THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from the South Carolina
Worker's Compensation Commission

WCC File No. 1609593
Appellate Case No. 2019-000560

Gena Cain Davis, Claimant,.....Appellant,

v.

S.C. Department of Corrections, Employer, and
State Accident Fund, Carrier,.....Respondents.

FINAL BRIEF OF THE RESPONDENTS

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Statement of the Case

The Appellant, Gena Cain Davis, alleges she injured her left knee, left leg, right knee, right leg, and back on July 14, 2016 while working for the South Carolina Department of Corrections.[1] By Form 50 dated October 19, 2016, Davis requested a workers' compensation hearing to determine her entitlement to additional medical benefits, including benefits for an alleged aggravation of a deep venous thrombosis condition for which Davis had been treated prior to the work accident. (R. p.22). After a

[1] A Form 50, establishing the claim, was filed on July 28, 2016; however, no hearing was requested until October 19, 2016. (R. pp.21—22).

hearing was scheduled, discovery was completed, and pre-hearing briefs were filed, Davis voluntarily withdrew her hearing request (Form 50) on February 6, 2017, after an expert witness deposition proved detrimental to her position. (R. pp.26—29; pp.140, l. 62; p.18 #1; p.87, ¶6).

Because the first hearing was unilaterally cancelled by Davis, the Respondents, the South Carolina Department of Corrections and the State Accident Fund, filed their own hearing request (Form 21) on April 7, 2017 in accordance with S.C. Code Reg. 67-505(F). (R. p.30). The Respondents contended that Davis had unjustifiably refused authorized medical treatment for her left knee and was; therefore, not entitled to any additional compensation benefits as a matter of law. (R. p.57).

By Form 50 dated April 13, 2017, Davis filed a second hearing request, again raising the very same issues raised in the October 19, 2016 Form 50. (R. p.33). A second hearing on these same issues was scheduled for July 19, 2017. (R. p.41). The Respondents moved to postpone the July 19, 2017 hearing in order to depose a new expert belatedly obtained by Davis. (R. pp.42--44). Davis did not object to a continuance and the motion was granted. (R. p.88, ¶5; R. p.1). At that time, the hearing on Davis's April 18, 2017 Form 50 and the Respondent's Form 21 was rescheduled for October 24, 2017. (R. p.45).

Davis filed pre-hearing briefs on July 6, 2017[2] 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

[2] The July 6, 2017 Pre-Hearing Brief was listed in the Respondents' Designation of Matter but was not included in the Record on Appeal filed with the Court of Appeals. To date, the Respondents have not received a copy of the Record on Appeal from the Appellant.

24, 2017 was in any way premature. (R.p.46). In addition, the Respondents went to the cost and expense of not only filing a second pre-hearing brief in anticipation of the October 24, 2017 hearing (R. pp.57—58), but went to the further cost and expense of actually appearing before the Hearing Commissioner as scheduled on October 24, 2017. (R. p.6, ¶1).

During a pre-hearing conference before the Hearing Commissioner, Davis announced that she was withdrawing her second Form 50 hearing request because she did not have the necessary medical evidence to support her claim, as required by the plain language of S.C. Code Ann. § 42-15-60[3]. (R. p.6, ¶1; p.82). Davis made no request that for consent by the Respondents, or approval from the Hearing Commissioner, to withdraw her Form 50 a second time without prejudice to her right to proceed with the claim, or to file a third hearing request in the future. 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. These

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[3] Davis's attorney argues that he was unaware of the statutory burden imposed by the plain language of S.C. Code Ann. § 42-15-60, alleging Davis could not have known of her statutory burden of proof until the Supreme Court issued its decision in the case of Hartzell v. Palmetto Collision, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016). However, the Hartzell case merely applied the plain language of a statute enacted in 2007. Furthermore, the Hartzell case was decided by the Supreme Court in September 2016, more than a year prior to the scheduled hearing in the case *sub judice*. Davis's arguments that she was unaware of her burden of proof under S.C. Code Ann. § 42-15-60 is simply baseless.

issues simply were not raised by Davis, or ruled upon by the Hearing Commissioner, on October 24, 2017 – neither "prejudice," nor "good cause" were even discussed.

At a pre-hearing conference on October 24, 2017, Davis 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 agreed that the Form 21 was not proper and cancelled the October 24, 2017 hearing entirely. (R. p.6). No evidence was received, no testimony was taken, and the parties did not even enter arguments on the record. Thereafter, on October 30, 2017, the Commission formally documented that Davis's second Form 50 hearing request had simply been "withdrawn." (R. p.139).

