

RECEIVED

Oct 25 2021

SC Court of Appeals

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

WCC FILE NO. 1215107

Randy H. Faulkenberry,

APPELLANT
CLAIMANT,

vs.

Conbraco Industries, Inc.,

EMPLOYER,

AND

Great American Alliance Insurance Company,

CARRIER,
DEFENDANTS/RESPONDENTS

Appellate Panel Review held in Columbia, South Carolina,
on July 19, 2021 per notices timely and properly served
upon all parties of interest.

Appellate Panel Decision and Order filed
September 23, 2021

APPEARANCES:

Claimant/Appellant represented by Andrew N. Safran,
Esquire of Andrew N. Safran, LLC, in Columbia, South
Carolina.

Defendants/Respondents represented by Benjamin M.
Renfrow, Esquire of Willson Jones Carter & Baxley, P.A. in
Greenville, South Carolina.

STATEMENT OF THE HEARING COMMISSIONER CASE

The parties were heard by Commissioner Avery B. Wilkerson, Jr., on March 22, 2021, in Columbia, South Carolina. On April 28, 2021, he signed the following Order:

IT IS, THEREFORE, ORDERED that Claimant's Motion to Compel Consummation of Settlement is denied.

IT IS SO ORDERED!

In his Order, signed April 28, 2021, the Hearing Commissioner made the following specific Findings of Fact and Conclusions of Law:

Hearing Commissioner Findings of Fact

1. Notice of the Hearing was timely and properly served on all parties of interest.
2. The parties stipulated to venue in Richland County.
3. South Carolina Code Ann. § 42-15-10 (2021) confers jurisdiction upon the South Carolina Workers' Compensation Commission to hear and dispose of this claim.
4. The parties are bound by the provisions of S.C. Code Ann. § 41-1-310 (2021).
5. Defendants offered \$105,023.96 to clincher the claim. This amount included the cost to fund the MSA. There is no mention of a separate \$28,036.38 payment for back due temporary total disability. (Claimant's Exhibit A; Defendants' Exhibit 5).
6. On September 23, 2020, Claimant's Attorney communicates a counteroffer of settlement that included "[commuted value], CMS approved MSA figure, and \$50,000.00 for non-allocated medical." (Claimant's Exhibit C).
7. Defendants communicated "a final offer to clincher at \$138,234.14, which [was] inclusive of the MSA amount that will not be submitted to CMS for approval" on October 19, 2020. (Claimant's Exhibit I; Defendants' Exhibit 2).
8. Subsequently, Claimant's Attorney drafted a document titled "Consent Order of Settlement" detailing the terms of settlement whereby Claimant agreed to release and forever discharge the Defendants from further liability for the claim in exchange for: The lump sum of "\$138,343.52, compliance with the medical payments obligations from the November 1, 2016 Appellate Panel

Order, satisfaction of all causally-related medical expenses...through October __, 2020, payment of two additional weeks of temporary total disability..., and the establishment of a Medicare Set-Aside [(MSA)] account in the amount of...\$27,927.00." This document was never executed. (Claimant's Exhibit L, ¶ 7).

