

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

Appellant Case No. 2014-001788

Clarence Winfrey,Appellant,

v.

Archway Services Inc, Employer, and
American Fire & Casualty Insurance Company, and
Liberty Mutual Group, Carrier, Respondents.

RESPONDENTS' REPLY TO PETITIONER'S PETITION FOR WRITS OF MANDAMUS
AND PROHIBITION AND PETITIONER'S REQUEST FOR EX PARTE ORDER

This matter comes before this Court on Petitioner's (1) Writ of Mandamus, (2) Writ of Prohibition, and (3) Request for Ex Parte Emergency Order Based on the "Special Grounds of Emergency." These requests were filed with the South Carolina Supreme Court on November 15, 2016. That same day, the Supreme Court transferred jurisdiction over these filings to the South Carolina Court of Appeals for further proceedings.

While the full underlying facts leading to Petitioner's filings are not particularly relevant to the legal bases discussed herein as to why Petitioner's filings should be dismissed and returned without any further action, it is important for this Court to understand the actions Petitioner has taken since July when Petitioner repeatedly attempted to convince this Court to

intervene on a simple discovery issue¹. The decision at that time by this Court was, functionally, that the Commission retained jurisdiction over all matters not directly related to the appeals before this Court. Specifically, this Court stated that questions arising out of the claim are to be “directed to the Workers’ Compensation Commission.” *See* Court of Appeals Order dated July 29, 2016. That decision is not only correct, but is enumerated in the Act. Specifically, the Act states “All questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, shall be determined by the commission, except as otherwise provided in this title.” S.C. Code Ann. § 42-3-180. The current matter filed by Petitioner is jurisdictionally no different from the prior near innumerable filings by Petitioner in the last 10 months—it deals with an issue that is solely within the purview of the Commission, as it does not relate in any way to the appeal(s) before this Court. Nevertheless, the factual background of this current issue is set out below.

Petitioner filed the above referenced filings in response to an Order of the South Carolina Workers’ Compensation Commission granting a Protective Order to Respondents. By way of background, while the instant matter is presently ongoing in both this Court (appeals on compensability, among other things) and the Commission (permanency and all other issues in the claim), Petitioner filed a Summons and Complaint in South Carolina Circuit Court (Richland County) alleging the Respondents have committed fraud, breach of contract with fraudulent intent, bad faith, intentional infliction of emotional distress, and abuse of process. This suit has since been removed to federal court. Shockingly, many of the factual allegations and causes of

¹ As this Court will recall, Petitioner repeatedly filed motions with this Court, the Supreme Court, and the Commission attempting to prevent a deposition of an authorized treating surgeon. Petitioner was rejected on approximately 8 different occasions across three jurisdictions in his quest to block the deposition. Further, this Court set out in its July 29 Order that all questions relating to additional issues in the claim are “directed to the Workers’ Compensation Commission.”

actions raised by Petitioner are thinly veiled and implicate the undersigned counsel in this matter in a fraudulent scheme against Petitioner.

The allegations of the Summons and Complaint, while utterly frivolous to the point they will, without question, result in severe sanctions against Petitioner, must be taken as true for purposes of ongoing litigation in the workers' compensation claim. Failing to address the allegations would be a disservice to Respondents. Petitioner has alleged, for example, Respondents actions of merely obtaining causally related medical records from treating doctors pursuant to valid subpoenas authorized by the Workers' Compensation Act constitutes an "abuse of process," subjects Respondents to civil liability, and exposes Respondents to potentially limitless money damages. Simply put, Petitioner has alleged in his Complaint that mere routine, mundane tasks of handling a workers' compensation claim—obtaining medical records—is illegal and results in Respondents owing Petitioner money damages. How then can Respondents be compelled to participate any further in any meaningful way on this claim if the mere act of obtaining medical records is alleged to be illegal and subjects Respondents to pay money damages to Petitioner?

