THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1609593

Gena Cain-Davis, Claimant, ... Appellant,

v.

SC Department of Corrections, Employer,
and State Accident Fund, Carrier, ... Respondents.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

1. Respondents fail to address whether the Single Commissioner's Administrative Order was appealable.

In her brief to the Appellate Panel and this Court, Appellant argued that "An administrative order granting a continuance or dismissing a pleading without prejudice is not directly appealable as a matter of law." [R.P. 91-92; Brief of Appellant, pages 12-13]. In their brief, Respondents ignore this issue. They do not respond in any manner whatsoever, quite possibly because orders allowing a claimant to withdraw a Form 50 without prejudice are not appealable as a matter of law. As this Court stated in Walker, "Moreover, the appealed order effected an indefinite continuance of this case. Orders granting continuances are not directly appealable." Walker v. Springs Industries, Inc., 379 S.E.2d 729, 298 S.C. 249 (Ct. App. 1989), *citing* Temples v. Ramsey, 285 S.C. 600, 330 S.E.2d, 558 (Ct. App.1985)("it is well-established that orders granting or denying motions for a continuance or a mistrial are not directly appealable.").

The Court has authority to treat Respondents' failure to respond to this issue as a confession that the Administrative Order was not appealable. See First Union Nat'l Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct.App. 1996) (if respondent fails to respond to an issue in his brief, the appellate court may treat the failure to respond as a confession that the appellant's position is correct), *reversed on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997). Should the Court so rule, the Appellate Panel's Decision and Order would be vacated, thus disposing of this appeal on that single dispositive issue.

2. The Appellate Panel's Decision and Order is properly before the Court of Appeals [In Reply to Respondents' Argument at pages 7-9].[1]

Respondents raise a new issue in their brief, to wit: "Is the Appellate Panel's Order interlocutory and; therefore, not immediately appealable." [Brief of the Respondents, page 1]. One might observe that Respondents are making the reverse of the argument Appellant made about Respondents' appeal of Commissioner Campbell's Administrative Order. [R.P. 91-92; Brief of Appellant, pages 12-13].

To be clear, the Single Commissioner's order was an interlocutory administrative order which accomplished two things: (1) it dismissed the Form 21 *without prejudice*; and (2) it memorialized that the hearing commissioner heard and granted Appellant's request to withdraw her Form 50 *without prejudice*, effectively granting a continuance. [R.P. 3]. The error lies with the Appellate Panel, wherein it failed to dismiss Respondents' interlocutory appeal. See Walker v. Springs Industries, Inc., 379 S.E.2d 729, 298 S.C. 249 (Ct. App. 1989)("Moreover, the appealed order [withdrawing the Form 50 without prejudice] effected an indefinite continuance of this case. Orders granting continuances are not directly appealable."); Temples v. Ramsey, 285 S.C. 600, 330 S.E.2d, 558 (Ct. App.1985)("it is well-established that orders granting or denying motions for a continuance or a mistrial are not directly appealable.").

The initial error was compounded when the Appellate Panel made Findings of Fact and

[1]Respondents requested that the summary of the underlying facts should be stricken because the supporting medical records were not entered into evidence. [Brief of Respondents, page 7, footnote 3]. As stated in Appellant's brief, the summary is taken from Appellant's prehearing brief. The prehearing brief itself (including the summary) was filed with the Commission fifteen days prior to the hearing as required by the Commission's regulations. See S.C. Code Reg. 67-611. Medical records and other expert reports are entered into evidence at the hearing itself.

Conclusions of Law which are erroneous and prejudicial to Appellant. Although there are certainly intermediate appellate orders which cannot be immediately appealed – typically where there is a remand to the trier of fact for further fact finding or clarification – appellate orders *reversing* the granting of a continuance by a trial judge must necessarily be appealable. The Appellate Panel's Order in the instant case is appealable because the new Findings of Fact – should they become the law of the case – could result in dismissal of the entire case with prejudice. This is the position taken by Respondents after Commissioner Campbell issued his Administrative Order (though no objection was raised at the hearing) and undoubtedly will be the position taken when the Form 15 and Form 50 hearings are tried before the next hearing commissioner.[2]

Holding the Single Commission lacked jurisdiction to grant the request for withdrawal without prejudice is effectively a final order. If a subsequent single commissioner agrees with Respondents' argument or its anticipated corollary (res judicata based on Finding of Fact 5), then the case will be dismissed with prejudice. As dismissal is the ultimate sanction, it should not be imposed so cavalierly. See McComas v. Ross, 626 S.E.2d 902, 368 S.C. 59 (Ct.App. 2006)("In

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[2]Respondents argue this very point in their brief to this Court:

> Effectively, the second dismissal (or second Form 50 withdrawal) operates as an adjudication on the merits and,; therefore, when Davis announced to the Hearing Commissioner and to the Respondents that she was withdrawing her second Form 50 on October 24, 2017, this was tantamount to a *voluntary dismissal on the merits.* [Brief of Respondents, page 24].

