THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. File No. 1622756

Appellate Case No. 2018-001477

Robert D'Espies, Claimant, Appellant

v.

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

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FINAL BRIEF OF RESPONDENT UEF

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STATEMENT OF THE CASE

This is an appeal from the South Carolina Workers' Compensation Commission. Claimant filed a Form 50 requesting a hearing on May 25, 2017. Because the alleged Employer did not have Workers' Compensation insurance, the South Carolina Workers' Compensation Uninsured Employers' Fund (UEF), Respondent, was named as a party. The UEF filed a Form 51 on June 22, 2017, generally denying the claim. The matter was heard before Commissioner R. Michael Campbell, II, on September 14, 2017. The Single Commissioner issued an Order on November 29, 2017, finding the matter compensable and that the Claimant is entitled to certain benefits under the South Carolina Workers' Compensation Act. R. p. 7. At the hearing, the UEF objected to the matter proceeding due to lack of jurisdiction. R. p. 34; Transcript p. 5, l. 17.

Both the UEF and the Employer timely appealed the Decision and Order of the Single Commissioner. R. pp. 17 – 18. The Appellate Panel issued a unanimous Decision and Order on July 2, 2018. R. p. 1. The Appellate Panel vacated the Single Commissioner's Order and remanded the matter to the next jurisdictional Commissioner for a hearing *de novo*. The Appellate Panel found, as a matter of fact, that the Employer did not receive notice of the hearing before the Single Commissioner.

The Order of the Full Commission Appellate Panel on July 2, 2018, is not a final agency decision that disposes of the whole subject matter of the Appellant's workers' compensation claim. Appellant has, nonetheless, appealed the Full Commission Appellate Panel's Order.

STANDARD OF REVIEW

The Administrative Procedures Act governs judicial review of decisions of the commission. S.C. Code Ann. § 1-23-380 (Supp. 2014); *Bone v. U.S. Food Serv.*, 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013). "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." *Hilton v. Flakeboard America Limited*, 418 S.C. 245, 249, 791 S.E.2d 719, 721 (2016). "In proceedings governed by the APA, a final judgment disposes of the whole subject matter of the action or terminates the particular. proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Nucor Corp. v. S.C. Dept. of Employment and Workforce*, 410 S.C. 507, 514-15, 765 S.E.2d 558, 562 (2014). "An agency decision which does not decide the merits of a contested case but merely remands to the Department for further action is not a final agency decision subject to judicial review." *S.C. Baptist Hosp. v. S.C. Dept. of Health and Envt'l Control*, 291 S.C. 267, 270, 353 S.E.2d 277, 279 (1987).

The South Carolina Administrative Procedures Act establishes the substantial evidence standard for judicial review of decisions by the Appellate Panel. *See* S.C. Code Ann. § 1- 23-380 (Supp. 2010); *See also Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). Under the substantial evidence standard of review, this court may not "substitute its judgment for that of the [Appellate Panel] as to weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law." *Stone v. Taylor Bros.*, 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence, nor the

evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusions the administrative agency reached in order to justify its actions." *Broughton v. S. of the Border*, 336 S.C. 488, 495, 520 S.E.2d 634, 637 (Ct. App. 1999). In workers' compensation cases, the Appellate Panel is the ultimate fact finder. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The Appellate Panel is reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence. *Id.*

STATEMENT OF FACTS

At the hearing before the Appellate Panel, Scott Calder was placed under oath. Mr. Calder testified that, upon information and belief, he is the sole member of S&A Construction and More, LLC. R. p. 89; App. Tr. p. 4, ll. 14 – 18. Mr. Calder testified that his mailing address is 296 Highway 66, Conway, South Carolina 29526, and that this has been his address for the last six (6) to seven (7) years. R. p. 94; App. Tr. p. 9, ll. 10 – 15.

Mr. Calder argued that he was denied an opportunity to be heard because he did not receive a Notice of Hearing from the Commission. R. p. 94; App. Tr. p. 9, ll. 1 – 7. In the Form 59, Appellant's Informal Brief, Employer wrote: "The Commissioner did incorrectly decide the facts of this case due to the fact S&A Construction and More LLC was not properly notified of the hearing date and time. I have been told the information was dropped in the regular mail and I should have received it, however I did not receive proper notice of the hearing . . . ." R. p. 22; Form 59.

