

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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OCT 31 2016

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

Honorable Casey L. Manning, Circuit Court Judge, Presiding

Case No. 2015-CP-40-07178

Clarence B. Jenkins, Jr.....Appellant,

v.

South Carolina Workers' Compensation Commission.....Respondent.

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the Circuit Court err in granting Respondent's Motion to Dismiss under Rule 12(b)(1), SCRCP?
2. Did the Circuit Court err in granting Respondent's Motion to Dismiss under Rule 12(b)(6), SCRCP?
3. Should Appellant's Designation of Matter be stricken or amended under Rules 208, 209, 210 and 240, SCACR?
4. Should the Initial Brief of the Appellant be corrected and/or stricken under Rules 208, 209, 210 and 240, SCACR?

STATEMENT OF THE CASE

The instant action arises out of Appellant's Summons and Complaint filed with the Richland County Court of Common Pleas on December 3rd, 2015, alleging a cause of action against the South Carolina Workers' Compensation Commission ("the Commission"), a Government Entity created under Title 42, South Carolina Code of Laws. (Appellant's Complaint, p. 1). On December 31st, 2015, the Commission answered by filing a Motion to Dismiss Appellant's Complaint for lack of jurisdiction over the subject matter and failure to state facts sufficient to constitute a cause of action pursuant to Rules 12(b)(1) and 12(b)(6) of the South Carolina Rules of Civil Procedure. (Respondent's Motion to Dismiss, p. 2-4). Prior to the Respondent's Motion to Dismiss being heard by the Circuit Court, Appellant filed no less than eight motions with the court. The Court of Common Pleas set all pending motions, including Respondent's Motion to Dismiss, for Hearing before the Honorable L. Casey Manning on March 22nd, 2016. Judge Manning heard oral arguments from the parties.

On May 27th, 2016 Judge Manning issued his Order granting Respondent's Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6). Judge Manning found the Appellant had not alleged a justiciable controversy, held that the Court of Common Pleas did not have jurisdiction over questions under the South Carolina Workers' Compensation Act, and ruled that Appellant had failed to state facts sufficient to constitute a cause of action. (Order of Judge Manning, p. 2). Finally, Judge Manning found that the ruling on Respondent's Motion to Dismiss was dispositive of all issues, and therefore dismissed all Motions filed by Appellant as moot. (Id.)

On June 30th, 2016 Appellant filed Notice of Appeal with the South Carolina Court of Appeals. (Appellant's Notice of Appeal, p. 1). On October 3rd, 2016, Appellant filed the Initial Brief of the Appellant and Designation of Matter (Designation of Matter and Initial Brief of Appellant). On October 28th, 2016, Respondent filed a Motion for Correction of and/or to Strike Items from Appellant's Designation of Matter and Initial Brief. (Respondent's Motion to Strike). Respondent also requested a stay in the briefing schedule pending the Court of Appeals ruling on Respondent's Motion. (Id.).

COLLATERAL APPEAL

Appellant previously filed with the Commission a workers' compensation claim against his employer, which was adjudicated by the Commission and fully and finally decided by the Appellate Panel of the Commission on February 23rd, 2016. Appellant is currently appealing the Decision and Order of the Full Commission *pro se* in Appellate Case No. 2016-000598. The Employer Amazon.Com DEDC, LLC, Employer ("Amazon"), and American Zurich Ins. Co., Carrier ("Zurich"), are the Respondents in Appellate Case No. 2016-000598.

While the appeal of his workers' compensation claim was pending before the Commission for adjudication in accordance with S.C. Code Ann. § 42-17-50, Appellant filed the instant suit in Richland County, naming the Commission as the Respondent. In Appellate Case No. 2016-000598 Appellant is seeking benefits to be awarded to him under the Workers' Compensation Act against Amazon and Zurich for an alleged injury by accident arising out of and in the course of his employment with Amazon. In the instant matter, Appellant appears to be seeking relief against the State of South Carolina, through its agency the Workers' Compensation Commission, for wrongs he allegedly

suffered due to the Commission's handling and adjudication of his workers' compensation claim.

