

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

MAY 15 2017

SC Court of Appeals

Appellate Case No.: 2016-002266

Renee Robles, Employee, Claimant, Appellant,

v.

Party Reflections, Inc., Employer, and
Employers Assurance Company, Carrier, Respondents.

APPELLANT'S RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL

The issue presented by Respondents' Motion to Dismiss Appeal, is that under the novel theory that because the Commission proceeded to hear and rule upon other matters – matters unaffected by the appeal – the Decision and Order on appeal is somehow no longer an appealable final order. Respondents' argument overlooks the Rules of Appellate Practice and misinterprets Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552(2013), and its progeny.

Respondents observe "Appellant fails to mention in his Initial Brief that after the appellate panel issued its September 2, 2016 order," another hearing before a single commissioner was requested, held, and ruled upon. [Motion to Dismiss Appeal, Page 4]. Not only was it proper for Appellant not to mention the later proceeding or include subsequent pleadings or orders, it would violate the Appellate Court Rules to do so. The rule is explicit: "The Record [on Appeal] shall not . . . include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR.

This appeal arises out of a September 25, 2014 hearing held before a single workers' compensation commissioner. The single commissioner's Decision and Order was reversed in part by the Appellant Panel. This appeal was filed on November 9, 2016. Appellant appealed two issues from the Appellate Panel's Decision and Order: (1) the method used to calculate the Average Weekly Wage; and (2) denial of temporary total disability compensation (argued in the alternative under two separate theories). [Brief of Appellant, page 1].

While the rulings arising out of the September 25, 2014 hearing were working their way through the legal system, the insurance carrier provided the evaluation and treatment ordered by the Appellate Panel. Robles completed his treatment and reached MMI. Robles then filed a Form 50 requesting a hearing to determine the extent of his permanent disability. The hearing was held on September 6, 2016. The single commissioner addressed issues of (1) the date of maximum medical improvement, and (2) an award of permanent disability compensation. [Exhibit B, page 4]. The issues addressed by the single commissioner in the later proceeding are entirely different than in the earlier proceeding.¹ MMI and permanent disability could not have been tried in 2014 because the issues were not ripe. The order appealed from in this case was a final judgment because it disposed of all issues raised before the single commissioner and appellate panel with finality.

The Appellate Court Rules anticipated this situation, as "Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Rule 205, SCACR. See, also Rule 241 (a), SCACR ("... administrative tribunal retains jurisdiction

¹The single commissioner in the September 6, 2016 hearing could not have addressed the average weekly wage and temporary compensation issues as she was bound by the Appellate Panel's previous order. For the same reasons, Appellant could not relitigate those issues. As Appellant had no ability to challenge the Appellate Panel's findings other than an immediate appeal to this court, review of the 2017 single commissioner order "would not provide an adequate remedy." S.C. Code Ann. 1-23-380 (2008).

over matters not affected by the appeal . . .). Indeed, the single commissioner addressed the issue in the amended Decision and Order stating in the Award that: “The average weekly wage and compensation rate are currently under appeal and are subject to change should the appellate panel be reversed.” [Exhibit C, page 17].

Bone is not applicable here because that case addressed whether a decision of the Court of Appeals *remanding* a workers’ compensation case back to the commission to address additional issues raised could be appealed to the Supreme Court.² The Bone court relied on section 1-23-390, which governs appeals to the Supreme Court. See S.C. Code Ann. 1-23-390 (2006)(“An aggrieved party may obtain a review of a final judgment of the circuit court or the court of appeals pursuant to

²In Bone, Bone alleged she had injured her back lifting up pallets on June 26, 2007. She reported her June 26th work accident on July 3, 2007. On her way to work on July 3rd, she had a flat tire. She told her supervisor about the flat tire. The supervisor interpreted her report as saying she had changed the tire herself, but Bone testified she pulled off the road and a man in the parking lot of a nearby business changed the tire for her. The single commissioner and appellate panel denied her claim. The circuit court reversed, stating, “The Commission denied the claim finding Claimant did not suffer an on the job injury, ostensibly finding Claimant injured her back while changing her tire on July 3. However, a review of the records shows no evidence to support this finding.” Bone v. U.S. Food Serv., 404 S.C. 67, 71-72, 744 S.E.2d 552, 555 (2013).

The Court of Appeals dismissed the employer’s appeal, “finding the order remanding the matter to the Commission for further proceedings did not constitute a ‘final judgment’ and thus was not immediately appealable . . .” Id.

The Bone parties all agreed the Appellate Panel’s order denying the claim was an appealable final decision. However, because the claim was denied, the Appellate Panel never “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.” Id. As a remand was necessary to create a final order, the circuit court order was deemed an unappealable interlocutory order.

The dispositive issue in Bone turned on section 1-23-390. Section 1-23-390 provides that only a “final judgment of the circuit court or the court of appeals” may be reviewed by the supreme court. S.C. Code Ann. 1-23-390 (2006). Conversely, section 1-23-380 allows appeals from a “preliminary, procedural, or intermediate agency action or ruling is . . . if review of the final agency decision would not provide an adequate remedy. S.C. Code Ann. § 1-23-380 (2006).

The Bone court held there was no right to appeal directly to the supreme court under section 1-23-390 because the court of appeals decision remanding for further proceedings was not a final decision. The “adequate remedy” analysis did not enter into the decision.

this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases.”). The right to appeal in this case is governed by Section 1-23-380. Section 1-23-380 provides an appeal to the Court of Appeals as a matter of right, so long as the party is “aggrieved by a final decision in a contested case.” S.C. Code Ann. 1-23-380 (2008).

