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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2012-212631

Kerry Levi,Appellant,

v.

Northern Anderson County EMS and
Berkshire Hathaway Homestate Insurance
Company,Respondents.

PETITION FOR REHEARING

David Hill Keller
Constangy Brooks & Smith, LLP
105 N. Spring Street Suite 105
Greenville, South Carolina 29201

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JUL 15 2014

SC Court of Appeals

Pursuant to South Carolina Appellate Court Rule 221, the respondents, Northern Anderson County EMS and Berkshire Hathaway Homestate Insurance Company, do hereby petition the Court for rehearing of its order filed June 30, 2014 upon the following grounds:

ISSUE I

The respondents have insisted both in their brief and at oral argument that the determination of the Full South Carolina Workers' Compensation Commission in this matter was a judgment based on the Form 21/Request for Hearing filed by respondents on September 24, 2011 (ROA p.27). While the motion was termed a "Motion to Dismiss" it was appended to the Form 21/Request for Hearing to stop payment of temporary total disability compensation.

South Carolina Workers' Compensation regulation 67-215B specifically states that "a motion involving the merits of the claim, including but not limited to, a motion 1. for dismissal" will not be addressed by the Commission. As such, procedurally under the South Carolina Workers' Compensation rules the issue before the Commission was, and by regulation had to be on the merits of the claim.

At oral argument this was specifically noted by his honor, Judge Lockemy, who questioned Mr. Hewitt regarding the same during Mr. Hewitt's reply. Mr. Hewitt, who admitted he is not an expert in Workers' Compensation or Administrative Law did not know the answer. The undersigned did know the answer to the question but was not allowed to respond by the Court as time for oral argument had expired.

ISSUE II

The Court has misapprehended and used interchangeably the law as it relates to Workers' Compensation practice and procedure and the law as it relates to Circuit Court practice and procedure. The Commission, however, is a complete statutory creation in total derogation of the Common Law. Therefore, both the rules and case law regarding Circuit Court cases do not apply to the Commission. Mendenall v. Anderson Hardwood Floors, LLC, 401 SC 558, 738 SE2nd 251

(2013). As such, the provisions of the act are self contained and authority for actions taken under the act must be found in the act itself. Id; Parker v. Williams and Madjanik, Inc., 275 SC 65, 267 SE2nd 524 (1980); SC Code of Laws Ann. §42-1-540. More specifically, the Rules of Civil Procedure, except for those rules as they apply to the taking of depositions, do not apply to the Workers' Compensation Commission. §42-3-30;§42-3-160. As such, all of the case law cited by the Court in its opinion as it relates to motions of dismissal in Circuit Court is irrelevant to the issue before the Court. Rather, the Court should have confined its determination strictly in the terms and provisions of Title 42 of the South Carolina Code of Laws and the Regulations of the Workers' Compensation Commission, especially Regulation 67-215.

In this regard, as raised by Judge Lockemy at oral argument there is no order of the "Commission" until such time as the Full Commission has ruled. Only the "Commission" can determine issues arising under the terms and provisions of Title 42. §42-3-180. The "Commission" is defined in §42-1-80 as the entire South Carolina Workers' Compensation Commission as created under the terms and provisions of Title 42.

While the Court correctly noted the appeals procedures to the Full Commission are governed by §42-17-50, §42-17-50 specifically notes that an order of the Single Commissioner becomes the law of the case if not reviewed in due time, and if reviewed a determination of the "Commission" under §42-17-50 is conclusive and binding on all parties. In other words, the acts of the Single Commissioner are all subject to review and do not become the law of the case until such time as the Full Commissioner has acted upon them.

ISSUE III

The Workers' Compensation case law regarding interlocutory appeals deals with appeals from the Full Commission only. As noted in the prior argument there is no determination of the "Commission" until the Full Commission has made its determination. As such, there are no reported decisions which respondents were able to find which dealt with an appeal from the

Single Commissioner to the Full Commission. The order of the Single Commissioner becomes the law of the case if not "reviewed in due time, and if reviewed a determination of the Commission under §42-17-50 is conclusive and binding on all parties." In other words, the acts of the Single Commissioner are all subject to review and do not become the law of the case until such time as the Full Commission has acted upon them, unless no one appeals. Further, under Title 42 only the Full Commission can determine if any appeal from the Single Commissioner to the Full Commission is interlocutory. The determination of this Court is limited to whether the appeal from the Full Commission is interlocutory.

