

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

SC Court of Appeals

Appellate Case No.: 2016-000497

Samuel Rose, Claimant, Appellant,

v.

JJS Trucking, Uninsured Employer, and Chris Thompson Services,
Upstream Employer, and Bridgefield Casualty Ins. Co., Carrier for
Chris Thompson Services, and The State Accident Fund, Respondents.

REPLY BRIEF

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ARGUMENT

The entire thrust of Respondents' Brief – indeed their entire defense of this case – has been reliance on technicalities, rather than dealing directly with the merits of their obligation to care for their injured employees. Two essential principles overshadow the issues raised in this appeal. The first is that it is not the place of the courts (nor litigants) “to play a ‘gotcha’ game with attorneys by showcasing their alleged mistakes, at the expense of their clients.” Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012)(Toal, C.J., dissenting); see, also McClurg v. Deaton, 395 S.C. 85, 716 S.E.2d 887 (2011)(“Although prolonging settlement negotiations in hopes of surpassing the statute of limitations is a disdainful practice some insurance companies keep, this in no way justifies the type of ‘gotcha’ game played by McClurgs’ counsel in this case.”)(Toal, C.J., dissenting). The second is that our State has a strong preference for deciding cases on the merits, rather than on procedural technicalities. Lewis v. Congress of Racial Equality and/or C. O. R. E., Inc., 274 S.E.2d 287, 275 S.C. 556 (1981). These sentiments are particularly relevant where, as here, the technicalities are not real and cause no impediment to this claim's viability.

1. **The Commission's Conclusions of Law in regard to additional medical and compensation benefits are encompassed in the original appeal because they derive from the erroneous procedural dismissal under Section 42-1-560 [in Reply to Respondents' arguments at pages 5-8].**

In its Decision and Order, the Appellate Panel made no findings of fact on the merits raised in the pleadings and listed on the Notice of Hearing [R. pp. 43, 113].

The dismissal of the case was based entirely on the procedural issues associated with the Form S-2. [R. pp. 39, lines 13-20; 41, lines 3-7].

As Respondents point out, the Appellate Panel did make additional Conclusions of Law, citing various statutes governing medical and compensation benefits. However, each of these followed the legal conclusion that:

Pursuant to S.C. Code Ann. Sec. 42-9-210, any and all compensation payments made by the Defendants to the Claimant after February 20, 2013, the date on which he commenced his third-party action without notice to the Defendants or the Commission, were not due and payable as a result of the Claimant's failure to comply with the mandatory requirements of S.C. Code Ann. Sec 42-15-560. [R. p. 41, lines 3-7].

The additional conclusions held no further benefits were due under section 42-9-260 (weekly temporary total disability compensation); section 42-15-60 (medical treatment); and section 42-9-10, 42-9-20, and 42-9-30 (permanent disability compensation). The fact each legal conclusion follows conclusion 11 and summarily states Respondents shall have no liability for these benefits confirms that the conclusions derive from the procedural dismissal; not the merits. Cf. Jasper County Bd. of Educ. v. Jasper County Grand Jury, 303 S.C. 49, 398 S.E.2d 498 (1990)(the definition of prevailing party "clearly envisions a victory to some degree on the merits."). As Appellant unquestionably appealed the rulings on the S-2, so must these derivative conclusions of law been necessarily appealed. When the appellate courts can fairly infer the issue was raised, it will not dismiss an appeal on preservation grounds. Cf. Holston v. Allied Corp., 300 S.C. 174, 386 S.E.2d 793(Ct. App. 1989)(issue properly raised on appeal where the issue raised was reasonably clear from appellant's arguments below); Palm v. General Painting Co., Inc., 296

S.C. 41, 370 S.E.2d 463 (Ct. App. 1988)(“it is inferable from the record that [claimant] raised this issue before the single commissioner”).

Respondents have repeatedly tried to backdoor this preservation issue into the case. The Appellate Panel tasked Respondents with drafting a proposed Order. The original draft included the sentence:

Regardless of these arguments, the fact remains that the Claimant is not entitled to any additional medical or compensation benefits under the South Carolina Workers' Compensation Act as a matter of law, having failed to perfect an appeal of the Hearing Commissioner Taylor's Conclusions of Law regarding the Claimant's entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30.

Appellant objected to inclusion of this language in the order. [R. pp. 293-295]. The Appellate Panel agreed, deleting this proposed conclusion of law in the final order. In so doing, they effectively ruled against Respondents on the issue (leaving one to observe that Respondents did not appeal, thus failing to preserve their own argument on preservation).

The Court should find that the listed conclusions of law are derivative of the dismissal over the S-2 issue, such that Respondents' preservation argument should be disregarded and denied.

