

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

The L. Casey Manning, Circuit Court Judge

Appellate Case No. 2016-001494

RECEIVED

DEC 27 2017

SC Court of Appeals

Theodore P. Polansky, Employee

Respondent,

v.

SC Office of Attorney General, employer,
And State Accident Fund, carrier,

Appellants.

REPLY BRIEF

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REPLY TO RESPONDENT'S BRIEF

1) WAS THE APPELLANT'S REQUEST FOR REVIEW TO THE APPELLATE PANEL TIMELY FILED?

The Respondent claims that this Appeal is jurisdictionally flawed due to an alleged untimely filing of the Form 30 (Request for Review) from the Order of the Single Commissioner to the Appellate Panel of the South Carolina Workers Compensation Commission. It is undisputed that notice of the Order was given on June 1, 2015. Additionally, it is undisputed that the Appellant's Form 30 was served on June 15, 2015. Finally, it is undisputed that S.C. Code of Laws Section 42-17-50 provides "If an application for review is made to the commission within fourteen days from the date when notice of the award shall have been given, the commission shall review the award".

The Respondent claims that the service of the Appellant's Form 30 on June 15, 2015, was untimely as he states it occurred on the 15 day as opposed to "within" 14 days following notice of the Order. As a threshold matter, it should be noted that the Respondent served a Form 30 on the same day as the Appellant, June 15, 2015. By letter to Amy Bracy, dated June 15, 2015, the Respondent's attorney forwarded his Form 30 for a cross appeal and specifically noted "I have previously advised defense counsel that this appeal would be filed if a decision was made to appeal. **This being the last date to timely file** and having heard nothing, I am filing this with the Commission at this time." (Letter to Amy Bracy, dated June 15, 2015) (R. p. 1367) (emphasis added). It is clear from the reading of this letter that the Respondent's Attorney believed June 15, 2015 to be the proper deadline for filing an appeal. I simply do not understand any reasonable basis that would give rise to a change in his belief.

The Respondent should be judicially estopped from taking two contradictory and adverse positions on the same point of law (timeliness of an appeal) wherein he both: a) purported that his own appeals was timely when filed on the same date as the Appellants, yet; b) alleges that the Appellant's appeal filed that same date to the full Commission was somehow not timely filed. This is impermissible under South Carolina law. (See Generally *Hayne Federal Credit Union v. Bailey* 327 S.C. 242, 489 S.E.2d 472 (S.C. 1997) stating in part that "judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." (Also See *Colleton Reg. Hosp. v. MRS Med. Rev. Sys.*, 866 F.Supp. 896 (D.S.C.1994))).

The Appellant and Respondent were correct in determining June 15, 2015 as the due date for the Form 30 in this case. As discussed above, S.C. Code §§42-17-50 *et. seq.* permits 14 days' time in which a party may file their appeal from the Single Commissioner's Order to the Appellate Panel. The determinative point on this issue is simply if the date of receipt of notice of the order is excluded from these calculations. It clearly should be excluded based on S.C. Code of Regs. §67-209, which specifically states, in pertinent part, under: "Computation of Time.

A. The day of the event, after which a designated period of time begins, is excluded." S.C. Code of Regs. §67-209. This language requires that in determining the due date at issue, you exclude the "day" (June 1, 2015) of the "event triggering the running of time" (notice of the order) from the calculation of the 14 days. As a result, the Appellant and Respondent's filing of Form 30's on June 15, 2015 were both timely.

The Respondent fails to address the controlling language of S.C. Code of Regs. §67-209 in his analysis and instead hobbles together unrelated Rules in an attempt to muddy the issue. Additionally, the Respondent cites the case of *Allison v. W.L. Gore & Assoc.*, 294 S.C. 185, 714

S.E.2d 547 (2011), for the proposition that an appeal filed on the 16th day is not timely. A review of this case shows that is not enlightening on the point at issue before the court as it does not address if the day that notice of the Order is given is counted in the 14 days or not.

Despite the clear language of the Workers Compensation Regulation that is directly on point, the Respondent now requests this Court to render a determination of the Appellate Panel of the Commission's jurisdiction to have heard the initial appeal, by utilizing a method of time calculation that violates the clear and express language of the Commission's own Regulations, in order to retroactively divest the Commission of jurisdiction to have previously heard this appeal. There is simply no basis for this argument.

CONCLUSION

For the reasons discussed above, these Appellants request that this Court find the Form 30 of the Appellant was timely filed and address the issues raised in this appeal by the Appellants.

Respectfully Submitted,



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December 26, 2017