

**BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION'S
APPELLATE PANEL**

Gena Cain Davis,)
Claimant/Respondent,)
)
-vs-)
)
S.C. Department of Corrections,)
Employer,)
and)
State Accident Fund,)
Carrier,)
Defendants/Appellants.)

W.C.C. FILE NO. 1609593

DECISION AND ORDER

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SC Court of Appeals

Statement of the Case

This matter is before the Commission's Appellate Panel pursuant to the Form 30 filed by the South Carolina Department of Corrections and the State Accident Fund seeking review and reversal of Hearing Commissioner Campbell's November 14, 2017 Order. A hearing was scheduled before Commissioner Campbell on October 24, 2017 pursuant to the Claimant's second Form 50 and the Appellants' Form 21. During a pre-hearing conference, the Claimant announced that she was withdrawing her Form 50 because she did not have any medical evidence to support her claim. The Claimant also argued that the Defendants' Form 21, which had been filed in accordance with S.C. Code Reg. 67-505(F), was not properly before the Commission. The Hearing Commissioner ruled that the Form 21 was not proper and cancelled the hearing.

By email dated November 2, 2017, the Hearing Commissioner's administrative assistant requested that the Claimant's attorney draft a proposed order regarding the dismissal of the Form 21 only. (Defendants' Exhibit "A"). The request for proposed

order makes no mention of the Form 50 withdrawal. However, the Claimant, *sua sponte*, drafted an order suggesting that she had withdrawn her second Form 50 “without prejudice.” The Defendants objected to this language in the proposed order, as the prejudice issue was never raised by the Claimant, or addressed by the Hearing Commissioner. (Defendants’ Exhibit “B”). The Claimant admitted that the issue had not been raised or ruled upon at the pre-hearing conference on October 24, 2017, but persisted nonetheless. (Defendants’ Exhibit “C”).

Commissioner Campbell issued his Order on November 14, 2017 and declared that the Claimant’s second Form 50 had been withdrawn “without prejudice” and that the Defendant’s Form 21 was not properly before the Commission. The Hearing Commissioner failed to make any findings of fact or conclusions of law and otherwise failed to elucidate the basis for his rulings. On appeal, the Defendants argue that the Hearing Commissioner’s Order is unsupported by the evidence in the record, contrary to the applicable law, impermissibly vague, and was otherwise made upon unlawful procedure. Therefore, the Defendants requested that the November 14, 2017 Order be reversed and vacated by the Appellate Panel.

We affirm in part and reverse in part.

Hearing Commissioner’s Order

The sum total of the Hearing Commissioner’s Order is as follows:

This matter was scheduled for a hearing on October 24, 2017 before the undersigned Commissioner pursuant to the Defendants’ Form 21, as well as the Claimant’s Form 50 and Defendants’ Form 51. After a

prehearing conference, the Claimant was allowed to withdraw the Form 50 without prejudice.

Furthermore, because temporary total disability compensation was suspended prior to the hearing and not current at the time of the hearing, pursuant to S.C. Code Ann. § 42-9-260(F), I find that the Form 21 hearing request was not properly before the Commission. Therefore, the Form 21 was dismissed and the October 24, 2017 hearing was cancelled. No penalties were assessed. The claim is hereby returned to the Commission's general files.

IT IS SO ORDERED!

Issues on Appeal

The Defendants raised the following issues on appeal:

1. *Did the Hearing Commissioner err in vaguely concluding that "the Claimant was allowed to withdraw the Form 50 without prejudice," considering the following:*
 - a. *The Claimant previously withdrew her Form 50 dated October 21, 2016 on February 8, 2017 after a hearing was scheduled, discovery was completed, and pre-hearing briefs were filed;*
 - b. *The Claimant refiled her Form 50 on April 18, 2017 and a hearing was scheduled for July 19, 2017;*
 - c. *The Defendants moved to postpone the July 19, 2017 hearing in order to depose an expert belatedly obtained by the Claimant and the Claimant did not object;*

