STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1318928
Appellate Case No. 2016-002423

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

v.

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

RESPONDENT'S INITIAL BRIEF OF RESPONDENT/APPELLANT

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II. The Full Commission did not err in Finding of Fact #4, in which it found Ashford "has a pending Form 50 that alleged injuries to his psyche, right lower extremity and right side which are not timely for the purpose of this hearing and are not properly before me" because this finding is true as the hearing was set only on Prysmian Power's Form 21 request for hearing.

III. This Court should dismiss this appeal because the order of the Workers' Compensation Commission is not a "final order" and review of the final agency decision will provide an adequate remedy for Prysmian Power.

IV. Ashford further argues that pursuant to Rule 220(c), the appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.

STATEMENT OF THE CASE

This is an appeal by Prysmian Power Cables & Systems, USA, and Sentry Insurance Company ("Appellants" or "Prysmian Power") from the Decision and Order of the Appellate Panel of the South Carolina Workers' Compensation Commission (the Appellate Panel) filed on November 1, 2016.

By way of case history, Ashford suffered an accidental injury occurring on October 30, 2013, while in the employment of Prysmian Power. Ashford suffered an admitted injury by accident when his right hand and wrist were crushed and stuck in a machine.

At the Form 21 hearing held by the single Commissioner on June 23, 2015, Ashford alleged that he was not at maximum medical improvement and needed additional medical care. Ashford was still having problems with his right upper extremity on his last visit with the authorized treating physician, Dr. Fulton; as a result, Ashford asked Dr. Fulton for a referral for a second opinion. Inexplicably, Dr. Fulton refused to recommend a second opinion and released Ashford with no work restrictions or future medical care. Consequently, Ashford had to seek medical care on his own with Dr. Subhash Patel of Southeastern Orthopaedic and Sports Medicine and Dr. Usama Gabr of Columbia Clinic, Spine and Pain Institute. Both Dr. Patel and Dr. Gabr recommended that an EMG/NCS be performed on Claimant's right upper extremity. Prysmian Power received the recommendation from Dr. Patel for an EMG/NCS and authorized the EMG/NCS performed by Dr Timothy Zgleszewski of Palmetto Spine Sports Medicine on June 3, 2015. The EMG/NCS was abnormal, corroborating Ashford's complaints to Dr. Fulton. There were multiple possible reasons for the abnormal test. However, instead of following through with authorizing another orthopaedist besides Dr. Fulton to review and opine what the positive EMG/NCS means in relation to Ashford's admitted right wrist injury, Prysmian Power chose to proceed with their Form 21

hearing. Ashford respectfully requested that the undersigned Commissioner authorize additional medical care with another hand specialist so that hand specialist can review the abnormal EMG/NCS and treat Ashford appropriately. Ashford had no problems with his right upper extremity prior to this admitted work-related injury in which he suffered a crush injury, right dorsal wound, right ulnar styloid fracture, right triangular fibrocartilage complex tear, and carpal tunnel syndrome. Ashford contended that he was not at maximum medical improvement as Dr. Patel and Dr. Gabr both recommended the EMG/NCS be performed and neither physician found Ashford at maximum medical improvement. Ashford also contended that the 5% impairment rating to the right upper extremity by Dr. David Fulton was premature as Ashford was not at maximum medical improvement. Ashford contended that the burden of proof was on Prysmian Power at a Form 21 hearing and that Prysmian Power failed to meet that burden of proof as Dr. Patel, Dr. Gabr, and the June 3, 2015, EMG/NCS overwhelmingly contradicted Dr. Fulton's opinion.

On January 20, 2017, Ashford had to file a Rule to Show Cause/Motion to Compel regarding Prysmian Power's failure to provide medical care as ordered by the Single Commissioner in the Order dated May 4, 2016, and by the Full Commission in the Order dated November 1, 2016. Prysmian Power appealed the Full Commission order to the South Carolina Court of Appeals, and at that time, Ashford had cross-appealed the Full Commission order. On July 2, 2017, Ashford moved to dismiss his cross-appeal. The language from Ashford's Motion to Compel is included below.