By email dated November 2, 2017, the Hearing Commissioner's administrative assistant inquired about Davis's attorney drafting a proposed order regarding the dismissal of the Form 21 only. (R. p.77). The request for proposed order makes not mention of the Form 50 withdrawal. (R. p.77). However, Davis's attorney, *sua sponte*, drafted an order suggesting that Davis had withdrawn her second Form 50 "without prejudice." The Respondents objected to this language in the proposed order, as "prejudice" was never raised by Davis or addressed by the Hearing Commissioner. (R. p.79; p.101; p.104; p.107). Davis admitted that the issue had not been raised or ruled upon at the pre-hearing conference on October 24, 2017, but nevertheless began arguing the matter weeks after the hearing was cancelled.

On November 9, 2017 – 17 days after withdrawing her Form 50 hearing request for a second time – Davis informed the Hearing Commissioner by email that

"[t]his matter has become more complicated than initially realized at the Hearing because [the Respondents] are now seeking to dismiss the claim..." (R. p.82).

Davis asked that the Hearing Commissioner issue an order allowing her to somehow *retroactively withdraw* the April 13, 2017 Form 50 she had already withdrawn, but this time without prejudice and with leave to refile. (R. p.82). The Respondents objected to Davis's untimely and inappropriate request more than 2 weeks after the Form 50 was withdrawn for a second time, not only because the request was without merit, but because the Hearing Commissioner had no proper motion before him, because no hearing request was pending, and because the Hearing Commissioner otherwise lacked the authority or jurisdiction to adjudicate Davis' untimely request. R. p.79; p.101; p.104; p.107). In addition, the Respondents noted that it was prejudicial to their right of due process to allow Davis to make new arguments without proper notice and adequate opportunity to be heard on these novel issues, which had not been raised prior to the actual withdrawal of the second Form 50 or in the weeks thereafter. (R. p.101).

The Hearing Commissioner issued an Order dated November 14, 2017 with a vague, conclusory finding that Davis's second Form 50 hearing request had been withdrawn "without prejudice" and that the Form 21 was not properly before the Workers' Compensation Commission. (R. p.3). The Hearing Commissioner failed to make any findings of fact or conclusions of law and otherwise failed to elucidate the factual or legal basis for his rulings. (R. p.3).

On November 20, 2017 the Respondents filed a Form 30 request for review of the Hearing Commissioner's Order by the Workers' Compensation Commission's Appellate

Panel. (R. p.60). On appeal, the Respondents argued 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 and in excess of legal authority. (R. pp.60—64; pp.67—84). By Order dated March 5, 2019 (R. pp.6—20), the Appellate Panel reversed the Hearing Commissioner's Order and found that

> *"[t] he 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."* (R. p.19, #7).

The Appellate Panel went on to conclude that 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);" that 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);" and that "[a]fter 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." (R. p. 19, #1, #4, #6).

Davis filed a Notice of Appeal to the Court of Appeals on April 4, 2019, but failed to set forth any grounds of appeal, as required by S.C. Code Ann. § 42-17-60. (R. p.110). However, with her Brief to the Court of Appeals, Davis attempts to impugn the integrity of the Respondents by boldly asserting that the Respondents' arguments rest on "technicalities, rather then [sic] dealing directly with the merits of their obligations to care for their injured employees." Of course, the merits of Davis's workers' compenation

claim have never been addressed because Davis has twice refused the opportunity for the Workers' Compensation Commission to hear her claims. The Respondents raise procedural and jurisdictional issues because these are the only issues before the Commission and the Court at this juncture. The perceived "technicality" of these arguments make them no less germane or dispositive.

On appeal, the Respondents respectfully contend that the Appellate Panel's Order dated March 5, 2019 is not immediately reviewable by the Court of Appeals, but is otherwise supported by substantial evidence in the record and the applicable law such that it should be affirmed.

