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SC Court of Appeals

The State of South Carolina
In the Court of Appeals

Appeal from the South Carolina
Workers' Compensation Commission

T. Scott Beck, Commissioner
Avery B. Wilkerson, Jr., Commissioner
Gene McCaskill, Commissioner

Appellate Case No.: 2020-000739

Jorge Lopez-Celestin.....Claimant, Appellant,

v.

Reeves Young, LLC, and
Holder Construction Group.....Employers,

And

Amerisure Insurance Company, and
American Zurich Insurance Company.....Carriers, Defendants

of whom Reeves Young, LLC, and
Amerisure Insurance Company are theRespondents.

**Appellant's Return to Respondents' Motion to Strike Matter
in Appellant's Designation of Matters to be Included in the Record on Appeal:**

Respondents, Reeves Young, LLC and Amerisure Insurance Company, filed a *Motion to Strike Matter in Appellant's Designation of Matters to be Included in the Record on Appeal* on July 23, 2020, contending the deposition transcript of Jorge Lopez-Celestin (Designation #10), and the deposition transcript of Juan Ochoa (Designation #7), should not be included in the Record on Appeal.

In support of the *Motion to Strike* Respondents assert at paragraph four the deposition transcript of Juan Ochoa was not submitted into evidence at the hearing before the Single

Commissioner, and is, therefore not a part of the Commission record. Additionally, Respondents assert at paragraph five the deposition of Jorge Lopez-Celestin was only partially submitted into evidence at the hearing before the Single Commissioner, and is, therefore only partially included in the record.

Appellant, Jorge Lopez-Celestin, contends the Motion to Strike should be denied because Appellant's Designation of Matter includes materials relevant to the argument before the commission, relevant to objections and rulings made before the commission, and relevant to the issues before this Court. Appellant further contends the Motion to Strike should be denied because the contested matters were presented at the hearing before the Commission.

The following provisions of the South Carolina Appellate Court Rules govern the material to be included in the Record on Appeal:

1. The purpose of the Record on Appeal is to include material relevant to the argument before the court, meaning, matters necessary to support salient facts alleged in briefing, including references and material relevant objections and rulings. Rule 208(b)(4), SCACR.
2. The purpose of the Designation of Matter to be Included in the Record on Appeal is to properly include portions of transcripts, pleadings, orders, exhibits, or other materials which is relevant to the appeal. Rule 209(b), SCACR.
3. The content of the Record on Appeal shall include all matter designated to be included by any party, but not include, however, matter *not* presented to the lower court or tribunal. Rule 210(c), SCACR. See *Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997) (In a footnote to its opinion the Court observed the insurance policy in question may have information relevant to the duties of the parties, however, the insurance policy was not part of the record); *Reed & State v. Becka*, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999)

(pursuant to Rule 209(c), SCACR, upon review of the record the matter was given substantive consideration based upon a finding the material in question, an affidavit, was presented to the trial court).

Argument

The present appeal arises from a decision of the South Carolina Workers' Compensation Commission. As such the rules governing the introduction of evidence at a workers' compensation hearing are those of the Rules of Procedure for the Administrative Law Court, Title 42 the South Carolina Workers' Compensation Act, the Regulations of the South Carolina Workers' Compensation Commission, and Chapter 23 of Title 1.

1. Pursuant to S.C. Code Ann. Section 42-17-40, the Commission shall hear the parties and representatives and witnesses and shall determine the dispute.
2. Pursuant to S.C. Code Ann. Section 1-23-320 (g) "the record in a contested case must include: (1) all pleadings, motions, intermediate ruling, and *depositions*; [and] (2) evidence received or considered."
3. Pursuant to SCALC Rule 14, parties may be required to prepare and return Prehearing Statements setting forth with particularity the issues in a contested case. Pursuant to SCALC Rule 27, the agency may require parties exchange prior to the hearing (A) a list of witnesses the party reasonably expects to testify at the hearing; and (B) a list of exhibits expected to be offered at the hearing.
4. Pursuant to S.C. Code Ann. Reg. 67-611, Respondents listed Juan Ochoa as a witness in his Pre-Hearing Brief.
5. Pursuant to S.C. Code Ann. Reg. 67-611, Respondents listed Claimant's deposition transcript as an exhibit in his Pre-Hearing Brief.