STANDARD OF REVIEW

This is an appeal from the grant of a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), SCRCF. "The question of subject matter jurisdiction is a question of law for the court." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). "We are free to decide questions of law with no deference to the [circuit] court." *Id.*

In considering a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCF, the circuit court must base its ruling solely on allegation set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). The circuit court may dismiss a claim when the defendant demonstrates the plaintiff's " 'failure to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." *FOC Lawshe Ltd. P'ship v. Int'l Paper Co.*, 352 S.C. 408, 412, 547 S.E.2d 228, 230 (S.C. App. 2002) (quoting Rule 12(b)(6), SCRCF). The Circuit court "must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint." *Brown v. Leverette*, 291 S.C. 364, 366, 353 S.E.2d 697, 698 (1987) (citation omitted). "The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case." *Id.* The South Carolina Court of Appeals applies the same standard of review implemented by the circuit court. *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 500 (S.C. App. 2001); *Hambrick v. Gmac Mortgage Corp.*, 370 S.C. 118, 121-22, 634 S.E.2d 5, 7 (S.C. App. 2006).

In this case, the complaint does not pertain to subject matter over which the trial court has jurisdiction nor does it state a claim for which relief can be granted. For these reasons, the lawsuit must be dismissed.

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DISMISSED THE ACTION PURSUANT TO RULE 12(B)(1), SCRPC, BECAUSE THE COURT OF COMMON PLEAS OF RICHLAND COUNTY LACKS SUBJECT MATTER JURISDICTION OVER THIS DISPUTE UNDER S.C. CODE ANN. § 42-3-180.

Appellant sought a Hearing before the Workers' Compensation Commission to adjudicate his entitlement to have workers' compensation benefits awarded to him by Amazon. It is clear from the pleadings that Appellant was dissatisfied with the handling of his workers' compensation claim by the Workers' Compensation Commission. However, the Court of Common Pleas is not the proper jurisdiction for Appellant to seek redress of his grievances regarding the handling of his workers' compensation claim. The Workers' Compensation Commission, not the Court of Common Pleas, has jurisdiction over claims arising under the Workers' Compensation Act. S.C. Code Ann. § 42-3-180 ("All questions arising under [Title 42, South Carolina Code of Laws], if not settled by agreement of the parties interested therein with the approval of the Commission, shall be determined by [the Workers' Compensation] Commission, except as otherwise provided in this Title."). The sole remedy available for a claimant alleging he is aggrieved by a Decision and Order of the Workers' Compensation Commission is provided under S.C. Code Ann. § 42-17-60 (1976, as amended), which allows a party to appeal a decision from the Commission to the courts.

Under a previous incarnation of § 42-17-60 appeals of decisions by the Commission were taken to the Court of Common Pleas S.C. Code Ann. § 42-17-60 (Supp. 2006). In 2007, the General Assembly amended § 42-17-60 to allow review to be taken directly to the Court of Appeals. *See* 2007 S.C. Act No. 111, Pt I, § 30, eff July 1, 2007, applicable

to injuries that occur on or after that date. However, even if Appellant's workers' compensation claim were subject to the previous version of § 42-17-60, it is Appellant's position that the Circuit Court's jurisdiction over questions arising from the Commission's handling of the workers' compensation would have been appellate only, and the Court of Common Pleas still would not have had jurisdiction to consider a cause of action against the Commission arising from its adjudication of Appellant's claim.

Appellant failed to exhaust administrative remedies under the South Carolina Workers' Compensation Act, and instead filed the instant action seeking redress from the courts. A failure to exhaust administrative remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute. *See Unisys Corp. v. S.C. Budget & Control Bd.*, 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001); *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 101, 674 S.E.2d 524, 529 (Ct. App. 2009); S.C. Code Ann. § 42-3-180.

The Court of Common Pleas therefore properly held that it lacked jurisdiction to consider Appellant's Complaint.

II. THE CIRCUIT COURT PROPERLY DISMISSED THE APPELLANT'S ACTION FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED PURSUANT TO RULE 12(B)(6), SCRCPP.