Arguments

I. The Appellate Panel's Order is not properly before the Court of Appeals.

The Appellate Panel's Order dated March 5, 2019 neither awarded, nor denied, workers' compensation benefits. In fact, Davis did not request an award of benefits from the Commission because she wanted her hearings delayed in order to obtain proof. (R. p.82). The Appellate Panel's Order does not discuss the merits of any claim to workers' compensation benefits. (R. pp.6—20). In fact, Davis did not properly raise any argument involving the merits of the claim before the Commission because the Commission has never held an evidentiary hearing. (R. p.126, ll.3—4). The Appellate Panel's order does not discuss any factual disputes between the parties. In fact, neither testimony, nor documentary evidence has ever been introduced in this claim because Davis has twice asked that the Commission cancel merits hearings that she, herself, had

requested.[4] The Appellate Panel finally determined no rights of any party. In fact, the Appellate Panel's Order is merely an intermediate order addressing purely legal issues created by a Hearing Commissioner who acted outside the scope of his authority to address issues that were not properly before him. According to the Appellate Panel, should the parties wish to address the merits of the claim, or othwerise seek to have their relative rights determined, they must request a hearing before the Commission and have such rights determined after evidence is actually presented and due process is protected. Therefore, the Respondents respectfully contend that the Appellate Panel's March 5, 2019 Order is interlocutory and not properly before the Court of Appeals.

Appeals from the Commission's Appellate Panel to the Court of Appeals are governed by S.C. Code Ann. S.C. Code Ann. § 42-17-60 of the Workers' Compensation Act[5] and by S.C. Code Ann. § 1-23-380 of the Administrative Procedures Act ("APA"). Under the APA, a party to a workers' compensation claim must be "aggrieved by a final decision in a contested case" to be entitled to judical review by the Court of Appeals under the plain terms of § 1-23-380. According to our Supreme Court, an order "which

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[4] Davis's Brief to the Court of Appeals wrongly contains a recitation of "Facts," that includes a purported summary of unstipulated medical records. No medical records have ever been introduced into evidence; therefore, this portion of Davis's Brief should be stricken in accordance with Rule 208 and Rule 210 of the Appellate Court Rules, which prohibit references to "matter which was not presented to the lower court of tribunal."

[5] In her Notice of Appeal to the Court of Appeals dated April 4, 2019, Davis failed to set forth the grounds of appeal, as required by S.C. Code Ann. § 42-17-60. (R. p.110).

determines the applicable law, but leaves open questions of fact, is not a final judgment." Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552 (2013) (citing Charlotte-Mecklenburg Hospital Authority v. S.C.D.H.E.C., 387 S.C. 265, 267, 692 S.E.2d 894 (2010).

Here, the Order on appeal is neither "final," nor is the appellant "aggreived." By its order of March 5, 2019, the Appellate Panel did nothing more than determine the applicable law (*i.e.*, the authority of the Hearing Commission to address issues not properly before him), leaving open questions of fact for future proceedings (whether Davis withdrew her second hearing request for "good cause" and whether she is entitled to any benefits under the Workers' Compensation Act). (R. pp.18—20). There are necessarily further acts that must be done (an actual hearing) "prior to a determination of the rights of the parties," making the Appellate Panel Order, by definition, "interlocutory." Id. As such, Davis's appeal should be dismissed.

While preliminary or intermediate orders of the Appellate Panel may be immediately appealable under § 1-23-380 if "review of the final ageny decision would not provide an adequate remedy," there is no such danger in the case *sub judice*. In fact, a future Commissioner may find "good cause" to allow Davis to proceed with a third hearing request, such that she need not even seek review of the final agency decision. If a future Commissioner finds such "good cause" lacking and denies her claim for benefits with finality, Davis would be free to appeal such a decision at that juncture with no prejudice resulting from the March 5, 2019 Appellate Panel Order. As explained by former Chief Justice Pleicones, circumstances "that will permit the immediate appeal of an interlocutory adminstrative decision under section 1-23-380(A) 'are about as rare as proverbial hens' teeth.'" Hilton v. Flakeboard America, Ltd., 418 S.C. 245, 791 S.E.2d

719 (2016). The present appeal is no mythical hen's tooth – there isn't even a chicken in the barnyard.

II. The Appellate Panel properly concluded that the Hearing Commissioner had no authority to issue his November 14, 2017 Order.

The Respondents respectfully contend that the Appellate Panel properly determined that:

> "the Hearing Comissioner erred as a matter of law in addressing the issues of prejudice and 'good cause,' as the issues were not raised by [Davis] prior to vountarily withdrawing her Form 50 hearing request for a second time." (R. p.16, ¶2).

The Apppellate Panel also properly found "that there was no discussion about whether the Form 50 withdrawal was with or without prejudice" prior to Davis withdrawing the Form 50 on October 24, 2017. (R. p.13, #5). This finding was properly predicated the following exchange at the Appellate Panel hearing:

> "Commissioner Taylor: ...when you advised Commissioner Campbell that you were going to withdraw your Form 50, was there a discussion between either you and Commissioner or Ms. Barr and Commissioner Campbell about whether it was with or without prejudice?

Mr. Samuels: There was not, your Honor."

