THE STATE OF SOUTH CAROLINA

In the Supreme Court

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S.C. SUPREME COURT

Appeal from the South Carolina
Worker's Compensation Commission

Opinion No. 2022-UP-081
(S.C. Ct. App. filed February 23, 2022)

Gena Cain Davis, Claimant,.....Respondent,

v.

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

PETITION FOR WRIT OF CERTIORARI

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A Petition for Rehearing was filed by the South Carolina Department of Corrections and the South Carolina State Accident Fund on March 9, 2022. (A. pp.248—266). The Court of Appeals finally ruled upon the Petition for Rehearing by Order dated March 28, 2022. (A. p.247)

Questions Presented

I. Did the Court of Appeals err as a matter of law by assuming appellate jurisdiction to review an interlocutory decision of the Workers' Compensation Commission?

II. Did the Court of Appeals err as a matter of law in concluding that the Workers' Compensation Commission lacked authority to review the Hearing Commissioner's decision pursuant to S.C. Code Reg. 67-701?

III. Did the Workers' Compensation Commission's Appellate Panel properly reverse the Hearing Commissioner's Order, which was rendered upon unlawful procedure, without authority or jurisdiction, and prejudicial to the Petitioners' right of due process?

IV. Did the Court of Appeals err as a matter of law in ordering a remand to the Workers' Compensation Commission when no issues germane to the appeal are pending?

Statement of the Case

Gena Cain Davis alleges she sustained injuries on July 14, 2016, while working for the South Carolina Department of Corrections.[1] By Form 50 dated October 19, 2016, Davis

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

requested a workers' compensation hearing to determine her entitlement to medical benefits. (A. p.22). After a hearing was scheduled, discovery was completed, and pre-hearing briefs were filed, Davis voluntarily withdrew her hearing request (Form 50) on February 6, 2017, because an expert witness deposition proved detrimental to her position. (A. pp.26—29; pp.140, l. 62; p.18 #1; p.87, ¶6).

By Form 50 dated April 13, 2017, Davis filed her hearing request a second time, again raising the very same issues raised in the October 19, 2016, Form 50. (A. p.33). A second hearing on these same issues was scheduled for July 19, 2017. (A. p.41). The Petitioners moved to postpone the July 19, 2017, hearing in order to depose a new expert belatedly obtained by Davis. (A. pp.42--44). Davis did not object to a continuance and the motion was granted. (A. p.88, ¶5; p.1). At that time, the hearing on Davis's April 18, 2017, Form 50 was rescheduled for October 24, 2017. (A. p.45). Davis filed pre-hearing briefs on July 6, 2017, and October 6, 2017, neither of which make any suggestion that her discovery was incomplete, that additional time was needed, that the matter should be postponed, or that the hearing scheduled for October 24, 2017, was in any way premature. (A.p.46).

During a pre-hearing conference before Hearing Commissioner R. Michael Campbell, II, on October 24, 2017, Davis informed the Petitioners and the Commission that she was withdrawing her second Form 50 hearing request because she did not have the medical evidence required by the plain language of S.C. Code Ann. § 42-15-60 to support her claim and asked that the hearing be cancelled.[2] (A. p.6, ¶1; p.82). Davis did not request postponement or adjournment

[2] Davis later alleged that she was unaware of the statutory burden of proof imposed by the plain language of S.C. Code Ann. § 42-15-60 and could not have known of this burden until the case of Hartzell v. Palmetto Collision, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016), was published.

of the hearing and she made no request for consent by the Petitioners, or approval from the Hearing Commissioner, to withdraw her Form 50 a second time without prejudice to her right to proceed with the claim (or to file a third hearing request in the future). At the pre-hearing conference, the Hearing Commissioner made no ruling and otherwise made no mention of the issues of prejudice, good cause, or delay.[3] These issues simply were not raised by Davis, or ruled upon by the Hearing Commissioner, on October 24, 2017, and Davis admits that neither "prejudice," nor "good cause," were even discussed. (A. p.138, ll.15--22). At Davis's request, no documentary evidence was received, or testimony was taken on October 24, 2017. (A.p.6). The parties did not even enter arguments on the record.[4] (A. p.6). Thereafter, on October 30, 2017, the Commission formally documented that Davis's second Form 50 hearing request had simply been "withdrawn." (A. p.139).