2. The documentation of Appellant's voluntary stipulation of dismissal of the counterclaim in the civil case was presented to the Commission and is properly part of the Record on Appeal [in Reply to Respondents' arguments at pages 5-8].

The Claimant, upon learning that Respondents had moved to dismiss his workers' compensation case based on the Form S-2, filed a voluntary Stipulation of Dismissal of his counterclaim in Robbie Clark v. Samuel A. Rose, Case No. 2012-

CP-10-2996. The Claimant then submitted the Stipulation of Dismissal in support of his Claimant's Motion to Introduce newly Discovered Evidence. [R. pp. 177-185].

Respondents argue that the stipulation of dismissal is not part of the record because (1) the Single Commissioner's order denying the motion was not attached to the Notice of Appeal; and (2) the Single Commissioner denied the motion to introduce newly discovered evidence (a ruling affirmed by the Appellate Panel).

A. Intermediate orders affecting the final judgment on appeal are reviewable by the Court.

Respondents argue that because the Single Commissioner's January 3, 2014 Order denying the December 20, 2013 motion was not attached to the Notice of Appeal, that particular order is unappealable. This argument fails on several grounds.

This case is an appeal from the Appellate Panel; not the Single Commissioner. The multiple rulings from the Single Commissioner were appealed to the Appellate Panel – which affirmed. [R. pp. 37, 189-192]. There is no requirement – nor even the possibility – of directly appealing an order from a single commissioner and bypassing the Appellate Panel. See Janhrette v. Union Camp Paper Corp., 293 S.C. 59, 358 S.E.2d 704 (1987) (decision of a hearing commissioner cannot be taken directly to the circuit court on appeal, without first being reviewed by the Full Commission); S.C. Code Ann. § 42-17-50, 42-17-60 (2007).

The January 3, 2014 order is an intermediate order. The Single Commissioner denied Appellant's motion to submit additional evidence which would have cured the S-2 defect and restored his case. Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007)(when claimant voluntarily dismisses third-

party case, “there is no violation of § 42-1-560 [because] the third-party suit is treated as never being filed.”) The denial of the motion prevented the Claimant from availing himself of the cure for his attorney’s error set out by the Supreme Court in Callahan. Appellant appealed the January 3, 2014 order to the Appellate Panel. [R. pp. 186-188]. The appeal was administratively dismissed as interlocutory under Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013). The administrative dismissal confirms that the order denying the motion was an intermediate order.

The statute governing appeals explicitly allows the reviewing court to address intermediate rulings which, as here, affect the merits. The statute states: “Upon an appeal from a judgment the court may review any intermediate order involving the merits and necessarily affecting the judgment.” S.C. Code Ann. § 18-1-130 (supp. 2016).

The statute was designed to avoid the hyertechnical arguments raised by Respondents. See, e.g., Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004)(“civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party”). Once the Notice of Appeal confers jurisdiction on the appellate court, the court has authority to decide all issues fairly before it – including intermediate rulings and orders which affect the judgment on appeal. The purpose of the Notice of Appeal is to confer jurisdiction; not to frame the issues. Rule 203(e)(2), SCACR. The process of framing issues occurs later – in the briefing stage. Appellant followed the proper procedure by including the Statement of Issues on Appeal in his brief. Rule 208(b)(1)(B), SCACR.

This Court plainly has jurisdiction and authority over the entire S-2 issue. Therefore, Respondents argument should be rejected.

B. Evidence properly submitted to the Commission is part of the Record on Appeal.

Respondents are correct that the Single Commissioner denied Appellant's Motion to Introduce newly Discovered Evidence. Respondents argue – incorrectly – that “facts and documents not admitted into evidence by the Commission are not properly included in the Record on Appeal pursuant to Rule 210(c), S.C.A.C.R.” The rule states no such thing. It states “The Record shall not, however, include matter which was not *presented* to the lower court or tribunal.” Rule 210(c), SCACR. The issue is not whether the single commissioner admitted the evidence; the issue is whether the Appellant presented the evidence to the tribunal. Respondents argument that only admitted evidence can be included in the Record on Appeal is simply wrong. If that were so, the appellate courts would never be able to review a trial judge's decision to exclude evidence.

The general rule on reviewing evidentiary rulings is whether there is a sufficient record made for the court to review. As this Court has stated, “[t]he threshold issue is whether [appellant] attempted to proffer the evidence, rather than whether his attempt succeeded. The rule regarding proffers has been relaxed where the trial court refuses to allow a proffer and the record clearly demonstrates prejudice, or where the appellate court is able to determine from the record what the testimony was intended to show and that prejudice clearly exists.” Jamison v. Ford Motor Co., 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct.App. 2007). In such instances, the appellate court will address the merits if it can be determined what the testimony was

intended to show. Rule 103(a)(2), SCRE; State v. Schmidt, 288 S.C. 301, 342 S.E.2d 401 (1986).

