

**BEFORE THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION'S APPELLATE PANEL**

SAMUEL ROSE, )  
 )  
 Claimant/Appellant, )  
 )  
 v. )  
 )  
 JJS TRUCKING, )  
 Uninsured Employer, and )  
 CHRIS THOMPSON SERVICES, )  
 Upstream Employer, and )  
 BRIDGEFIELD CASUALTY INS. CO., )  
 Carrier for Chris Thompson )  
 Services, and )  
 THE STATE ACCIDENT FUND, )  
 )  
 Respondents. )

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W.C.C. File No. 1112328

**DECISION & ORDER**

**RECEIVED**

MAR 08 2016

SC Court of Appeals

**STATEMENT OF THE CASE**

This matter came before the Commission's Appellate Panel for a review hearing on April 21, 2015. The case was previously tried before Commissioner Taylor on September 23, 2013 in St. Matthews, South Carolina, pursuant to the Form 21 filed by Chris Thompson Services and Bridgefield Casualty Insurance (hereinafter "the Respondents"), requesting permission to terminate compensation following a previous Commission Order finding that the Claimant sustained an injury by accident on August 10, 2011 and was entitled to a medical evaluation to determine the extent of his injuries, as well as ongoing temporary total disability compensation. Following the hearing, on November 8, 2013, the Respondents learned for the first time that the Claimant had an ongoing third-party claim arising out to of the August 10, 2011 accident pending in the Charleston County Court of Common Pleas.

On November 12, 2013, the Respondents filed a Motion to Introduce Newly Discovered Evidence, specifically the Claimant's pleadings in connection with the third-party claim he filed in

the Charleston County Court of Common Pleas on February 20, 2013. The Respondents argued that this newly discovered evidence was relevant to the determination of the issues pending before Commissioner Taylor because the Claimant did not file a Form S-2 with the Workers' Compensation Commission, the Employer, or the Carrier within thirty days after filing his third-party claim. As a result, the Respondents argued that the Claimant is not entitled to additional benefits under the Workers' Compensation Act as a matter of law for failure to comply with the requirements of S.C. Code Ann. § 42-1-560. The Claimant did not file a return<sup>1</sup> to the Respondent's Motion to Introduce Newly Discovered Evidence. The Respondents' Motion was granted by Administrative Order dated January 3, 2014 and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case.

On September 2, 2014, Commissioner Taylor issued a Decision and Order, by which she made the following findings of fact and conclusions of law:

**FINDINGS OF FACT**

1. *The parties to this proceeding were sent directives for a proposed order on January 13, 2014.*
2. *The Claimant commenced a civil action against a third-party as a result of the same August 10, 2011 accident for which he seeks workers' compensation benefits by filing a counterclaim against Robbie Clark in the Charleston County Court of Common Pleas on February 20, 2013. (See Exhibits "A" and "B" to the Defendants' Motion to Introduce Newly Discovered Evidence).*
3. *The Claimant did not file or serve a Form S2 on the Employer, Carrier, or the Commission within thirty days after commencing the third-party action on February 20, 2013 and did not otherwise notify the Employer, Carrier or the*

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<sup>1</sup> The Claimant did file a "Motion in Opposition to Introduce After Discovered Evidence." The Claimant's motion was denied by Administrative Order dated January 3, 2014.

*commission that this third-party action had been commenced. To date, no Form S2 has been filed or served by the Claimant.*

