THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

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.

RETURN TO PETITION FOR REHEARING

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net

ATTORNEY FOR APPELLANT

ARGUMENT

The Court should deny the Petition for Rehearing. Respondents' Petition for Rehearing is essentially a cut and paste of their Respondents' Brief, raising the same arguments nearly verbatim. The entire thrust of Respondents' Brief – indeed their entire defense of this case – has been reliance on technicalities, rather then dealing directly with the merits of their obligation to care for their injured employees.

As the Petition makes the same arguments made in Respondents' Brief, Appellant also bases his return largely on his Reply Brief.

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 4-6].

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).

Strictly speaking, the Court did not explicitly rule on this issue, implicitly finding that the listed conclusions of law are derivative of the dismissal over the S-2 issue. As such, 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 6-7].

The Appellant, 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 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 and was correctly rejected by this Court.

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. The Court properly found the Appellate Panel committed an error of law in refusing to accept the after-

discovered evidence submitted by Appellant and correctly reversed the decision below. Respondents' Petition for Rehearing should be denied

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 8-11].

In their Petition for Rehearing, Respondents argue that the Court "misapprehended the mandatory requirements of S.C. Code Ann. § 42-1-560 in reversing the Decision and Order of the Workers' Compensation Commission. No one disputes that Appellant 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.").

Perhaps resorting to hyperbole, Respondents state Appellant's:

> admitted failure to comply with S.C. Code Ann. § 42-1-560 could somehow be "cured" by voluntarily dismissing this third-party lawsuit and then simply re-filing. The Petitioners respectfully contend that the Claimant should not be permitted to grossly circumvent the clear statutory requirements in this manner. To date, there is no case law on this issue and the Supreme Court has previously declined to address the "efficacy" of a re-filing."

[Petition for Rehearing, page 10].

Curiously, Respondents cite to Callahan – the case that allows a claimant to do exactly what Respondents argue is prohibited.

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; Petition for Rehearing, page 11]. This is simply a refusal to elevate form over substance. The fact is Appellant 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 properly reversed the decision. The Petition for Rehearing should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Rehearing should be denied.

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29250
(803) 779-4000
stephen@samuelslawfirm.net

ATTORNEY FOR APPELLANT

Columbia, South Carolina
May 14, 2018

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In The Court of Appeals

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PROOF OF SERVICE

I certify that I, Katherine R. Carter, paralegal to Stephen B. Samuels, have served the **Return to Petition for Rehearing** upon counsel for the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on May 14, 2018, addressed as follows:

Amy Cofield, Esquire
809 South Lake Drive
Lexington, SC 29072

Kirsten L. Barr, Esquire
P.O. Box 2167
Mount Pleasant, SC 29464

Lisa Glover, Esquire
Uninsured Employers' Fund
P. O. Box 210039
Columbia, S.C. 29221-0039

May 14, 2018

Katherine R. Carter
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000

SAMUELS LAW FIRM

STEPHEN B. SAMUELS
ATTORNEYS AT LAW

May 14, 2018

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

RE: Samuel Rose v. JJS Trucking, *et. al.*
Appellate Case No.: 2016-000497

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of **Return to Petition for Rehearing** in the above-referenced matter. We also enclose the original and one (1) copy of **Proof of Service** for filing. Please date-stamp the extra copy of each and return it to us in the self-addressed stamped envelope.

By copy of this letter and enclosure to Amy Cofield, Kirsten Barr, Lisa Glover, we are hereby serving a copy of the **Return to Petition for Rehearing** upon counsel for the Respondents as indicated by the enclosed Proof of Service.

Thank you for your assistance. Please contact us with any questions or if further information is needed from our office.

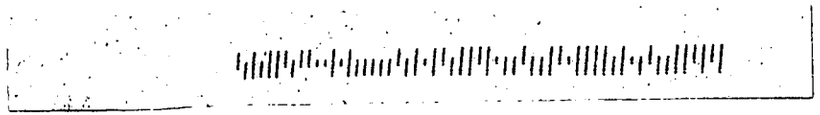
With kindest regards, I am

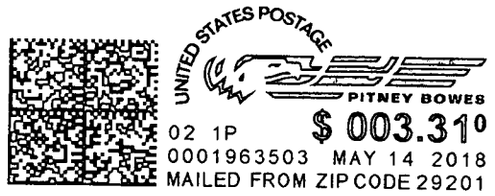
Sincerely,

Katherine R. Carter
Paralegal for Stephen B. Samuels

/krc
Enclosure(s) as stated

cc: Amy Cofield, Esquire
Kirsten L. Barr, Esquire
Lisa Glover, Esquire





1320 RICHLAND STREET
COLUMBIA, SC 29201

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