

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Docket No.:17-ALJ-30-0038-IJ

RECEIVED

AUG 15 2017

SC Court of Appeals

Doraine E. Martin,

Respondent,

v.

S.C. Dept. of Corrections and
State Accident Fund,

Appellants.

**APPELLANTS' RESPONSE TO RESPONDENT'S MOTION FOR THE TAXING OF COSTS
AND ATTORNEY'S FEES AGAINST THE APPELLANTS**

Pursuant to South Carolina Appellate Court Rules 222 and 240, the Appellants respond to Respondent's Motion for the Taxing of Costs and Attorney's Fees Against the Appellants, as follows:

1. The Respondent has two pending Workers' Compensation claims filed against the Appellants pending with the South Carolina Workers' Compensation Commission (Claim Nos. 2014-3319 and 2015-4381).
2. On February 14, 2017, the Appellants properly filed a Motion for Protective Order in the above-referenced cases seeking protection from answering Respondent's deposition questions that were protected by attorney-client privilege and work product protection.

3. On February 21, 2017, the Respondent filed a Motion to Compel in the Administrative Law Court regarding the same two workers' compensation claims.

4. On February 27, 2017, the Appellants responded to an e-mail from the Administrative Law Court informing the Administrative Law Court that S.C. Code Ann. Section 1-23-600(A) "specifically omits all hearings arising under the Workers' Compensation Commission from the jurisdiction of an administrative law judge." The Respondent's counsel was copied on this e-mail. (See Exhibit A).

5. On March 1, 2017, the Appellants filed a brief with the Administrative Law Court asserting that the Administrative Law Court does not have jurisdiction over claims arising under the Workers' Compensation Commission. A copy of the brief was hand delivered to the Respondent's counsel at the hearing before Judge Funderburke. (See Exhibit B).

6. On March 1, 2017, Judge Funderburke heard oral arguments regarding whether the Administrative Law Court has jurisdiction to enforce the Motion to Compel over the two pending Workers' Compensation claims.

7. Again, the Appellants argued that the Administrative Law Court did not have jurisdiction to rule on matters arising under the jurisdiction of the Workers' Compensation Commission.

8. On March 9, 2017, Judge Funderburke Ordered that the discovery in these matters must remain in the exclusive jurisdiction of the South Carolina Workers' Compensation Commission.

9. On March 20, 2017, the Respondent filed a Motion for Reconsideration of the Administrative Law Court's March 9, 2017 Order.

10. On March 29, 2017, the Appellants filed a response to the Respondent's Motion for Reconsideration further asserting that the Administrative Law Court does not have jurisdiction to hear matters arising under the Workers' Compensation Commission. (See Exhibit C).

11. On April 21, 2017, the Administrative Law Court granted the Respondent's Motion for Reconsideration and ruled that it had jurisdiction over discovery disputes in cases arising under the Workers' Compensation Commission.

12. On May 16, 2017, the Workers' Compensation Commission issued an Order finding that the discovery dispute in question falls within the jurisdiction of the South Carolina Workers' Compensation Commission.

13. On May 19, 2017, the Appellants filed a Notice of Appeal challenging the jurisdiction of the Administrative Law Court; the Appellants were under opposing Orders from two different courts, each of which hold contempt power.

14. This appeal has been dismissed for timing rather than substance. While the Appellants acknowledge the dismissal of the appeal from the interlocutory order, the Court of Appeals affirmed the Appellants' continuous argument that the Administrative Law Court did not have jurisdiction to hear matters arising under the Workers' Compensation Commission—"It must be noted, however, that section 1-23-600(A) of the South Carolina Code (Supp.2016) expressly excludes cases arising under the Workers' Compensation Commission from the oversight of the Administrative Law Court."

15. The Appellants have been firm in their position that the Administrative Law Court does not have jurisdiction over workers' compensation claims in South Carolina. The timing of the Notice of Appeal does not discredit this position as it was affirmed in the Order of this Court filed on July 19, 2017.

16. The Appellants would not have needed to appeal this issue but for the Respondent improperly filing a motion for a hearing in Administrative Law Court regarding cases arising under the jurisdiction of the Workers' Compensation Commission.

