

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION  
COMMISSIONER GENE McCASKILL  
COMMISSIONER SUSAN S. BARDEN  
COMMISSIONER AISHA TAYLOR

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**RECEIVED**  
MAR 12 2015  
**SC Court of Appeals**

WCC File No. 1202332  
Appellate Case No. 2014-002289

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Elliott Barber, Employee, .....Appellant,

v.

Candies Construction Co., LLC, Employer, and Granite State  
Insurance Co., Carrier, and Custom Coated Components, LLC,  
Uninsured Employer, and the South Carolina Uninsured  
Employers' Fund, ..... Respondents.

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**INITIAL BRIEF OF RESPONDENTS' CANDIES CONSTRUCTION  
CO., LLC & GRANITE STATE INSURANCE CO.**

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CHRISTIAN STEGMAIER  
cstegmaier@collinsandlacy.com  
AMY L. NEUSCHAFER  
aneuschafer@collinsandlacy.com  
ASHLEY R. KIRKHAM  
akirkham@collinsandlacy.com  
Collins & Lacy, P.C.

1330 Lady Street, Sixth Floor (29201)  
Post Office Box 12487  
Columbia, SC 29211  
(803) 256-2660  
Attorneys for Respondents Candies  
Construction Co. LLC & Granite State  
Insurance Co.

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## STATEMENT OF ISSUES ON APPEAL

- I. Is the Order of the South Carolina Workers' Compensation Appellate Panel Immediately Appealable?
  
- II. Did the South Carolina Workers' Compensation Commission Appellate Panel Properly Issue a Non-Final Order Without Specifying Support for its Decision?

## STATEMENT OF THE CASE

Appellant Elliott Barber (“Barber”) alleges injuries to his neck, left upper extremity, and left shoulder in a compensable accident occurring on January 4, 2012. Barber filed a Form 50 Request for Hearing serving three separate employers: Custom Coated Components, Candies Construction Co., LLC (“Candies Construction”), and the South Carolina Uninsured Employers’ Fund (“SCUEF”).

A hearing was held before single Commissioner Avery Wilkerson on November 11, 2013 to determine whether Barber was an employee of Custom Coated Components or Candies Construction, or neither, at the time of the accident, and if so, whether Barber was entitled to benefits pursuant to the South Carolina Workers’ Compensation Act (the “Act”).

Commissioner Wilkerson issued an Order on February 28, 2014 finding Barber was an employee of Candies Construction at the time of the accident and, therefore, Candies Construction was responsible for temporary disability benefits and medical treatment pursuant to the Act. (Single Commissioner Order 02/28/14).

Candies Construction appealed the Order to the Appellate Panel of the Full Commission. After oral argument, the Appellate Panel issued an Order

on October 2, 2014 vacating the Single Commissioner's Decision and Order and remanding the claim to the jurisdictional Commissioner for a hearing de novo. (Appellate Panel Order 10/2/14).

A de novo hearing was scheduled before jurisdictional Commissioner Campbell for December 2, 2014. Barber timely filed a Notice of Appeal to this Court, and the hearing was cancelled pending this appeal.

## STATEMENT OF THE FACTS

Barber appeared and testified at the hearing before the single Commissioner. Barber testified he was a full time employee of Candies Construction at the time of the accident. (Hrg. Tr. p. 32: 24-25). Barber's job duties for Candies Construction included remodeling houses, pouring concrete, and digging foundations. (Hrg. Tr. p. 32: 19-23). Prior to working for Candies Construction, Barber worked at Custom Coated Components. Ernest Candies owned both Candies Construction and Custom Coated Components. (Hrg. Tr. pp. 28: 14-32:10). In November 2011, Mr. Candies asked Barber to help him remove machinery located in Custom Coated Components' warehouses. (Hrg. Tr. p.35: 10-24). Barber testified the machines were being moved because Custom Coated Components was moving, and the money from the sale of scrap metal from the machinery was needed to make payroll for employees of Candies Construction. (Hrg. Tr. p. 35: 17-20; 53: 11-14). While moving the machinery from the Custom Coated Components' Warehouses, Barber was still on the clock as a Candies Construction employee and paid the same amount per hour. (Hrg. Tr. p. 61: 18-24). However, Barber admitted it was not part of his job with Candies

Construction to move machinery at Custom Coated Components. (Hrg. Tr. p. 61: 6-7).