(R. pp.18, ll.15--22). The Appellate Panel's finding is further supported by an email from Davis's attorney to the Hearing Commissioner on November 9, 2017, stating that the prejudice issue was suddenly relevant 17 days after the Form 50 was withdrawn because:

> "[t]his matter has become more complicated than initially realized at the Hearing...[counsel for the Respondents] has pointed out to me that I had previously withdrawn a Form 50 in this case..." (R. p.82).

Therefore, the Appellate Panel properly concluded that,

> "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." (R. p.19, Conclusion of Law #6)

The Respondents ask that these findings and conclusions be affirmed by the Court of Appeals as they are supported both by substantial evidence and the applicable law.

Despite Davis's grasping estoppel argument to the contrary, the Respondents were under no obligation to counsel Davis on the potential impact of her unilateral, voluntary decision to withdraw her hearing request for a second time on October 24, 2017. (R. pp.131—138). Furthermore, at no time did Davis actually request the Respondent's consent to withdraw her hearing request for a second time without

prejudice. (R. p.128, ll.15—22; p.82). The Respondents were present at the hearing on October 24, 2017 to try the case on its merits and had no obligation to give legal advice or consent to Davis. However, according to Davis, the Respondent's silence on October 24, 2017 was implied consent. While it is true that the Respondents did not object to Davis withdrawing her hearing request for a second time on October 24, 2017, the seminal issues of prejudice and "good cause" were, admittedly, never part of the discussion on that date. (R. pp.131—138; p.128, ll.15—22; p.82). When those issues were raised weeks later, the Respondents vehemently objected. (R. p.79; p.101; p.104; p.107).

Therefore, Davis's attempt at an estoppel argument, citing King v. Ligon, 180 S.C. 224, 235, 185 S.E. 305, 309 (1936), is without merit. "The essence of equitable estoppel is that the party entitled to invoke the principle was misled to his injury." S.C. Pub. Serv. Auth. v. Ocean Forest, Inc., 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981). Neither Davis, nor his attorney were ever "misled" by the Respondents, nor can they prove the essential elements of estoppel. *See* Strickland v. Strickland, 375 S.C. 76, 84-85, 650 S.E.2d. 465, 470 (2007).

Davis further argues, inexplicably, that the Hearing Commissioner retained jurisdcition after she voluntarily withdrew her Form 50 hearing request on October 24, 2017 because a trial judge "entertains jurisdiction until his decision is rendered." (citing First Carolina Joint Stock Land Bank of Columbia v. Knotts, 191 S.C. 384, 1 S.E.2d 797 (1939)). But here, the Hearing Commissioner had no such decision to render, specifically because Davis unilaterally determined, all on her own and without any request of the Hearing Commissioner or the Respondents, that she wanted the October 24, 2017 hearing to be cancelled before it began. Davis made no request for a continuance, nor did she ask the Hearing Commissioner to retain jurisdiction to render

judgment on any disputed issue in the future. Davis did not request a finding of "good cause" or argue the issue of "prejudice" on October 24, 2017, she simply withdrew her Form 50 hearing request because she did not have sufficent medical evidence to prove her claim. (R. p.132, ll.8—13). After October 24, 2017, there was nothing left for the Hearing Commissioner to decide. There was no matter before him at all.

According to Davis, S.C. Code Reg. 67-609 somehow extended the Hearing Commissioner's jurisdiction beyond October 24, 2017, when Davis unilaterally withdrew her second Form 50 hearing request, but this argument is also without merit. Regulation 67-609(A)(1) explains that a Form 50 "may be withdrawn by writing... the Commissioner's office identified on the hearing notice." Of course, only a claimant can withdraw a Form 50. *See* S.C. Code Reg. 67-609(A). In this case, the withdrawal was made so late that Davis notified the Commission and the Respondents, in person, at the pre-hearing conference. Clearly, all parties were notified, in person, by Davis herself, that the Form 50 was withdrawn on October 24, 2017.

Davis's verbal notice was then recorded in the Commission's file on October 30, 2017 in accordance with S.C. Code Reg. 67-609(A)(2), when the Commission formally documented that Davis's second Form 50 hearing request had simply been "withdrawn." (R. p.139). Thereafter, no further action was permitted by the Hearing Commissioner to address prior arguments, or required of Davis to effecuate the withdrawal of the Form 50 and the cancellation of the hearing she accomplished six days earlier.

