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SC Court of Appeals

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.

PETITION FOR REHEARING
AND
REQUEST FOR ORAL ARGUMENT

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Statement of the Case

Pursuant to Rule 221, S.C.A.C.R., the Respondents, the South Carolina Department of Corrections and the South Carolina State Accident Fund, respectfully request rehearing by the Court of Appeals following the issuance of the Court's unpublished opinion dated "March 23, 2022."[1] The Respondents contend that the Court of Appeals overlooked the fact that it does not have appellate jurisdiction under the plain terms of the Administrative Procedures Act, as interpreted by the South Carolina Supreme Court, and; therefore, the Court's opinion should be withdrawn and the appeal dismissed, as previously requested by the Respondents but not addressed by the Court. Even if the Court could properly exercise appellate jurisdiction under S.C. Code Ann. § 1-23-380, the Respondents further contend that the Court does not have authority to reverse the March 5, 2019, Order of the South Carolina Workers' Compensation Commission under S.C. Code Ann. § 1-23-380(5) because the Order does not affect any "substantial right," as it neither awards, nor denies, any benefits to the Appellant who has twice requested that a hearing on the merits be cancelled because she lacked sufficient evidence to prove her claim under the Workers' Compensation Act.

In addition, the Court misapprehended the authority of the Workers' Compensation Commission's Appellate Panel by engaging in an unduly restrictive interpretation of S.C. Code Ann. § 42-17-50, by failing to give the Commission any deference in its construction of that statute, and by refusing to accord S.C. Code Reg. 67-701 the full force and effect of law. The Court further misapprehended the nature of the Hearing Commissioner's Order -- an unlawful Order rendered in excess of his authority and

[1] The date on the Court's decision is an obvious typographical error.

jurisdiction to the prejudice of the Respondents' right to due process -- by considering it analogous to a lawful order on a proper procedural motion that should be entitled to deference. Lastly, the Court appears to have misapprehended the procedural posture of this claim by ordering a remand for additional proceedings without specifying what issues should be considered on remand, by whom, and under what authority. The Respondents respectfully contend that because the Appellant specifically requested that the hearing on the merits of her claim be cancelled and because he Appellate Panel fully addressed all issues properly before it, remand would be improper.

Arguments

I. The Court of Appeals overlooked the fact that it does not have appellate jurisdiction.

Appeals from the Workers' Compensation Commission are governed by the Administrative Procedures Act. Lark v. Bi-Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). Specifically, S.C. Code Ann. § 1-23-380 only authorizes judicial review of a "final decision" of an administrative agency, unless "review of the final agency decision would not provide an adequate remedy." A "final" decision is one that "disposes of the whole subject matter of the action ... leaving nothing to be done but to enforce by execution what has been determined." Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010) (internal citation omitted). Because the Workers' Compensation Commission's March 5, 2019, Order is not a "final" decision, and because there is no risk that review of some "final" agency

decision in the future would not provide an adequate remedy[2], the Court of Appeals is without authority or jurisdiction to review it pursuant to the plain terms of S.C. Code Ann. § 1-23-380. Importantly, this is more than a question of appellate jurisdiction under the statute because the Workers' Compensation Commission is part of the Executive Branch; therefore, "respect for separation of powers demand that judicial review of an administrative decision not occur until the decision ... is truly final." Torrence v. S.C. Dept. of Corrections, 433 SC 224, 857 S.E.2d 549 (2021). Based on the plain language of S.C. Code Ann. § 1-23-380 and respectful consideration for the separation of powers, the Court's Order should be withdrawn and the appeal dismissed.

In its decision, the Court of Appeals failed to elucidate the basis upon which it has assumed appellate jurisdiction, despite the fact that this issue was clearly raised. *See* Brief of the Respondents, Sec. I, pp.7—10. The Court makes no mention of S.C. Code Ann. § 1-23-380 and identifies no exception to the general rule requiring a "final" decision, ostensibly because none exists.[3] However, there can be no question that the Workers' Compensation Commission's March 5, 2019, Order does not "decide the merits" of the case, as it neither awards, nor denies, any benefits because no evidentiary

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[2] *See* Russell v. Wal-Mart Stores, Inc., ___ S.C. ___, 826 S.E.2d 864 (2019) (finding that "the commission's unreasonable delay in making a final decision" left the Appellant "without an adequate remedy on appeal from a final decision under section 1-23-380"). In the present case, the Appellant is solely responsible for any delay in a final decision, having twice asked the Commission to cancel hearings on the merits and having filed the present, interlocutory, appeal, and there is no danger of an inadequate remedy. (R. pp.12—16).

