

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2018-001234

Ex Parte: Preston F. McDaniel, Esquire,
and John M. Milling, Esquire, Appellants,

IN RE:

Pamela Cartee, Claimant,

v.

SC Judicial Department, Employer,
and State Accident Fund, Carrier, Defendants.

RECEIVED
AUG 14 2018
SC Court of Appeals

RETURN TO MOTIONS STYLED AS:

NOTICE OF MOTION AND MOTION FOR AN ORDER OF A JUDGE OF THE COURT FOR A TEMPORARY STAY OF THE APPEAL AND TIME LIMITS PURSUANT TO RULE 240 (b) AND 240 (i), SCACR; THEN AFTER TIME TO FILE A RETURN FOR AN ORDER STAYING THE APPEAL PURSUANT TO RULE 205 AND 240, SCACR, AND REMANDING THE MATTER TO THE SC WORKERS' COMPENSATION COMMISSION FOR COMPLIANCE WITH THE LAW IN REFERENCE TO SERVICE OF ITS ORDER PURSUANT TO STATUTE, AND RE-CAPTIONING AND REVISING THE CONTENT OF ITS ORDER AND FOR A STAY OF FURTHER PROCEEDINGS PENDING A RESOLUTION OF THE DECLARATORY JUDGMENT ACTION; AND FURTHER PROCEEDINGS NOT INCONSISTENT WITH THE ORDER OF THE COURT.

and

MOTION TO CORRECT THE OFFICIAL CAPTION IN THIS MATTER AS SET FORTH ABOVE TO INCLUDE THE NAME OF THE RESPONDENT,

**SC WORKERS' COMPENSATION COMMISSION, DUE TO OVERSIGHT
AND/OR INADVERTENT ERROR IN THE CAPTIONING BY THE COURT
UNDER RULE 267, SCACR**

The South Carolina Workers' Compensation Commission (the WCC) files this Return to the various outstanding motions. The WCC also requests certain ministerial corrections. To understand this return, it is necessary to review the contorted procedure in this matter.

This began as a routine workers' compensation matter in which the claimant, Ms. Cartee, won an award as the result of an injury she incurred while she was an employee of the South Carolina Judicial Department. The award is not in dispute, has not been appealed, and the merits of the award are not at issue. The dispute is about an award of attorney's fees that was for less than the amount desired by Appellant made by the Honorable H. Gene McCaskill as a single commissioner and affirmed by the Full Commission. The end result is that Appellants believe they have been awarded less attorneys' fees than they are entitled to receive per their fee agreement. It has been represented to us that the claimant, Ms. Cartee, does not object to the requested attorneys' fees even though an approval of the higher attorneys' fees requested by Appellants would reduce Ms. Cartee's total recovery. The WCC is concerned that Appellants are attacking the WCC's authority to protect the interests of claimants with regard to attorneys' fees, a power the WCC has for the protection of claimants and the WCC wishes to intervene for this reason. Should Appellant prevail on its appeal, Ms. Cartee will have to pay to her lawyer an additional \$13,461.76 out of money that has been awarded to her to compensate her for her permanent and total disability. Ms. Cartee has already paid her lawyers \$69,499.57 which was withheld from compensation awarded to her by the Commission.

To complicate this matter further, Appellants filed a collateral attack on the Commission's action in the Circuit Court in Darlington County in 2018-CP-16-334. Ms. Kirkland and I appeared in that case on behalf of the Commission to support the Commission's view that Mr. McDaniel's and Mr. Milling's proper action to challenge the fee reduction is a direct appeal of that Commission order to the South Carolina Court of Appeals. This appeal is that action. The Darlington action is superfluous and we are confident that the circuit court will ultimately be found not to have subject matter jurisdiction in this workers' compensation case. Judge Burch issued a stay in that case to allow Mr. McDaniel and Mr. Milling time to amend their complaint.

1. The proper parties and the proper caption.

This court by letter dated July 11, 2018, sets forth a caption that does not include the Commission as a party. Mr. McDaniel filed a Motion to Correct the Official Caption on July 26, 2018, and the Commission filed a motion to intervene on July 30, 2018. The result of either of these requests would be to include the Commission as a party with standing in this case and we request you do so. The Commission does not object to being listed in the caption, so long as it is clear for the record that the Commission was the adjudicator of, and not an adverse party defendant to, the underlying decision on appeal.