On November 9, 2017, Davis's attorney submitted a proposed order and *sua sponte* included a ruling that "the Claimant was allowed to withdraw the Form 50 without prejudice."[5] (A. p.82). The Petitioners objected to this language, as "prejudice" was never raised by Davis, or

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(A. p.82). However, the Hartzell case was decided more than a year prior to the scheduled hearing in the case *sub judice* and merely applied the plain language of a statute enacted in 2007.

[3] S.C. Code Reg. 67-609 states that a claimant may withdraw a Form 50 once without prejudice, but that withdrawing a Form 50 for a second time without "good cause" and "merely for the purpose of delay" may "operate as a voluntary dismissal of the claim when the form is withdrawn by a claimant who has once withdrawn a Form 50…based on the same set of facts."

[4] At a pre-hearing conference on October 24, 2017, Davis also argued that the Petitioners' Form 21, which had been filed in accordance with S.C. Code Reg. 67-505(F), was not properly before the Commission and asked that the hearing on the Form 21 be cancelled. The Hearing Commissioner agreed.

[5] By email dated November 2, 2017, the Hearing Commissioner's administrative assistant inquired about Davis's attorney drafting a proposed order regarding the dismissal of the Form 21. (A. p.77). The request for proposed order makes no mention of the Form 50 withdrawal. (A. p.77).

addressed by the Hearing Commissioner, and the issue was not properly before the Hearing Commissioner after the Form 50 was voluntarily withdrawn. (A. p.79; p.101; p.104; p.107). Davis admitted that the issue had not been raised or ruled upon at the pre-hearing conference on October 24, 2017, but nevertheless began arguing the matter *via* e-mail in the weeks after the hearing was cancelled. (A. p.82, p.138, ll.15--22).

On November 9, 2017 – 17 days after voluntarily withdrawing her Form 50 hearing request for a second time – Davis informed the Hearing Commissioner that "[t]his matter has become more complicated than initially realized at the Hearing …" (A. p.82). Davis argued that the Hearing Commissioner should allow her to somehow retroactively withdraw the April 13, 2017, Form 50 she had already withdrawn, but this time without prejudice and with leave to refile. (A. p.82). The Petitioners again objected to Davis's untimely request more than two weeks after the Form 50 was withdrawn for a second time, not only because the request was without merit, but because the Hearing Commissioner had no proper motion before him, because no hearing request was pending, and because the Hearing Commissioner otherwise lacked the authority or jurisdiction to adjudicate Davis' the issue. (A. p.79; p.101; p.104; p.107). In addition, the Petitioners argued that it was prejudicial to their right of due process to allow Davis to make new arguments without proper notice and adequate opportunity to be heard on these novel issues, which had not been raised prior to the actual withdrawal of the second Form 50 or in the weeks thereafter. (A. p.101).

The Hearing Commissioner issued an Order dated November 14, 2017, with the conclusory finding that Davis's second Form 50 hearing request had been withdrawn "without prejudice." (A. p.3). The Hearing Commissioner failed to make any findings of fact or conclusions of law and otherwise failed to elucidate any factual or legal basis for his ruling. (A.

p.3). The Hearing Commissioner's Order did not mention S.C. Code Reg. 67-609 or its requirements.

On November 20, 2017, the Petitioners filed a Form 30 request for review by the Workers' Compensation Commission's Appellate Panel pursuant to S.C. Code Reg. 67-701. (A. p.60). By their Form 30, the Petitioners argued that the Hearing Commissioner's Order is unsupported by the evidence in the record, contrary to the applicable law, impermissibly vague, and was otherwise made upon unlawful procedure and in excess of legal authority. (A. pp.60—64; pp.67—84). By Order dated March 5, 2019 (A. pp.6—20), the Appellate Panel reversed the Hearing Commissioner's Order and found that

> "[t]he hearing was cancelled by the Hearing Commissioner on October 24, 2017 prior to going on the record, after which time the Hearing Commissioner's authority and jurisdiction to adjudicate this claim ended." (A. p.19, #7).

