

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2018-001477

Robert J. D'Espies, Claimant, Appellant,

v.

S&A Construction and More, LLC, Employer, and the South Carolina
Workers' Compensation Uninsured Employers' Fund, Respondents.

INITIAL REPLY BRIEF OF APPELLANT

RECEIVED
OCT 17 2018
SC Court of Appeals

Craig Anderson Snook
SC Bar No. 10128
Axelrod & Associates, P.A.
4701 Oleander Drive
Myrtle Beach, South Carolina 29577
Telephone: (843) 916-9300
craig@gotaxelrod.com

Attorney for Appellant

TABLE OF CONTENTS

Table of Authorities ii

Argument

THE APPELLATE PANEL DECISION IS IMMEDIATELY APPEALABLE
UNDER S.C. CODE ANN. §1-23-380 (SUPP. 2015) AND HILTON V.
FLAKEBOARD AM. LTD., 418 S.C. 245, 791 S.E.2D 719 (2018).....1

Conclusion3

TABLE OF AUTHORITIES

CASES

Bone v. U.S. Food Service, 404 S.C. 67, 76, 744 S.E.2d 552, 557 (2013) 1

Hilton v. Flakeboard Am. Ltd., 418 S.C. 245, 791 S.E.2d 719 (2018) 1, 2, 3

The Island Packet v. Kittrell, 365 S.C. 332, 617 S.E.2d 730 (2005) 1

STATUTES

S.C. Code Ann. §1-23-380 (Supp. 2015) 1, 3

ARGUMENT

THE APPELLATE PANEL DECISION IS IMMEDIATELY APPEALABLE UNDER S.C. CODE ANN. §1-23-380 (SUPP. 2015) AND HILTON V. FLAKEBOARD AM. LTD., 418 S.C. 245, 791 S.E.2D 719 (2018).

Before making his reply to the argument of Respondent UEF, it should be noted that Respondent S&A has filed no brief or designation of matter in this appeal. This is of critical importance to the resolution of this matter insofar as it is Respondent S&A around whom the entire controversy is centered. Respondent S&A is the party that failed to appear at the Single Commissioner hearing. Respondent UEF appeared at the hearing, defended the case and lost before the Single Commissioner. Were it not for Respondent S&A's after the fact allegation in its Form 30 that it did not receive actual notice of the Single Commissioner hearing, the Appellate Panel would have affirmed the Single Commissioner.¹

In any event, this appeal is properly before this Court for review. Appeals from administrative agencies are governed by the Administrative Procedures Act. Bone v. U.S. Food Service, 404 S.C. 67, 76, 744 S.E.2d 552, 557 (2013). Pursuant to the APA 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 Ann. §1-23-380 (Supp. 2015). Our Supreme Court has held that whether an intermediate action or ruling is immediately reviewable is to be decided on a case-by-case basis i.e., whether a review of the final decision would not provide an adequate remedy. The Island Packet v. Kittrell, 365 S.C. 332, 617 S.E.2d 730 (2005). Most recently in Hilton v. Flakeboard Am. Ltd., 418 S.C. 245, 791 S.E.2d 719 (2018),

¹ The Respondents raised numerous grounds for appeal in their respective Form 30's but the only issue addressed and ruled on by the Appellate Panel was the notice issue raised by Respondent S&A. As noted in Footnote 2 of Appellant's Brief, Respondent UEF is precluded from raising these issues for its benefit due to lack of standing, waiver and estoppel.

the Court addressed a situation where the Commission in effect ordered a new trial under extraordinary circumstances and found that requiring the claimant to wait to appeal until the final agency decision would not provide him with an adequate remedy. See Hilton, 418 S.C. at 252. That is precisely what is happening here and applying this analysis to the case at bar reveals that this case is in fact immediately appealable under the APA and Hilton.

In the present action, the Appellate Panel Decision from which Appellant appeals presents a question of first impression in South Carolina, to wit: “Does a party to a worker’s compensation case have a right to *actual* receipt of a hearing notice when the applicable regulations governing service of hearing notices provide for service by mail and the party does not allege that the notice was erroneously addressed or improperly mailed? Resolution of this novel issue at this juncture presents Appellant’s only adequate remedy and serves the interest of justice for several reasons.

First, there is little if any harm to the Respondents in having this matter heard and decided by this Court right now. If this question is answered in the affirmative by this Court, Respondents will receive the *de novo* hearing ordered by the Appellate Panel. If this question is answered in the negative by this Court, the Respondents will be spared the time and expense of re-litigating the case at the *de novo* remand hearing in the face of ultimately losing the case in a subsequent appeal.

On the other hand, if this appeal is dismissed as not immediately appealable, Appellant will be forced to re-litigate a claim on which he has already prevailed under new circumstances which are disadvantageous at best and fundamentally unfair at their worst. Should the Appellant lose the *de novo* remand hearing, he will have been forced to spend additional time and money only to appeal the very same issue that is presently before this Court. In the event that Appellant prevails in the *de novo* remand hearing, he will be left facing the uncertainty of additional potential appeals and further Commission hearings flowing from the events of the *de novo* remand hearing, or as

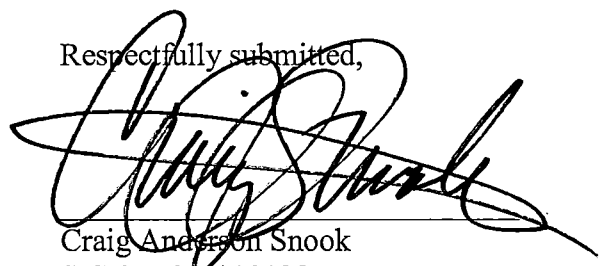
the Hilton Court described it: “the possibility of repeated unexplained ‘do overs’ before a final decision of the Commission.” 418 S.C. at 252. This is precisely the type of *inadequate* remedy the Hilton decision is designed to avoid. The issue presented here is unique, unusual and every bit a “hens tooth” for proper consideration and decision by this Court.