We believe this is particularly important in this case because the ultimate issue is whether S.C. Code Ann. § 42-15-90 that provides in part "(A) Attorney fees, physician fees, and hospital charges for services under this title are subject to the approval of the commission. . ." *Id.* was properly applied in this case which resulted in reduced attorneys' fees. If the Commission is not given standing, there will not be a side to argue that the WCC's authority with regard to attorneys' fees is proper.

2. Proper service of process by the Commission.

In Paragraph 7 of his Memorandum in support of the aforementioned motion, Mr. McDaniel states:

7. That pursuant to the Affidavits of the Appellant Preston F. McDaniel and the Affidavit of John M. Milling, the Appellant Preston F. McDaniel has not been served with a revised, recaptioned Order as of the date of this filing, and John M. Milling has never been served either by electronic mail, regular US .mail, certified US Mail, or personally with a copy of the Order issued by the Full Commission on May 30, 2018, or a revised Order.

The issue of the proper caption is being addressed here. Regardless, whether the order referred to by Mr. McDaniel contains the WCC in the caption is of no moment. No rights are impacted as the WCC has its opportunity to intervene here and Appellants Milling and McDaniel are before the Court. No rights of Appellants are impacted. There is not any prejudice to anyone. If anyone has the right to complain, it is the WCC and the WCC is not complaining.

The Certificate of Service attached to the Commission Order provides that “[t]his is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon on all parties by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties. . .” “[W]e hold an email sent from the court, an attorney of record, or a party that provides written notice of entry of an order or judgment triggers the time for serving a notice of appeal for purposes of Rule 203(b)(1), SCACR. For the reasons stated, our holding shall be applied prospectively and Petitioners' appeal is remanded to the Court of Appeals to proceed on its merits.” *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 422 S.C. 211, 219, 810 S.E.2d 856, 860 (2018). Section 67-213(A) specifically allows service of Decision and Orders electronically.

Ms. Sabrina Kelly, Paralegal to Mr. McDaniel, emailed Ms. Amy Bracy, Judicial Director of the Commission, on June 1, 2018, complaining that Mr. Milling was not served with a copy of the decision and order. Ms. Bracy responded that Mr. Milling was not served because he was “neither a party to the December 8th, 2017 Form 61 Fee Petition nor the March 20th, 2018 Form 30 Request for full Commission Review.” The referenced email and the Form 61 are attached to McDaniel’s Motion at 21 – 26.

S.C. Code Ann. Regs. 67-213(A) (2018 Supp.) permits electronic service of Commission Orders. The Order in this case was served on May 30th, 2018 and service was complete within five days. Rule 203(b)(6) requires that the notice of appeal be served “within thirty (30) days after receipt of the decision.” There is no dispute that both Mr. McDaniel and Mr. Milling “received” copies of the signed and executed Decision and Order of the Full Commission.

The Commission’s procedures for serving parties electronically is consistent with the Administrative Procedures Act and does not conflict with § 1-23-380 as asserted by Appellant. Section 1-23-380 does not purport to govern procedure or deadlines for filing motions or petitions before the Commission.

The Workers’ Compensation Commission is not required to provide notice of an award by certified mail. The only mention of certified mail in regards to awards of the Commission appears in the section dealing with conclusiveness of awards and appeals, § 42-17-60. The pertinent sentence to that section provides

However, either party to the dispute, within thirty days from the date of the award or within thirty days after receipt of notice to be sent by registered mail of the award, but not after, whichever is longest, may appeal from the decision of the commission to the court of appeals.

S.C. Code Ann. § 42-17-60 (1976, as amended). The purpose of this sentence is to establish the deadline for filing an appeal to the Court of Appeals, not to designate the method the

Commission must use to notice parties of its awards. Further, use of the conjunction “or” between the clauses “date of the award” and “within thirty days after receipt of notice to be sent by registered mail of the award” evidences that the Commission is not required to use certified mail, but has the option to use certified mail. Designation of the method the Commission is to use in providing notice of its awards is codified at Reg. 67-213, which was promulgated and amended in accordance with § 42-3-30. The Commission’s electronic service of the Decision and Order on May 30th, 2018 to Mr. McDaniel provided him sufficient notice of the award consistent with § 42-17-60.

There has not been a violation of the rules regarding service of process of the order. Regardless, no deadlines have been missed, there is no prejudice, and the parties are before this court.

3. Request to stay this appeal.

There is no reason to stay this appeal. Mr. McDaniel seems to ask for two different stays. First, he appears to ask for a stay so that the matter may be remanded to the WCC for correction of the caption and compliance with the law of service. The issue about the caption is being addressed here and is only relevant for this appeal. The WCC is not a proper party for a hearing before itself and has no interest in the attorney’s fee matter other than an interest in preserving its review powers which are for the benefit of claimants, not the Commission. As discussed previously, there is no problem with service of process.

