

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

APPELLATE CASE No. 2017-002126
SCWCC File No. 1419738

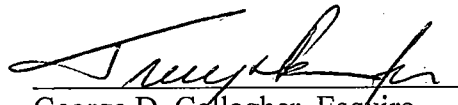
Nathaniel Alston,.....Appellant.

v.

All My Son's Moving & Storage, Employer,
and Vanliner Insurance Company,
Carrier..... Respondents.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals



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STATEMENT OF ISSUES ON APPEAL

1. Did the Commission err in finding that Appellant does not have a compensable back injury and therefore is not entitled to compensation and/or medical benefits under the Act for any claims based on Appellants alleged back injury?

STATEMENT OF THE CASE

Nathanial Alston (“Appellant”) appeals the decision of the Single Commissioner and Full Commission denying his allegation of a compensable lower back injury. On December 13, 2014, Appellant sustained a compensable left shoulder injury while lifting a heavy cast iron table. Defendants initiated TTD benefits on December 14, 2014. Appellant’s original attorney, Samuel Harm, filed a Form 50 Notice of Claims and entered a letter of representation. TTD benefits were suspended on June 29, 2015 for Appellant’s purported non-compliance with medical treatment. Appellants benefits resumed 6 weeks later, on August 10, 2015.¹ An initial hearing on this matter was held on May 6, 2015 before Commissioner McCaskill. The hearing was conducted to determine the direction of Appellant’s medical care. Despite the fact that Appellant was represented by Ryan Montgomery until just prior to the hearing, and by John Holland and Rob Usry until immediately after the hearing, Appellant never made mention of an alleged compensable back injury related to his December 13, 2014 injury.

¹ As part of Appellant’s initial filing he sought repayment of TTD for the period of June 29, 2015 – August 10, 2015. (See Form 50, filed by Steven Garcia attached hereto as Exhibit ___) Defendant’s had stopped payment of TTD for that period due to Appellant’s failure to comply with medical treatment. Immediately prior to the scheduled hearing on this matter, Mr. Garcia was relieved as counsel. Appellant’s next counsel, Spencer Langley, revisited this request with Commissioner Beck during a Pre-hearing conference. The parties agreed that Defendants would reinstate the 6 weeks of suspended TTD with 25% interest, in exchange for Appellant’s agreement to be treated by Dr. Shallcross for pain management. The Consent Order memorializing this agreement was never executed and Appellant never attended any of the appointments scheduled with Dr. Shallcross. This issue was not addressed again, has never been ruled upon and therefore, is not part of this appeal.

In March 2016, a hearing was set with Commissioner Beck on Respondent's Form 21. The hearing was continued to allow Appellant's new counsel, Kathryn Williams, to "get up to speed." Shortly after the continuance was granted, Ms. Williams was relieved as counsel and Appellant hired Tom Gagne, Mr. Gagne filed Appellant's third Form 50, still without any allegation of a back injury. On March 10, 2016, Appellant presented at St. Francis Emergency Room complaining of low back pain attributable to his work accident on 12/13/14. This appears to be the first time Appellant's alleged back issue was noted on any record related to the case. Appellant followed up with St. Francis on April 11, 2016 and began treating on his own initiative with Dr. Loudermilk of Piedmont Pain Management on May 2, 2016. The hearing before Commissioner Beck was rescheduled to June 29, 2016, and once again Appellant requested a continuance to seek new counsel. The hearing was postponed with the understanding that it would take place on July 27, 2016.

The first substantive hearing on Appellants claims was heard by Commissioner Wilkerson on July 27, 2016. At the time of this hearing Appellant appeared *Pro Se*. The hearing proceeded on Defendants Form 21 request to suspend Appellant's temporary total disability ("TTD") benefits in accordance with S.C. Code § 42-15-60. This request was based on Appellant's alleged refusal of medical treatment recommended by authorized treating physicians designated by Respondents. In addition, Defendants petitioned for an award of credit for benefits paid when not due under S.C. Code §42-9-210, specifically, all TTD paid during periods in which Appellant refused medical treatment to be applied against Appellant's entitlement to future benefits. In his Pre-Hearing Brief, Appellant raised the issue of a compensable back injury. Even though Appellant had not previously raised this issue, the parties stipulated that Commissioner Wilkerson should also decide the compensability of the newly alleged back claims in the interests of judicial economy.