9. Defense Counsel e-mailed Claimant's Attorney on November 23, 2020 expressing his understanding that the \$27,927.00 was to be included in the final offer of \$138,234.14 and requesting additional changes to the Consent Order. Defense counsel also reiterates that \$138,234.14 is his client's total final offer. They were unwilling to pay extra for the MSA or the additional medical bills listed in the correspondence. There is no mention of a separate check for Claimant's \$28,036.38 in back-owed temporary total disability benefits. (Claimant's Exhibit N).
10. Also, on November 23, 2020, Claimant's Attorney responds via e-mail indicating that he will read Defense Counsel's revisions and that "the cash payment figure includes the sum of the previously non-negotiated check [in the amount of \$28,036.38] I have been holding." (Claimant's Exhibit O).
11. An e-mail from Defense counsel, dated December 1, 2020 indicates that three checks will be sent: \$110,197.76 for the final settlement, \$28,036.38 as payment for back TTD, and \$27,927 to fund the MSA. That total of the three checks is: \$166,161.14. (Claimant's Exhibit Q; Defendants' Exhibit 6).
12. The December 1, 2020 e-mail between the parties evidences a seemingly contradictory intent that the carrier will "not pay anything further beyond the agreed upon amount of \$138,234.14" despite the contradictory check itemization set forth in the same communication. It also reiterates both party's understanding that final lump sum settlement included the \$28,036.38. (Claimant's Exhibit Q; Defendants' Exhibit 6).
13. Defense counsel, also in the December 1, 2020 e-mail requests a "clean agreement" that includes his proposed changes. (Claimant's Exhibit Q; Defendants' Exhibit 6).
14. Claimant's Attorney drafts a second Consent Order of Settlement for Defense Counsel's review that sets forth the following settlement terms: A lump sum payment of \$138,234.14, payment of all authorized or Commission-Ordered, causally-related medical bills, "the tendering of the additional sum of...\$28,026.38..., the payment of two additional weeks of temporary total disability compensation and the establishment of a [MSA] in the amount of...\$27,927.00." This draft remained unexecuted at the time of the Hearing. (Claimant's Exhibit R ¶ 7, 20, O; Defendants' Exhibit 7).

15. The language in the second Consent Order for Settlement is inconsistent with both the December 1, 2020 and November 23, 2020 correspondence. (Claimant's Exhibit R ¶ 7, 20, Q; Defendants' Exhibit 6).
16. On December 7, 2020, Claimant's Attorney submits another revised Consent Order for Settlement to Defense Counsel for approval. The draft is unsigned. (Claimant's Exhibit T; Defendants' Exhibit 7).
17. In an e-mail correspondence on December 10, 2020, Defense counsel writes that he thinks the revisions look fine, but that additional review of the MSA language is necessary. (Claimant's Exhibit U).
18. Claimant's Attorney responds that he has made additional changes and that the agreement is pending a calculation of the amount of temporary total disability due. He suggests that "we insert language stating TTD ends after the Order has been approved by the Commission" and again asks for Defense Counsel's approval. (Claimant's Exhibit V; Defendants' Exhibit 7).
19. Claimant's Attorney asks for confirmation that the last draft of the Consent Order was acceptable to Defense Counsel on December 28, 2020. (Claimant's Exhibit X).
20. Defense Counsel responds that he'd communicated the drafts were acceptable and was waiting on signatures from the Claimant and his counsel. The parties agree to speak regarding the "impasse." (Claimant's Exhibits Y & Z).
21. Claimant's Counsel responds on December 29, 2020 that the "confusion" involves the cut-off period for TTD and which party is to sign the agreement first. (Claimant's Exhibit AA; Defendants' Exhibit 7).
22. On January 19, 2021, Claimant's Attorney sends another revised Consent Order to Defendants' Counsel for review. (Claimant's Exhibit BB; Defendants' Exhibit 7).
23. By January 22, 2021, Defense Counsel communicates that there is "a problem reconciling the numbers." Claimant's attorney communicates that he thought "the dollar figures were previously resolved." (Claimant's Exhibit EE, GG).
24. Defense Counsel, on January 26, 2021, communicates that he believes the \$28,036.38 was erroneously added into the settlement negotiations twice. He resolves that he will send three checks totaling: \$681.44 (representing the 2 additional weeks of TTD), \$27,927.00 to fund the MSA, \$96,423.76 (representing the commuted value and including \$28,036.38), and \$15,000.00 amount over commuted value from the carrier. This totals \$140,032.20. (Defendants' Exhibit 8).

25. Defense Counsel sends another proposed Consent Order with additional changes indicating that it now embodies the terms of settlement on January 26, 2021 and their prior communications had been "a little unclear." He states: "If you read this and upon receipt of the checks your client doesn't want to settle, just let me know." (Claimant's Exhibit HH; Defendants' Exhibit 9).
26. Claimant's Attorney responds with a detailed correspondence outlining his understanding of the terms of the Consent Order stating: "[Y]ou offered the sum of \$138,234.14, which encompassed the commuted value, the \$27,927 MSA allocation and non-covered cash;...we then agreed I would include this \$28,036.38 check replacement in the Order terms, while making clear this check replacement did not alter the fact new money would be limited to \$138,234.14[.]" Claimant's Exhibit II).

