

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION SC Court of Appeals

T. Scott Beck; Susan S. Barden; Avery B. Wilkerson, Jr.
Workers' Compensation Commissioners

WCC File No: 1200479
Appellate Case No. 2015-002092

Dallas Paul Bessinger, Claimant,

v.

R-N-M Builders & Associates, LLC, Employer, and FirstComp a division of Markel, Inc.,
Carrier,

Of whom the South Carolina Uninsured Employers' Fund is the..... Appellant/Respondent,

And

FirstComp, a division of Markel, Inc., is the..... Respondent/Appellant.

BRIEF OF RESPONDENT/APPELLANT

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February 25, 2016

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TABLE OF CONTENTS

| | |
|--|----|
| Table of Contents..... | i |
| Table of Authorities..... | ii |
| Statement of Issues on Appeal..... | 1 |
| Statement of the Case..... | 1 |
| Standard of Review..... | 2 |
| Standard of the Facts..... | 3 |
| Arguments..... | 4 |
| I. The Appellate Panel erred in Vacating the prior order and Remanding for a de novo hearing..... | 4 |
| a. The Appellate Panel exceeded its statutory authority in issuing the Remand Order..... | 4 |
| b. The Appellate Panel erred in complying with the regulations of the Commission..... | 5 |
| c. The Appellate Panel erred in failing to make any findings of facts to support the remedy ordered..... | 6 |
| II. Conclusion..... | 7 |

TABLE OF AUTHORITIES

Case Law

1. Brayboy v. Clark Heating Co., Inc., 306 S.C. 56, 409 S.E.2d 767 (1991).....6
2. Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962).....6
3. Forrest v. A.S. Price Mech., 373 S.C. 303, 644 S.E.2d 784 (Ct. App. 2007).....2
4. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981).....2
5. Shealy v. Aiken County, 341 S.C. 448, 535 S.E.2d 438 (2000).....2
6. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 632 S.E.2d 874 (Ct. App. 2006).....2

Statutes/Regulations/Rules/Treatise

1. S.C. Code Ann. § 1-23-380(A)(5).....2
2. S.C. Code Ann. § 42-17-50.....3, 4, 7
3. S.C. Code Regs. § 67-707(C)(2)(d).....6
4. S.C. Code Regs. § 67-709(E).....5
5. S.C. Code Regs. § 67-709(E)(4).....5

STATEMENT OF ISSUES ON APPEAL

**WHETHER THE APPELLATE PANEL ERRED IN VACATING THE
DECEMBER 18, 2012 ORDER OF THE SINGLE COMMISSIONER AND
REMANDING THE CASE FOR A DE NOVO HEARING?**

STATEMENT OF THE CASE

This matter arises originally out of a Form 50, *Request for Hearing*, filed by Dallas Paul Bessinger (“Claimant”) with respect to an alleged work-related injury sustained on January 4, 2012. In his Form 50, Claimant alleged that FirstComp was the carrier with coverage for this incident pursuant to a policy of insurance issued on the date of injury. (R. p. 65) FirstComp filed a Form 51, *Answer to Request for Hearing*, asserting as an affirmative defense that the insurance policy issued by FirstComp to Claimant’s employer, J&L Construction (“J&L”), was procured by fraud in the inducement and is, therefore, void *ab initio*. (R. p. 67) A hearing was held on July 18, 2012, before Commissioner Andrea C. Roche. A Decision and Order dated December 18, 2012 (“12/18/12 Order”) was issued in which the Commissioner found, *inter alia*, that the FirstComp workers’ compensation policy at issue in this case was procured by fraud and was, therefore, void *ab initio*. (R. p. 1) The Commissioner also found that the South Carolina Workers’ Compensation Uninsured Employers’ Fund (“UEF”) was responsible for Claimant’s workers’ compensation benefits and medical care. (*Id.*) UEF appealed the 12/18/12 Order to the Appellate Panel of the South Carolina Workers Compensation Commission (“Appellate Panel”). (R. p. 176)