Commissioner Wilkerson issued his ruling and instructions for defense counsel to prepare his formal Order on August 3, 2016. In sum, the Commissioner denied the Respondents' petitions for relief, as well as denied compensability/causal relation of Appellant's alleged back condition. Defense counsel submitted the proposed Order to Commissioner Wilkerson and copied Appellant. Appellant then submitted a letter to Commissioner Wilkerson dated October 10, 2016 objecting to the Order as written and requesting revisions. The October 10 letter also raised new irrelevant issues and allegations not raised at the Hearing, including, but not limited to, an allegation that defense counsel and/or the carrier engaged agents to spy on and harass Appellant. Defense counsel simply responded with his belief that the proposed Order as prepared fully memorialized Commissioner's Wilkerson's ruling/findings, accurately recited the relevant evidence in the Record, and fairly characterized the issues presented and the positions of the parties.

Commissioner Wilkerson executed the proposed Order without revisions or amendments. The Order's certificate of service on the parties was dated October 14, 2016. Allowing for a five day "mailbox rule" for receipt of the Order via first class U.S. Mail, service was deemed completed on October 19, 2016 per WCC Regulation 67-213 (A) (2).

After receipt of the Order, Appellant untimely appealed to the Full Commission. Pursuant to S.C. Code §42-17-50 and WCC Regulation 67-701, a party has fourteen (14) days from notice of the Order to file an Appeal from the single commissioner's ruling to the Full Commission. The Regulation further provides that the time to Appeal to the Full Commission is a jurisdictional requirement, "[t]he fourteen-day period is *jurisdictional*." S.C. Code Ann. Regs. 67-701 (emphasis added). Beginning with the day after service of the Order was completed, October 20, 2016, any Appeal to the Full Commission should have been filed by November 2, 2016. Thereafter, Appellant purportedly filed a Form 30 Request for Full Commission Review dated

November 14, 2016, incorporating by reference, and attaching his October 10 letter to Commissioner Wilkerson as the basis of his Appeal. Via Email dated November 29, 2016 the Commission's Judicial Director served the Form 30 and attachments on defense counsel for Respondents. This Notice again confirms that Appellant's purported Appeal is untimely, BUT the Commission will nevertheless treat his filing as a "Motion to Reinstate" his appeal.

Respondents filed a Reply to the Full Commission's decision to consider the purported Motion to Reinstate. On December 12, 2016, the Full Commission issued a form order by writing in "reinstate Appeal." The Full Commission thereafter heard this matter on April 19, 2017 and issued its Order on September 25, 2017 affirming Commissioner Wilkerson's ruling that is the subject of Appellant's purported appeal to this Court. This appeal followed.

Appellants Request for Appeal, Briefs, and Documents to be Included in the Record on Appeal fail to pinpoint which part of the Commission's decision Appellant wishes to appeal to this esteemed body. However, it appears that the heart of the issue is Appellant's displeasure with the Single Commissioner and Full Commissions refusal to accept his alleged back injury as compensable.²

STANDARD OF REVIEW

The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Kearse v. State Health & Human Servs. Fin. Comm'n, 318 S.C. 198, 456 S.E.2d 892 (1995). A court may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact unless the agency's findings are clearly erroneous in view of the reliable, probative and substantial evidence on the whole record. Grayson v. Carter

² The tumultuous procedural history in this case includes Appellant being represented by no less than seven attorneys and treated by no less than five physicians. This dialogue does not include the entire procedural history of the case but instead focuses on the issues assumably on appeal.

Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995). Substantial evidence is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached. Gibson v. Florence Country Club, 282 S.C. 384, 318 S.E.2d 365 (1984).

