

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
FULL COMMISSION

APPELLATE CASE NO. 2017-01746

RECEIVED

SEP 18 2017

SC Court of Appeals

Daniel Gatton,

Respondent,

vs.

The Boeing Company,

Employer,

and,

Indemnity Insurance Company of N.A.,

Carrier,
Appellants.

APPELLANTS' MEMORANDUM OF APPEALABILITY

Now come Appellants who, on request of this Court, submit this Memorandum addressing appealability of the issues determined by Order of the Full Commission Panel, South Carolina Workers' Compensation Commission ("Commission"), dated July 17, 2017.

PROCEDURAL HISTORY

Respondent filed a Form 50, Employee's Notice of Claim Only, on May 22, 2017, providing notice to the Commission of their claim for additional benefits in this matter arising out of an admitted work injury that occurred in 2013. Respondent simultaneously filed with the Commission a Motion to Compel Second Opinion seeking medical evaluation by a new

physician in this long-standing claim. Appellants timely filed a Response to Claimant's (Respondent's) Motion to Compel asserting Respondent's efforts to procure medical treatment via motion is improper and in contravention of South Carolina Regulations 67-215(A) & (B) regarding determination of issues via motion "involving the merits of the claim." Appellants asserted in their Response any request for a final award of medical treatment directly implicates the merits of the claim, i.e. determination of the scope of the Commission's standing Order in the claim and substance of Respondent's ongoing medical treatment mandated by that Order. Appellants further asserted the contents of Respondent's Motion failed to comply with S.C. Regulation 67-215(D) which requires as statement of or reference to facts and circumstances that constitute the basis for granting the relief requested in the Motion. Respondent's Motion failed to state or reference *any* facts or circumstances to support the Motion.

The jurisdictional Commissioner granted the Motion without a hearing requested by both parties. Appellants timely filed a Form 30, Request for Commission Review, asserting the hearing Commissioner erred in awarding Respondent a second medical opinion in contravention of Commission regulations. The Full Commission issued a form Order dated July 17, 2017, dismissing Appellants' request for review as interlocutory. Appellants' timely filed a Notice of Appeal with this Court requesting appellate review of that Order.

LAW/ANALYSIS

The issue brought before this Court on appeal is limited in scope – whether the Full Commission erred in dismissing Appellants' Form 30, Request for Commission Review as interlocutory. Inherent in determination of that issue is the question of whether an award of medical treatment in the form of a second opinion by Order of a Workers' Compensation Commissioner is a "final judgment" subject to review pursuant to S.C. Code Ann. §42-17-50 and

Regulations 67-701, *et seq.* Thus, the seminal question for this Court is whether the Commission's determination that an award of medical treatment under the Workers' Compensation Act without remand or other directives is a "final judgment."

As an initial concern, the Administrative Procedures Act ("APA") addresses appealability of decision rendered by state agencies such as the Workers' Compensation Commission. *S.C. Code Ann. §1-23-310, et. seq.; Bone v. U.S. Food Service and Indemnity Insurance Company of North America*, 404 S.C. 67, 744 S.E.2d 552 (2013). Specifically, S.C. Code Ann. §1-23-380 permits judicial review of administrative agency decisions where an aggrieved party has exhausted all administrative remedies. The APA further specifies that a party may obtain review of a "final judgment" by taking an appeal in compliance with the South Carolina Appellate Court Rules. S.C. Code Ann. §1-23-390.

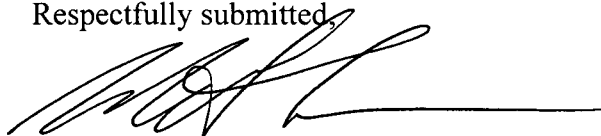
Appellants contend the Commission's decision granting Respondent's Motion to Compel Second Opinion is a final judgment in the form of an award of medical treatment. Medical treatment is a specific benefit afforded an injured worker in a compensable work accident under the South Carolina Workers' Compensation Act. S.C. Code Ann. §42-15-60(A). Appellants further contend the final award of medical treatment in the form of a second medical opinion granted on basis of a Motion to Compel was improper and in contravention of the Commission's own regulations. S.C. Reg. 67-215(A) (B) & (D). The granting of that Motion in contravention of those regulations was the specific error assigned in Appellants' Form 30, Request for Commission Review. Consequently, the Full Commission's dismissal of the request for review as interlocutory is tantamount to a determination that an award of medical benefits under the Workers' Compensation Act is *not* a final award of benefits.

In *Bone v. U.S. Food Service and Indemnity Insurance Company of North America*, 404 S.C. 67, 78, 744 S.E.2d 552 (2013), the South Carolina Supreme Court quoted Black's Law Dictionary's definition of "final judgment" as "[a] court's last action that settles the rights of the parties and disposes of **all issues in controversy**, except for the award of costs ... and enforcement of the judgment." *Black's Law Dictionary* 919 (9th ed. 2009)(emphasis added). The final judgment at issue is an award of medical treatment pursuant to S.C. Code Ann. §42-15-60(A) in the form of a second medical opinion. Respondent's *only* request for benefits under the Workers' Compensation Act was award of a second medical opinion. There was no further action or subsequent benefit requested by Respondent in his Motion to Compel nor was there any further action or subsequent benefit ordered by the jurisdictional Commissioner. Thus, this is the final determination of the parties' respective rights and obligations under the Workers' Compensation Act on the *only* issue in controversy. The hearing Commissioner's decision granting the Motion requiring Appellants to provide that second opinion is the final determination on that lone issue which "settles the rights of the parties" and disposed of "all issues in controversy" as presented to the Commission by the Motion.

