

DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO: 1116698

GUS A. KING,
Claimant,

vs.

PIERSIDE BOATWORKS,
Employer,

and

PMA INSURANCE GROUP,
Carrier.

Defendants.

RECEIVED

JUL 11 2018

SC Court of Appeals

HEARING:

Held in Columbia, South Carolina, on
March 29, 2018

APPEARANCES:

Claimant, deceased employee, was
represented at the hearing by Reese M.
Stidham, IV, Esquire, of Howell &
Christmas, LLC, Mount Pleasant, South
Carolina.

Claimant, Laura King, was represented by
Blake Hewitt, Esquire and Allison Sullivan,
Esquire, of Bluestein Thompson Sullivan,
LLC, Columbia, South Carolina.

Defendants were represented by R. Daniel
Addison, Esquire, of Hedrick Gardner
Kincheloe & Garofalo, LLP, Columbia,
South Carolina.

PURPOSE OF HEARING:

To determine issues set forth on Forms 50
and 51.

DECISION & ORDER:

Susan S. Barden, Commissioner

ORDER FILED:

May 1, 2018

STATEMENT OF THE CASE

This matter is before the undersigned Commissioner upon the Form 50, *Employee's Request for Hearing*, filed by counsel for the named employee/claimant, Gus King ("Deceased Employee"), on or about July 11, 2017. An additional Form 50, *Request for Hearing*, was filed on or about February 8, 2018 on behalf of the putative dependent of Deceased Employee, Laura King ("Claimant") and the Personal Representative of Deceased Employee's Estate, Robert Home (the "Estate").¹ In their Form 50s, Deceased Employee and Claimant seek an order from the Commission enforcing an agreement reached at mediation between Deceased Employee (prior to his death) and his employer, Pierside Boatworks, and its carrier, PMA Insurance Group (collectively, "Defendants"). Defendants contend that the mediation agreement at issue is not enforceable on the grounds that it does not comport with the requirements of the South Workers Compensation Act (the "Act") and the Regulations of the South Carolina Workers Compensation Commission ("Commission") to be a binding and enforceable Agreement and Final Release.

STIPULATIONS

Counsel for all parties stipulated at the hearing to the following issues:

1. Notices were timely and properly served upon all the parties of interest.
2. Venue, set in Richland County, is proper as agreed by all parties.
3. Claimant's average weekly wage is \$727.28, yielding a compensation rate of

\$484.85 (Previous Order of the Commission, dated May 20, 2014).

¹ The Estate's right to intervene in this action has been previously ruled on by the Commission via an October 26, 2017 Order denying the Estate's Motion to Intervene, Postpone, and for an Order Requiring Mediation. Following the October 26, 2017 order, the Estate filed a Renewed Motion to Intervene on or about November 7, 2017. That motion was denied by order dated February 13, 2018. As such, the Estate is not a party to this action.

Without objection, the Commission's file was made a part of the record in this matter with the exception of any self-serving declarations or unstipulated medical.

APA SUBMISSIONS

Deceased Employee's APA

APA	DOCUMENT	DATE	PAGES
1	Order and Award	5/20/2017	1-30
2	Agreement Following Mediation Conference	6/2/2016	31
3	Form 70, Mediatory Report	6/2/2016	32
4	Email from Employer/Carrier Scheduling Mediation	3/11/2016	33-35
5	Email from Employer/Carrier confirming date/location of Mediation	4/5/2016	36-43
6	Email from Mediator's Office confirming date/location of Mediation	4/5/2016	44-45
7	Email from Employer/Carrier Requesting Claimant's Attorney's Tax ID in Order to Issue Settlement Check	6/3/2016	46
8	Email from Employer/Carrier to Claimant's attorney Advising They Are Stop Paying on Claimant's Settlement Check	6/14/2016	47
9	Letter from Employer/Carrier Enclosing Claimant's Gross Settlement Check and Form 19	6/9/2016	48-50