- d. *The claim was rescheduled for a hearing on October 24, 2017;*
- e. *The Claimant filed pre-hearing briefs on July 6, 2017 and October 6, 2017, neither of which make any suggestion that discovery was incomplete, that additional time was needed, that the matter should be postponed, or that the hearing scheduled for October 24, 2017 was in any way premature;*
- f. *The Defendants went to the cost and expense of not only filing a second pre-hearing brief in anticipation of the October 24, 2017 hearing, but went to the further cost and expense of actually appearing before the Hearing Commissioner as scheduled on October 24, 2017;*
- g. *At a pre-hearing conference on October 24, 2017, the Claimant withdrew her Form 50 without any showing of good cause or motion/request that would allow her to withdraw her Form 50 a second time without prejudice to the Claimant's right to proceed with her claim;*
- h. *At the pre-hearing conference on October 24, 2017, the Hearing Commission made no ruling and otherwise made no mention of the issues of prejudice; good cause, or delay;*
- i. *The Commission formally recorded that the Form 50 was "withdrawn" on October 30, 2017;*
- j. *On November 9, 2017 – 17 days after withdrawing her Form 50 a second time – the Claimant informed the Hearing Commissioner by email (attached Exhibit A) that "[i]his matter has become more*

complicated that initially realized at the Hearing because [the Defendants] are now seeking to dismiss the claim" and asked that the Hearing Commissioner allow the Claimant to somehow retroactively withdraw the previously withdrawn second Form 50 without prejudice and leave to refile;

- k. The Defendant vehemently objected to the Claimant's untimely and inappropriate request more than 2 weeks after the second Form 50 was withdrawn, as the Hearing Commissioner had no proper motion before him, no hearing request was pending, and the Hearing Commissioner otherwise lacked jurisdiction to adjudicate the Claimant's untimely request;*
- l. In addition, the Defendants noted that it was prejudicial to their right of due process to allow the Claimant to make new arguments without proper notice and adequate opportunity to be heard on these novel issues, which had not previously been raised prior to the withdrawal of the second Form 50;*
- m. The Defendants respectfully contend that the second Form 50 was withdrawn without good cause and merely for the purpose of delay, as evinced by the Claimant's own statements to the Hearing Commissioner (see attached Exhibit A) that "[i]n light of [the Defendants' position] and over concern that there may not be sufficient proof in the record, I advised Commissioner Campbell that I was withdrawing my Form 50 to obtain additional medical evidence;"*

- n. *The Claimant's own statements make it clear that there was no contemporaneous request regarding the withdrawal of the second Form 50 and instead the Claimant admits that she merely informed the Commission of her Decision because she was unprepared for the hearing she herself had requested and required an additional delay, even though more than a year had passed since the original hearing request;*
- o. *In addition, the Defendants respectfully contend that the Claimant's claimed ignorance of the statutory requirements of S.C. Code Ann. § 42-15-60 does not constitute "good cause" under any legal theory, statute, or regulation;*
- p. *The Defendants further contend that the Hearing Commissioner's Order of November 14, 2017 makes no mention of the governing legal authority, S.C. Code Reg. 67-609, makes no finding of "good cause," and is therefore unlawful, impermissibly vague, and otherwise contrary to the requirements of the Administrative Procedures Act and Workers' Compensation Act;*
- q. *Furthermore, the Hearing Commissioner's November 14, 2017 Order was based upon unlawful procedure and otherwise violates the Defendants' statutory and constitutional right of due process;*
- r. *Lastly, the Hearing Commissioner's pronouncement in the November 14, 2017 regarding the prejudice issue is in contravention of the requirements of S.C. Code Reg. 67-609(C)?*

2. *Did the Hearing Commissioner err in vaguely concluding that the Form 21 hearing request was not properly before the Commission when the Form 21 hearing request was properly filed in accordance with S.C. Code Ann. § 42-15-60, S.C. Code Ann. § 42-15-80, and S.C. Code Reg. 67-505(F)?*

Discussion

- I. **The Hearing Commissioner erred as a matter of law in vaguely concluding that “the Claimant was allowed to withdraw the Form 50 without prejudice.”**

The Claimant voluntarily withdrew her first Form 50 (dated October 21, 2016) on February 8, 2017 *after* a hearing was scheduled, discovery was completed, and pre-hearing briefs were filed. The Claimant then filed a second Form 50 on April 18, 2017 and a hearing was scheduled for July 19, 2017. The Defendants moved to postpone the July 19, 2017 hearing in order to depose an expert belatedly obtained by the Claimant and the Claimant did not object. At that time, the second Form 50 was rescheduled for a hearing on October 24, 2017.