Hearing Commissioner Conclusions of Law

1. Notice of the hearing was timely and properly served on all parties of interest.
2. The parties stipulated to venue in Richland County.
3. South Carolina Code Ann. § 42-15-10 (2021) confers jurisdiction upon the South Carolina Workers' Compensation Commission to hear and dispose of this claim. The Claimant was hired by a South Carolina employer, was injured in South Carolina, and worked in South Carolina. As the Claimant seeks an award under the Workers' Compensation Laws of this State for injuries he sustained while employed by the Defendant, jurisdiction is proper.
4. The parties are bound by the provisions of S.C. Code Ann. § 42-1-310 (2021).
5. Because none of the Consent Order of Settlement drafts were executed by the parties and because the greater weight of the evidence establishes that the correspondence and multiple drafts were part of continuing settlement negotiations, Claimant's Motion to Compel Settlement must be denied. Section 42-9-390 permits voluntary settlements as long as "the amount of compensation and the time and manner of payment are in accordance with [the Act]. The employer must file a copy of the settlement agreement with the commission if each party is represented by an attorney." S.C. Code Ann. § 42-9-390 (2021). Regulation 67-803(2) requires execution of the Settlement Agreement and Final Release by the claimant, his or her attorney, and the attorney for the carrier. Reg. 67-803(2)(2021). In addition, it requires that the attorney for the carrier file a copy of the agreement in triplicate with the Commission. *Id.* In Mackey v. Kerr McGhee Chemical Company, our State's Court of Appeals answered the question of whether a claimant could repudiate an offer of settlement that had been accepted on his behalf by his

attorney prior to formally executing the settlement documents. Mackey v. Kerr McGhee Chemical Company, 280 S.C. 265, 266 (1984).¹ In holding that either the employee or the employer may withdraw from the agreement prior to its execution and filing with the commission, the court explicitly stated that “[c]ontract law principles are inapplicable here because § 42-1-310 provides that employee claims for compensation are governed exclusively by the workers’ compensation act.” Id. at 270. In an unpublished decision, the South Carolina Court of Appeals revisited the Mackey ruling in 2013. In Haley v. Tire Kingdom, the Court of Appeals affirmed the single commissioner’s denial of a motion to enforce a settlement agreement where neither party had signed the agreement or filed it with the Commission as required by § 42-9-390 and Mackey. Haley v. Tire Kingdom, No. 2013-UP-166 (S.C. Ct. App. 2013).² Absent the requisite signatures and filing, the parties “had only a settlement proposal, which conferred no enforceable rights.” Id. Furthermore, the dissatisfied party could still file for a hearing. Id. In the instant case, Defendants communicated an initial offer of settlement that did not mention replacement of the \$28,036.38 stale draft. (Claimant’s Exhibit A; Defendants’ Exhibit 5). Claimant’s Attorney followed-up with a counter-offer proposing “commuted value, CMS approved MSA figure, and \$50,000.00 for non-allocated medical.” (Claimant’s Exhibit C). Defendants then tendered a “final offer to clincher at \$138,234.14, which [was] inclusive of the MSA amount that will not be submitted to CMS for approval.” (Claimant’s Exhibit I; Defendants’ Exhibit 2). The balance of the voluminous communications submitted by Claimant’s Counsel evidences Defendant’s objections to multiple drafts of the Consent Order as well as language indicating that additional review and/or revisions are necessary and that at least by January 22, 2021 there was “a problem reconciling the numbers” and the calculation of the commuted value. (Claimant’s Exhibit N, O, Q, R ¶ 7, 20, T, U, V, X, Y, Z, AA, BB, EE, GG; Defendants’ Exhibit 6, 7). At no point during these communications was an agreement ever executed by the parties or filed with the Commission. Defendants’ January 26, 2021 correspondence indicates that if after tendering the settlement drafts and providing additional suggestions to revise the Consent Order the Claimant wished not to settle, the parties would not be bound. (Claimant’s Exhibit HH; Defendants’ Exhibit 8, 9).