Claimant's APA

APA	DOCUMENT	DATE	PAGES
A	Claimant's Marriage License	--	1
A	Legal Memorandum supporting the enforcement of the mediation agreement	3/14/2018	1-6

Defendants' APA

APA	DOCUMENT	DATE	PAGES
--	Memorandum of Law	12/13/2017	14
--	Reply Brief	3/26/2018	6

EVIDENCE OF CASE

The facts in this case are essentially undisputed. The underlying claim involves an admitted injury to Deceased Employee that occurred on November 18, 2011. Pursuant to an Award and Order issued May 20, 2014, Deceased Employee was found to be permanently and totally disabled as a result of his injuries and entitled to lifetime future causally-related medical care and treatment. See Deceased Employee's APA 1, pp 25-26, Finding of Fact No. 12. Deceased Employee was awarded a lump sum award of his permanent and total disability benefits and a Form 19, *Status Report and Compensation Receipt*, was filed on September 10, 2014, showing that Defendants had paid Deceased Employee all indemnity benefits to which he was entitled and the claim was closed. Defendants, thereafter, continued to provide Deceased Employee with the causally-related medical care to which he was entitled under the May 20, 2014 order.

A mediation between Deceased Employee and Defendants was held on June 2, 2016, for the purpose of resolution and settling out Deceased Employee's future medical treatment. At the conclusion of the mediation, the parties signed an Agreement Following Mediation Conference ("Mediation Agreement") memorializing the general terms of the negotiated settlement. See Deceased Employee's APA 2. The Mediation Agreement specifically provided: "The employer/carrier will prepare an Agreement and Release, releasing all parties or entities from all claims by the claimant which will be signed by the claimant and claimant's attorney." One week later, on or about June 9, 2016, Claimant was killed in an unrelated motor vehicle accident. No Agreement and Final Release (clincher) was ever signed or filed with the Commission. After learning of the death of Deceased Employee, Defendants notified Deceased Employee's attorney that they were placing the settlement on hold to determine how to proceed. Deceased

Employee's APA 8, p. 47. Defendants later withdrew from the settlement on the grounds that Deceased Employee's claim abated at his death.

Prior to the hearing, Defendants submitted a Memorandum of Law in support of their position. As part of her Form 58, *Pre-hearing Brief*, Claimant submitted a Brief on Enforcement of Settlement Agreement to which Defendants submitted a Reply Brief.

Based on the pleadings, memoranda, and review of the record as a whole, I, the undersigned Commissioner, make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Gus King ("Deceased Employee") was found permanently and totally disabled by previous Order of the Commission, dated May 20, 2014, and therefore received 500 weeks of compensation and lifetime future medical care. This finding is supported by the Commission file as a whole and, specifically, the May 20, 2014 Decision and Order.

2. Claimant received his indemnity award in lump sum on September 10, 2014. This finding is supported by the Commission file and, specifically, the Form 19, *Status Report and Compensation Receipt*, filed on September 10, 2014.

3. Subsequently, the parties engaged in mediation on June 2, 2016, to settle the issue of Claimant's future medical care. This finding is supported by the record as a whole, including but not limited to the briefs of the parties.

4. Although the parties signed a mediation agreement on that date, no Agreement and Final Release was ever executed/signed by Deceased Employee. This finding is supported by the record as a whole, including but not limited to the briefs of the parties.

5. Deceased Employee died in an unrelated car accident on June 9, 2016. This finding is supported by the record as a whole, including but not limited to the briefs of the parties.

6. Because Deceased Employee never signed an Agreement and Final Release, no Agreement and Final Release was ever filed with the Commission in accordance with S.C. Code Ann. § 42-9-390 and S.C. Code Regs. 67-801 and 67-803.

7. I find that parties are always free to “back out of” a proposed clincher agreement until it is signed, whether a claimant is unrepresented or represented. Nothing in Title 42 of the South Carolina Code or the applicable regulations state otherwise.

8. Claimant’s argument that filing of an Agreement and Final release is merely a ministerial or perfunctory act is not persuasive, as no Agreement and Release was ever signed by Deceased Employee.