> 1. The Full Commission order in this case held in finding of fact #25 that, "Claimant is entitled to all causally related future medical treatment, as recommended by Dr. Gabr, by a physician with a specialty to the hand of Defendants' choosing." This is the only care that Defendants have to provide pursuant to the Full Commission order.
> 2. Defendants have to provide this medical care while any appeal is pending pursuant to S.C. Code Ann. § 42-17-60 (Supp.2012). "In the case of an appeal from

the decision of the commission on questions of law, the appeal does not operate as a supersedeas and, after that time, the employer is required to make weekly payments of compensation and to provide medical treatment ordered by the commission involved in the appeal or certification until the questions at issue have been fully determined in accordance with the provisions of this title." See *Bone v. U.S. Food Service*, 404 S.C. 67, 83, 744 S.E. 2d 552, 561 (2013). Rule 241(b)(7), SCACR (stating the general rule that a notice of appeal acts to automatically stay matters decided in the order does not apply to "workers' compensation awards as provided in S.C. Code Ann. § 42-17-60"). *Id.*

3. Thus, the law requires Defendants to provide ongoing medical care as ordered by the Full Commission while an appeal is pending. Indeed, the conduct of Defendants after the Full Commission award indicate that they understand this principle of law as Defendants have stopped Claimant's weekly temporary total disability (TTD) checks based on the Full Commission award even though Claimant has cross-appealed the Full Commission order on this issue. Thus, Claimant is not receiving any workers' compensation benefits while this appeal is pending. Claimant is still waiting on Defendants to provide the medical care as ordered by the Full Commission. Inexcusably, Defendants have complied with the part of the Full Commission order which allowed TTD benefits to be stopped but have not complied with the part of the Full Commission order which requires medical care to be provided to Claimant.

On January 30, 2017, Prysmian Power filed a return contesting Ashford's Motion to Compel and asking the single Commissioner to deny Ashford's Motion to Compel. It was not until the single Commissioner granted Ashford's Motion to Compel on February 2, 2017, and Ordered Prysmian Power to provide the orthopaedic medical care that Prysmian Power provided the orthopaedic follow up medical care. After providing the orthopaedic medical care as ordered by the Commission, Prysmian Power has subsequently filed another Form 21 request for hearing with the Commission on May 19, 2017.

By way of background, this claim was before the South Carolina Workers' Compensation Commission pursuant to the Form 21 filed by Prysmian Power on April 30, 2015. Prysmian Power alleges incorrectly in their Statement of the Case that this claim was before the South Carolina Workers' Compensation Commission pursuant to the Form 50 filed by Ashford on February 16,

2015. The Hearing Commissioner mistakenly put on the cover page of his Decision and Order dated May 4, 2016, that the purpose of the hearing was to determine the issues set forth on the Forms 21 of the Defendants and Forms 50 and 51 of the parties. However, in the substantive part of his Order on pages 3 and 4, the Hearing Commissioner correctly ruled that,

> This matter is properly before the undersigned Commissioner to resolve the issues that were raised in Defendant's Form 21 as it pertains to Claimant's admitted right wrist injury. Defendants seek to stop temporary total disability (TTD) benefits and medical care and pay a permanent partial disability award to Claimant under the South Carolina Workers' Compensation Act based upon an admitted accidental injury to the right wrist that occurred on October 30, 2013, while in the employment of Employer/Defendants. Claimant currently has a pending Form 50 hearing request alleging additional injuries to his psyche, right lower extremity, and right side and permanent and total disability requiring mandatory mediation which are not timely for the purposes of this hearing and are not properly before me. This case was heard by the undersigned Commissioner on June 23, 2015, at which time the parties and/or their representatives appeared and evidence was received.

More importantly, the Full Commission (the Appellate Panel) Decision and Order dated November 1, 2016, establishes the facts on appeal in this case. The Appellate Panel clearly stated the purpose of the hearing held on June 23, 2015. The Appellate Panel stated on page 2 of their Order, "By way of background, this claim was before the South Carolina Workers' Compensation Commission pursuant to the Form 21 filed by the Defendants on April 30, 2015." The Appellate Panel did not mention anywhere in their Decision and Order that the purpose of the hearing was to determine issues in the Forms 50 and 51 of the parties because the hearing was only held on the basis of the Form 21 request made by Prysmian Power.