[3] As explained by former Chief Justice Pleicones, circumstances "that will permit the immediate appeal of an interlocutory administrative 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).

hearing has ever been held – at the Appellant's request. No reasonable person could seriously suggest that the Commission's March 5, 2019, Order "finally disposes of the whole subject matter of the action or terminates the action, leaving nothing to be done but to execute the judgment" such that the judicial review is authorized by statute or appellate jurisdiction is conferred. *See* Charlotte-Mecklenburg, *supra*.

Indeed, none of the cases cited in the Court's opinion support its assertion of appellate jurisdiction. In Walker v. Springs Industries, 298 S.C. 249, 379 S.E.2d 729 (Ct. App. 1989), the Workers' Compensation Commission's Appellate Panel affirmed a Hearing Commissioner's decision to return a claim to the Commission's general files following the claimant's request to withdraw her Form 50. The Walker Court dismissed the appeal, explaining that the "case does not qualify for direct appeal" because the Appellate Panel's order was "interlocutory and unappealable" pursuant to S.C. Code Ann. § 14-3-330.[4] The Walker Court said nothing of the Appellate Panel's authority to review the Hearing Commissioner's decision pursuant to S.C. Code Ann. § 42-17-50 or S.C. Code Reg. 67-701, as the Court's opinion seems to suggest. The sole issue was whether an appeal could be taken from the Appellate Panel's Order to the Court of Appeals. Therefore, the Court clearly misapprehended the holding of Walker by suggesting that it was the Appellate Panel, and not the Court of Appeals, which lacked authority to consider the case *sub judice*.

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[4] The Supreme Court has since explained that the Administrative Procedures Act, not S.C. Code Ann. § 14-3-330, governs the appellate courts' authority to hear appeals from the Workers Compensation Commission. Bone v. U.S. Food Service, 404 S.C. 67 733 S.E.2d 200 (2012).

Not even the case upon which the Court primarily relies, Levi v. North Anderson Co. EMS, 409 S.C. 374, 762 S.E.2d 44 (Ct. App. 2014), supports the exercise of appellate jurisdiction[5]. The Appellate Panel Order under review in Levi concluded that the claimant was not entitled to any benefits under the Workers' Compensation Act and dismissed the claim. Clearly, an order denying benefits and dismissing a claim "disposes of the whole subject matter of the action," rendering it a "final" decision under S.C. Code Ann. § 1-23-380. *See* Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control, 387 S.C. 265, 267, 692 S.E.2d 894, 895 (2010). The same is simply not true in the present case, where the Appellate Panel did not award, deny, or even address the Appellant's entitlement to benefits.

A third case cited by the Court, Martinez v. Spartanburg County, 406 S.C. 532, 753 S.E.2d 436 (2014), likewise does not support the Court's assumption of appellate jurisdiction. In Martinez, the Supreme Court rightly recognized that where an Appellate Panel order "left matters to be determined rather than disposing of the whole subject matter of the action," the "order was not appealable" and a Court of Appeals opinion reviewing that order must be vacated. The same is true here, as the Appellate Panel disposed of no matter, but left to be determined whether the Appellant is entitled to refile her claim under S.C. Code Reg. 67-609(C) upon a showing of good cause; whether and to what extent the Appellant sustained any injury by accident arising out of or in the

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[5] The Court also cites Temples v. Ramsey, 285 S.C. 600, 330 S.E.2d. 558 (1989) and Brown v. County of Berkeley, 366 S.C. 354, 622 S.E.2d 533 (2005). Temples involved a breach of contract and does not support the Court's assertion of appellate jurisdiction. In Brown, a tort claim, the Supreme Court held that an interlocutory order denying a motion to dismiss and "is not presently subject to appellate review."

