

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Appellate Panel, Workers' Compensation Commission

Appellate Case No. 2012-212631 (S.C. Ct. App. filed June 30, 2014)

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S.C. Supreme Court

Kerry Levi,Respondent,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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INDEX

Certificate of Counsel.....	1
Questions Presented.....	2
Statement of the Case.....	3
Arguments	
1. Did the Court of Appeals err in determining the matter before them was a motion to dismiss?.....	6
2. Did the Court of Appeals err in citing Circuit Court precedent in a Workers' Compensation matter?.....	7
3. Did the Court of Appeals err in determining the case in chief was an interlocutory appeal?.....	9
4. Did the Court of Appeals err in failing to address the Commission's determination that it lacks subject matter jurisdiction?.....	11
5. Did the Court of Appeals err in determining that the original order of the Workers' Compensation Commission did not affect a substantial right of the defendants?.....	12
6. Did the Court of Appeals err in violating SCACR 268(2)?.....	13
Conclusion.....	14

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on August 25, 2014.

September 24, 2014



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QUESTIONS PRESENTED

1. Did the Court of Appeals err in determining the matter before them was a motion to dismiss?
2. Did the Court of Appeals err in citing Circuit Court precedent in a Workers' Compensation matter?
3. Did the Court of Appeals err in determining the case in chief was an interlocutory appeal?
4. Did the Court of Appeals err in failing to address the Commission's determination that it lacks subject matter jurisdiction?
5. Did the Court of Appeals err in determining that the original order of the Workers' Compensation Commission did not affect a substantial right of the defendants?
6. Did the Court of Appeals err in violating SCACR 268(2)?

STATEMENT OF THE CASE

This is a Workers' Compensation appeal. This matter comes before the court based on an opinion of the South Carolina Court of Appeals issued on June 30, 2014. A petition for rehearing was duly and timely filed and the Court of Appeals denied reconsideration and/or rehearing on August 25, 2014.

In the underlying case, Kerry Levi suffered two workers' compensation injuries while employed by Northern Anderson County EMS. The first injury occurred on or about March 10, 2011. Levi was working as a paramedic for Northern Anderson County EMS when she was moving a large patient from a bed to a wheelchair. She and another paramedic were using a sliding board to move the patient. The patient started to fall from the board and Levi grabbed the patient and felt a "pop" in her back. Medical records indicate Levi received a brief period of treatment from Doctors Care and Dr. Newsom at the Greenville Memorial Hospital Center for Health and Occupational Services (CHOS). She was released back to light duty and fully released by Dr. Newsom on March 22, 2011. Levi never had any compensable lost time as a result of the first accident.

On or about March 29, 2011, Levi was in an ambulance driven by a co-employee, Josh Thomas, when she and Thomas were rear-ended by another driver. This accident severely exacerbated her pre-existing condition from her earlier injury, and since that time she has received on going medical care and treatment.

Through investigation, Petitioners determined the owner of the vehicle which struck Thomas and Levi was owned by Donald Proell. Proell was insured by Allstate Insurance Company. During discovery, Petitioners realized Levi had elected her remedy.

When her deposition testimony was taken on August 3, 2011 attorney for Levi admitted she had already settled the third party claim without the required notice to Petitioners.

It became clear by early September 2011, Levi had settled with Allstate Insurance Company in the amount of Five Hundred Fifty Dollars (\$550.00) on April 10, 2011. That check was cashed by her on April 19, 2011. Levi never filed any forms with the South Carolina Workers' Compensation Commission or the Carrier and never advised the Commission, the Employer or the Carrier of the settlement. After receiving confirmation from Allstate Insurance Company that she had indeed accepted a Five Hundred Fifty Dollar (\$550.00) settlement for her claim, Petitioners filed a South Carolina Workers' Compensation Commission Form 21 requesting a hearing on the issue of whether Levi had elected her remedy pursuant to South Carolina Code of Laws Ann. § 42-1-560 and established case law.

The matter was heard on Petitioner's Form 21 on January 3, 2012 and an order issued on January 20, 2012 by Commissioner Avery Wilkerson, finding Levi had not elected her remedy. After the initial hearing, in which Commissioner Wilkerson refused to dismiss Levi's claim, Petitioners immediately appealed to the full South Carolina Workers' Compensation Commission.

Oral argument was held before a three member panel of the Full South Carolina Workers' Compensation Commission on May 22, 2012. During oral argument, Levi, by and through her attorney, Chad Pye of Spartanburg, South Carolina, conceded had she taken a settlement for the automobile accident she would have elected her remedy. However, it was Levi's contention the claim was still open and she had never settled the

claim at all. Rather, she urged, the injuries she was compensated for by Allstate were not covered by Title 42 and defendants remain free to seek additional recovery from Allstate.

