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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2018-001234

RECEIVED
FEB 19 2019
SC Court of Appeals

Pamela Cartee, Claimant,

v.

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

IN RE: Preston F. McDaniel, Esquire,
and John M. Milling, Esquire, Appellants,

v.

SC Workers' Compensation Commission.....Respondent.

MOTION TO REMAND TO SC WORKERS' COMPENSATION COMMISSION,
THE ADMINISTRATIVE LAW COURT OR THE CIRCUIT COURT
TO FINALIZE THE RECORD BEFORE THE AGENCY
AND SPECIFICALLY PURSUANT TO SC CODE §1-23-380(4)
FOR SUCH ACTION AS THE COURT CONSIDERS APPROPRIATE TO ADDRESS
SO AS TO COMPLETE THE RECORD TO
ALLEGED IRREGULARITIES IN THE PROCEDURES BEFORE THE AGENCY
NOT SHOWN IN THE RECORD
AND
FOR AN ORDER STAYING THE APPEAL PENDING COMPLETION OF
THE RECORD BEFORE THE AGENCY FOR SUBMISSION TO THE COURT

TO: T. PARKIN C. HUNTER, ESQUIRE AND HARLEY L. KIRKLAND,
ATTORNEY, ATTORNEYS FOR THE RESPONDENT:

YOU WILL PLEASE TAKE NOTICE that pursuant to Rule 240, SCACR,
the Appellants in the above-referenced matter move for an Order of
the Court remanding this matter to, the SC Workers' Compensation
Commission; the Administrative Law Court; or the Circuit Court as
the Court deems appropriate to finalize the Record before the
Agency pursuant to the directions of the Court under SC Code §1-
23-380(4) as to the issues raised on appeal involving alleged
irregularities in the procedures before the Agency not shown in
the Record, and for an Order staying the appeal pending completion
of the Record before the Agency for submission to the Court. Said
Motion is based upon the Memorandum attached hereto and
incorporated herein by reference.

WE SO MOVE.

Respectfully submitted:



Preston F. McDaniel, Esquire
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

and

John M. Milling, Esquire
MILLING LAW FIRM
Post Office Box 519
Darlington, SC 29532
(843) 393-4083

Appellants

February 19, 2019

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SC Workers' Compensation Commission.....Respondent.

MEMORANDUM IN SUPPORT OF
MOTION TO REMAND TO SC WORKERS' COMPENSATION COMMISSION,
THE ADMINISTRATIVE LAW COURT OR THE CIRCUIT COURT
TO FINALIZE THE RECORD BEFORE THE AGENCY
AND SPECIFICALLY PURSUANT TO SC CODE §1-23-380(4)
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The Movants, the Appellants before the Court, would respectfully show unto the Court in support of the Motion to Remand this matter to the SC Workers' Compensation Commission, or the Administrative Law Court or the Circuit Court as the Court deems appropriate to complete the Record so as to address and establish in the Record the irregularities in procedure not shown in the Record as directed by the Court as follows:

1. That this matter involves an appeal from the Order of the Full Commission sitting en banc affirming 4-2, with four members voting on the "Vote Sheets" to simply affirm [WCC Reg. 67-709(E) (2) - mandates any modifications be recorded] the Order of the Hearing Commissioner refusing to approve a portion of the attorneys' fees requested for approval by the Appellants. Again, for the Record, it is noted that it is uncontested that the Fee Petition was a standard fee petition calculated on the same basis as hundreds that have been approved by the Commission(ers) since 1994 - the inception of the Regulation and that Ms. Cartee, the claimant and client of the Appellants, specifically requested that the fee as submitted and requested for approval be approved by the Commission; waived any appearance; and in fact advised the Commission that she would be glad to appear before the Commission in support of the fee being approved as requested.

