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October 26, 2016

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
1220 Senate St.
Columbia, South Carolina 29211

RECEIVED
OCT 27 2016
SC Court of Appeals

RE: Theodore Polansky v. SC Attorney General
Appeal Case No: 2016-1494 & 2016-1890
Case No. 2015-CP-4007380
WCC No.: 9922954 & 0024408
Our File No.: 1200-0073 & 1200-0074


Dear Mrs. Kitchings:

As you are aware, the Court held Appeal # 2016-1494 in abeyance pending the circuit court's action on remaining issues arising from the same Workers' Compensation Commission's Order. One of those remaining issues (the immediate payment of accrued benefits) gave rise to Appeal # 2016-1890.

I have enclosed a copy of a October 10, 2016 Order of the Honorable Jean H. Toal granting an Order of Supersedeas over the Orders that gave rise to Appeal # 2016-1890. I am currently waiting to see if the Claimant will appeal the Order of Supersedeas. I request that all deadlines in Appeal # 2016-1890 be held in abeyance until the issue of Supersedeas is finally determined, after which Appeal # 2016-1890 will likely be dismissed or consolidated in to Appeal # 2016-1494

Should anything in this letter require further discussion, please call me on my direct dial: 803-705-2149.

Sincerely,


Temus C. Miles, Jr.

Enclosures

cc: Preston McDaniel

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2015CP4007380

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Theodore Polansky

SC Attorney General

OCT 27 2016

South Carolina State Accident Fund

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Total SC Court of Appeals

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. No. Suit); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other _____

RICHLAND COUNTY
FILED
2015 OCT 16 AM 11:12
JENNIFER M. BRIDGE
CLERK, S.C.P.C.

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

Order of Supersedeas Attached

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge [Signature] Judge Code 2758 Date Oct. 16, 2016

For Clerk of Court Office Use Only

This judgment was entered on the 14 day of Oct, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 14 day of Oct, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Preston F. McDaniel

Temus C. Miles Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court Jeanette W. McBride

THE STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Theodore Polansky,)
)
 Employee)
)
 Respondent/Cross Appellant,)
)
 vs.)
)
 SC Office of Attorney General,)
)
 Employer,)
)
 and)
)
 South Carolina State Accident Fund,)
)
 Carrier)
 Appellants/Cross Respondents.)

#1
 [Handwritten signature]

IN THE COURT OF COMMON PLEAS
 OF THE FIFTH JUDICIAL CIRCUIT

Case No.: 2015-CP-40-07380

ORDER OF SUPERSEDEAS

RECEIVED

OCT 27 2016

SC Court of Appeals

RICHLAND COUNTY
 FILED
 2016 OCT 10 PM 4:45
 JEANETTE W. HEBRIDE
 C.P. & G.S.

The Employer/Carrier moved this Court for an Order of Supersedeas over Orders in this matter signed by the Honorable L. Casey Manning on July 5, 2016 and July 28, 2016, pursuant to Rule 241, S.C.A.C.R., Rule 65. S.C.R.C.P. and the Court's inherent authority to enforce its own ruling. The Employer/Carrier sought an Order of Supersedeas holding all further proceedings, expressly including Rule to Show Cause and Enforcement proceedings, in relation to the above referenced Orders in abeyance pending the outcome of the Appeals in this civil action now pending at the South Carolina Court of Appeals. This matter was assigned to me for a hearing on September 28, 2016.

Having reviewed the Employer/Carrier's Motion for Order Of Supersedeas and all related pleadings and filings, the Order and Rule to Show Cause, dated September 20, 2016, and hearing arguments of counsel on both matters, I find that an Order of Superseadeas is required to

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“prevent a contested issue from becoming moot” (as contemplated by Rule 241(c)(2), S.C.A.C.R.) as the underlying entitlement to the back due award as part of the challenged award of lifetime benefits is an issue contested in the Appeals now pending in the Court of Appeals and that the Employer/Carrier’s refusal to make payment of the accrued benefits was justified.

BACKGROUND

#2
8/18/15
On July 1, 2015, the Claimant was awarded lifetime benefits in relation to an alleged compensable physical brain injury that Claimant asserts rendered him permanently and totally disabled under the South Carolina Workers’ Compensation Act. This alleged physical brain injury is an alleged exacerbation of an earlier workers’ compensation claim (“the Original Comp Claim”) and is alleged to have resulted from a drug-drug interaction suffered during treatment provide as part of the Original Comp Claim. The Employer/Carrier has consistently denied that the Claimant has suffered a physical brain injury that rendered him permanently and totally disabled or that he is entitled to any indemnity benefits beyond 500 weeks previously paid.

