

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY) C/A No. 2017-CP-26-07775

Kelaher, Connell & Connor, P.C.,)
)
)

Plaintiff,)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

vs.)

South Carolina Workers' Compensation)
Commission,)

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Defendant.)

SC Court of Appeals

This matter came before the Court by Motion of the Defendant, South Carolina Workers' Compensation Commission, and was argued March 1, 2018 at the Horry County Judicial Center before the Honorable Benjamin H. Culbertson. Defendant was represented by Douglas Charles Baxter, Esquire and J. Keith Roberts, Esquire. Plaintiff was represented by Gene Connell, Esquire. Defendant moved for an Order granting its Motion to Dismiss pursuant to Rule 12 of *the South Carolina Rules of Civil Procedure*.

Plaintiff filed a negligence claim against the Defendant, South Carolina Workers' Compensation, alleging in the Complaint that Defendant was negligent in the following particulars: (a) failing to notify Plaintiff of a hearing; (b) failing to recognize and protect Plaintiff's lien; (c) mishandling documents including a Fee Petition which was in fact forwarded to the Commission on four occasions; (d) failing to follow generally accepted practices in notifying Plaintiff after he had been relieved; (e) failing to send written notice to the Plaintiff; (f) failing to handle notice to the Plaintiff of a potential hearing in a businesslike manner; and (g) failing to

abide by its employees' emails and notes which indicated that if Plaintiff filed a Form 61 with an Order and cost sheet they would hold until the end of the case. Complaint ¶ 16.

A motion to dismiss shall be granted if the Court lacks subject matter jurisdiction. Rule 12(b)(1), SCRCP. The proper procedure to raise a Court's lack of subject matter jurisdiction is through a motion to dismiss. Edens v. Bellini, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004). Additionally, a motion to dismiss shall be granted if the party asserting the claim has failed to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP. "In considering a motion to dismiss a Complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on the allegation set forth in the complaint." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). The trial court is to construe the complaint in a light most favorable to the non-moving party and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. Freemantle v. Preston, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012).

The right to workers' compensation is wholly statutory, not existing except under the circumstances provided in the South Carolina Workers' Compensation Act (§ 42-1-10 *et. seq.* of the Code of Laws of South Carolina, as amended). Price v. Peachtree, 721 S.E.2d 461 (Ct. App. 2011). Section 42-3-180 of the Code of Laws of South Carolina, as amended, provides that all questions arising under the Workers' Compensation Act, if not settled by agreement of the parties interested thereof with the approval of the Commission, shall be determined by the Commission. James v. Anne's, Inc., 701 S.E.2d 730 (2010). Attorney's fees for claims under this Act are subject to the approval of the Commission. S.C. Code Ann. § 42-15-90.

While the trial court has subject matter jurisdiction over tort claims, certain cases may be taken from the trial court's original jurisdiction by the General Assembly. Sabb v. South Carolina

State University, 350 S.C. 416 (2002) (holding that the circuit court has divested original jurisdiction in the South Carolina Workers' Compensation Commission for personal injury claims arising in the course and scope of one's employment). Disputes which are ancillary to the rights to workers' compensation benefits should be determined by the Workers' Compensation Commission. See Price v. Peachtree, 721 S.E.2d 461 (Ct. App. 2011).

Here, Plaintiff is disputing the payment of attorney's fees for legal work performed for a claimant in a South Carolina Workers' Compensation case (*Bruce W. Nadolny v. AVX Corporation and Liberty Mutual Insurance Company*, WCC No. 0708860). Plaintiff asserted and argued that employees of the South Carolina Workers' Compensation Commission were negligent in failing to protect Plaintiff's lien and in failing to notify Plaintiff of the hearing so that Plaintiff could assert a claim for attorney's fees. Plaintiff argued that failing to provide an opportunity for it to be heard was a violation of its constitutional rights.

All attorney's fees resulting from claims within the South Carolina Workers' Compensation Act are subject to the approval of the Commission as it has original jurisdiction over such claims. S.C. Code Ann. § 42-15-90. Therefore, any disputes that Plaintiff has with the payment of attorney's fees are within the jurisdiction and approval of the Commission; not the Circuit Court. Furthermore, even if this Court did have jurisdiction, the Defendant is immune based on the South Carolina Tort Claims Act. The South Carolina Tort Claims Act ("SCTCA") (§15-78-10 *et. seq.*) governs all tort claims against governmental entities and is the *exclusive civil remedy* available in an action against a governmental entity or its employees. Flateau v. Harrelson, 584 S.E.2d 413, 416 (Ct. App. 2003) (emphasis added). "Governmental entity" is defined as the State and its political subdivisions, and includes its offices, agencies, authorities, departments, commissions, boards, divisions, and instrumentalities. S.C. Code Ann. § 15-78-30.

A governmental entity is immune from liability in several enumerated instances. S.C. Code Ann. §15-78-60; see also Hawkins v. City of Greenville, 358 S.C. 280, 293, 594 S.E.2d 557, 564 (Ct. App. 2004) (holding the exceptions found in §15-78-60 “significantly limit the tort liability of government entities”). S.C. Code Ann. §15-78-60 states: “the governmental entity is not liable for a loss resulting from (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature.”

Here, the South Carolina Workers’ Compensation Commission is a governmental entity, and therefore, any claims that Plaintiff has against the Commission are subject to the SCTCA. As stated in S.C. Code Ann. §15-78-60, a governmental entity is not liable for any loss resulting from an administrative action or inactive of a legislative, judicial, or quasi-judicial nature. Here, the Commission, as set forth by the General Assembly, is a judicial and administrative department of the State (S.C. Code Ann. §42-3-10) and the allegations of negligence in the Complaint all involve administrative actions and/or inactions. As such, the Commission cannot be held liable for any alleged losses as set out in the Complaint. As to any alleged constitutional violations, the South Carolina Workers Compensation Commission has not waived its Eleventh Amendment immunity.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED, that Defendant’s Motion to Dismiss is granted and this action is hereby dismissed with prejudice.

AND IT IS SO ORDERED.

The Honorable Benjamin H. Culbertson
Fifteenth Judicial Circuit

Conway, South Carolina
Dated: _____, 2018



Horry Common Pleas

Case Caption: Kelaher Connell & Connor PC VS Workers Compensation
Commission South Carolina
Case Number: 2017CP2607775
Type: Order/Dismissal

Presiding Circuit Judge

s/Benjamin H. Culbertson, Judge Code 2148