In his Form 50 hearing request, Ashford alleged permanent and total disability, which is a claim under 42-9-10 and requires mandatory mediation prior to a hearing. South Carolina Regulation 67-1802 (2017). Mandatory mediation has not been held in this case. The hearing notice sent by the South Carolina Workers' Compensation Commission on May 14, 2015, stated

the subject is, "To determine if employer/carrier may stop payment, and if so, to determine if claimant is entitled to any further benefits. Carrier also request (sic) credit for temporary total benefits paid in excess of award." Thus, the hearing held on June 23, 2015, was based solely on the Form 21 filed by Prysmian Power. The burden of proof rested solely with Prysmian Power to prove to the Commission that Ashford had reached maximum medical improvement, and that Prysmian Power was entitled to stop temporary total disability benefits. The burden of proof was never on Ashford at the Form 21 hearing requested by Prysmian Power. Thus, the Commission was correct not to address any issues raised by Ashford at Prysmian Power's Form 21 hearing on June 23, 2015. Only the issues raised by Prysmian Power were properly before the Commission. In addition, Ashford has a right to mandatory mediation prior to the Form 50 hearing being held. The Commission would have violated Ashford's right to mandatory mediation if it had addressed issues not properly before the Commission.

In a Decision and Order filed on May 4, 2016, the Hearing Commissioner ruled that, "Claimant has a pending Form 50 that alleged injuries to his psyche, right lower extremity and right side. Although evidence was presented at the hearing regarding these alleged injuries, I find they are not timely for the purposes of this hearing and are not properly before me." The Appellate Panel unanimously affirmed the Hearing Commissioner on November 1, 2016, in paragraph 4 of the Findings of Fact which states that, "Claimant has a pending Form 50 that alleged injuries to his psyche, right lower extremity and right side which are not timely for the purpose of this hearing and are not properly before me." Prysmian Power incorrectly alleges in their Statement of the Case that, "...the Appellate Panel did not specifically address the psychological issue in its order."

STATEMENT OF FACTS

On February 16, 2015, Ashford filed a Form 50 request for hearing alleging permanent and total disability and injuries to right upper extremity, right lower extremity, right side, and resultant psychological,

which requires mandatory mediation prior to a hearing pursuant to South Carolina Regulation 67-1802. On March 12, 2015, Prysmian Power filed a Form 51 admitting an injury to the wrist but denying other alleged injuries. Mandatory mediation has not been held.

On April 30, 2015, Prysmian Power filed a Form 21 seeking to stop payment of compensation, determine if compensation was due, and request credit for overpayment of temporary compensation. The hearing notice sent by the South Carolina Workers' Compensation Commission on May 14, 2015 stated the subject is, "To determine if employer/carrier may stop payment, and if so, to determine if claimant is entitled to any further benefits. Carrier also request (sic) credit for temporary total benefits paid in excess of award." The Commission did not have authority to rule upon the compensability of body parts listed in Ashford's Form 50 and issue a disability award at the Form 21 hearing as Ashford has a right to mandatory mediation prior to a hearing to determine permanent and total disability. Only at the Form 50 hearing after mediation has been unsuccessful would the Commission have the authority to rule upon which body parts are compensable and make a finding as to whether Ashford is permanently and totally disabled. Pursuant to *Singleton v. Young Lumber Co.*, 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960), "To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected." The finding of other body parts being affected pursuant to *Singleton* can only be made by the Commission at a Form 50 hearing after mandatory mediation has been held. South Carolina Regulation 67-1802 (2017). Prysmian Power did not have a right nor did the Commission have the authority at Prysmian Power's Form 21 hearing to address and rule upon Ashford's alleged work-related injured body parts (including psychological) and whether permanent and total disability resulted from the alleged work-related injured body parts. Those issues can only be addressed by the Commission after mandatory mediation has been held.