ISSUE IV

The case law regarding interlocutory appeals, deals with appeals from the Full Commission only. As noted in the prior argument, there is no determination of the "Commission" until the Full Commission has made its determination. As such, there are no reported decisions which respondents were able to find which deal with an appeal from the Single Commissioner to the Full Commission. Rather all of the case law which relates to interlocutory and not directly appealed orders deals only with appeals from the Full Commission to either the Circuit Court under the prior statute, or the Court of Appeals. See e.g., Martinez v. Spartanburg County, 406 SC 532 (2014), 753 SE2nd 436, Price v. Peachtree Electric Service, Inc. 405 SC 455, 748 SE2nd 229(293); Gatis v. Murrels Inlet VFW, 353 SC 100, 576 SE2nd 191 (Ct. App. 2003); Nettles v. Spartanburg School District #7, 341 SC 580, 535 SE2nd 146 (Ct. App. 2000); Walker v. Springs Industries, Inc., 298 SC 249, 379 SE2nd 729 (Ct. App. 1989); Chastain v. Spartan Mills, 289 SC 61, 88 SE2nd 836 (1955).

Further, two older cases of the South Carolina Supreme Court make it clear that there is no order of the Commission until an act or order has been ruled upon by the Full Commission. Under the prior statute which required an appeal to the Circuit Court before appealing to the Court of Appeals the Supreme Court held that the decision of a Single Commissioner can not be

taken to the Circuit Court without first being ruled upon by the Full Commission. Janhrett v. Union Camp Paper Corp, 293 SC 59, 358 SE2nd 704 (1987). Further, in the case of Cord v. E.H. Hines Const. Co., 220 SC 356, 67 SE2nd 677 (1951), the Supreme Court ruled that all actions of a Single Commissioner must be ruled upon by the Full Commission before the same are appealable. Specifically, in Cord the Court ruled a determination by the Workers' Compensation Commission denying an employer's motion for a physical examination of the Claimant was appealable as an order of the Full Commission notwithstanding the fact that there was not specific award by the Commission.

Respondents would, therefore, assert that there was no order of any type to be reviewed until the Full Commission ruled on the matter and the determination of this Court is limited to whether the order of the Full Commission was directly appealable as a final judgment, which it clearly was.

ISSUE V

South Carolina Workers' Compensation Commission has already determined that it lacks subject matter jurisdiction to hear the case of Kerry Levi. It is axiomatic that the issue of subject matter jurisdiction may be raised by any party at any time during a hearing and appeal process.

The defendants specifically raised this issue to the Full Commission based on long standing South Carolina Case Law. The decision of the appellate panel specifically found that the South Carolina Workers' Compensation Commission lacks subject matter jurisdiction over claimant's claim. (ROA p.23). Further, defendants raised the issue of the subject matter jurisdiction of the South Carolina Workers' Compensation Commission over this claim to the Appellate Court in its brief. (Brief p. 7-18 and case law cited therein; §42-1-560). Pursuant to the basic law of civil procedure the respondents are, once again, raising specifically before this Court the issue, unresolved by the opinion, concerning whether the South Carolina Workers'

Compensation Commission should receive a remand of a case that it has already determined they do not have subject matter jurisdiction over. It is noted that the appellant did not contest the lack of subject matter jurisdiction, nor did this Court rule upon the same, even though raised by respondents.

ISSUE VI

Even if Circuit Court law applied to this matter the order of the Single Commissioner was directly appealable. As noted above the Court has misapprehended the procedural effects of this case and how it came to a hearing and an appeal to the Full Commission in the first instance.