17. Alternatively, the Appellants seek a reduction in the amount of costs to be awarded.

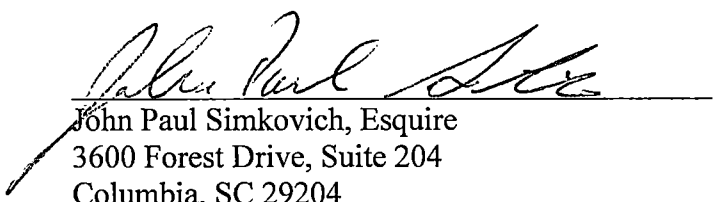
18. The Respondent asserts it took seven hours to prepare a one and half page Motion to Dismiss.

19. The Appellant's contend that seven hours is an unreasonable amount of time for an attorney of Respondent's counsel's experience to prepare such a motion.

For the foregoing reasons, the Appellants respectfully request that this Court dismiss the Respondent's Motion for the Taxing of Costs and Attorney's Fees Against the Appellants.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.



John Paul Simkovich, Esquire
3600 Forest Drive, Suite 204
Columbia, SC 29204
Attorney for Defendants

Exhibit A

John Paul Simkovich

From: John Paul Simkovich
Sent: Monday, February 27, 2017 4:26 PM
To: 'Julia M. Miller'; Kim Hinkle; preston@pfmcdlaw.com
Cc: Shannon T. Poteat
Subject: RE: WCC 1520218 Doraine Martin vs. SC Department of Corrections 2015-4381: Hearing

Julia,

I apologize for my delay in responding as I was in Charleston attending a deposition. I will be present at the hearing at 3:30 on March 1, 2017.

However, I would like to make Judge Funderburk aware that it appears that he does not have jurisdiction to hear this Motion. This Motion involves two currently pending workers' compensation claims and the enforcement of a subpoena arising under the South Carolina Workers' Compensation Commission. Moreover, there is a current Motion for a Protective Order currently filed with the Workers' Compensation Commission. S.C. Code Section 1-23-600(A)(4) specifically omits all hearings arising under the Workers' Compensation Commission from the jurisdiction of an administrative law judge.

SECTION 1-23-600. Hearings and proceedings.

(A) An administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10 in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide these cases, **except those arising under the:**

- (1) Consolidated Procurement Code;
- (2) Public Service Commission;
- (3) Department of Employment and Workforce;
- (4) **Workers' Compensation Commission**, except as provided in Section 42-15-90; or

Thank you,

WJC&B

Willson Jones Carter & Baxley, PA.

John Paul Simkovich, Attorney
jpsimkovich@wjlaw.net
3600 Forest Drive, Suite 204
Columbia, South Carolina 29204
Phone: (803) 227-2893
Fax: (803) 782-2527
wjclaw.com

This message may be protected by the attorney/client privilege, attorney work product or other privileges. If you received this message in error, please send a reply, delete the message immediately and do not forward this message to any other person.

From: Julia M. Miller [mailto:jmiller@SCAdministrativeLawCourt.onmicrosoft.com]
Sent: Monday, February 27, 2017 3:23 PM

Exhibit B

under the Workers' Compensation Commission's Authority.

II. THE CLAIMANT IS AFFORDED RELIEF UNDER WORKERS' COMPENSATION COMMISSION REGULATION 67-215.

It is both customary and procedurally correct to petition the Worker's Compensation Commission to resolve any discovery disputes. Pursuant to S.C. Code § 42-3-30, the Workers' Compensation Commission is empowered to issue regulations governing the administration of discovery. Accordingly, the Workers' Compensation Commission affords the Claimant an avenue for relief pursuant to Regulation 67-215(1). This regulation states:

- A. A party may file a motion when a form is not applicable. The Commission will accept motions including, but not limited to, a motion
(1) Relating to a subpoena or discovery.

In this instance, the Claimant has bypassed the regulation set forth by the Workers' Compensation Commission and filed this motion with Administrative Court. The subpoena issued by the Claimant (Exhibit C of Claimant's Memorandum in support of this motion) in this case is known as a Form 27 and is actually produced by the Workers' Compensation Commission. Thus, it is clear that the regulation was promulgated with the intent for the Workers' Compensation Commission to rule on matters dealing with subpoena's issued under its power of enforcement.

