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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

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SC Court of Appeals

Common Pleas Case No. 2012-CP-32-02093
Common Pleas Case No. 2012-CP-32-02111
Appellate Case No. 2014-001258

Ricky Kneece,

Respondent

v.

Kneece Farms and Legion in
Liquidation and South Carolina
Property and Casualty Insurance
Guaranty Association,

Appellants

PETITION FOR REHEARING

The Respondent requests rehearing of the decision in this appeal on the following grounds.

The Workers' Compensation Commission order was immediately appealable.

The Court of Appeals erred in vacating the order of the Circuit Court and remanding the claim to the South Carolina Workers' Compensation Commission for further action.

The instant appeal is governed by the South Carolina Administrative Procedures Act ("APA"). Bone v. U.S Food Serv., 404 S.C. 67, 73, 744 S.E.2d 552(2013); 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). S.C. Code Ann. Section 1-23-380 provides for an appeal of a final agency decision. The Supreme Court has defined a final decision as follows: “[a] final judgement 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 Hosp. Auth. v. S.C. Dep’t of Health & Env’tl Control.

However, the APA also provides that a preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. S.C. Code Ann. Section 1-23-380.

The decision of the Appellate Panel was immediately appealable to the Circuit Court by either standard.

Citing Bone v. U.S. Food Serv., 404 S.C. 67, 73, 744 S.E.2d 552(2013), the Court of Appeals held that “[a]n agency decision which does not decide the merits of a contested case is not a final agency decision subject to judicial review.” In Bone v. U.S Food Serv., the Supreme Court concluded that an order of the Circuit Court remanding a claim to the Workers’ Compensation Commission for further proceedings was not immediately appealable.

The Circuit Court order in this action is a final order. The Court below concluded:

THEREFORE, based on the foregoing, the Workers’ Compensation Commission erred in finding and concluding that the Claimant did not suffer physical brain damage. Accordingly, the Commission Order of April 19, 2012 is reversed. The Claimant is totally and permanently disabled with physical brain damage and entitled to benefits provided for in Section 42-9-10. The Defendants’ appeal is without merit and is dismissed. The order of the Hearing Commissioner dated April 28, 2011 is reinstated. The matter is remanded to the Workers’ Compensation Commission to enter its order awarding benefits under S.C. Code Section 42-9-10(C) from the date of the 1999 accident and continuing for life together with all other benefits ordered by the Hearing Commissioner in his order dated April 28, 2011. (R. pp. 42-43).

The Circuit Court order below reinstated the decision of the Hearing Commissioner disposing of the whole subject matter of the action leaving nothing to be done but to enforce by execution what the Circuit Court had determined. The order was final and immediately appealable pursuant to Bone v. U.S. Food Serv.; Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env't'l Control; and Montjoy v Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994).

The Court of Appeals in the instant action concluded that the order of the Workers' Compensation Commission Appellate Panel was not appealable because it was not a final decision. The Appellate Panel overturned the Hearing Commissioner concluding that the Respondent did not suffer permanent brain damage and remanded the matter for a determination of permanency, a decision all parties considered to be a final decision and a decision all parties appealed to the Circuit Court.

Under the terms of the APA, the order of the Workers' Compensation Commission was immediately appealable. The Court of Appeals in Canteen v. McLeod Regional Medical Center, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) held that the Appellate Panel's decision overturning the Hearing Commissioner's finding that the Claimant suffered a brain injury and remanding the claim to the Hearing Commissioner for a determination of permanency was immediately appealable. Construing S.C. Code Ann. Section 1-23-380 of the APA, the Court of Appeals concluded that the Claimant had exhausted all of her administrative remedies and that the order of the Appellate Panel was a final agency decision. In so doing, the Court of Appeals expressly stated that the Appellate Panel order appealed from was not interlocutory. The Court of Appeals concluded that because the disposition of the brain injury issue effectively disposed of the claim and because the decision of the Appellate Panel deprived the Claimant for treatment of

her brain injury, the Appellate Panel order was a final agency decision on the merits. Canteen v. McLeod Regional Medical Center.¹

The Appellate Panel below similarly held that the Respondent did not suffer a physical brain damage and remanded the claim back to the Hearing Commissioner for a determination as to permanency. Consequently, the decision of the Appellate Panel constituted a final agency decision and was immediately appealable. Canteen v. McLeod Regional Medical Center. All parties considered the Appellate Panel decision to be immediately appealable. The Circuit Court order below disposed of the whole subject matter of the workers' compensation claim and constitutes a final order which was immediately appealable. All parties considered the Circuit Court order to be immediately appealable. The order of the Circuit Court below should be affirmed and the matter remanded to the Workers' Compensation Commission for enforcement of the provisions of the order.

