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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

(S.C. Ct. App. Orders dated Aug. 29, 2014 and March 19, 2015)

Shannon Cook ..... Respondent,

v.

Spartanburg Steel Products, Inc. ..... Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Shannon Cook proposes the following re-statement of the question presented:

> Did the Court of Appeals err in holding that the term "final decision"—a term with an established meaning as it pertains to appealability—does *not* include an order that decides all of the issues in a particular hearing, but less than all of the issues in a contested case?

COUNTER-STATEMENT OF THE CASE

Describing this case's history requires a brief explanation of certain facts and of workers' compensation law, but the question presented is straightforward. The petitioner says that an order is a "final decision" for the purpose of immediate appealability as long as the order decides all of the issues the parties argued below, even though there are more issues in the case. The Court of Appeals rejected this argument. That decision was correct.

This case began May 9, 2012, when Shannon Cook filed a Form 50. (App.p.23).

A Form 50 is titled "Notice of Claim and/or Request for Hearing." *Id.* This form gave the petitioner notice that Mr. Cook was bringing a "change of condition claim." *Id.*

Change of condition claims are authorized by section § 42-17-90 of the South Carolina Code (Supp. 2014). This statute gives the Workers' Compensation Commission continuing jurisdiction over a workers' compensation case and allows the commission to review a workers' compensation award based on the request of either party or on the commission's own motion.

After initiating his change of condition claim, Mr. Cook terminated his lawyer and hired new counsel. The new lawyer requested a hearing on the claim in May of 2013. (App.p.31). This was about a year after Mr. Cook filed notice of the claim.

In the time since Mr. Cook's "notice" filing and his request for a hearing, it became clear that Mr. Cook was entitled to additional workers' compensation assistance. Mr. Cook's original award included future medical benefits, but those benefits were limited. Mr. Cook now had multiple doctors who were opining that his condition had changed for the worse and that Mr. Cook needed surgery. See (App.p.125, ¶12) (describing the limited medical treatment authorized by Mr. Cook's original award); (App.p.125, ¶9) (describing that multiple physicians believe Mr. Cook's condition has changed and that he needs surgery).

Mr. Cook's employer—the petitioner—knew all of this because the petitioner sent Mr. Cook to these doctors. One of the doctors, Dr. Phillip LaTourette, was the authorized treating physician for Mr. Cook's pain management. (App.p.119). This doctor referred Mr. Cook to another doctor, Dr. Marco Rodriguez, about three (3) months after Mr. Cook gave the petitioner notice of his change of condition claim. (App.p.117).

After Dr. Rodriguez recommended surgery, the petitioner sent Mr. Cook to a third doctor—Dr. Charles Kanos—for a second opinion. But when Dr. Kanos recommended a test before opining about surgery, the petitioner refused to authorize the test. Instead, Mr. Cook had to pay for the test himself, and Dr. Kanos recommended surgery after he reviewed the test results. All of these points are noted in the commission's decision, see (App.p.118-119), yet the petitioner still refuses to authorize surgery.

A single commissioner conducted a hearing on Mr. Cook's Form 50 in September of 2013. See (App.p.46) (first page of hearing transcript). The issues Mr. Cook presented at the hearing were whether his change of condition claim was compensable and whether the petitioner should be ordered to pay for his medical treatment; either as part of the change of

condition claim or because that treatment was causally related to his original injury. See (App.p.44) (Mr. Cook's pre-hearing brief).

The petitioner defended Mr. Cook's claim on procedural grounds. First, the petitioner said Mr. Cook's original filing, his "notice" filing, was improper. Next, the petitioner argued that the medical report attached to that filing was deficient. Finally, the petitioner contended that Mr. Cook's subsequent Form 50s—his requests for a hearing—were deficient because they did not have any medical records attached to them. (App.p.115-117) (the commission's summary of these arguments). Again, all of these defenses were procedural. The petitioner did not defend Mr. Cook's issues on the merits.

