146 (2010). Due process necessarily includes the right to meaningful judicial review.

The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received . . . the right to meaningful judicial review.

Dangerfield v. State, 376 S.C. 176, 656 S.E.2d 352 (2008) (emphasis added).

In this case, given the continuing payment of disability benefits despite the Circuit Court's acknowledgment that there has been no finding of disability, meaningful judicial review necessarily includes a temporal component. Appellants have been deprived of property by court action, and the appeal has now been dismissed. Appellants submit that dismissal of the appeal when the Appellants continue to undergo a deprivation of property deprives the Appellants of meaningful judicial review. .

II. THE COURT HAS APPELLATE JURISDICTION OF THIS ORDER PURSUANT TO SECTION 1-23-380.

Appellants also assert appellate jurisdiction pursuant to South Carolina Code of Laws Section 1-23-380, by which any order of the Commission is "immediately

reviewable if review of the final agency decision would not provide an adequate remedy.” *Bone* has no bearing on appeal of a case under Section 1-23-380. Appellants continue to dispute compensability of this matter. Appellants submit that review of the final agency decision would not provide an adequate remedy for the following reasons: 1) Appellants have continued to dispute compensability in this case; 2) disability benefits have been ordered; and 3) there is no clear statutory mechanism for the Commission to order repayment of benefits to the Appellants if, on appeal of the final order, the Court finds error and determines this claim was not compensable *ab initio*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal in this case is not interlocutory and the Circuit Court’s Order is immediately appealable. Appellants respectfully request that the Court review its *per curiam* Order and reinstate the appeal.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.



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Attorneys for Appellants

February 25, 2014

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2011-CP-20-436

Case Tracking No. 2012-212898

James Clark, Jr.,

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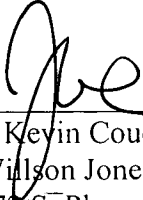
Pyramid Masonry Contractors, Inc., and
Hartford Accident Insurance Company;

Appellants.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on James Clark, Jr. by depositing a copy of it in the United States Mail, postage prepaid, on February 25, 2013, addressed to his attorneys of record, Gary W. Popwell, Esquire, Lee, Eadon, Isgett, Popwell and Reardon, P.A., P.O. Box 1505, Columbia, SC 29202 and Barry B. George, Esquire, 1419 Bull Street, Columbia, SC 29201 and by electronic mail to his attorneys of record.

February 25, 2013



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February 25, 2014

(Sent Via Overnight Mail)

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: James Clark, Jr. vs. Pyramid Masonry Contractors, Inc.
Case Tracking No.: 2012-212898
WCC File No.: 0427461 DOI: 11/17/2004
Carrier: Sedgwick CMS - Claim No.: YMG-35644
WJC&B File No.: 0510.00133

Dear Ms. Kitchings:

I enclose for filing an original and six copies of Appellants' Petition for Rehearing in the above-referenced case as well as a check in the amount of \$25.00 for the filing fee. I am also enclosing Proof of Service showing that a copy of the Petition for Rehearing has been served on Respondent's Counsel, Gary W. Popwell and Barry B. George.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



J. Kevin Couch

JKC/jew
Enclosures

cc: Gary W. Popwell, Esquire (Via E-mail & U.S. Mail)
Barry G. George, Esquire (Via E-mail & U.S. Mail)
Ms. Juley Sikora (Via E-mail)

<https://www.ups.com/cship/create?ActionOriginPair=default> Print/Window... 2/25/2014

JANE WATKINS

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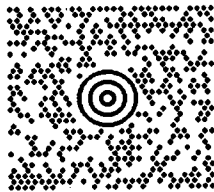
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803-734-1839

SC COURT OF APPEALS

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COLUMBIA SC 29201-3726

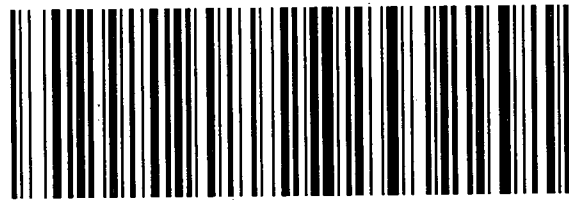


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SC Court of Appeals