Moreover, the APA is not so rigid as to prohibit parties in the proper circumstance from appealing intermediate orders. S.C. Code Ann. Section 1-23-380 which permits an appeal of a preliminary, procedural, or intermediate agency action or ruling, also serves as authority for the appeal in the instant action. Our appellate courts have not fully defined those circumstances where a final agency decision would not provide an adequate remedy. The Court of Appeals has held that a delay in payment of money between carriers does not necessarily suffice to demonstrate the inadequacy of the remedy of a final agency decision. Rose v. JJS Trucking, LLC, 411 S.C. 366, 768 S.E.2d 412 (Ct. App. 2015).

¹ In dictum, Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env't'l Control purported to overrule Canteen v. McLeod Regional Medical Center to the extent the decision relied upon S.C. Code Ann. Section 14-3-330 to permit the appeal of interlocutory orders of the Workers' Compensation Commission. However, since the holding for which Canteen v. McLeod Regional Medical Center is cited, was based upon the authority in S.C. Code Ann. Section 1-23-380, the decision has precedential value here.

However, the sole issue in the instant appeal is the Respondent's recovery of benefits for physical brain damage pursuant to S.C. Code Ann. Section 42-9-10(C). To recover under S.C. Code Ann. Section 42-9-10(C), the physical brain damage must be severe. Crisp v. SouthCo, Inc., 401 S.C. 627, 738 S.E.2d (2013). Under S.C. Code Ann. Section 42-9-10(C), the Claimant suffering permanent and severe physical brain damage is entitled not only to monetary payments for life, but also medical treatment for his physical brain damage for life. Under the statutes governing appeals from the Workers' Compensation Commission, a Claimant who has been denied treatment and who must prosecute an appeal to win his right to medical treatment for his physical brain damage would not be entitled to medical treatment during the pendency of his appeal. Left untreated, physical brain damage may result in deterioration of the Claimant's health which belated treatment will not repair. An award of treatment at the end of a lengthy appeals process may be too little too late for the Claimant with permanent and severe physical brain damage depriving him of the benefits to which he would be entitled pursuant to S.C. Code Ann. Section 42-9-10(C). A final agency decision delayed by additional litigation would not adequately compensate the permanently and severely brain damaged Claimant and under the authority of S.C. Code Ann. Section 1-23-380, the decision of the Appellate Panel below, even if intermediate, would be immediately reviewable by the Circuit Court.²

The procedural record in the case before the Court best demonstrates the compelling interest in an early resolution of the sole legal issue in this appeal. The order of the Hearing Commissioner was issued April 28, 2011. The appeals to the full Commission, Circuit Court and the Court of Appeals have taken five years to this point in the litigation. Vacating the Circuit Court order has the effect of terminating benefits for Respondent's permanent and severe

² Both parties tend to benefit from an early decision on the issue of physical brain damage. A Claimant with severe permanent brain damage receives necessary treatment more timely and to the extent a Claimant's treatment for his brain damage is successful or beneficial, the Carrier's cost of treatment would tend to be reduced.

physical brain damage and a remand to the Commission will require the Respondent to linger as long as five more years for his appeal to work its way through the appellate process before asking this Court to award him benefits under S.C. Code Ann. 42-9-10(C). The General Assembly intended S.C. Code Ann. Section 1-23-380 to further the ends of justice and in so doing authorized the immediate review of certain intermediate agency decisions.

The decision of the Appellate Panel rejected Respondent's claim for treatment for his permanent and severe physical brain damage. The risk of additional, unnecessary brain damage which would result from the unjustified failure to treat for serious permanent and severe physical brain damage provides a compelling reason to justify an immediate appeal under S.C. Code Ann. Section 1-23-380. Certainly, the General Assembly did not intend for the APA to be construed so rigidly as to threaten the health and well-being of this State's workers which the South Carolina Workers Compensation Act was enacted to protect.

While the provisions of S.C. Code Ann. Section 14-3-330 are not directly applicable to the instant appeal, the provisions which address the appealability of an intermediate order or decree provide some insight into the intent of the General Assembly in enacting the provisions of S.C. Code Ann. Section 1-23-380 which provide for an immediate review of an intermediate agency decision. In enacting S.C. Code Ann. Section 14-3-330, the General Assembly recognized that delay associated with the lengthy appeals process may prove unduly prejudicial to one or both parties and provided for appellate review of intermediate orders where the merits were implicated. A body of law has developed defining those instances where appeal of an intermediate Circuit Court order was appropriate under S.C. Code Ann. Section 14-3-330. As noted above, the appellate courts have yet to develop a body of law defining an appeal will lie from an intermediate agency decision under S.C. Code Ann. Section 1-23-380. Having

determined that the interests of justice require early appellate review of some lower tribunal decisions, it seems clear that the General Assembly intended the appellate courts to have jurisdiction over intermediate agency decisions under the same circumstances that appellate courts have jurisdiction to review intermediate orders issued by the circuit courts. Thus, the decisions construing S.C. Code Ann. Section 14-3-330 serve as authority for this Court's review of the decision of the Appellate Panel below. The decision of the Appellate Panel concerning the singular issue of physical brain damage implicates the merits and as argued above, a review of a future decision of the Workers' Compensation Commission may come too late to protect the Claimant's health. The decision of the Court of Appeals in Canteen v. McLeod Regional Medical Center compels the conclusion that the order of the Appellate Panel below was an immediately reviewable intermediate agency decision pursuant to S.C. Code Ann. Section 1-23-380.³