As Respondents plainly intend to persist in this argument – notwithstanding this incomplete and misleading characterization of the event – the Appellate Panel's Order leaves Caini-Davis without an adequate remedy on appeal and is manifestly prejudicial. See Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 290-291, 826, S.E.2d 863 (2019)("We find the commission's unreasonable delay in making a final decision leaves Russell without an adequate remedy on appeal under section 1-23-380. Therefore, we find the appellate panel's remand order is immediately appealable.").

those cases where our supreme court has affirmed dismissal of actions based on a failure to prosecute, the dismissals were imposed to maintain the orderly disposition of cases in the face of repeated warnings to the offending party or multiple opportunities to proceed with trial, and only then upon a finding of unreasonable neglect.").

Appellant was unable to locate any reported opinions in this state addressing the *reversal* of a trial judge's granting of a motion for continuance – other than the line of cases holding such rulings are not directly appealable. As granting a continuance effects no prejudice on either party, such rulings are fundamentally unappealable. See Townsend v. Townsend, 323 S.C. 309, 474 S.E.2d 424 (1996)("In any case, we will not set aside a judge's ruling on a motion for a continuance unless it clearly appears there was an abuse of discretion to the prejudice of the movant."). This case is appealable because the Appellate Panel reversed an unappealable administrative order in an extraordinary and illegal decision.

Following the initial pronouncement in Bone limiting appealability of the Commission's orders, our Supreme Court has struggled to elucidate clear standards in light of a series of cases highlighting the prejudice engendered by multiple arbitrary procedural rulings from the Commission. See Bone v. U.S. Food Serv., 404 S.C. 67, 744 S.E.2d 552 (2013)("order remanding the matter to the Commission for further proceedings does not constitute a final judgment as required by section 1–23–390 and, therefore, is not immediately appealable.").

In Russell, the court dealt with appealability of a case in which

> despite the fact counsel for Wal-Mart specifically asked there not be a de novo hearing, despite the fact the issue of a de novo hearing was not raised by either side after the second commissioner's order, despite the fact almost six years had elapsed since Russell's claim for a change of condition was filed, despite the existence of two detailed single commissioner orders awarding Russell additional benefits, the

> appellate panel remanded to a third commissioner for a third hearing, specifically requiring the very thing the party appealing to it (Wal-Mart) had specifically asked not to have—a new hearing.

Russell v. Wal-Mart Stores, Inc., 426 S.C. 281, 290, 826 S.E.2d 863 (2019).

Relying on Bone, this Court had remanded the case back to the Commission on the grounds that the order was interlocutory. The South Carolina Supreme Court reversed, holding"the commission's unreasonable delay in making a final decision leaves Russell without an adequate remedy on appeal under section 1-23-380. Therefore, we find the appellate panel's remand order is immediately appealable."

In 2016, the Supreme Court:

> again faced the prejudice workers' compensation litigants may encounter when the commission orders repeated remands, and appeal must be delayed until a final decision. We stated, "Under these unique circumstances where the Commission has ordered the relitigation of the entire dispute without regard to the matters raised by the appealing party, we find that requiring Hilton to wait until the final agency decision to appeal would not provide him an adequate remedy."[3]
> Id. *quoting* Hilton v. Flakeboard America Limited, 418 S.C. 245, 791 S.E.2d 719 (2016).

These cases show the realization by our Supreme Court that procedural errors by the Commission must be subject to immediate appeal, lest the procedural errors frustrate the underlying purpose of swift and sure justice. For this reason, the Court should reject Defendants' argument and allow this appeal to move forward on all issues.

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[3]In Hilton, the Appellate Panel vacated the Single Commissioner's award and "ordered the relitigation of the entire dispute without regard to the matters raised by the appealing party . . ." Hilton v. Flakeboard Am. Ltd., 418 S.C. 245, 791 S.E.2d 719 (2016). In allowing an immediate appeal, the court added that if "the Commission's order is allowed to stand, a party could face the possibility of repeated unexplained 'do overs' before a final decision of the Commission." Id.

3. <u>The Hearing Commissioner retained Jurisdiction over the case at the time he issued the Administrative Order [In Reply to Respondents' Argument at pages 15-16].</u>

The Appellate Panel held: "The hearing was cancelled by the Hearing Commissioner on Otober [sic] 24, 2017 prior to going on the record, after which time the Hearing Commissioner's authority and jurisdiction to adjudicate this claim ended." [R.P. 19, Finding of Fact 7]. This was error, for if a Hearing Commissioner, like a trial judge, "has jurisdiction to hear a matter and the matter having been heard before him, he entertains jurisdiction until his decision is rendered." <u>First Carolinas Joint Stock Land Bank of Columbia v. Knotts</u>, 191 S.C. 384, 410, 1 S.E.2d 797, 808 (1939).