Regulation 67-607 requires that parties be given thirty (30) days' notice of the hearing. Regulation 67-213 reads, in pertinent part, as follows:

> The Commission services hearing notices . . . electronically or by deposit in the United States Postal Service first class postage, addressed to the parties according

> to R. 67-210. All . . . uninsured employers shall be served by depositing the notice in the United States Postal Service, first class postage per R. 67-210. The Commission may, but is not required to, serve such notices by certified mail, return receipt requested. Service by certified mail is complete upon receipt.

A review of the hearing notice dated July 19, 2017, appears to show that it was served on the Employer by deposit in the United States Postal Service first class postage, addressed to the Uninsured Employer in this case at the address Mr. Calder testified to at the Full Commission hearing. The hearing notice does not show that the document was mailed by certified mail, return receipt requested.

The UEF also appealed to the Appellate Panel. UEF appealed Stipulation Two (2), which reads: "Notice of the hearing was timely and properly provided to all parties of interest." R. p. 8; Order. p. 2. Fund asserted that there was no such stipulation in the Record. R. p. 90; Tr. p. 1 – 55; Record as a whole. Claimant argued that Fund did so stipulate by not objecting to making the Hearing Notice part of the record before the Single Commissioner ("So when he [Fund's attorney] agreed that the Commission's file would be made part of the record without objection, he agreed and stipulated to that notice of the hearing, and that notice of the hearing is properly addressed to the uninsured employer." R. p. 103; App. Tr. p. 18, ll. 20 – 25.

ARGUMENTS

1. **WHETHER THIS APPEAL SHOULD BE DISMISSED PURSUANT TO S.C. CODE ANN. § 1-23-380 BECAUSE THE ORDER ON APPEAL IS NOT A FINAL AGENCY DECISION AND APPELLANT STILL RETAINS ADEQUATE REMEDIES?**

Appellant's appeal should be dismissed pursuant to S.C. Code Ann. § 1-23-380. An agency decision which does not enter a final award, decide the merits of a contested case, but provides an adequate remedy of review is not subject to judicial review. An order remanding the matter for further. proceedings before entry of a final award is an intermediate judgement that does not

dispose of the entirety of the action. *Bone v. U.S. Food Serv.*, 404 S.C. 67, 744 S.E.2d 552 (2013). "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." *Hilton v. Flakeboard America Limited*, 418 S.C. 245, 249, 791 S.E.2d 719, 721 (2016). Circumstances that permit the immediate appeal of an interlocutory administrative decision under S.C. Code Ann. § 1-23-380 "are about as rare as the proverbial hens' teeth." *Id.* citing *State v. Lytchfield*, 230 S.C. 405, 409, 95 S.E.2d 857, 859 (1959).

In *Bone*, the Court determined that an order requiring further proceedings in the Workers' Compensation Commission did not constitute a final order. *Bone*, 404 S.C. at 74, 744 S.E.2d at 556. In *Bone*, the Supreme Court confirmed a circuit court decision which reversed the Full Commissions Order denying benefits was appealed. *Bone*, at 72, 744 S.E.2d at 555. The circuit court decision required the Workers' Compensation Commission to determine a final order based upon compensability. *Id.* The Court determined that because the circuit court order did not fully dispose of the workers' compensation action by issuing a final award, and because the claimant could still appeal a final award, it was not a final decision subject to judicial review. *Id.* at 74, 744 S.E.2d at 556.

In *Hilton*, the Court held that a party does not have to wait until a final agency decision to appeal an intermediate agency order that is extreme. *Hilton*, 418 S.C. at 252, 791 S.E.2d at 723. In *Hilton*, the Full Commission Appellate Panel ordered further litigation of the entire dispute without regard to the matters raised by the appealing party. *Id.* at 250, 791 S.E.2d at 722. The Court determined that requiring the appellant to wait until a final agency decision would not provide him an adequate remedy because the Panel's order was extreme and without explanation. *Id.*

The Appellate Panel remanded the claim for a *de novo* hearing. R. pp. 1 – 6. Absent this appeal, the matter would have been heard in September of 2018. Appellant maintains an adequate remedy in review of the final agency decision and therefore is precluded from immediate review of the Appellate Panel's ruling. If he is able to prove his case when the matter is heard, the Appellant will be entitled to benefits under the Workers' Compensation Act.

