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**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA**

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**In The Court of Appeals**

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**APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION**

Fairfield County Court of Common Pleas

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WCC No.: 062913  
Appellate Case No. 2014-000269

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Fairfield County School System/SC School Boards Insurance Trust,..... Appellants,

v.


Gloria Parker, ..... Respondent.

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**INITIAL BRIEF OF APPELLANTS**

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June 2, 2014.

  
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**STATEMENT OF ISSUES ON APPEAL**

- I. **THE TRIAL COURT ERRED IN FAILING TO FIND THAT JURISDICTION IS PROPER IN THE CIRCUIT COURT PURSUANT TO CASE AND STATUTORY LAW APPLICABLE TO PRE-JULY 1, 2007 WORKERS' COMPENSATION CASES.**
  
- II. **THE TRIAL COURT ERRED IN INCLUDING ALTERNATE GROUNDS FOR DISMISSAL IN ITS ORDER INASMUCH AS INCLUSION OF ANY ALTERNATE OR ADDITION GROUNDS FOR DISMISSAL OF THE APPEAL ON THE GROUNDS OF FAILURE TO PROSECUTE WAS INAPPROPRIATE IN LIGHT OF THE COURT'S INDICATION AT THE HEARING ON THIS MATTER THAT MATTERS ASIDE FROM JURISDICTIONAL CONCERNS WOULD BE HELD IN ABEYANCE IN ORDER TO ALLOW THE COURT ADEQUATE TIME TO FULLY CONSIDER THE PARTIES' ARGUMENTS REGARDING SUBJECT MATTER JURISDICTION.**
  
- III. **DISMISSAL OF THE APPEAL FOR FAILURE TO PROSECUTE AND/OR PERFECT THE APPEAL AMOUNTS TO AN ABUSE OF DISCRETION.**

## FACTS/STATEMENT OF THE CASE

This denied case was heard before the Single Commissioner on September 30, 2011. At the hearing, Gloria Parker (“Claimant”) alleged she sustained a work-related injury on October 19, 2006 when she twisted her right knee while getting up from a desk. Claimant further alleged that the injury to her knee caused her to suffer an altered gait which in turn aggravated her pre-existing back condition. Fairfield County School System (“the School District”) and the South Carolina School Boards Insurance Trust (collectively “Appellants”) denied the claim, maintaining that the Claimant’s October 19, 2006 injury to her right knee did not arise out of her employment with the School District; rather, the incident was idiopathic in nature, and, therefore non-compensable. Alternatively, Appellants asserted that even if Claimant’s October 19, 2006 injury is deemed compensable, Claimant suffered from extensive pre-existing back problems as well as a pre-existing altered gait, which conditions were not exacerbated by her knee injury within the meaning of the case, statutory, and regulatory law governing determination of the compensability of such injuries.

By order dated June 29, 2012, the Single Commissioner determined that Claimant “suffered a compensable injury to her right leg, aggravating her back, causing her leg and back pain, arising out of and in the course and scope of her employment with Fairfield County School System.” In reaching this determination, the Single Commissioner found the Claimant’s testimony at the hearing regarding how the accident occurred credible without addressing or determining the impact of Claimant’s own prior inconsistent and contradictory statements as to the mechanism of the injury. In determining Claimant’s credibility, the Single Commissioner also erroneously failed to recognize that Claimant’s own eye-witness’s deposition testimony contradicted rather than corroborated the account Claimant offered for the first time at the

hearing. The Single Commissioner also failed to make specific findings of fact based on medical documentation regarding the extent of Claimant's pre-existing back condition.

On appeal to the Full Commission, Appellants argued that the Single Commissioner erred in finding that the Claimant sufficiently established that she suffered a work-related injury to her right leg. Appellant's specifically challenged the credibility of the Claimant's account of the alleged accident as relayed, for the first time, by the Claimant at the hearing on the merits of this action. Appellants further specifically challenged the erroneous characterization of the deposition testimony of Claimant's eye-witness, Richard Woodle, as essentially corroborating the testimony the Claimant offered for the first time at the hearing on this matter with respect to the condition of the carpeting in the area where Claimant's alleged accident occurred. Further, Appellants asserted on appeal to the Full Commission that medical evidence in the record clearly establishes that the Claimant did not suffer a re-injury to or aggravation of her pre-existing back condition within the meaning of the applicable case and statutory law; rather Claimant's back condition was the same after the alleged accident as before the incident.

