

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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OCT 20 2016

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

R. Knox McMahon, Circuit Court Judge

Common Pleas Case No. 2012-CP-32-02093
Common Pleas Case No. 2012-CP-32-02111
Appellate Case No. 2014-001258
SC Supreme Court Case No. 2016-001729

Ricky Kneece,

Petitioner,

v.

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

Respondents.

PETITIONER'S REPLY TO RESPONDENTS' RETURN TO
PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Were questions concerning the Petitioner's severe and permanent physical brain damage, the arbitrariness of the application of Regulation 67-1101, and the Petitioner's loss of earning capacity preserved for Supreme Court review?
- II. Was the Workers' Compensation Commission order immediately appealable?

ARGUMENT I

QUESTIONS CONCERNING THE PETITIONER'S SEVERE AND PERMANENT PHYSICAL BRAIN DAMAGE, THE ARBITRARINESS OF THE APPLICATION OF REGULATION 67-1101, AND THE PETITIONER'S LOSS OF EARNING CAPACITY WERE PRESERVED FOR SUPREME COURT REVIEW.

By ordering without hearing that the Circuit Court Order below be vacated, the Court of Appeals also overturned or voided the Circuit Court's holdings that the Petitioner suffered severe and permanent brain damage, that the application of Regulation 67-1101 to the Petitioner's severe and permanent brain damage was arbitrary, and that the Petitioner suffered a loss of earning capacity thereby totally and permanently disabling him. The issues of Petitioner's entitlement to an opportunity to be heard and his entitlement to relief on the underlying merits of his claim for total and permanent disability are inextricably intertwined.

The Petitioner put the question of his entitlement to total and permanent disability with severe and permanent brain damage before the Court of Appeals as envisioned by the Appellate Court Rules.

Rule 242(d)(2), SCACR reads as follows:

The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein.

Questions concerning the Petitioner's severe and permanent physical brain damage, the arbitrariness of the application of Regulation 67-1101, and the Petitioner's loss of earning capacity were both raised in the Court of Appeals and in the petition for rehearing.

The Petition for Rehearing dated April 22, 2016, set out not only the rationale for the Petitioner's right to a hearing but also for the concomitant entitlement to an order affirming the Circuit Court decision concluding that he was totally and permanently disabled with severe and permanent brain damage. The Petitioner argued that,

[t]he 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. (Appendix, page 6; Petition for Rehearing, page 1).

The Petitioner expressly requested that the Court of Appeals either grant him a hearing or, in the alternative, affirm the Circuit Court Order. The Petition for Rehearing argues as follows:

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. (Appendix, page 13; Petition for Rehearing, page 8.)

The Petition for Rehearing sought both the opportunity to persuade the Court of Appeals that the Petitioner was entitled to the relief ordered by the Circuit Court below and expressly requested

the Court of Appeals to affirm the Circuit Court Order awarding the Petitioner benefits. Moreover, the question of the Petitioner's total and permanent disability with severe and permanent brain damage and entitlement to recovery pursuant to S.C. Code Ann. Section 42-9-10(C) is a subsidiary question to that of the Petitioner's right to persuade the Court of Appeals of the merits of his claim.

The parties on appeal filed a record consisting of over 1,513 pages and fully briefed the issues pertaining to the Petitioner's severe and permanent physical brain damage, the arbitrariness of the application of Regulation 67-1101, and the Petitioner's loss of earning capacity. Without rehashing argument with which the Court of Appeals was fully familiar, the Petition for Rehearing placed the merits of the Petitioner's claim squarely before the Court of Appeals, thereby fully preserving these issues for further review. The Court of Appeals was fully aware of the issues in this appeal and gave the Petition for Rehearing "careful consideration."

(Court of Appeals order dated July 22, 2016: Appendix, page 1.)

As will be discussed in Argument II, *infra*, determining whether the review of the final Workers' Compensation Commission decision gives the Petitioner an adequate remedy requires the Court to reach the underlying merits of the Workers' Compensation Commission's order, thereby preserving the issue of the Petitioner's severe and permanent physical brain damage for review by the Supreme Court. Hilton v. Flakeboard America Limited and Liberty Mutual Insurance Company, Opinion No. 27670 (filed October 12, 2016).

ARGUMENT II

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"). Hilton v. Flakeboard America Limited and Liberty Mutual Insurance Company, *supra*. The APA 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.