The above applies to testimony excluded at trial. The attorney must make a proffer of the excluded testimony to create a record for the appellate court. See, e.g. Fore v. Griffco of Wampee, Inc., 409 S.C. 360, 762 S.E.2d 37 (Ct. App. 2014)(remanding to consider proffered testimony of witness improperly excluded by commission). The “reviewing court may not consider error claimed in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been.” State v. Roper, 274 S.C. 14, 20, 260 S.E.2d 705, 708 (1979).

More importantly, it is undisputed that Rose filed the stipulation of dismissal. Respondents understandably seek to prevent the Court from taking judicial notice of this indisputable fact, as it is dispositive of the case and commands reversal. This Court has authority to take judicial notice of adjudicative facts which are indisputable. Masters v. Rodgers Dev., 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984). Cf. Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984)(“A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records. . . It is not error for a judge to take judicial notice of what was stated in [a] former opinion in [a] prior action of the same case.”).

The rule on proffering excluded evidence exists to allow meaningful appellate review as does the rule on judicial notice of undisputed facts. As the Stipulation of Dismissal was presented to the Commission and the fact the third-party case was dismissed without prejudice is indisputable, this Court has the ability and authority to review the exclusion of the evidence and reverse the Commission.

3. The Workers' Compensation Commission erred in dismissing Appellant's case when he cured any violation of §42-1-560 by voluntarily dismissing his counterclaim in the civil lawsuit [in Reply to Respondents' arguments at pages 11-14].

No one disputes that the Claimant did not timely file and serve the Form S-2 on Respondents within 30 days of filing the Answer and Counterclaim in the civil case. The issue here is whether the defect was cured by his voluntary dismissal of the counterclaim without prejudice. Callahan created a safety net whereby claimants who inadvertently fail to timely file the S-2 can cure the defect so long as they have not irrevocably prejudiced the subrogation rights of the employer. Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007)(when claimant voluntarily dismisses third-party case, "there is no violation of § 42-1-560 [because] the third-party suit is treated as never being filed.").

The rule implicated here serves important purposes in the workers' compensation system. Section 42-1-560 created a subrogation interest for the employer wherein it can recover a portion of what it paid in workers' compensation benefits from a third-party tortfeasor. The statute serves multiple public policy interests. The subrogation interest reimburses employers for the costs of a workplace injury, thus lowering insurance premiums for employers. The true cost of the claim is largely borne by the third-party tortfeasor, thus retaining some measure of our fault-based tort system while accommodating our no-fault workers' compensation system. And the injured party is still able to make a recovery both from his employer and from the tortfeasor – yet is prevented from making a double recovery, thus ensuring fairness for all parties.

The statute and case law recognize that the employee is the master of his claim – such that he can elect to proceed under workers’ compensation, waive his rights under the act and elect to proceed in tort, or recover both subject to the subrogation lien (which is the wisest path). Section 42-1-560 spells this out, including the requirements that he file a suit within one year and serve the S-2 within 30 days of filing suit.

The difficult aspect of how these case have evolved is in the strict – perhaps even draconian – construction of the statute. No one disputes that a claimant who settles with a third-party tortfeasor without protecting the employer’s subrogation interest has elected a remedy and waived his right to workers’ compensation benefits. Once a settlement has been disbursed (and perhaps spent), there is no real way for the employer to recover its lien.

The courts have determined there are two critical events: (1) commencement of a lawsuit; and (2) the filing of the S-2. Filing a lawsuit without filing an S-2 does not *in fact* prejudice the employer. So long as the third-party case has not been settled or tried, the employer’s subrogation interest has not been compromised. A review of the case law shows *prejudice in fact* is the real issue.

The issue first arose in Taylor v. Mount Vernon-wood-berry Mills Inc, 211 S.C. 414, 45 S.E.2d 809 (1947). The court framed the “question for determination [as] whether an employee who is injured in the course of his employment, and, without the knowledge and consent of his employer, a self-insurer, makes a binding settlement with a third party against whom he has a claim for damages for his injury, and executes a full and complete release to the latter, is thereby debarred from

compensation under the [predecessor to § 42-1-560]. Id. The court held such a settlement – with a signed release – “operated as a bar to the alternate remedy against the employer.” Id.

