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THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Order of Dismissal (S.C. Ct. App. Filed July 1, 2010)

Cathy C. Bone, ...Respondent,

v.

U. S. Food Service and Indemnity Insurance Company of North America,...... Petitioners.

BRIEF OF PETITIONERS

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STATEMENT OF THE CASE

Respondent Cathy C. Bone ("Bone") filed her Form 50, Request for Hearing, on or about August 7, 2007, seeking payment of partial disability benefits resulting from an alleged work-related injury to her back on June 26, 2007. (App. p. 29) Lexington 5 D, d/b/a US Food Service, Inc. ("Employer") and GAB Robins North America, Inc. ("Carrier") (collectively "Petitioners") filed a timely Form 51, Employer's Answer, in which they denied Bone's claim and asserted all applicable defenses. (App. p. 30) Specifically, Petitioners denied the claim given that it was not reported until July 3, 2007, the same day Bone injured her back while changing a tire on her way to work. Following a hearing on November 5, 2007, the single commissioner issued her Decision and Order dated February 11, 2008, in which she determined Bone was not credible, failed to meet her burden of proof, and was not entitled to benefits. (App. p. 15-25)

Bone timely appealed the single commissioner's order to the Appellate Panel of the Full Commission with the filing of her Form 30, Request for Commission Review. (App. p. 31) Following oral argument on May 29, 2008, the Full Commission issued its Decision and Order dated June 19, 2008, in which it unanimously affirmed the single commissioner's order. (App. p. 8-14) Bone timely appealed the Full Commission order to the South Carolina Court of Common Pleas for Lexington County. Following oral argument on March 9, 2009, the circuit court issued its order dated March 26, 2009, in which it determined that the denial of the award was not supported by substantial evidence, found as a matter of law that Bone sustained a compensable injury, reversed the Decision and Order of the Full Commission, and remanded this action to the Commission

for further proceedings consistent with its order. (App. p. 3) This appeal followed with the filing of Petitioners' Notice of Appeal filed April 29, 2009.

Bone filed her first motion to dismiss this appeal on October 29, 2009, in which she took the position that the circuit court order was not a "final order" and, therefore, was not subject to immediate appellate review. (App. p. 185-194) Thereafter, via letter order dated December 21, 2009, the court of appeals denied the motion and instructed the parties to address this issue as the first issue on appeal in their respective briefs. (App. p. 282-283) Following the submission of initial briefs, Bone again moved to dismiss the appeal, and the court of appeals granted that motion via order dated June 30, 2010. In its order, the court of appeals relied upon this Court's opinion as stated in *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010). (App. p. 284-286) For the reasons stated herein, this Court should reverse the order of the court of appeals because it results from an overly broad, incorrect reading of this Court's precedent to erroneously dismiss the instant appeal and unnecessarily delay appellate review to the prejudice of all parties herein.

ARGUMENT

The order of the South Carolina Court of Appeals dismissing the instant appeal as interlocutory results from an erroneous and overly broad reading of the holding in *Charlotte-Mecklenburg* and circumvents the legislative intent of S.C. Code Ann. §§ 1-23-380 and -390 governing appellate review of final administrative agency decisions. Upon closer examination, that case actually supports immediate review of the circuit court's order because it finally determines the legal rights of the parties; to wit, the legal

conclusion that Bone sustained a compensable injury in the course and scope of her employment. The circuit court's order overturns the factual findings of the single commissioner and the Full Commission and holds, as a matter of law, that "[t]he evidence of record shows Claimant sustained a compensable injury." (App. p. 6) Thus, the circuit court made a conclusive finding as to compensability, and the only remaining task for the Commission on remand is the ministerial task of calculating the amount of benefits. Inasmuch as the challenged order constitutes a final order with regard to the legal question of compensability, it is immediately appealable, and Petitioners are entitled to immediate appellate review.

I. THE CIRCUIT COURT IS SUBJECT TO IMMEDIATE REVIEW.

Bone's premise rests on the incorrect assumption that recent precedent of this Court compels the conclusion that a remand order in an administrative proceeding is never immediately appealable. This statement is incorrect and has been expressly rejected by controlling authority on this issue. To the extent the court of appeals ruled to the contrary, both in this case and in *Long v. Sealed Air Corporation*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011), its holdings should be reversed.

A. The Administrative Procedures Act Affords Immediate Review.

South Carolina Code Ann. § 1-23-380 contemplates judicial review of a "final decision" in contested cases such as this. Further, S.C. Code Ann. § 1-23-390 provides for appellate review of "any final judgment of the circuit court." Thus, these statutes, by their express terms, permit immediate appellate review in workers' compensation proceedings where the challenged order is a final order; to wit, where the order reaches the merits or affects a substantial right. *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379,

387, 622 S.E.2d 546, 551 (Ct. App. 2005)[1] ("An order involves the merits if it finally determines some substantial matter forming the whole or part of some cause of action or defense in the case."). The circuit court order is just such a final decision. The finding to the contrary by the court of appeals – that "[t]he order on appeal remands the matter to the Appellate Panel for further proceedings; thus, it is not a final judgment, and it is not immediately appealable." (App. p. 285) – fails to accurately describe the effect of the circuit court order and implies that further fact finding on the legal question at issue (work-related injury resulting in entitlement to compensation benefits) is necessary. To the contrary, the circuit court order effectively decides the only issue in these proceedings – whether or not Bone sustained a compensable injury. Thus, the order is not "interlocutory" in the sense contemplated by the court of appeals because it determines with finality the only legal question presented.