The Claimant filed pre-hearing briefs on July 6, 2017 and October 6, 2017, neither of which make any suggestion that discovery was incomplete, that additional time was needed, that the matter should be postponed, or that the hearing scheduled for October 24, 2017 was in any way premature. In addition, the Defendants went to the cost and expense of not only filing a second pre-hearing brief in anticipation of the

October 24, 2017 hearing, but went to the further cost and expense of actually appearing before the Hearing Commissioner as scheduled on October 24, 2017.

At a pre-hearing conference on October 24, 2017, the Claimant withdrew her Form 50 without any showing of good cause or request that would allow her to withdraw her Form 50 a second time without prejudice to the Claimant's right to proceed with her claim. Furthermore, at the pre-hearing conference on October 24, 2017, the Hearing Commissioner made no ruling and otherwise made no mention of the issues of prejudice, good cause, or delay. The issue simply was not raised by the Claimant or ruled upon by the Hearing Commissioner on October 24, 2017 – "good cause" was not even discussed. Thereafter, on October 30, 2017, the Commission formally documented that the second Form 50 had simply been "withdrawn." (Defendants' Exhibit "D").

On November 9, 2017 – 17 days after withdrawing her Form 50 for a second time – the Claimant informed the Hearing Commissioner by email (Defendants' Exhibit A) that

"[t]his matter has become more complicated than initially realized at the Hearing because [the Defendants] are now seeking to dismiss the claim"

and asked that the Hearing Commissioner allow the Claimant to somehow *retroactively withdraw* the previously withdrawn second Form 50, but this time without prejudice and leave to refile. The Defendants objected to the Claimant's untimely and inappropriate request more than 2 weeks after the second Form 50 was withdrawn, not only because it was without merit, but because the Hearing Commissioner had no proper motion before him, no hearing request was pending, and the Hearing

Commissioner otherwise lacked jurisdiction to adjudicate the Claimant's untimely request. In addition, the Defendants noted that it was prejudicial to their right of due process to allow the Claimant to make new arguments without proper notice and adequate opportunity to be heard on these novel issues, which had not previously been raised prior to the withdrawal of the second Form 50. The Appellate Panel agrees.

The Defendants further contend that the second Form 50 was withdrawn without good cause and merely for the purpose of delay, as evinced by the Claimant's attorney's own statements to the Hearing Commissioner (see attached Exhibit A) that

“[i]n light of [the Defendants' position] and over concern that there may not be sufficient proof in the record, I advised Commissioner Campbell that I was withdrawing my Form 50 to obtain additional medical evidence.” (emphasis added).

The Claimant's own statements make it clear that there was no contemporaneous argument that the withdrawal of the second Form 50 was for good cause, or request that she be allowed to do so without prejudice, but instead, the Claimant admits that she merely *informed* the Commission of her decision because she was unprepared for the hearing she herself had requested and required an additional delay, even though more than a year had passed since the original hearing request.

In addition, the Defendants contend that the Claimant's claimed ignorance of the statutory requirements of S.C. Code Ann. § 42-15-60 and ill-preparedness to prove her case with the statutorily-required evidence at the October 24, 2017 hearing does not constitute “good cause” under any legal theory, statute, or regulation. The current

version of S.C. Code Ann. § 42-15-60 was enacted more than a decade ago and the Defendants argue that it is untenable that the Claimant's claimed ignorance of that statute's evidentiary requirements could somehow justify her withdrawing her hearing request after the hearing was scheduled to begin. According to the Defendants, the Claimant's burden of proof under § 42-15-60 was not a new issue, her failure of proof was not a matter beyond her control, and there was no showing of due diligence to meet this long-established burden. The Appellate Panel does not address the issue of "good cause," believing it is not properly before the Commission at this time.