course of her employment under S.C. Code Ann. § 42-1-160; whether and to what extent the alleged accident aggravated her known pre-existing conditions under S.C. Code Ann. § 42-9-35; whether and to what extent the Appellant is entitled to any medical benefits under S.C. Code Ann. § 42-15-60; whether and to what extent the Appellant is entitled to any disability compensation under S.C. Code Ann. § 42-9-10, § 42-9-20, § 42-9-260, § 42-15-80, and S.C. Code Reg. 67-505(F); and whether and to what extent the Appellant is entitled to scheduled benefits under S.C. Code Ann. § 42-9-30. Therefore, the Respondents respectfully request that the Court of Appeals withdraw its opinion and dismiss the appeal in accordance with the mandates of S.C. Code Ann. § 1-23-380 and firmly established precedent.

II. The Court of Appeals overlooked the fact that it does not have authority to reverse the Commission.

Pursuant to S.C. Code Ann. § 1-23-380(5), an appellate court may only reverse or modify an administrative order "if substantial right of the appellant have been prejudiced." Here, the Court of Appeals failed to identify any "substantial right" of the Appellant that could have possibly been prejudiced by the Appellate Panel's Order, which neither awards, nor denies, any benefits. The ultimate conclusion of the Appellate Panel was that, after the Claimant withdrew her second hearing request and the hearing was cancelled, "the Hearing Commissioner was divested of jurisdiction and authority to entertain or adjudicate further arguments regarding this claim." (R. p.19). Can it reasonably be said that the Appellant has a "substantial right" to extrajudicial proceedings, or a void declaration rendered without authority or jurisdiction?

Obviously not, but the Appellant identifies no other interest affected by the Appellate Panel's Order.

Our Supreme Court has previously held that an order affects a substantial right "when such order would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense." *Ex parte* Wilson, 367 S.C. 7, 625 S.E.2d 205 (2005) (citing Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 335 n.4, 426 S.E.2d 777, 780 n.4 (1993)); see *also* Thornton v. SCE&G, 391 SC 297, 705 S.E.2d 475 (Ct. App. 2011) (holding that an order affects a substantial right "if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits and preventing the party from seeking to correct any errors in the order during or after trial"). Here, the Appellate Panel's Order did not discontinue any action, as that decision was already made, unilaterally, by the Appellant when she withdrew her hearing request on October 24, 2017. (R. p.18 #5). The Appellate Panel's Order does not prohibit the Appellant from appealing any finding or conclusion regarding "good cause" or "prejudice" or any other issue regarding her entitlement to workers' compensation benefits in the future *after those issues are actually litigated* before a hearing commissioner with jurisdiction and authority. The Appellate Panel's Order removed no material issue from the case, it merely determined that Hearing Commissioner Campbell was without authority or jurisdiction to decide issues that were not before him when he issued his Order on November 14, 2017. Therefore, the Appellate Panel's Order affects no "substantial right" of the Appellant and the Court of Appeals has no authority to reverse it under S.C. Code Ann. § 1-23-380(5). As such, the Respondents respectfully contend that the Court's decision should be withdrawn and the appeal dismissed.

III. The Court of Appeals overlooked the fact that the Commission has authority to review the Hearing Commissioner's "decision" pursuant to S.C. Code Reg. 67-701.

The Court, by engaging in an unduly restrictive interpretation of S.C. Code Ann. § 42-17-50, by failing to give the Commission any deference in its construction of that statute, and by refusing to accord S.C. Code Reg. 67-701 the full force and effect of law, determined that the Appellate Panel had no authority to review the Hearing Commissioner's decision in this case. Under S.C. Code Ann. § 42-17-50, the Appellate Panel has authority to review an "award" of a Hearing Commissioner. While it is true (as the Court noted) that "[t]he Code does not define award," the Worker's Compensation Commission – the very agency charged with its construction – has interpreted it to mean "decision" or "order" by virtue of S.C. Code Reg. 67-701. That regulation, having been promulgated in accordance with S.C. Code Ann. § 42-17-50, as well as the Administrative Procedures Act and S.C. Code Ann. § 42-3-30, is entitled to "full force and effect of law." *See* S.C. Code Ann. §1-23-160.