2. That as set out in the Notice of Appeal, the appeal involves numerous exceptions alleging irregularities in procedure both before and in the Hearing Commissioner process; during and in the Full Commission appeal (review) process, hearing and Order; and subsequent to the Order of the Full Commission sitting en banc (a variance in procedure) up to and including the subsequent process and the appeal filed by the Appellants to this Court, and the irregularities in procedure as they affect this Appeal and a Declaratory Judgment action filed/pending in the Circuit Court.

3. That as to the Hearing Commissioner and process as part of the irregularities in procedure not appearing in the Record those specifically include:

a. The WCC Regulations for approval of attorney's fees provides under R. 67-1204(D)(E) that the Order approving the attorney's fees may be signed or the Commissioner may amend, sign and return the Order and the Attorney, if he disagrees with the Amended Order may file a Motion with the Commission's Judicial Department in which the Attorney may request to present testimony or evidence. Subsection F provides that if the Commissioner reviewing the Form 61 and Order finds that it does not comply, the Commissioner is mandated and, "shall immediately schedule a Hearing to consider argument of Counsel and testimony". The Fee Petition in question was submitted on December 5th and no hearing was scheduled

by the Commissioner nor if there anything in the Record to establish that one was even contemplated until after January 9th when the Appellants requested a hearing. This is a clear-cut violation of that Regulation and there is nothing in the Record to establish why this irregularity in procedure occurred.

b. The Interim Order issued by the Hearing Commissioner on January 9th reflects a legal basis ("I have ... reviewed the law . . .") for refusing to approve the fee and then the final Order of the Hearing Commissioner sets forth a legal basis for denial; "reading of Regulation 67-1205(c)(2)" and a legal interpretation contrary to case law as to the date of a final "Award". The Code of Judicial Conduct provides that it is a violation of the Code for a Judicial Officer to consider any outside legal advice without notice to the parties. There is no notice appearing in the Record to Appellants nor is there any showing of where the Commissioner came up with the legal basis or analysis since it was not submitted to him for consideration by the Appellants. There is also nothing in the Record as to why the Commissioner did not amend, sign and return the Order to the Attorney in early or even mid-December which would have allowed for the filing of an immediate Motion [WCC Reg. 67-1204(E)]. There is also nothing in the Record to establish why the Commissioner found or formulated the legal opinion that the Fee

Petition was not in compliance with Rule 67-1205 for determining a reasonable fee; or why a final Order was not issued until March 9th, three months after the submission of the Fee Petition on December 5th.

c. There is nothing in the Record to establish why the Hearing Notice that was issued was served on both the employer and the insurance carrier, the State Accident Fund, and their attorney by the Commission where they are not parties to the attorney client fee contract nor the approval of fees under S.C. Code §42-15-90; the Supreme Court Rules on determining a reasonable fee, or WCC Reg. 67-1205(B) and (C)(2).

All of the above constitute irregularities of procedure not shown in the Record.

4. That subsequent to the Order of the Hearing Commissioner and the appeal, there were numerous irregularities in the processing of the appeal before the Full Commission; including specifically:

a. The only Brief that was submitted or of which the Appellants were given notice was that of the Appellants. See (C) below.

b. Neither the statutory authority of the Commission to review an Award nor any Commission Regulation provides that the review of a contested Fee Petition is to be heard en banc. In

fact, the Commission's Regulations specifically provide that all appeals are to be heard by a three-member Panel; WCC Reg. 67-709(B) (Commission has voted and approved by Order for Chairman to assign to three (3) member panels. This is a total irregularity not shown in the Record as to this process and procedure.