The Appellate Panel went on to conclude that Davis "voluntarily withdrew her first Form 50 dated October 21, 2016 on February 8, 2017 pursuant to S.C. Code Reg. 67-609(A);" that Davis "voluntarily withdrew her second Form 50 dated April 18, 2017 on October 24, 2017, pursuant to S.C. Code Reg. 67-609(C);" and that "[a]fter second Form 50 was withdrawn and the Form 21 hearing was cancelled, the Hearing Commissioner was divested of jurisdiction and authority to entertain or adjudicate further arguments regarding this claim." (A. p. 19, #1, #4, #6). Davis filed a Notice of Appeal to the Court of Appeals on April 4, 2019. (A. p.110).

Before the Court of Appeals, the Petitioners argued that the Appellate Panel's Order dated March 5, 2019, is not immediately reviewable under S.C. Code Ann. § 1-23-380. (A. pp.190—

193). The Court of Appeals failed to address this argument. The March 23, 2022[6], Order of the Court of Appeals makes no mention of § 1-23-380 or the authority by which it asserted appellate jurisdiction. (A. p.242). Instead, by its Order dated March 23, 2022, the Court of Appeals reinstated the Hearing Commissioner's decision, without addressing its many shortcomings, and concluded that the Workers' Compensation Commission's Appellate Panel did not have authority to administratively review the decision of Hearing Commissioner Campbell because, in the opinion of the Court of Appeals, that decision did not involve "important issues." The Court of Appeals remanded the claim "for proceedings consistent" with its opinion; however, the Court failed to elucidate what issues were to be considered on remand, by whom, and upon what authority.

In the Order denying the Petition for Rehearing dated March 28, 2022, the Court of Appeals "[i]n an effort to clarify the mandate," ordered that "the claim is remanded to the commission to proceed with whatever fillings and hearing requests are pending, if any." (A. p.247). The Court of Appeals also acknowledged the Petitioner's due process and other substantive arguments for the first time, but instead of addressing them, concluded "nothing prevents [the Petitioners] from asserting at a future hearing that the single commissioner's decision was in error or that the claimant's Form 50 was withdrawn for the sole purpose of delay." Apparently, the Court of Appeals now endorses a procedural quagmire whereby immediate review is forbidden and collateral attack is preferred.

Pursuant to Rule 242, S.C.A.C.R., the Petitioners, the South Carolina Department of Corrections and the South Carolina State Accident Fund, respectfully request that the Supreme

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[6] The date on the Court's decision is an obvious typographical error, as it was issued on February 23, 2022.

Court issue a Writ of Certiorari to review the Opinion of the Court of Appeals dated March 23, 2022, and the Order denying the Petition for Rehearing dated March 28, 2022. The Petitioners respectfully contend that the Court of Appeals lacked appellate jurisdiction under the plain terms of the Administrative Procedures Act, as interpreted by the South Carolina Supreme Court. Even if the Court of Appeals could properly exercise appellate jurisdiction under S.C. Code Ann. § 1-23-380, the Petitioners 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 Davis, 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 of Appeals erred in its interpretation and application of S.C. Code Ann. § 42-17-50, by failing to give the Workers' Compensation 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 of Appeals further erred in reinstating the Hearing Commissioner's Order that was properly reversed by the Commission's Appellate Panel on the basis that it is an unlawful order rendered in excess of authority and jurisdiction to the prejudice of the Petitioners' right to due process. In addition, the suggestion by the Court of Appeals that the Petitioners may collaterally attack the Hearing Commissioner's November 14, 2017, Order is not only untenable, but creates unnecessary confusion, delay and, quite possibly, inconsistent orders necessitating further appeals. Therefore, the Petitioners respectfully request that the Supreme Court grant a Writ of Certiorari, vacate the Orders of the Court of Appeals, and dismiss Davis's appeal from the South Carolina Workers' Compensation Commission for want of appellate jurisdiction.

Arguments

I. The Court of Appeals lacked appellate jurisdiction to review the interlocutory decision of the Workers' Compensation Commission.