STANDARD OF REVIEW

South Carolina Code Ann. 42-17-50, states in part, "if an application is made to the

Commission the Commission shall review the award and if good grounds be shown, therefore, reconsider the evidence, receive further evidence, rehear the parties or their representative and if proper amend the award." In accordance with South Carolina Code Ann. 42-15-50, when reviewing the evidence and award of Hearing Commissioner, the Commission may make its own finding of fact and reach its own conclusions of law either consistent or inconsistent with those of the Hearing Commissioner. *Lowe v. Am-Can Transport Service, Inc.* 283 S.C. 534, 324 S.E. 2d 87 (S.C. App. 1984). *Green v. Raybestos-Manhattan, Inc.,* 156 S.E. 2d 318 (1967). It is logical for the Full Commission, which did not have the benefit of observing the witnesses, to give weight to the Hearing Commissioner's opinion but the Full Commission under our statute may disagree. *Greeen v. Raybestos-Manhattan, Inc., 156 S.E. 2d 318 (1967)* citing *Riddle v. Fairforest Finishing Company,* 198 S.C. 419; 19 S.E. 2d 341 (1942).

The South Carolina Supreme Court has held that the "Workers' compensation statutes are to be construed in favor of coverage; any exception to workers' compensation coverage must be narrowly construed." *Lester v. South Carolina Workers' Compensation Commission,* 334 S.C. 557; 514 S.E. 2d 751, (1999) citing *Peay v. U.S. Silica Co.*, 313 S.C. 91, 437 S.E.2d 64 (1993). "Any reasonable doubts as to construction of the Act should be resolved in favor of coverage." *Lester v. South Carolina Workers Compensation Commission*, 334 S.C. 557; 514 S.E.2d 751 (1999) citing *Mauldin v Dyna-Color/Jack Rabbit,* 308 S.C. 18; 416 S.E. 2d 639 (1992).

Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society. *Cokely v. Robert Lee, Inc.* (1941),

197 S.C. 157; 14 SE 2d 889; *Kennerly v. Ocmulgee Lumbar Co.* (1945), 206 S.C. 481; 34 S.E. 2d 792; *Marchbanks v. Duke Power Co.* (1939), 190 S.C. 334; 2 S.E. 2d 825; *Phillips vs. Dixie Stores*, Inc. (1938), 186 S.C. 374, 195 S.E. 2d 646. One of the obvious primary purposes of this Act is to prevent injured employees and those lawfully dependent upon them for support from becoming charges upon society and the public generally for support. *Flemon v. Dickert-Keowee, Inc.* (1972) 259 S.C. 99, 190 S.E. 2d 751. It is established law of this State that any reasonable doubt as to the construction of a workmen's compensation law must be resolved in favor of the claimants, its provisions reconciled if possible, it's purposes effectuated and its presumptions and penalties directed toward the end of providing coverage rather than noncoverage. *Cokely v. Robert Lee, Inc.* (1941), 197 S.C. 157, 14 SE 2d 889; *Ham v. Mullins Lumbar Co.* (194), 193 S.C. 66, 7 S.E. 2d 712; *Baldwin v. Pepsi-Cola Bottling Co.* (1959), 234 S.C 320, 108 SE 2d 409. See also *De Berry v. Coker Freight Lines* (1959). 234 S.C 304, 108 S.E. 2d 114. While the Workmen's Compensation Act is to be liberally construed to the end that the benefits thereof may not be denied upon technical, narrow and strict interpretation, words should be given their established legal meaning or the meaning which the legislature intended; nor is the Court justified in so construing it as to do violence to a specific requirement of the Act. *Brown v. Martin* (1943), 203 S.C. 84 26 S.E. 2d 317.

The Administrative Procedures Act ("APA") governs this Court's review of the Full Commission's decisions. *See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). "A decision of the Worker's Compensation Commission will not be overturned by a reviewing court unless it is clearly unsupported by substantial evidence in the record." *Howell v. Pac. Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987). Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission

reached. *Waters v. S.C. Land Res. Conservation Comm'n*, 321S.C. 219, 467 S.E.2d 913 (1996).

In workers' compensation cases, the Full Commission is the ultimate fact finder. *Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 344 S.E. 2d 613 (1996). The final determination of witness credibility and the weight to be accorded evidence is reserved exclusively to the Full Commission. *Ford v. Allied Chem. Co.*, 252 S.C. 561, 167 S.E.2d 564 (1969). It is not the task of an appellate court to weigh the evidence as found by the Full Commission. *Ellis v. Spartan Mills*, 276 S.C. 216, 277 S.E.2d 590 (1981). Further, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence. *Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 519 S.E.2d 102 (1999). Where the record includes conflicts in the evidence over a factual issue, the findings of the Full Commission are conclusive. *Etheridge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002).