In addition, the Defendants have properly filed a Motion for Protective Order with the Workers' Compensation Commission (Exhibit G). Pursuant to the South Carolina Rules of Civil Procedure 30(j)(3), the Defendants had 5 days from the suspension of the deposition to file a motion for protective order to preserve the objections made by counsel during the deposition. Instead of responding to the Protective Order filed by the Defendants with the Workers' Compensation Commission, the Claimant has sought relief in a different jurisdiction.

Lastly, judicial economy mandates that the trial process and the discovery process should not be bifurcated between two court systems. It is both inefficient and illogical for one court system to hear the case on the merits and have another court system rule on issues of discovery. This

motion was filed on two pending cases before the Workers' Compensation Commission. All motions made by the parties of these actions must be heard by a workers' compensation commissioner.

III. THE ADMINISTRATIVE LAW COURT DOES NOT HAVE JURISDICTION TO HEAR THIS MATTER

Claimant's counsel has filed this claim for the enforcement of a subpoena before the South Carolina Administrative Law Court pursuant to S.C. Code §1-23-320 entitled "Notice and hearing in a contested case." However, this is not a "contested case" under the purview of the Administrative Law Court and falls outside the jurisdiction of this Court. This motion concerns two Workers' Compensation claims (WCC File Nos. 1520218 & 1422034) and the enforcement of a subpoena arising from these two claims.

Pursuant to S.C. Code §1-23-310(3) a "[c]ontested case" means a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an **agency after an opportunity for hearing**" (emphasis added). S.C. Code §1-23-310(2) defines an "agency" to mean each state board, commission, department, or officer, other than the legislature, the courts, or the Administrative Law Court, **authorized by law to determine contested cases**" (emphasis added). It is clear that the Defendants, S.C. Department of Corrections and the State Accident Fund, are not agents as defined by Chapter 23, Article 3 of the S.C. Code of Laws. Neither Defendant is authorized by law to determine contested cases nor does either Defendant purport to carry out such duties. Rather, S.C. Department of Corrections operates the state's penal system and the State Accident Fund provides workers' compensation insurance for public employees. Notwithstanding the fact that both entities are run by the South Carolina state government, neither can be classified as agencies pursuant to S.C. Code §1-23-310(2).

Moreover, Chapter 23, Article 5 of the S.C. Code of Laws specifically exempts cases arising

under the Workers' Compensation Commission from the jurisdiction of the Administrative Law Court. Section 1-23-600(A) states:

Hearings and proceedings.

(A) An administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10 in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide these cases, **except those arising under the:**

- (1) Consolidated Procurement Code;
- (2) Public Service Commission;
- (3) Department of Employment and Workforce;
- (4) **Workers' Compensation Commission**, except as provided in Section 42-15-90; or

(emphasis added).

Thus, it is clear by this statute that the legislature intended to omit actions arising under the Workers' Compensation Commission from the jurisdiction of the Administrative Law Court.

Furthermore, S.C. Code §1-23-600(G) fails to provide this Court with the jurisdiction to hear this Motion to Compel. S.C. Code §1-23-600(G) states:

Notwithstanding another provision of law, the Administrative Law Court has jurisdiction to review and enforce an administrative process **issued by an agency** or by a department of the executive branch of government, as defined in Section 1-30-10, such as a subpoena, administrative search warrant, cease and desist order, or other similar administrative order or process. A department or agency of the executive branch of government authorized by law to seek an administrative process may apply to the Administrative Law Court to issue or enforce an administrative process. A party aggrieved by an administrative process issued by a department or agency of the executive branch of government may apply to the Administrative Law Court for relief from the process as provided in the Rules of the Administrative Law Court.

(emphasis added).

Once again, the Defendants in this matter do not meet the definition of an agency as defined in this Article. S.C. Code § 1-23-505(2) and (3) defines an agency as not only having the ability, but the mandate, to determine the rights, duties, or privileges of a party. The Defendants in this matter do not determine the rights of the Claimant in her workers' compensation claims—this is the sole duty of the Workers' Compensation Commission.