Respondents argue the Appellate Panel's findings and conclusions "are supported both by substantial evidence and the applicable law." [Brief of Respondents, page 11]. Respondents base this argument on their own mischaracterization of the underlying events. They – as did the Appellate Panel – completely overlook (or deliberately ignore) Commissioner Campbell's statement that: "Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50 without prejudice, and with it being within his discretion to do so, allowed Mr. Samuels to do that." [R.P. 107].

Instead, Respondents focus on the (literally correct) response by Appellant's counsel to follow-up questions from the Appellate Panel as to whether there was a "discussion between either you and Commissioner Campbell or Ms. Barr and Commissioner Campbell about whether it was with or without prejudice?" Counsel responded truthfully "There was not, your Honor." This was after Counsel had previously explained that the discussion did not include a *literal* discussion about whether it was with or without prejudice (using those specific terms) – because it was apparent from

the context that the purpose was to obtain additional proof, ergo the request to withdraw the Form 50 was necessarily without prejudice. [R.P. 127, line 10 - 129, line 14]. The Appellate Panel's attempt to wring some sort of concession from counsel on the verbiage has the appearance of setting a procedural trap. See In re Nov. 4, 2008 Bluffton Election, 686 S.E.2d 683, 385 S.C. 632 (2009)("we are guided by the principle that courts should not interpret procedural rules to create a trap for unwary lawyers."); Cf. Trowell v. S.C. Dept. of Public Safety, 681 S.E.2d 893, 384 S.C. 232 (Ct. App. 2009)("The agency's decision here arbitrarily created a trap for the unwary petitioner.").

Respondents go on to argue that "Despite Davis's grasping estoppel argument to the contrary, Respondents were under no obligation to counsel Davis on the potential impact of her voluntary decision to withdraw her hearing request for a second time on October 24, 2017." [Brief of Respondents, page 11]. This is a remarkable statement. For while it is true an attorney has no obligation to provide legal advice to her opposing counsel's client, attorneys do have obligations to be candid with the tribunal and fair to the opposing party. Rules 3.3, 3.4, Rules of Professional Conduct.

Respondents do not dispute that the request to withdraw the Form 50 was made in the context of the need to obtain additional proof. Indeed, they concede that "the seminal issues of prejudice and 'good cause' were, admittedly, never part of the discussion on that date." [Brief of Respondents, page 11]. Respondents go on to say "When those issues were raised weeks later, the Respondents vehemently objected." Given that *those issues* were raised by *Respondents* weeks later – well after counsel had to the opportunity to raise them before Commissioner Campbell – the vehement

objections seem out of place, if not outright disingenuous.[4] Commissioner Campbell's statement makes it clear he understood the withdrawal was without prejudice. And indeed, Respondents failure to object at the hearing makes it apparent that she understood this as well.

Respondents try to remake this into an estoppel issue, presumably to create additional elements for Appellant to prove. Respondents claim "Neither Davis, nor his [sic] attorney were ever 'mislead" by the Respondents, nor can they prove the essential elements of estoppel."[5] [Brief of Respondents, page 12]. Yet, the record shows Respondent deliberately mislead Appellant – simply by the act of remaining silent with the intent of profiting later by her silence. "If one remains silent where in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent." Smith v. Williams, 141 S.C. 265, 282, 139 S.E. 625, 630 (1927). "It is a general rule of law, as well as of good morals and fair dealing, that if a party is silent when he should speak, or supine when he should act, he will not afterwards be permitted to either speak when he should be silent, or to act when he failed to do so at the first proper and opportune moment. 'Silence

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[4]The issue was first raised when Respondents – on their own initiative – sent a proposed Order directly to Commissioner Campbell dismissing the case with prejudice. [R.P. 103].

[5]The elements of equitable estoppel are (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially. Corley v. Looper, 340 S.E.2d 556, 287 S.C. 618 (Ct. App. 1985). These elements are proven by counsel's deliberate silence during the discussion over withdrawing the Form 50 to obtain additional evidence, followed by her attempt to raise the dismissal with prejudice issue weeks later. Appellant justifiably relied on counsel's silence as implied consent to her ultimate prejudice.

always implies consent,' says another cardinal maxim of the law." King v. Ligon, 180 S.C. 224, 185 S.E. 305 (1936). Respondents' counsel knew exactly what was going on and what she was doing.

Respondents argue Commissioner Campbell had no jurisdiction because "he had no such decision to render, specifically because Davis unilaterally determined, all on her own and without any request of the Hearing Commissioner or the Respondents, that she wanted the October 24, 2017 hearing to be cancelled before it began."[6] [Brief of Respondents, page 12]. Semantics aside, Commissioner Campbell had two decisions to make. He had to rule on the motion to dismiss the Form 21 (as it was not voluntarily withdrawn by Respondents). And he had to confirm his granting leave to Appellant to withdraw her Form 50 without prejudice. For those decisions to become effective, he needed to sign an Order – which is exactly what he did. It is remarkable that Respondents would make this argument when they were the ones who first submitted a proposed Order to the hearing commissioner. They did not raise the jurisdictional issue until Commissioner Campbell rebuffed their belated attempt to bootstrap a dismissal through gamesmanship.