Davis's argument that some formal "Administrative Order" is required before she can withdraw her Form 50 is not only specious, but antithetical to the plain terms of S.C. Code Reg. 67-609(A) which make no mention of any such order being required. "Regulation 67-609 contemplates that the withdrawal request will be made prior to the

hearing before the [hearing] commissioner and provides the procedures for requesting a new hearing date," but nothing in Regulation 67-609 contemplates any further deliberative action by the Commission after a Form 50 is withdrawn and before a new hearing is scheduled. *See* Spruill v. Richland County Sch. Dist. 2, 363 S.C. 61, 64-65, 609 S.E.2d 524 (2005).

The Appellate Panel, the executive agency charged with promulgating and administering Regulation 67-609, concluded that Davis's voluntary withdrawal of the Form 50 was complete on October 24, 2017, at which time the Hearing Commissioner was divested of any authority or jurisdiction to determine any dispute between the parties. (R. p. 19). Of course, our Supreme Court has explained that the Courts

> "traditionally defer to an executive agency's construction of its own regulation. Such a construction is 'accorded most respectful consideration and will not be overturned absent compelling reasons.' Even if Regulation 67-609 were ambiguous, we would defer to the commission's interpretation since it reflects a sound policy decision not to permit disgruntled claimants a second 'bite at the apple.'" Spruill, *supra*.

Therefore, even traditional deference compels affirmation of the Appellate Panel in this case.

Furthermore, it is clear the Hearing Commissioner had no authority or jurisdiction to issue an Order on November 14, 2017 because no proper hearing request was before him, no motion was pending, and no issue was "assigned to him," as Davis

wrongly suggests.[6] Workers' Compensation Commissioners cannot simply issue orders because a litigant emails them with a plaintive request, as Davis's attorney did. If a claimant wishes for a Workers' Compensation Commissioner to issue an order deciding an issue in dispute, there are well-defined procedures defined by the Workers' Compensation Act and its corresponding regulations, as well as the Administrative Procedures Act, designed to guarantee the due process rights of the parties.

Specifically, a claimant must make an application for a hearing purusant to S.C. Code Ann. § 42-17-20 by filing a Form 50 hearing request in accordance with S.C. Code Reg. 67-208. The defendant is then given 30 days to "state its poisition and defenses" in accordance with S.C. Code Reg. 67-603. The Commission must issue a hearing notice specifying the "purpose of the hearing" at least 30 days in advance of the hearing pursuant to S.C. Code Reg. 67-607. Regulation 67-611 then requires a claimant to file a Form 58, pre-hearing brief, at least ten days before the hearing to specify the factual and legal issues to be presented to the Commissioner at the hearing. "All available evidence and testimony shall be presented at the scheduled hearing or a party must move for an adjournment" purusant to S.C. Code Reg. 67-612(J). The Administrative Procedures Act requires that the hearing be recorded, so all arguments and evidence can be preserved. S.C. Code Ann. § 1-23-320(H). The APA further requires that "[o]pportunity muse be

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[6] In her Brief, Davis argues that the Hearing Commissioner "issued the Administrative Order addressing the issues before him on the pleadings." However, there were no issues before him and there were no pleadings before him because the pleadings were withdrawn by Davis on October 24, 2017. Any issue previously raised was mooted by Davis's unilateral action.

afforded all parties to respond and present evidence and argument on all issues involved." S.C. Code Ann. § 1-23-320(E). Lastly, the APA requires that a "final decision shall include findings of fact and conclusions of law, separately stated." S.C. Code Ann. § 1-23-350.

Here, Davis did not file a Form 50 raising the issue of whether her claim had abated pursuant to S.C. Code Reg. 67-609(C) after she withdrew her hearing request a second time. The Respondents were given no opportunity to answer such a claim or raise defenses, as is their right under S.C. Code Reg. 67-603. The Commission issued no 30 day notice alerting the Respondents that there would be a hearing on the abatement issue, as is required by S.C. Code Reg. 67-607. Davis failed to file any Form 58, pre-hearing brief, rasing any factual issue regarding "good cause" or "delay" or "prejudice" or alleging any legal issue under Regulation 67-609(C), despite the plain requirements of Regulation 67-611. No evidence or argument was ever presented at a hearing on the factual and legal issues surrounding abatement under Regulation 67-609(C), nor is there any transcript preserving Davis's arguments or the Respondent's defenses, despite the mandatory requirements of S.C. Code Ann. § 1-23-320(H). That is because the Respondents were never given the "[o]pportunity...to respond or present evidence and argument" on these issues, in contravention of S.C. Code Ann. § 1-23-320(E). Lastly, the Hearing Commissioner's November 14, 2017 Order contains no findings of fact or conclusions of law, as mandated by S.C. Code Ann. § 1-23-350. *See* Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991); *see also* S.C. Code Ann. § 1-23-350 (1986) ("Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings").

