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Oct 27 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Appeal No. 2021-000932

Sherry L. Floyd, Employee..... Respondent,

v.

McLeod Health, Employer, and
McLeod Health Self Insured c/o Antum Risk, Carrier Petitioners.

PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240, SCACR, Petitioners McLeod Health and McLeod Health Self Insured c/o Antum Risk petition this Court to rehear its October 25, 2021 Order dismissing the appeal in this case. Petitioners received the Order on October 25, 2021.

This Court overlooked or misapprehended the key fact that Petitioners did not appeal a Hearing Commissioner order vacating a previous order that merely “conditionally dismissed Respondent’s claim and ordered Respondent to show cause for her failure to attend the hearing.” In fact, the 14-Day Order of Dismissal & Order to Show Cause, filed July 21, 2021 (the “14-Day Order”) automatically became final when Respondent failed to present any response as to whether good cause existed for her failure to attend the July 13, 2021 hearing within the allotted time. Thus, the 14-Day Order was not conditional at the time the Hearing Commissioner attempted to vacate it

but, instead, was a final order of the Hearing Commissioner dismissing Respondent's claim with prejudice.

As noted in Petitioner's Memorandum on Appealability, Respondent's response to the 14-Day Order was due on August 9, 2021. When Respondent failed to file any response or appeal to the Full Commission by that date, Respondent's claim for workers' compensation benefits was automatically dismissed with prejudice. It is Petitioner's position that the Commission lost any jurisdiction over this claim at that point. As such, the Hearing Commissioner's attempt to rescind the 14-Day Order on August 17, 2021 was ineffective. Respondent neither moved the Hearing Commissioner to rehear or reconsider the automatic dismissal of her claims,¹ nor appealed that dismissal to the Full Commission within the statutory deadline. At that point in time, the Commission no longer had jurisdiction over this claim which already had been dismissed with prejudice. *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188-189, 714 S.E.2d 547, 549 (2011) (affirming that "the fourteen day period is jurisdictional" and cannot be extended by the Commission).

This Court also overlooked or misapprehended the unique procedural posture of this appeal, which provides the exception to the rule that, ordinarily, an appeal of a Hearing Commissioner decision must be taken first to the Full Commission. *See Janhrette v. Union Camp Paper Corp.*, 293 S.C. 59, 60, 358 S.E.2d 704, 705 (1987), *citing Riddle v. Fairforest Finishing Co.*, 198 S.C. 419, 426, 18 S.E.2d 341, 344 (1942).

¹ Even if Respondent's "Reply to Order of Dismissal & Order to Show Cause, filed on August 12, 2021, could be construed as a motion for rehearing or reconsideration, which Petitioner deny, such motions are not proper before a Hearing Commissioner. *See Rhame v. Charleston County Sch. Dist.*, 412 S.C. 273, 278 n.3, 772 S.E.2d 159, 162 n.3 (2015) ("a motion for rehearing is proper before the Appellate Panel and not the single commissioner").

In very narrow circumstances, of which this case is one, the Workers' Compensation Act provides a limited exception to the general rule. That is, an "*award of the commission, as provided in Section 42-17-40, if not reviewed in due time, or an award of the commission upon the review, as provided in Section 42-17-50, is conclusive and binding as to all questions of fact.*" S.C. Code Ann. § 42-17-60 (emphasis added). Thus, once the deadline passed with no response or appeal from Respondent, the 14-Day Order became final, conclusive and binding as to all questions of fact.

As a result, the order on appeal, the Hearing Commissioner's August 17, 2021 "Vacate Order" did not vacate a previous order that only "conditionally dismissed Respondent's claim," but, instead, a prior order that was final, no longer subject to further appeal, and binding as to all questions of fact. To the extent this Court's October 25, 2021 Order characterizes the 14-Day Order as only a "conditional" dismissal of Respondent's claim, it is in error and must be corrected. As of August 9, 2021, the 14-Day Order was final and Respondent's claims were dismissed with prejudice. This Court should revise its October 25, 2021 Order to correct the mischaracterization of the 14-Day Order as having only "conditionally dismissed Respondent's claim and ordered Respondent to show cause for her failure to attend the hearing," to read as having "dismissed Respondent's claim with prejudice." Once that correction is made, it becomes apparent that the unappealed 14-Day Order became and is the law of the case, Respondent's claims were and are dismissed with prejudice, and both the Hearing Commissioner and the Commission lack appellate jurisdiction to revive them.

After the August 9, 2021 deadline passed with no response from Respondent or, critically, no appeal of the 14-Day Order to the Full Commission, the 14-Day Order

became final. Given that Respondent’s claim was dismissed with prejudice, the 14-Day Order became the law of the case and both the Hearing Commissioner and the Commission lacked any jurisdiction, appellate or otherwise, to review or alter that order.² As a result of the procedural posture of this case, none of which is their fault, Petitioners are faced with the dilemma that, on one hand, the Full Commission lacks appellate jurisdiction to hear this claim, *Allison*, 394 S.C. at 188-189, 714 S.E.2d at 549 (“the fourteen day period is jurisdictional” and cannot be extended by the Commission); *see also Reese v. CCI Constr. Co.*, 334 S.C. 600, 604, 514 S.E.2d 144, 145 (Ct. App. 1999) (ruling not appealed to the appellate panel “right or wrong, it is the law of the case”), while on the other hand, this Court has issued an Order dismissing Petitioners’ timely and valid appeal.