Three years later the identical situation arose in Gardner v. City of Columbia Police Dept., 57 S.E.2d 308, 216 S.C. 219 (1950). Following Taylor, the court held claimant nullified his workers’ compensation award by “the execution of the release which exonerated the third party tort-feasor from all damages arising out of the accidental injury; and as a direct legal consequence, destroyed the [employer’s] right of subrogation as provided in the Workmen’s Compensation Act.” Id. Notably, Justice Stukes dissented (as he had in Taylor), stating “The record indicates that this is a harder case upon the unwary and uninformed employee and, to me, accentuates the injustice of the rule.” Id. (Stukes, J., dissenting).

The issue arose again in 1959 in Stroy v. Millwood Drug Store, Inc., 109 S.E.2d 706, 235 S.C. 52 (1959). The employee was seriously injured in a motor vehicle accident while in the course of his employment. He filed suit against the other driver. The case was tried resulting in a defense verdict – thus, there was no recovery in the third party case. The employee then sought workers’ compensation benefits. His claim was denied on the grounds that he had elected his remedy – notwithstanding there had been no recovery in the third party case. The Supreme Court added a critical additional fact, to wit: “it appears that prior to the trial of the action against the Checker Cab Company, appellant refused an offer of \$500 in settlement. It was clearly prejudicial to the right of subrogation to decline this offer without the consent of respondents.” Id.

In the 1982 Fisher case, the employee was injured in a fall at a retail store while shopping for her employer. She settled the personal injury case against the retail store without consent of the employer. The Commission held by her settlement with the store, she had elected a remedy against a third party without compliance with section 42-1-560. The Court interpreted the statute to state “the legislature did not intend for a claimant to settle his third party case without regard to the employer's rights for subrogation under § 42-1-550 and still maintain a workmen's compensation claim.” Fisher v. South Carolina Dept. of Mental Retardation-Coastal Center, 291 S.E.2d 200, 277 S.C. 573 (1982). The court summarized by stating: “Appellant's noncompliance with the statutory procedure and disregard for the rights and remedies of the carrier violates the spirit of the act. It is clear Mrs. Fisher made an election and has waived any rights she may have had under the South Carolina Workmen's Compensation Law.” Id.

More recently in Wise, the Court of Appeals held the rule applied to bar a workers' compensation claim where the claimant had both settled against the third-party tortfeasor and obtained a default judgment against the employer. The Court found it “clear that an employee cannot recover against an employer under both a workers' compensation action and a civil action. Here, Claimant recovered \$900,000 from Employer in the form of a default judgment. Further, because Claimant did not strictly comply with the notice provisions in filing suit against a third party, he is barred from recovering under the Act.” Wise v. Wise, 394 S.C. 591, 716 S.E.2d 117 (2011).

The interesting part of Wise is not the underlying ruling – which followed the established line of cases. Rather it is the fact that the employee filed the civil suit *after* trying and losing the workers’ compensation case on jurisdictional grounds. The issue was whether the employer could introduce the post-hearing civil suit as after-discovered evidence when it was not in existence at the time of the workers’ compensation hearing. The Court held the fact of the civil suit was properly before the court on two grounds: (1) the court could take judicial notice of indisputable facts; and (2) the evidence of the civil claim met the criteria for the admission of new evidence because “Noting requires that facts be in existence at the time of the first hearing by the single commissioner.” Id. The second point is important here because the single commissioner denied Appellant’s motion to submit the Stipulation of Dismissal because it was “after-created evidence.” [R. pp. 16-17].

The cases holding there was an election of remedies all have one consistent element: prejudice in fact. In every one of these cases, the employee had settled, tried or obtained a default judgment in the civil case. There was no means for the employer to resurrect its subrogation interest. The subrogation interest had been extinguished.

That brings us to Callahan. Callahan emphatically reemphasizes “that § 42-1-560(b) must be strictly followed in order for a claimant to preserve her right to proceed against both an employer and a third-party.” Callahan v. Beaufort County School Dist., 375 S.C. 92, 651 S.E.2d 312 (2007). Once making that statement, the Callahan court then diverges from all previous decisions by concluding that “Claimant’s voluntary dismissal without prejudice of her third-party suit allows her

to proceed with her workers' compensation claim.” Id. Thus, while acknowledging the general rule of strict compliance, the Court looked to whether the employer had suffered prejudice in fact. On the facts before it, the Court found there was no prejudice because the employer’s right of subrogation had not been irrevocably extinguished. An employee is allowed to dismiss the original lawsuit and comply with § 42-1-560(b) when refiling suit against the third-party tortfeasor. The Callahan holding thus preserves the employee’s right to full recovery; preserves the employer’s right to subrogation; and puts the ultimate burden on the at-fault tortfeasor.