Essentially, neither Davis's request for relief via email on November 9, 2017, nor the Hearing Commissioner's November 14, 2017 Order itself, complies with a single statute or regulation governing the mandatory procedures for the adjudication of a workers' compensation claim. (R. p.82; p.3). As such, the Hearing Commissioner's order violates not only the statutory rights of the Respondent, but also violates their constitutional right to due process. Even in a workers' compensation claim, the Commission is "required to meet minimum standards of due process." Smith v. Dept. of Mental Health, 329 S.C. 485, 499, 494 S.E.2d 630 (1997) (internal citations omitted). "In cases where important decisions turn on questions of fact, due process at least requires an opportunity to present favorable witnesses." Id., (citing Brown v. South Carolina State Bd. of Educ., 301 S.C. 326, 391 S.E.2d 866 (1990); Tall Tower, Inc. v. South Carolina Procurement Review Panel, 294 S.C. 225, 363 S.E.2d 683 (1987)). Accordingly, the Respondents were deprived, not only of their statutory rights, but of their constitutional right notice and opportunity to defend themselves at "a full and fair hearing" on the abatement issue under Regulation 67-609. Id; *see* S.C. Const., art. 1, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard."). Therefore, the Appellate Panel properly concluded that "the Hearing Commissioner was divested of jurisdiction and authority to entertain or adjudicate further arguments regarding this claim" and reversed his November 14, 2017 Order. This proper conclusion should be affirmed by the Court of Appeals.

III. If the issue of "good cause" was properly before the Hearing Commissioner, the Court of Appeals must remand the issue for a determination by the Appellate Panel.

The Appellate Panel did not address the abatement issue under S.C. Code Reg. 67-609(C), believing the issue was not properly before the Commission, as discussed herein above.[7] However, should the Court of Appeals accept Davis's argument that the abatement issue was properly raised and decided, then it is incumbent upon the Court of Appeals to remand the issue to the Appellate Panel. "In workers' compensation cases, the [Appellate Panel] is the ultimate fact finder." Shealy v. Aiken County, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). In addition, the "final determination of witness credibility and the weight to be accorded evidence is reserved to the [Appellate Panel]." Id. To simply "reinstate" the Order of the Hearing Commissioner, as Davis advocates, would be "[i]n effect...to determine the facts from conflicting evidence. Only the commission is authorized to do this." Baldwin v. James River Corp., 304 S.C. 485, 405 S.E.2d 421 (Ct. App. 1991) (*citing* Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d. 646 (1967)).

Furthermore, with respect to Davis's argument that Appellate Panel had no authority to reverse the Hearing Commissioner's November 14, 2017 Order, the

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[7] The Appellate Panel Order states, the "Appellate Panel does not address the issue of 'good cause,' believing it is not properly before the Commission at this time." (R. p.15, ¶1).

Respondents respectfully contend that his argument is without merit. According to Davis, an "administrative order granting a continuance" is not directly appealable. Of course, Davis never requested a continuance in this claim and the Hearing Commissioner did not order a continuance on November 14, 2017. Quite simply, Davis never made any timely request of the Hearing Commissioner regarding the import of her unilateral decision to voluntarily withdraw her second Form 50 hearing request. Therefore, to the extent that she relies upon case law governing the appealiabilty of an order of continuance to the Appellate Courts under Title 14, Davis's arguments must necessarily fail.

Davis's reliance on Allison v. W.L. Gore & Assoc. 294 S.C. 185, 714 S.E.Wd 547 (2011) and Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552 (2013) is also misplaced. Bone dealt with an appeal from the circuit court to the Court of Appeals, governed by S.C. Code Ann. § 1-23-390, which specifically requires that the circuit court issue a "final judgment." In Allison, the issue was whether an Appellate Panel order denying a motion to dismiss is immediately appealable under S.C. Code § 42-17-60. Neither Allison, nor Bone and neither S.C. Code Ann. § 1-23-390, nor S.C. Code Ann. § 42-17-60, are applicable to the Appellate Panel's review of a Hearing Commissioner's decision.

