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THE STATE OF SOUTH CAROLINA
In the Supreme Court

S.C. Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION
COMMISSION

Appellate Panel

Appellate Case No. 2013-002611

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

v.

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

and

The S.C. Uninsured Employers Fund.....Respondent

BRIEF OF PETITIONER

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STATEMENT OF ISSUES ON APPEAL

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 Form 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.

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 an 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.

Petitioner timely filed his Petition for Certiorari. The Petition was granted on January 16, 2015.

STATEMENT OF FACTS

The facts, as summarized and found by the Commission (R. pp. 12-17), are that on or about February 25, 2009, while engaged in cleaning up his employer's shop, Hartzell was moving tires, rims and a heavy frame machine consisting of steel posts and chains weighing approximately 200-300 pounds. In order to move the machine it must be tilted back and set on wheels in the manner of tilting a hand truck. Hartzell testified that after moving the frame machine he began having pain in his lower back which then got progressively worse. The following day he reported this to shop owner Mike Stallings. Mr. Stallings suggested that he go to the emergency room if he was having problems (R. p. 43, line 4 -p. 45, line 12).

Although Hartzell was unsure of the exact date of injury, he testified that it was at the end of February 2009 and fixed the date because he only worked for Palmetto another couple of weeks.

Hartzell sought chiropractic treatment at his own expense with Dr. Austin Murray, but eventually discontinued treatment with Dr. Murray for financial reasons (R. p. 52, line 15 - p. 53, line 1).

On Dr. Murray's intake form, Hartzell indicated the onset of his problem was "February 30th, 2009". The Commission found this to be an obvious error but generally

corroborative of the approximate date of injury determined by Hartzell as February 25, 2009 (R. p. 174).

The Commission found that Mr. Stallings acknowledged that he could not testify with certainty that Hartzell had not reported the injury, only that “It does not ring a bell” (R. p. 117, line 20 - p. 118, line 18).

The Commission found the Hartzell’s testimony to be more credible than Mr. Stallings, on the issues of the fact of injury and its reporting (R. p. 14).

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!” (R. 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 404 S.C. 79, 744 S.E. 2nd 552, 559.

This case fits squarely within the Bone precedent. As in Bone, Hartzell 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.

This case is similar to Ex parte: South Carolina Property and Casualty Insurance Guaranty Association v. Quality HR Services, Inc., Opinion number 5290 (S.C. Ct. App

Filed January 28, 2015), in which the Court of Appeals was presented with an appeal where the Worker's Compensation Commission held the carrier liable for benefits in ten (10) consolidated cases but had never determined whether any of the ten (10) claimants were actually entitled to benefits. In that case, as here "...the Commission ruled only on the coverage issue and did not decide the individual claimant's entitlement to benefits..." (Opinion p. 4). Following Bone, the Court of Appeals determined that the order was not a final decision of the commission under S.C. Code Ann. Section 1-23-380, vacated a circuit court order and remanded the matter to the Worker's Compensation Commission.

This Court reaffirmed Bone in Price v. Peachtree Electrical Services, Inc., 405 S.C. 455, 748 S.E. 2nd 229 (2013) holding "an agency decision that does not decide the merits of a contested case is not a final agency decision subject to judicial review." Id. at 405 S.C. 457, 748 S.E. 2nd 230.

Subsequent to Bone, the statutory procedure has changed. Appeal from the Worker's Compensation Appellate Panel is now direct 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 the employer has an adequate remedy since 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.

In Levi v. Northern Anderson County EMS, 409 S.C. 374, 762 S.E. 2nd 44 (Ct. App. 2014), the Court of Appeals considered a case subsequent to the statutory change which eliminated the appeal to the circuit court. The Court of Appeals followed Bone, observing that there is no change in result in cases which arose after the statutory change:

“Our Supreme Court has made clear in recent years with Bone that the circuit court (under the former statute), this court, and the Supreme Court cannot hear appeals from the appellate panel if it does not constitute a final decision.” Id. at 409 S.C. 385, 762 S.E. 2nd 50.