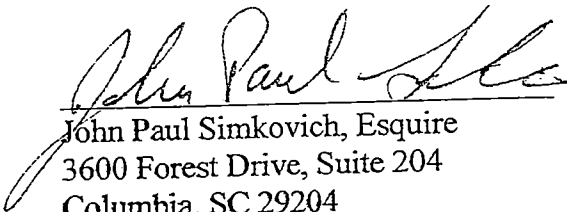
For the sake of argument, even if the Defendants are determined to be agents as defined

in Article 5 of the S.C. Code, the section quoted above cannot be interpreted to provide the Claimant with the relief sought in this motion. The last sentence of the quote above, “[a] party aggrieved by an administrative process issued by a department or agency of the executive branch of government may apply to the Administrative Law Court for relief from the process as provided in the Rules of the Administrative Law Court,” dictates that an aggrieved party can only be relieved from an administrative process. It does not state that a party can seek relief in general. In other words, the Claimant can only seek to squash or relieve herself of a subpoena issued by an agency. She cannot compel an agency to succumb to a subpoena. The reason this statute reads in this manner is because it contemplates the Workers’ Compensation Commission as the agency issuing the subpoena and not the parties to a workers’ compensation claim. Thus, S.C. Code §1-23-600(G) is inapplicable to the motion before the Court.

For the foregoing reasons, the Defendants respectfully request that this Court issue an Order dismissing this Petition and Motion For Enforcement of Subpoena For Production of Documents and to Compel Discovery By Answering Questions Posed During Discovery Examination and Rulings on Objections Based on Privilege in its entirety for lack jurisdiction.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.


John Paul Simkovich, Esquire
3600 Forest Drive, Suite 204
Columbia, SC 29204
Attorneys for Defendants

Date: March 1, 2017

Exhibit C

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT
Docket No.: 17-AJL-30-0038-CC

Doraine E. Martin,)
)
 Claimant/)
 Petitioner,)
)
 vs.)
 South Carolina Department of Corrections,)
)
 Employer,)
)
 and)
 State Accident Fund ,)
)
 Carrier,)
)
 Defendants/)
 Respondents.)
)
)

**RESPONDENTS' RESPONSE TO
PETITIONER'S MOTION FOR
REHEARING AND/OR
RECONSIDERATION AND/OR
AMENDMENT OF THE COURT'S
ORDER FILED MARCH 9, 2017**

In response to Petitioner's Motion for Rehearing and/or Reconsideration and/or Amendment of the Court's Order Filed March 9, 2017, the respondent's would reply as follows:

1. That the Court correctly ruled that the South Carolina Workers' Compensation Commission has authority and power to enforce its subpoenas pursuant to S.C. Code Ann. §42-3-150 (2015). Moreover, S.C. Code Ann. Regs. 67-215 (2012) specifies the mechanism in which the petitioner can move the South Carolina Workers' Compensation to enforce a subpoena.
2. That S.C. Code Ann. §42-3-180 provides a general grant of authority in the South Carolina Workers' Compensation Commission to address all issues arising under the Workers' Compensation Act. James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010).

FILED
MAR 29 2017

3. That this matter involves two workers' compensation claims filed at the Workers' Compensation Commission. The subpoena the Petitioner seeks to enforce is known as a Form 27 and was created by the South Carolina Workers' Compensation Commission. Thus, the subpoena in question was issued under the authority of the South Carolina Workers' Compensation Commission.

4. That the Respondents properly filed a Motion for Protective Order with the South Carolina Workers' Compensation Commission prior to the Petitioner's filing in this Court.

5. That the Court correctly deferred jurisdiction to the South Carolina Workers' Compensation Commission to avoid inconsistent outcomes and simultaneous proceedings in more than one court. The Court properly reached this conclusion pursuant to the priority principle as controlling exercise of concurrent jurisdiction. ("As a rule the exercise of concurrent jurisdiction is controlled by the principle of priority. According to this principle the court of concurrent jurisdiction that first exercises it acquires exclusive jurisdiction to further proceed in the case. In other words, once a court of concurrent jurisdiction has begun to exercise its jurisdiction over a case its authority to deal with the action is, subject to appellate review, exclusive until it is completely disposed of, and no other court of concurrent jurisdiction may interfere with the proceedings thus pending...." Tucker v. Tucker, 264 S.C. 172, 177-78, 213 S.E.2d 588, 590 (1975).

