

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 12 2015
SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1217409

Reginald Warner, Employee, Appellant,

v.

Gallman Personnel Services, Inc., Employer, and Zurich American Insurance Company, c/o
Gallagher Bassett Services, Inc., Carrier, Respondents.

RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL

The issue presented by Respondents' Motion to Dismiss is whether a party to a workers' compensation case can appeal an order granting a new trial *de novo*. Traditionally, orders granting new trials have always been immediately appealable. See S.C. Code Ann. 14-3-330 (2)(1991). This rule applies to orders granting new trials in workers' compensation cases. See Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011)(holding Court of Appeals erred in granting new trial based on erroneous finding that the Commission abused its discretion in denying employer's motions for a continuance or to keep the record open for the depositions of two witnesses). Cf. Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012)(reversing appellate panel and ordering trial *de novo* because "rehearing procedure violated Appellant's right to procedural due process"). The question is whether the Supreme Court's Bone decision changes that fundamental rule. See .

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

The Supreme Court never intended Bone to create an inviolable bright line rule prohibiting every appellate decision ordering a remand from further appeal. Bone is designed to prohibit further appeal when there are other issues left undecided by the administrative agency. The Bone case itself was remanded because “Neither the Commission nor the circuit court addressed the severity of Bone’s injury, whether or not she had reached MMI, or if she should be provided medical treatment. No award of any kind was made.” Id

In the instant case, that situation does not exist. The Single Commissioner’s Decision and Order made specific and detailed findings regarding the body parts injured and medical treatment to be provided. It was, by any standard, an award of benefits and thus a final order.

The issue here – which is the fundamental issue in this appeal – is whether the Appellate Panel erred in vacating the Single Commissioner and ordering a trial *de novo*. More specifically, whether the Appellate Panel properly found the Single Commissioner abused his discretion in refusing to grant a continuance and “exceeding the scope” of the issues raised by the parties.

This is plainly an appealable issue. If it were not, then this Court could never have heard the employer’s appeal in Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E.2d 9 (Ct. App. 2012)(reversing appellate panel and ordering trial *de novo* because “rehearing procedure violated Appellant’s right to procedural due process”). This is particularly significant here because Adams is the case on which Respondents relied on before the Appellate Panel.

Numerous other cases have allowed appeals of procedural issues in the Commission’s

adjudication of cases. See, eg. Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011)(holding Court of Appeals erred in granting new trial based on erroneous finding that the Commission abused its discretion in denying employer's motions for a continuance or to keep the record open for the depositions of two witnesses); Gurley v. Mills Mill, 225 S.C. 46, 80 S.E.2d 745 (1954)("If the commission has no authority to pass such rules and regulate procedure and determine questions of continuance, it would be powerless to administer the Workmen's Compensation Law. Of necessity it must be left to the commission to determine whether or not a case shall proceed to trial or be continued. The granting or refusal of a continuance rests in the sound discretion of the trial court and such discretion when exercised will not be interfered with unless abuse thereof is shown."); Morgan v. JPS Automotives, 467 S.E.2d 457, 321 S.C. 201 (Ct. App. 1996)(commission required to leave record open to admit critical evidence of disability where party makes timely motion under the regulations and the evidence is already in existence but not available for the hearing); Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct.App.1985)(Hearing Commissioner enjoys considerable latitude and discretion in deciding whether to allow a party to reopen his case and this decision will not be disturbed unless the opposing party was prejudiced thereby); Holcombe v. Dan River Mills/Woodside Division, 286 S.C. 223, 333 S.E.2d 338 (Ct. App. 1985)(no abuse of discretion where Commissioner allowed employer to depose several doctors but refused to allow deposition of vocational expert).

None of these opinions could exist if procedural irregularities were not appealable. The denial of a continuance may be interlocutory and not immediately appealable, but once the final order on the merits has been issued – as it was here – then the denial of the continuance may be appealed, as may an order granting a new trial based on denial of the continuance. See Trotter v. Trane Coil

Facility, 393 S.C. 637; 714 S.E 2d 289 (2011)(holding Court of Appeals erred in granting new trial based on erroneous finding that the Commission abused its discretion in denying employer’s motions for a continuance or to keep the record open for the depositions of two witnesses).

