Chapter 9

ORDERS AND APPEALS

§ 9.01 Order and Award - Introduction.

You have tried your case and the commissioner has asked you to submit a proposed order and award. The primary rule of drafting is to remember that you and your client will have to live with that order and award until the appeals process is over, and until the award is paid. If the findings of fact, conclusions of law, or the award and order are poorly drawn your client will suffer. This applies to even the simplest of awards. Remember the cardinal rule of defense practice after an award: to minimize or even defeat the loss through delay and the use of the appeals process. Time is on their side. Therefore, the better and tighter an order is written, the less the defense can appeal and the quicker benefits will be paid to your client.

The most important point to be made about drafting an order is to be thorough. You must, in both the findings of fact and conclusions of law, address all of the essential elements of the claim, including, inter alia, accident, notice, filing, disability (temporary and permanent, partial and total), and medical treatment.

See Appendix 9 for sample orders.

§ 9.02 Statutory and Case Law.

Sections 42-17-40 and 1-23-350 outline the requirements for an order. Section 42-17-40 requires an "award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue...." Section 1-23-350 of the Administrative Procedures Act imposes basically the same requirements as section 42-17-40, with two noteworthy exceptions. First, it specifically requires separate findings of fact, conclusions of law and decision/award. Second, it requires that if a finding of fact is set out in the terms of the statute then it shall be accompanied by a "concise and explicit statement of the underlying facts supporting the findings." (Emphasis added). It clearly implies that these should be separately stated.

In Hill v. Jones, 255 S.C. 219, 178 S.E.2d 142 (1970), the court pointed out the problem with a poorly drawn order:

> *The opinion of the Majority Commission contained only brief references to the testimony and no reasons were stated for the factual finding that the claim was compensable. In view of the quoted statement in the award of the Majority Commission and the absence of a sufficient statement of the factual basis and reasons for its decision, we are unable to determine whether the award was based upon an inference of compensability because there was 'so much controversy as to how claimant fell,' or upon a conclusion that respondent had established his right to recover by the greater weight of the evidence.*
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> *The vice in this award, which we here disapprove, is that the quoted statement, in the absence of further factual or legal clarification of the basis for the ultimate finding of compensability, creates a substantial question as to whether the Majority Commission applied the correct rule of law with reference to the burden of proof.* Hill v. Jones, *178 S.E.2d at 145.*

In Airco Inc. v. Hollington, 269 S.C. 152, 236 S.E.2d 804 (1977), the court let an award by the full commission stand that did not contain separately stated findings of fact and conclusions of law. The court held that section 42-17-40 did not require separately enumerated findings of fact and conclusions of law, but did note that such findings and conclusions "probably would be the better practice..." Airco, Inc., 236 S.E.2d at 808. With regard to the commission's

duty to make adequate findings and conclusions the court stated:

> *We have previously held that the statutory duty on the part of the Industrial Commission requires that findings of fact be made upon the essential factual issues. Additionally, such findings must be sufficiently definite and detailed to enable the appellate court properly to determine whether the findings of fact are supported by the evidence and whether the law has been correctly applied to those findings.* Airco, Inc., 236 S.E.2d at 808.

In Aristizabal v. I. J. Woodside - Division of Dan River, Inc., 268 S.C. 366, 234 S.E. 2d 21 (1977), the court held that "if a material fact is contested, the hearing commissioner must make a specific, express finding on it." 234 S.E.2d at 23. The court in Aristizabal refused to hold that the commission had "implicitly" made a finding on a notice issue. The court has made it clear that it generally will not assume that findings were implicity made. See Drake v. Raybestos-Manhattan, 241 S.C. 116, 127 S.E.2d 288 (1962).

Usually the remedy on appeal for an insufficient or omitted finding of fact will be a remand, which may or may not include a new hearing or the taking of additional evidence. However, the supreme court has indicated that in certain situations it will review the entire record and will reverse if remand is fruitless because the record contains no factual basis upon which the administrative agency could base a contrary finding. See Hamm v. Southern Bell, 302 S.C. 132, 394 S.E.2d 311 (1990). The courts have also come close to making their own findings of fact when there is only one "reasonable inference" to be drawn from the evidence. See Springs Industries vs. S.C. Second Injury Fund, 296 S.C. 359, 372 S.E.2d 915 (S.C. App. 1988). When there is only one reasonable inference to be drawn from the evidence, the issue becomes a question of law for the court to decide. Kinsey vs. Champion American Service Center, 268 S.C. 177, 232 S.E.2d 720 (1977). See also Young vs. Hyman Motors, 199 S.C. 233, 19 S.E.2d 109 (1942); Mullinax vs. Winn-Dixie Stores, 318 S.C. 431, 458 S.E.2d 76 (S.C. App. 1995).

The bottom line is that if you are drafting an order, you must address every material fact in issue and your factual findings must be definite enough for the court to understand the basis in evidence upon which the findings were made.