Instead, the Appellate Panel's authority to review the Hearing Commissioner's Order is governed exclusively by S.C. Code Ann. § 42-17-50, which gives the Appellate Panel broad latitude to review awards by a Hearing Commissioner. Such latitude is exemplified by the very case cited by Davis, Walker v. Springs Industries, Inc., 298 S.C. 249, 379 S.E.2d 729 (Ct. App. 1989), wherein the Workers' Compensation Commission's Appellate Panel properly adjudicated a Form 30 Application for Review of an order

dismissing a Form 50 without prejudice. Here, the Appellate Panel properly exercised its authority to review the Hearing Commissioner's vague award of reprieve from the requirements of S.C. Code Reg. 67-609(C) because the Hearing Commissioner lacked authority and jurisdiction to address the issue. The Appellate Panel's appellate jurisdiction under S.C. Code Ann. § 42-17-50 is separate and distinct from the appellate jurisdiction of the Court of Appeals under S.C. Code Ann. § 42-17-60 and § 1-23-390.

Davis cites no authority, statutory or otherwise, in support of her argument that the Appellate Panel's Order should be vacated for want of appellate jurisidction. The Respondents respectfully contend that the Appellate Panel properly exercised its jurisdction under S.C. Code Ann. § 42-17-50 to reverse the Hearing Commissioner' award. To hold otherwise would not only be a waste of judicial economy, but, more importantly, would deprive the Respondents of any meaningful review of whether the Hearing Commissioner lacked authority to address the issues of prejudice and good cause some 17 days after Davis withdrew voluntarily her Form 50 hearing request for a second time – an act that clearly deprived the Hearing Commissioner, himself, of jurisdction. In addition, immediate review of the Hearing Commissioner's award deprived Davis of no right, nor did it prejudice her in anyway. Instead, the Appellate Panel's Order leaves matters exactly as they were when Davis walked away from the October 24, 2017 hearing: should she wish to file a third Form 50 hearing request, she need only prove the "good cause" requirements of S.C. Code Reg. 67-609 to the satisfaction of a hearing Commissioner with jurisdiction and authority to address the issue, after notice to and opportunity to be heard is given to the Respondents.

Again, should the Court of Appeals determine that the issue of abatement under S.C. Code Reg. 67-609(C) was properly before the Commission, the appropriate remedy

is to remand the matter to the Appellate Panel for review of the Hearing Commissioner's conclusory finding on this issue. "Only the Commission is authorized to pass upon the weight of the evidence in a workmen's compensation case, and it is proper to remand a case to it for required findings where the record contains evidence from which such findings may be made." Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E.2d 646 (1967) (internal citations omitted).

IV. Davis did not withdraw her second Form 50 hearing request for "good cause."

Pursuant to S.C. Code Reg. 67-609(C),

> "[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."

It is undisputed that Davis withdrew a Form 50 on February 6, 2017. (R. p.87). It is undisputed that Davis filed a second Form 50 on April 13, 2017 based upon the same set of facts. (R. p.21, 22, & 33). It is also undisputed that Davis withdrew her Form 50 a second time on October 24, 2017. (R. p.82). The seminal question is whether Davis withdrew her Form 50 a second time for "good cause," or rather for the "purpose of delay." The Respondents respectfully contend that the Hearing Commissioner's

improper, conclusory finding that Davis "was allowed to withdraw the Form 50 without prejudice" on October 24, 2017 is not supported by substantial evidence, or the applicable law. (R. p.3).

"Delay" is shown to be the sole purpose of the Form 50 withdrawal based on Davis's attorney's own statements to the Hearing Commissioner's assistant that

> "[i]n light of [the Respondents' 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." (R. p.82) (emphasis added).

Not only do these 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 Davis be allowed to do so without prejudice (R. pp.18, ll.15--22), but also these statements constitute a clear admission that Davis merely *informed* the Commission of her decision because she was unprepared for the hearing she herself had requested and required an additional time (a "delay"), even though more than a year had passed since the original hearing request.

More than two weeks after withdrawing her Form 50 hearing request, Davis's attorney admitted that her "Form 50 was withdrawn to obtain proof." (R. p.82). However, she failed elucidate any purported justification why she had failed to obtain proof before the actual hearing and failed to demonstrate any "good cause" why additional time should be granted to gather such proof. According to Davis (in her Brief to the Court of Appeals), she was

> "concerned despite the volume of medical evidence, she may have lacked a medical record using the specific *magic words* stating additional medical treatment 'will tend to lessen the period of disability...stated to a reasonable degree of certainty.' *See* Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016), *citing* S.C. Code Ann. § 42-15-60(A)(2015). As Respondents' counsel...indicated she was contesting future treatment based on a strict interpretation of Hartzell, it was prudent for Appellant to ensure she had this specific medical opinion in this specific language before proceeding further." (emphasis original)

However, Davis'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 applicable version of S.C. Code Ann. § 42-15-60 was enacted more than a decade ago to require the very "magic words" that apparently surprised Davis on October 24, 2017.