The unmitigated comic absurdity of this allegation by Petitioner should be clear on its face. That said, because Respondents are forced to take the allegations as true—and the resulting alleged damages as valid—it must be noted that neither the Workers' Compensation Commission nor this Court can force Respondents to commit illegal acts nor can either force Respondents to subject themselves to civil damages based on compliance with the law and with orders issued by the Commission. To do so would improper and inequitable. Yet that is exactly what will happen if Respondents are required to continue adjusting and handling the claim pursuant to the Act and the orders of the Commission. For that reason, Respondents sought—and were granted—a

protective order to shield themselves from unlimited continuing liability and damages based on Petitioner's own allegations². Petitioner now is unhappy with the bed he has made through the filing of his lawsuit against Respondents. Put another way, having to deal with unforeseen consequences not a valid ground for the requested relief.

Following the issuance of the Protective Order by the Commission, Petitioner timely filed a Motion to Reconsider with the Commission on November 15, 2016. As noted above, Petitioner then filed the underlying Writs on November 16, 2016. One of the many assertions in the Petition filed by Petitioner is that there is “no adequate remedy” and that this matter is “an emergency.” Petitioner asserts that this filing is necessary—and this Court must render a decision—because the Commission is unable to timely provide relief. However, Petitioner and Respondents conducted a conference with the Commission on November 16, 2016. In that conference, **the Single Commissioner offered to conduct the required hearing on Petitioner's Motion to Reconsider the morning of Friday, November 18, 2016—e.g. today. Petitioner refused to participate in the hearing** instead wishing to rely on this Court to provide him with relief. This is obviously incredibly pertinent and relevant—as will be set out below—because Petitioner not only had an adequate remedy at law (which he nevertheless asserts he does not), but Petitioner rejected that adequate remedy at law offered to him by the Commission. Worse, that remedy at law would have been carried out and completed before this Court would have even received final briefing on these issues—let alone reached a decision on the filings.

² Respondents admit the basis of the Protective Order would be moot should Petitioner dismiss his Complaint with prejudice. Petitioner has indicated his willingness to do so in a letter to the undersigned on November 16, 2016. Respondents have agreed to accept a dismissal of the Complaint with prejudice in exchange for withdrawing the Motion for Protective Order. This would have the effect of immediately reinstating all benefits to Petitioner. Despite Petitioner's desire to receive benefits and his prior apparent willingness to dismiss his Complaint, no further action has been taken by Petitioner at the time of this filing.

This alone requires this Court to reject and/or decline Petitioner's filings and direct Petitioner to again follow the procedures set out in the Act through the Commission (e.g. the Motion to Reconsider followed by a Form 30).

As an additional point for this Court: allowing this type of filing to continually be presented to this Court (or the Supreme Court) by Petitioner wholly circumvents the procedures and processes set out for appeal by the Supreme Court. Rewarding a party for refusing to follow the clear rules related to appeal from adverse decisions would be improper and a judicial boondoggle. This filing is nothing more than an appeal from a Commission Order couched in grandiose language in which Petitioner hopes to be able to skip the prerequisite steps for an appeal.

Writ of Mandamus

1. Petitioner first seeks a Writ of Mandamus issued to the Commission "...ordering the Commission to perform the ministerial act of dismissing the Motion."
2. Mandamus is the highest judicial writ and is issued only when (1) there is a specific right to be enforced, (2) the public official has a positive duty "to perform the act", **and** (3) no other specific remedy. Edwards v. State, 383 S.C. 82, 95-96, 678 S.E.2d 412 (2009); Littlefield v. Williams, 343 S.C. 212, 540 S.E.2d 81 (2000); Willimon v. Greenville, 243 S.C. 82, 132 S.E.2d 169 (1963). In order for the requested Writ to be issued, Petitioner is required to meet all three prongs set out in Edwards, Littlefield, and Willimon. As further set out below, Petitioner cannot meet all three prongs required and, therefore, this Court cannot issue the requested Writ of Mandamus.
3. A writ of mandamus is a coercive writ that orders a public official to perform a ministerial duty. Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999).