9. The Mediation Agreement memorialized what the parties agreed to at mediation. Nothing in the mediation regulations states that once a mediation agreement is signed, it is binding upon the parties. See S.C. Code Regs. 67-1801 *et seq.* I decline to create new law where such does not exist.

10. A mediation agreement is not synonymous with an Agreement and Final Release. If this were the case, for example, S.C. Code Regs. 67-801(A) would state that parties can agree to settle their claims by entering into a mediation agreement. Nor does S.C. Code Regs. 67-1801 *et seq.* provide that mediation agreements can be utilized in lieu of a Form 16 or an Agreement and final Release.

11. The Commission is without authority to enforce the Mediation Agreement. Bazzle v. Huff, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995) (“An administrative agency has only such powers as have been conferred by law and must act within the authority granted for that purpose.”)

12. Filing a settlement document is an explicit statutory requirement under South Carolina law. See S.C. Code Ann. § 42-9-390 (“The employer must file a copy of the settlement agreement with the commission . . .”)(emphasis added). In this case, however, there was nothing to file, as an Agreement and Final Release was never executed. See S.C. Code Regs 67-803 (Specifying the requirements for an agreement to constitute an Agreement and Final Release).

13. In support of the contention that the Mediation Agreement is enforceable, Claimant relies various authorities from jurisdictions outside of South Carolina. These authorities, however, are distinguishable from this case and do not support Claimant’s position.

14. In B. Frank Joy Co. v. Isaac, 636 A.2d 1016 (Md. 1993), the employee and employer entered into a settlement agreement and submitted that agreement to the commission for approval. This settlement agreement was submitted to the commission for approval as required by the statute. The claimant died eight days before the hearing. At the hearing, the employer sought to rescind the agreement arguing they had that right at any time before it was approved by the Commission. The commission nevertheless approved the agreement. In affirming this decision, the court noted that the Maryland statute required approval of an agreement in order to be enforceable but stated:

That does not mean, however, that the parties have total freedom to renege a valid bilateral agreement they have formally submitted for Commission approval in compliance with the Act. When they present a duly executed settlement agreement to the Commission, the parties thereby relinquish control of the matter to the

supervisory powers, authority, and discretion bestowed upon the Commission. Then a party, acting unilaterally, does not have unfettered license to withdraw what that party has submitted in good faith.

Isaac, 636 A.2d at 1025 (emphasis added).

15. In Ferreira v. Arrow Mut. Liability Ins. Co., 447 N.E.2d 1258 (Mass. App. Ct. 1983), the court held:

Barring mutual mistake, fraud or other principles of equity, we believe that when an instrument with the finality of an agreement for redeeming liability has been executed and filed with the Division, presented to the single member for approval at a hearing conference, and recommended for approval by that member, the insurer may no longer unilaterally rescind the agreement.

Ferreira, 447 N.E.2d at 1259-60 (emphasis added).

16. Defendants' position, on the other hand, is supported by Mackey v. Kerr-McGee Chemical, Co., 280 S.C. 265, 312 S.E.2d 565 (Ct. App. 1984). As stated in that case, "Certainly, an employee or his dependents who had agreed to accept a settlement could withdraw from that agreement at any time prior to verification and filing, and we see no reason why the employer and his insurer cannot do the same thing." Mackey, 280 S.C. at 270, 312 S.E.2d at 568 (quoting with approval, Pepitone v. State Farm Mut. Ins. Co., 346 So. 2d 266 (La. Ct. App. 1977)) (emphasis added). While this case was decided prior to the 2007 amendments to the Workers Compensation Act removing the specific requirement of Commission approval when a party is represented, the reasoning remains the same: until a settlement agreement is entered into and filed with the Commission, either party retains the right to withdraw from the agreement.

17. The fact that the agreement at issue here arises out of a mediation does not alter this outcome. Nothing in the mediation regulations state that a mediation agreement is tantamount to or satisfies the statutory and regulatory requirements of an Agreement and Final Release. See S.C. Code Regs. 67-1801 et. seq.

