

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeal

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JUN 13 2016

SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Commissioners Susan S. Barden, Gene McCaskill, Aisha Taylor

Appellate Case No.: 2016-000848

Scott M. Colstrom, Claimant,Appellant,

v.

SBC Internet Services, Inc., Employer, and Old Republic Insurance Company,
CarrierRespondents.

APPELLANT'S RETURN TO RESPONDENTS' MOTION TO DISMISS

Respondents' Motion should be denied. Respondents argue that the Appellate Panel's Order is interlocutory. Respondents argue that only an interlocutory order falling within the exceptions of S.C. Code Ann. §14-3-330 may be appealed. Respondents assert the Appellate Panel's order vacating and remanding for a hearing de novo does not fall within these exceptions, therefore the appeal should be dismissed.

Respondents' Motion to Dismiss is based upon inapplicable law, and an incomplete recitation of the Appellate Panel's order.

Appellate review of an administrative agency's decision, here the Workers' Compensation Commission, is governed by the statutory scheme of the Administrative

Procedures Act and not the general appealability statute of S.C. Code Ann. §14-3-330, Bone v. U.S Food Service, 399 S.C. 566, 733 SE 2d 200 (2012). As such, Respondents reliance on S.C. Code Ann. §14-3-330 is misplaced.

Pursuant to the Administrative Procedures Act, S.C. Code Ann. §1-23-380:

“...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...Except as otherwise provided by law, an appeal is to the court of appeals.

Per S.C. Code Ann. §1-23-380(4):

The review must be conducted by the court and must be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, and established by proof satisfactory to the court, the case may be remanded to the agency for action as the court considers appropriate.

Per Island Packet v. Kitrell, 617 SE 2d 730 (2005), whether an intermediate action or ruling is immediately reviewable is to be decided on a case-by-case basis. In the present case review of the final agency decision would not provide an adequate remedy for Appellant as discussed *Infra*.

The Appellate Panel’s order which is the subject of this appeal provides:

The Commissioners considered the matter and **Vacated and Remanded** the matter to the next jurisdictional Commissioner, but not the original hearing Commissioner for a hearing de novo.

(Underlining added for emphasis). ¹

In accordance with S.C. Code Ann. § 42-17-40, “the Commission or any of its members shall hear the parties at issue...” (*Emphasis added*) However, the Appellate Panel’s order specifically prohibits one of the members of the Commission from hearing

¹ The Respondent’s Motion To Dismiss omitted this underlined portion of the Appellate Panel Order.

the case. No reason is given for this prohibition. Appellant has a right to have his case heard by any of the members of the Commission, and this prohibition is prejudicial to a substantial right of the Appellant.

The Appellate Panel's Order remanding the case and prohibiting a particular Commissioner from hearing it is a violation of a statutory provision, S.C. Code §1-23-380 (5)(a); in excess of the statutory authority of the agency, S.C. Code 1-23-380 (5)(b); affected by an error of law, S.C. Code §1-23-380 (5)(d); and, arbitrary and capricious or characterized by an abuse of discretion, S.C. Code §1-23-380 (5) (f).

S.C. Code Reg. 67-709 provides the procedural requirements for Appellate Panel review. Per 67-709 E. (4):

The Commission sitting as a five or six member panel may remand a case to the Hearing Commissioner only for taking additional or newly discovered evidence or for exceptional circumstances set forth in its order.

(Emphasis added). A panel of only three members decided this case. No reference to additional or newly discovered evidence was raised by either party before the Appellate Panel. No mention of additional or newly discovered evidence is contained in the Appellate Panel Order. No "exceptional circumstances" for remand are set forth in the Appellate Panel's Order. A three member Appellate Panel does not have authority to remand a case per 67-709. The Appellate Panel's order vacating and remanding the case to any hearing Commissioner, except the one who previously heard it, fails to cite either of the required grounds for Remand by 67-709.

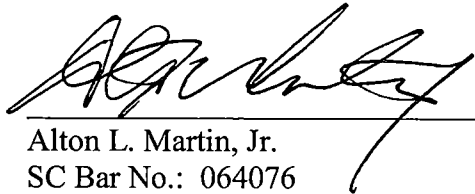
Appellant is not appealing the Remand. Instead he is alleging through his appeal the Appellate Panel's failure to utilize the procedure promulgated by S.C. Code Reg. 67-709. If the Appellate Panel deviates from or renders its decision without consideration of

the appropriate criteria, it essentially abrogates a party's due process rights. Cooper v. S.C. Dept. Of Probation & Pardon, 377 S.C. 489, 661 SE2d 106 at 111 (2008).

Review after a final agency decision would not provide an adequate remedy for Appellant. Appellate Panel's failure to follow proper procedure for Remand cannot be corrected, because sufficient findings are not provided in the Appellate Panel's Order to allow proper appellate review; S.C. Code Ann. §42-17-50, Baldwin v. James River Corp., 304 S.C. 485, 405 SE 2d 421 (Ct. App. 1991); and the Appellate Panel may do no valid act in the absence of the requisite five or six panel members under 67-709, Garris v. Gov Bd of SC Reinsurance 333 SC 432 at 453, 511 SE 2d 48 (1998).

Based on the foregoing, the Respondents' Motion should be denied.

Respectfully submitted,



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June 10, 2016
Greenville, South Carolina

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In the Court of Appeal

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Workers' Compensation Commission

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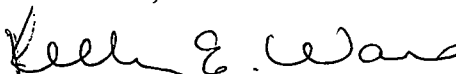
SBC Internet Services, Inc., Employer, and Old Republic Insurance Company,
CarrierRespondent

PROOF OF SERVICE

I certify that I, Kelly E. Ware, am a paralegal to Alton L. Martin, Jr. and I have served the **Appellant's Return to Respondents' Motion to Dismiss** upon the Respondents and the South Carolina Workers' Compensation Commission by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below, addressed as follows:

Amy Bracy, Judicial Director
Keith Robert, Esquire
S. C. Workers' Compensation Commission
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Columbia, SC 29202-1715

Matthew O. Riddle, Esquire
Catherine Holland Chase, Esquire
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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumter St.
Columbia, SC 29201

**RE: Scott M. Colstrom, Employee, Appellant v. SBC Internet Services, Inc.,
Employer and Old Republic Insurance Company, Carrier, Respondents**
Appellate Case No.: 2016-000848

Dear Ms. Kitchings:

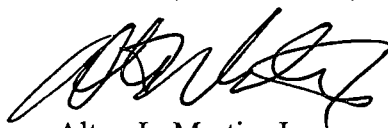
Please find enclosed for filing an original and six (6) copies of Appellant's Return to Respondents' Motion to Dismiss in the above-referenced case.

Please return a clocked copy of the Appellant's Return to Respondents' Motion to Dismiss to me in the enclosed self-addressed stamped envelope. Should you have questions or need any additional information, please do not hesitate to call me. Thank you for your assistance in this matter.

With kind regards, I am

Sincerely,

MARTIN & MARTIN, P.A.



Alton L. Martin, Jr.

ALMjr/kew


Enclosures

cc: Amy Bracy, SCWCC (w/enclosures)
Matthew O. Riddle, Esquire (w/enclosures)
Catherine Holland Chase, Esquire (w/enclosures)
Stephen Lynwood Brown, Esquire (w/enclosures)


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