4. Mandamus will issue only to compel a public official **to perform a mandatory legal duty**. Redmond v. Lexington County School Dist. No. Four, 314 S.C. 431, 445 S.E.2d 441 (1994) (emphasis added). The dismissal of the Motion, as sought by Petitioner, is not a mandatory legal duty of the Commission. Therefore a Writ of Mandamus cannot be issued as requested by Petitioner.
5. The primary purpose of a writ of mandamus is to enforce an established right **and a corresponding imperative duty created or imposed by law**. Littlefield, *supra*. (emphasis added). Petitioner's request to this Court—to require the Commission to deny a Motion—is not an imperative duty created or imposed by law on the Commission. To the contrary, the Commission is vested with the right to resolve **all** questions arising under the Act. *See* S.C. Code Ann. § 42-3-180.
6. When the legal right is doubtful, or the performance of duty rests in discretion, **or when there is another adequate remedy, a writ of mandamus cannot rightfully be issued**. In the Interest of Lyde, 284 S.C. 419, 327 S.E.2d 70 (1985) (emphasis added). Petitioner has another legal remedy: a Motion for Reconsideration filed with the Commission. Not only does Petitioner have this legal remedy available, Petitioner filed for this relief the day before filing the petition with this Court. Further, as noted above, the Commission offered to conduct a hearing on Petitioner's motion on the morning of February 18, 2016 and Petitioner refused to participate (instead relying on his filings with this Court to provide relief). Petitioner cannot reject adequate remedies at law in preference of filing a petition for a Writ of Mandamus.
7. If this Court is inclined to even consider issuing the Writ of Mandamus sought by Petitioner—rather than dismissing or denying the request—Respondents are entitled to a

hearing pursuant to South Carolina Rule of Civil Procedure 65(f)(1). Specifically, Rule 65(f)(1) states “No writ of mandamus, habeas corpus, or other remedial writ shall be granted without notice of motion for the writ to the adverse party...[t]he motion **shall be heard** upon such notice as the court may prescribe...”

8. It would be improper, and against precedent cited herein, for this Court to issue Petitioner’s requested Writ of Mandamus when Petitioner has an adequate remedy at law³, has already begun the process of exercising that adequate remedy at law (by filing a Motion to Reconsider), and has been given—and rejected—the opportunity for a hearing with the Commission which would have been an adequate remedy at law. The Writ of Mandamus simply cannot issue from this Court.

Writ of Prohibition

9. Petitioner next seeks a Writ of Prohibition “...prohibiting the SC Workers’ Compensation Commission from enforcing its Order and vacating the Administrative Form Order issued on November 8, 2016 granting the Motion for a Protective Order...”
10. First, a writ of prohibition requires a judicial act or function, or one that is at least *quasi-judicial*. Berry v. Lindsay, 256 S.C. 282, 288, 182 S.E.2d 78 (1971). Second, it requires an “alleged ground” that supports issuing such a writ. Id. at 292. Finally, the person seeking a writ of prohibition, or petitioner, must not have “adequate relief” available. Id. at 293. For the reasons set out below, Petitioner cannot meet the requirements for a Writ of Prohibition.
11. The writ of prohibition is an extraordinary prerogative writ, as old as the common law itself.