Respondents write at length about the procedural aspects of withdrawing the Form 50. It is true that a party can unilaterally withdraw a Form 50 simply by notifying the Commission. Appellant did exactly this when she withdrew her first Form 50 – as she was able to do as a matter of right. However, she did not unilaterally withdraw her second Form 50. That withdrawal took place in open court in a discussion with the hearing commissioner and Respondents' counsel. All

[6]At the risk of belaboring the point, Appellant did not state she wanted the hearing "cancelled." She moved for an order dismissing the Form 21, requiring reinstatement of her weekly compensation, and assessing a mandatory 25% penalty for illegal termination of compensation. [R.P. 32, 53]. As to the Form 50, "Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50 without prejudice, and with it being within [Commissioner Campbell's] discretion to do so, allowed Mr. Samuels to do that." [R.P. 107].

present understood that the Form 50 was being withdrawn without prejudice to obtain additional medical proof. See Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct.App.1985) (when the claimant in a workers' compensation case inadvertently omits proof of causation, the case should be reopened and an opportunity should be afforded the claimant to supply such proof in the interest of justice). In the case of a second withdrawal, a party should ensure it takes place at a hearing where opposing counsel has the opportunity to object and argue that the hearing must go forward on the existing evidence. And that is what happened.

Respondents contend they were denied due process to object to the withdrawal because a third Form 50 had not yet been filed when Commissioner Campbell issued his order. Presumably this was their intent when they failed to object while the discussion took place. Respondents had their opportunity to force the issue in open court. For their own tactical reasons, they implicitly consented to the withdrawal without prejudice. They cannot complain now. It is too late. One cannot complain to an appellate court when your own tactical decision misfires. See Erickson v. Jones Street Publishers, 368 S.C. 444, 629 S.E.2d 653 (2006)("calculated tactical decision" by litigant not to present a defense during the liability phase of bifurcated trial not reviewable on appeal). *Cf.* Shearer v. DeShon, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962)(party may not complain on appeal of error or object to trial procedure which his own conduct has induced).

The Hearing Commissioner retained jurisdiction over the matter until he issued the signed Administrative Order. He was required to issue an order confirming his rulings on the Form 21 and Form 50. The Appellate Panel's holding that the Hearing Commissioner was divested of jurisdiction prior to issuing the Administrative Order should be reversed.

4. The issue of "good cause" was not before the Hearing Commissioner because he granted Appellant's request to withdraw her Form 50 without prejudice [In Reply to Respondents' argument at pages 17-20].

Respondents argue that the "issue of 'good cause' should be remanded to the Appellate Panel. [Brief of Respondents, page 17]. Respondents are referring to the provision in the regulations allowing a *commissioner* (not the Appellate Panel) to determine if a Form 50 on the same set of facts has been withdrawn twice "without good cause . . . and . . . merely for the purpose of delay." S.C. Code Ann. Reg. 67-609 (2017). Appellant is not suggesting that the issue of good cause needs to be determined by the single commissioner, the appellate panel or anyone else. The issue never arose before the Hearing Commissioner because he granted leave to withdraw without prejudice.

Respondents seek a remand to litigate the issue – either before the Appellate Panel or before another Hearing Commissioner. This should not be allowed. Respondents implicitly consented to the withdrawal without prejudice. They had an opportunity to object and force the issue before Commissioner Campbell. They waived their objection. They should not be allowed a second bite of the apple.

Respondents now argue that this is a factual determination involving weighing evidence and assessing the credibility of the witnesses (presumably this includes the credibility of Commissioner Campbell). The *witnesses* to the proceeding have all made their statements and the facts are known. There is no dispute.

Commissioner Campbell unequivocally stated "Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50 without prejudice, and with it being within his discretion to do so, allowed Mr. Samuels to do that." [R.P. 107]. Appellant's counsel said the same with the additional explanation that the request was couched as a withdrawal to obtain medical

evidence. Respondents' counsel confirms this. Most importantly, she confirms that she remained silent. She may protest that she had no legal obligation to speak up, yet the fact remains her silence was consent. She understood what transpired, as did Commissioner Campbell. As there is no factual dispute, there is no reason to remand. Commissioner Campbell's Administrative Order was well within his discretion and should be reinstated and affirmed. See Trotter v. Trane Coil Facility, 393 S.C. 637, 714 S.E.2d 289 (2011)("Every reasonable presumption in favor of a proper exercise of the trial court's discretion will be made."), *quoting* 17 C.J.S. Continuances § 5 (2011).

