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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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JAN 23 2017

SC Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2016-002423

James Ashford, Employee, Claimant.....Respondent/Appellant,

v.

Prysmian Power Cables & Systems, USA, Employer,
and Sentry Insurance Company, Carrier.....Appellants/Respondents.

**RETURN TO MOTION TO
DISMISS APPEAL**

Prysmian Power Cables & Systems, USA, and Sentry Insurance Company ("Appellants/Respondents") respectfully submit this Return to Motion to Dismiss Appellants/Respondents' appeal filed in this matter. For the reasons set forth herein, the Motion should be denied.

FACTUAL/PROCEDURAL BACKGROUND

This claim was before the South Carolina Workers' Compensation Commission ("Commission") pursuant to the Form 50 filed by the Respondent/Appellant on February 16, 2015 and the Form 21 filed by the Appellants/Respondents on April 30, 2015. The Appellants/Respondents asserted that the Respondent/Appellant reached maximum medical improvement (MMI) for his right wrist injury on February 13, 2015, per the corresponding report

of Dr. David B. Fulton. As such, the Appellants/Respondents requested the termination of temporary total disability (TTD) benefits pursuant to § 42-9-260 of the Act, and requested a determination as to the extent of permanent partial disability (PPD) sustained to the right arm under § 42-9-30. The Appellants/Respondents further requested a determination as to whether the Respondent/Appellant is entitled to further medical treatment pursuant to § 42-15-60 of the Act, which the Appellants/Respondents denied.

Conversely, the Respondent/Appellant alleged that he is not at MMI and needs additional medical care. In support of this allegation the Respondent/Appellant offered reports from Dr. Usama Gabr and Dr. Subhash Patel, neither of whom specifically opined regarding whether the Respondent/Appellant had achieved MMI.

By way of Decision and Order filed May 4, 2016, Commissioner R. Michael Campbell, II, of the South Carolina Workers' Compensation Commission ("Commission"), determined, in part, that the Respondent-Appellant had not reached MMI for his right wrist injury and was entitled to additional causally-related medical treatment under § 42-15-60, as recommended by Dr. Gabr, by a physician of the Appellants/Respondents' choosing. Accordingly, Commissioner Campbell ordered the Appellants/Respondents were not entitled to terminate TTD benefits.

The Appellants/Respondents timely appealed the Decision and Order of Commissioner Campbell to the Appellate Panel of the Commission, raising numerous grounds for appeal including but not limited to whether the Respondent/Appellant had achieved MMI, whether the refusal to terminate TTD benefits was appropriate, and whether the Appellants/Respondents' rights to due process were violated by Commissioner Campbell's failure to rule on the compensability of the alleged psychological injury. By way of Decision and Order filed November 1, 2016, the Appellate Panel unanimously affirmed in part and reversed in part the Decision and

Order of Commissioner Campbell. Specifically, the Appellate Panel found the Respondent/Appellant was released to return to work without restrictions by Dr. Fulton with no other contrary opinion being found in the record. As such, the Appellate Panel found the Appellants/Respondents were entitled to terminate TTD benefits effective May 4, 2015. The remainder of the Decision and Order, including the determination that the Respondent/Appellant had not achieved MMI, was affirmed. A cross-appeal to this Court resulted.

ARGUMENT

I. ORDER OF THE APPELLATE PANEL CONSTITUTES A FINAL DECISION.

It is well-founded under § 1-23-380(A) of the Administrative Procedures Act (APA) that “[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review. . . .” S.C. Code Ann. § 1-23-380(A) (Supp. 2007). The Respondent/Appellant, citing the Supreme Court’s recent interpretation of this statute in Bone v. U.S. Food Service, asserts that there is “no question” the Order of the Appellate Panel in this matter is an intermediate Order and not a final decision. See Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552 (2013) (Current order remanding the matter to the Commission for further proceeding does not constitute a final judgment as required by § 1-23-380 and, therefore, is not immediately appealable). The basis for this assertion is his opinion that the only issue before the Appellate Panel was whether the Respondent/Appellant has achieved MMI, and further that Respondent/Appellant has an outstanding Form 50 Request for Hearing pending before the Commission, the adjudication of which is required before the decision of the Commission becomes “final.” However, the Respondent/Appellant has misapplied § 1-23-380(A) and the Supreme Court’s interpretation of

this statute in Bone by failing to recognize the factual differences between Bone and the matter at bar.

In Bone, the Commission denied the claim in total requiring Bone to appeal to the Circuit Court as the first level of appeal.¹ The circuit court reversed the Order of the Commission, found the claim compensable, and remanded the claim to the Commission with instructions to award benefits pursuant to the Act. It is the remand to the Commission for an awarding of benefits which creates the factual contrast in these two cases. As the Supreme Court noted in affirming the Court of Appeal's dismissal of the appeal as interlocutory, "[n]either the Commission nor the circuit court addressed the severity of Bone's injury, whether or not she had reached MMI, or if she should be provided medical treatment. No award of any kind was made." Bone, 404 S.C. at 74, 744 S.E.2d at 556 (see also Charlotte-Mecklenburg Hosp. Auth. V. S.C. Dep't of Health & Env't'l Control, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010), citing Good v. Hartford Accident & Indem., Co., 201 S.C. 32, 21, S.E.2d 209 (1942) ("A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.")). There was no award in Bone and, therefore, there was nothing to enforce by execution.