The Hearing Commissioner Order, dated July 1, 2015, found for the Claimant and required payment of lifetime benefits to commence on March 8, 2011. This was the date of the last payment of compensation made to Claimant by Employer/Carrier under the 500 week award for the Original Comp Claim. Of note, 500 weeks is the maximum award payable under the S.C. Workers’ Compensation Act, up to including death, *except* for awards of life time indemnity benefits associated with permanent physical brain injury or other injuries expressly identified by statute.

Employer/Carrier appealed the decision of the single Commissioner to the Appellate Panel of the Full Commission. The Full Commission ultimately affirmed the “findings of fact” and “conclusions of law” of the single Commissioner’s Order. Subsequently, Employer/Carrier

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appealed the Appellate Panel's Order. It is undisputed that the Employer/Carrier has made weekly payments to the Claimant beginning 30 days after the Order of the Full Workers' Compensation Commission, dated November 10, 2015 and that the appeal of the underlying award continues to this day.

Because the alleged date of injury in this case occurred prior to July 1, 2007, the amendments set forth in Act 111 do not apply, and jurisdiction over the appeal was in the Court of Common Pleas pursuant to the former version of S.C. Code Ann. § 42-17-60. (See Generally, S.C. Code Ann. § 42-17-60 (Supp. 2006), and specifically *Pee Dee Regional v. S.C. Second Injury Fund* 375 S.C. 60, 650 S.E.2d 464 (S.C. Sup. Ct. 2007)), holding in part that appeals from the Workers' Compensation Commission to the Court of Common Pleas were procedurally appropriate when the injury *sub judice* took place prior to July 1, 2007.). Accordingly, the Appeal of the Full Workers' Compensation Commission's Order was filed in the Court of Common Pleas for Richland County, South Carolina.

On February 8, 2016, the Honorable L. Casey Manning heard Respondent/Cross Appellant, Theodore Polansky's, Motion for payment of accrued Worker's Compensation benefits. By an Order dated July 5, 2016, the Circuit Court ordered that the Employer/Carrier "shall make immediate payment to the Claimant in a lump sum of all accrued weekly compensation payment" dating back to the date of last payment (March 8, 2011). The Employer/Carrier filed a timely Motion for Reconsideration. The Circuit Court denied the Motion for Reconsideration by Order dated July 28, 2016. Thereafter, the Employer/Carrier served a Notice of Appeal to the South Carolina Court of Appeals on August 29, 2016. Additionally, the Employer/Carrier previously filed a Notice of Appeal on the Order of the Circuit Court affirming the lifetime award of indemnity benefits. The Employer/Carrier has

worked continuously to perfect the numerous Appeals in these cases since their filings.

The Claimant moved for a Rule to Show regarding the Employer/Carrier's refusal to make payment under these Orders and, in response, the Employer/Carrier filed its Motion for Supersedeas. By Order of The Honorable L. Casey Manning, dated September 20, 2016, the Executive Director of the State Accident Fund was Order to come before the Court "to show just cause or excuse, if any he has, for failure to comply with the Orders of this Court dated and filed July 7, 2016 and August 16, 2016." These matters were set for hearing, and heard, before me on September 28, 2016. At the hearing, I excused the Executive Director of the State Accident Fund from appearing as all issues before the court were questions of law and factual consideration were not necessary. This order arises from the September 28, 2016 Hearing.

#4
[Signature]

ANALYSIS

The Orders of the Circuit Court at issue here require the Employer/Carrier to make payment of back due weekly compensation benefits that have accrued from the date compensation was to be reinstated (March 8, 2011) through the date that Employer/Carrier resumed making weekly payments and payment of a 10% penalty on all unpaid compensation to the Claimant within 14 days of the payment becoming due, pursuant to S.C. Code Ann. §42-9-90. Employer/Carrier contests the enforceability of the Circuit Court's Orders on the basis of the Supreme Court's decision in *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 115 S.E.2d 57 (1960) and the language of S.C Code §§42-17-60 and 42-9-90. Employer/Carrier believes it is required to make only *weekly* payments of compensation while the matter is pending on appeal, with such payments not to include payment of back due accrued benefits until after the appeals are finally resolved.