¹ (This footnote was included in the Hearing Commissioner’s Decision and Order:) While Mackey was decided prior to an amendment to S.C. Code Ann. 42-9-390 removing the requirement that settlement agreements be formally approved by the Commission, its principles remain instructive as the filing requirement remains intact and also played a part in the court’s analysis in that case. In addition, the parties titled the agreement at issue “Consent Order of Settlement” and provided a signature block for a Commissioner’s signature. This indicates their intent that the Commission approve the final agreement. Therefore, the instant case bears no significant difference to Mackey.

² (This footnote was included in the Hearing Commissioner’s Decision and Order:) Unpublished decisions can be cited as persuasive authority. There is no binding authority that bears directly on the issue presented. Claimant’s citation of North Carolina law is also considered persuasive authority but is less so because it is an opinion from a foreign jurisdiction interpreting a foreign workers’ compensation code.

6. To the extent Claimant's Attorney relies on contract principles and Chaisson v. Simpson, 195 N.C. App. 463, 673 S.E.2d 149, 159 (2009), his reliance is misplaced. While Claimant's Attorney is correct in his assertion that "South Carolina workers' compensation law is fashioned after North Carolina's statute [and] our courts often rely on North Carolina precedent for guidance in interpreting [our Act,]" Chaisson is, nonetheless, a North Carolina decision construing the North Carolina Workers' Compensation Act. This authority is persuasive but is not binding on this Commission. Hernandez-Zuniga v. Tickle, 374 S.C. 235 (Ct. App. 2007)(citing Nelson v. Yellow Cab Co., 343 S.C. 102, 117-18 (S.C. Ct. App. 2000) aff'd 349 S.C. 589 (2002))(citing Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 434 (1992)); Stephen v. Avins Constr. Co., 324 S.C. 334, 340 (S.C. Ct. App. 1996). Furthermore, in Chaisson, the court affirmed the North Carolina Industrial Commission's enforcement of a settlement where the Defendant carrier never submitted any evidence that the settlement amount was a "mistake," the defense attorney's notes of her conversation with the adjuster, the defense attorney's correspondence with the claimant, and the claimant's understanding and subsequent execution of the agreement all congruently supported the conclusion that the parties intended to settle the claim for \$97,500. Id. at 471-73. Unlike the present case, this settlement figure remained constant and never deviated throughout various correspondence. Also, unlike the present case, the parties in Chaisson were not engaged in intricate discussion of settlement figures resulting in multiple drafts of the agreement. The parties were still attempting to settle the issue of temporary total benefits due as of December 10, 2020. (Claimant's Exhibit V; Defendants' Exhibit 7). And, by the time the drafts were issued in January, it was clear that an error may have been made while calculating the commuted value of the claim. (Claimant's Exhibit EE, GG; Defendants' Exhibit 8).

7. To the extent the agreement at issue is not a "Settlement Agreement and Final Release" as governed by § 42-9-390, it is also unenforceable as a "Consent Order of Settlement." Section 42-17-10 governs agreements as to compensation and requires approval of the Commission or the "agreement shall be voidable by the employee or his dependents." S.C. Code Ann. § 42-17-10 (2021). All drafts of the agreement at issue are titled "Consent Order of Settlement." The parties' purported agreement is titled "Consent Order of Settlement" and included a signature line for a commissioner. (Claimant's Exhibit L, R). Therefore, absent the final step of approval by the commission, per the statute the agreement is unenforceable regardless of the interpretation of the parties' extraneous communications.

STATEMENT OF CURRENT CASE

On May 17, 2021, counsel for Claimant filed an application for review in the case setting forth his grounds for review, copies of which were furnished to all interested parties prior to oral argument presented to the Appellate Panel on July 19, 2021. By appeal, counsel for Appellant argued that the Hearing Commissioner erred in denying Appellant's motion to compel consummation of the unexecuted settlement documents.