The essential point is that orders granting a new trial have always been appealable. This is certainly the case in appeals from trial courts. The fundamental right to appeal the grant of a new trial is so critical to procedural due process that it is specifically codified in the statute governing appeals from the courts. S.C. Code Ann. 14-3-330 (2)(1991)(Explicitly allowing appealability of “An order affecting a substantial right made in an action when such order . . . grants or refuses a new trial . . .”).

Although appeals from the Workers’ Compensation Commission are governed under the APA rather than Section 14-3-330, there is nothing in the APA prohibiting an appeal from an Appellate Panel order vacating a final decision of a Single Commissioner for purported procedural irregularities. Indeed, the APA specifically contemplates appealing an order granting a trial *de novo*:

This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or **trial de novo** provided by law. 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. § 1-23-380 (supp. 2014).

The APA even provides a specific remedy for judicial review of procedural irregularities “*not shown* in the record.” S.C. Code Ann. § 1-23-380 (4) (supp. 2014). If an appellate court can go outside the record to review “alleged irregularities in procedure” before an agency, then surely it can review procedural irregularities shown in the record. See Michau v. Georgetown Cnty., 396 S.C. 589, 723 S.E.2d 805 (2012)(“The statutory language makes no such distinction [between claimant and employer], so we decline to adopt this forced construction.”).

In the instant case, the Appellate Panel erred in holding the Single Commissioner abused his discretion and in granting a trial *de novo*. This procedural irregularity on the part of the Appellate Panel is immediately appealable. Appellant was awarded medical treatment for specific injuries in a final order issued by the Single Commissioner. The decision of the Appellate Panel to vacate that order and arbitrarily give Respondents a “second bite of the appeal” is and must be appealable as an essential part of due process. The motion to dismiss should be denied.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied. Respondents should be directed to file and serve their Brief on the merits



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March 11, 2015

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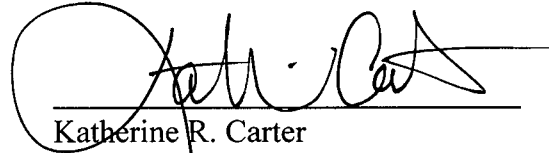
Gallman Personnel Services, Inc. and Zurich American Insurance Company, c/o
Gallagher Bassett Services, Inc., Respondents.

PROOF OF SERVICE

I certify that I, Katherine Carter, am a paralegal to Stephen B. Samuels and I have caused the **Appellant's Return to Respondents' Motion to Dismiss Appeal** 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:

C. Barrett Burley, Esquire
Attorney for Respondents
McAngus, Goudelock & Courie, LLC
Post Office Box 12519
Columbia, South Carolina 29211

The Honorable Amy Bracy
Judicial Director
S.C. Workers' Compensation Commission
Post Office Box 1715
Columbia, South Carolina 29202-1715

A handwritten signature in black ink, appearing to read "Katherine R. Carter", is written over a horizontal line. The signature is fluid and cursive.

Katherine R. Carter
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Columbia, South Carolina
March 11, 2015



STEPHEN B SAMUELS
ATTORNEY AT LAW

March 11, 2015

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

RE: Reginald Warner v. Gallman Personnel Services, Inc., et al
Appellate Case No.: 2014-002279

Dear Ms. Kitchings:

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

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

Sincerely,

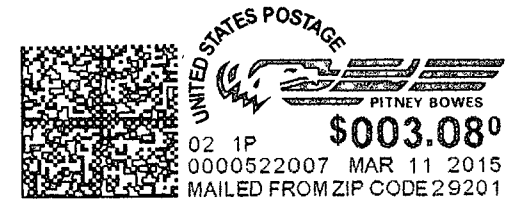
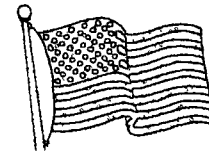
A handwritten signature in black ink, appearing to read "Katherine R. Carter".

Katherine R. Carter
Paralegal for Stephen B. Samuels

SBS/krc
Enclosures

cc w/encl.: C. Barrett Burley, Esquire
Amy Bracy, SCWCC

WE WORK FOR THE PEOPLE WHO WORK.



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