However, an appellate court may reverse or modify a decision of the Full Commission "if the findings and conclusions of the [Full Commission] are affected by error of law, clearly erroneous in view of the reliable and substantial evidence on the whole record, or arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Gray v. Club Grp., Ltd.*, 339 S.C. 173, 182, 528 S.E.2d 435, 440 (Ct. App. 2000); see also S.C. Code Ann. §1-23-380(5) (2017). "An abuse of discretion occurs if the Commission's findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law." *Conner v. City of Forest Acres*, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005); *Nelson v. Taylor*, 347 S.C. 210, 214, 553 S.E.2d 488, 490 (2001).

ARGUMENTS

I. The Commission did not deny Prysmian Power due process rights by (1) finding the alleged injury to Ashford's psyche was not timely and not properly before the Commission, and (2) delaying the issuance of a Decision and Order by the Hearing Commissioner for more than one year after filing of the Form 21 by Prysmian Power and more than ten months after the hearing. The time frame of the Hearing Commissioner's ruling is not relevant to the issue of whether psyche should have been adjudicated by the Commission at Appellant's Form 21 hearing.

A. South Carolina Regulation 67-1802, which became effective June 28, 2013, states,

> 67-1802 Mediation Required with Certain Claims.
> A. It is ordered by the Commission that claims arising under Section 42-9-10, or claiming permanent and total disability pursuant to Section 42-9-30 (21), occupational disease cases, third-party lien reduction claims, contested death claims, mental/mental injury claims, and cases of concurrent jurisdiction under the South Carolina Workers' Compensation Act and the Federal Longshore and Harbor Workers' Compensation Act must be mediated prior to a hearing.

The Form 50 hearing request, which alleged injuries to right upper extremity, right lower extremity, right side, and resultant psychological, filed by Ashford on February 16, 2015, alleged a claim arising under 42-9-10, and must be mediated prior to a hearing. The Commission has no discretion if a claim has been alleged under 42-9-10. Mediation must be held prior to any issues that have been raised in the Form 50 being heard by the Commission. It makes no difference whether Ashford requests that those issues be heard. It makes no difference whether evidence is submitted regarding those issues. The Commission does not have the authority at a Form 21 stop pay hearing to rule upon issues which must be mediated prior to a hearing. The Commission does not have the authority at a Form 21 stop pay hearing to decide compensability and disability of body parts, including psyche, which have been alleged in the Form 50 under 42-9-10 and require mandatory mediation prior to a hearing. After mandatory mediation has been held as required by SC Regulation 67-1802 and is unsuccessful, the Commission has the authority at the subsequent Form 50 hearing to decide any and all issues regarding compensability and disability of body parts as well as whether Respondent is permanently and totally disabled.

The Commission does not have the authority, as Prysmian Power wrongfully argues, at an

Employer Form 21 hearing to rule upon issues alleged in the Form 50, which can only be heard after mandatory mediation has been held and been unsuccessful. If the Commission could rule upon issues alleged only in a Claimant's Form 50, which alleges a claim arising under 42-9-10 and requires mandatory mediation prior to a hearing, at a Form 21 Employer's hearing, South Carolina Regulation 67-1802 would be rendered null and void and of no effect as there would no longer be mandatory mediation prior to a hearing. Claimant filing a Form 50 alleging a claim arising under 42-9-10 is the only procedural mechanism which triggers the requirement of mandatory mediation prior to a hearing. A Form 21 hearing by the Employer cannot defeat or circumvent the requirement of mandatory mediation prior to a hearing as requested by a Claimant in a Form 50. All four Commissioners in this case ruled correctly regarding the psyche not being properly before the Commission as Respondent's Form 50 was not before them at the Form 21 hearing on June 23, 2015. Ashford's Form 50 will not properly be before the Commission for a hearing until mandatory mediation has been held and been unsuccessful.