c. Contrary to All Regulations, Court Rules and statutory authority, the Constitution, and case law, the Appellants were not provided with any notice of any participation by anybody else, whether that be staff member, Attorney for the Commission or anyone, nor any Memorandum nor communication opposing the Memorandum of Law, the Brief and the oral argument presented by the Appellants in support of their Petition. Also, in that regard, the Hearing Commissioner's Order consisted of two (2) pages whereas the Full Commission Order is twenty (20) pages in length and the four member vote simply to affirm the Hearing Commission portion contains five (5) pages with 22 Findings of Fact and eight (8) pages with twenty-nine (29) Conclusions of Law containing number case, statutory and regulatory citations not submitted or cited to the Commission by the Appellants in their Brief. This is an obvious irregularity in procedure before the Full Commission and constitutes both a violation of law and procedure and also the potential of an ethics violation in reference to considering outside legal opinion not noticed to the

parties.

d. That the four members of the Full Commission voted to affirm the Decision of the Hearing Commissioner as written. However as noted the Full Commission Order consisted of twenty (20) pages whereas the Hearing Commissioner's Order consisted of two (2) pages and the Commission's Regulations specifically provide that if there is any modification to the Order of the Hearing Commissioner that such modifications shall be set forth in writing on the Vote Sheets (WCC Reg. 67-709(E)(2) and there is nothing on the Vote Sheets to show this irregularity in procedure as to why a twenty (20) page Order versus simple Order simply affirming that decision was written.

e. That during the processing of the appeal it was brought to the attention of General Counsel for the Commission and the Judicial Director that this involved a matter of attorney-client privilege and the contract between an Attorney and their client and that notice to and involvement of any other parties outside of the attorneys representing the Claimant and the Claimant, of any hearings or requests for submission of any information or submission of Briefs or contact or involvement with the proceedings would constitute a tortious interference with contract and a violation of the attorney-client privilege and that all such notices should be limited to the involved parties; that

being the Attorney and their client. According to the Affidavits of Service, both the Full Commission Hearing Notice and the Full Commission Order were served on counsel for the employer. There is nothing to show in the Record why this irregularity of procedure in that why was notice given to the employer and the insurance carrier who had nothing to do with nor are they a party to the submission of the request for approval of the attorney's fees to the Commission as is required by Statute.

5. That subsequent to the issuance of the Full Commission Order, there were numerous violations of procedure not appearing in the Record specifically including:

a. Why the Commission refused to include John Milling as a party to the appeal before the Full Commission and as a party to the action;

b. Why after notice the Commission refused to issue an Amended Order or serve the Order on Mr. Milling;

c. Why the Commission failed to notify the Appellants after notice of the intent to file a Petition for Rehearing of the new unpublished regulatory requirements a concerning specifically the time to file a Petition for rehearing; and

d. Why a final Order was not issued by the Commission on the Petition for Rehearing as is required by the Commission's Regulations; thus, another irregularity in procedure not appearing

in the Record.

6. That there are specific statutory provisions that mandate certain special procedures that are to be followed by the General Assembly and the Commission in the adoption of Regulations by the Commission concerning the approval of attorney's fees or in reference to attorney's fees and the review authority of the Commission of those attorney's fees. Judge Huff, then Representative Huff, was instrumental in the adoption of this special procedural safeguard outside the usual Administrative Procedures Act requirements for the adoption of agency regulations to protect both the attorneys and their clients from, maybe even well-intended, regulations implementing the approval authority of the Commission from interference with freedom of contract, the attorney-client relationship, and/or the attorneys Code of Ethics of ethical responsibilities. Although requested, there is nothing in the Record to show in the Record whether or not the Regulations were properly promulgated and adopted in accordance with SC Law and specifically SC Code §42-3-185. Although requested, there is nothing in the Record to show as to whether or not the Regulations of the Commission were enacted by the General Assembly in accordance with the specific and very stringent requirements of that Code Section.

For all the foregoing reasons and concerning the

irregularities that do not appear in the Record of the Commission, this matter should be remanded to the Commission or the ALJ or Circuit in the Court's discretion with instructions which would allow for discovery to be conducted under such direction as the Court deems appropriate to include Subpoenas and depositions to properly reflect in the Record before the Court the irregularities in procedure not now appearing in the Record. The development of the Record to establish these irregularities in procedure is in imperative to affording the Appellants' due process of law.