In his brief, Claimant took the position that (1) the determination that the commuted value encompassed 295 weeks is legally erroneous; (2) the evidence of record firmly establishes the parties reached a meeting of the minds as to all material settlement terms; and (3) the Commission is authorized to compel consummation of the settlement agreement.

In their brief, Defendants argued that the preponderance of the evidence shows that the Hearing Commissioner did not err in denying Claimant's motion to compel consummation of the unexecuted settlement, because settlement negotiations never concluded, and the parties had not executed a settlement agreement in accordance with the South Carolina Workers' Compensation Act. Defendants asserted that there is no settlement to consummate because the settlement negotiations never concluded.

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. Section 42-17-50 (1985), review the Award, weigh the evidence as presented at the initial hearing, and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Single Commissioner.

All proffered arguments have been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Appellate Panel and has since been under study and consideration. After careful review in the instant case, the Appellate Panel, by

unanimous vote, fully affirms the Single Commissioner's Order, and issues the following Findings of Fact and Conclusions of Law, which shall become, and hereby are, the law of the case.

FINDINGS OF FACT

Based upon the documentary evidence submitted by the respective parties, pursuant to the Administrative Procedures Act, and the Commission's file relative to this claim, WE, THE APPELLATE PANEL, FIND THE FOLLOWING AS FACT:

1. Notice of the Hearing was timely and properly served on all parties of interest.
2. The parties stipulated to venue in Richland County.
3. South Carolina Code Ann. § 42-15-10 (2021) confers jurisdiction upon the South Carolina Workers' Compensation Commission to hear and dispose of this claim.
4. The parties are bound by the provisions of S.C. Code Ann. § 41-1-310 (2021).
5. Defendants offered \$105,023.96 to clincher the claim. This amount included the cost to fund the MSA. There is no mention of a separate \$28,036.38 payment for back due temporary total disability. (Claimant's Exhibit A; Defendants' Exhibit 5).
6. On September 23, 2020, Claimant's Attorney communicates a counteroffer of settlement that included "[commuted value], CMS approved MSA figure, and \$50,000.00 for non-allocated medical." (Claimant's Exhibit C).
7. Defendants communicated "a final offer to clincher at \$138,234.14, which [was] inclusive of the MSA amount that will not be submitted to CMS for approval" on October 19, 2020. (Claimant's Exhibit I; Defendants' Exhibit 2).
8. Subsequently, Claimant's Attorney drafted a document titled "Consent Order of Settlement" detailing the terms of settlement whereby Claimant agreed to release and forever discharge the Defendants from further liability for the claim in exchange for: The lump sum of

“\$138,343.52, compliance with the medical payments obligations from the November 1, 2016 Appellate Panel Order, satisfaction of all causally-related medical expenses...through October __, 2020, payment of two additional weeks of temporary total disability..., and the establishment of a Medicare Set-Aside [(MSA)] account in the amount of...\$27,927.00.” This document was never executed. (Claimant’s Exhibit L, ¶ 7).

9. Defense Counsel e-mailed Claimant’s Attorney on November 23, 2020 expressing his understanding that the \$27,927.00 was to be included in the final offer of \$138,234.14 and requesting additional changes to the Consent Order. Defense counsel also reiterates that \$138,234.14 is his client’s total final offer. They were unwilling to pay extra for the MSA or the additional medical bills listed in the correspondence. There is no mention of a separate check for Claimant’s \$28,036.38 in back-owed temporary total disability benefits. (Claimant’s Exhibit N).

10. Also, on November 23, 2020, Claimant’s Attorney responds via e-mail indicating that he will read Defense Counsel’s revisions and that “the cash payment figure includes the sum of the previously non-negotiated check [in the amount of \$28,036.38] I have been holding.” (Claimant’s Exhibit O).

11. An e-mail from Defense counsel, dated December 1, 2020 indicates that three checks will be sent: \$110,197.76 for the final settlement, \$28,036.38 as payment for back TTD, and \$27,927 to fund the MSA. That total of the three checks is: \$166,161.14. (Claimant’s Exhibit Q; Defendants’ Exhibit 6).