Regulation 67-701(A) states,

> "[e]ither party or both may request Commission review of the Hearing Commissioner's **decision** ... within fourteen days of the day the Commissioner's **order** is received." (emphasis added).

Neither Regulation 67-701, nor S.C. Code Ann. § 42-17-50, employ the term "final," nor do they in any way exclude intermediate decisions or orders from immediate review, yet the Court resorted to such a forced construction in limiting the Commission's authority to reach its desired conclusion. Grazia v. S.C. State Plastering, LLC, 390 S.C. 562, 569, 703 S.E.2d 197, 200 (2010) (holding that the Court should not resort to subtle or forced

construction to limit or expand a statute's operation). It is because neither S.C. Code Ann. § 42-17-50, nor Regulation 67-701, require a decision or order be "final" that the Appellate Panel "commonly reviews intermediate orders," as the Court acknowledged.

Furthermore, neither Regulation 67-701, nor S.C. Code Ann. § 42-17-50, limit Appellate Panel review to "intermediate awards that decide important issues[6]," as the Court suggests without explanation or authority. However, the Court "cannot rewrite the statute and inject matters into it which are not in the legislature's language." City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997) (citing Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970). By holding that the Appellate Panel is only empowered to review "final" orders or "intermediate awards that decide important issues," the Court necessarily rewrites S.C. Code Ann. § 42-17-50 and injects matters into it which are not in the legislature's language, which is plain error.

It was previously well-settled that the "construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons." Brown v. S.C. Dept of Health & Envtl. Control, 348 S.C. 507, 515, 560 S.E.2d 410, 414 (2002) (quoting Dunton v. S.C. Bd. of

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[6] Even assuming that the Appellate Panel can only review "intermediate awards that decide important issues," the Respondents respectfully contend that the question of whether the Appellant has shown "good cause" to withdraw her Form 50 a second time without prejudice constitutes an "important issue," which necessitates immediate review by the Appellate Panel. Also important is the question of whether the Hearing Commissioner has authority to issue an order on a question that was never properly raised after being divested of jurisdiction. Had the Appellate Panel believed these were not "important issues" requiring immediate review, the Appellate Panel, within its disretion, could have dismissed the appeal or found it to be without merit under S.C. Code Reg. 67-703.

Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)). Here, the Court failed elucidate any "compelling reason" why the Commission's plain, ordinary, and wholly reasonable construction of the term "award" to mean "decision" or "order" should be overruled or why S.C. Code Reg. 67-701 should be invalidated[7]. *See also*, Spruill v. Richland Co. Sch. Dist., 363 S.C. 61, 609 S.E.2d 524 (2005) (holding that appellate 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'"). Given the absence of any "compelling reason" or even "respectful consideration" by the Court, and because the Commission was otherwise within its authority to promulgate Regulation 67-701 and properly exercised this authority in reviewing the Hearing Commissioner's decision in this case, the Respondents respectfully contend that the Court of Appeals should withdraw its opinion and dismiss the appeal.

IV. The Court misapprehends the nature of the Hearing Commissioner's Order.

The Court mistakenly concluded that the Hearing Commissioner's Order "is analogous to an order granting a continuance or denying a motion to dismiss[8]." When a Hearing Commissioner grants a continuance, it necessarily means that a proper motion

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[7] The Appellant has filed no petition requesting amendment or repeal of Regulation 67-701 pursuant to S.C. Code Ann. § 1-23-126, nor has she preserved any argument that the Regulation was promulgated without authority.