On January 4, 2012, after working at Candies Construction for the day, Barber, Mr. Candies, and Gerald (last name unknown) went to Custom Coated Components' warehouse and began removing machinery to sell for scrap metal. (Hrg. Tr. p. 37: 14-22). A machine weighing approximately 250 pounds fell on Barber's left shoulder. (Hrg. Tr. p. 38: 1-10).

At the hearing before the single Commissioner, Mr. Candies confirmed Barber worked for Candies Construction on a full time basis at the time of the accident. (Hrg. Tr. p. 97: 8-10). He further testified that in November 2011, Custom Coating Components was going through foreclosure of three warehouse facilities. (Hrg. Tr. p. 100: 10-20). The facilities, including exterior equipment and the building contents, had been vandalized and equipment was stolen. (Hrg. Tr. p. 100: 21-101: 13). Mr. Candies decided to remove the equipment to sell for scrap metal and to use the money for "weekend money." (Hrg. Tr. p. 103: 5- 25). Contrary to Barber's testimony, Mr. Candies confirmed the money from the sale of scrap metal was not put back into Custom Coating Components or used for payroll at Candies Construction. (Hrg. Tr. p. 103: 17-22). Furthermore, Mr. Candies testified

that Barber's payment for moving the machinery was not paid by Candies Construction. (Hrg. Tr. p. 105: 23-25). According to Mr. Candies, Barber was not acting as an employee of Candies Construction when he moved the machinery, but the work was only a side job. (Hrg. Tr. p. 104: 21-22; p. 105: 16-20).

On December 12, 2013, the parties received directives from the single Commissioner requesting Barber's counsel draft an order finding Barber was an employee of Candies Construction at the time of the accident because a "nexus" existed. (Single Comm'r Directives). On December 31, 2013, counsel for Candies Construction requested the single Commissioner clarify what "nexus" existed. (12/31/13 email from Candies Construction's counsel). In his response, the single Commissioner stated that a "nexus" means a direct connection or involvement as to employment. The single Commissioner further stated Barber was an employee of Candies Construction at the time of the accident and an employer relationship exists. (1/13/14 email from SCWCC).

On January 17, 2014, Counsel for Barber sent all parties the proposed Order. That same day, counsel for Candies Construction requested Barber's counsel make changes to the proposed Order. Without sending a final copy of

the Order to all parties, Barber's counsel submitted a revised proposed Order to the single Commissioner on January 23, 2014. (1/24/14 email from Defendants). Counsel for Candies Construction requested he be permitted to submit an alternate proposed Order because Barber's counsel failed to make substantive proposed changes to the Order as requested by counsel for Candies Construction. (1/24/14 email from Defendants). The single Commissioner's office requested any proposed changes be in writing, so counsel for Candies Construction submitted proposed changes to Findings of Fact numbers 14-17 to the Commissioner's office. (1/24/14 email from Defendants).

On February 10, 2014, the single Commissioner's office requested a conference call with all parties be held the next day. (2/27/14 email from SCWCC). Counsel for Candies Construction responded he was not available at the time of the proposed conference call, and the Commissioner's office replied the call would probably be scheduled for the next week. (2/27/14 email from SCWCC).

On February 24, 2014, the parties asked the single Commissioner's office for an update on the conference call. (2/27/14 email from SCWCC). The single Commissioner's office responded the Order was being served

February 27, 2014 (without a conference call to discuss Counsel for Candies Construction's requested changes to the proposed Order). (2/27/14 email from SCWCC). When asked whether the single Commissioner no longer wanted or needed a conference call to discuss the requested changes, his office responded "I would assume so. He has signed it." (2/27/14 email from SCWCC).

The Order of the single Commissioner was issued February 28, 2014 and found there was a "nexus" between Barber's work moving machinery at Custom Coated Components and Barber's employment with Candies Construction because Barber was employed with Candies Construction at the time of the accident. The single commissioner further found that a nexus existed because Candies Construction benefitted from the work since Ernest Candies would use the money from the sale of scrap metal to pay the employees of Candies Construction. (Single Comm'r Order Findings of Fact Nos. 11-12, 15-16).