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." The Workers' Compensation Commission Appellate Panel overturned the Hearing Commissioner concluding that the Petitioner did not suffer permanent brain damage and remanded the matter for a determination of permanency. All parties considered the Appellate Panel decision to be a final decision which all parties appealed to the Circuit Court.

The decision in Bone v. U.S Food Serv., by a closely divided Court, is not dispositive here. 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.

The Supreme Court has recognized that circumstances will arise wherein a final agency decision will not provide a Claimant an adequate remedy. In Hilton v. Flakeboard America Limited and Liberty Mutual Insurance Company, the Supreme Court held that,

Section 1-23-380(A) states, in relevant part, 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.” We agree, under these unusual facts, that review of the final agency decision would not provide Hilton with an adequate remedy, and he is therefore entitled to an immediate appeal. Determining whether review of the final agency decision would give Hilton an adequate remedy requires us to reach the underlying merits of the Commission’s order, and since we conclude that the order cannot stand, we vacate the Court of Appeals’ order and remand the matter to the Commission. Hilton v. Flakeboard America Limited and Liberty Mutual Insurance Company.

The sole question in the instant appeal is whether the Petitioner suffered severe and permanent physical brain damage entitling him to recovery of benefits 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 benefits for life. The treating physicians and psychologists prescribe further treatment for the Petitioner. Left untreated, physical brain damage may result in deterioration of the Claimant’s health which belated treatment will not repair. A final agency decision delayed by additional litigation and a lengthy appeals process would not adequately compensate the severely and permanently physically brain damaged Claimant.

The procedural history in the case before the Court best demonstrates the compelling interest in an early resolution of the sole legal question in this appeal. The order of the Hearing Commissioner finding that the Petitioner was totally and permanently disabled with severe and

permanent brain damage was issued April 28, 2011, over five years ago. Vacating the Circuit Court order has the effect of terminating benefits for Respondent's permanent and severe physical brain damage and a remand to the Commission will require the Respondent to linger as long as five additional years for his appeal to work its way through the appellate courts. 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.

Moreover, the Respondents argue that on remand, the Workers' Compensation Commission should re-litigate the Petitioner's claim. The Workers' Compensation Commission Appellate Panel found that "a Claimant who can drive a 'complicated' computer-operated tractor for fifty (50) hours per week has not sustained a physical brain injury. The Claimant sustained an injury pursuant to Regulation 67-1101." (Appendix, page 200; 2012 Order at page 10).

Notwithstanding that the Workers' Compensation Commission reversed the Hearing Commissioner with respect to one finding of fact, the Respondents dispute not only the Petitioner's permanent and total disability pursuant to S.C. Code Ann. Section 42-9-10(C), but also the questions of whether the Petitioner suffered a loss of earning capacity, the benevolent employer doctrine, the Petitioner's ability to handle finances, the Petitioner's entitlement to temporary total disability payments, reimbursement of Petitioner's medical expenses and Petitioner's future medical treatment (See Arguments II. A, B, III. A, B, C, IV and V of the Respondents' brief on appeal; Appendix, page 22).

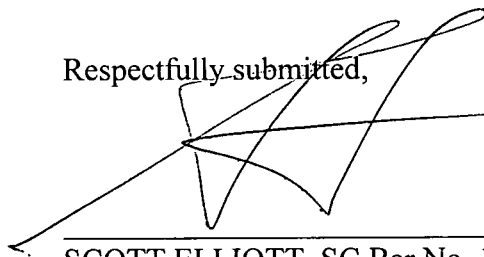
The Respondents propose to re-litigate the claim. This Court in Hilton v. Flakeboard America Limited and Liberty Mutual Insurance Company held that in circumstances where, as

here, the Workers' Compensation Commission order creates the possibility of repeated unexplained "do overs" before the final decision of the Commission, S.C. Code Ann. Section 1-23-380(A) permits an appeal of an otherwise interlocutory administrative decision.

CONCLUSION

For the foregoing reasons, as well as those set out in the Petition for Writ of Certiorari, Petitioner asks the Court to grant the petition for a writ of certiorari, reverse the decision of the Court of Appeals, and affirm the order of the Circuit Court.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Petitioner's Reply to Respondents' Return to Petition for Writ of Certiorari on the below-named parties, at the addresses given, by depositing a copy of it in the United States Mail, postage prepaid, on October 20, 2016.

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