[8] The Workers' Compensation Commission expressly prohibits motions to dismiss. S.C. Code Reg. 67-215(B)(1).

has been filed in accordance with S.C. Code Reg. 67-613 and Reg. 67-215, which not only provides the parties notice of the issues to addressed but gives the Hearing Commissioner jurisdiction and authority to decide the motion and requires the Hearing Commissioner to "issue a written decision." S.C. Code Reg. 67-215(G)(2). However, in the present case, Hearing Commissioner Campbell had no such motion before him and had no such authority to decide any issue or issue any written decision. Instead, the Appellant informed the Hearing Commissioner that she was voluntarily withdrawing her second Form 50 hearing request on October 24, 2017, at which time "the Hearing Commissioner was divested of jurisdiction and authority to entertain or adjudicate further arguments regarding the claim." (R. p.19 #6).

The Court of Appeals apparently overlooks the fact that its Opinion essentially reinstates an impermissibly vague decision that was reversed by the Commission's Appellate Panel on the basis that it was rendered upon unlawful procedure, without authority or jurisdiction, and prejudicial to the Respondents' right of due process. There is no reason to believe that the Appellate Panel would not reach the same conclusion if the Appellant files a new hearing request, the matter is adjudicated on the basis that Hearing Commissioner Campbell's November 14, 2017, Order cannot be collaterally attacked, and the issue is again appealed to the Appellate Panel, resulting in an extraordinary waste of time and resources. The Administrative Procedures Act, S.C. Code Ann. § 1-23-320(E), specifically requires that "[o]pportunity must be afforded all parties to respond and present evidence and argument on all issues involved" in an administrative hearing. However, the Respondents were never afforded any reasonable opportunity to address whether the Appellant has shown good cause entitling her to withdraw her claim a second time without prejudice because the issue was admittedly

never raised, and no evidentiary hearing was ever held. Therefore, even if the Hearing Commissioner's November 14, 2017, Order could not be reversed by the Appellate Panel on March 5, 2019, for procedural and due process violations, it will be reversed eventually.

In addition, the Appellate Panel properly found "that there was no discussion about whether the Form 50 withdrawal was with or without prejudice" prior to the Appellant withdrawing the Form 50 on October 24, 2017. This finding was predicated on the following exchange on the Record:

> "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. p.138, ll.15--22). The Appellate Panel's finding is further supported by an email from the Appellant's attorney to the Hearing Commissioner on November 9, 2017, stating that she did not even believe the prejudice issue was relevant until 17 days after she voluntarily withdrew her Form 50, when she claimed that "[t]his matter has become more complicated than initially realized at the Hearing." (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."

On November 9, 2017 – 17 days after withdrawing her Form 50 and cancelling the hearing – the Appellant sent an email to the Hearing Commissioner asking that she be allowed to retroactively withdraw the previously withdrawn Form 50, but this time without prejudice and leave to refile. Prior to actually withdrawing her Form 50 on October 24, 2017, the Appellant made no motion or request for a continuance, nor did she ask the Hearing Commissioner to retain jurisdiction to render judgment on any disputed issue in the future. The Appellant 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 sufficient evidence to prove her claim.

According to S.C. Code Reg. 67-609(A)(1), a Form 50 "may be withdrawn by writing... the Commissioner's office identified on the hearing notice." Of course, only the Appellant could withdraw her own Form 50. *See* S.C. Code Reg. 67-609(A). In this case, the withdrawal was made so late that the Appellant notified the Commission and the Respondents, in person, on October 24, 2017. The Appellant'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 the Appellant'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 the Appellant to effectuate the withdrawal of the Form 50 and the cancellation of the hearing she accomplished six days earlier. "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 a Hearing Commissioner 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). Therefore, even if the Hearing Commissioner's November 14, 2017, Order could not be reversed by the Appellate Panel on March 5, 2019, for want of authority and jurisdiction, it will be reversed eventually.

The Appellate Panel, the agency charged with promulgating and administering Regulation 67-609, concluded that the Appellant'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 #6). 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 ...'" Spruill v. Richland County Sch. Dist. 2, *supra*.

