THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appe.

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1116275

John McDaniel, Employee,..... Appellant,

v.

Career Employment Professional
d/b/a Snelling Staffing, Employer, and
United Wisconsin Insurance Co., Carrier,..... Respondents.

RESPONDENTS' RETURN IN OPPOSITION TO MOTION TO RECONSIDER

Pursuant to Rules 221(a) and 240(f), SCACR, Respondents Career Employment Professional d/b/a Snelling Staffing and United Wisconsin Insurance Co. oppose Appellant's Motion to Reconsider ("Motion"). Pursuant to Rule 221(a), SCACR, "[a] petition for rehearing shall ... state with particularity the points supposed to have been overlooked or misapprehended by the court." Appellant's Motion fails to state any points that were either overlooked or misapprehended by this Court. He merely asks this Court to "reconsider and clarify" its June 22, 2016 Order, (Unpub. Op. No. 2016-UP-327, June 22, 2016), so as to add "instructions for the remand hearing," which would grant Appellant additional relief he sought on appeal.

This Court remanded this matter to the South Carolina Workers' Compensation Commission ("Commission") with instructions that the Commission provide Appellant

"with the required thirty days' notice and his review hearing." (Unpub. Op. No. 2016-UP-327, June 22, 2016). Not only does this Court not need to address the issues raised by Appellant in his Motion, Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999), it should not do so prior to allowing the Commission to hold the remand hearing as ordered.

Although the Commission's rules and regulations applicable to this case remain the same, on rehearing Appellant may make whatever arguments to the Commission that he believes are relevant and that are appropriate. Appellant's statement that he "fears" he may obtain an adverse ruling from the Commission does not constitute justification for this Court to reconsider its Opinion and decide the hand-picked substantive issues Appellant raises in his Motion. Furthermore, although Appellant characterizes the issues raised in his Motion as due process issues, they are discovery and procedural issues which, if not resolved to his satisfaction by the Commission, can be raised later on appeal, should he choose to do so. In any event, each of the issues raised by Appellant lacks merit.

Issue No. 1[1]

The Commission did not violate Appellant's due process rights by granting Respondents' motions to quash his subpoenas. The procedural background to this issue is as follows: the parties initially were heard by Hearing Commissioner Melody James on November 28, 2012, at which hearing Appellant was given full opportunity to submit evidence, call witnesses, and cross-examine witnesses. (R. 256-311). The only witness proposed by Appellant was Mr. Cobb. (R. 205). The Hearing Commissioner issued her

[1] Respondents refer to the issues herein as they are numbered in Appellant's Final Brief.

decision on January 4, 2013. (Hearing Commissioner Decision, filed Jan. 4, 2013, R. 1-14 ("January Hearing Commissioner Decision")).

Although Appellant appealed the January Hearing Commissioner Decision, (R. 63-66, Form 30, dated January 14, 2013), his counsel also filed a motion to have the pay records of Jerod Lampkin[2] admitted. (R. 67-73). In that motion, Appellant asked that Full Commission review be stayed and that the matter be remanded to the Hearing Commissioner to consider the additional evidence. (R. 67-73 ("Motion to Admit")).

On April 15, 2013, the Commission granted Appellant's Motion to Admit, but noted that the matter was "set for Appellate Hearing on all issues." (R. 16-17). Appellant, now proceeding *pro se*,[3] contacted the Commission directly and asked that the matter be remanded to the Hearing Commissioner for consideration of the new evidence, *i.e.*, Mr. Lampkin's pay records. (*See* R. 74). In response, the Commission issued an order granting Appellant's motion to remand this matter to the Hearing Commissioner. (R. 18).

Subsequently, a hearing was set before Hearing Commissioner James for July 8, 2013 for the limited purpose of considering Mr. Lampkin's newly-admitted pay records. (R. 44). Appellant was advised several times that the remand hearing was *solely* to consider Mr. Lampkin's pay records. (R. 472-473) (R. 470).

Nonetheless, Appellant served subpoenas in an attempt to require Jim Pascutti, Angela Baldwin and Nicole Service to appear at the remand hearing before

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[2] Mr. Lampkin replaced Appellant at Alside Revere after Appellant's November 21, 2011 injury. (R. 71) (R. 333, lines 12-14 (indicating Mr. Lampkin worked at Alside for approximately a year starting November 22, 2011)).

[3] Appellant relieved his counsel on March 29, 2013. (R. 15).

Commissioner James. (R. 202-204). Respondents moved to quash the subpoenas. (R. 119-123).

At the July 8, 2013 hearing, Commissioner James reiterated several times that the *sole* purpose of and the *single issue* under consideration at the remand hearing was "the interpretation of [Jarod Lampkin's] pay records and any impact that they have on the decision and order ..." (R. 314, line 21 – 315, line 1) (R. 327, lines 16-19) (R. 326, lines 14-23) (R. 344, lines 4-5) (R. 355, lines 19-20) (R. 357, lines 13-24) (R. 359, lines 17-21). She considered and granted Respondents' motion to quash, noting that the individuals subpoenaed were two employees of Snelling Staffing and the claims adjuster for its insurer, none of whom could speak to anything regarding employment records from Alside Revere that post-dated the time that Appellant worked there. (R. 315, line 15 – 317, line 11) (R. 327, line 13 – 329, line 7).