The March 5, 2019, Order of the South Carolina Workers' Compensation Commission's Appellate Panel reversed the November 14, 2017, decision by Hearing Commissioner R. Michael Campbell, II, on the basis that it addressed issues that were not properly before the Hearing Commissioner and that he otherwise had no authority or jurisdiction to address. The Appellate Panel's Order neither awarded, nor denied, any workers' compensation benefits and did not finally decide any issue. Indeed, no evidentiary hearing has ever been held, as the Claimant, Davis, has twice withdrawn her own hearing request, being ill-prepared to prove her case on the merits.[7]

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"

[7] To the extent that the effects of Davis's voluntary, unilateral actions on October 24, 2017, are final, that result rests on Davis alone and not on any decision by the Appellate Panel that would render it a "final decision" under S.C. Code Ann. § 1-23-380.

agency decision in the future would not provide an adequate remedy[8], the Court of Appeals lacked 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. As this Court has recently explained, "[b]eyond the statutory requirement for a final decision, 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 S.C. 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 decision of the Court of Appeals should be vacated, and the appeal dismissed.

The Court of Appeals failed to elucidate the basis upon which it assumed appellate jurisdiction, despite the fact that this issue was clearly raised. (A. pp.190—193). The opinion of the Court of Appeals 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.[9] However, there can be no question that the Workers' Compensation Commission's March 5,

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[8] *See* Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 863 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. (A. pp.12—16).

[9] 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).

2019, Order does not "decide the merits" of the case. Therefore, the Petitioners respectfully request that the Supreme Court vacate the decision of the Court of Appeals and dismiss the appeal in accordance with the mandates of S.C. Code Ann. § 1-23-380 and firmly established precedent, including the very cases cited, but wrongly applied, by the Court of Appeals.

II. The Court of Appeals erred in concluding that the Workers' Compensation Commission lacks authority to review the Hearing Commissioner's decision.

The Court of Appeals, by engaging in an unduly restrictive interpretation of S.C. Code Ann. § 42-17-50, by failing to give the Workers' Compensation 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 immediately review a Hearing Commissioner's decision that was improperly issued without jurisdiction or authority. 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 of Appeals 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[10]," nor do they in any way exclude intermediate decisions or orders from immediate review, yet the Court of Appeals resorted to such a forced construction in limiting the Commission's authority. 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 of Appeals acknowledged.

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 Examiners in Optometry, 291 S.C. 221, 223, 353 S.E.2d 132, 133 (1987)). Here, the Court of Appeals 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.

[10] *Contra*, S.C. Code Ann. § 1-23-380, which "on its face … refers to a 'final judgment'…a well-established term of art in the law to which great significance is attached." Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552 (2013).

67-701 should be invalidated[11]. *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 of Appeals, 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 Petitioners respectfully contend that the Order of the Court of Appeals should be vacated, and the appeal dismissed.

Furthermore, neither Regulation 67-701, nor S.C. Code Ann. § 42-17-50, limit Appellate Panel review to "intermediate awards that decide important issues," as the Court of Appeals holds (though without explanation or citation of authority).[12] However, the Court of Appeals "cannot rewrite the statute and inject matters into it which are not in the legislature's language."

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[11] Davis 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. The Court of Appeals failed to address Regulation 67-701 whatsoever.

[12] In one of the cases relied upon by the Court of Appeals, Walker v. Springs Industries, 298 S.C. 249, 379 S.E.2d 729 (Ct. App. 1989)[12], 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 employee's request to withdraw her Form 50. The Court held that the "case does not qualify for direct appeal" because the Appellate Panel's order was "interlocutory and unappealable." 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. The sole issue was whether an appeal could be taken from the Appellate Panel's Order to the Court of Appeals. Therefore, the Court of Appeals 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* under this precedent.

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 of Appeals necessarily rewrites S.C. Code Ann. § 42-17-50 and injects matters into it which are not in the legislature's language, which, respectfully, is plain error.

Moreover, even if this "important issue" requirement were the appropriate legal standard governing Appellate Panel review, only the Workers' Compensation Commission is empowered to make such a factual finding about whether the Petitioners' Form 30, Request for Review, raised sufficiently "important issues" to be immediately reviewed. Under the Administrative Procedures Act, it is well-settled that the Workers' Compensation Commission is the ultimate fact finder in a workers' compensation claim. Jordan v. Kelly Co., 381 S.C. 483, 674 S.E.2d 166 (2009). It is not the task of a reviewing court to weigh the evidence. DeBruhl v. Kershaw Co. Sheriff's Dept., 303 S.C. 20, 397 S.E.2d 782 (Ct. App. 1990). To make an implicit finding of fact on appeal about whether the issues raised on the Form 30 were of sufficient importance to the Workers' Compensation Commission to be reviewed immediately, especially when the issue of said "importance" was never raised or ruled upon by the Commission, was plain and reversible error by the Court of Appeals. *See* Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779–80 (2004) (holding that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court.")