### **CONCLUSIONS OF LAW**

1. *S.C. Code Sec. 42-1-560 sets forth the requirements for simultaneously pursuing a third-party civil action and a workers' compensation claim. The statute provides that "[n]otice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." Because the Claimant did not provide any notice of the commencement of the third-party action to the Commission, the Employer, or the Carrier within thirty days and because the Claimant has not filed a Form S2, which is the form prescribed by the Commission for notice of such third-party actions, the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.*
2. *Because the Workers' Compensation Act is in derogation of common law rights, the terms and requirements of S.C. Code Ann. Sec 42-1-560 must be strictly construed. Callahan v. Beaufort Co. Sch. Dist., 375 S.C. 92, 651 S.E.2d 311 (2007). Even though Defendants are entitled to maintain their lien on the proceeds of any recovery from the third-party whether by judgment, settlement, or otherwise and despite the fact that the Defendants have "not lost [their] right of subrogation against the responsible third-party, the statutory provision mandates notice to the employer, carrier, and the Commission within thirty days of filing the third-party suit." Callahan, *supra*.*
3. *According to the South Carolina Supreme Court, "42-1-560(b) must be strictly followed in order for a claimant to preserve [the] right to proceed against both an employer and a third-party." Callahan, *supra*. Because the Claimant has not followed the mandatory requirements of S.C. Code Ann. Sec. 42-1-560, but has ignored them entirely, the Claimant has failed to preserve his right to proceed against the employer for additional benefits under the Workers' Compensation Act after the date he commenced the third-party action, February 20, 2013.*
4. *Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on*

*which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.*

5. *Pursuant to S.C. Code Ann. Sec. 42-9-260, the Defendants are entitled to terminate temporary disability compensation effective the date of the hearing, September 23, 2013.*
6. *Pursuant to S.C. Code Ann. Sec. 42-15-60, the Defendants shall have no liability for any additional medical care or treatment under the workers' Compensation Act.*
7. *Pursuant to S.C. Code Ann. Sec. 42-9-10, Sec. 42-9-20, and Sec. 42-9-30, the Claimant is not entitled to, and the Defendants shall have no liability for, any benefits for permanent disability or loss of use under the Workers' Compensation Act.*
8. *Pursuant to S.C. Code Sec. 42-1-560(b), the Defendants shall have a lien on the proceeds of any recovery from any third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.*

Thereafter, the Claimant filed a Form 30 requesting review of Commissioner Taylor's September 2, 2014 Order on the following grounds:

*FIRST: The Hearing Commissioner erred in granting Defendant's [sic] Chris Thompson Services, LLC and Bridgefield Casualty Insurance Companies November 12, 2013 Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim filed in Charleston County Court of Common Pleas on February 20, 2013), the error being that the defense of exclusive remedy was not pled by any of the Defendant's [sic], nor was the issue raised at the September 23, 2013 hearing before the single Commissioner, further the Answer and Counterclaim could have been secured by the Defendant's before the September 23, 2013 hearing had they exercised reasonable diligence.*

*SECOND: The Hearing Commissioner erred in denying the Claimant's November 21, 2013 Motion in Opposition to Introduce After Discovered Evidence summarily without any legal reasoning, findings of fact or conclusions of law to support this denial.*

*THIRD: The Hearing Commissioner erred in denying Claimant's December 20, 2013 Motion to Introduce newly Discovered Evidence (voluntary dismissal of the Claimant's third-party suit), holding the voluntary dismissal did not fit the meaning of "Newly Discovered Evidence" under Regulation 67-707 of the South Carolina Code as it did not exist at the time of the hearing before the undersigned [sic] on August 5, 2013, the error being there is no requirement under South Carolina Statutory Law, South Carolina Workers' Compensation Regulations or South Carolina Common Law Jurisprudence that evidence must exist at the time of a hearing in order for it to be considered as newly discovered evidence.*

*FOURTH: The Hearing Commissioner erred in granting Defendant's [sic] Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Claimant's Motion to Introduce Newly Discovered Evidence (voluntarily [sic] dismissal Claimant's third-party suit) the error being that South Carolina case law holds that when a Claimant voluntarily dismissed his/her third-party suit the voluntary dismissal leaves the situation as though no suit had ever been filed and the Claimant's failure to comply with S.C. Code Ann. § 42-1-560 in not filing a Form S-2 is fully remedied and moot. Callahan v. Beaufort County School District, 375 S.C. 92, 651, [sic] S.E.2d 311 (2007).*

*FIFTH: The Hearing Commissioner erred in granting the Defendant's [sic] Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying the Claimant's Motion to Introduce Newly Discovered Evidence (voluntary dismissal of Claimant's third-party suit), the error being this is a gross miscarriage of justice as the single Commissioner entertained new defenses that were not pled or argued at the September 23, 2013 hearing by the Defendant's [sic], however the single Commissioner did not allow the Claimant to introduce newly discovered evidence or to*