On April 30, 2015, Prysmian Power filed a Form 21 seeking to stop payment of compensation, determine if compensation was due, and request credit for overpayment of temporary compensation. The hearing notice sent by the South Carolina Workers' Compensation Commission on May 14, 2015 stated the subject is, "To determine if employer/carrier may stop payment, and if so, to determine if claimant is entitled to any further benefits. Carrier also request (sic) credit for temporary total benefits paid in excess of award." The Commission does not have authority to rule upon the compensability of body parts listed in a Claimant's Form 50 and issue a disability award at the Form 21 hearing as a Claimant has a right to mandatory mediation prior to a hearing to determine permanent and total disability. Only at the Form 50 hearing after mediation has been unsuccessful would the Commission have the authority to rule upon which body parts are compensable and make a finding as to whether a Claimant is permanently and totally disabled. Pursuant to *Singleton v. Young Lumber Co.*, 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960), "To obtain compensation in addition to that scheduled for the injured member, claimant must show that some

other part of his body is affected." The finding of other body parts being affected pursuant to *Singleton* can only be made by the Commission at a Form 50 hearing after mandatory mediation has been held. South Carolina Regulation 67-1802 (2017). Prysmian Power did not have a right nor did the Commission have the authority at Prysmian Power's Form 21 hearing to address and rule upon Ashford's alleged work-related injured body parts (including psychological) and whether permanent and total disability resulted from the alleged work-related injured body parts. Those issues can only be addressed by the Commission after mandatory mediation has been held.

Furthermore, the Hearing Commissioner and the Appellate Panel clearly explained their reasons for not addressing psyche at Prysmian Power's Form 21 hearing. All four of the Commissioners unanimously agreed that psyche was not properly before them at Appellants' Form 21 stop pay hearing. In a Decision and Order filed on May 4, 2016, the Hearing Commissioner ruled in Findings of Fact number 4 that, "Claimant has a pending Form 50 that alleged injuries to his psyche, right lower extremity and right side. Although evidence was presented at the hearing regarding these alleged injuries, I find they are not timely for the purposes of this hearing and are not properly before me." The three Commissioners on the Appellate Panel unanimously affirmed the Hearing Commissioner on November 1, 2016, in paragraph 4 of the Findings of Fact that, "Claimant has a pending Form 50 that alleged injuries to his psyche, right lower extremity and right side which are not timely for the purpose of this hearing and are not properly before me."

All of the case law cited by Appellants is prior to South Carolina Regulation 67-1802 becoming effective on June 28, 2013; as a result, none of it is relevant to the issue of mandatory mediation being required prior to a hearing regarding any issue alleged by Respondent in his Form 50. Furthermore, Prysmian Power can cite no case law, statute, or authority which allows the Commission to hear issues and rule upon issues raised in a Form 50 which has not been set for a hearing by the Commission.

B. Prysmian Power has not been prejudiced by any alleged due process violation as the Commission ruled correctly on not having the psychological issue before them at the Form 21 hearing.

Prysmian Power can still make every argument they have now regarding psyche at the Form 50 hearing if mediation is unsuccessful. Prysmian Power can still use the evidence they have obtained regarding psyche. If there is another hearing in this case, Prysmian Power can defend the psyche claim in any manner they see fit. The fact that mediation has not been held and that this appeal is pending shows how Prysmian Power's appeal is interlocutory and should be dismissed. Mediation may very well resolve this case, but instead Prysmian Power has chosen to file this interlocutory appeal and now complain about their own costs of litigation. This is a disingenuous argument.

The time frame in which the Commission decided this case has not prejudiced Prysmian Power whatsoever in regard to the only issue on appeal, the psychological issue. Prysmian Power has not provided any psychological care to Ashford. Prysmian Power chose to litigate this case, chose to appeal this case, and knows the risks in litigating a case.