This Court also overlooked or misapprehended the fact that a dismissal with prejudice “operates as an adjudication on the merits terminating the action and concluding the rights of the parties.” *Freeman v. McBee*, 280 S.C. 490, 493, 313 S.E.2d 325, 327 (Ct. App. 1984), *citing Ottinger v. Chronister*, 13 N.C. App. 91, 96, 185 S.E.2d 292, 295 (1971) (“[t]he legal import of the words ‘with prejudice’ as applied to a judgment of dismissal is to terminate the action operating as res judicata and barring any further prosecution by the plaintiff of the same cause of action”). Thus, on August 9, 2021, once the 14-Day Order became final and no longer subject to review by the Commission, neither the Hearing Commissioner nor the Commission had jurisdiction to

² As explained previously, this case is factually distinguishable from *Levi v. Anderson County EMS*, 409 S.C. 374, 762 S.E.2d 44 (Ct. App. 2014), because the 14-Day Order dismissed Respondent’s claim with prejudice, which constitutes an “award” as that term is defined by *Black’s Law Dictionary* 164 (10th ed. 2014), and became the law of the case and unreviewable by the Full Commission as of August 9, 2021

consider Respondent's excuse for not presenting at the July 13, 2021 hearing or any other issue regarding the merits of her claim.

As was the case in *Collins v. Sigmon*, 299 S.C. 464, 385 S.E.2d 835 (1989), the unique posture of this case suggests that normal rules of appealability do not readily resolve that issue. Instead, where Petitioners are faced with the choice of appealing to the Full Commission, which they contend lacks appellate jurisdiction to hear the appeal, or file a timely appeal with this Court with the risk that this Court will deem the appeal to be an impermissible interlocutory one, they had little option but to file appeals with both forum. Given the preclusive effect of the 14-Day Order's dismissal with prejudice, both the Hearing Commissioner and the Full Commission are without jurisdiction to consider the merits of this case, which is barred by *res judicata*.

This Court also overlooked or misapprehended the fact that, if Petitioners are correct that the Commission lacks jurisdiction to hear this appeal, and this Court declines to consider it, Petitioners will be forced to litigate the merits of a claim that is barred by *res judicata*. The fundamental purpose of *res judicata*, however, is "to ensure that 'no one should be twice sued for the same cause of action.'" *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012), quoting *Judy v. Judy*, 393 S.C. 160, 173, 712 S.E.2d 408, 414 (2011); see also *South Carolina Pub. Interest Found. v. Greenville County*, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (Ct. App. 2013) ("[t]he doctrine [of *res judicata*] flows from the principle that *public interest* requires an end to litigation and no one should be sued twice for the same cause of action").

Finding that this appeal is properly before this Court is consistent not only with Sections 42-17-40 and 42-17-60 of the Workers' Compensation Act, but also with

Section 1-23-380 of the Administrative Procedures Act, which provides in pertinent part, that “[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.” S.C. Code Ann. § 1-23-380. Being forced to litigate a claim that is barred by *res judicata* places Petitioners in the untenable position where the final decision of the administrative agency would not provide an adequate remedy. As a result, this Court should find that, under the unique circumstances and procedural posture of this case, the Vacate Order is immediately appealable because, once Respondent’s claim was dismissed with prejudice without any timely appeal by Respondent to the Full Commission, the Commission lost appellate jurisdiction over this claim, and Petitioners should not be forced to litigate a claim that is barred by *res judicata*.

This Court should either hear Petitioners’ appeal or, if it finds it more appropriate, stay this appeal until the Commission determines whether it possesses appellate jurisdiction to hear the issues raised on Petitioners’ Form 30. If this Court does not allow this appeal to remain in place, and the Commission determines it does not have appellate jurisdiction, which Petitioners believe it will, they will be forced to fully adjudicate a claim that already has been dismissed with prejudice.

At a minimum, this Court should correct the factual mis-statement characterizing the 14-Day Order as one that only “conditionally dismissed Respondent’s claim.” As of August 9, 2021, Respondent’s claim was automatically dismissed with prejudice pursuant to the clear and unambiguous terms of the 14-Day Order.

CONCLUSION

For the reasons stated herein, this Court should grant this Petition and find that this appeal is properly before the Court and, if the Court believes it necessary, stay this appeal until the Commission determines whether it lacks appellate jurisdiction over Petitioners' appeal there. At a minimum, this Court should amend its October 25, 2021 Order to correct the mischaracterization of the 14-Day Order as having only "conditionally dismissed Respondent's claim and ordered Respondent to show cause for her failure to attend the hearing," to read as having "dismissed Respondent's claim with prejudice."

Respectfully submitted,

MCANGUS GOUDELOCK & COURIE, LLC

October 27, 2021

s/Helen F. Hiser

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PROOF OF SERVICE

I certify that I have served Petitioners' **Petition for Rehearing** on the attorney of record for Respondent Sherry L. Floyd by emailing a copy of it on the 27th day of October, 2021, addressed as follows:

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Reply To

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Via S.C. Courts E-Filing & U.S. Mail

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: Sherry L. Floyd vs. McLeod Physicians Association and McLeod Health Self
Insured c/o Antum Risk
Date of Accident: December 31, 2018
WCC File No.: 1821956
Our File No.: 2021.21002
Claim No.: MCLH-09431
Appeal No.: 2021-000932

Dear Ms. Kitchings:

Enclosed please find the original of Petitioners' Petition for Rehearing, and the Proof of Service in the above-referenced matter. We are serving counsel of record via email.

We will send our firm's check in the amount of \$50 for filing the Petition via U.S. Mail with a copy of this letter.

If you have any questions, please do not hesitate to contact me.

Sincerely,
McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: William Ceth Land, Esq. (via Email)