On April 17, 2014, the Appellate Panel issued a Decision and Order (“Remand Order”) vacating the 12/18/12 Order and remanding the case for a “hearing de novo to reconsider the evidence, receive further evidence, and rehear the parties or their representatives.” (R. p. 17) No appeal of the Remand Order was filed by FirstComp at that time as it was an interlocutory order. A subsequent hearing was set before Commissioner McCaskill (“Single Commissioner”) on

August 21, 2014. On March 31, 2015, the Single Commissioner issued a Decision and Order (“3/31/15 Order”) finding the FirstComp policy was procured through fraud and dismissed FirstComp from the claim. (R. p. 24) UEF appealed the 3/31/15 Order. (R. p. 244) While FirstComp did not have any objection to the ultimate decision of the Single Commissioner, UEF’s appeal compelled FirstComp to appeal the 3/31/15 Order on the limited grounds that the Remand Order was improper and the 12/18/12 Order should not have been vacated. (R. p. 246) On September 3, 2015, the Appellate Panel affirmed the 3/31/15 Order in its entirety. (R. p. 45) UEF timely filed its Notice of Appeal to the Court of Appeals. (R. p. 292) FirstComp cross-appealed on the grounds that the Appellate Panel’s Remand Order was improper and not in compliance with the South Carolina Workers Compensation Act, the Regulations of the South Carolina Workers Compensation Commission, or the interpretive case law of these authorities. (R. p. 294)

STANDARD OF REVIEW

“The Administrative Procedures Act (“APA”) establishes the standard of review for decisions by the South Carolina Workers’ Compensation Commission.” Forrest v. A.S. Price Mech., 373 S.C. 303, 306, 644 S.E.2d 784, 785 (Ct. App. 2007) (citing Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981)). “In workers’ compensation cases, the [Appellate Panel] is the ultimate fact finder.” Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000) (citation omitted). This court reviews facts based on the substantial evidence standard. Thompson v. S.C. Steel Erectors, 369 S.C. 606, 612, 632 S.E.2d 874, 877 (Ct. App. 2006). “Under the substantial evidence standard, the appellate court may not substitute its judgment for that of the [Appellate Panel] as to the weight of the evidence on questions of fact.” Forrest, 373 S.C. at 306, 644 S.E.2d at 785 (citing S.C. Code § 1-23-380(A)(5)). The appellate court may reverse or modify the Appellate Panel’s decision only if substantial rights have been

prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence in the record. *Id.* at 306, 644 S.E.2d at 785-86.

STATEMENT OF THE FACTS

In the Remand Order, the Appellate Panel provided a Statement of Case that incorporated verbatim the Findings of Fact, Conclusions of Law and ordering provisions from the 12/18/12 Order. (R. pp. 17-21) Following this recitation, the Appellate Panel made the following “Rulings of Law of the Full Commission:”

1. This matter was heard before the South Carolina Workers’ Compensation Full Commission Appellate Panel during the last term of Review pursuant to S.C. Code § 42-17-50.
2. The Commissioners reviewed the award of the single Commissioner and find that good grounds have been shown for the Commission to reconsider the evidence, receive further evidence, and rehear the parties or their representatives pursuant to S.C. Code § 42-17-50.
3. The Commission **Vacates** the Decision and Order of the single Commissioner and **Remands** the matter to the Jurisdictional Commissioner for a hearing de novo to reconsider the evidence, receive further evidence, and rehear the parties or their representatives.

(R. p. 6)(emphasis in original) No additional findings were provided and no indication as to what “good grounds” had been shown to support the above order. Prior to its entry, FirstComp objected to the order on the grounds that it did not, among other things, “make such specific and definite findings” as required for an order of the Commission. (R. p. 617) Over FirstComp’s objections, the Remand Order was entered and a *de novo* hearing was set before the Single Commissioner on August 21, 2014. Present at the hearing were counsel for Claimant, counsel for UEF, and Counsel for FirstComp, with each party having submitted evidence pursuant to their respective Form 58, *Pre-Hearing Briefs*, and APA submissions. The Single Commissioner determined that all parties, including Claimant’s employer J&L, had been properly notified of the hearing and the hearing would proceed. (R. p. 25) Though J&L had been present at the

original hearing, it did not appear at the *de novo* hearing, either through counsel or through its principals, John Loughery and Emory Wilkie. The issues for determination in the *de novo* hearing were determination of Claimant's employer, determination of the proper carrier, Claimant's compensation rate and his entitlement to temporary total disability ("TTD") benefits.