Even assuming that the Appellate Panel can only review "intermediate awards that decide important issues," the Petitioners respectfully contend that the question of whether a Hearing Commissioner has authority to issue an order on a question that was never properly raised after

being divested of jurisdiction, in violation of the Petitioners' right to Due Process, actually is an "important issue." Had the Appellate Panel believed this was not an "important issue" requiring immediate review, the Appellate Panel, within its sole discretion, could have dismissed the appeal or found it to be without merit under S.C. Code Reg. 67-703. Here, the Court of Appeals erred as a matter of law assuming the Commission's discretionary authority in an effort to reach a contrary conclusion. As such, the Petitioners respectfully request that the Petition for Writ of Certiorari be granted, the decision of the Court of Appeals be vacated, and that Davis's appeal be dismissed.

III. The Workers' Compensation Commission properly reversed the Hearing Commissioner's Order, which was rendered upon unlawful procedure, without authority or jurisdiction, and prejudicial to the Petitioners' right of due process.

The Court of Appeals did not address the merits of the Workers' Compensation Commission's March 5, 2019, Order. (A. pp.6—20). However, the Petitioners respectfully contend that the Appellate Panel's findings and conclusions that Davis voluntarily withdrew her Form 50 on October 24, 2017, at which time the Hearing Commissioner "was divested of jurisdiction and authority to entertain or adjudicate further arguments regarding this claim" (A. p.19), are supported by substantial evidence and the applicable law. Therefore, the Court of Appeals should have affirmed the March 5, 2019, Order of the Appellate Panel pursuant to S.C. Code Ann. § 1-23-380. It is not the province of the appellate courts to weigh the evidence as found by the Appellate Panel and the substantial evidence test "must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment." Lark v. BiLo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981)(internal citations omitted).

Not only did the Court of Appeals fail to address the merits of the appeal, but erroneously concluded that the Hearing Commissioner's Order "is analogous to an order granting a continuance or denying a motion to dismiss[13]." When a Hearing Commissioner grants a continuance, it necessarily means that a proper motion 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, Davis simply made a unilateral decision and informed the Hearing Commissioner that she was voluntarily withdrawing her second Form 50 hearing request on October 24, 2017 (A. p. 82).[14]

Substantial evidence supports the Appellate Panel's finding "that there was no discussion about whether the Form 50 withdrawal was with or without prejudice" prior to Davis unilaterally and voluntarily withdrawing her Form 50 on October 24, 2017. (A. p.18 #5). This finding was predicated, in part, 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*

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

[14] According to Davis's attorney,"[i]n light of [the Defendants' position] and over concern that there may not be sufficient proof in the record, I advised Commissioner Campbell that I was withdrawing my Form 50 to obtain additional medical evidence." (A. p.82).

Commissioner or Ms. Barr and Commissioner Campbell about whether it was with or without prejudice?

Mr. Samuels: *There was not, your Honor.*" (A. p.138, ll.15--22).

The Appellate Panel's finding in this regard is further supported by an e-mail from Davis's attorney to the Hearing Commissioner on November 9, 2017, stating that they did not even believe the prejudice issue was relevant until 17 days after the Form 50 was withdrawn, claiming that "[t]his matter has become more complicated than initially realized at the Hearing." (A. p.82). At no time prior to November 9, 2017 – 17 days after withdrawing her Form 50 and cancelling the hearing – did Davis make any motion or request for a continuance, nor did she ask the Hearing Commissioner to retain jurisdiction over any issue, nor did she request a finding of "good cause" for her unilateral actions, nor did she argue the issue of "prejudice" or request consent to withdraw her Form 50 without prejudice. Therefore, the Appellate Panel properly concluded that,

> "[a]fter 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."