18. The Commission is a statutory creation, and as such the Commission and the parties are governed by statutory and regulatory provisions of Title 42 of the South Carolina Code. This is not a circuit court contract case and principle of contract law have no application in this context. See Mackey, 280 S.C. at 270, 312 S.E.2d at 568 (“Contract law principles are inapplicable here because § 42-1-310 provides that employee claims for compensation are governed exclusively by the worker’s compensation act.”).

19. The settlement agreement reached at mediation in this case was never memorialized in an Agreement and Final Release, never signed, and never filed with the Commission. The Commission has no authority to enforce an agreement that does not comply with the specific terms of the Act and, in fact, is specifically prohibited from doing so. See S.C. Code Regs. §67-803(C) (“The Commission shall not approve an Agreement and Final Release that is not fairly made and in accordance with the Act.”)

20. I find that the Mediation Agreement at issue in this case does not satisfy the requirements of the Workers Compensation Act to constitute an Agreement and Final Release and may not be construed as one. As no Agreement and Final Release was signed or filed with the Commission, the Commission is without the statutory authority to enforce an agreement reached at mediation. Prior to the signing and filing of an Agreement and Final Release, each party retained the right to rescind any settlement negotiated at mediation, as was done by Defendants in this case.

21. At the time of his death, Deceased Employee had received all benefits for compensation to which he was entitled under the Act and his right to receive future medical care abated at his death. As such, no benefits remain to accrue to the benefit of any other party under the Act.

22. For the foregoing reasons, the relief sought by Claimant and Deceased Employee is denied.

CONCLUSIONS OF LAW

Accordingly, as provided in the South Carolina Code of Laws, 1976, as amended, §42-17-40, it is the determination of this Commissioner that:

1. This case is governed by the terms and provisions of the South Carolina Workers' Compensation Act.
2. Under §42-3-180, this Commissioner has jurisdiction over the parties to hear the issues in dispute.
3. Under §42-1-130, Deceased Employee Gus A. King was a covered employee.
4. Under §42-1-140, Pierside Boatworks was a covered employer.
5. Under §42-3-150, there was an employer/employee relationship between the parties.
6. Under §42-17-20, venue in Richland County, South Carolina, was proper and agreed to by the parties.
7. Under §-1-23-320(b) and Regulation 67-607, notice of hearing was timely and properly served upon all parties of interest.
8. Under §42-1-160, as determined by prior order of the Commission, the Deceased Employee, Gus A. King, sustained a compensable injury by accident arising out of and in the course of his employment.
9. Under §42-1-40, as determined by prior order of the Commission, Deceased Employee's average weekly wage is \$727.28, yielding a compensation rate of \$484.85.

10. Under S.C. Code Ann. § 42-9-390 and S.C. Code Regs. 67-801 and 67-803, no Agreement and Final Release was ever signed by Deceased Employee or filed by the Employer with the Commission and, thus, there is no binding Agreement and Final Release to enforce.

11. Pursuant to the Workers Compensation Act, including but not limited to S.C. Code Ann. § 42-9-390 and S.C. Code Regs. 67-801 and 67-803, the Commission lacks the authority to enforce the Mediation Agreement as requested by Deceased Employee and Claimant.

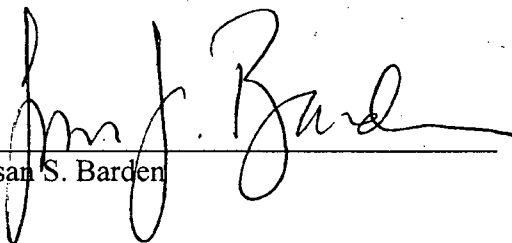
12. As Deceased Employee had received all compensation to which he was entitled prior to his death, any remaining benefits to which he may have been entitled to under the Act abated at his death.