Prysmian Power could have chosen wisely not to proceed with a premature Form 21 hearing on June 23, 2015, and provide the follow up medical care with an orthopaedist as ultimately ordered by the Hearing Commissioner and Appellate Panel. Once the Hearing Commissioner and Appellate Panel correctly ruled that Prysmian has to provide a hand specialist to evaluate Ashford's hand and wrist injury, Prysmian could have simply provided the medical care as ordered by the Commission and not appealed this case. However, Prysmian Power never did agree to provide the follow up orthopaedic care for Ashford. On January 20, 2017, Ashford filed a Motion to Compel Prysmian Power to provide the orthopaedic medical care as ordered by

the Hearing Commissioner and Appellate Panel while Prysmian Power's appeal was pending, which was contested by Prysmian Power. It was not until the Commission granted Ashford's Motion to Compel and Ordered Prysmian Power to provide the orthopaedic care that Prysmian provided the orthopaedic follow up medical care. Prysmian Power has filed another Form 21 hearing with the Commission on May 19, 2017. Ashford will be forced to move to dismiss Prysmian Power's Form 21 while this appeal is pending. If Prysmian Power would withdraw this appeal, the Commission would have jurisdiction to set the mandatory mediation, and if unsuccessful, both parties would receive a hearing on the merits of the case based on Prysmian Power's Form 21 and Ashford's Form 50.

If Prysmian Power had withdrawn their premature Form 21 hearing on June 23, 2015, and simply sent Ashford to an orthopaedist for evaluation based on the positive EMG/NCS that Prysmian Power authorized, there would have been no reason to appeal this case. The Form 21, which Prysmian Power just filed on May 19, 2017, could have been filed in 2015, and the case would likely have reached a final decision in 2015. Prysmian Power cannot now blame the Commission when they chose a poor litigation and appellate strategy.

II. The Commission did not err in Finding of Fact #4, in which it found Ashford "has a pending Form 50 that alleged injuries to his psyche, right lower extremity and right side which are not timely for the purpose of this hearing and are not properly before me" because this finding is true as the hearing was set only on Prysmian Power's Form 21 request for hearing.

The Appellatte Panel's unanimous finding of fact that Ashford "has a pending Form 50 that alleged injuries to his psyche, right lower extremity and right side which are not timely for the purpose of this hearing and are not properly before me" is correct. The Form 50 was not before the Commission. The hearing notice is undisputed. The hearing notice sent by the South Carolina Workers' Compensation Commission on May 14, 2015 stated the subject is, "To determine if

employer/carrier may stop payment, and if so, to determine if claimant is entitled to any further benefits. Carrier also request (sic) credit for temporary total benefits paid in excess of award." It is undisputed that Respondent alleged in his Form 50 request for hearing filed on February 16, 2015, a claim arising under 42-9-10, which requires mandatory mediation prior to a hearing. It is undisputed that mediation has not been held as required by Respondent's Form 50 request for hearing filed on February 16, 2015.

Both the Hearing Commissioner Order and the Appellate Panel Commission Order are clear that the hearing was pursuant only to the Form 21 filed by Appellants. The Hearing Commissioner stated on pages 2 and 3 of his Order,

> This matter is properly before the undersigned Commissioner to resolve the issues that were raised in Defendant's Form 21 as it pertains to Claimant's admitted right wrist injury. Defendants seek to stop temporary total disability (TTD) benefits and medical care and pay a permanent partial disability award to Claimant under the South Carolina Workers' Compensation Act based upon an admitted accidental injury to the right wrist that occurred on October 30, 2013, while in the employment of Employer/Defendants. Claimant currently has a pending Form 50 hearing request alleging additional injuries to his psyche, right lower extremity, and right side and permanent and total disability requiring mandatory mediation which are not timely for the purposes of this hearing and are not properly before me. This case was heard by the undersigned Commissioner on June 23, 2015, at which time the parties and/or their representatives appeared and evidence was received.

The Appellate Panel stated on page 2 of their Order, "By way of background, this claim was before the South Carolina Workers' Compensation Commission pursuant to the Form 21 filed by the Defendants on April 30, 2015."

The Appellate Panel Order could not be any clearer and its findings any more correct as to why the psyche was not properly before the Commission. Indeed, Prysmian Power can cite no law or authority as to how psyche was properly before the Commission.

III. This Court should dismiss this appeal because the order of the Workers' Compensation Commission is not a "final order" and review of the final agency decision will provide an adequate remedy for Appellants/Respondents.