Respondents argue that the request to withdraw the Form 50 was not a request for a continuance. [Brief of Respondents, page 18]. This court has previously held that a request to withdraw a Form 50 is equivalent to a request for a continuance. Walker v. Springs Industries, Inc., 379 S.E.2d 729, 298 S.C. 249 (Ct. App. 1989). The request was granted at the hearing and confirmed in writing 17 days later when Commissioner Campbell issued his Administrative Order. Respondents assertion that "[Cain]-Davis never requested a continuance in this claim and the Hearing Commissioner did not order a continuance until November 14, 2017" is untrue.

To the extent Respondents argue that the Appellate Panel has plenary authority to review all awards or orders issued by a Single Commissioner, Appellant must disagree. Perhaps the Appellate Panel has authority to review interlocutory orders. Perhaps it even has authority to review orders granting or denying continuances. It seems unlikely though. The general rules of appealability must necessarily limit what can and cannot be reviewed. At some point these orders must have been appealed; otherwise our courts could not have established the rule that "that orders granting or denying motions for a continuance or a mistrial are not directly appealable." Id.

More likely though, these cases arose as separate issues in appeals from final orders. An

order denying a continuance could ultimately be prejudicial should a party be unable to successfully try a case due to the unavailability of witnesses. An adverse verdict or dismissal could be challenged on those grounds.

However, the appellate courts will not accept a direct appeal of an order granting a continuance. As such, while the Court heard such an appeal in Walker, it did not decide the issue on the merits. Instead, the Court dismissed the appeal because the underlying order was not appealable. The opinion is short, so there is no discussion as to whether the appeals to the Appellate Panel and circuit court should also have been dismissed. Even so, it would appear that any direct appeal at any level of a trial judge's granting of a continuance must be dismissed. Therefore, the Decision and Order of the Appellate Panel should be vacated.

5. A request to withdraw a Form 50 without prejudice to obtain additional proof constitutes good cause as a matter of law [in Reply to Respondents' Argument at pages 20-24].

Respondents raise a new issue, to wit: "[Cain-] Davis did not withdraw her second Form 50 hearing request for 'good cause.'" [Brief of Respondents, page 20]. This issue was not raised to nor ruled on by the Appellate Panel, so is not preserved. Moreover, Respondents did not appeal this issue themselves. The Hearing Commissioner never reached the issue because he granted the request to withdraw the Form 50 without prejudice.

To the extent the issue is before the Court, it is controlled by Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct.App.1985). In Brown, the claimant moved to take the deposition of a doctor after the hearing. The motion was granted. However, the claimant then realized he had to take the deposition of a second doctor, yet had inadvertently failed to make the request at the time of the hearing. The hearing commissioner granted the motion. The employer appealed. This Court

affirmed, noting "When the claimant inadvertently omits [proof of causation], an opportunity should be afforded the claimant to supply such omission in the interests of justice." The Court observed there was no prejudice to the employer as the employer was permitted to present rebuttal testimony. Id. See also Morgan v. JPS Automotives, 321 S.C. 2012, 467 S.E.2d 457 (Ct. App. 1996)(error to refuse to grant motion to supplement record with additional evidence of disability, holding "Commissioner should have permitted adjournment in the interests of justice.")

In this case, it is undisputed that the Form 50 was withdrawn *in open court* for the express purpose of obtaining additional proof with no objection from Respondents. Under Brown and Morgan, this effects no prejudice to Respondents and should be permitted in the interests of justice. Moreover, there is no evidence the sole purpose of the request was merely for delay.

6. As the Form 21 hearing was set based on Respondents misrepresentation that temporary total disability was currently being paid, the Hearing Commissioner properly dismissed the Form 21, although the Appellate Panel should have ordered reinstatement of compensation with a penalty[in Reply to Respondents' Argument at pages 24-26].

Respondents contend "The Appellate Panel was under no obligation to penalize Respondents or to address Davis's entitlement to compensation, as neither issue was properly before the Commission." [Brief of Respondents, page 24]. To a certain extent, Appellant agrees with this statement. Appellant moved before the Hearing Commissioner for an Order reinstating compensation with a 25% penalty. [58 page 6]. Instead, the Hearing Commissioner simply dismissed the Form 21. [R.P. 3].

This left Appellant with the option of either filing an appeal or filing a Form 15 (Section III). Appellant elected to file the Form 15 as it was quicker.[7] She filed the Form 15 on November 6,

[7]Form 15 hearings must be held within 60 days. S.C.Code Ann. § 42-9-260 (C)(2007).

2017. The hearing was scheduled for December 18, 2017 (although ultimately postponed indefinitely due to this appeal). Respondents filed their Form 30 (Notice of Appeal) on November 20, 2017. Oral argument was not heard until February 20, 2018.

The Appellate Panel necessarily had to deal with the Form 21 issue because Respondents raised the issue in their Form 30 and brief. At the Appellate Panel, Respondents "request[ed] that the Appellate Panel conclude that the Appellants properly suspended temporary compensation in accordance with S.C. Code Ann. § 42-15-80 and that the Form 21 was properly before the Commission in accordance with S.C. Code Reg. 67-505 (F)."