The hearing commissioner rejected each of the petitioner's arguments. See (App.p.91, ¶18 and p.92, ¶5) (the relevant findings and conclusions). His order found that Mr. Cook had not reached maximum medical improvement and it designated Dr. Kanos as Mr. Cook's treating physician. The hearing commissioner left other issues unresolved. He noted that Mr. Cook's permanent impairment was premature and he held Mr. Cook's request for temporary disability benefits in abeyance. (App.p.90, ¶13 and p.91, ¶¶16, 17, and 21).

The petitioner asked the full commission to review the hearing commissioner's order, and an appellate panel of the commission issued a unanimous decision that affirmed the order in its entirety. See (App.p.124) (noting full affirmance by a unanimous vote).

The petitioner then appealed the panel's decision to the Court of Appeals.

Mr. Cook asked the Court of Appeals to dismiss the appeal because the commission's decision was not a "final decision." He noted that "final decision" is a term of art that signifies an order disposing all of the issues in a case and leaving nothing left to be done.

He cited this Court's decision in *Bone v. U.S. Food Service* for that definition, but other cases state the same thing. See, e.g., *Charlotte-Mecklenburg Hosp. Auth. v. South Carolina Dep't of Health & Envtl. Control*, 387 S.C. 265, 267, 692 S.E.2d 894-95 (2010). Mr. Cook said the appeal should be dismissed without prejudice and that all issues in the case would be appealable when the commission issued a "final order," as the current order expressly contemplates. See (App.pp.140-41) (Mr. Cook's motion) and (App.p.128, ¶4) (commission's instruction that other issues are held in abeyance pending a final order).

The petitioner said that the commission's decision on the change of condition issue was a "final decision." The petitioner also said that the rejection of its procedural defenses was a "final decision" and that this order was a "final decision" because the order addressed all of the issues that the parties had argued. (App.pp.142-47). The petitioner claimed that the"final judgment" definition from *Bone* did not apply because *Bone* involved a circuit court's order with a remand, not an order from the appellate panel. The petitioner also said that even if *Bone*'s definition *did* apply, this order met that definition. *Id.*

The Court of Appeals granted the motion to dismiss in a short order that was filed August 29, 2014. (App.p.6).

The petitioner then filed a lengthy document captioned as a "motion for rehearing and/or to reinstate appeal." (App.pp.8-129). This filing repeated many of the petitioner's original arguments, but it also added the new arguments that a "final *decision*" is different from a "final *judgment*" and that this order's language about other issues being held in abeyance was "boilerplate" that Mr. Cook's lawyer added when he drafted the proposed orders for the hearing commissioner and the appellate panel to sign.

A panel of three judges unanimously denied the petition for rehearing. In doing so, the panel specifically rejected each of the petitioner's arguments. See (App.pp.2-5).

ARGUMENT

This decision of the Court of Appeals does not involve a novel issue. There was no disagreement among the members of the panel, the court's holding does not conflict with prior decisions of this Court, and this case does not involve a constitutional question. See Rule 242, SCACR (describing some of the considerations that this Court may deem relevant in deciding a request for a writ of certiorari). Nothing here warrants further review. Moreover, there are at least two (2) reasons why the petitioner's argument is incorrect.

First, at the end of the day, the petitioner is defining a "final decision" to be an order that involves the merits, affects a substantial right, and adjudicates some of the issues in a case, but not all of the issues in a case. This is the dictionary definition of an "interlocutory" order, not a "final" order. There *is* an exception to the APA's rule that requires a final decision before an administrative case is appealable, but the petitioner never argued that exception here. Instead, the petitioner argued that this order is a "final" order. It is not.

Second, there is a reason the petitioner did not argue that this order qualifies as an interlocutory order that is immediately appealable. Doing so would have required the petitioner to face section 42-17-60 of the Workers' Compensation Act, which says that even if the commission's order was appealable now, the petitioner would still have to provide Mr. Cook's medical treatment while the appeal was pending. That means this fight about appealability is not about saving the petitioner from any sort of prejudice—it can't be. This

is about the petitioner seeking a back-door way to review one part of this case—compensability—before the petitioner is on the hook for any actual "award" of monetary benefits. This is the same argument that lost in *Bone*. This appeal can be heard later.