Candies Construction appealed to the Workers' Compensation, arguing the single Commissioner failed to make sufficient findings of fact in support of his decision as required by S.C. Code Ann. § 1-23-350. Specifically, Candies Construction argued that the Order did not contain sufficient factual

findings in support of the decision that Barber was an employee of Candies Construction at the time of the accident. Candies Construction further contended the single Commissioner's order failed to include adequate factual findings regarding the existence of a nexus between Candies Construction and Barber's work at Custom Coated Components. After oral argument, the Appellate Panel issued an Order vacating the single Commissioner's Order and remanding the case for a hearing de novo. (Appellate Panel Order 10/2/14). The Appellate Panel did not provide any findings in support of its decision.

This appeal follows.

## STANDARD OF REVIEW

The Administrative Procedures Act (“APA”) establishes the standard for judicial review of decisions of the Workers’ Compensation Commission. Bone v. U.S. Food Service, 404 S.C. 67, 73, 744 S.E.2d 552 (2013) (citing Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E.2d 615 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981); Eaddy v. Smurfit–Stone Container Corp., 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003)). Under 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....” Bone, 404 S.C. at 73-74, 744 S.E.2d at 556 (citing S.C. Code Ann. Section 1–23–380(A) (Supp. 2007)). “A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are ‘clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.’” Hargrove v. Titan Textile Co., 360 S.C. 276, 289-90 (Ct. App. 2004) (citing Burse v. S.C. Dep’t of Health and Env’tl. Control, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(A)(6)(e)(Supp. 2003)). Under the scope of review established in the APA, an appellate court may not substitute its judgment for that of the

Commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law. Id. at 290 (citing Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp. 2003)).

## LAW/ANALYSIS

### I. The Appellate Panel Order is Not Immediately Appealable

This claim is not ripe for appellate review because the Appellate Panel's Order is not a final judgment. Only final judgments of an administrative agency, including the South Carolina Workers' Compensation Commission, are subject to judicial review. Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552 (2013) (citing S.C. Code Ann. Section 1-23-380(A); S.C. Baptist Hosp. v. S.C. Dep't of Health & Env't'l Control, 291 S.C. 267, 270 (1987)). Since the Appellate Panel's Order simply remanded the claim back to a jurisdictional commissioner for a de novo hearing of whether Barber is entitled to benefits under the Act, no final judgment has been issued entitling Barber to appeal to this Court.

For claims under the APA, “[a]n aggrieved party may obtain a review of a final judgment of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases.” S.C. Code Ann. § 1-23-390 (emphasis added). The general appealability statute allowing an appeal from a decision involving the merits has no place in the APA, which created a

different appellate scheme and only allows appeals to this Court when a final judgment has been issued. Bone, 404 S.C. at 77, 744 S.E.2d at 558.

The Order of the Appellate Panel vacated the single Commissioner's Order and remanded the claim to a jurisdictional commissioner for a de novo hearing, where the issues to be decided will again include whether Barber suffered a compensable injury by accident within the course and scope of his employment with either Candies Construction or Custom Coated Components and, if so, whether Barber is entitled to benefits under the Act. Because the Appellate Panel Order did not "dispose[] of the whole subject matter of the action or terminate[] the particular proceeding or action[] leaving nothing to be done but to enforce by execution what has been determined," the Order is not subject to judicial review by this Court. Bone 404 S.C. at 75, 744 S.E.2d at 557 (citing Charlotte–Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env't'l Control, 387 S.C. 265, 267, 692 S.E.2d at 894 (2010); Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 21 S.E.2d 209 (1942)).

The instant claim is even farther from a final judgment than the Bone decision was when it was appealed. In Bone, the circuit court already had found the employee's claim compensable, thus triggering the employer to

provide benefits pursuant to the Act and binding the Commission to issue an Order pursuant to the circuit court's finding of compensability by the circuit court. In the case sub judice, the claim has been remanded for a de novo hearing and compensability remains undecided.

Accordingly, this appeal should be dismissed because Barber is not appealing from any final judgment of the Commission and thus the appeal is not ripe for review by this Court.

## II. The Appellate Panel Did Not Err in Issuing a Non-Final Order Without Specifying Support for its Decision

The Appellate Panel did not err in issuing an order without supporting findings of fact or conclusions of law. Because the Appellate Panel's Order was not a final decision, it was not required to set forth such support.