§ 9.03 Orders-Findings of Fact.

Remember, if a material fact is at issue, it must be addressed. Therefore, there should be a factual finding and conclusion of law on every such issue. What is at issue can be determined from the pleading documents (Commission Forms: 50, 51, 52, 53, 58, 21, or other commission form or motion filed), any stipulations, and the evidentiary proof. Some of the usual issues that must be addressed by fact and law are:

1. Jurisdiction;
2. Parties;
3. Timely filing and/or statute of limitations;
4. Notice;
5. Accident;
6. Average weekly wage and compensation rate;
7. Dates of temporary disability (total/partial), maximum medical healing, ability to return to work;
8. General and/or specific disability; and, disfigurement.

Practitioners and commissioners have traditionally included a synopsis or summary of the evidence and law in the body of their orders, prior to stating their official findings and conclusions. Statements not specifically designated as finding of fact or conclusion of law may not be considered and may result in at least a remand. Moore v. S.C. Alcohol Beverage Control Commission, 304 S.C. 356, 404 S.E.2d 714 (S.C. App. 1991). acated 308 S.C. 160, 417 S.E.2d 555 (1992).

The lesson here is if it is important, it should be a finding of fact. Some attorneys have begun to dispense with summaries of the evidence and make everything a finding of fact.

§ 9.04 Orders-Conclusions of Law.

There is no required format for the conclusions of law. The sample orders in Appendix 9 should provide some guidance. There should be a conclusion of law applicable to each material fact. However, there does not have to be a separately stated conclusion of law for

each finding of fact. Some attorneys are of the opinion that the conclusions of law should be limited to a statement of the workers' compensation statutes and/or commission rules that apply. Others are of the opinion that interpretative case law should be added to such recitations or stated separately in reference to and in explanation of the findings of fact that are made. What is appropriate or necessary has been the subject of limited review and probably should relate to the nature and complexity of the material finding of fact in issue giving rise to the need for the conclusions of law. If the legal issue is a novel or complex one, a thorough discussion of the applicable law is probably warranted. A well reasoned analysis of the law in the order may help persuade the full commission and subsequent reviewing courts.

§ 9.05 Appeals to the Full Commission.

Appeals to the full commission are governed in general by section 42-17-50 and commission regulations 67-701 et. seq. The form for filing a request for review is commission Form 30. The fourteen days to request review runs from receipt of the order or award. This is jurisdictional. Filing is complete upon mailing. Regulation 67-701.

Any issue of law or fact not raised as an issue on appeal becomes the law of the case. Hamm v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2d 712 (1940); Green vs. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (S.C. App. 1993). This is especially true in light of commission regulation 67-701 which provides that "Each question presented must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error."

Section 42-17-50 defines the scope of review by the commission: "...[T]he Commission shall review the award and, if good grounds be shown therefore, reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award." This section has been interpreted to give the commission the power to make its own findings of fact and conclusions of law, even if inconsistent with those of the single commissioner. Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967). However, the commission does not have the authority to address issues not raised by the parties in their

applications for review. Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114 (S.C. App. 1995).

While section 42-17-50 and regulation 67-705 both allow the submission of additional or newly discovered evidence, such evidence is rarely allowed. In order to have the evidence admitted, the party proposing its admission must convince the commission that it is of the same nature and character as would warrant the granting of a new trial in circuit court. See In Re Crawford, 205 S.C. 72, 30 S.E.2d 841 (1944).

Regulation 67-705 governs briefs to the commission. The appellant's brief to the commission must be filed with the commission on or before the date specified on the Form 31, Notice of Review. The brief is deemed filed when mailed and accompanied by a certificate of mailing. See regulation 67-205(D). Appellants must file an appellate brief. Oral argument must be affirmatively requested on the Form 30.

In writing a brief the lawyer should remember the advice of the late Chief Justice Julius B. Ness: make it short and sweet; keep it simple and to the point. Regulation 67-705 provides that briefs shall include a statement of the case, questions presented, argument, and conclusion. In preparing your brief it is imperative that you get the issues and your key points across to the commissioners as quickly and clearly as possible.

Oral argument is governed by regulation 67-706. The normal rules of argument apply. Attorneys must stay within the record. However, for some reason defense attorneys in workers' compensation are more likely to blatantly misstate or go outside the record than they would in other type cases. Do not allow these statements to go unchallenged.

The decision of the full commission is the award. The full commission decision must contain findings of fact, conclusions of law and the award. Green v. Raybestos Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967); Lowe v. Am-Can Transport Services Inc., 283 S.C. 534 324 S.E.2d 87 (S.C. App. 1984). Regulation 67-709 sets out the procedures for making and issuing the decision by the full commission or appellate panel. For the purpose of this discussion the full commission decision serves only to provide additional grounds for appeal and should be reviewed carefully for that purpose.