The Court of Appeals reversed the Appellate Panel’s order because the order from the single commissioner was not immediately appealable to the Appellate Panel. Id. at 409 S.C. 385, 762 S.E. 2nd 50.

Following the Court of Appeals’ logic in Levi, and since the single commissioner’s order in this case was not a final award, the appeal to the Appellate Panel was also premature.

The Court of Appeals applied the same principal in another “direct appeal” case in Rose v. JJS Trucking, LLC, Opinion number 5291 (S.C. Ct. App. Filed January 28, 2015).

Bone was decided by the Supreme Court after briefing in the Court of Appeals 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 Court of Appeals again addressed this issue in Levi, Supra, stating:

The right to appeal is a jurisdictional matter and, even if the parties do not raise the issue of appealability, we must dismiss the appeal on our own motion if we conclude we do not have jurisdiction.” Levi, Supra at 409 S.C. 379, 762 S.E. 2nd 47.

The appropriate remedy is an order vacating the decisions of the Court of Appeals and the Appellate Panel and remanding to the Worker’s Compensation Commission for further proceedings consistent with the single commissioner order.

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.

Should the Court decide that the single commissioner’s order was not an appealable final order, this question is moot.

The Court of Appeals held that the Appellate Panel’s determination that Hartzell 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 accompanying 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 349 S.C.457, 562 S.E. 2nd 682.

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

As to a non-jurisdictional factual issue, the Worker’s Compensation Commission’s decision must be affirmed if the factual findings are supported by substantial evidence in the record. Hill v. Eagle Motor Lines, 373 S.C. 422, 645 S.E. 2nd 424 (2007). This court held:

The Commission’s decision must be affirmed if the factual findings are supported by substantial evidence in the record. (Citation omitted). Substantial evidence is that evidence which, in considering the record as a whole would allow reasonable minds to reach the conclusion the Commission reached. (Citation Omitted). The possibility of drawing two inconsistent conclusions from the evidence does not prevent the Commission’s finding from being supported by substantial evidence. Id. at 373 S.C. 436, 645 S.E. 2nd 431.

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.” (R. 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. (R. 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. (R. p. 65, lines 16-22).

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

Even if Hartzell’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.” (R. p. 64, lines 17-21).

Mike Stallings testified that the shop was “...a close group, your friends and family...” (R. p. 112, line 15-17) and that he purchased breakfast and lunch for “the guys” every day. (R. p. 113, lines 10-12). Stallings also admitted that he could not say that the conversation with Hartzell about his injury had not occurred, only that “It doesn’t ring a bell.” (R. p. 117, line 20 - p. 118, line 18).

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.” Etheredge, Supra at 349 S.C. at 457, 562 S.E. 2nd at 682.


CONCLUSION

The Worker’s Compensation Commission’s single commissioner’s order was not appealable and all subsequent proceedings before the Appellate Panel, and Court of Appeals should be vacated and the case remanded to the Worker’s Compensation Commission for proceedings consistent with the single commissioner’s order.

In the alternative, the Court of Appeals’ opinion should be reversed as there was substantial evidence in the record sufficient to affirm the Worker’s Compensation Commission’s order.

Respectfully submitted,

February 11, 2015



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THE STATE OF SOUTH CAROLINA

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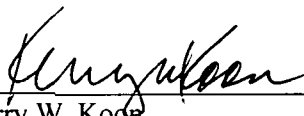
PROOF OF SERVICE

I certify that I have served Brief of Petitioner upon Respondents, by depositing a copy of same in the United States mail, postage prepaid, on February _____, 2015, 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:

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VIA FEDEX # 8043 3720 1428

Daniel E. Shearouse, Clerk of Court
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RE: Richard A. Hartzell v. Palmetto Collision, LLC
Appellate Case #: 2013-002611

Dear Mister Clerk,

Please find herewith the original and 14 copies of the petitioners brief in the above referenced matter together with 13 additional copies of the Record on Appeal and Appendix. Also enclosed is a Proof of Service of the brief on opposing counsel.

With kindest regards, I am

Very truly yours,



Kerry W. Koon

KWK:mm
Enclosures

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