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 Davis could withdraw her own Form 50. *See* S.C. Code Reg. 67-609(A). In this case, the withdrawal was made so late

that Davis notified the Commission and the Petitioners, in person, on October 24, 2017. Davis's verbal notice was then recorded in the Commission's file on October 30, 2017, in accordance with S.C. Code Reg. 67-609(A)(2), when the Commission formally documented that Davis's second Form 50 hearing request had simply been "withdrawn." (A. p.139). Thereafter, no further action was permitted by the Hearing Commissioner or required of Davis 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. *See* Spruill v. Richland County Sch. Dist. 2, 363 S.C. 61, 64-65, 609 S.E.2d 524 (2005). Therefore, the Hearing Commissioner's November 14, 2017, Order was properly reversed by the Appellate Panel on March 5, 2019, for want of authority and jurisdiction.

The Appellate Panel, the agency charged with promulgating and administering Regulation 67-609, concluded that Davis's voluntary withdrawal of the Form 50 was complete on October 24, 2017, at which time the Hearing Commissioner was divested of any authority or jurisdiction to determine any dispute between the parties. (A. p.19 #6). Of course, the 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.' Even if Regulation 67-609 were ambiguous, we would defer to the commission's interpretation since it reflects a

sound policy decision not to permit disgruntled claimants a second 'bite at the apple.'" Spruill 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 e-mails them with a plaintive request, as Davis 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, an employee 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 employer 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 an employee 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, Davis did not raise the issue of whether her claim could be withdrawn "without prejudice" a second time for "good cause" pursuant to S.C. Code Reg. 67-609(C) prior to, or even at the hearing. The Petitioners were given no opportunity to answer such a claim or raise defenses, as is their right under S.C. Code Reg. 67-603.[15] No evidence or argument was ever presented at a hearing on the factual and legal issues under Regulation 67-609(C), nor is there any transcript preserving Davis's arguments or the Petitioners' defenses, despite the mandatory requirements of S.C. Code Ann. § 1-23-320(H). The Petitioners 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). In fact, the Hearing Commissioner's November 14, 2017, Order does not even contain any findings of fact or conclusions of law, as mandated by S.C.

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[15] The Petitioners deny that Davis has proven her entitlement to withdraw her Form 50 for a second time "without prejudice" under S.C. Code Reg. 67-609(C) and deny either substantial evidence or the applicable law support the Hearing Commissioner's conclusion in this regard. The precise question under the regulation is whether Davis withdrew her Form 50 a second time for "good cause," or rather for the "purpose of delay." However, "delay" is shown to be the sole purpose of the Form 50 withdrawal based on Davis's attorney's own statements. Davis admitted that her "Form 50 was withdrawn to obtain proof," specifically required by S.C. Code Ann. § 42-15-60 and Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016). (A. p.82, p.175). However, Davis failed elucidate any purported justification why she had failed to obtain proof before the actual hearing and failed to demonstrate any "good cause" why additional time should be granted to gather such proof. Respectfully, Davis's claimed ignorance of the statutory requirements of S.C. Code Ann. § 42-15-60 and ill-preparedness to prove her case with the statutorily required evidence at the October 24, 2017, hearing does not constitute "good cause" under any legal theory, statute, or regulation. Davis's burden of proof under § 42-15-60 was not a new issue (having been enacted more than a decade earlier), her failure of proof was not a matter beyond her control, and there was no showing of due diligence to meet this long-established burden. Instead, Davis sought a delay in the adjudication of her claims because she was inexplicably, and unjustifiably, ill-prepared.

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) ("[f]indings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings").

Essentially, neither Davis's request for relief *via* e-mail 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 Petitioners, 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)).

Despite all of the legal, factual, procedural, jurisdictional, and even constitutional flaws implicit in Hearing Commissioner Campbell's November 14, 2017, Order, and despite the constraints of the Administrative Procedures Act (S.C. Code Ann. § 1-23-380) on an appellate court's authority to reverse an agency decision supported by substantial evidence and the applicable law, the Court of Appeals reinstated the Hearing Commissioner's Order. In addition, the Court of Appeals appears to favor a future collateral attack (based on these same legal, factual, procedural, jurisdictional, and constitutional errors) over the immediate review and

reversal that the Workers' Compensation Commission deemed appropriate.[16] Therefore, if the Petitioners are successful in a collateral attack at a future hearing, the parties will be left with two inconsistent orders, which would guarantee additional appeals (though likely the same ultimate conclusion by the Appellate Panel), resulting in the waste of extraordinary time and resources.