*be heard to argue their position in response to Defendant's newly discovered evidence which would render the Defendant's [sic] exclusive remedy argument moot.*

*SIXTH: The Hearing Commissioner erred in granting the Defendant's [sic] Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim and denying the Claimant's Motion to Introduce Newly Discovered Evidence (voluntary dismissal of Claimant's third party-suit) without holding a hearing on the issue to allow both sides to argue their respective positions or to reconvene the September 23, 2013 hearing pursuant to South Carolina Workers' Compensation Regulation 67-707(C)(2)(d).*

*SEVENTH: The Hearing Commissioner erred in granting the Defendant's [sic] Motion to Introduce Newly Discovered Evidence (Claimant's Answer and Counterclaim) and denying Claimant's Motion to Introduce Newly Discovered Evidence (Voluntary Dismissal of Claimant's third-party suit) without holding a hearing on the issue or reconvening the September 23, 2013 hearing, the error being it is well-settled law of South Carolina that if the Commission undertakes to receive such additional evidence, due process requires that counsel should be alerted before hand so that they may be prepared to participate in the proceedings. Green v. Rabestos-Manhattan, Inc., 250 S.C. 58, 156, [sic] S.E.2d 318 (1967). In the case at bar, there were no proceedings whatsoever, simply a Commissioner allowing newly discovered evidence to come in from one party and not allowing newly discovered evidence in rebuttal from the opposing party without holding a hearing on the issue or reconvening the original hearing.*

*EIGHTH: The Hearing Commissioner erred in finding of fact #3 and Conclusion of Law #1 in holding that the Claimant failed to file a Form S2 when the Claimant did indeed file a voluntary dismissal of the Claimant's underlying 3<sup>rd</sup> party lawsuit as newly discovered evidence on December 19, 2013, which the Commissioner denied, then subsequently filed the appropriate S2 on February 10, 2014 after re-filing the underlying 3<sup>rd</sup> party lawsuit.*

*NINTH: The Hearing Commissioner erred in Conclusion of Laws #1, #2, #3, #4, #5, #6, #7, and #8 in holding that the Claimant did not provide notice of the 3<sup>rd</sup> party action by way of filing a Form S2 and therefore was not entitled to additional medical treatment,*

*disability benefits or permanent disability when the Claimant voluntarily dismissed his underlying 3<sup>rd</sup> party claim on December 5, 2013 before settling it and submitted the dismissal to the Commission as newly discovered evidence and then after re-filing the 3<sup>rd</sup> party lawsuit timely filed a Form S2 on December 19, 2013, the error being that when a Claimant voluntarily dismisses his/her third-party suit the voluntary dismissal leaves the situation as though no suit had ever been filed and the Claimant's failure to comply with S.C. Code Ann. § 42-1-560 in not filing a Form S-2 is fully remedied and moot. Callahan v. Beaufort County School District, 375 S.C. 92, 651, [sic] S.E.2d 311 (2007).*

### **CONCLUSION**

The Appellate Panel AFFIRMS the September 2, 2014 Decision and Order of Hearing Commissioner Taylor in its entirety and enters the following:

### **FINDINGS OF FACT**

1. The Claimant commenced a civil action against a third-party as a result of the same August 10, 2011 accident for which he seeks workers' compensation benefits by filing a counterclaim against Robbie Clark in the Charleston County Court of Common Pleas on February 20, 2013.
2. The Claimant did not file or serve a Form S2 on the Employer, Carrier, or the Commission within thirty days after commencing the third-party action on February 20, 2013 and did not otherwise notify the Employer, Carrier or the commission that this third-party action had been commenced.