1a. A "final decision" is an order that adjudicates the entire controversy between the parties.

Black's Law Dictionary defines "interlocutory" as "[s]omething intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." BLACK'S LAW DICTIONARY 731 (5th ed. 1979). In contrast, "final judgment" notes "the disposition of *all* issues in the action." *Link v. Sch. Dist. of Pickens County*, 302 S.C. 1, 5 n.3, 393 S.E.2d 176, 178 n.3 (1990) (emphasis in original). A final judgment "disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 894-95 (citing *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942)). It has been described as a party "arriv[ing] at the end of the road[,]" *Mid-State Distribs. v. Century Importers*, 310 S.C. 330, 334-35, 426 S.E.2d 777, 780 (1993), and it "must show intrinsically and distinctly, and not inferentially, that the matters in the record have been determined in favor of one of the litigants, or that the rights of the parties in the litigation have been adjudicated." *Good*, 201 S.C. at 41, 21 S.E.2d at 212.

The order the petitioner has appealed fits the dictionary definition of "interlocutory." It decides some of the points in this workers' compensation claim, but it does not decide all of the issues in this claim. Mr. Cook requested all of the benefits available under the law,

including temporary total disability benefits. See (App.pp.31 and 38). Those issues have not been decided. The order is important, but it is not the final order.

The commission acknowledged this distinction. The order instructs that some issues are premature and that other issues are in a state of suspension. The order's penultimate notation explains that all unaddressed issues "are hereby held in abeyance pending a final order[.]" (App.p.128, ¶4). The commission knew a final order was yet to come.

The petitioner says it objected to the commission's finding that Mr. Cook's degree of permanent disability should be held in abeyance, but the petitioner's argument below was different than the argument the petitioner is making now. The petitioner's argument about permanency was that Mr. Cook's claim was not compensable. (App.pp.154-55, ¶11). The first time the petitioner claimed this abeyance language was improper "boilerplate" was in its petition for rehearing to the Court of Appeals. See (App.p.14). As the Court of Appeals recognized, that means this particular argument is barred.

Even if the argument was not barred, the point would not matter. As the petitioner acknowledges, workers' compensation cases often involve many issues handled in separate hearings. The upshot of the petitioner's view is that every time the appellate panel decides all of the issues from a hearing request, the commission has made a "final decision" on those issues. That approach would not prevent piecemeal appeals, it would guarantee them.

1b. The Administrative Procedures Act's appealability statute does not recognize a distinction between a "final *decision*" and a "final *judgment.*"

Another argument that did not appear until the petition for rehearing was the argument that an administrative agency's final decision is different from a final judgment.

The Court need not consider this argument. The petitioner cannot argue something that it did not argue when it opposed Mr. Cook's original motion to dismiss. See (App.pp.142-46). A party may not raise an issue for the first time in a petition for rehearing. *Herron v. Century BMW*, 395 S.C. 461, 469, 719 S.E.2d 640, 644 (2011).

But this argument would still fail even if it was not precluded. This Court has explained "[t]he object of [the final judgment] requirement . . . is to present the whole cause for determination in a single appeal and thus to prevent the unnecessary expense and delay of repeated appeals." *Id.* at 41, 21 S.E.2d at 212. The appealability statutes in the Administrative Procedures Act articulate the same purpose. The APA says that there are two (2) instances when a party may seek judicial review of an administrative agency's decision. The first is when the party is aggrieved "by a final decision in a contested case." S.C. Code Ann. § 1-23-380 (Supp. 2014). The second is when the party is aggrieved by "[a] preliminary, procedural, or intermediate agency action" and "review of the final agency decision would not provide an adequate remedy." *Id.*

This is the final judgment rule with one specifically articulated exception. The losing party can appeal only after exhausting *all* avenues for relief. This suggests that there will be no more hearing requests at the agency level, no more administrative proceedings, and that everything in the case is done. This language does not contemplate that intermediate orders will be appealable as long as those orders decide part of the case. Some intermediate decisions can be reviewed immediately, but only if immediate review is necessary.