All things considered, it simply makes sense to determine this issue now instead of later, thereby preserving valuable judicial resources and saving all the parties time and money in the process. As stated by the Court in Hilton “[u]nder these extraordinary circumstances *** the standard set by §1-23-380(A) has been met.” 418 S.C. at 251. Appellant’s adequate remedy under the APA and Hilton lies with this Court hearing and deciding this issue in the present appeal.

CONCLUSION

For the reasons stated hereinabove and in the Appellant’s Brief, this Court should hear and decide this issue now, reverse the Decision and Order of the South Carolina Workers’ Compensation Commission dated July 2, 2018 and reinstate the Decision and Order of the Single Commissioner dated November 29, 2017.

Respectfully submitted,



Craig Anderson Snook
S.C. Bar No. 10128
Axelrod & Associates, P.A.
4701 Oleander Drive
Myrtle Beach, South Carolina 29577
Telephone: (843) 916-9300
craig@gotaxelrod.com

Attorney for Appellant

October 15, 2018
Myrtle Beach, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2018-001477

Robert J. D'Espies, Claimant,Appellant,

v.

S&A Construction and More, LLC, Employer, and the South Carolina
Workers Compensation Uninsured Employers' Fund,Respondents.

RECEIVED

OCT 17 2018

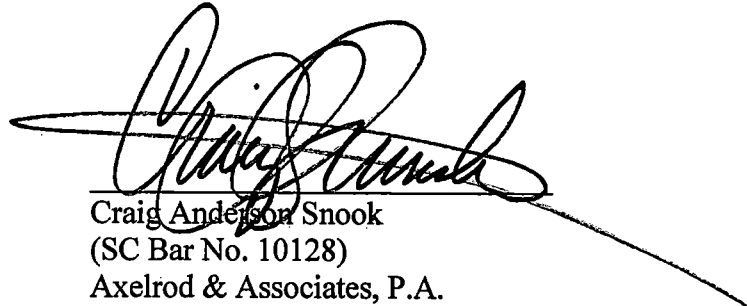
SC Court of Appeals

PROOF OF SERVICE

I hereby certify that I have served Appellant's Initial Reply Brief on the attorney for the Respondent South Carolina Workers' Compensation Uninsured Employers' Fund and the *pro se* Respondent S&A Construction and More, LLC by placing it in the US mail, postage pre-paid on October 15, 2018, addressed as follows:

Timothy B. Killen, Esquire
349 W. Coleman Blvd, Suite 300
Mt. Pleasant, SC 29464
(843) 277-0826
Counsel for Respondent South Carolina Workers'
Compensation Uninsured Employers' Fund

S&A Construction & More, LLC, *pro se*
Attn: Scott Caulder
296 Hwy 66
Conway, SC 29526



Craig Anderson Snook
(SC Bar No. 10128)
Axelrod & Associates, P.A.
4701 Oleander Drive
Myrtle Beach, South Carolina 29577
Telephone: (843) 916-9300
craig@gotaxelrod.com

October 15, 2018
Myrtle Beach, South Carolina

Attorney for Appellant

AXELROD & ASSOCIATES, P.A.
Attorneys and Counselors at Law

Stuart Mark Axelrod†
Caitlin M. Epley
Craig Anderson Snook
Laura L. Hiller
Heather M. Sarvis‡
Pamela Ansari Cobiella◊
William J. Nowicki (Rock Hill Office)*

"Success is all that Matters"
Over 90 Years Combined Legal Experience

4701 Oleander Drive
Myrtle Beach, SC 29577
P: 843.916.9300
F: 843.916.9311

GotAxelrod.com

†Certified Family Court Mediator
‡Certified Guardian ad Litem
◊Licensed in SC, MD and DC
*Licensed in SC and NC

October 15, 2018

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: D'Espies v. S&A Construction & More, LLC, et.al.
Appellate Case No.: 2018-001477

Dear Ms. Kitchings:

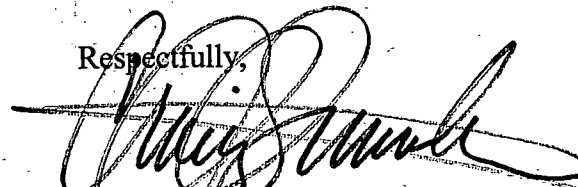
Enclosed for filing are the following:

1. Initial Reply Brief of Appellant;
2. Proof of Service for the foregoing; and
3. Postage paid return envelope.

By copy of this letter I am serving Respondents with the same. Please have your staff clock in the enclosed copy of the Initial Reply Brief of Appellant and return the clocked copy to my office in the postage paid return envelope.

Thank you for your assistance and please let me know if there are any questions in this regard.

Respectfully,



Craig Anderson Snook, Esquire
Attorney & Counselor at Law

RECEIVED
OCT 17 2018
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
October 15, 2018
Page 2 of 2

Enclosure(s) as stated

cc: Timothy B. Killen, Esquire w/enclosures
S&A Construction & More, LLC (*pro se*) w/enclosures

AXELROD & ASSOCIATES, P.A.
ATTORNEYS AND COUNSELORS AT LAW

4701 Oleander Drive
Myrtle Beach, South Carolina 29577
(P) 843-916-9300 (F) 843-916-9311

TO:

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
MAY 17 2012
S.C. COURT OF APPEALS