§ 9.06 Appeal to the Circuit Court.

Appeals to the circuit court are governed by section 42-17-60 and section 1-23-380. If there is a direct conflict between the two statutes, the APA controls, but when the APA is silent, section 42-17-60 (the original appeal statute) applies. Williams v. S.C. Dept. of Wildlife, 295 S.C. 98, 367 S.E.2d 418 (1987); Pringle v. Builders Transport, 298 S.C. 494, 381 S.E.2d 731 (1989). In Pringle, the court held that the APA takes precedence over section 42-17-60 in workers' compensation appeals to circuit court. Therefore, as required by the APA, the appeal petition must specifically set out the grounds of appeal. If it does not and is not amended within the thirty (30) day filing period, the case will be dismissed.

Section 42-17-60 provides that appeals should be filed in the "court of common pleas of the county in which the alleged accident happened, or in which the employer resides or has his principal office...." Williams, supra, had held that this rule was jurisdictional. Therefore, if you did not file in the proper county your case could be dismissed. However, Williams was reversed in Dove vs. Gold Kist, 314 S.C. 235, 442 S.E.2d 598 (1994). After Dove, the most likely repercussion to filing in the wrong county would be a change of venue motion. What happens if a case is moved by consent, or if the employer does not have a principal place of business in South Carolina and the accident did not happen in the state is unclear.

An appeal petition should state that the appeal is being taken pursuant to and in compliance with sections 42-17-60 and 1-23-380. The language, "and other applicable law," should also be in the appeal. This could be a saving clause if not objected to under certain circumstances. Section 1-23-380(a) specifically states it does not limit other judicial review or relief.

The appeal is from the decision of the full commission or commission panel decision as opposed to the decision of the single commissioner. If that is not stated, or if reference is wrongly made to the initial order of the hearing commissioner only, the appeal notice and petition may be dismissed as defective.

Appeal must be taken within thirty (30) days after notice of the order is received. Section 42-17-60 requires actual notice or notice by "registered mail."

Notice of the appeal is required to be served on all parties and the commission under section 1-23-310(A)(1). If a party does not raise an issue as to procedure, e.g., sufficiency of the petition, any defect is waived. Parker v. Public Service Commission, 288 S.C. 304, 342 S.E.2d 403 (1986).

The scope of review in circuit court and beyond is governed by the Administrative Procedures Act. Under section 1-23-380(A)(6) the circuit court has two types of relief that may be granted. First, as to questions of fact, the court may affirm or remand for further proceedings. Of course, it cannot substitute its judgment for that of the agency. Lark v. Bi Lo, 276 S.C. 130, 276 S.E.2d 304 (1981). However, the statute further provides that the court may reverse or modify the decision of the commission if the substantial rights of party have been prejudiced because the administrative findings, inferences, conclusions or decisions are

> *(a) in violation of constitutional or statutory provisions;*
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> *(b) in excess of the statutory authority of the agency;*
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> *(c) made upon unlawful procedure;*
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> *(d) affected by other error of law;*
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> *(e) clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or*
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> *(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.*

Most factual issues turn on whether there is "substantial evidence" to support the decision. Lark, supra. However, the "only reasonable inference" cases discussed previously may sometimes apply.

Always remember to notify the commission of the outcome of the circuit court appeal. The commission's file will remain in limbo until you do. The commission has threatened to fine attorneys who do not advise them of the outcome of appeals to circuit court.

There are several rules or comments that need to be made about appeals to the circuit court:

1. You have already lost at least once.

2. Circuit courts are busy and non-jury workers' compensation appeals are not their top priority.

3. Judges do not have reading days.

4. Know your judge.

5. Tell the court as soon as possible why your client is worthy of a favorable decision.

6. Judges who handled workers compensation cases before going on the bench may be more sympathetic to your client's plight. Oftentimes they want to help your client if they can. You must give the court something to hang its hat.

7. If you submit a brief and/or excerpts of testimony, remember Judge Ness' rules: Make it short and sweet. Keep it simple and to the point.

8. Highlight the favorable law for the judge. Do not misquote or misstate anything.

9. Sometimes your best strategy is to shoot for a remand instead of a reversal.

10. Have the record with you; do not count on the commission to provide it, even though they are supposed to do so.

11. Remember, most of the decisions cited throughout this paper where the court has used procedural law or statutory quirks or interpretation to make the decision were made not for those reasons but because a trial lawyer convinced the court his client was worthy of the court's favor. Therefore, if you are the appellant do not count on procedure but use it so the court can help and if you are the respondent, do not let it help the other side.

Finally, always make sure that the circuit court's decision addresses all issues before it. If the circuit court does not address an issue, it is your duty to bring that oversight to the court's attention by filing a motion pursuant to SCRCP Rule 59(e). The appellate courts will not allow you to appeal an issue that was not addressed below.