The Court of Common Pleas properly dismissed Appellant's Complaint pursuant to Rule 12(b)(6), SCRCPP, because Appellant's pleading failed to state facts sufficient to constitute a cause of action. In considering a Motion to Dismiss pursuant to Rule 12(b)(6), the Court of Common Pleas must base its ruling solely on allegations set forth in the complaint. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). The question is whether, in the light most favorable to the Appellant, and with every doubt

resolved in his behalf, the complaint states any valid claim for relief. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). In this case, the Complaint does not state a claim for which relief can be granted. For that reason, it was proper for the Court of Common Pleas to dismiss the action.

Appellant makes numerous conclusory statements of wrongdoing by the Commission; however, Appellant's complaint is devoid of any facts that, if true, would constitute a cause of action for which the law recognizes a remedy. The Workers' Compensation Commission as a governmental entity is not liable for a loss resulting from legislative, judicial, or quasi-judicial action or inaction, or the exercise of discretion or judgment by the governmental entity. S.C. Code Ann. § 15-78-60.

Appellant states for a first cause of action "[the Commission] made an egregious error at May 21, 2015 hearing by not allowing Appellant to submit pertinent medical documentations which is (sic) required under R-67-611 (sic) therefore an abuse of power." (Complaint, p. 10). Appellant failed to plead facts sufficient to support this assertion that the Commission abused its power under 8 S.C. Code Reg. 67-611. S.C. Code Reg. 67-611 is inapplicable to Appellant's assertion that he is entitled to submit medical records as evidence of the case without first providing notice prior to the scheduled Workers' Compensation hearing. Submission of expert reports under the Workers' Compensation Act is governed by 8 S.C. Code Reg. 67-612. The very nature of S.C. Code Reg. 67-612 is wholly discretionary and thus a Hearing Commissioner may accept or exclude expert reports in accordance with the regulation. Any alleged errors committed by the Commission regarding the admission of evidence can only be redressed by appeal under S.C. Code Ann. § 42-17-60.

Next, Appellant states that “Amazon and Sedgwick¹ stated that no income was ever provided to Plaintiff for any time away from work due to work injury since February 10, 2015.therefore (sic) constitutes misrepresentation and false statements under South Carolina Worker Compensation Law.” (Complaint, p. 11).

Appellant failed to plead facts sufficient to support his assertion that the Commission committed acts that constituted “misrepresentation and false statements under the Worker (sic) Compensation Law.” (Complaint, p. 11.) According to Black’s Law Dictionary, misrepresentation is the act of making a false or misleading assertion about something, usually with the intent to deceive. *Black’s Law Dictionary* 1539 (9th Ed. 2009). False statement is defined as an untrue statement knowingly made with the intent to mislead. *Black’s Law Dictionary* 1091 (9th Ed. 2009). Appellant fails to plead any facts that support his contention that the Commission committed an act that was misleading or intentionally deceptive. Likewise, Appellant failed to state any facts sufficient to support his assertion that the Commission violated the law under 8 S.C. Code Reg. 67-505 or 506.

Finally, Appellant alleges as a cause of action “[the Commission] has refused to accept disability when Appellant was denied access to the work site to earn an income due to work restrictions and injury as determined by Dr. Mohmound Abu-Atta.” This is a conclusory statement, and Appellant does not allege facts that, if true, would constitute a cause of action. Any alleged errors committed by the Commission in the adjudication of the workers’ compensation claim can only be redressed by appeal under S.C. Code Ann. § 42-17-60.

¹ Sedwick CMS is a third-party claims administration service that served as an agent of American Zurich Insurance Company in the handling of Appellant’s workers’ compensation claim.

Appellant states no facts to support his assertion that the Commission violated its laws in its orders, opinions, or awards issued in relation to his workers' compensation claim against his employer. All orders, opinions, and awards issued by the Commission in relation to Appellant's workers' compensation claim against his employer have been issued in accordance with the applicable statutes and regulations found in the Workers' Compensation Act and Administrative Procedures Act. A party dissatisfied with a Decision and Order of the Commission has an adequate remedy at law via appeal under § 42-17-50 and § 42-17-60.