ARGUMENT

1. THE COMMISSION DID NOT ERR IN DENYING COMPENSATION AND/OR MEDICAL BENEFITS FOR APPELLANTS ALLEGED LOWER BACK INJURY.

The Commission did not err in denying compensation and/or medical benefits under the Act and this body should affirm that decision for three reasons. First, Appellant back injury was not part of the merits of the case and therefore an order regarding that injury is interlocutory. Second, Appellants appeal to the Full Commission was untimely and is void *ab initio*. Third, there is substantial evidence in the record to support the Commission's finding that Appellant did not suffer a compensable back injury.

A. Appellant's Failure to Timely Appeal the Single Commissioner's Order Denied the Commission the Authority to Hear the Appeal.

It is an undisputed fact that Appellant's appeal from Commissioner Wilkerson's Order to the Full Commission was not filed timely. The deadline for filing the appeal was November 2, 2016, and no semblance of an Appeal was filed by Appellant until November 14, 2016. Moreover, Defendants did not receive notice of the purported appeal until 15 days thereafter, on November 29, 2016.

It is an elementary matter of law that the statutory deadline to appeal a single commissioner's Order to the Full Commission is jurisdictional. S. C. Code Ann. Regs 67-701. Specifically, the Full Commission has absolutely no authority or discretion to extend the time to

appeal for any reason whatsoever. Allison v. W.L. Gore & Associates, 394 S.C. 185, 714 S.E.2d 547 (SC 2011). The Supreme Court's holding is unequivocal: "*the Commission lacks the authority to extend the fourteen days permitted for the filing of an appeal from the decision of a single commissioner.*" Id. at 188-189 (*emphasis added*). In Goodman v. City of Columbia, 458 S.E.2d 531 (SC 1995) the South Carolina Supreme Court determined the Commission has discretion to accept a letter timely filed in lieu of the form prescribed by the Commission for an appeal to the Full Commission from the single commissioner's ruling. In Goodman, the Single Commissioner denied petitioner's request for benefits on September 27, 1990. On October 2, 1990, petitioner wrote the Commission stating his desire to appeal all the issues denied by the Single Commissioner. The Commission then sent petitioner a Form 30 so he could perfect his appeal. The Commission advised petitioner that the deadline to file the form 30 was October 14, 1990. The petitioner failed to file the Form 30 until October 17, 1990. Despite missing the deadline to perfect his appeal, the Commission allowed petitioner's appeal to move forward. The City of Columbia appealed arguing that regulation 67-701 did not provide the Commission the authority to extend the deadline found in S.C. Code Ann. 42-17-50³. Both the Court of Appeals and the Supreme Court agreed with the Commission. The Supreme Court stated, "Petitioner's letter unquestionably gave notice of intent to appeal, and the Commission, in its discretion chose to treat the letter as an application for review. We find that great deference should be given to the Commission's deciding that petitioner substantially complied with the mandates of § 42-17-50." Id. at 532 (citing Dunton v. S.C. Board of Examiners in Optometry, 291 S.C. 221, 353 S.E.2d 132 (1987)).

³ S.C Code Ann. § 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 and, if good grounds be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award."

The case at hand is distinguishable from Goodman because Appellant failed to send any correspondence giving any semblance of notice of appeal within the 14-day window following the issuance of the Commissioner's final Order. Appellant merely wrote the Commissioner to object to the proposed *draft* Order drafted by Respondent's counsel per the Commissioner's instructions. This letter cannot be construed as substantial compliance with S.C. Code § 42-17-50 because, despite its purported objections to the Commissioner's ruling, it was not issued in response to the *final* executed Order from the Commissioner. Therefore, an intent to Appeal from that final Order cannot be reasonably be discerned. Thereafter, Appellant did not take any action giving semblance of an intent to appeal until November 14, 2016, which is well beyond the 14-day period running from October 19. For these reasons the Full Commission lacked appellate jurisdiction to review the single commissioner's ruling and its Order dated September 25, 2016 is *void ab initio*. See Turner v. Malone, 24 S.C. 398 (SC 1886). ("a judgement entered without jurisdiction is *void ab initio*).