12. The December 1, 2020 e-mail between the parties evidences a seemingly contradictory intent that the carrier will “not pay anything further beyond the agreed upon amount of \$138,234.14” despite the contradictory check itemization set forth in the same communication. It

also reiterates both party's understanding that final lump sum settlement included the \$28,036.38. (Claimant's Exhibit Q; Defendants' Exhibit 6).

13. Defense counsel, also in the December 1, 2020 e-mail requests a "clean settlement agreement" that includes his proposed changes. (Claimant's Exhibit Q; Defendants' Exhibit 6).

14. Claimant's Attorney drafts a second Consent Order of Settlement for Defense Counsel's review that sets forth the following settlement terms: A lump sum payment of \$138,234.14, payment of all authorized or Commission-Ordered, causally-related medical bills, "the tendering of the additional sum of...\$28,036.38..., the payment of two additional weeks of temporary total disability compensation and the establishment of a [MSA] in the amount of...\$27,927.00." This draft remained unexecuted at the time of the Hearing. (Claimant's Exhibits R ¶ 7, O; Defendants' Exhibit 7).

15. The language in the second Consent Order for Settlement is inconsistent with both the December 1, 2020 and November 23, 2020 correspondence. (Claimant's Exhibits R ¶ 7, Q; Defendants' Exhibit 6).

16. On December 7, 2020, Claimant's Attorney submits another revised Consent Order for Settlement to Defense Counsel for approval. The draft is unsigned. (Claimant's Exhibit T; Defendants' Exhibit 7).

17. In an e-mail correspondence on December 10, 2020, Defense counsel writes that he thinks the revisions look fine, but that additional review of the MSA language is necessary. (Claimant's Exhibit U).

18. Claimant's Attorney responds that he has made additional changes and that the agreement is pending a calculation of the amount of temporary total disability due. He suggests that

"we insert language stating TTD ends after the Order has been approved by the Commission" and again asks for Defense Counsel's approval. (Claimant's Exhibit V; Defendants' Exhibit 7).

19. Claimant's Attorney asks for confirmation that the last draft of the Consent Order was acceptable to Defense Counsel on December 28, 2020. (Claimant's Exhibit X).

20. Defense Counsel responds that he'd communicated the drafts were acceptable and was waiting on signatures from the Claimant and his counsel. The parties agree to speak regarding the "impasse." (Claimant's Exhibits Y & Z).

21. Claimant's Counsel responds on December 29, 2020 that the "confusion" involves the cut-off period for TTD and which party is to sign the agreement first. (Claimant's Exhibit AA; Defendants' Exhibit 7).

22. On January 19, 2021, Claimant's Attorney sends another revised Consent Order to Defendants' Counsel for review. (Claimant's Exhibit BB; Defendants' Exhibit 7).

23. By January 22, 2021, Defense Counsel communicates that there is "a problem reconciling the numbers." Claimant's attorney communicates that he thought "the dollar figures were previously resolved." (Claimant's Exhibits EE, GG).

24. Defense Counsel, on January 25, 2021, communicates that he believes the \$28,036.38 was erroneously added into the settlement negotiations twice. He resolves that he will send four checks totaling: \$681.44 (representing the 2 additional weeks of TTD), \$27,927.00 to fund the MSA, \$96,423.76 (representing the commuted value and including \$28,036.38), and \$15,000.00 amount over commuted value from the carrier. This totals \$140,032.20. (Defendants' Exhibit 8).

25. Defense Counsel sends another proposed Consent Order with additional changes indicating that it now embodies the terms of settlement on January 26, 2021 and their prior communications had been "a little unclear." He states: "If you read this and upon receipt of the

checks your client doesn't want to settle, just let me know." (Claimant's Exhibit HH; Defendants' Exhibit 9).

26. Claimant's Attorney responds with a detailed correspondence outlining his understanding of the terms of the Consent Order stating: "[Y]ou offered the sum of \$138,234.14, which encompassed the commuted value, the \$27,927 MSA allocation and non-covered cash;...we then agreed I would include this \$28,036.38 check replacement in the Order terms, while making clear this check replacement did not alter the fact new money would be limited to \$138,234.14[.]" Claimant's Exhibit II).