The Court of Common Pleas properly dismissed Appellant's Complaint pursuant to Rule 12(b)(6), SCRCF, because Appellant failed to provide facts sufficient to constitute a cause of action to support his assertion that the Commission violated its laws.

III. THE COURT OF APPEALS SHOULD ORDER THAT APPELLANT'S DESIGNATION OF MATTER BE STRICKEN AND OR AMENDED TO REMOVE ITEMS NOT INCLUDED IN THE RECORD BEFORE THE LOWER COURT.

The issue before the Circuit Court was the Respondent's Motion to Dismiss, the only matters on the Record were the pleadings, the Respondent's Motion to Dismiss, and the transcript of the hearing.

Appellant has designated several items that were not part of the Record before the Circuit Court; these non-record items may not be included in the Record before this Court.

An appellate court cannot decide issues that were not raised before the trial court. *Wilson v. Builders Transport, Inc.*, 330 S.C. 287, 294, 498 S.E.2d 674, 678 (Ct. App. 1998). Further, Rule 209(b), SCACR, establishes that the Designation "may only propose

to include portions of the transcript, pleadings, orders, exhibits, or other materials properly included in the Record on Appeal [See Rule 210(c)].” Rule 210(c), SCACR, states that the Record “shall not, however, include matter which was not presented to the lower court or tribunal.”

Therefore, matters which were not presented to the lower court cannot be included in the Designation because they would be improper to include in the Record on Appeal. *See Argabright v. Argabright*, 398 S.C. 176, 179, 727 S.E.2d 748, 750 (Ct. App. 2012)(establishing that the appellant court is “bound to the record at trial . . . ”); *see also State v. White*, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007)(statements not presented to the lower court “cannot be properly included in the Record on Appeal”).

As the issue before the Circuit Court was the Respondent’s Motion to Dismiss, the only matters on the Record were the pleadings, the Respondent’s Motion to Dismiss, and the transcript of the hearing. Consequently, the following non-record items were listed in the Appellant’s Designation:

#2. “Decision and Order of February 26, 2016”;

#3. “Decision and Order of August 14, 2015”;

#8. “Transcript of Proceedings of South Carolina Worker’s[sic]

Compensation Commission Full Board Hearing December 14, 2015”;

#9. “Transcript of May 21, 2015 South Carolina Worker’s[sic]

Compensation Commission Hearing pp.1-20”;

#10. “Motion to Include Dr. Mahmoud Abu-Ata Medical Records”;

#11. “Motion to Include Medical Reports by Dr. Carol Benoit and Dr.

James Way and Disability Determination by Social Security

Administration”;

- #12. "Notice of deposition of Mahmoud Abu-Ata, M.D.";
- #13. "Form 50 filed by pro se claimant dated February 25, 2015";
- #14. "A police report filed by J.R. Brock of Lexington, South Carolina";
- #15. "South Carolina Worker's[sic] Compensation Commission
Regulatory Advisory of Form14B[sic]";
- #17. "An email letter from Attorney Russell J. Goudeock dated April 24,
2014";
- #18. "A letter from Nurse Kelly Wells of Disability case[sic] Management
Professionals dated June 9, 2014";
- #19. "An email letter from Michelle Doyle of Amazon.Com,DEDC,
LLC[sic] Human Resource Office on February 19, 2014";
- #20. "South Carolina Worker's[sic] Compensation Commission
Educational Publication Board of Directors";
- #23. "S.C. Code Ann. 15-79-105(C)."
- (Appellant's Designation of Matter, p. 1-2).

The items discussed immediately above were never admitted into the Record before the Circuit Court and must be removed from Appellant's Designation, as they are not proper for the Record on Appeal. Rule 209(a), SCACR; Rule 210(c), SCACR; *Argabright*, 398 S.C. at 176; *Wilson*, 330 S.C. at 294.

IV. THE COURT OF APPEALS SHOULD ORDER THAT THE INITIAL BRIEF OF APPELLANT SHOULD BE STRICKEN AND OR AMENDED TO REMOVE REFERENCES TO ITEMS NOT INCLUDED IN THE RECORD BEFORE THE LOWER COURT.