Further, the Respondent would respectfully submit that the Court of Appeals failed to give the parties adequate notice and an opportunity to be heard on the jurisdictional issue on which it vacated the Circuit Court order. While by letter dated December 10, 2015, the Court of Appeals requested the Appellants to brief the issue of whether the order of the Appellate Panel was appealable to the Circuit Court, the letter failed to expressly state the issue of concern to the Court of Appeals.⁴

Understanding the Court of Appeals to be requesting authority for the Circuit Court's jurisdiction over the instant appeal as opposed to that of the Court of Appeals, the Appellants

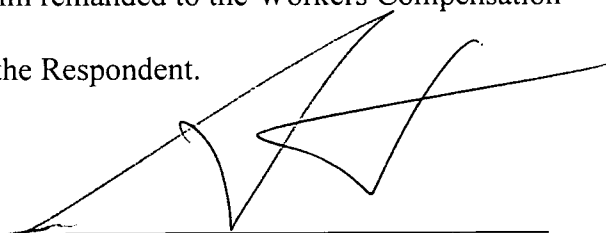
³ While the Respondent submits that Canteen v. McLeod Regional Medical Center has precedential value, to the extent that the Court deems the decision to have been overruled, the Respondent herewith moves the Court pursuant to S.C.A.C.R 17 to argue against precedent.

⁴ The text of the Court of Appeals request is as follows:
"Our review of the Order of the Appellate of the Workers' Compensation Commission indicates it might not have been appealable to the circuit court. Accordingly, it is requested that you serve and file a memorandum addressing the issue of appealability within ten (10) days of the date of this letter."

submitted their memo which correctly set forth the decision in Pee Dee Regional Transportation v. S.C. Second Injury Fund, 375 S.C. 60, 650 S.E.2d 464 (2007) in support of the Circuit Court's jurisdiction. In hindsight, the Court of Appeals must have been requesting that the Appellants submit authority for the appealability of the Appellate Panel decision under Bone v. U.S Food Serv.⁵ However, the nature of the Court of Appeals request was unclear, and the Respondent would respectfully submit that he is entitled to more fully brief and argue the issue of the appealability of the decision of the Appellate Panel.

CONCLUSION

The Respondent, therefore, respectfully requests rehearing in this case on the grounds raised above. In particular, the Respondent requests an opportunity to fully brief the issue of appealability of the decision of the Appellate Panel and the opportunity for oral argument on all issues before the Court of Appeals. In the alternative, the Respondent submits that the order of the Circuit Court below be affirmed and the claim remanded to the Workers Compensation Commission to execute the judgment awarded the Respondent.



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Columbia, South Carolina
April 22, 2016

⁵ In other appeals, the Court of Appeals has acted to have parties address the issue of appealability of final agency orders under Bone but the requests appear to have been more specific. See South Carolina Property and Casualty Insurance Guaranty Association v. Quality HR Services, Inc., 411 S.C. 501, 768 S.E.2d 670 (Ct. App. 2015).

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R. Knox McMahon, Circuit Court Judge

Appellate Case No. 2014-001258

Ricky Kneece,

Respondent

v.

Kneece Farms and Legion in
Liquidation and South Carolina
Property and Casualty Insurance
Guaranty Association,

Appellants

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on the below-named parties, at the addresses given, by depositing a copy of it in the United States Mail, postage prepaid, on April 22, 2016.

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April 22, 2016

Via Hand Delivery

The Honorable Jenny Abbott Kitchings

Clerk, SC Court of Appeals

P. O. Box 11629

Columbia, SC 29211

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SC Court of Appeals

RE: Ricky Kneece v. Kneece Farms and SCPCIGA
WCC File No.: 5920867
Appellate Case No. 2014-001258

Dear Ms. Kitchings:


Enclosed please find the original and six copies of the Petition for Rehearing on behalf of Ricky Kneece, together with Proof of Service in the above-captioned matter. I have also enclosed an extra copy of this document, which I would ask you to date stamp and return to me via my courier. By copy of this letter, I am serving all other parties of record with the above-referenced document.

Elliott & Elliott, P.A. check number 8934 in the amount of \$25.00 is enclosed for the filing fee.

If you have questions or require any further information, please do not hesitate to contact me. Thank you for your time and assistance.

Sincerely,

ELLIOTT & ELLIOTT, P.A.


Scott Elliott
S.C. Bar #1872

SE/mlw
Enclosures

cc: Peter P. Leventis, IV, Esquire (w/encl.)
Mark D. Cauthen, Esquire (w/encl.)