Also, this Court has *treated* this statute like the final judgment rule. The Court has observed that the APA generally allows judicial review only of "final decisions," and that

appeals in administrative cases are different from other cases where "intermediate judgment[s]" *are* immediately appealable if those intermediate judgments "involve the merits." See *Bone*, 404 S.C. 67, 76, 744 S.E.2d 552, 557 (2013). If the APA's purpose was to enact the appealability scheme that the petitioner envisions, section 1-23-380 would be written differently. Instead of talking about a "final decision," it would have language that mirrors section 14-4-330 of the Code (1977 & Supp. 2014), which allows the immediate appeal of "intermediate judgments" that involve the merits as well as orders that affect a party's substantial rights.

Respectfully, the order the petitioner has appealed is plainly an intermediate order. The order recognizes that other issues are pending, and this recognition just confirms what everyone already knows—there *are* more issues in this workers' compensation claim, and unless the parties can work out an agreement on those issues, more contested hearings are coming. The commission might be able to adjudicate permanency and issue a final order if the petitioner would authorize Mr. Cook's surgery. Instead, the petitioner has refused to do so and has insisted on pursuing this premature appeal. The Court of Appeals was right to dismiss. This order is not a "final" order, and the petitioner never argued that this order is an intermediate order that needs to be reviewed immediately.

2. This a back-door attempt to appeal this workers' compensation case in piecemeal fashion.

The Workers' Compensation Act explains how an appeal affects a pending award. An appeal is not a stay. The employer is required to pay any weekly benefits in the award, and the employer is also required to provide any medical treatment from the award. S.C. Code § 42-17-60 (Supp. 2014).

This may seem like the commission's order has full effect during an appeal, but it does not. As long as an appeal is pending, the employer is *not* required to make any back-payments of benefits that accrued prior to the commission's award, and the employer is also not required to reimburse an injured worker for medical treatment that has already been provided. Language requiring these payments is conspicuously absent from section 42-17-60. Thus, to use the present case as an example, the petitioner is supposed to be paying for Dr. Kanos to provide Mr. Cook's surgery even though this appeal is pending, see (App.p.126, ¶16) (designating Dr. Kanos as the treating surgeon), but the petitioner does not have to reimburse Mr. Cook for the out of pocket costs Mr. Cook incurred seeking medical treatment on his own, see (App.p.125, ¶15).

The reason this point is important is that it shows there is no way the petitioner could plausibly claim it is being prejudiced by having to wait to take this appeal. The petitioner clearly does not want to pay for Mr. Cook's surgery, but there is no way around *that*—the statute says that the petitioner is on the hook for surgery regardless.

Here again, the petitioner is making the same argument that the losing party made in *Bone*. The claim in *Bone* was that immediate review was "necessary" because postponing appellate review until after there was a running award would mean that if the employer eventually won the appeal, the employer would have lost the benefits it paid during the interim. See 404 S.C. at 82-83, 744 S.E.2d at 561.

But there are two problems with that argument. First, it relies on the mistaken premise that an employer cannot seek repayment of benefits after a successful appeal. This Court held the opposite in *Moore v. North American Van Lines*. See 319 S.C. 446, 462

S.E.2d 275 (1995). Second, this argument is really an attack on section 42-17-60 and the scheme that statute envisions. After all, *the statute* is the reason why an appeal is not a supersedeas and why the employer is liable for weekly benefits while an appeal is pending. Paying benefits during an appeal can't constitute any cognizable prejudice. Paying benefits during the appeal is what *the statute* requires an employer to do.

At the end of the day, the petitioner is seeking to bypass this statute and have part of this claim reviewed even though only part of the claim has been decided. If that is what the petitioner wanted, it should have made an argument under section 1-23-380 and the exception that statute articulates. The answer to that argument is for the petitioner to seek an amendment of section 42-17-60. The answer is not to seek a premature appeal.

CONCLUSION

The orders of the Court of Appeals are correct. An order that decides all of the issues in a particular hearing, but less than all of the issues in a contested case, is not a "final decision." This Court should deny certiorari.

Respectfully submitted,

June 1, 2015

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner with a copy of the *Return to Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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