The remand is needed to establish whether or not the Regulations in reference to attorneys' fees were properly adopted according to law; whether or not and why the Appellants were not informed as to any problems that the Hearing Commissioner had with the Fee Petition as submitted and were not immediately provided an opportunity to challenge that; and whether or not the Hearing Commissioner failed to comply with the Commission's Regulations by not immediately scheduling a hearing and delayed the decision on the request for almost three months on denying a portion of the attorneys' fees as requested and as to whether or not he considered outside legal advice without notifying the parties involved; and whether or not proper procedure was followed in the processing of the appeal after the Order; and whether or not the Commission violated its own Regulations throughout the processing

of the appeal and in the appeal process, and in the hearing and in the Order issued by the Commission and whether or not the entire process and decision by the Commission to deny the Petition for approval of part of the attorneys' fees as requested is in accordance with statute; regulation and case law; and whether or not all of these actions or any of these actions were based on irregularities in procedure which are paramount for the Court's proper consideration of the appeal in this matter and should be made a part of the Record.

Respectfully submitted:



Preston F. McDaniel, Esquire
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

and

John M. Milling, Esquire
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Appellants

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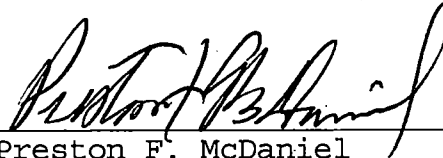
PROOF OF SERVICE

I certify that I have served the:

MOTION TO REMAND TO SC WORKERS' COMPENSATION COMMISSION, THE ADMINISTRATIVE LAW COURT OR THE CIRCUIT COURT TO FINALIZE THE RECORD BEFORE THE AGENCY AND SPECIFICALLY PURSUANT TO SC CODE §1-23-380(4) FOR SUCH ACTION AS THE COURT CONSIDERS APPROPRIATE TO ADDRESS SO AS TO COMPLETE THE RECORD TO ALLEGED IRREGULARITIES IN THE PROCEDURES BEFORE THE AGENCY NOT SHOWN IN THE RECORD AND FOR AN ORDER STAYING THE APPEAL PENDING COMPLETION OF THE RECORD BEFORE THE AGENCY FOR SUBMISSION TO THE COURT with MEMORANDUM IN SUPPORT

thereof by depositing a copy of same in the United States Mail,
postage prepaid, on February 19, 2019 addressed to:

T. Parkin C. Hunter, Esquire
Harley L. Kirkland, Attorney
Post Office Box 11549
Columbia, South Carolina 29211-1549



Preston F. McDaniel
MCDANIEL LAW FIRM
1315 Elmwood Avenue
Columbia, South Carolina 29201
(803) 771-7211

and

John M. Milling
MILLING LAW FIRM
Post Office Box 519
Darlington, South Carolina 29532
(843) 393-4083

Appellants

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McDANIEL LAW FIRM
ATTORNEYS AND COUNSELORS AT LAW
1315 ELMWOOD AVENUE
COLUMBIA, SOUTH CAROLINA 29201

**Proudly representing injured workers
for over 30 years.**

Preston F. McDaniel

Matthew Robertson

Telephone (803) 771-7211

Facsimile (803) 252-0709

February 19, 2019

VIA HAND DELIVERY

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

RE: Pamela Cartee v. SCJD (Preston F. McDaniel)
Appellate Case No. 2018-001234

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of a Motion to Remand along with the required filing fee. I would appreciate your returning a clocked-in copy to me via the courier.

By copy of this letter I am notifying and serving Counsel for the Respondent with a copy of the Motion.

As always, I appreciate all the courtesies and kindnesses shown to me by the Court.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosures

cc: John M. Milling, Esquire
T. Parkin Hunter, Esquire
Harley L. Kirkland, Attorney

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