It lies to prevent the encroachment, excess, or improper assumption of jurisdiction on the part

³ Specifically, Petitioner can file a Motion to Reconsider. If that Motion is denied, Petitioner has the right to appeal to the Full Commission on a Form 30. If that appeal is unsuccessful, Petitioner has the right to appeal to the Court of Appeals. This filing before the Court seeks to circumvent and skip all those steps which are all adequate remedies at law.

of an inferior court or tribunal. But, where the inferior court has jurisdiction of the person and subject-matter, the writ does not lie to prevent an erroneous decision, or to prevent the enforcement of an erroneous judgment. It does not lie to correct errors. Nor is it allowed, even in cases of usurpation or abuse of power, unless existing remedies are inadequate or inapplicable. When the encroachment, excess, or improper assumption of jurisdiction can be corrected by appeal, writ of error, or certiorari, prohibition will not lie. In this case the defendant had an adequate remedy by appeal. It was therefore error to grant the writ of prohibition. Holladay v. Hodge, 65 S.E. 952, 84 S.C. 91 (S.C., 1909); *see also* State v. Nathan, 4 Rich. Law, 513; State v. C. & A. R. R., 1 S. C. 46; State v. Fickling, 10 S. C. 301; State v. Kirkland, 41 S. C. 29, 19 S. E. 215; Franklin v. Raborn, 60 S. C. 99, 38 S. E. 260.

12. Where a review of the judicial act is possible, a petitioner should seek review and exhaust available remedies before “seek[ing] redress in the courts.” Barry at 293. Here a review of the act is not only possible, it has been undertaken. Petitioner filed for a review with the Commission prior to filing this underlying petition. Petitioner readily admits this point. Therefore, this Court cannot issue a Writ of Prohibition because a review is available to Petitioner.
13. A court can issue this writ “to restrain a judicial act” of a lower court. Id. at 288 (quoting Ex Parte Jones, 160 S.C. 63, 158 S.E. 134, 137 (1931)).
14. It is a remedy that is “used with forbearance and caution, and only in cases of necessity.” Id. As will be further set out below in discussion of the alleged “emergency” nature of this matter, Petitioner’s request is not one of necessity. This is further bolstered by the fact that Petitioner was offered a hearing by the Commission to be conducted on November 18, 2016. Petitioner elected not to participate instead relying on these filings with

the Court of Appeals. Petitioner cannot now claim this petition and the situation creates a “necessity” when Petitioner has rejected adequate remedies at law that would have resolved this issue prior to this Court undertaking a review.

15. It can only be used “to prevent an encroachment, excess, usurpation, or improper assumption of jurisdiction on the part of an inferior court or tribunal, or to prevent some great outrage upon the settled principles of law and procedure.” Id. In the present case, there is no jurisdictional issue with the Commission hearing—and ruling—on the Motion for Protective Order. S.C. Code Ann. § 42-3-180 states “All questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, shall be determined by the commission, except as otherwise provided in this title.” The Commission clearly has very broad jurisdiction to resolve all issues arising out of pending claims. Despite Petitioner’s continued assertions, a claim is in fact currently pending before the Commission as Petitioner has filed a workers’ compensation claim and permanency has yet to be ruled on by the Commission. Further, as noted previously, this Court has already ruled (just a few short months ago_ that the Commission retained jurisdiction over all issues in this matter that were not already before this Court. In that series of filings, Petitioner argued the same thing he is arguing now—the Commission lacks jurisdiction over this case because there is no “pending action.” That position was expressly rejected by this Court. In fact there is a pending action before the Commission. Because there has been no “encroachment, excess, usurpation, or improper assumption of jurisdiction” by the Commission there is no legal basis to issue the Writ of Prohibition. Likewise, there is no “great outrage upon settled principles of law and procedure” as the Commission has the authority to hear motions and this matter

solely relates to equitably protecting Respondents from excess liability thrust upon it by Petitioner and his Complaint.