Pursuant to the APA, a "final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings." S.C. Code Ann. § 1-23-350 (emphasis added). As previously discussed, the Appellate Panel's vacation of the single Commissioner's Order and remand for a de novo hearing before a jurisdictional Commissioner was not a final decision because it did not

“dispose[] of the whole subject matter of the action or terminate[] the particular proceeding or action[] leaving nothing to be done but to enforce by execution what has been determined.” Bone, 404 S.C. at 75, 744 S.E.2d at 557 (citing Charlotte–Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env't'l Control, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010); Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 21 S.E.2d 209 (1942)).

When the Commission finds an employee is entitled to benefits under the Act, the APA mandates the Commission set forth facts in support of its findings. Such an order, when not appealed, becomes a final order requiring the employer to provide benefits pursuant to the Act, so the Commission must include the facts supporting those findings. Because the single Commissioner’s Order did not include any facts supporting the finding Barber was an employee of Candies Construction at the time of the accident, or any findings to support the nexus between Candies Construction and Custom Coated Components, Candies Construction appealed the single Commissioner’s Order to the Appellate Panel.

However, the Appellate Panel’s Order is not a final order and does not subject any party to any ruling under the Act. Rather, the Appellate Panel’s Order merely vacates the single Commissioner’s Order and remands the

claim for a de novo hearing before a jurisdictional Commissioner. Thus, the specific factual findings requirement imposed by §1-23-350 has not been triggered because there is no final order, and the Appellate Panel is not required to provide support for its findings.

In Hill v. Jones, 255 S.C. 219, 222, 178 S.E.2d 142, 143 (1970), the Commission's order did not state which facts supporting the finding that the employee suffered a compensable accident. The South Carolina Supreme Court held that, pursuant to Section 72-354 (now Section 1-23-350), findings of fact must be detailed to enable the appellate court to properly determine whether the findings are supported by the evidence and whether the law has been properly applied. Id. at 224, 178 S.E.2d at 144 (citing 58 Am. Jur. 878, § 472; Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E. 2d 288 (1962)). However, Hill and § 1-23-350 are inapposite to the instant case. Unlike in Hill, the Appellate Panel did not make a final decision which triggers the requirement to provide detailed findings to support the decision.

Requiring the Appellate Panel to include sufficient findings of fact supporting their decision is not proper in a de novo remand case because it subjects the jurisdictional Commissioner to opinions of other Commissioners on remand and does not effectively allow the jurisdictional Commissioner to

conduct a de novo hearing without the influences of the Appellate Panel's findings. If the Appellate Panel were to address the errors by including in their Order facts which do not support the single Commissioner's findings, the jurisdictional Commissioner may be tempted to follow the Appellate Panel's findings rather than conducting a true de novo review of the claim, which prejudices the remand hearing.

Furthermore, the purpose underlying the requirement of specific factual findings—the ability to review the decision on appeal—is not applicable in where a decision is not final. Accordingly, it is a waste of judicial resources to require the Appellate Panel to explain the reasoning behind a non-final decision. Because only final judgments of an administrative agency may be appealed, extending the requirement to provide sufficient factual findings for all decisions, rather than only final decisions, requires the court unnecessarily expend limited judicial resources.

Finally, the Appellate Panel correctly vacated the single Commissioner's Order because the Order found Barber was an employee of Candies Construction even though Barber: (1) was on the property of Custom Coated Components at the time of the accident; (2) was removing parts not owned by Candies Construction at the time of the accident; (3) the work was

outside the scope of Barber's employment with Candies Construction; and (4) the work did not benefit Candies Construction. The only findings in the Order that could be construed to substantiate the "nexus" between Barber and Candies Construction at the time Barber was moving machinery at the Custom Coated Components' warehouse was added by counsel for Barber when drafting the Order and not included in the single Commissioner's directives. Pursuant to S.C. Code § 1-23-350, the single Commissioner's Order (which would have required enforcement by execution if not appealed or followed), was required to state sufficient facts supporting the Commissioner's findings to enable a reviewing court to determine whether the findings were supported by the evidence and the law. The single Commissioner refused to render such support for his factual findings, and instead allowed Counsel for Barber to speculate as to the supporting facts in order for a final judgment to be prepared and executed when drafting the Order. Accordingly, the single Commissioner erred in not issuing detailed findings and the Appellate Panel was correct in vacating the Order and remanding the claim for a de novo hearing.

