

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 0822640

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MAR 02 2015
SC Court of Appeals

Thomas Contreras, Employee/Claimant, Appellant,

v.

St. John's Fire District, Employer, and State Accident Fund, Carrier, Respondents.

APPELLANT'S RETURN TO MOTION TO DISMISS

The Appellate Panel's Decision and Order is immediately appealable because it finally determined the issue of whether Appellant can recover for general disability under § 42-9-20.

Respondents contend any order remanding a case for additional proceedings is not directly appealable. Appellant respectfully disagrees. In reversing the Single Commissioner, the Appellate Panel foreclosed any possibility that Contreras could recover for loss of earnings capacity under S.C. Code Ann. § 42-9-20 (2007). An order finally determining a part of the case is immediately appealable – indeed must be appealed else the ruling become the law of the case. See Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993)(holding failure to appeal commissioner's order requiring claimant to elect remedy between election of remedy § 42-9-20 and § 42-9-30 was law of the case). Moreover, the Appellate Panel is the final trier of fact. If the Panel was correct in holding the award must be made under § 42-9-30 on the existing record, then it must make that award itself – not remand back to a single commissioner.

Judicial review of the Commission's decisions is governed by the Administrative Procedures

Act (APA). Pursuant to the APA, “[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” S.C. Code Ann. § 1-23-380 (Supp. 2013). “An agency decision which does not decide the merits of a contested case is not a final agency decision subject to judicial review.” Bone v. U.S. Food Serv., 404 S.C. 67, 73-74, 744 S.E.2d 552, 556 (2013).

In the instant case, the Appellate Panel reversed an award for loss of earnings capacity made under S.C. Code Ann. 42-9-20 (2007). This decision decided the merits of the lost earning claim with finality – against Appellant. Moreover, even though the Appellate Panel remanded, the remand is limited to an award under § 42-9-30. It is therefore, immediately appealable because “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.”

Bone is the key case establishing the basic principle underlying appealability from the Commission and other administrative agencies. It should be pointed out that workers’ compensation cases are inherently different than other administrative decisions. A decision granting or denying a zoning permit, a liquor license, a power rate increase, a certificate of use for a medical device or even unemployment compensation is a one time decision deciding the single issue in a case. In workers’ compensation, there can be multiple hearings over varying issues such as jurisdiction, compensability, temporary compensation, medical treatment and permanent disability. Even a decision awarding permanent disability does not end the case, for it may begin again on a change of condition or involve future disputes over medical treatment. The significance here is that final orders on these multitudinous issues are still being regularly decided by the appellate courts – even post Bone. See, e.g., Shatto v. Mcleod Reg’l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013)(order determining employment status was an appealable final order).

Appellant is aware of this Court’s recent decisions in Rose v. JJS Trucking, LLC, Op. No.

5291 (S.C.Ct.App. Filed January 28, 2015)(Shearouse Adv.Sh. No. 4 at 91) and Alvarez v. Quality HR Servs., Inc., Op. No. 5291 (S.C.Ct.App. Filed January 28, 2015)(Shearouse Adv.Sh. No. 4 at 85). Both cases are distinguishable in that neither dealt with the merits of the case.

In Rose, the upstream employer sought to transfer liability to the South Carolina Uninsured Employer's Fund while the underlying claim was still ongoing. The commission refused to order the transfer, finding the issue of transfer was "not ripe for adjudication at this time." The employer argued the order was immediately appealable because a later appeal would deprive them of an adequate remedy. The Court disagreed, noting "Appellants make no specific argument as to how the commission's refusal to address transfer at this time affects Appellants in any way other than to delay the payment of money."

The Court dismissed the appeal, holding: "Because the commission has not yet ruled on the merits of Samuel Rose's entire claim for benefits, however, the order is not a final decision, and thus not immediately appealable." Id. Rose differs from the instant case in that the Commission held the issue at bar was not ripe. As the Commission never addressed the merits, there was no final order from which to appeal.

In Alvarez, putative employers sought to appeal jurisdiction before the merits of the individual claims had been adjudicated. The Court vacated the decision below, holding:

In this case, the commission ruled only on the coverage issue and did not decide the individual claimants' entitlement to benefits. Because the commission has yet to determine the substantive rights of the claimants, the commission's order is not a final decision.

Alvarez v. Quality HR Servs., Inc., Op. No. 5291 (S.C.Ct.App. Filed January 28, 2015)(Shearouse Adv.Sh. No. 4 at 85).

Alvarez would have been appealable by the employers had the Commission ruled that the individual claimants were entitled to temporary compensation and medical treatment – even though permanent disability could not have yet been decided (since without provision of treatment, none of

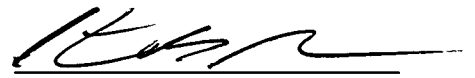
the claimants could have been placed at MMI). Cf. Levi v. N. Anderson Cnty. EMS, 409 S.C. 374, 762 S.E.2d 44 (Ct. App. 2014)(dismissing appeal because single commissioner's order was a denial of a motion to dismiss, thus not a final order reaching the merits of the claim).