Furthermore, the Hartzell case, which applied, but did not alter, the "magic words" required by S.C. Code Ann. § 42-15-60, was issued by the Court of Appeals more than a year before the October 24, 2017 hearing. The Respondents respectfully contend that it is untenable that Davis's claimed ignorance of that statute's evidentiary requirements, or of year-old case law, could somehow justify her withdrawing her hearing request after the hearing was scheduled to begin. Davis'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 dilligence to meet this long-established burden. Instead, Davis sought a delay in the adjudication of her claims because she was inexplicably, and unjustifiably, ill-prepared.

Furthermore, because the Hearing Commissioner's Order of November 14, 2017 makes no mention of the governing legal authority, S.C. Code Reg. 67-609(C), and because it makes no finding (or even mention of) the seminal issue of "good cause," it 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 agreed that the Hearing Commissioner's Order was "impermissibly vague, as it lacks detailed findings of fact and rulings of law." Therefore, it would be improper for the Court of Appeals to reinstate, or otherwise affirm the Hearing Commissioner's Order.

The Respondents further respectfully contend that the Hearing Commissioner's pronouncement in the November 14, 2017 Order regarding the prejudice issue is in direct contravention of the requirements of S.C. Code Reg. 67-609(C). This regulation is essentially drawn upon Rule 41, F.R.C.P., and is modeled upon the common law doctrine of *retraxit*, which provides 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). Effectively, the second dismissal (or second Form 50 withdrawal) operates as an adjudication on the merits and; therefore, when Davis announced to the Hearing Commissioner and to the Respondents that she was withdrawing her second Form 50 on October 24, 2017, this was tantamount to a voluntary dismissal with prejudice. The mere fact that Davis did not intend the preclusive effect of the law to apply to her is irrelevant.

V. The Appellate Panel was under no obligation to penalize the Respondents or to address Davis's entitlement to compensation, as neither issue was properly before the Commission.

S.C. Code Ann. § 42-15-80 authorized the Respondents to immediately suspend temporary compensation on March 27, 2017 because the Davis refused to submit to a physical examination. The Respondents 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. 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 myeleogram.

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 would not entertain the Form 21 pursuant to S.C. Code Ann. § 42-9-260. Davis did not appeal the Hearing Commissioner's Order and further, because there was never an evidentiary hearing on these issues, the Appellate Panel properly determined the question of whether Davis was entitled to additional compensation, or whether a penalty should be assessed, was not properly before the Appellate Panel. As explained more fully above, the Commission does not have authority to issue orders based on a mere request by a claimant – statutory and regulatory procedures must be followed before an order can be properly issued, most important of them is *an actual hearing*. Furthermore, because the issue was neither properly raised or ruled upon by the Commission, the issue is not preserved for appeal. Wilder Corp. v. Wilkie, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

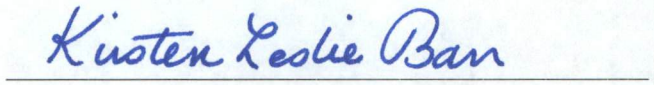
It must be remembered that Davis had an opportunity to pursue her claim for additional compensation benefits (or even a penalty) at the hearing scheduled for October 24, 2017. The purpose of the October 24, 2017 was to determine those very issues. (R. p.45). However, Davis insisted that the hearing be cancelled. Any argument

she may have regarding her right to compensation, or the obligation of the Commission to order payment of any benefits or penalties, was abandoned on October 24, 2017. Should Davis wish to have these issues addressed in the future, she is free to request a new hearing and prove her entitlement to benefits on the record.

Conclusion

For the reasons set forth herein above, the Respondents, the South Carolina Department of Corrections and the South Carolina State Accident Fund, respectfully request that Davis's appeal be dismissed for want of appellate jurisdiction. In the alternative, the Respondents respectfully request that the March 5, 2019 Order of the Workers' Compensation Commission's Appellate Panel be affirmed.

Respectfully submitted,



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December 31, 2019

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from the South Carolina
Worker's Compensation Commission

WCC File No. 1609593
Appellate Case No. 2019-000560

Gena Cain Davis, Claimant,.....Appellant,

v.

S.C. Department of Corrections, Employer, and
State Accident Fund, Carrier,.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of the Respondents complies with Rule 211(b), SCACR, and Supreme Court Order 2007-08-16-02, dated August 13, 2007, requiring redaction of personal data identifiers.

December 31, 2019

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