Respondents respectfully submit the Full Commission likewise had no authority or jurisdiction to treat an untimely appeal as a purported "Motion to Reinstate." The fallacy of proceeding under this procedural guise is self-evident- an appeal cannot be reinstated that was never properly filed in the first place as an end-run around the Regulation's jurisdictional requirements. The Full Commission, therefore, lacked appellate jurisdiction to consider Appellant's attempted appeal from Commissioner Wilkerson's Order. As such, Commissioner Wilkerson's Order is the law of the case and is not subject to further review by the Court. See Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (SC 2009) (under the law-of-the-case doctrine, a party is precluded from relitigating matters on appeal that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court). Since the Full

Commission Order is void and Commissioner Wilkerson's Order is the law of the case, this Court necessarily lacks appellate jurisdiction over this matter.

B. Compensability of Appellants Back Injury is Interlocutory and Not currently Appealable.

Defendant's filed a Form 21 on April 21, 2016 seeking to end Appellant's TTD based on Appellant's refusal/noncompliance with medical treatment. (Hr'g Tr. 4:1-25 – 5:1-2) During the hearing the parties and Commissioner Wilkerson admit that the issue of a back injury is not properly before the Commissioner (Hr'g Tr. 26:1-6). While the parties ultimately agreed to allow Commissioner Wilkerson to make a ruling on whether Appellant's alleged back injury was compensable, that decision is remains interlocutory and is not subject to review by this Court.

The Full Commission's Order is interlocutory and not subject to review by the Court at this time. In Bone v. U.S. Food Services, 404 S.C. 455, 748 S.E.2d 229 (SC 2013), the Supreme Court held that "an agency decision that does not decide the merits of a contested case is not a final agency decision that is subject to judicial review." Moreover, the Court noted that "a final judgement disposes of the whole subject matter of the action, or terminates the proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Id.* The Full Commission Order in this case is clearly not a "final agency decision." Although the substance of Appellant's grounds for appeal to this Court are not clear, the Full Commission Order simply denies compensability of Appellant's alleged back condition. Respondent's compensation claim for his admitted shoulder injury remains open and ongoing, including TTD benefits and Appellant's pursuit of medical treatment.

The South Carolina Administrative Procedures Act (“APA”) provides that 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 § 1-23-380. In this case, Appellant has an adequate remedy for the Commission’s denial of his alleged back claim; specifically, he may appeal that decision to this Court once there has been a final adjudication and award of his admitted claims by the Full Commission. In other words, Appellant has not been substantially prejudiced by the denial of his back claim to the extent warranting immediate judicial review of such denial when a) he continues to receive TTD benefits for his admitted compensable claims and b) he has pursued medical treatment for his alleged back condition under his group health coverage.

C. The Decision of the Full Commission is Supported by Substantial Evidence

Regardless of the aforementioned appealability issues, the Record contains substantial evidence supporting the Commissions’ decision that Appellant did not suffer a compensable lower back injury. Not only is there is no expert medical evidence supporting a claim of compensability, Appellant failed to report a lower back injury at the time of the accident as confirmed by the contemporaneous medical records. In fact, the first time Appellant mentioned a back injury was in his Pre-Hearing Brief to Commissioner Wilkerson in 2017.

Judicial review of a Commission decision is governed by the substantial evidence rule of the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2012). Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which,

considering the record as a whole, would allow reasonable minds to reach the same conclusion the administrative agency reached in order to justify its action. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). The findings of the Full Commission are presumed correct and can be set aside only if unsupported by substantial evidence or based on an error of law. McGuffin v. Schlumberger-Sangamo, 307 S.C. 184, 186, 414 S.E.2d 162, 163 (1992). It is not within the appellate court's purview to reverse findings of the Full Commission which are supported by substantial evidence. Broughton v. South of the Border, 336 S.C. 488, 496, 520 S.E.2d 634, 637 (Ct. App. 1999).