By order dated February 20, 2013, the Full Commission affirmed the Single Commissioner's order, again without directly addressing the inconsistent and contradictory accounts Claimant offered as to the mechanism of the accident and without correcting the erroneous finding that Claimant's eyewitness's testimony was consistent with the account Claimant offered for the first time at the hearing on the merits.

Appellant appealed to the Court of Appeals, having timely served the Respondent with the notice of appeal. This Court determined the appeal should have been filed in the Circuit Court and, accordingly, transferred the appeal to Circuit Court. After hearing oral arguments on Respondent's Motion to Dismiss based on lack of subject matter jurisdiction due to Appellant's

failure to serve the South Carolina Workers' Compensation Commission with notice of the appeal within 30 days of the Commission's order, the Circuit Court dismissed the appeal. This appeal followed.

### **STANDARD OF REVIEW**

Questions of law, such as the existence of subject matter jurisdiction, may be decided on appeal with no particular deference to the lower court. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 327, 534 S.E.2d 672, 675 (2000). A trial court's decision to dismiss and action for failure to prosecute is discretionary, but should be reversed where there is a clear showing of abuse of discretion. Small v. Mungo, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970).

#### **I. JURISDICTION IS PROPER IN THE CIRCUIT COURT PURSUANT TO CASE AND STATUTORY LAW APPLICABLE TO PRE-JULY 1, 2007 WORKERS' COMPENSATION CASES.**

It is uncontradicted that notice of intent to appeal in this matter was timely served on Respondent's counsel and filed in the South Carolina Court of Appeals well within the thirty (30) day applicable time limitation. Moreover, the proof of service indicates that the notice of appeal was also to be forwarded to the South Carolina Workers' Compensation Commission at the same time as the notice was served on the Respondent. However, the proof of service does not list the address of the Workers' Compensation Commission. Because counsel for Appellant did not retain a copy of an envelope forwarding the notice of appeal to the Workers' Compensation Commission, and because the paralegal who addressed and mailed the notice of appeal was no longer employed with counsel for Appellant's law firm, counsel for Appellate was unable determine with certainty whether or not the notice of appeal was actually forwarded to the

Workers' Compensation Commission. Accordingly, counsel for Appellant served or re-served the Workers' Compensation Commission with the Notice of Appeal on July 3, 2013.

Pursuant to the Supreme Court's holding in Skinner v. Westinghouse, 380 S.C. 91, 668 S.E.2d 795 (2008), Appellant's service on the commission more than thirty days after filing the appeal did not divest the Circuit Court of appellate jurisdiction. In Skinner, the Appellant Westinghouse served its appeal in the circuit court on August 2, 2006 and served the notice of appeal on the commission on October 16, 2006. The circuit court determined it lacked jurisdiction to hear the appeal because service on the commission was not accomplished within thirty days of the filing of the appeal and dismissed the appeal. The South Carolina Supreme Court reversed the circuit court's ruling, holding that under the law applicable to pre-July 1, 2007 cases, a thirty day deadline only existed for service on the appellate court and not on the commission. Id.

The Skinner Court noted that the circuit court relied substantially on Rule 74, SCRCP,<sup>1</sup> in determining that it lacked jurisdiction. In finding the circuit court's reliance on Rule 74 was misplaced, the Supreme Court held that South Carolina jurisprudence "confirms that jurisdictional appealability issues are governed by statute, and not by the rules of civil procedure." Id. at 796, Citing N.C. Fed Sav. & Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97,97 (1986)( rejecting an attempt to invoke a rule of civil procedure as a basis of the right to appeal and holding, "[t]he right to appeal arises from and is controlled by statutory law"). The Court also referenced Rule 82(a), SCRCP for the proposition that the thirty-

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<sup>1</sup> As the Supreme Court explained, "Rule 74 refers to controlling statutorily imposed time periods –'the notice of intention to appeal shall be filed with the . . . administrative agency . . . within the time provided by statute, or by this rule when no time is fixed by statute.' The nonjurisdictional default period imposed by Rule 74 is thirty days." Id. at 94, 668 S.E.2d at 797, Note 2.

day time period referenced in Rule 74 could not be construed as jurisdictional. *Skinner* at 94, 668 S.E.2d at 796. Rule 82(a) provides: “[t]hese [civil procedure] rules shall not be construed to extend or limit the jurisdiction of any court of this State . . . .” Having found that the Rules of Civil Procedure were not controlling as to determining the appellate jurisdiction of the circuit court, the *Skinner* court next turned to applicable statutory law in order to determine whether Westinghouse’s service on the commission more than thirty days after filing its appeal divested the circuit court of jurisdiction. The *Skinner* Court found no such divestment of jurisdiction had occurred.