Inherent in the Full Commission's decision to dismiss the Form 30, Request for Commission Review, is their determination this is an intermediate decision pending further action by the Commission. That determination is belied by the lack of request for any additional action or plea for benefits made by the Appellants in conjunction with the request for the second medical opinion. There is no indication in the very limited record to be presented to this Court that this is a "preliminary, procedural, or intermediate agency action or ruling" as referenced in the APA. S.C. Code Ann. § 1-23-380(A).

Appellants assert the Full Commission erred in dismissing the Form 30, Request for Commission Review, as “interlocutory.” The subject of that request for review was a final determination and award of workers’ compensation medical benefits pursuant to S.C. Ann. §42-15-60(A) made by the jurisdictional Commissioner in contravention of the Commission’s own procedures and regulations. The award of those benefits by the jurisdictional Commissioner was a “final judgment” made on the *only* issue presented to the Commission. It fully disposed of any and all issues put before the Commission via Respondent’s Motion to Compel Second Opinion – the only pleading on file with the Commission requesting any action or award of benefits. Accordingly, Appellants respectfully submit the Full Commission’s determination this issue is not subject to review as deemed interlocutory is ripe and appropriate for review by this Court where the determination that an issue is interlocutory is made in error.

Respectfully submitted,



Mikell H. Wyman, Esquire
GALLIVAN, WHITE & BOYD, P.A.
South Carolina Bar I.D. No. 70134
Post Office Box 22768
Charleston, SC 29413
Attorney for Employer/Carrier/
Defendants/Appellants

September 15, 2017

Other Counsel of Record:

Michael J. Jordan, Esquire
The Steinberg Law Firm, LLP
Post Office Box 1028
Goose Creek, SC 29445
Attorney for Employee/Claimant/Respondent

RECEIVED

SEP 18 2017

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

FULL COMMISSION

APPELLATE CASE NO. 2017-01746

Daniel Gatton,

Respondent,

vs.

The Boeing Company,

Employer,

and,

Indemnity Insurance Company of N.A.,

Carrier,
Appellants.

PROOF OF SERVICE

I certify that I have served Appellants' Memorandum of Appealability on counsel of record by depositing a copy of it in the United States Mail, first-class postage prepaid, on September 15, 2017, addressed as follows:

Michael J. Jordan, Esquire
The Steinberg Law Firm, LLP
Post Office Box 1028
Goose Creek, SC 29445

Attorney for Employee/Claimant/Respondent



Gayle Millage

Charleston, South Carolina

Appellate Case No.
2017-01746

September 15, 2017

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

Re: Daniel Gatton v. The Boeing Company and Indemnity Insurance Co. of North America
WCC File No.: 1315112
Date of Accident: July 22, 2013
Carrier File No.: 2002501081
Our File No.: 3940-438

RECEIVED

SEP 18 2017

SC Court of Appeals

Dear Ms. Kitchings:

Enclosed herewith for filing please find the original and seven (7) copies of Appellants Memorandum of Appealability and Proof of Service of same in the above-referenced matter. Please file the original and return a clocked-in copy to me in the envelope provided.

By copy of this letter, I am serving the same upon the South Carolina Workers' Compensation Commission and all counsel of record.

Please note no hearing was held in this matter so no transcript of proceedings will be available.

With kind regards, I remain

Very truly yours,

GALLIVAN, WHITE & BOYD, P.A.



Mikell H. Wyman

MHW/glm
Enclosures

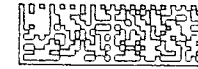
cc: The Honorable Amy Bracy (w/enclosure)
Michael J. Jordan, Esquire (w/enclosure)
John F. Sullivan (w/enclosure) *(via facsimile only)*
Kimberlee L. Oppliger (w/enclosure) *(via MessageCourier only)*

NEOPOST

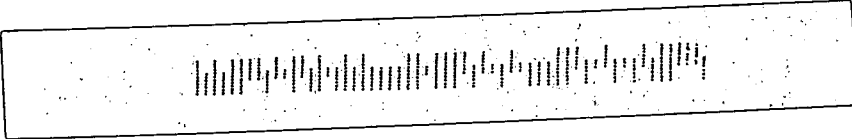
FIRST-CLASS MAIL

09/15/2017

US POSTAGE \$002.87⁰



ZIP 29401
041L11255602



Gallivan, White & Boyd, P.A.

ATTORNEYS AT LAW

40 Calhoun Street, Suite 315
Post Office Box 22768 (29413)
Charleston, South Carolina 29401

RECEIVED

SEP 18 2017

SC Court of Appeals

3940-438

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