Although the Appellate Panel affirmed the dismissal of the Form 21, it made additional findings and conclusions of law which are erroneous (and impermissibly vague). The critical error begins with an erroneous legal conclusion. The Appellate Panel found as facts that:

> Also prior to going on the record at a hearing on October 24, 2017, the Claimant objected to the Defendant's Form 21 because temporary disability compensation had been suspended on April 5, 2017.
>
> The hearing was cancelled by the Hearing Commission 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. [R.P. 19, Findings of Fact 6 and 7].

Other than the erroneous statement about the Hearing Commissioner's authority and jurisdiction ending, these findings are correct. Appellant moved to dismiss the Form 21 pursuant to S.C. Code Ann. § 42-9-260(F)("[T]he commission may not entertain any application to terminate or suspend benefits unless and until the employer or carrier is current with all payments due."). The Hearing Commissioner agreed and he (not Appellant) cancelled the hearing. The Appellate Panel affirmed the dismissal of the Form 21 because temporary compensation had been illegally suspended.

The error arose in the Conclusions of Law when the Appellate Panel inconsistently concluded: "The Defendants suspended temporary disability compensation on April 5, 2017 in accordance with S.C. Code Reg. 67-505(F) and S.C. Code Ann. § 42-15-80(A)." [R.P. 19, Conclusion of Law 2]. This conclusion dovetails with Respondents' argument, yet is legally incorrect.

As more fully stated in the Brief of Appellant, the statute precludes unilateral suspension of temporary compensation after 150 days. S.C. Code Ann. § 42-9-260 (F) (2007)("After the one-hundred-fifty-day period has expired, the commission shall provide by regulation the method and procedure by which benefits may be suspended or terminated for any cause, but **the regulation must provide for an evidentiary hearing and commission approval prior to termination or suspension** . . .)(emphasis added). This is supported by case law – including case law which predates the 1996 amendments to the Act stated above..

Respondents rely on Wardlaw v. J. G. Ridgeway Const. Co, 212 S.C. 116, 46 S.E.2d 662 (1948). In Wardlaw, the claimant refused to undergo a myelogram because he believed it was too risky. The Supreme Court held he failed to prove his refusal was justified because he presented no expert testimony or medical evidence about the risks.

The carrier in Wardlaw appears to have followed the same procedure the Carrier followed in this case: unilateral suspension of compensation upon alleged refusal to undergo a medical test.[8] The court sets out the procedural history, but the timing and propriety of the suspension without a

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[8]An important distinction here is that Wardlaw refused to attend the test. Cain-Davis attempted to undergo the test three times, but was unable to complete it because the swelling from the DVT prevented her from holding her leg straight long enough to undergo the MRI. There is no *actual* refusal in the instant case.

hearing was not an issue in the appeal. The issue was simply whether or not the claimant proved by lay testimony that his refusal to undergo the myelogram was justified. Even more importantly, when Wardlaw was decided the Act did not require an evidentiary hearing prior to suspension. That requirement was not enacted until 1974. See S.C. Code § 72-177 (1974)("The commission shall provide by rule the method and procedure by which benefits may be suspended or terminated for any cause, but the rule must provide for an evidentiary hearing and commission approval prior to termination or suspension unless such prior hearing is expressly waived in writing by the recipient.").

Other cases are more instructive on the procedural aspects. In Ward – decided five years after Wardlaw – the carrier "obtained from the Industrial Commission permission to stop compensation payments until such time as claimant reported" for the examination. After a hearing, the Commissioner found the refusal was justified and ordered temporary compensation to be reinstated retroactively. The Supreme Court affirmed. Ward v. Dixie Shirt Co., 223 S.C. 448, 76 S.E.2d 605 (1953). As in Wardlaw, the court merely described the procedural history; the issue went to the merits. Nonetheless, Ward is instructive because the carrier could not unilaterally suspend compensation on mere allegations. Even though the 1942 statute then in effect did not require the full "evidentiary hearing and commission approval prior to termination or suspension" required today, a unilateral suspension was not allowed. The carrier had to obtain permission from the Commission prior to suspending compensation.

The most important early case is Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960). In Singleton, the employee had been receiving weekly compensation under a Form 15

(Agreement as to Compensation).[9] Upon receiving a medical report that he had reached MMI, the carrier unilaterally stopped payment of compensation without complying with the statute requiring an evidentiary hearing. The case was set for a hearing to determine whether the carrier had the right to permanently stop payment of compensation and to award permanent disability compensation. At the start of the hearing, the carrier moved to continue the hearing until Singleton submitted to an examination by their doctor. The motion was denied. The hearing Commissioner "held that the [carrier], without authority, violated the [Agreement as to Compensation] and award by arbitrarily stopping the payments of compensation on July 15, 1957 without complying with [the applicable statute and rule] of the Commission." Id. Additionally, the Commissioner assessed a 10% penalty for untimely payment.