In determining which statutes were instructive to its inquiry regarding the circuit court’s jurisdiction, the *Skinner* Court specifically recognized that:

In 2006 the General Assembly passed Act No. 387, 2006 S.C. Acts 387, which altered the procedure for appealing the decision of state agencies; however, the General Assembly addressed Workers’ Compensation law subsequently in Act No. 111, 2007 S.C. Acts 111. Act 111 comprehensively reformed Workers’ Compensation law in 2007. By order of this Court, the Workers’ Compensation reform applied to injuries on or after July 1, 2007. *Pee Dee Reg’l Transp. v. S.C. Second Injury Fund*, 375 S.C. 60, 62, 650 S.E.2d 464, 465 (2007). Therefore, the law of this case predated the appellate procedural changes to Workers’ Compensation law.

*Skinner* at 95, note 3, 668 S.E.2d at 797, note 3 (emphasis added). The appellate courts of this state have consistently held that the date of injury, rather than any other factor relevant to workers’ compensation cases, governs which law is applicable to determinations involving workers’ compensation cases. *See, e.g., Id.* Having determined that the law applicable to the case was that law which predated the July 2007 reformations to workers’ compensation law, the Court went on to find that “[u]nder the Administrative Procedures Act, section 1-23-380(A)(1) of

the South Carolina Code (2005) fails to supply a clear deadline to serve an agency” when it states:

Proceedings for review are instituted by filing a petition in the circuit court within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the final decision thereon. Copies of the petition shall be served upon the agency and all parties of record.

While the Court noted that the commission must be served with a copy of the appeal petition, the Court specifically noted that §1-23-380(A)(1) of the Administrative Procedures Act does not, from a jurisdictional standpoint, mandate such service within thirty days. Id. at 95, 668 S.E.2d at 797. As the Court noted, “[t]he reference to serving the agency is not associated with the filing deadline with the court.”

The Skinner Court next considered section 42-17-60 of the South Carolina Code of laws (Supp. 2006), which specifically applies to workers’ compensation cases and states, “either party to the dispute, *within thirty days* from the date of the award or within thirty days after receipt of notice to be sent by registered mail of the award, but not thereafter, may appeal from the decision of the commission to the court of common pleas . . . .” (emphasis added). The Court determined that “[a]gain, the deadline for filing the notice of appeal with the circuit court is provided, but no mention of a deadline to serve the agency is given.”

Moreover, Rule 203(b) of the South Carolina Appellate Court Rules, which imposes a 30 day deadline to serve an administrative agency with the notice of appeal expressly applies only “[w]hen a statute allows a decision of the administrative law court or agency (administrative tribunal) to be appealed directly to the Supreme Court or the Court of Appeals.” No statutory authority allows a decision in a pre- July 1, 2007 workers’ compensation case to be appealed

directly to the Supreme Court or the Court of Appeals. Accordingly, Rule 203(b) is inapplicable to pre-July 1, 2007 workers' compensation claim.

Here, as in Skinner, a review of the law applicable to this pre-July 1, 2007 case yields the conclusion the thirty-day deadline only existed for service on the appellate court and not on the agency. Because the commission has been served with the notice of appeal, this procedural defect has been cured and the Trial Court therefore erred in dismissing the appeal.