Second, there is no reason to stay this appeal which is properly before this court. There is no reason to issue a stay until a Darlington Circuit Court that does not have subject matter jurisdiction makes an irrelevant ruling. “All questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, shall be

determined by the commission, except as otherwise provided in this title.” S.C. Code Ann. § 42-3-180. The issue with regard to attorneys’ fees is squarely a matter before the Commission pursuant to § 42-15-90 and the circuit court does not have subject matter jurisdiction.

The Commission is the “Administrative Tribunal” as defined in Rule 202(b)(2), SCACR. Appeal from a final decision of the Commission should be taken to the Court of Appeals in the same manner as an appeal from a final decision from a lower court or any other administrative tribunal. The following authorities support this position:

It is plain from the foregoing statute [Code 1962 § 72-356] that it was the intention of the legislature to provide for the disposition of a claim made to the Industrial Commission by the orderly process of a hearing before a Single Commissioner; a review, by the Full Commission, of the Single Commissioner's award; an appeal from an award by the Full Commission to the Court of Common Pleas; and an appeal from that Court to the Supreme Court.

Greer v. Greenville Cty., 245 S.C. 442, 452, 141 S.E.2d 91, 96 (1965)

It was the intent of the Legislature to provide that the procedure [on appeal] should be akin to that of a court, as, for instance, an appeal from an inferior court to the Court of Common Pleas, and an appeal from that Court to the Supreme Court... Thus, ... the intention of the Legislature was to provide for the disposition of a claim made to the Industrial Commission by the orderly process of a hearing before a Single Commissioner, or a deputy appointed by the Full Commission; a review, by the Full Commission, of the Single Commissioner's award; an appeal from an award by the Full Commission to the Court of Common Pleas; and an appeal from the Court of Common Pleas to the Supreme Court.

Riddle v Fairforest Finishing Co., 198 S.C. 419, 18 S.E.2d 341, 343-44 (1942); *see also Walsh v. U. S. Rubber Co.* 238 S.C. 411, 120 S.E.2d 685 (1961).

Where it was contended that an appeal from the Commission should be treated the same as if it had come from a lower court it was held that:

Upon consideration of the whole act and its drastic departures from the common law which it displaced, the answer is patent that the procedure upon appeal must not be permitted to conflict with the novel substantive law which the act contains.

Schwartz v. Mount Vernon-Woodberry Mills, 206 S.C. 227, 239, 33 S.E.2d 517, 521–22 (1945). S.C. Code Ann. § 42-17-60 was amended in 2007 to allow appeals from final decisions of the Commission to be taken directly to the Court of Appeals, rather than the Court of Common Pleas. 2007 S.C. Act No. 111, Pt I, § 30, eff July 1, 2007, applicable to injuries that occur on or after that date.

4. Other ministerial matters.

The South Carolina Appellate Case Management System has Attorney General Wilson and Senior Assistant Attorney General T. Parkin Hunter as attorneys for the South Carolina Judicial Department and James Keith Roberts as attorney for the WCC. The Attorney General and I are not representing the South Carolina Judicial Department in this workers' compensation matter. The SC Judicial Department is the employer. We have no knowledge as to the representation, if any, of the South Carolina Judicial Department in this matter. Mr. Roberts is the General Counsel for the Commission but Harley L. Kirkland and T. Parkin Hunter are representing the Commission. The claimant, Ms. Cartee, also is not anticipated to appear.¹

The sum of \$13,461.76 is at stake in this matter and whether it will be part of Ms. Cartee's award or part of the attorneys' fees paid to Appellants. The WCC believes this Court should affirm the WCC's finding.

[Signature block is on the next page]

¹ Given the potential for a conflict of interest between Ms. Cartee and Appellants, the Court might consider appointing a Guardian ad Litem or independent attorney to speak on her behalf to the Court of Appeals.

Respectfully Submitted,

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By: 

ATTORNEYS FOR THE COMMISSION

COLUMBIA, SOUTH CAROLINA
AUGUST 14, 2018

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Return to Motions in the above matter, by placing a copy of said document in the United States mail, first class postage prepaid, and addressed to:

1. Preston F. McDaniel, Esq.
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
2. John M. Milling
Milling Law Office
P.O. Box 519
Darlington, SC 29540

August 14, 2018
Columbia, South Carolina.

[Continued on Following Page]

By: T. R. [Signature]

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