THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC Case No. 0726308

Shannon Cook, Claimant, ...Respondent,

v.

Spartanburg Steel Products, Inc., Defendant, ...Appellant.

APPELLANT'S REPLY TO RESPONDENT'S RETURN AND MOTION TO STRIKE

Respondent Shannon Cook has presented no valid or persuasive reasons why this Court should deny Appellant's Motion for Rehearing and/or to Reinstate Appeal ("Motion"). As a result, and based on the reasons set forth below and in the Motion, this Court should reinstate this appeal.

1. **Appellant properly sought reinstatement of its appeal.**

Respondent first argues that Appellant's citation to and reliance on Rule 260, SCACR, was incorrect, asserting that the appeal was not dismissed because of a failure to comply with appellate court rules. Respondent is incorrect. Appellant's request that this appeal be reinstated pursuant to Rule 260, SCACR, was proper and should be granted.

Rule 201, SCACR, states that, "[a]ppeal may be taken, as provided by law, from any final judgment, appealable order or decision." The fact that this Court looks to statutory and case law to determine what constitutes a "final judgment, appealable order or decision" in a particular case does not mean that an appeal dismissed on the basis that the decision below is not immediately appealable was not dismissed for failure to comply with appellate court rules. Instead, Rule 201 addresses this specific issue. "It is a fundamental rule of appellate procedure that a judgment or order must be final before it can be appealed. [citation omitted] Rule 201(a) SCACR, provides: 'Appeal may be taken, as provided by law, from any final judgment or appealable order.' To promote judicial efficiency and orderly adjudication of disputes on appeal, this rule seeks to prevent multiple appeals of non-final matters." Jean H. Toal, Shahin Vafai & Robert Muckenfuss APPELLATE PRACTICE IN SOUTH CAROLINA 83 (2d Ed. 2002). Thus, a dismissal on the basis of lack of finality is clearly a dismissal for failure to comply with appellate court rules, and Appellant's Motion was properly styled in the alternative as a motion for reinstatement and/or rehearing.

Respondent did not present any substantive arguments as to why Appellant's appeal should not be reinstated. Therefore, Appellant's Motion on this point is unopposed substantively and should be granted. *See, e.g.*, First Union Nat. Bank v. FCVS Commc'ns, 321 S.C. 496, 502, 469 F.E.2d 613, 217 (Ct. App. 1996) (a party's failure to respond to an argument may be deemed a concession that the other party's position is correct).

2. This Court should deny Respondent's motion to strike the attachments to Appellant's Motion.

Respondent has presented no valid reason why this Court should strike the attachments to the Motion. In fact, Rule 240(c) specifically directs that "[w]here the Record on Appeal ... has not been filed ... the parties shall file affidavits and other documents in support of their

positions." Rule 240(c), SCACR. There is no limitation or requirement that supporting documentation must be filed or can only be filed with a party's opposition to a motion to dismiss. Respondent's attempt to create such a rule runs counter to this Court's long-standing position that all portions of a record should be reviewed in the interest of reaching the correct result and in the interests of justice. *See, e.g.*, Poston v. Barnes, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987) (explaining that "[t]he search for the truth, in order to give justice to the litigants, is the primary duty of the courts").

Furthermore, although Respondent correctly points out the standard for rehearing, he does not and cannot point to any rule that prohibits a party from citing to new or different parts of the record below in a motion for rehearing, so long as those portions of the record are relevant, were presented to the forum below and are properly presented to this Court, all of which are the case here. The cases presented by Appellant are inapposite, as they address different issues. Kennedy v. South Carolina Ret. Sys., 349 S.C. 5321, 532, 564 S.E.2d 322, (2001) (refusing to address an argument on rehearing "because it was never presented to this Court"); Moore v. Trimmier, 32 S.C. 511, 11 S.E. 548 (1890) (refusing to consider on rehearing evidence of an alleged release on a judgment lien that the petitioner failed to present to the circuit court). Here, the arguments presented to this Court in Appellant's Motion were raised previously and the attachments unarguably were part of the record before the Commission. As Respondent has not alleged that the attachments to the Motion were not presented to and part of the record before the Commission, his arguments are little more than an attempt to preclude this Court's ability to understand fully the precise posture of this case.

In addition, the bases for moving to strike materials presented to this Court are that either the material is irrelevant or was not presented to the forum below. Rules 209(b) & 210(c),

SCACR. Neither applies here, where the attachments were clearly presented to the Commission and are indisputably relevant to the issues raised in Appellant's Motion.

Even if Respondent's position were valid with respect to a motion for rehearing, which Appellant does not concede, the attachments are clearly permissible as part of its Motion for reinstatement and, therefore, should be considered. For all of the reasons set forth above, this Court should deny Respondent's request to strike the attachments to the Motion.