Commissioner James issued her Decision and Order on September 30, 2013. (Decision and Order of Hearing Commissioner Melody L. James, filed Sept. 30, 2013, R. 23-27 ("September Hearing Commissioner Decision")). Among other things, she affirmed her grant of Respondents' motion to quash, because "there is no testimony that could be elicited from these individuals that is relevant to the Alside pay records of Jared Lampkin." (R. 26).

On October 1, 2013, the Commission provided notice of the rescheduled Full Commission hearing on the previously-filed Form 30 Notice of Appeal. The appellate hearing was scheduled for October 14, 2013. (R. 45).[4] The Commission explained on multiple occasions, that the Commission hearing was based on Appellant's January 2013

[4] It is this notice that this Court has found to be insufficient. (Unpub. Op. No. 2016-UP-327, June 22, 2016).

Form 30 appeal of the January Hearing Commissioner Decision. (R. 483-488) (R. 488) (R. 491-492) (R. 497).

Nonetheless, Appellant again served subpoenas on Mr. Pascutti, Ms. Baldwin and Ms. Service, this time requesting that they appear at the appellate panel hearing set for October 14, 2013, (R. 197-200), which Respondents moved to quash. (R. 124-128). The Commission granted Respondents' motion to quash. (R. 370, line 21 – 371, line 6). As noted above, Appellant had full opportunity to present any witnesses he believed relevant at the initial hearing before Commissioner James. As a result, both the Hearing Commissioner's and the Commission's grant of Respondents' motions to quash were entirely proper and do not constitute good reason to grant rehearing and/or reconsideration of this Court's Order.

Issue No. 2

The Commission did not violate Appellant's due process rights by denying his motions to submit additional evidence into the record after the initial hearing. In addition to the motion concerning Mr. Lampkin's pay records, Appellant filed two more motions to admit evidence after the close of the hearing before Commissioner James. On May 6, 2013, Appellant filed a motion to admit additional evidence, purporting to add pages 126-209 to his APA submissions. (R. 75-79 ("May 6 Motion")). On May 10, 2013, he filed another motion seeking to admit his deposition transcript into the record. (R. 80-83 ("May 10 Motion")).[5] On June 17, 2013, the Commission issued orders denying Appellant's May 6 and May 10 Motions. (R. 20-21).

[5] Appellant sought to waive the filing fees for these two motions, which request was denied pursuant to an Administrative Order. (R. 19).

These orders were proper because, among other things, Appellant failed to present this evidence at the initial hearing and he failed to meet the test for newly admitted evidence. Commission Regulation 67-612(J) provides that "[a]ll available evidence and testimony shall be presented at the scheduled hearing or a party must move for an adjournment according to R. 67-613." S.C. Code Regs. § 67-612(J).[6] Appellant had both the opportunity and the duty to present whatever evidence and testimony he chose at the initial hearing before Hearing Commissioner James. Prior to that hearing, Appellant's counsel submitted a Form 58, Pre-Hearing Brief, and nearly 125 pages of evidence. (R. 205) (R. 77 (Appellant's May 6, 2013 motion for additional evidence starting at page 126)). The remand hearing, at which he insists he should have been able to submit evidence in addition to Mr. Lampkin's pay records, was convened solely to consider Mr. Lampkin's pay records. (R. 472-473) (R. 470). At the initial hearing, Appellant had full opportunity "to respond and present evidence and argument on all issues involved," S.C. Code Ann. § 1-23-320(E), and the Commission committed no error in refusing to allow him to continue to supplement the record in an effort to rehabilitate his case.

Regulation 67-707 provides, in pertinent part, that, in order to present newly discovered evidence, the moving party must establish that the new evidence is of the same nature and character required for granting a new trial *and* show that "the evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery." S.C. Code Regs. § 67-707(B)&(C); Martin v. Rapid Plumbing, 369 S.C. 278,

[6] Appellant did not seek a postponement, pursuant to Regulation 67-613, of the initial hearing before Commissioner James.

287, 631 S.E.2d 547, 552 (Ct. App. 2006) ("the evidence must not be known to the party and could not have been secured by reasonable diligence"). Appellant admitted that the evidence was in his or his attorney's possession at the time of the initial hearing, and only argued that he was unaware that it had not been submitted. (R. 75-76, 80). Therefore, he did not establish that the evidence met the requirements of S.C. Code Regs. § 67-707.

As a result, the Commission properly denied his May 6 and May 10 motions to add evidence to the record, and Appellant's arguments on this issue do not constitute good reason to grant rehearing and/or reconsideration.