CONCLUSIONS OF LAW

In view of those Findings of Fact, and as provided in the South Carolina Code of Laws, WE, THE APPELLATE PANEL, CONCLUDE THE FOLLOWING AS MATTERS OF LAW:

1. Notice of the hearing was timely and properly served on all parties of interest.
2. The parties stipulated to venue in Richland County.
3. South Carolina Code Ann. § 42-15-10 (2021) confers jurisdiction upon the South Carolina Workers' Compensation Commission to hear and dispose of this claim. The Claimant was hired by a South Carolina employer, was injured in South Carolina, and worked in South Carolina. As the Claimant seeks an award under the Workers' Compensation Laws of this State for injuries he sustained while employed by the Defendant, jurisdiction is proper.
4. The parties are bound by the provisions of S.C. Code Ann. § 42-1-310 (2021).
5. Because none of the Consent Order of Settlement drafts were executed by the parties and because the greater weight of the evidence establishes that the correspondence and multiple drafts were part of continuing settlement negotiations, Claimant's Motion to Compel Settlement must be denied. Section 42-9-390 permits voluntary settlements as long as "the amount of

compensation and the time and manner of payment are in accordance with [the Act]. The employer must file a copy of the settlement agreement with the commission if each party is represented by an attorney.” S.C. Code Ann. § 42-9-390 (2021). Regulation 67-803(2) requires execution of the Settlement Agreement and Final Release by the claimant, his or her attorney, and the attorney for the carrier. Reg. 67-803(2)(2021). In addition, it requires that the attorney for the carrier file a copy of the agreement in triplicate with the Commission. *Id.* In Mackey v. Kerr McGhee Chemical Company, our State’s Court of Appeals answered the question of whether a claimant could repudiate an offer of settlement that had been accepted on his behalf by his attorney prior to formally executing the settlement documents. Mackey v. Kerr McGhee Chemical Company, 280 S.C. 265, 266 (1984).³ In holding that either the employee or the employer may withdraw from the agreement prior to its execution and filing with the commission, the court explicitly stated that “[c]ontract law principles are inapplicable here because § 42-1-310 provides that employee claims for compensation are governed exclusively by the workers’ compensation act.” *Id.* at 270. In an unpublished decision, the South Carolina Court of Appeals revisited the Mackey ruling in 2013. In Haley v. Tire Kingdom, the Court of Appeals affirmed the single commissioner’s denial of a motion to enforce a settlement agreement where neither party had signed the agreement or filed it with the Commission as required by § 42-9-390 and Mackey. Haley v. Tire Kingdom, No. 2013-UP-166 (S.C. Ct. App. 2013).⁴ Absent the requisite signatures and filing, the parties “had only a settlement proposal, which conferred no enforceable rights.” *Id.* Furthermore, the dissatisfied party could still file for a hearing.

³ While Mackey was decided prior to an amendment to S.C. Code Ann. 42-9-390 removing the requirement that settlement agreements be formally approved by the Commission, its principles remain instructive as the filing requirement remains intact and also played a part in the court’s analysis in that case. In addition, the parties titled the agreement at issue “Consent Order of Settlement” and provided a signature block for a Commissioner’s signature. This indicates their intent that the Commission approve the final agreement. Therefore, the instant case bears no significant difference to Mackey.

⁴ Unpublished decisions can be cited as persuasive authority. There is no binding authority that bears directly on the issue presented. Claimant’s citation of North Carolina law is also considered persuasive authority but is less so because it is an opinion from a foreign jurisdiction interpreting a foreign workers’ compensation code.