The Full Commission Appellate Panel's Order is not a final decision regarding Appellant's workers' compensation claim and therefore is interlocutory in nature and not subject to judicial review by this Court. Therefore, this appeal should be dismissed.

2. WHETHER THE APPELLATE PANEL OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION CORRECTLY FOUND AS A FACT THAT REGULATION 67-607 REQUIRES THAT ALL PARTIES RECEIVE 30-DAYS NOTICE IN ADVANCE OF A HEARING?

Per S.C. Code Ann. Regs. 67-607, "Each party is afforded at least thirty days notice of a hearing." Employer testified he did not receive any notice of the hearing before the Single Commissioner. In his Brief, Appellant argues that, even if the Employer did not receive this required notice, Employer was "not denied due process." Brief of Appellant, p. 8. However, the "requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965).

As noted above, in workers' compensation cases, the Appellate Panel is the ultimate fact finder. *See Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). The Appellate Panel is also reserved the task of assessing the credibility of the witnesses and the weight to be accorded evidence. *Id.* The Appellate Panel took testimony from Scott Calder of Employer, and it determined that Employer was not afforded notice as required by S.C. Code Ann. Reg. 67-607. R. pp. 1 – 6. This Finding of Fact is based on Mr. Calder's testimony and credibility.

The Appellate Panel, as the ultimate finder of fact, made its own finding regarding whether the Employer was afforded timely notice of the hearing. The Appellate Panel determined, as a matter of fact, that the Employer did not receive timely notice of the hearing. R. p. 4. The Appellate Panel unanimously based this finding of S.C. Code Ann. Reg. 67-607. R. pp. 4 – 5.

This finding was based on the substantial evidence. Determining otherwise would force this Honorable Court to substitute its judgment on a factual matter for the judgment of the unanimous Appellate Panel. "When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct.App.2004). Further, "The final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel." *Frame v. Resort Servs. Inc.*, 357 S.C. 520, 528, 593 S.E.2d 491, 495 (Ct.App.2004). Accordingly, the Decision and Order of the Appellate Panel should be affirmed.

At the hearing, Appellant moved to strike the complete testimony of Mr. Calder. R. p. 106; App.Tr. p. 21, ll. 14 – 16. The Chair of the Appellate Panel said,

> And with regard to the motion to strike, I will note a lot of it was hearsay testimony but I'll rule – I guess I'll go ahead and rule that it will be admitted just for the purpose of his reason for not attending the hearing and not *necessarily* for the truth of the matter in those particular statements.

R. p. 106; App.Tr. p. 21, ll. 17 – 23.

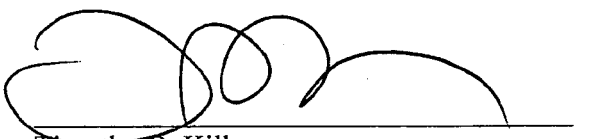
Of course, the Rule of Evidence to not apply in Workers' Compensation matters. *Hamilton v. Bob Bennett Ford*, 339 S.C. 68, 528 S.E.2d 667 (2000). Per S.C. Code § 1-23-30, "Except in proceedings before the Industrial Commission the rules of evidence as applied in civil cases in the court of common pleas shall be followed." The Appellate Panel allowed the testimony into the record. The Supreme Court has held that "great liberality is exercised in permitting the introduction of evidence in proceedings under Workmen's Compensation Acts." *Ham v. Mullins*

Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940). Further, there is no hearsay in the crucial point of his testimony. Certainly, Mr. Calder's testimony that, "I . . . never received anything in the mail as far as a hearing date" is not hearsay. R. p. 94; App.Tr. p. 9, ll 5 – 7. That testimony was not excluded from the record. That testimony is the only evidence on the issue of whether he was afforded the necessary notice under S.C. Code Ann. Reg. 67-607. Therefore, the Decision and Order of the Appellate Panel should be affirmed.

CONCLUSION

Based upon the foregoing arguments and authorities, the Respondent UEF respectfully requests that this Honorable Court dismiss this appeal as it is interlocutory and not subject to review. Alternatively, Respondents respectfully request that this Honorable Court affirm the Full Commission Appellate Panel's Decision and Order.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF COUNSEL

I hereby certify on this 10th day of July, 2019, that the Respondent UEF's Final Brief complies with requirements of Rule 211(b), SCACR.

July 10, 2019

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