To the contrary, the subject matter of the proceeding in this case was whether the Respondent/Appellant had reached MMI and, depending upon the decision, the applicable award to which the Respondent/Appellant was entitled. The Appellant Panel determined the Respondent/Appellant had not reached MMI and awarded additional medical benefits. This determination, flawed as it may be, constitutes a final judgment to dispose of the whole subject

¹ Prior to July 1, 2007, the initial forum for appeal from the Appellate Panel of the Workers' Compensation Commission was the applicable circuit court.

matter of the action. Unlike Bone, the Appellate Panel did not remand the claim to the Single Commissioner for a determination of additional benefits; the only action left to be taken was the execution of what had been awarded – additional medical treatment to bring the Respondent/Appellant to the point of MMI. The Court in Bone is very clear that such an adjudication constitutes a final judgment sufficient for immediate appeal.

II. **IF THE ORDER OF THE APPELLATE PANEL IS NOT A FINAL DECISION, WHICH APPELLANTS/RESPONDENTS DENY, A FINAL AGENCY DECISION WOULD NOT PROVIDE AN ADEQUATE REMEDY.**

Assuming *arguendo* this Court finds the Order of the Appellate Panel not to be a final judgment, the Appellants/Respondents nonetheless assert the ruling is immediately reviewable by this Court because a final decision of the Commission would not provide an adequate remedy. See S.C. Code Ann. § 1-23-380(A). If the appeal is dismissed, the Appellants/Respondents will be required to provide the Respondent/Appellant with medical treatment, which may include significant modalities including surgery, until either the Respondent/Appellant agrees he has reached MMI or the Commission determines such, all the while awaiting the opportunity appeal the issue of whether the award of additional medical treatment was even proper in the first place. Of course, should the claimant contest MMI again, the Appellants/Respondents may face the prospect of a cycle of remands before a “final” decision is reached by the Commission. This was exactly the issue raised by the Supreme Court in Hilton v. Flakeboard America Limited, which prompted the decision that the appealing party did not have an adequate remedy allowing for an immediate appeal under § 1-23-380(A). Hilton v. Flakeboard America Limited, 418 S.C. 245, 252, 791 S.E.2d 719, 723 (2016).

In fact, the Respondent/Appellant perfectly demonstrated the inequity of this possibility in his Motion to Dismiss. The Respondent/Appellant argues he is entitled to medical treatment

during the pendency of the appeal to this Court under § 42-17-60 of the Workers' Compensation Act, and points out that if the "Appellants/Respondents follow their duty and obligation under the law, the medical care at issue on appeal will have already been provided by Appellants/Respondents when the appeal is argued [at a later date] making that issue moot." In other words, there would be no reason to appeal the Order of the Appellate Panel from November 1, 2016, as the issue that would be appealed, whether the Respondent/Appellant is at MMI or entitled to further medical treatment, would be moot as that treatment would already have been provided. As such, dismissing this appeal as interlocutory would not provide the Appellants/Respondents with an adequate remedy.

For the reasons set forth above, the Appellants/Respondents respectfully request this Court to deny the Respondent/Appellant's Motion to Dismiss.

Respectfully submitted,

SOWELL GRAY ROBINSON STEPP & LAFFITTE, L.L.C.

By: 

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Attorneys for Appellants/Respondents

January 23, 2017

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PROOF OF SERVICE

I certify that I have served the Respondents' Return to Motion to Dismiss Appeal, on the following: David N. Truitt, Esquire, 925 Calhoun Street, Columbia, SC 29201 (via U.S. Mail) and Honorable Jenny Abbott Kitchings, Judicial Director, South Carolina Court of Appeals, 1220 Senate Street, Columbia, SC, 29201 (via hand-delivery), on January 23, 2017.

SOWELL GRAY ROBINSON STEPP & LAFFITTE,
L.L.C.

By: 

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Attorneys for Respondents

January 23, 2017



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January 23, 2017

VIA HAND DELIVERY

Honorable Jenny Abbott, Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: James A. Ashford v. Prysmian Power Cables
WCC File No.: 1318928
Appellant Case No.: 2016-002423
Date of Accident: 10/30/13
Claim No.: 55C098612
Our File No.: 5431/8392

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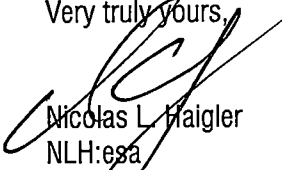
Dear Ms. Kitchings:

Please find enclosed herewith the original and seven (7) copies of the Respondents' Return to Motion to Dismiss Appeal in the above-referenced matter. We would appreciate your filing the original and six (6) copies of the Respondents' Return to Motion to Dismiss Appeal. We ask that you return a clocked-in copy to us via our courier.

Also enclosed is our Firm's check in the amount of \$25.00 for the filing of this document.

By copy of this letter and aforementioned document to the Appellant's attorney, we are serving him with a copy of this document.

Very truly yours,


Nicolas L. Haigler
NLH:esa
Enclosures

cc: David N. Truitt, Esquire (via U.S. Mail)
Ms. Dietra Garland (via e-mail only)
Ms. Christina Trainor (via e-mail only)
Mr. Terry Cummings (via e-mail only)
Ms. Shafia Sarwar (via e-mail only)
Ms. Dianne Wells (via e-mail only)
Ms. Melissa Manwaring (via e-mail only)