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, and no motion was pending. Workers' Compensation Hearing Commissioners cannot simply issue orders because a litigant emails them with a plaintive request, as the Appellant did here. If a party desires a decision in a contested case, there are well-defined procedures in 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 pursuant 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 position 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" pursuant 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 must be 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, the Appellant did not file a Form 50 raising the issue of whether her claim could be withdrawn "without prejudice" for a second pursuant to S.C. Code Reg. 67-609(C). 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 prejudice issue, as is required by S.C. Code Reg. 67-607. The Appellant failed to file any Form 58, pre-hearing brief, raising 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 the Appellant'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 the Appellant'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. 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 Court erred in finding the Hearing Commissioner's Order is analogous to a valid order addressing a proper motion for a continuance. There can be no analogy between a lawful procedural order, which is entitled to deference, and an unlawful order issued without jurisdiction or authority, which must be vacated. As concluded by the Appellate Panel, the Hearing Commissioner's order was an illegal one, issued in excess of his authority, and required reversal. Reinstating it, as the Court has done, serves no legitimate purpose, but will undoubtedly result in further appeals and waste of judicial resources.

V. The Court misapprehends the procedural posture of this case by ordering a "remand for proceedings consistent with [its] opinion."

As explained more fully above, the Appellant has twice withdrawn her own hearing request and asked that the Workers' Compensation Commission cancel any hearing on the merits of her claim. The Appellate Panel fully and finally decided all issues raised in the Respondent's Form 30 and no other issues are preserved for review by this Court or consideration by the Commission on remand[9]. (R. pp.8—12; 60—64). This begs the

[9] To the extent that the Appellant alleges that the Hearing Commissioner should have awarded penalties, the Appellant abandoned this issue when she failed to file a Form 30. Therefore, the issue was not properly before the Appellate Panel, is not properly before the Court, and is not a proper issue for remand. *See* S.C. Code Reg. 67-701(A)(3)(a) (requiring that "[t]he grounds for appeal must be set out in detail on the Form 30"); S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007) (holding that to preserve an issue for appeal, it must be raised by the appellant in a timely manner and with sufficient specificity (citing Jean Hoefer Toal *et al.*, Appellate Practice in South Carolina 57 (2d ed. 2002)).

question, what issue is to be considered on remand, by whom, and upon what authority? The Court's Opinion is silent on these fundamental questions, which alone necessitates reconsideration. *See* Wilder Corp. v. Wilke, 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 first raised and ruled upon by the lower appellate tribunal).

Conclusion

Therefore, the Respondents, the South Carolina Department of Corrections and the South Carolina State Accident Fund, respectfully request that the unpublished decision of the Court of Appeals be withdrawn and the appeal dismissed in accordance with S.C. Code Ann. § 1-23-380 and for the reasons stated herein above.

Respectfully submitted,

March 9, 2022

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THE STATE OF SOUTH CAROLINA
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Gena Cain Davis, Claimant,.....Appellant,

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S.C. Department of Corrections, Employer, and
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PROOF OF SERVICE

The undersigned hereby certifies that the above-named Appellant, Gena Cain Davis, was served with the Petition for Rehearing and Request for Oral Arguments of the Respondents this 9th day of March 2022, by email and by depositing a copy of the same in the United States Mail, first class postage prepaid, addressed to counsel of record, as follows:

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March 9, 2022

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March 9, 2022

Via Email-ctappfilings@sccourts.org/Regular Mail
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: Gena Cain Davis v. SC Department of Corrections
W.C.C. File No.: 1609593
Appellate Case No.: 2019-000560
Carrier File No.: 2016-2181
Date of Accident: July 14, 2016

Dear Ms. Kitchings:

Enclosed herewith for filing, please find Petition for Rehearing and Request for Oral Arguments of the Respondents, including original Proof of Service of the same in the above-referenced matter.

By a copy of this correspondence, I am serving the other counsel of record with a copy of our Petition. Also enclosed, please find our check in the amount of $50.00 for the filing fee.

Yours very truly,

Kirsten L. Barr

KLB/ebw/les
Enc.
cc: Brianna Jones, South Carolina State Accident Fund (w/enc.) (email only)
Russell Rush, SC Dept. of Corrections (w/enc.) (email only)
Stephen B. Samuels, Esq. (w/enc.) (email/mail)
Russell Rush, SC Dept. of Corrections (w/enc.) (email only)
Erin Farthing, Esq. (w/enc.) (email only)
Edwin P. Martin, Jr., Esq. (w/enc.) (email only)