This is not, as argued by Respondents, a “grossly prejudicial legal fiction.” [Brief of Respondents, page 14]. This is simply a refusal to elevate form over substance. The fact is that the Claimant took steps to preserve his employer’s subrogation rights. That he did so upon learning of his attorney’s error is immaterial – as the real issue is that he had not irrevocably extinguished Respondents’ subrogation interest (illusory though it may have been).

There is simply no prejudice to the Respondents in reversing the Commission. Respondents retain all statutory subrogation rights. Conversely, the prejudice to Rose is manifest. Not only would he lose his workers’ compensation benefits, there is no viable remedy in tort for him to elect. He counterclaimed when sued by his coworker. Both the underlying suit and the counterclaim are barred by the exclusive remedy provision. The civil case was void *ab initio*.

The Court should reverse the decision below and find that the Claimant has not elected his remedy.

4. Appellant was denied due process when the Commission refused to consider the Stipulation of Dismissal [in Reply to Respondents' arguments at pages 14-16].

Respondents argue that “The Claimant cannot now to be heard to allege prejudice of his own making.” [Brief of Respondents, page 16]. Specifically, Respondents seem to allege that the Commission should be affirmed because “Claimants simply chose not to file a return or reply memorandum in response to the Respondent’s Motion to Introduce Newly Discovered Evidence.” [Brief of Respondents, page 16].

This argument makes no sense. The Claimant did file a response to the motion – two in fact. He first filed a Motion in Opposition to Introduce After Discovered Evidence on November 21, 2013. [R. pp. 170-172]. The response was inartfully captioned as a “Motion in Opposition,” yet it was undeniably a written response to the motion filed by Respondents.

The Claimant’s second response was to file Claimant’s Motion to Introduce newly Discovered Evidence on December 20, 2013. The evidence sought to be introduced was the Stipulation of Dismissal without prejudice filed December 5, 2013 in Robbie Clark v. Samuel A. Rose, Case No. 2012-CP-10-2996.

The Claimant exercised due diligence in curing the S-2 defect. He timely filed his initial response to Respondents’ motion. Within less than a month, he filed the Stipulation of Dismissal, which was then attached to his own December 20, 2013 motion. All these steps were taken before Commissioner Taylor issued a ruling on any of the motions. Commissioner Taylor issued her rulings on January 3, 2014 – addressing all issues on the same day.

There is nothing inherently wrong in Commissioner Taylor addressing the S-2 issue raised in Respondents' motion. The error lies in refusing to allow the Claimant notice and opportunity to respond, thus denying him due process.

The Single Commissioner's rationale for refusing to consider the Stipulation of Dismissal was an error of law. Simply as a matter of practicality, the Claimant could not obtain a filed Stipulation of Dismissal within 10 days of Respondents' motion. Indeed, even if he had, it would have made no difference, as the refusal to consider the Stipulation of Dismissal was based on its characterization as "after-created evidence" rather than on timeliness. It was plainly before the Single Commissioner when she issued her rulings.

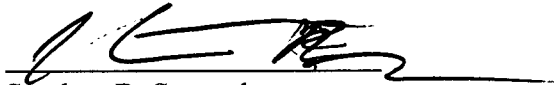
The controlling case on the evidentiary issue is Wise v. Wise, 394 S.C. 591, 716 S.E.2d 117 (2011). In Wise, the employee filed the civil suit *after* trying and losing the workers' compensation case on jurisdictional grounds. The issue was whether the employer could introduce the post-hearing civil suit when it was not in existence at the time of the workers' compensation hearing. The Court held the evidence of the civil claim met the criteria for the admission of new evidence because "Nothing requires that facts be in existence at the time of the first hearing by the single commissioner." Id. The same rule applies here. The single commissioner denied Appellant's motion to submit the Stipulation of Dismissal because she viewed it as "after-created evidence" which was somehow different than after-discovered evidence. [R. pp. 16-17]. Wise confirms this was an error of law.

The Court should reverse the denial of Appellant's motion to introduce the Stipulation of Dismissal. The Court should find as a matter of law that the Claimant

complied with Callahan by dismissing the tort suit and should reinstate his claim for workers' compensation benefits.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed. The Appellant's claim for workers' compensation benefits should be reinstated. The case should be remanded for a decision on the merits of the issues raised in the September 23, 2013, Form 21 hearing.


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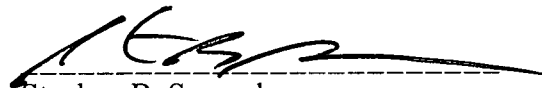
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule
211(b), SCACR.



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