Appellant's Initial Brief references non-record items. Rule 208(b)(4), SCACR, states that the brief "shall contain references to the transcript, pleadings, orders, exhibits,

or other materials which may be properly included in the Record on Appeal . . . to support the salient facts alleged.” As the above-listed items are not proper for the Record on Appeal, they cannot properly support the facts alleged in the Appellant’s Initial Brief. Specifically:

- On page 4 of the Initial Brief, Appellant references the police report filed by Officer J.R. Brock, listed above in Appellant’s Designation as item number 14;
- On page 4 of the Initial Brief, Appellant additionally references “expert’s evaluations” by Dr. Carol Benoit and Dr. James Way. These evaluations are not listed by Appellant in his Designation. Further, the only mention of these evaluations in the Designation is listed above as item number 11, a motion to include Dr. Benoit and Dr. Way’s reports;
- On page 5 of the Initial Brief, Appellant references “S.C. Code Ann. § 15-79-105(C).” This statute does not exist.

(Initial Brief of Appellant, p. 4-5).

As such, Respondent asserts that Appellant’s Initial Brief should be stricken and the Appellant’s Initial Brief should contain references only to documents that were on the Record before the Circuit Court.

CONCLUSION

The Court of Common Pleas held that Appellant’s Complaint should be dismissed pursuant to Rule 12(b)(1) due to lack of jurisdiction over the subject matter and Rule 12(b)(6) due to a failure to state facts sufficient to constitute a cause of action. Appellant has identified no error of law in the Court of Common Pleas’ opinion. Therefore, the

decision of the Court of Common Pleas dismissing the Complaint should be UPHELD
and Appellant's appeal should be DISMISSED.

Dated this the 31st day of October, 2016.

Respectfully submitted,

THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Casey L. Manning, Circuit Court Judge

SC Court of Appeals

Case No. 2015-CP-40-07178

Clarence B. Jenkins, Jr.,.....Appellant,

v.


South Carolina Workers' Compensation Commission,.....Respondent.

PROOF OF SERVICE

I, the undersigned counsel for Respondents, hereby certify that I have served a copy of the INITIAL BRIEF OF RESPONDENT by causing a copy of the same to be deposited in the United States mail, first class postage, prepaid, address to the *pro se* Appellant on this the 31st day of October, 2016:

Clarence B. Jenkins, Jr.
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10/31, 2016



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Workers' Compensation Commission

October 31st, 2016

South Carolina Court of Appeals
The Hon. Jenny Abbott Kitchings, Clerk of Court
1220 Senate St.
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OCT 31 2016

SC Court of Appeals

Re: Clarence B. Jenkins, Jr., Appellant v. S.C. Workers' Compensation Commission,
Respondent.
Appellate Case No.: 2016-001382

Dear Ms. Kitchings:

Enclosed please find the original and one (1) copy of Respondent the South Carolina Workers' Compensation Commission's Initial Brief of Respondent which I would appreciate your filing with the court. Currently pending before the court is Respondent's Motion for Correction of and/or to Strike Items from Appellant's Designation of Matter and Initial Brief, filed on October 28th, 2016, wherein I have requested a stay in the briefing schedule in this matter. However, out of an abundance of caution, I am filing an Initial Brief of Respondent at this time in order to comply with the time for serving and filing requirements of Rule 208(a)(2), SCACR.

By copy of this letter to the last known address for Mr. Clarence B. Jenkins, Jr., Claimant *pro se*, I am hereby serving him with a copy of the Initial Brief of Respondents. Please see the attached Certificate of Service.

If there is anything further the court requires from the Respondent at this time, please do not hesitate to ask.

With warmest regards,

Sincerely,

A handwritten signature in cursive script that reads "J. Keith Roberts".

J. Keith Roberts, Esquire
S.C. Workers' Compensation Commission

Enclosure

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RETURN SERVICE REQUESTED

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OCT 31 2016

SC Court of Appeals

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The Hon. Jenny Abbott Kitchings, Clerk of Court

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