The Defendants further contend that the Hearing Commissioner's Order of November 14, 2017 makes no mention of the governing legal authority, S.C. Code Reg. 67-609, makes no finding of "good cause," and is therefore unlawful, impermissibly vague, and otherwise contrary to the requirements of the Administrative Procedures Act and Workers' Compensation Act. See S.C. Code Ann. § 42-17-40(A); see also Hill v. Jones, 255 S.C. 219 (1970). The Appellate Panel agrees that the Hearing Commissioner's Order is impermissibly vague, as it lacks detailed findings of fact and rulings of law.

In addition, the Defendants argue that the Hearing Commissioner's pronouncement in the November 14, 2017 regarding the prejudice issue is in contravention of the requirements of S.C. Code Reg. 67-609(C). That regulation clearly and unequivocally states that

"[w]ithdrawing a Form 50...the second time without good cause may operate as a voluntary dismissal of the claim when the form is withdrawn by a claimant who has once withdrawn a Form 50...based upon the same set of facts, and, in the

opinion of the Commissioner, the form is withdrawn merely for the purpose of delay.”

This regulation is essentially drawn upon Rule 41, F.R.C.P. and is modeled upon the common law doctrine of *retraxit*, which holds that once a case has been voluntarily dismissed, if it is brought to court again a dismissal in this second case will mean the case can never again be brought back to court. *See also Ford v. Ford*, 239 S.C. 305 (1961). The Defendants argue that, effectively, the second dismissal, or second Form 50 withdrawal, operates as an adjudication on the merits and that, therefore, when the Claimant announced to the Commission and to the Appellants that she was withdrawing her second Form 50 on October 24, 2017, this was tantamount to a voluntary dismissal with prejudice.

After careful review of the Record and the arguments of the parties, the Appellate Panel concludes that the Hearing Commissioner erred as a matter of law in addressing the issues of prejudice and “good cause,” as the issues were not raised by the Claimant prior to voluntarily withdrawing her Form 50 hearing request for a second time. This issue otherwise was not properly before the Hearing Commissioner following the cancellation of the October 24, 2017 hearing and is not properly before the Appellate Panel now.

II. The Hearing Commissioner properly concluded that the Form 21 hearing request was not properly before the Commission.

The Defendants argue that S.C. Code Ann. § 42-15-80 authorized them to

immediately suspend temporary compensation on March 27, 2017 because the Claimant refused to submit to a physical examination. The Appellants followed the procedure outlined in S.C. Code Reg. 67-505(F), by filing a Form 21 according to S.C. Code Reg. 67-506 on April 5, 2017. The Defendants argue that Regulation 67-505(F) authorizes the suspension of temporary compensation outside of the first 150 days for refusal of a medical examination and only requires that a Form 21 be filed subsequent to that suspension. The regulation states:

“When the employer’s representative suspends temporary compensation for refusal of medical treatment according to Section 42-15-60 or 42-15-80, the employer’s representative shall file a Form 21 according to R. 67-506.”

Regulation 67-506(F) further states that:

“After the 150 day period, when the employer’s representative has suspended temporary compensation pursuant to R.67-505, the employer’s representative shall file a Form 21 with the Judicial Department.”

This procedure was the subject of Wardlaw v. J.D. Ridgeway Construction Co., 212 S.C. 116 (1948), where the Supreme Court of South Carolina upheld the unilateral suspension of temporary compensation after 152 days on the basis that the claimant had unjustifiably refused a myelogram.

The Hearing Commissioner, in his November 14, 2017 Order, did not mention S.C. Code Ann. § 42-15-80 or S.C. Code Reg. 67-505(F). Instead, the Hearing Commissioner merely determined that because temporary disability benefits had been suspended, he could not entertain the Form 21 pursuant to S.C. Code Ann. § 42-9-260. We agree.