16. It cannot be used “to correct errors and irregularities in procedure,” “to prevent an erroneous decision or an enforcement of an erroneous judgment, or even in cases of encroachment, usurpation, and abuse of judicial power or the improper assumption of jurisdiction” if there is available “an adequate and applicable remedy.” *Id.* at 288, 292-93. Assuming *arguendo* that Petitioner is correct the Commission lacks a procedure to entertain the motion (which they do not), Berry is clear that is irrelevant and not grounds for the Writ to issue. Further, the Writ of Prohibition cannot be issued when there is an “adequate and applicable remedy.” As noted throughout, Petitioner has already filed a Motion to Reconsider which is quite clearly an adequate and applicable remedy to his grievance. Further, Petitioner was offered a hearing by the Commission to be conducted on November 18, 2016. Petitioner elected not to participate instead relying on these filings with the Court of Appeals. Petitioner cannot now claim he lacks an adequate remedy when Petitioner has already rejected adequate remedies at law that would have resolved this issue prior to this Court undertaking a review.
17. Limited case law on Writs of Prohibition in South Carolina states, essentially, if what you are seeking the writ for is appealable or otherwise reviewable, then you have an adequate and applicable remedy in seeking such review. *Id.* at 288. To beat a dead horse, as noted throughout, Petitioner has an appealable issue, has begun the process of appeal, and has rejected a resolution with the Commission (a hearing). This Court cannot issue a Writ of Prohibition based on Petitioner’s acts of refusing to engage in an adequate legal remedy offered to him.

18. For reference, the Supreme Court has previously issued a writ of prohibition when an appeal was inadequate because it would not resolve the issue as quickly as needed. *See, for example, Woodworth v. Gallman*, 195 S.C. 157, 10 S.E.2d 316 (1940). However, that case and reasoning is inapplicable in the present case. In the present case, Petitioner was offered a resolution by the Commission which would have resolved this issue prior to this Court ever reaching a decision on these petitions—Petitioner was offered a hearing on February 16, 2016 to be conducted on the morning of February 18, 2016. Respondents agreed to waive the 10-day hearing notice requirement in order to allow Petitioner to be heard and to have the hearing completed on February 18, 2016. Petitioner made the decision not to partake in the hearing instead relying on his filings with this Court. Any analysis that relates to expediency necessitates a rejection of the request for a Writ of Prohibition because Petitioner cannot create the “urgency” by waiving or refusing to pursue other remedies that would have resulted in a quicker resolution.

19. It would be improper, and against precedent cited herein, for this Court to issue Petitioner’s requested Writ of Prohibition when Petitioner has an adequate remedy at law⁴, has already begun the process of exercising that adequate remedy at law (by filing a Motion to Reconsider), and has been given—and rejected—the opportunity for a hearing with the Commission which would have been an adequate remedy at law. Further, the Commission had jurisdiction over this issue as S.C. Code Ann. § 42-3-180 provides broad coverage for all issues arising out of a workers’ compensation claim—as this issue does. The Writ of Prohibition cannot issue from this Court.

⁴ Specifically, Petitioner can file a Motion to Reconsider. If that Motion is denied, Petitioner has the right to appeal to the Full Commission on a Form 30. If that appeal is unsuccessful, Petitioner has the right to appeal to the Court of Appeals. This filing before the Court seeks to circumvent and skip all those steps which are all adequate remedies at law.

Emergency Ex Parte Order

20. Finally, Petitioner moves for an “Ex Parte Emergency Order Staying the Administrative Form Order” issued by the Commission in this matter. Interestingly, Petitioner sets forth no basis for why an “emergency” order should issue from this Court. Presumably, Petitioner’s basis is the continued refrain that he “lacks an adequate remedy at law” and/or “the Commission cannot hear this matter in a timely manner.” As has been highlighted throughout, both of these contentions are without merit and, in fact, the very opposite is true.
21. An emergency order from this Court is wholly unnecessary. The sole purpose of issuing the Order would be to stay enforcement of the Commission Order so that Petitioner could obtain a hearing before the Commission. **The Commission offered Petitioner a hearing to be held the morning of February 18, 2016. Petitioner declined to participate in the hearing instead choosing to rely on this Court to issue an Order.** Petitioner cannot claim this matter is an “emergency” when his own inaction is what now makes it an emergency. The writs and Order sought by Petitioner are, quite simply, a last resort when no other remedy is available. Petitioner cannot reject the adequate legal remedy he sought and then be rewarded by this Court.
22. Additionally, Petitioner again seeks to invoke the “death” in support of why this is an emergency. However, much like the prior set of petitions and Orders related to the surgery, Petitioner has again not presented an actual medical opinion to substantiate this argument. Respondents would point out that Petitioner advanced this exact argument in the prior set of filings which induced this Court to issue an Order requiring immediate approval for a surgery on March 18, 2016. In order to comply with this Order, Respondents immediately approved that surgery pursuant to the Order. As this Court will recall, the surgeon—not Respondents—