6. Pursuant to SCALC Rule 19, no motion was made by either party regarding the exclusion of evidence.
7. Pursuant to SCALC Rule 21, the discovery conducted in preparation for the hearing was conducted according to the procedures in Rules 26-37, SCRCF.
8. Pursuant to Rule 32(a)(4) the full deposition transcript may be introduced if only part of the deposition was previously introduced by an adverse party.¹
9. Pursuant to SCALC Rule 28, the administrative law judge may hold a pre-hearing conference prior to the hearing to obtain stipulations or rule on the admissibility of evidence. During the pre-hearing conference for the matter in controversy there was no request or ruling requiring the exclusion of the evidence presented at the hearing.
10. Pursuant to SCALC Rule 29, the parties have the right to introduce evidence on the points at issue and cross-examine witnesses present at the hearing as necessary for a full and true disclosure of facts. During the testimony of Juan Ochoa, Appellant attempted to cross examine the witness and an objection was entered into the record with regards to the proper use of the transcript of Juan Ochoa's deposition testimony.
11. Pursuant to S.C. Code Ann. 1-23-330, the rules of evidence do not apply to South Carolina Workers' Compensation Cases.
12. Pursuant to SCALC Rule 30, the record after a final decision shall include all evidence received or considered. Respondents admit in their motion that the deposition of Jorge Lopez-Celestin was both received and considered. The record further demonstrates the deposition transcript of Juan Ochoa was considered by the commission in that an objection was raised with regards to the cross examination of Juan Ochoa by use of the transcript.

¹ Rule 32(a)(4) was cited for the same proposition by the Respondents in their Reply Brief, page 6.

13. The materials Respondents seek to exclude were presented and cited by the Appellant before the Appellate Panel of the Workers' Compensation Commission. Respondents did not object to its consideration.

14. Pursuant to SCALC Rule 36, the record on appeal shall contain shall include all evidence received or considered. No objection to the record was made by Respondents to the Appellate Panel of the Commission – from which the present controversy arises – regarding the inclusion of the deposition transcripts of Jorge Lopez-Celestin and Juan Ochoa.

Conclusion

Appellant contends the Motion to Strike seeks to strike matters that were presented to the lower court, in that there was deliberation as to the admissibility and content of the transcripts, and further asserts the motion seeks to strike material relevant to the argument to be made in the present appeal. The evidence Respondents seek to exclude was considered by the Commission and was part of the record before the Commission.

1. Respondents admits in their motion the deposition transcript of Jorge Lopez-Celestin was submitted into the record. (Motion ¶ 5). Respondent, however, contends only two pages of the transcript should be included in the record even though there is no indication in the record, that the commission intended to limit its review to two pages. Neither has responded provided evidence he submitted a motion requesting the commission limit its review of the transcript to the two pages enumerated. As such the inclusion of the transcript in Designation of Matter is proper and the request to strike the deposition transcript from the record should be denied.
2. Respondents objected to the use of the deposition transcript of Juan Ochoa while Juan Ochoa was testifying during the hearing. The hearing commissioner issued a ruling on the

motion adverse to the Appellant. Appellant has appealed that ruling. As such, the deposition Transcript of Juan Ochoa can be included in the Designation of Matter since the transcript is both relevant to the appeal and its argument before the court.

Therefore, Appellant respectfully requests this Court deny the Respondents' Motion to Strike Matter in the Appellant's Designation of Matter to be Included in the Record on Appeal as the proposed matters are proper submitted to the Court for consideration on appeal.



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