In the instant case, the orders of the Single Commissioner and Appellate Panel directly addressed the merits. As to the Single Commissioner's award under § 42-9-20, that award was denied with finality by the Appellate Panel. The decision deprived Contreras of a remedy. It is, therefore, immediately appealable. The Court should deny Respondents' Motion to Dismiss.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion to Dismiss, order final briefing and set the case for oral argument on the merits.

Respectfully Submitted,



Gary Christmas
HOWELL & CHRISTMAS, LLC
P.O. Box 1896
Mt. Pleasant, SC 29465
(843) 849-2800

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net

Attorneys for Appellant

February 27, 2015
Columbia, South Carolina



STEPHEN B SAMUELS
ATTORNEY AT LAW

February 27, 2015

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

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RE: Thomas Contreras v. St. Johns Fire Department
Appellate Case No.: 2014-001217

Dear Ms. Kitchings:

Enclosed for filing are the original and two (2) copies of the **Appellant's Initial Reply Brief**, the original and seven (7) copies of the **Appellant's Return to Respondents' Motion to Dismiss** and a **Proof of Service**, in the above case.

Please have your staff clock in the Appellant's Initial Reply Brief, Return to Respondents' Motion to Dismiss, and Proof of Service and return a clocked copy in the enclosed self addressed stamped envelope.

Thank you for your assistance. Please contact us with any questions or if further information is needed from our office.

Sincerely,

Katherine R. Carter
Paralegal for Stephen B. Samuels

/krc
Enclosure(s) as stated

cc w/encl.: Margaret Urbanic, Esq.
Ellen Goodwin, Esq.
Gary Christmas, Esq.

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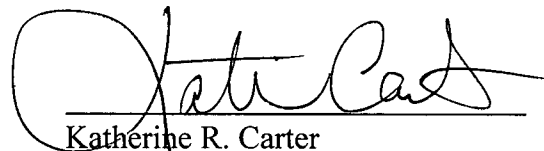
St. Johns Fire Department, Employer, and
State Accident Fund, Carrier, Respondents.

PROOF OF SERVICE

I certify that I, Katherine Carter, am a paralegal to Stephen B. Samuels and I have caused the **Appellant's Initial Reply Brief and Return to Respondents' Motion to Dismiss** to be served on the parties below, by placing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below, addressed as follows:

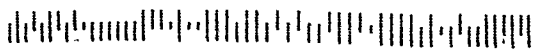
Margaret M. Urbanic
Clawson and Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492-8144

Ellen Goodwin
State Accident Fund
PO Box 102100
Columbia, SC 29221

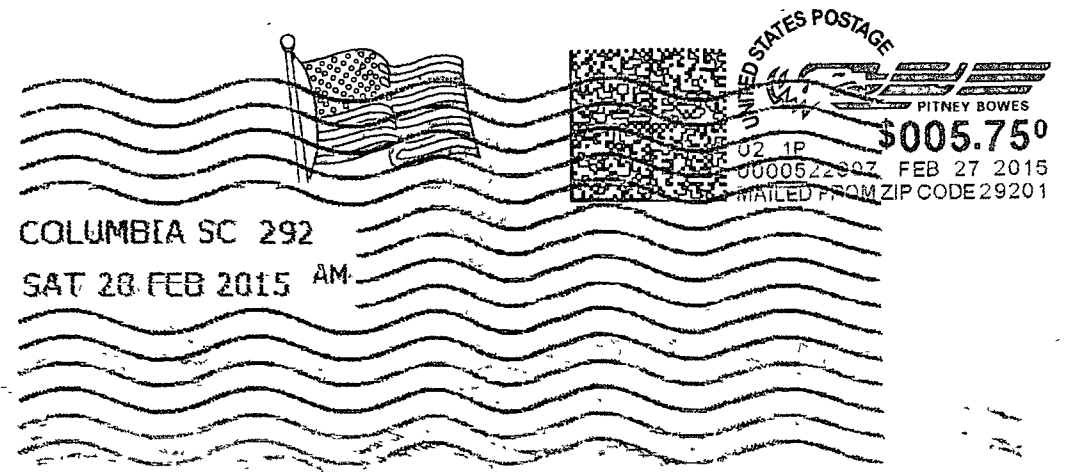


Katherine R. Carter
Samuels Law Firm, LLC
1320 Richland Street
Columbia, SC 29250
(803) 779-4000
Katherine@samuelslawfirm.net

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1320 RICHLAND STREET
COLUMBIA SC 29201

The Honorable Jenny Abbott Kitchings
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