delayed that surgery. This Court, in its July 29 Order, astutely noted "...this court granted [Petitioner's] motion to compel medical care based on [Petitioner's] assertions that any delay in care could result in 'an absolutely devastating situation for [Petitioner], up to and including his death'...[w]e note it has now been four months since we granted [Petitioner's] request to compel medical care, which if delayed could have resulted in [Petitioner's] death." This is Petitioner's repeated "boy who cried wolf" rallying cry. Rather than follow procedures which provide an adequate remedy at law, Petitioner simply repeatedly invokes this argument, demands an emergency hearing, obtains an emergency order, rinse repeat. It is time to stop rewarding this flagrant abuse of petitions to this Court by Petitioner who is merely using the system to get free, premature appeals rather than following guidelines for an actual, legitimate appeal.

23. Based on voluminous precedent and case law cited herein, along with Petitioner's actions in rejecting a remedy offered by the Commission (a hearing to be held on February 18, 2016), this Court should decline to issue any Order interfering with the Commission on these issues. Petitioner has an adequate—and speedy—remedy before the Commission. Respondents have previously agreed to waive any notice requirements for a hearing so that it may be heard in an expeditious manner. The ball was, figuratively speaking, placed in Petitioner's court. Rather than appear for a hearing, Petitioner chose to take the ball and run to this Court. That is not a proper or valid reason for this Court to issue an "emergency Order."

Conclusion

24. For all the foregoing reasons set out herein, this Court should reject Petitioner's filings. This Court should refuse to issue an "emergency Order" because Petitioner has refused an adequate legal remedy in the Commission.

25. Likewise, a Writ of Mandamus and a Writ of Prohibition are improper because Petitioner cannot meet the required elements of each.

November 18, 2016
Columbia, South Carolina



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THE STATE OF SOUTH CAROLINA
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Case No. 2014-001788

Clarence Winfrey, Appellant,

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Archway Services Inc, Employer,


and

American Fire & Casualty Insurance Company c/o
Liberty Mutual Group, Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I have this 18th day of November 2016, caused to be served a copy of Respondents' Reply to Petitioner's Petition for Writs of Mandamus and Prohibition and Petitioner's Request for Ex Parte Order by hand delivery:

Preston F. McDaniel, Esquire
The McDaniel Law Firm
1315 Elmwood Avenue
Columbia, South Carolina 29201



Fiona R. Reed
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Reply To

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November 18, 2016

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SC Court of Appeals

VIA HAND DELIVERY

Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Clarence Winfrey v. Archway Services
Appellant No.: 2014-001788
Carrier Claim No.: 22209963
MGC File No.: 2095.13137


Dear Ms. Kitchings:

Please find enclosed Respondents' Reply to Petitioner's Petition for Writs of Mandamus and Prohibition and Petitioner's Request for Ex Parte Order.

By copy of this letter, I am serving counsel of record with the above-referenced Respondents' Reply to Petitioner's Petition for Writs of Mandamus and Prohibition and Petitioner's Request for Ex Parte Order.

Thanking you in advance for your assistance, I am,

Very truly yours,


Brett H. Bayne

BHB/frr
Enclosures
cc: Preston F. McDaniel, Esquire