This is an appeal in a workers' compensation case. The court should dismiss this appeal because the order of the Workers' Compensation Commission is not a "final order" and review of the final agency decision will provide an adequate remedy for Appellants/Respondents.

The Administrative Procedures Act generally limits a party's right to appeal an administrative case until after there has been a "final" decision. See S.C. Code Ann § 1-23-380. This term is a term of art; it describes an order that disposes of all the issues in a case and leaves nothing to be done but to enforce by execution what has been determined. See *Bone v. U.S. Food Service*, 404 S.C. 67, 83, 744 S.E. 2d 552, 561 (2013). Under section 1-23-80(A) of the APA, "[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). "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." S.C. Code Ann. § 1-23-380(A).

The Court of Appeals has the authority to dismiss Prysmian Power's appeal at any time, and if any appeal warrants a dismissal, this is it. Prysmian Power does not have a good faith argument to make. Prysmian Power also has appealed a case in which the Commission can provide a remedy and in which mediation may result in the case resolving. There has been no final decision rendered by the Commission. Prysmian Power is attempting to use the Court of Appeals to gain an advantage in the still pending worker's compensation case because they do not like the correct ruling of the Appellate Panel. Prysmian Power filed another Form 21 request for hearing on May 19, 2017, while this appeal is pending. This shows that Prysmian Power knows that they do not

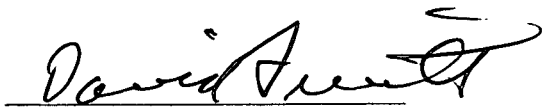
have a "final order" from the Commission, and that they still have an adequate remedy in worker's compensation. Prysmian Power is trying to have the benefit of two rulings, both from the Commission and the Court of Appeals at the same time, and will follow the ruling that they prefer. Indeed, the remedy requested in Prysmian Power's conclusion is to have the matter remanded to the Commission for a ruling on the merits of the psychological injury. This very remedy is already in place pursuant to South Carolina Regulation 67-1802, which allows for a hearing on the merits of all issues, including psyche, if mediation is unsuccessful. Mediation may resolve this case, but the filing of this appeal by Prysmian Power before the South Carolina Worker's Compensation Commission laws and regulations have had a chance to reach a final decision has interrupted and stopped the process. This appeal is interlocutory whether Prysmian Power likes the Appellate Panel Order or not. This appeal by Prysmian Power is a waste of judicial resources and time and exemplifies why interlocutory appeals are not allowed.

IV. Ashford further argues that pursuant to Rule 220(c), the appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.

CONCLUSION

Ashford respectfully requests that this Court affirm the finding of fact of the Appellate Panel Order which states that Ashford has a pending Form 50 that alleged injuries to his psyche, right lower extremity and right side which are not timely for the purpose of this hearing and are not properly before me. In addition, Prysmian Power's appeal is interlocutory, and Ashford respectfully requests that this Court dismiss this appeal because the order of the Workers' Compensation Commission is not a "final order" and review of the final agency decision will provide an adequate remedy for Prysmian Power.

Respectfully Submitted,



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July 7, 2017

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1318928

Appellate Case No. 2016-002423

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

v.

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

PROOF OF SERVICE

The undersigned hereby certifies that he has hand-delivered on July 7, 2017, a copy of the Respondent's Initial Brief of Respondent/Appellant in the above entitled action to Nicolas L. Haigler, Esq., SOWELL GRAY STEPP & LAFFITTE, L.L.C., 1310 Gadsden Street, Columbia, SC 29211 and Honorable Jenny Abbott Kitchings, Judicial Director, South Carolina Court of Appeals, 1015 Sumter St., Columbia, SC 29201.

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July 7, 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 Cables and Services
Appellate Case No.: 2016-002423

Dear Ms. Kitchings:

Please find enclosed the original and one copy of the Respondent/Appellant's Initial Brief and Proof of Service.

By copy of this letter and the aforementioned documents to Appellants' attorney, I am also serving him with a copy of Respondent/Appellant's Initial Brief and Proof of Service.

Thank you for your attention to this matter.

Truitt Law Firm, LLC

Sincerely,

David N. Truitt, Esq.

Enclosures
cc: Nicolas L. Haigler, Esquire (via hand-delivery)