## CONCLUSION

This claim is not ripe for review by this Court because no final judgment has been issued by the Commission to entitle any party to appellate review pursuant to the Administrative Procedures Act. Further, since no final decision was rendered in the Appellate Panel's Order, the Commission was not required to substantiate their findings with facts. Accordingly, Respondent Candies Construction and its carrier, Granite State Insurance Company, respectfully request this case be remanded to the Commission for a de novo hearing before a jurisdictional Commissioner to determine whether Barber is entitled to benefits pursuant to the Act.

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Respectfully Submitted,  
COLLINS & LACY, P.C.

By: 

CHRISTIAN STEGMAIER

[cstegmaier@collinsandlacy.com](mailto:cstegmaier@collinsandlacy.com)

AMY L. NEUSCHAFER

[aneuschafer@collinsandlacy.com](mailto:aneuschafer@collinsandlacy.com)

ASHLEY R. KIRKHAM

[akirkham@collinsandlacy.com](mailto:akirkham@collinsandlacy.com)

1330 Lady Street, Sixth Floor (29201)

Post Office Box 12487

Columbia, SC 29211

(803) 256-2660 (voice)

(803) 771-4484 (facsimile)

ATTORNEYS FOR THE RESPONDENT,  
CANDIES CONSTRUCTION CO., LLC  
& CARRIER GRANITE STATE  
INSURANCE COMPANY

**INITIAL BRIEF OF RESPONDENTS**

Columbia, South Carolina  
March 12, 2015

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION  
COMMISSIONER GENE McCASKILL  
COMMISSIONER SUSAN S. BARDEN  
COMMISSIONER AISHA TAYLOR

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**PROOF OF SERVICE**

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Counsel for Respondents Candies Construction Co., LLC and Granite State Insurance Co. certifies that she has served the Initial Brief and Designation of Matter of Respondents' Candies Construction Co., LLC and Granite State Insurance Co. on all parties by depositing a copy of it in the

United States Mail, postage prepaid, on March 12, 2014, addressed to the following attorneys of record:

Ryan T. LeBlanc, Esquire  
Joye Law Firm, LLP  
Post Office Box 62888  
North Charleston, SC 29419-2888

Lisa C. Glover, Esquire  
S.C. Uninsured Employers' Fund  
PO Box 210039  
Columbia, SC 29221

Respectfully Submitted,  
COLLINS & LACY, P.C.

By: 

CHRISTIAN STEGMAIER

[cstegmaier@collinsandlacy.com](mailto:cstegmaier@collinsandlacy.com)

AMY L. NEUSCHAFER

[aneuschafer@collinsandlacy.com](mailto:aneuschafer@collinsandlacy.com)

ASHLEY R. KIRKHAM

[akirkham@collinsandlacy.com](mailto:akirkham@collinsandlacy.com)

1330 Lady Street, Sixth Floor (29201)

Post Office Box 12487

Columbia, SC 29211

(803) 256-2660 (voice)

(803) 771-4484 (facsimile)

ATTORNEYS FOR RESPONDENTS  
CANDIES CONSTRUCTION CO., LLC  
AND GRANITE STATE INSURANCE  
CO.

**PROOF OF SERVICE-INITIAL  
BRIEF**



Monica M. McGee | D: 803.255.0458 | E: mmcgee@collinsandlacy.com  
Senior Paralegal

March 12, 2015

**VIA HAND DELIVERY**

The Honorable Jenny A. Kitchings  
South Carolina Court of Appeals  
Filing Desk  
Edgar A. Brown Building  
1205 Pendleton Street, 1<sup>st</sup> Floor  
Columbia, SC 29201

Re: ***Elliott Barber v. Candies Construction/Custom Components***  
***WCC File No. 1202332***  
***Appellate Case No. 2014-002289***  
***C&L File No. 000001-81742***

Dear Ms. Kitchings:

We have enclosed the unbound original and two copies of the Designation of Matter and Initial Brief of Respondents' Candies Construction Co., LLC and Granite State Insurance Co., in connection with the above referenced matter. Please clock the copies and return same to our courier.

By copy of this letter and enclosures, we are serving counsel of record same.

With warmest regards, I remain

Sincerely,

A handwritten signature in cursive script, appearing to read 'Monica McGee'.

Monica M. McGee  
Senior Paralegal

/mmm

Enclosures

cc: Lisa C. Glover, Esquire  
Ryan T. LeBlanc, Esquire

**RECEIVED**

MAR 12 2015

**SC Court of Appeals**