Respondents also misinterpret Bone. Bone has never stood for the proposition that a workers’ compensation case cannot be appealed until the Commission has ruled on every possible issue that could potentially come up in a case – specifically making the ultimate award of permanent disability compensation. If no case could be appealed until the Commission makes an award for permanent disability, the system would be unworkable. Bone simply means that an order from an appellate court (or the appellate panel) remanding a case back to the commission for further proceedings is not an immediately appealable final order. Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552(2013); Martinez v. Spartanburg Cnty., 406 S.C. 532, 753 S.E.2d 436 (2014)(“A party is entitled to judicial review of any final agency decision. . . . Here, under Bone, the circuit court’s order was not a final judgment. It remanded the matter to the Commission for further proceedings, and thus left matters to be determined rather than disposing of the whole subject matter of the action.)

Respondents’ interpretation of Bone would create enormous practical problems for bench and bar. Had Appellant not appealed the Appellate Panel’s order, he risked being barred in a later appeal by the law of the case doctrine. See Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund, 389 S.C. 422, 699 S.E.2d 687 (2010)(holding “arguments are not properly before this Court either because the issue is not preserved or the issue was unappealed and is now the law of the case”).

Workers' compensation cases are unique.³ Unlike criminal cases and civil litigation (and most administrative hearings) where there is one trial and one verdict, workers' compensation cases often involve multiple hearings and multiple decisions as the case evolves. A given case could begin with a hearing on whether the accident was work-related, followed by hearings over medical treatment and temporary compensation, and ending with a hearing awarding permanent disability compensation. Even the "final" award can be altered on a new proceeding for a change of condition. See, S.C. Code Ann. § 42-17-90 (2007) ("... on the ground of a change in condition, the commission may review an award and on that review may make an award ending, diminishing, or increasing the compensation previously awarded . . ."). It would be an absurd result if the parties were only allowed to appeal after the Commission made a permanent disability award. This is precisely why the legislature permitted an immediate appeal where "review of the final agency decision would not provide an adequate remedy." S.C. Code Ann. § 1-23-380 (2006). For the same reason, the Rules of Appellate Practice exclude workers' compensation awards from the general rule automatically staying matters decided in the commission's orders. Rule 241 (b) (7), SCACR.

³The Rose case cited by Respondents is distinguishable because the appeal did not deal with the merits of the case. The Rose appellant sought to raise an issue the Commission had declined to address. In Rose, the upstream employer sought to transfer liability to the South Carolina Uninsured Employer's Fund while the underlying claim was still ongoing. The commission refused to order the transfer, finding the issue of transfer was "not ripe for adjudication at this time." The employer argued the order was immediately appealable because a later appeal would deprive them of an adequate remedy. The Court disagreed, noting "Appellants make no specific argument as to how the commission's refusal to address transfer at this time affects Appellants in any way other than to delay the payment of money."

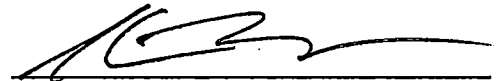
The Court dismissed the appeal, holding: "Because the commission has not yet ruled on the merits of Samuel Rose's entire claim for benefits, however, the order is not a final decision, and thus not immediately appealable." Id. Rose differs from the instant case in that the Commission held the issue at bar was not ripe, thus holding a decision for a later day at a later hearing. As such, there was no final order from which to appeal. Rose v. JJS Trucking, LLC, 768 S.E.2d 412, 411 S.C. 366 (Ct. App. 2015)

Consider the result of dismissing the appeal in this case. The average weekly wage and denial of temporary compensation have been decided with finality by the Appellate Panel. The Appellate Panel also ordered additional medical evaluation and treatment – which was not appealed. No other issues were raised. Unlike Bone, there is no remand for further proceedings – there is nothing left to be done by the Commission. Yet, because these issues had already been decided by finality, they were not – and could not – have been raised again before the single commissioner at the hearing on September 6, 2016 (a hearing two full years after the hearing *sub judice* was held). How then can those issues be preserved? What mechanism could there be to raise them again on appeal?

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be denied. Respondents should be directed to immediately file the Brief of Respondent and this appeal should move forward on the merits.

Respectfully Submitted,



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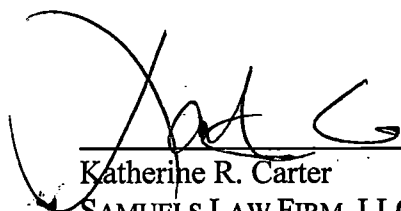
Party Reflections, Inc., Employer, and
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PROOF OF SERVICE

I certify that I, Katherine R. Carter, paralegal for the Samuels Law Firm, LLC, have served the **Appellant's Return to Respondents' Motion to Dismiss Appeal** upon counsel for the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on May 11, 2017, addressed as follows:

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May 11, 2017

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
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SC Court of Appeals

RE: Renee Robles v. Party Reflections, Inc. and Employers Assurance Co.
Appellate Case No.: 2016-002266

Dear Ms. Kitchings:

Enclosed for filing are the original and seven (7) copies of the **Appellant's Return to Respondents' Motion to Dismiss Appeal and Proof of Service**, in the above case.

By copy of this letter and enclosure to Ashley Kirkham, Christian Stegmair, and Kelsey Jan Brudvig, we are serving opposing counsel with a copy of our **Appellant's Return to Respondents' Motion to Dismiss Appeal** as indicated by the attached Proof of Service.

Please have your staff file the Appellant's Return to Respondents' Motion to Dismiss Appeal and Proof of Service and return a clocked copy in the enclosed self-addressed stamped envelope.

With kindest regards, I am

Respectfully,

Katherine R. Carter
Paralegal for Stephen B. Samuels

/krc

cc: Ashley R. Kirkham, Esq.
Christian Stegmaier, Esq.
Kelsey Jan Brudvig, Esq.
Mark R. Calhoun, Esq.

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