Accordingly, the Petitioners respectfully contend that the Court of Appeals 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 (and properly was) vacated without delay. As properly concluded by the Appellate Panel, the Hearing Commissioner's order was an illegal one, issued in excess of his authority, and required reversal. Reinstating this order and suggesting a future collateral attack, as the Court of Appeals has done, serves no legitimate purpose, but will undoubtedly result in further appeals and expense. Instead, assuming *arguendo* that appellate jurisdiction was properly assumed by the Court of Appeals, the Appellate Panel's March 5, 2019, Order should have been affirmed in accordance with S.C. Code Ann. § 1-23-380.

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[16] The March 28, 2022, Order of the Court of Appeals denying the Petition for Rehearing states, "[a]s to respondents' argument that the single commissioner's decision denied them due process, nothing prevents them from asserting at a future hearing that the single commissioner's decision was in error or that the claimant's Form 50 was withdrawn for the sole purpose of delay." (A. p.247).

IV. The Court of Appeals erred in ordering a remand to the Workers' Compensation Commission.

Without explanation, the decision of the Court of Appeals concludes with a "remand for proceedings consistent with [its] opinion." As explained more fully above, Davis 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 Petitioners' Form 30 and no other issues are preserved for review by this Court or consideration by the Commission on remand[17]. (A. pp.8—12; 60—64). This begs the question, what issue is to be considered on remand, by whom, and upon what authority? The Opinion of the Court of Appeals is silent on these fundamental questions. *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).

In the Order denying the Petition for Rehearing dated March 28, 2022 (A. p.247), the Court of Appeals seemingly acknowledges these issues, stating that "[i]n an effort to clarify the mandate the claim is remanded to the commission to proceed with whatever fillings and hearing requests are pending, if any." This begs the further question of why a remand has been ordered

[17] To the extent that Davis 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, was not properly before the Court of Appeals, 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)).

if not for a specific purpose? More importantly, ordering the Workers' Compensation Commission to "proceed" with any "hearing requests" ignores the fact that Davis has twice withdrawn her same hearing request[18] and has otherwise refused to submit to a medical examination[19] and; therefore, may not be entitled to proceed with a third hearing request as a matter of law. It is unclear whether the Court of Appeals is signaling a position on these issues, which are not squarely before it, or whether the "remand" language simply implies the procedural remittitur. Regardless, the lack of clarity on this issue is, respectfully, yet another reason for the Supreme Court to grant the Petition for Writ of Certiorari.

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[18] According to S.C. Code Reg. 67-609(C), a claimant may withdraw a Form 50 once without prejudice, but that withdrawing a Form 50 for a second time without "good cause" and "merely for the purpose of delay" may "operate as a voluntary dismissal of the claim when the form is withdrawn by a claimant who has once withdrawn a Form 50…based on the same set of facts." This regulation is essentially drawn upon Rule 41, F.R.C.P., and is modeled upon the common law doctrine of *Retraxit*, which holds that once a case has been voluntarily dismissed, if it is brought to court again a dismissal in this second case will mean the case can never again be brought back to court. *See also* Ford v. Ford, 239 S.C. 305 (1961). The Petitioners argue that, effectively, the second dismissal, or second Form 50 withdrawal, operates as an adjudication on the merits and that; therefore, when Davis announced to the Commission and to the Petitioners that she was withdrawing her second Form 50 on October 24, 2017, this was tantamount to a voluntary dismissal with prejudice.

[19] Pursuant to S.C. Code Ann. § 42-15-80, if an employee "refuses to submit himself to or in any way obstructs the examination requested by and provided for by the employer, his right to compensation and his right to take or prosecute a proceeding under this title must be suspended until the refusal or objection ceases…." Therefore, the Petitioners contend that, having refused to submit to an MRI of her allegedly injured left knee on March 15, 2017, which was requested and provided by the Petitioners, Davis is not entitled to a hearing before the Workers' Compensation Act as a matter of law. (A. p.30, p.57).

Conclusion

Therefore, the Petitioners, the South Carolina Department of Corrections and the South Carolina State Accident Fund, respectfully request that the Supreme Court grant a Writ of Certiorari to review and vacate the decision of the Court of Appeals in accordance with S.C. Code Ann. § 1-23-380 and for the reasons stated herein above.

Respectfully submitted,

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