It was the contention of Levi, because she did not settle her claim with Allstate involving her workers compensation accident, her settlement does not affect the defendants' rights. It was, and remains the position of Petitioners, however, that Levi's theory is not supported by the case law, and there is a "bright line" rule in South Carolina law regarding settlement of third party claims which was designed to protect defendants' liens and right to subrogation. Petitioners now have no right to collect against Allstate without the filing of a lawsuit against them in Circuit Court, the very situation which the notice requirements of § 42-1-560 were designed to avoid. The likelihood of success of such a lawsuit is unknown, but the expense of such a suit, even if successful was occasioned by the legal error of Levi. Further, the evidence presented before the Commission, submitted by Levi herself, shows the settlement, in the amount of Five Hundred Fifty Dollars (\$550.00), was for a full and final settlement of Levi's injury claim.

On July 2, 2012 the full Commission issued a unanimous order reversing the determination of Commissioner Wilkerson and finding Levi had elected her remedy. The Commission also determined because Levi had involved the terms of § 42-1-560, they no longer had Subject Jurisdiction over the claim. This order was based on well established South Carolina case law.

Levi then appealed to the Court of Appeals which, subsequently issued an opinion and denied rehearing. However, the Court of Appeals sole issue, which was never raised below, was whether the Form 21 filed pursuant to §42-9-260 and regulation 67-506

constituted a “motion to dismiss” under the **South Carolina Circuit Court Rules of Civil Procedure**. As will be noted in the argument, herein, the Commission is not subject of the rules of Civil Procedure, the case law involving the rules of civil procedure do not apply to the Workers’ Compensation Commission and the Form 21 could not have constituted a motion to dismiss because regulation 67-215d specifically states that no such motion exist in South Carolina Workers’ Compensation practice.

Nonetheless, the Court of Appeals determined that under the rules of Civil Procedure, which do not apply to Workers’ Compensation practice, nonetheless, the Court of Appeals found that the Form 21 did constitute a motion to dismiss.

ARGUMENT

1. Did the Court of Appeals err in determining the matter before them was a motion to dismiss?

Petitioners 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). Levi argued that her appeal from the Single Commissioner to the Full Commission was an appeal of a final order and was not directly appealable based on the Rules of Civil Procedure. The Court of Appeals has followed this erroneous line of thought in the Opinion. There are two main reasons the argument of Levi and the Opinion of the Court of Appeals are erroneous.

While the case heard by the Single Commissioner was termed a “Motion to Dismiss” it was appended to the Form 21/Request for Hearing to stop payment of

temporary total disability compensation. The Workers Compensation Commission can only hear a case filed by a defendant on a Form 21 and cannot hear a Motion to Dismiss. In fact, in Workers' Compensation cases there is no such thing as a Motion to Dismiss as found in Circuit Court.

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 because in Workers' Compensation Practice there is no such thing as a motion to dismiss.

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.

2. Did the Court of Appeals err in citing Circuit Court precedent in a Workers' Compensation matter?

The Court of Appeals misapprehended and used interchangeably the law as it relates to Workers' Compensation practice and procedure with the law as it relates to Circuit Court practice and Civil Procedure. The Commission, however, is a complete statutory creation in total derogation of the Common Law. Therefore, both the Rules of Civil Procedure and the case law regarding Circuit Court procedure and practice 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 Workers' Compensation Act (Title 42 of the South Carolina Code of Laws, Ann.) 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 at all. §42-3-30;§42-3-160. As such, all of the case law cited by the Court of Appeals in its opinion as it relates to motions of dismissal in Circuit Court is irrelevant to the issue before this Court. Rather, the Court of Appeals should have confined its determination strictly to 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 was 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. Yet, the Court of Appeals violated established case and statutory law by determining the order of the Single was an Order of the "Commission".

While the Court of Appeals correctly noted the appeals procedures to the Full Commission are governed by §42-17-50, §42-17-50 specifically states that an order of the Single Commissioner becomes the law of the case only if not reviewed in due time, by the Full Commission; and if reviewed a determination of the "Commission" under

§42-17-50 becomes conclusive and binding on all parties. In other words, the acts of the Single Commissioner are always subject to review and do not become a final order until such time as the Full Commissioner has acted upon them. The Court of Appeals has cited case law in another forum, i.e. Circuit Court, without looking at or citing the law as it applies to the Commission.

3. Did the Court of Appeals err in determining the case in chief was an interlocutory appeal?

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 Court of Appeals or Supreme Court decisions which deal with an appeal from the Single Commissioner to the Full Commission. The order of the Single Commissioner becomes the law of the case only 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 in all cases and do not become the law of the case or binding on any party until such time as the Full Commission has acted upon them. Further, under Title 42 only the Full Commission can determine if any appeal from the Single Commissioner to the Full Commission is interlocutory (§42-3-180). The determination of the appellate Courts is limited to whether the appeal from the Full Commission to the Court of Appeals is interlocutory. Also, as noted in our Reply Brief, when the matter came before the Full Commission, Levi did not raise the issue of an interlocutory appeal. While she may not have had to do so under Rules and Case law

which do not apply to Commission practice, the Rules of Civil Procedure, she was obliged to do so before the Commission. *Creech v. Ducane Co.*, 320 SC 559, 467 SE2nd 114 (Ct.App. 1995).