Conclusion

Having carefully reviewed the Record in this claim and the arguments of the parties, the Appellate Panel hereby enters the following:

Findings of Fact

1. The Claimant voluntarily withdrew her first Form 50 hearing request (dated October 21, 2016) on February 8, 2017.
2. On April 5, 2017, the Defendants suspended temporary disability compensation, based on their contention that the Claimant had refused medical treatment, and contemporaneously filed a Form 21.
3. The Claimant then filed a second Form 50 hearing request on April 18, 2017.
4. A hearing on the Claimant's second Form 50 and the Defendants' Form 21 was scheduled for October 24, 2017 before Hearing Commissioner Campbell.
5. Prior to going on the record at a hearing on October 24, 2017, the Claimant informed the Hearing (Single) Commissioner and the Defendants that she was voluntarily withdrawing her second Form 50. Claimant's counsel admits in oral argument before the undersigned Commissioners that there was no discussion about whether the Form 50 withdrawal was with or without prejudice. See Appellate Hearing Transcript, pages 18-20.

6. Also prior to going on the record at a hearing on October 24, 2017, the Claimant objected to the Defendant's Form 21 because temporary disability compensation had been suspended on April 5, 2017.
7. The hearing was cancelled by the Hearing Commissioner on October 24, 2017 prior to going on the record, after which time the Hearing Commissioner's authority and jurisdiction to adjudicate this claim ended.

Conclusions of Law

1. The Claimant voluntarily withdrew her first Form 50 dated October 21, 2016 on February 8, 2017 pursuant to S.C. Code Reg. 67-609(A).
2. The Defendants suspended temporary disability compensation on April 5, 2017 in accordance with S.C. Code Reg. 67-505(F) and S.C. Code Ann. § 42-15-80(A).
3. The Defendants filed a Form 21 on April 21, 2017, in accordance with S.C. Code Reg. 67-506(F).
4. The Claimant voluntarily withdrew her second Form 50 dated April 18, 2017 on October 24, 2017, pursuant to S.C. Code Reg. 67-609(C).
5. The Hearing Commissioner cancelled the Hearing on October 24, 2017, pursuant to S.C. Code Ann. § 42-9-260(F) because temporary disability compensation was suspended on April 18, 2017.
6. After the second Form 50 was withdrawn and the Form 21 hearing was cancelled, the Hearing Commissioner was divested of jurisdiction and authority to entertain or adjudicate further arguments regarding this claim.

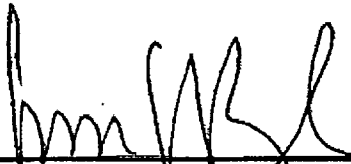
Order

IT IS, THEREFORE, HEREBY ORDERED that the Order of the Hearing Commissioner is REVERSED IN PART and AFFIRMED IN PART as set forth herein above, and

IT IS FURTHER ORDERED that no penalties are assessed.

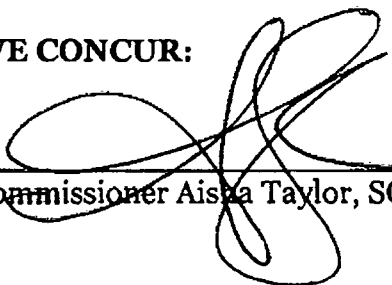
IT IS SO ORDERED!

August ~~____~~, ²⁰¹⁹~~2018~~

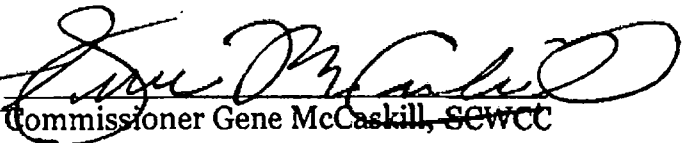


The Honorable Susan S. Barden
S.C. Workers' Compensation Commission

WE CONCUR:



Commissioner Aisha Taylor, SCWCC



Commissioner Gene McCaskill, SCWCC

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 Eugenia Hollmon on March 5, 2019