Our Supreme Court affirmed in a detailed opinion. The Court noted that the statute and rules:

> contemplate that if the insurance carrier desires to stop further payment of compensation under a temporary award, application should be made to the Commission for permission to do so. Notice should be given to the employee. The question can then be determined by the Commission. Where there is a disagreement between the parties as to the right to discontinue further weekly compensation, the matter will be placed on the calendar for a hearing. If it is determined that the carrier is entitled to discontinue further payments of total temporary disability, the question of any permanent disability or disfigurement would then be ripe for determination. But apart from the foregoing requirements we do not think the right of a claimant to further compensation can be adjudicated without notice to him and an opportunity afforded for a hearing, if he desires to contest the issue.

Id. at 465, 114 S.E.2d at 842.

In the modern era, Last v. MSI Construction is exactly on point with the instant case. In Last,

[9] The Form 15 still exists today, albeit in modified form to fit the 1996 amendments to Section 42-9-260. The statutory authority for the Form 15 is found at S.C. Code Ann. § 42-17-10 (2007).

the carrier unilaterally suspended temporary compensation when the claimant missed a medical appointment due to his incarceration on an unrelated criminal charge. It then filed a stop pay application (Form 21). Following the hearing, the "Commissioner ruled Carrier erroneously stopped payment before a hearing was held and ordered Carrier to pay all temporary total benefits due to the date of the hearing. He found Claimant had not refused medical treatment and ordered the temporary total payments to continue until Claimant reached maximum medical improvement." Last v. MSI Const. Co., Inc., 409 S.E.2d 334, 305 S.C. 349 (1991). The Appellate Panel reversed. The Circuit Court reversed the Appellate Panel and reinstated the Hearing Commissioner's order. The Supreme Court affirmed. Last confirms that the right to ongoing compensation payments is a vested right, such that payments cannot be suspended or terminated without an evidentiary hearing.

The Legislature has always intended that worker's compensation benefits be provided to injured workers with a strong degree of certainty. As families depend on a regular income, temporary compensation is meant to be as constant and reliable as a paycheck.[10]

From almost the very beginning, the Act included two key provisions: (1) an agreement to pay compensation would be irrevocable by the employer; and (2) compensation could not be suspended or terminated without appropriate due process protection for the employee.[11]

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[10]See S.C. Code Ann. § 42-9-90 (2007)(providing for 10% penalty if compensation not timely paid); § 42-9-220 ("Compensation under this Title shall be paid periodically, promptly and directly to the person entitled thereto"); § 42-9-230 ("installments paid weekly must be paid on the same day of the week"); § 42-9-240 ("compensation shall be paid in installments weekly"); § 42-9-260 (1996)("Failure to comply with this section shall result in a twenty-five percent penalty imposed upon the carrier or employer computed on the amount of benefits withheld in violation of this section").

[11]In 1952, the Workers' Compensation Act was amended to require notice to the Commission: "Upon making the first payment and upon suspension of payment for any cause, the employer shall notify the Commission, in accordance with a form prescribed by the

The "Agreement as to Compensation" is governed by S.C. Code Ann. § 42-17-10 (2007). The section provides that:

> [i]f . . the employer and the injured employee . . . reach an agreement in regard to compensation under this title, a memorandum of the agreement in the form prescribed by the Commission, accompanied by a full and complete medical report shall be filed with the Commission within fifteen days after agreement has been reached by the parties for approval of the Commission; otherwise, such agreement shall be voidable by the employee or his dependents. . . . If approved by the Commission, the memorandum shall for all purposes be enforceable by a court's decree as specified in this title.

S.C. Code Ann. § 42-17-10 (1985).

The "form prescribed by the Commission" has always been the Form 15. See, Lowther v. Standard Oil Co. of New Jersey, 206 S.C. 286, 33 S.E. 2d 889 (1945). The Form 15 has *always* been binding on the employer. Section 42-17-10 specifically states that the Form 15 "shall be *voidable by the employee*" if not filed with the Commission by the employer. S.C. Code Ann. § 42-17-10 (1985)(emphasis added). This language makes it clear that an Agreement to Pay Compensation is binding on the employer regardless of whether it is filed for approval with the Commission. It is the signature of the employer's representative that creates the binding effect; not later action by the Commission.

Over the years, the appellate courts have consistently confirmed that an agreement to pay compensation is irrevocable and binding on the employer. In Allen v. Benson Outdoor Advertising

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Commission, that payment of compensation has begun or been suspended as the case may be." S.C. Code § 72-177 (1962).

In 1974, the Act was again amended, this time to require an evidentiary hearing before termination or suspension of compensation: "The commission shall provide by rule the method and procedure by which benefits may be suspended or terminated for any cause, but the rule must provide for an evidentiary hearing and commission approval prior to termination or suspension unless such prior hearing is expressly waived in writing by the recipient." S.C. Code § 72-177 (1974). This language remained unchanged until the 1996 amendments.