Since the case law regarding interlocutory appeals, deals with appeals from the Full Commission only, as noted above, there is no determination for an Appellant Court to review until the Full Commission has made its determination concerning an order of the Single Commissioner. As such, there are no reported appellate court decisions which petitioners 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 under the current statute. 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 there is no order of the Commission until an act or order of the Single Commissioner 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 because under Title 42 there is nothing for an

appellate Court to review until the Full Commission has acted . *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 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.

Petitioner 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 of Appeals is limited to whether the order of the Full Commission was directly appealable by him as a final judgment, which it clearly was.

4. Did the Court of Appeals err in failing to address the Commission's determination that it lacks subject matter jurisdiction?

The 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 black letter law the petitioners, once again, raised specifically before the Court of Appeals the issue, unresolved by their opinion, concerning whether the South Carolina Workers' Compensation Commission should receive a remand of a case that it has already determined it does not have subject matter jurisdiction over. It is noted that Levi did not contest the lack of subject matter jurisdiction, nor did the Court of Appeals rule upon the same, even though raised by respondents at every level.

5. Did the Court of Appeals err in determining that the original order of the Workers' Compensation Commission did not affect a substantial right of the defendants?

Even if Circuit Court law applied to this matter the order of the Single Commissioner was still directly appealable. As noted above the Court of Appeals misapprehended the procedural effects of this case and how it came to a hearing in the first instance and how the appeals process to the Full Commission is different from what happens in Circuit Court.

However, that aside, the Petitioners specifically raised at oral argument before the Court of Appeals and in the petition for re-hearing that even had the rules and case law in Circuit Court applied, which they manifestly do not, nonetheless a substantial right of the petitioners was affected by the order of the Single Commissioner. In his order, the Single Commissioner ruled the defendants/petitioners lien under §42-1-560 was limited to reimbursement for the treatment of medical cost only. (ROA p. 5). This in direct violation of the statute which gives the defendants/petitioners 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 petitioners in our brief to the Court of Appeals, the amount of compensation potentially payable to appellant in this matter is substantial but was specifically excluded by the order of the Single Commissioner from lien determination—a potential loss 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 un-appealed, the law of the case would have been that the respondents could only receive medical benefit reimbursement and not compensation reimbursement in direct violation of the lien statute.

6. Did the Court of Appeals err in violating SCACR 268(2)?

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). The Court of Appeals cited an unpublished North Carolina case in direct contravention of the Rule. Petitioners know of no other remedy for such a breach than complete vacating of the original opinion and re-argument before another appellate panel.

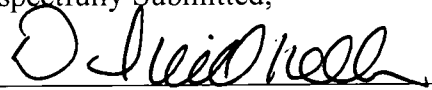
IT IS THEREFORE RESPECTFULLY SUBMITTED that the determination of the Court of Appeals be vacated and reversed, that Opinion No. 5243 of June 30, 2014 be withdrawn and that this Court grant the petition for a Writ of Certiorari and (1) make a determination that a remand to the Full Commission is legally pointless, and in contravention of Judicial Economy, regardless of any other errors made by the Court of Appeals, because the South Carolina Workers' Compensation Commission lacks subject matter jurisdiction of the claim and/or (2) re-determine the case without reference to South Carolina Circuit Court rules and case law but based on established case law relating to orders of the Full Workers' Compensation Commission, and/or (3) that the matter be completely vacated and the matter be argued before this Court or be remanded to the Court of Appeals with instructions for re-argument before a neutral panel based on as clear motion of Appellate Court Rule 268(2).

CONCLUSION

For reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

September 24, 2014

Respectfully Submitted,



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In The Supreme Court

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CERTIFICATE OF SERVICE

I, Caroline Anders, say that I am the legal assistant for David H. Keller, attorney for Petitioners Northern Anderson County EMS and Berkshire Hathaway Homestate Insurance Company with CONSTANGY, BROOKS & SMITH, LLP in Greenville, South Carolina; and on the 24th day of September, 2014, I mailed in a sealed envelope, postage prepaid, a copy of the Petition for a Writ of Certiorari, along with a certificate of service on opposing counsel and a certificate of counsel to the following person(s) at the following address:

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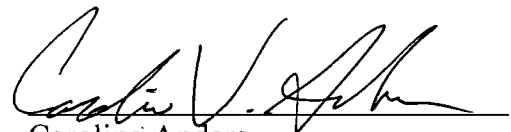
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