However, that aside, the respondents specifically raised at oral argument that even had the rules and case law in Circuit Court applied, nonetheless a substantial right of the respondents was affected by the order of the Single Commissioner. In his order the Single Commissioner ruled the defendants/respondents lien under §42-1-560 was limited to the treatment of medical cost only. (ROA p. 5). This in direct violation of the statute which gives the defendants/respondents a lien for total amounts incurred in the claim. §42-1-560(b). The importance of the order of the Single Commissioner becoming law of the case is not insubstantial. As noted previously, the law as it relates to Workers' Compensation Benefits is solely contained within Title 42. The terms "medical" and "compensation" are individually defined. Section 42-1-100 defines compensation to mean the monetary allowances payable to an employee or his dependants as provided for in Title 42. As noted by respondents in our brief, the amount of compensation potentially payable to appellant in this matter was substantial but was specifically excluded by the order of the Single Commissioner from lien determination—a potential lost to respondents of over \$200,000.00 dollars in lien recovery. Medical payments are totally separate from compensation payments and are defined in §42-15-60. Medical benefits include medical, surgical, hospital, and other treatment including medical


and surgical supplies as may be reasonably required to affect a cure or give relief to the claimant. Id. As such, had the order of the Single Commissioner been unappealed the law of the case would have been that the respondents could only receive medical benefit reimbursement and not compensation reimbursement.

ISSUE VII

Pursuant to SCACR rule 268(2), the opinion in this case violates the Rule and should be completely withdrawn and reargued because the determination of the Court is based on an unpublished opinion in the state of North Carolina, in direct violation of Rule 268(2).

IT IS THEREFORE RESPECTFULLY SUBMITTED that the determination of the Court of Appeals be reconsidered and that Opinion No. 5243 of June 30, 2014 be withdrawn and that the Court (1) make a determination that remand to the Full Commission is legally pointless, regardless of any other error because the South Carolina Workers' Compensation Commission lacks subject matter jurisdiction of the claim (2) re-determine the case without reference to South Carolina Circuit Court rules and case law and/or (3) that the matter be completely withdrawn and re-argued before the Court based on Appellate Court Rule 268(2).

DATED: July 14, 2014

By: 
David Hill Keller, Esq.
Bar # 003345
Constangy, Brooks & Smith, LLP
Attorney for Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2012-212631

Kerry Levi,Appellant,

v.

Northern Anderson County EMS and
Berkshire Hathaway Homestate Insurance
Company,Respondents.

CERTIFICATE OF SERVICE

I, Caroline Anders, say that I am the legal assistant for David H. Keller, attorney for Respondents Northern Anderson County EMS and Berkshire Hathaway Homestate Insurance with CONSTANGY, BROOKS & SMITH, LLP in Greenville, South Carolina; and on the 14th day of July, 2014, I mailed in a sealed envelope, postage prepaid, a copy of the Respondents Petition for Rehearing to the following person(s) at the following address:

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Blake Hewitt
Bluestein, Nichols, Thompson & Delgado, LLC
P.O. Box 7965
Columbia, SC 29202

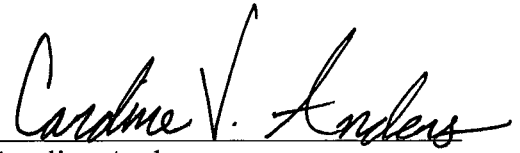
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SC Court of Appeals

John S. Nichols
Bluestein, Nichols, Thompson & Delgado, LLC
1614 Taylor Sreet
Columbia, SC 29202

Chadwick Dean Pye
P O. Box 6346
Spartanburg, SC 29304



Caroline Anders
Legal Assistant to David H. Keller
Constangy, Brooks & Smith, LLP
105 N. Spring Street, Suite 105
Greenville, SC 29601
Telephone (864) 990-1883
canders@constangy.com

CONSTANGY
BROOKS & SMITH, LLP

105 N SPRING STREET
SUITE 105
GREENVILLE, SOUTH CAROLINA 29601
TELEPHONE (864) 242-2577 • FACSIMILE (864) 242-9815
www.constangy.com

dkeller@constangy.com
864-242-2577

July 14, 2014

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

**Re: Kerry Levi v. Northern Anderson County EMS
Berkshire Hathaway Homestate Companies
Appellate Case No. 2012-212631
Date of Injury: 03/29/2011
CB&S File No. 08020-53203**

Dear Ms. Kitchings:

Enclosed please find original and six copies of Respondents' Petition for Rehearing, along with my certificate of service, and a firm check for the \$25.00 filing fee. Should you have any questions, please feel free to contact me.

Yours truly,



David H. Keller

DHK/cva
Enclosures

cc: Blake A. Hewitt
John S. Nichols
Chadwick D. Pye

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