The history of this case fails to support the finding of a compensable back injury. Following his accident on December 13, 2014, Appellant was treated at Doctor's Care and did not mention any problems related to his back. (APA 22-25). Claimant was next treated by Dr. Keith at Orthopedic Specialist of Spartanburg. Dr. Keith's records likewise do not address any claim of a lower back injury. (APA 1-13). Subsequently, he was treated by Piedmont Orthopedic Associates with no mention of a back issue. (APA 14-21). It is not until he sees Dr. Behr on July 18, 2016, after claimant has retained and released over 6 attorneys and had his hearing postponed 3 times, that he first mentions a problem with to his back issue to any medical provider. The absence of objective contemporaneous medical records documenting an alleged lower back injury certainly constitutes substantial evidence upon which the Commission relied to deny compensability of that alleged injury.

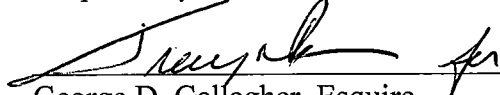
Moreover, during the July 2016 hearing before Commissioner Wilkerson, Appellant admitted he had not previously raised this issue. (Hr'g tr. 25:25 – 26:6). Appellant filed voluminous records but he failed to present any medical evidence showing a causal relationship between his alleged back injury and his work-related accident. Appellant also admitted there is no

direct medical evidence causally relating his claim of a compensable lower back injury to his September 2014 accident. (Hr'g Tr. 87:25 – 89:9; 90:3 – 92:3). In support of his claim of a compensable lower back injury, Appellant relies on a nerve conduction study that was ordered to diagnose the issue of cervical radiculopathy from his shoulder. (HT 87:12-19). That nerve conduction study was ordered to rule out possible cervical spine issues, not the alleged lumbar spine injury Appellant is now alleging. Respondents presented evidence that Appellant had been awarded Social Security Disability benefits, due at least in part, for pre-existing lumbar spine injuries stemming from a previous work accident. (Hr'g TR.). This alone constitutes substantial evidence supporting the denial of compensability of the alleged lumbar injury.

CONCLUSION

Commissioner Wilkerson rule, and the Full Commission, correctly upheld the determination that Appellant did not suffer a compensable lower back injury. Not only was there a complete lack of medical evidence supporting such a claim, and Appellant admitted as much. The substantial evidence in the Record supports the Commission's findings. Additionally, Appellant's appeal was both untimely and interlocutory and should not have been considered by the Full Commission. For these reasons and all those stated above, the Order on these issues should be **AFFIRMED**.

Respectfully submitted,



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Attorney for Respondents

April 30, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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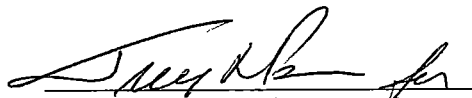
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SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondents and Designation of Matter on Nathaniel Alston by depositing a copy of it in the United States Mail, postage prepaid, on April 30, 2018, addressed to Nathaniel Alston, 150 Howell Circle, Apt. 253, Greenville, SC 29615.

April 30, 2018



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April 30, 2018

The Honorable Jenny Abbott Kitchings
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1015 Sumter Street, Suite 200
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RE: *Nathaniel Alston v. All My Sons Business*
Appellate Case No. 2017-002126
WCC No.: 1418755
Claim No.: 830000140072
DOA: 12/13/2014
Our File No.: 20796-0003

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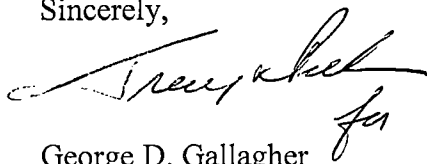
SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of the Initial Brief of the Respondents, Designation of Matter to Be Included in the Record on Appeal and Proof of Service on behalf of All My Sons Business, and Vanliner Insurance Company in the above-referenced matter. Please return a clocked copy of this document to me in the enclosed self-addressed stamped envelope.

By copy of this letter, I am serving a copy of the Final Brief of the Respondents upon all counsel of record.

Sincerely,


George D. Gallagher

DGD/ecs

Enclosures

cc: Nathaniel Alston (w/encl) (Via Certified RRR)
Jennifer Quigley (w/encl)



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