Id. In the instant case, Defendants communicated an initial offer of settlement that did not mention replacement of the \$28,036.38 stale draft. (Claimant's Exhibit A; Defendants' Exhibit 5). Claimant's Attorney followed-up with a counter-offer proposing "commuted value, CMS approved MSA figure, and \$50,000.00 for non-allocated medical." (Claimant's Exhibit C). Defendants then tendered a "final offer to clincher at \$138,234.14, which [was] inclusive of the MSA amount that will not be submitted to CMS for approval." (Claimant's Exhibit I; Defendants' Exhibit 2). The balance of the voluminous communications submitted by Claimant's Counsel evidences Defendants' objections to multiple drafts of the Consent Order as well as language indicating that additional review and/or revisions are necessary and that at least by January 22, 2021 there was "a problem reconciling the numbers" and the calculation of the commuted value. (Claimant's Exhibits N, O, Q, R ¶ 7, T, U, V, X, Y, Z, AA, BB, EE, GG; Defendants' Exhibits 6, 7). At no point during these communications was an agreement ever executed by the parties or filed with the Commission. Defendants' January 26, 2021 correspondence indicates that if after tendering the settlement drafts and providing additional suggestions to revise the Consent Order the Claimant wished not to settle, the parties would not be bound. (Claimant's Exhibit HH; Defendants' Exhibits 8, 9).

6. To the extent Claimant's Attorney relies on contract principles and Chaisson v. Simpson, 195 N.C. App. 463, 673 S.E.2d 149, 159 (2009), his reliance is misplaced. While Claimant's Attorney is correct in his assertion that "South Carolina workers' compensation law is fashioned after North Carolina's statute [and] our courts often rely on North Carolina precedent for guidance in interpreting [our Act,]" Chaisson is, nonetheless, a North Carolina decision construing the North Carolina Workers' Compensation Act. This authority is persuasive but is not binding on this Commission. Hernandez-Zuniga v. Tickle, 374 S.C. 235 (Ct. App. 2007)(citing Nelson v. Yellow Cab Co., 343 S.C. 102, 117-18 (S.C. Ct. App. 2000) aff'd 349 S.C. 589 (2002))(citing

Spoone v. Newsome Chevrolet-Buick, 309 S.C. 432, 434 (1992)); Stephen v. Avins Constr. Co., 324 S.C. 334, 340 (S.C. Ct. App. 1996). Furthermore, in Chaisson, the court affirmed the North Carolina Industrial Commission's enforcement of a settlement where the Defendant carrier never submitted any evidence that the settlement amount was a "mistake," the defense attorney's notes of her conversation with the adjuster, the defense attorney's correspondence with the claimant, and the claimant's understanding and subsequent execution of the agreement all congruently supported the conclusion that the parties intended to settle the claim for \$97,500. Id. at 471-73. Unlike the present case, this settlement figure remained constant and never deviated throughout various correspondence. Also, unlike the present case, the parties in Chaisson were not engaged in intricate discussion of settlement figures resulting in multiple drafts of the agreement. The parties were still attempting to settle the issue of temporary total benefits due as of December 10, 2020. (Claimant's Exhibit V; Defendants' Exhibit 7). And, by the time the drafts were issued in January, it was clear that an error may have been made while calculating the commuted value of the claim. (Claimant's Exhibits EE, GG; Defendants' Exhibit 8).

7. To the extent the agreement at issue is not a "Settlement Agreement and Final Release" as governed by § 42-9-390, it is also unenforceable as a "Consent Order of Settlement." Section 42-17-10 governs agreements as to compensation and requires approval of the Commission or the "agreement shall be voidable by the employee or his dependents." S.C. Code Ann. § 42-17-10 (2021). All drafts of the agreement at issue are titled "Consent Order of Settlement." The parties' purported agreement is titled "Consent Order of Settlement" and included a signature line for a commissioner. (Claimant's Exhibits L, R). Therefore, absent the final step of approval by the commission, per the statute the agreement is unenforceable regardless of the interpretation of the parties' extraneous communications.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law,

IT IS, HEREBY, ORDERED that the Order of the Hearing Commissioner, signed on April 28, 2021, is hereby affirmed in full.

IT IS FURTHER ORDERED that Appellant's Motion to Compel Consummation of Settlement is denied.

AND IT IS SO ORDERED.

**AFFIRMED IN FULL
CONCUR:**

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION


Aisha Taylor, Commissioner


Gene McCaskill, Commissioner


Susan Barden, Commissioner

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 Valerie D. Deller on September 23, 2021