Issue No. 4

The Commission did not violate Appellant's due process rights by not ruling on the set of proposed findings of fact that he submitted, unrequested, to the Commission. As explained in Respondents' Brief, Appellant misreads Section 1-23-350, which provides, in pertinent part that, "[*i*]*f, in accordance with agency rules*, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding." S.C. Code Ann. § 1-23-350 (emphasis added). The Commission simply does not have any agency rules or regulations governing or allowing for each party to submit proposed findings of fact that the Commission must then respond to in detail.

Instead, the Commission has a long-standing practice of issuing a detailed Request for Proposed Order, such as the ones sent to Appellant's counsel, (R. 48-49), to Staff Attorney Roberts, (R. 50-51), and the request issued by the Commission on October 31, 2013. (R. 52). In such requests, the Commission always reserves "the right to modify and/or delete any or all portions of the submitted Decision and Order." (Id.).

Furthermore, Appellant's suggestion would render workers' compensation proceedings uncontrollably unwieldy. Parties could submit lengthy proposed findings that would require the Commission essentially to rehear the entire matter each time it entered a written decision.

As a result, the Commission did not err in not ruling on Appellant's proposed findings of fact, and Appellant's argument on this point does not constitute good reason to grant rehearing and/or reconsideration.

Issue No. 5

The Commission did not violate Appellant's due process rights by not accepting his self-styled Amended Form 30. On October 12, 2013, Appellant emailed a self-styled "Amended Form 30 for the upcoming review hearing." (503-504). Appellant's "Amended Form 30" attempted to raise issues concerning the January Hearing Commissioner Decision, the September Hearing Commissioner Decision, as well as subsequent motions and rulings, including arguments he made to Hearing Commissioner James in the July 8, 2013 hearing. Appellant's "Amended Form 30" was not accompanied by any filing fee or a request for waiver of same. (R. 503-504).

Contrary to Appellant's assertions otherwise, the Appellate Panel did not accept Appellant's self-styled Amended Form 30 and then later decide to reject it. Instead, at the October 14, 2013 Appellate Panel hearing, when Appellant stated that he had submitted an Amended Form 30, Commissioner Barden simply replied: "We have that in front of us, yes, sir." (R. 372, lines 3-19). This was not an acceptance but a statement of fact.

Appellant's attempt to file an Amended Form 30 was both untimely (with respect to the January Hearing Commissioner Decision), and defective (with respect to both the January and September Hearing Commissioner Decisions), and the Commission properly declined to accept it. Section 42-17-50 provides, in pertinent part, that an application for review must be filed with the Commission "within fourteen days from the date when notice of the award shall have been given," and that "[e]ach application for commission review must be accompanied by a fee equal to that charged in circuit court for filing a summons and complaint in order to defray the costs of the review." S.C. Code Ann. Ann. § 42-17-50; *see also* S.C. Code Reg. § 67-701. The requirements of Section 42-17-50 delineate the Commission's appellate jurisdiction and cannot be expanded by that body. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 188-189, 714 S.E.2d 547, 549-550 (2011) (the fourteen-day window for appeals is jurisdictional and cannot be extended). The Commission has no rules or regulations that allow Appellant to file an Amended Form 30 raising additional issues concerning the January Hearing Commissioner Decision,[7] and Appellant failed to submit the required filing fee to appeal the September Hearing Commissioner Decision.

Therefore, because Appellant's self-styled Amended Form 30 was never accepted by the Commission and was improperly filed, Appellant's argument on this point does not constitute good reason to grant rehearing and/or reconsideration.

[7] While the Commission has rules for amending a Form 50 or 52 request for hearing, the Form 51 Answer, and the Pre-Hearing Brief, (*see* S.C. Code Ann. §§ 67-609(B)(2), 67-610 & 67-611, respectively), there are no rules for amending a Form 30. (*See* S.C. Code Ann. §§ 67-701-712).

CONCLUSION

For the reasons stated herein, this Court should deny Appellant's Motion to Reconsider.

McANGUS GOUDELOCK & COURIE, L.L.C.

July 13, 2016

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PROOF OF SERVICE

I certify that on the 13th day of July, 2016, I served the **Respondents' Return in Opposition to Motion to Reconsider** on John McDaniel by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

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SC Court of Appeals

July 13, 2016

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: John McDaniel v. Career Employment Professionals d/b/a Snelling Staffing Services and United Wisconsin Insurance Company c/o United Heartland
Date of Accident: November 21, 2011
WCC File No.: 1116275
Our File No.: 20638.12027
Claim No.: 041100021048
Appellate Tracking No.: 2014-000186

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents' Return in Opposition to Motion to Reconsider, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the self-addressed, stamped envelope.

If you have any questions, please do not hesitate to contact me.

Yours truly,
McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures
cc: John C. McDaniel, *pro se*

mgc | INSURANCE DEFENSE

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