At the outset of the hearing, FirstComp objected to the basis for convening a *de novo* hearing in this matter. (R. p. 520) FirstComp argued that the Remand Order was improper on the grounds that it did not contain necessary findings of fact sufficient to determine the basis for vacating the 12/18/12 Order or what, if any, error occurred in the prior hearing requiring a new hearing. The Single Commissioner found that jurisdiction was proper for him to proceed with a *de novo* hearing. Following the entry of an order by the Single Commission, FirstComp appealed solely on the basis that the Remand Order was improper, the 12/18/12 Order should not have been vacated, and the *de novo* hearing should not have been ordered.

ARGUMENTS

I. The Appellate Panel erred in Vacating the prior order and Remanding for a *de novo* hearing.

As noted above, FirstComp appeals from the 3/31/15 Order on the basis that the Remand Order is facially invalid and does not comply with the requirements of the South Carolina Workers' Compensation Act, the regulations promulgated by the Commission, the Administrative Procedures Act, and the mandates of the South Carolina Supreme Court.

a. The Appellate Panel exceeded its statutory authority in issuing the Remand Order.

The South Carolina Workers' Compensation Act ("Act") provides that, upon a request for review of a single commissioner's order, the Commission "shall review the award and, if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the

parties or their representatives and, if proper, amend the award.” S.C. Code § 42-17-50. This provision provides a mechanism for the Appellate Panel to reconsider evidence from a hearing on review, to receive additional evidence, rehear the parties or amend an underlying award. This provision does not expressly authorize the Appellate Panel to arbitrarily vacate an award and remand the case to a single commissioner for a new hearing. The plain language of the Act requires the Appellate Panel to “amend” and award “if proper” and “if good grounds be shown therefore.” The statute does not contemplate the wholesale vacating of an underlying single commissioner order, particularly where there are no findings whatsoever as to the grounds for the extraordinary and severe remedy of requiring the parties to proceed with conducting an entirely new hearing.

For this reason, the Remand Order violates the plain language of the Act by ordering a remedy that is not within the express statutory authority of the Commission.

b. The Appellate Panel erred in not complying with the duly promulgated regulations of the Commission.

In vacating the 12/18/12 Order, and remanding for a de novo hearing, the Appellate Panel failed to comply with the regulations of the Commission regarding its scope of review. S.C. Code Regs, §67-709(E) provides that the Appellate Panel may “modify” an order of a single commissioner by “making a new finding of fact, conclusion of law, or modifying the Hearing Commissioner’s finding of fact or conclusion of law.” Pursuant to this regulation, as with the express language of the Act, the Appellate Panel’s authority on review is limited and does not contemplate a remand as ordered in the Remand Order. The Commission’s regulations provide that the Commission, when sitting as a five or six member review panel, “may remand a case to the Hearing Commissioner *only for taking additional or newly discovered evidence or for exceptional circumstances set forth in the order.*” S.C. Code Regs, §67-709(E)(4) (emphasis

added). Additionally, the Appellate Panel may remand a case for consideration of additional or newly discovered evidence. S.C. Code Regs, §67-707(C)(2)(d). On its face, the Remand Order violates the Commission's regulations and exceeds its authority under the Act. Nowhere in the Commission's regulations is the Appellate Panel granted the authority to vacate an order of a single commissioner and direct a new hearing as to all issues. Even if such authority existed, it is clear from the regulations that "good cause" or "exceptional circumstances" would be required to justify such extraordinary relief. The Remand Order contains no such findings. As such, the Remand Order was issued in violation of the Commission's Regulations and should be reversed.

c. The Appellate Panel erred in failing to make any findings of facts to support the remedy ordered.