ORDER

For the foregoing reasons, I find that Mediation Agreement in this case does not constitute a binding Agreement and Final Release and the Commission has no authority to enforce it as if it is one. I, therefore, order that the relief requested by Deceased Employee and Claimant be DENIED, no further benefits are owed by Defendants in this claim, and the claim should be closed.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION


Susan S. Barden

May 1, 2018

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Barbara Skarbek on May 1, 2018

South Carolina Workers' Compensation Commission

1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
(803) 737-5723



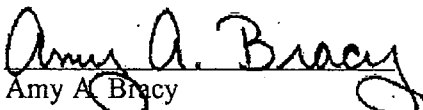
WCC File #: 1116698

Date of Injury: 11/18/2011

**ADMINISTRATIVE
ORDER**

GUS KING v. PIERSIDE BOATWORKS
WCC File No: 1116698

The Request for Commission Review in the above captioned case is dismissed. It was not timely filed pursuant to R.67-701 and R.67-205 D. The appeal of the 2/13/18 Order should have been received on or before March 3, 2018.


Amy A. Bracy
Judicial Director

Date: June 11, 2018

CERTIFICATE OF SERVICE

I hereby certify on June 11, 2018, I served this document on the parties listed below by electronic mail or depositing a copy hereof, postage prepaid, in the United States mail and addressed as follows:

Paul J Doolittle
Attorney At Law
PO Box 2579
Mount Pleasant, SC 29464

PIERSIDE BOATWORKS
C O JOHN BROPHY
1300 PIERSIDE ST PIER J
NORTH CHARLESTO, SC 29405

James G. Christmas
Howell & Christmas, LLC
P O Box 1896
Mt. Pleasant, SC 29465

Blake A. Hewitt
Bluestein Nichols Thompson Delgado LLC
P O Box 7965
Columbia, SC 29202

R. Daniel Addison (1)
Hedrick Gardner Kincheloe & Garofalo
P.O. Box 11267
Columbia, SC 29211

By: Valerie D. Deller, Judicial Department

Please Reply to Columbia Office

June 19, 2018

S.C. Workers' Compensation Commission
Amy Bracy, Judicial Director
P.O. Box 1715
Columbia, SC 29202

RE: Gus A. King v. Pierside Boatworks
W.C.C. File No.: 1116698

Dear Ms. Bracy:

I am writing about an administrative Order dated June 11, 2018. I have attached a copy of the Order to this letter.

I need to raise two issues related to the Order.

First, the Order indicates "the request for commission review" in this case is being dismissed. I want to ensure the Commission is aware that three (3) requests for Commission review were filed recently. I filed two of them. The third was filed by attorney Gary Christmas.

I read the June 11 Order as indicating only one of the three requests for Commission review has been dismissed, that being the appeal of Commissioner Barden's Order dated February 13, 2018. If I am mistaken and the Commission has dismissed all of the requests for Commission review, I would appreciate a responsive communication advising me of this.

Second, the June 11 Order indicates I should have appealed the February 13 Order within 14 days. I want to make sure the Commission is aware that the February 13 Order did not address the merits in this case. The February 13 Order denied a motion to intervene I filed on behalf of the deceased Claimant's Estate. The grant or denial of a motion to intervene is interlocutory. In fact, I attempted to immediately appeal a prior Order denying the same request. The Commission dismissed that appeal as interlocutory in an order dated December 11, 2017.

Commissioner Barden addressed the merits of this case in an Order served May 1, 2018. All interlocutory rulings are appealable as part of the appeal of the merits. My clients wish to appeal the May 1, 2018, Order addressing the merits, and they also wish to appeal the interlocutory decision disallowing the Claimant's Estate from participating in this case. Please accept my apology if my filing multiple Form 30s was incorrect or confusing in this regard.

If you have any questions concerning this matter, please do not hesitate to contact me at (803)779-7599. I would be happy to provide any further explanation or clarification if it would be helpful. With kind regards, I am

Yours truly,

A handwritten signature in black ink, appearing to read "Blake A. Hewitt".

Blake A. Hewitt

BAH
enclosure

cc: J. Gary Christmas, Esq.
R. Daniel Addison, Esq.
Paul Doolittle, Esq.