Company, the court held: "The question of whether claimant sustained an injury by accident . . . was finally adjudicated by the agreement as to compensation which was duly approved by the Industrial Commission and formal award entered thereon. Appellants cannot now retry the basic issue of liability." Allen, 236 S.C. 22, 112 S.E. 2d 722, 723 (1960). Shortly thereafter, the court affirmed the general principle by quoting with approval the Rhode Island Supreme Court: "We are of the opinion that the legislature intended to guard the injured employee against just such a situation and that, while encouraging the parties to enter into agreements without the necessity and expense of a judicial hearing, it took care that such agreements should not easily be avoided by providing, in effect, that they should have the same force as decrees of the court in settling the rights and obligations of the parties." Singleton v. Young Lumber Co., 236 S.C. 454, 114 S.E.2d 837 (1960), *quoting* Carpenter v. Globe Indem. Co., 14 A.2d 235 (R.I. 1940). As recently as 1990, the South Carolina Supreme Court reaffirmed the general principle by citing to both Allen and Singleton for the proposition that, "Once the Commission approves a compensation agreement, the agreement becomes as binding as a judicial decree and the facts contained therein are as definitely settled as factual findings incorporated in a decree." McCreery v. Covenant Presbyterian Church, 303 S.C. 271, 400 S.E.2d 130 (1990).

In 1996, a few years after McCreery, the Legislature addressed two nagging problems which had arisen with the binding effect of an agreement to pay compensation. Employers were reluctant to start compensation without first fully investigating a claim. The understandable fear that they would be irrevocably locked into paying for a non-meritorious claim resulted in long delays for injured workers. The second concern was that the requirement for a hearing before stopping compensation was proving to be cumbersome for employers and a drain on the Commission's

resources.

The Legislature responded with a superbly crafted and elegant piece of legislation. They substantially rewrote § 42-9-260 by creating a 150-day grace period during which employers could unilaterally suspend or terminate compensation for specified reasons – including when "the employee refuses medical treatment, as provided in Section 42-15-60, or refuses an examination or evaluation, as provided in Section 42-15-80, and the termination or suspension of benefits continues until the refusal ceases or the commission determines the refusal is justified pursuant to either Section 42-15-60 or 42-15-80." S.C. Code Ann. § 42-9-260 (B)(6)(1996). However, *no changes* were made to the procedure for suspending or terminating temporary compensation *after* the 150-day grace period. See S.C. Code Ann. § 42-9-260 (B)(3)(1996). The amendment retained the previous procedure for suspension or termination after the grace period. *Compare* S.C. Code Ann. § 42-9-260 (F)(1996), *with* S.C. Code § 72-177 (1974). After 150 days, an agreement to pay compensation remains binding on the employer.

The Legislature plainly intended to solve a problem and make the system more efficient during the early stages of a claim. However, the legislature retained existing law on the binding effect of paying compensation once the grace period had expired. After 150 days, the claimant's right to compensation has vested such that it cannot forcibly be stopped without the procedural due process of an evidentiary hearing.

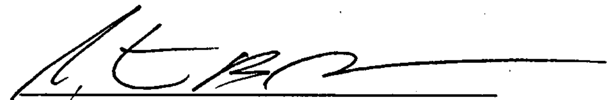
Returning to this specific case, the Court should reverse the Appellate Panel's legal conclusion that "The Defendants suspended temporary disability compensation on April 5, 2017 in accordance with S.C. Code Reg. 67-505(F) and S.C. Code Ann. § 42-15-80(A)." [FC Order, page 14, Conclusion of Law 2]. The unilateral suspension violated § 42-9-260. The controlling statute

required Respondents to file their 21 stating their allegation that Cain-Davis had unjustifiably refused medical treatment. They were required to continue payments unless and until the Commission issued an Order allowing suspension after an evidentiary hearing. They cannot legally suspend compensation prior to the hearing, nor can they obtain a hearing by falsely certifying that they are current on all payments.

Therefore, the Court should reverse the Appellate Panel and hold that Respondents are legally required to (1) pay temporary compensation retroactively from the date of suspension and continuing; (2) pay a mandatory 25% penalty on the compensation which had been withheld; and (3) continue payments until the Commission issues an order allowing suspension or termination afer an evidentiary hearing.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed in part as to the Form 50, and affirmed as modified (requiring Respondents to resume payment of temporary compensation with the statutory penalty).



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1609593

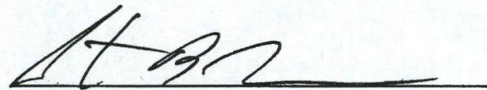
Gena Cain-Davis, Claimant, ... Appellant,

v.

SC Department of Corrections, Employer,
and State Accident Fund, Carrier, ... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b), SCACR.



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