Notwithstanding the absence of authority for the action taken by the Appellate Panel in the Remand Order, that order is defective as it does not satisfy the obligations of the Commission to make specific findings of fact to support its decision. According to the South Carolina Supreme Court, the Commission is required to "make such specific and definite findings upon the evidence reported as will enable this court to determine whether the general finding or conclusion should stand, particularly when there are material facts at issue." Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E.2d 288 (1962). "Where material facts are in dispute, the administrative body must make specific, express findings of fact." Brayboy v. Clark Heating Co., Inc., 306 S.C. 56, 409 S.E.2d 767 (1991). In this case, the Remand Order lacks even minimal findings, much less anything that would satisfy the requirements as stated by the Supreme Court.

In the Remand Order, the only findings of fact are those that were found by the Single Commissioner in support of her decision that the policy at issue in this case is void *ab initio*. (R. pp. 19-21) The Remand Order goes on to state that "good grounds have been shown for the

Commission to reconsider the evidence, receive further evidence, and rehear the parties or their representatives pursuant to S.C. Code §42-17-50.” (R. p. 22) The Remand Order does not specify what those “good grounds” were shown or why they support a rehearing of any kind, much less a full *de novo* hearing before a new single commissioner.

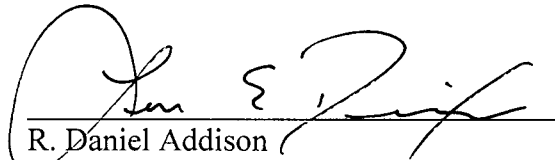
The Supreme Court has made it clear that every order of the Commission must state with specificity not only what is being ordered but the supporting findings and conclusions for that order so that a reviewing court can determine what was done and why. The import of this rule is made clear by the facts of this case. The Appellate Panel, despite having been asked to do so, remanded this case for a new hearing without any guidance as to what, if anything, was improper in the prior hearing. In the absence of this guidance, the parties conducted a new hearing and obtained the same result. UEF appealed that order, which was affirmed by the Appellate Panel this time without modification. As a result, the parties are now over a year and half past the date of the Remand Order and are in precisely the same posture as they were then, albeit having to undertake considerable expense to litigate the entire case all over again.

South Carolina’s appellate courts have repeatedly and consistently required the Commission to make specific and detailed findings that support its actions. An order purporting to vacate an order of a single commissioner without enumerating the findings supporting that action does not meet this standard. The Remand Order fails to state its findings with sufficient specificity to allow a reviewing court to determine the propriety of the Commission’s actions. Consequently, the Remand Order is facially deficient, and does not comply with the statutes, rules and requirements for a proper order of the Commission.

II. Conclusion

For the above reasons, FirstComp contends that Remand Order is invalid as it exceeds the express statutory and regulatory authority granted to the Commission and should be reversed. In

addition, the Remand Order was improper and deficient in vacating the 12/18/12 Order without stating with specificity the basis for its decision. As such, the Remand Order should be vacated and the case remanded with instructions to affirm the 12/18/12 Order affirmed in its entirety or to issue an order that states with specificity the grounds for any modification to it in accordance with the Act and the regulations of the Commission.



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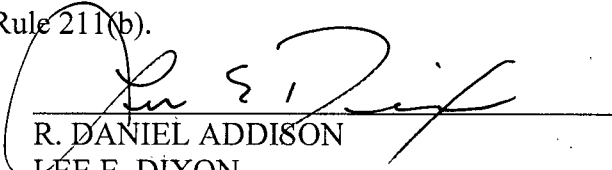
Of whom the South Carolina Uninsured Employers' Fund is the..... Appellant/Respondent,

And

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Respondent/Appellant, FirstComp,
complies with the provisions of SCACR, Rule 211(b).



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PROOF OF SERVICE

This is to certify that a copy of the foregoing **Brief of Respondent/Appellant** has been served upon the flowing by placing the same in the United States mail, first class postage pre-paid, addressed as shown below on the 25th day of February, 2016.

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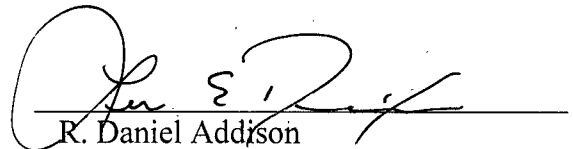
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