**II. INCLUSION OF ANY ALTERNATE OR ADDITIONAL GROUNDS FOR DISMISSAL OF THE APPEAL ON THE GROUNDS OF FAILURE TO PROSECUTE WAS INAPPROPRIATE IN LIGHT OF THE TRIAL COURT'S INDICATION AT THE HEARING ON THIS MATTER THAT MATTERS ASIDE FROM JURISDICTIONAL CONCERNS WOULD BE HELD IN ABEYANCE IN ORDER TO ALLOW THE COURT ADEQUATE TIME TO FULLY CONSIDER THE PARTIES' ARGUMENTS REGARDING SUBJECT MATTER JURISDICTION.**

At the hearing on the matter, both parties indicated that they were informed on the day before the hearing by the Clerk of Court's office that the Court was not in receipt of a certified copy of the Workers' Compensation Commission's file. Counsel for Appellants indicated that although the Workers' Compensation historically provided the Circuit Court with certified copies of the Commission's file, the Commission has informed the Worker's Compensation bar, including Counsel for Appellants, that due to difficulties with receiving Commission files back from various Courts, parties to appeals would themselves have to provide materials to the Court on appeal. Counsel for Respondent did not disagree that the workers' compensation bar had been so informed by the Commission. Counsel for Appellants further advised the Court that pursuant to the instructions of the Workers' Compensation Commission, counsel had copies of all materials relevant to the appeal at the hearing, including, but not limited to the parties'

pleadings, evidentiary and APA and filings, and the orders of the Single Commissioner and Full Commission.

However, the Court determined that due to the Court's desire to carefully review the materials submitted in support and in opposition to the Respondent's motion to dismiss, the appeal could not be heard on the day of the hearing. Thus, the availability of a certified copy of the Commission's file was rendered moot pending the Court's ruling on the jurisdictional issues. Accordingly, inclusion of the alternate grounds for dismissal in the Court's order was improper at this procedural juncture.

**III. DISMISSAL OF THE APPEAL FOR FAILURE TO PROSECUTE AND/OR PERFECT THE APPEAL AMOUNTS TO AN ABUSE OF DISCRETION.**

The appellate courts of this State, as well as the Fourth Circuit Court of Appeals, have addressed this issue. In McCargo v. Hedrick, 545 F.2d 393, 396 (4th Cir. 1976), the Court held that dismissal is a harsh sanction, which "should be resorted to only in extreme cases." Dismissal is generally permitted only in the face of a clear record of delay or contumacious conduct by the plaintiff. Id. The discretion should be exercised discreetly and only after due consideration of the availability of sanctions less severe than dismissal. Id.; Bush v. U.S. Postal Serv., 496 F.2d 42, 44 (4th Cir. 1974). The Fourth Circuit has said the trial court must consider four factors before dismissing a case for failure to prosecute: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal. Hillig v. Comm'r of Internal Revenue, 916 F.2d 171, 174 (4th Cir. 1990). See also Herbert v. Saffell, 877 F.2d 267, 270 (4th Cir.

1989); McCargo, 545 F.2d at 396; Chandler Leasing Corp. v. Lopez, 669 F.2d 919, 920 (4th Cir. 1982). See generally, McComas v. Ross, 368 S.C. 59, 62, 626 S.E.2d 902, 904 (Ct. App. 2006).

First, Appellants would reiterate that copies of all materials relevant to three appeal were available at the hearing, as per the directive of the Workers' Compensation Commission. Accordingly, there was no failure to prosecute the matter. Further, alternatives far less drastic than dismissal of the appeal were and are available with respect to these issues. Particularly in light of the Trial Court's indication that the merits of the appeal could not be heard at the hearing on Respondent's motion to dismiss, which Respondent requested be heard first, a request or motion to compel provision of the a certified copy of the Commission's file could easily be made before rescheduling of any hearing on the merits of the appeal.

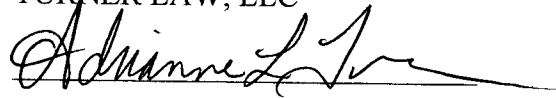
Alternatively, the hearing on the merits of the appeal could have been held contemporaneously with the hearing on the motion to dismiss, with directions from the Trial Court that a certified copy of the Commission's file be provided to the Trial Court within whatever timeframe the Trial Court deemed appropriate. As well, had the Trial Court not indicated that the hearing on the merits of the appeal was not appropriate in light of the pending motion to dismiss, Appellants could have made what would have been Appellant's first motion to continue the appeal in order to allow Appellants time to obtain a certified copy of the Commission's file or to move the Court for an order compelling the Commission to provide the same.

## **CONCLUSION**

For the foregoing reasons, Appellants respectfully request that this Court reverse the Circuit Court's Order Dismissing the matter and remand the matter to the Circuit Court for a hearing on the merits.

Respectfully Submitted,

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A handwritten signature in cursive script, appearing to read "Adrienne L. Turner", written over a horizontal line.

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