### **CONCLUSIONS OF LAW**

1. S.C. Code Sec. 42-1-560 sets forth the requirements for simultaneously pursuing a third-party civil action and a workers' compensation claim. The statute provides

that "[n]otice of the commencement of the [third-party] action shall be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." Because the Claimant did not provide any notice of the commencement of the third-party action to the Commission, the Employer, or the Carrier within thirty days and because the Claimant has not filed a Form S2, which is the form prescribed by the Commission for notice of such third-party actions, the Claimant has failed to satisfy the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.

9. Because the Workers' Compensation Act is in derogation of common law rights, the terms and requirements of S.C. Code Ann. Sec 42-1-560 must be strictly construed. Callahan v. Beaufort Co. Sch. Dist., 375 S.C. 92, 651 S.E.2d 311 (2007). Even though Defendants are entitled to maintain their lien on the proceeds of any recovery from the third-party whether by judgment, settlement, or otherwise and despite the fact that the Defendants have "not lost [their] right of subrogation against the responsible third-party, the statutory provision mandates notice to the employer, carrier, and the Commission within thirty days of filing the third-party suit." Callahan, supra.
10. According to the South Carolina Supreme Court, "42-1-560(b) must be strictly followed in order for a claimant to preserve [the] right to proceed against both an employer and a third-party." Callahan, supra. Because the Claimant has not followed the mandatory requirements of S.C. Code Ann. Sec. 42-1-560, but has ignored them entirely, the Claimant has failed to preserve his right to proceed

against the employer for additional benefits under the Workers' Compensation Act after the date he commenced the third-party action, February 20, 2013.

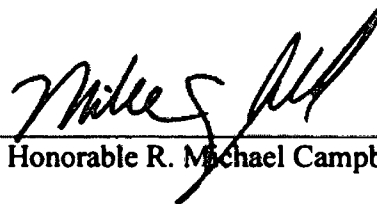
11. Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.
12. Pursuant to S.C. Code Ann. Sec. 42-9-260, the Defendants are entitled to terminate temporary disability compensation effective the date of the hearing, September 23, 2013.
13. Pursuant to S.C. Code Ann. Sec. 42-15-60, the Defendants shall have no liability for any additional medical care or treatment under the Workers' Compensation Act.
14. Pursuant to S.C. Code Ann. Sec. 42-9-10, Sec. 42-9-20, and Sec. 42-9-30, the Claimant is not entitled to, and the Defendants shall have no liability for, any benefits for permanent disability or loss of use under the Workers' Compensation Act.
15. Pursuant to S.C. Code Sec. 42-1-560(b), the Defendants shall have a lien on the proceeds of any recovery from any third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.

**ORDER**

IT IS THEREFORE, HEREBY ORDERED that the Claimant is not entitled to, and the Defendants/Respondents shall have no liability for, any additional benefits under the Workers' Compensation Act.

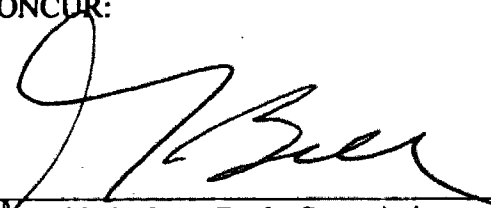
IT IS, FURTHER ORDERED that the Defendants/Respondents shall have a lien on the proceeds of any recovery by the Claimant from any third-party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses paid by the Defendants.

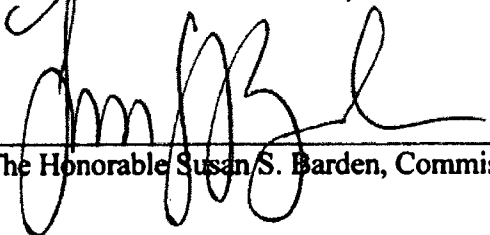
IT IS SO ORDERED!

  
\_\_\_\_\_  
The Honorable R. Michael Campbell, II, Commissioner

Date: February 8<sup>th</sup>, 2014

WE CONCUR:

  
\_\_\_\_\_  
The Honorable T. Scott Beck, Commissioner

  
\_\_\_\_\_  
The Honorable Susan S. Barden, Commissioner

**CERTIFICATE OF SERVICE**

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

***By Kim Falls on February 8, 2016***