6. That the Circuit Court does not have jurisdiction over this matter as the Petitioner suggests. S.C. Code §42-3-160 dictates that depositions of witness shall be taken in conformance to the SCRCF, but it does not confer jurisdiction to the court of common pleas.


7. That whether the Workers' Compensation Commissioner that will hear this matter is a "layman Commissioner" has no bearing on the Court's Order. The Workers' Compensation

Commissioners are appointed by the Governor with the advice and consent of the South Carolina Senate. The South Carolina Workers' Compensation Commission was created by statute. Accordingly, the legislature has the best understanding of the duties, responsibilities, and qualifications required of a Workers' Compensation Commissioner as the legislature created the position.

For the foregoing reasons, the Respondents respectfully request that this Court dismiss the Petitioner's Motion for Rehearing and/or Reconsideration and/or Amendment of the Court's Order Filed March 9, 2017 and uphold its Order that the discovery in this matter must remain in the exclusive jurisdiction of the South Carolina Workers' Compensation Commission.

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.


John Paul Simkovich, Esquire
3600 Forest Drive, Suite 204
Columbia, SC 29204
Attorneys for Defendants

Date: March 29, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Docket No.: 17-ALJ-30-0038-IJ

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SC Court of Appeals

Doraine E. Martin,

Respondent,

v.


S.C. Dept. of Corrections and
State Accident Fund,

Appellants.

PROOF OF SERVICE

I certify that I have served the Appellant's Response to Respondent's Motion for the Taxing of Costs and Attorney's Fees Against the Appellants with Exhibits "A" – "C" on August 15, 2017 by depositing a copy of it in the United States Mail, postage prepaid, on May 19, 2017, addressed to her attorney of record, Preston McDaniel, Esquire of the McDaniel Law Firm, 1315 Elmwood Avenue, Columbia, SC 29201. I also served the Appellant's Response to Respondent's Motion for the Taxing of Costs and Attorney's Fees Against the Appellants with Exhibits "A" – "C" by hand delivery to Jenny Abbott Kitchings, South Carolina Court of Appeals Clerk of Court, Richland County, 1015 Sumter Street, Columbia, South Carolina 29201.

May 19, 2017


John Paul Simkovich
Shannon Till Poteat
Riley McCraw
Willson Jones Carter & Baxley, P.A.
3600 Forest Drive, Suite 204
Columbia, SC 29204

WILLSON JONES CARTER & BAXLEY, P.A.

ATTORNEYS AT LAW

GREENVILLE CHARLESTON COLUMBIA CHARLOTTE RALEIGH ATLANTA

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www.wjcbllaw.com

May 19, 2017

Via Hand Delivery

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

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AUG 15 2017

SC Court of Appeals

Re: Doraine Martin vs. SC Department of Corrections
ALC Docket No.: 17-ALJ-30-0038-IJ
WCC File No.: 1520218 DOI: 12/23/2015
Carrier: State Accident Fund - Claim No.: 2015-4381
WJC&B File No.: 0385.01326

Dear Ms. Kitchings:

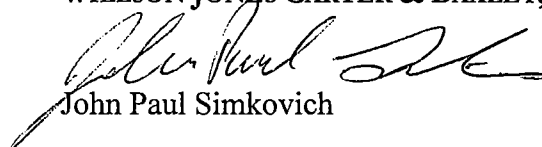
Enclosed for filing with the South Carolina Court of Appeals, please find the following:

1. An original and eight copies of the Appellant's Response to Respondent's Motion for the Taxing of Costs and Attorney's Fees Against the Appellants with Exhibits "A" – "C";
2. Proof of Service of the Notice of the Appellant's Response to Respondent's Motion for the Taxing of Costs and Attorney's Fees Against the Appellants with Exhibits "A" – "C"

By copy of this letter to the parties' of record, as shown on the Proof of Service, I hereby serve a copy of the Appellant's Response to Respondent's Motion for the Taxing of Costs and Attorney's Fees Against the Appellants with Exhibits "A" – "C" and Proof of Service.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.


John Paul Simkovich

Enclosures

cc (w/ enc.): The Honorable Jana E. Shealy, ALC Clerk of Court
Mr. Preston McDaniel, Esquire
Ms. Melanie Rouse (via-email)