3. The decision to dismiss this appeal was incorrect and should be reversed.

Respondent presents no valid reason why this Court should not grant Appellant's Motion. The fact that Respondent resorts to mischaracterizing and misconstruing Appellant's arguments in order to frame arguments he can then knock down reveals the weakness in his position. For example, Appellant did not argue simply that a Commission Decision is final for purposes of appellate review because it decided the issues on a Form 50 or a Form 21 request for hearing. Instead, the Commission Decision in this case is final for purposes of review because it decided all of the issues pending before the Commission, a fact both the Commission and Respondent's counsel acknowledged. (Att. G, p. 11) (Att. I, p. 14) (Att. E, p. 28, lines 3-5). Respondent argues that, although the "issue in *this* hearing was whether the respondent had sustained a change of condition," other cases might raise other issues, which he equates to a motion for partial summary judgment on that issue.

Respondent's argument is both misplaced and nonsensical. First, he again acknowledges and concedes in his Return that the **only** issue raised in the proceeding below was whether he sustained a change of condition for the worse. Second, it is nonsensical to compare a final decision in a single-issue case to a decision on a motion for partial summary judgment. By its very nature, a motion for **partial** summary judgment requests the court to rule on one or some,

but not all of the issues pending before it. Partial summary judgment assumes there is more than one issue pending. If a single issue is pending before a lower tribunal, a motion for summary judgment, however styled, would completely resolve the matter. Here, the Commission decided the single issue raised and argued to it and is, therefore, final for purposes of appellate review.[1]

As noted in the Motion, it is common for workers' compensation cases to be resolved over time through a series of proceedings, each with one or more issues that is resolved by the Commission in a final decision. Under Respondent's theory, no issue could ever be appealed to this Court until every single issue that possibly could be raised to the Commission had been raised and resolved. This process could span years, and parties would be unsure whether the claimant or the employer might find some other issue to raise to the Commission in a new proceeding, thereby blocking any appeal of a previously final decision of the Commission. Such a result is completely unworkable, would work hardships on both employees and employers, and could not be what the Legislature intended.

As explained in the Motion, both Respondent's and this Court's reliance on Bone v. U.S. Food Serv., 399 S.C. 566, 733 S.E.2d 200 (2012) in this case is misplaced. The specific holding in Bone is that, "[i]n agency appeals, the APA is controlling over general provisions that conflict with its terms. In this case, there is a specific statute in the APA that governs appeals from the circuit court in Commission cases, *section 1-23-390*, and it limits appeals to those from final judgments." 399 S.C. at 576-77, 733 S.E.2d at 205. Although Section 1-23-390 still limits appeals to those from final judgments, this case is governed by Sections 42-17-60 (providing for appeals directly to the Court of Appeals) and 1-23-380 (providing for appeals from a final

[1] As noted in Appellant's Motion, to the extent the issue of whether Claimant is entitled to TTD is viewed as having been raised to the Commission, it can and should be resolved by this Court in Appellant's favor because the only evidence in the record shows Respondent never responded in any way to Appellant's offer of a light duty position. *See* Pack v. South Carolina Dept. of Transp., 381 S.C. 526, 534, 673 S.E.2d 461, 465 (Ct. App. 2009); *see also* (Att. E. p. 27, lines 17 – 29, line 3).

agency decision). S.C. Code Ann. §§ 42-17-60 & 1-23-380. Section 1-23-390 addresses appeals from final judgments of the circuit court and, as this case does not involve any proceeding before the circuit court, simply does not apply in this appeal. The Supreme Court recognized this distinction in Shatto v. McLeod Reg. Med. Ctr., 406 S.C. 470, 474 n.2, 753 S.E.2d 416, 418 n.2 (2013).

Although Respondent asserts that it is irrelevant that this case does not involve a remand, he fails to point to any case, including Bone, that dismissed an appeal on lack of finality where the single issue pending before the Commission was finally decided and there was no remand. That is because there are none.

Finally, because Respondent did not address many of the points raised in Appellant's Motion, this Court should accept those arguments as unopposed. For example, Respondent did not contest the assertion that he did not present any evidence whatsoever to the Commission concerning either TTD or permanency. Nor did he take any position with regard to Appellant's argument that, to the extent this Court believes the issue of permanency was raised to the Commission, this Court can decide that issue as a matter of law because there is no conflicting evidence on this issue. Further, Respondent did not dispute that both he and the Commission specifically acknowledged that the only issue pending before the Commission in this case is whether Respondent sustained and proved a change of condition for the worse.

mgc

Reply To
HELEN F. HISER
Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

September 23, 2014

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: Shannon W. Cook vs. Spartanburg Steel Product and Hartford Insurance Company of the Midwest c/o Sedgwick Claims Management Services, Inc.
Date of Accident: September 17, 2007
WCC File No.: 0726308
Our File No.: 20194.14124
Claim No.: YDS65635
Appellate Case No.: 2014-001372

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Appellant's Reply to Respondent's Return and Motion to Strike, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the self-addressed, stamped envelope.

If you have any questions, please do not hesitate to contact me.

Yours truly,
McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures
cc: Ryan S. Montgomery, Esquire

20194.14124/HFH/jlr
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211