The orders at issue place the Employer/Carrier in the position of having to make

payments that may be determined not to have been owed if the appeal of the lifetime award results in a reversal and would leave the Employer/Carrier with no practical means to recovery the excessive payments made pursuant to the challenged Order. In the event that the Orders are given effect before the Appeals are fully decided, the rights the Defendant to make only legally due payments will be rendered moot as there will be no means to recover the undue payments made pursuant to the challenged orders. This Order of Supersedeas is necessary to “prevent a contested issue from becoming moot” (as contemplated by Rule 241(c)(2), S.C.A.C.R.).

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8/18/17

The issue of payment of a lump sum award during the pendency of an appeal was previously addressed in *Case v. Hermitage Cotton Mills*, 236 S.C. 515, 115 S.E.2d 57 (1960). The Supreme Court interpreted Section 72-356, the earlier version of what became S.C. Code Ann. 42-17-60, to require “payment, after the expiration of the thirty-day supersedeas period and during the pendency of the employer’s appeal...only of the weekly compensation accruing after the date of the Commission’s Award.” Id., 533. Accordingly, the Employer/Carrier has made all payments that are due as the appeal of this award continues and the Orders of the Circuit Court on payment of accrued benefits should be given no further effect until the appeals are finally decided.

Under the reasoning of the *Case Court*, during the pendency of an appeal by an employer of an Order which provided benefits to a claimant, the injured worker is entitled to be provided weekly benefits to sustain him while that appeal is under review. However, the claimant is not entitled to any additional monies or award, above and beyond the weekly benefits the Claimant is presently receiving, until the appeal is adjudicated. Payment of indemnity benefits “calculated retroactively from the date of the commission’s order” are expressly included in the benefits that are not payable during the appeal. *Case*, at 533. Consistency requires this exception to be

applied to a lump-sum payment of indemnity benefits calculated from a date prior to Order, as we have in this case.

Furthermore, the amendments to § 42-17-60 of the South Carolina Code Ann. (Supp 2008), have codified the ruling in the *Case* decision and specifically provides that the employer is required to make only weekly payments of compensation following the date of appeal to the Court of Appeals. The newly amended version of this statute clearly states that *weekly* benefits are payable, but makes no mention of paying the balance of an award or payments for a back due accrued award. Thus, pursuant to the Supreme Court's ruling in *Case v. Hermitage Cotton Mills* and S.C. Code § 42-17-60, Employer/Carrier are responsible for making only weekly payments of compensation only while the matter is pending on appeal.

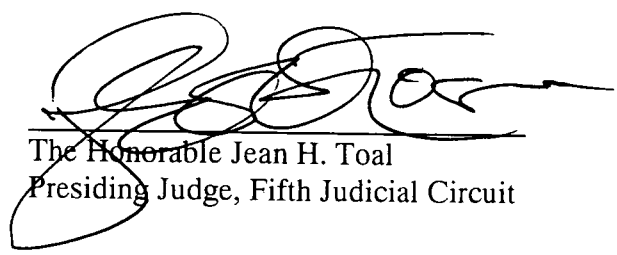
#6
SBS
Similarly, there is no basis for the Claimant's request that Employer/Carrier pay a 10% penalty on monies/awards not paid to the Claimant within 14 days of becoming due, as the award is not due and owed by Employer/Carrier at this time, as the Order of the Commission is presently on appeal to this Circuit Court and is therefore not a *final* Order to which payment would be required under S.C. Code Ann. §42-9-90. It is undisputed that the Employer/Carrier is currently providing medical benefits and prospective weekly indemnity benefits during the pendency of this appeal, which is all that is required.

CONCLUSION

For the reasons stated above, I hereby enter and Orders of Supersedeas with reference to the Orders in these matters signed by the Honorable L. Casey Manning on July 5, 2016 and July 28, 2016 and hold all further proceedings in relation to the above referenced Orders in abeyance pending the final outcome of the Appeal of the award of Lifetime Benefits as no benefits beyond those currently being paid will be due until such time.

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IT IS SO ORDERED.



The Honorable Jean H. Toal
Presiding Judge, Fifth Judicial Circuit

October 10, 2016
Columbia, South Carolina

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Temus C. Miles Jr.
PO Box 7217
Columbia, SC 29202

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BY: _____