B. Precedent By This Court Also Supports Immediate Review.

Bone's reliance on *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000); *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994) and *Magaha v. Greenwood Mills, Inc.*, S.C. Sup. Ct. Order dated February 19, 2009 (unpublished) is misplaced, as those decisions simply do not signal a departure from the final judgment rule in workers' compensation cases. This authority actually supports construction of Sections 1-23-380 and -390 in a manner that supports immediate review.

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[1] A majority of the panel deciding *Long v. Sealed Air* took the position that the reasoning employed in *Brown* was flawed because it invoked the "involves the merits" construct "that is relevant only under section 14-3-330." 391 S.C. 483, 487, 706 S.E.2d 34, 36, n. 4 (Ct. App. 2011). As correctly noted by the dissent, however, the *Brown* Court relied on section 1-23-390, as well as "case law cited by our supreme court in *Montjoy* to interpret 1-23-390." *Id.*, 391 S.C. at 492, 706 S.E.2d at 39, n. 9. Moreover, this Court denied *certiorari* in *Brown*, which, for the reasons stated herein, employed the correct analytical framework and enjoys continued vitality as persuasive authority.

The *Montjoy* Court affirmed dismissal of an order characterized as interlocutory and not directly appealable. In so doing, the court relied upon the "final judgment" rule codified in the Administrative Procedures Act at S.C. Code Ann. § 1-23-390. While the *Montjoy* decision is short, it is inaccurate to say that the only background supporting its holding is citation to Section 1-23-390 or that the APA mandates dismissal here. To the contrary, the *Montjoy* Court's reliance on *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984) and *Hunt v. Whitt*, 279 S.C. 343, 306 S.E.2d 621 (1983) indicates the court relied on the traditional formulation of the final judgment rule. In *Owens*, the court dismissed an appeal because the challenged order did not "involve the merits of the action." *Id.* at 492, 306 S.E.2d at 385. Similarly, in *Hunt*, the court dismissed the appeal as interlocutory where the challenged order remanded the case for the taking of additional testimony and did not affect the merits of the action. 279 S.C. at 343, 306 S.E.2d at 622.

Bone also finds no support in *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000). There, the court concluded the trial court lacked jurisdiction to issue a full written order where neither party sought relief pursuant to Rule 59(e), SCRCP, from an earlier Form 4 order within the requisite ten day period. *Id.* at 493, 530 S.E.2d at 127. The second issue was whether or not the circuit court's form order, which reversed a finding of maximum medical improvement and the award of permanent disability, constituted an appealable final judgment. While it was unclear exactly what tasks the Commission was to perform on remand, the remand order nevertheless was not immediately appealable because it required "further proceedings," presumably on the presence or absence of findings supporting a determination that claimant had reached MMI. *Id.* at 218, 530 S.E.2d at 494. The parties were bound by an imprecise remand

order for which they did not seek clarification in a timely fashion and that, at least on its face, required further proceedings at the Commission level. The decision simply couldn't "contain the 'involve the merits' language" because the basis of the circuit court's reversal was unclear. (App. p. 153)

The lower court order in *Magaha* suffered from the same lack of finality that deprived the parties of immediate appellate review in *Montjoy* and *Leviner*. There, the impediment to appellate review was simply that the challenged order did not reach the underlying merits of the claimant's claim for benefits. Thus, even if it were appropriate to rely upon *Magaha* as persuasive, that unpublished opinion clearly does not signal a departure from the final judgment rule in the workers' compensation arena.

II. THE *CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY* OPINION DOES NOT COUNSEL IN FAVOR OF DISMISSAL.

The court of appeals order relies upon an incorrect and overly broad reading of this Court's holding in *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health & Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010). Without analysis of why the order at issue in *Charlotte-Mecklenburg* was not subject to immediate review, the court of appeals would read the holding of the case so broadly as to deny appellate review in any case when the primary legal issue has been decided with finality but where the execution of such an order is tasked to the administrative agency on remand. *Charlotte-Mecklenburg* hits on exactly the distinction between final orders and truly interlocutory orders presented, but misapplied, in Petitioners' substantial briefing on this issue, accepted by the court of appeals in its dismissal, and perpetuated in *Long v. Sealed Air Corporation*. The circuit court order finally determined the legal issue of

compensability, is a final order subject to immediate review, and this Court should reverse the court of appeals order to the contrary.

The *Charlotte-Mecklenburg* decision emphasizes the long-standing rule that an order that finally determines the substantive rights of the parties, such as the order of the circuit court in this case, is subject to immediate appellate review. Indeed, the *Charlotte-Mecklenburg* holding emphasizes the distinction as follows: "A final judgment disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Id.*, 387 S.C. at 267, 692 S.E.2d at 895. By contrast, an order does not constitute a final judgment where "there is some further act which must be done by the court prior to a determination of the rights of the parties." *Id.*, 387 S.C. at 267, 692 S.E.2d at 894. In that case, the administrative law court order was not immediately reviewable because it remanded the action specifically for a determination of the central question in the case - whether the applicants involved were entitled to a certificate of need. Thus, the lower tribunal was necessarily tasked with undertaking an additional fact finding mission.

In contrast, the circuit court's order in this case concluded, as a matter of law, that Bone sustained a compensable injury – a finding that unquestionably constitutes a final determination of the rights of the parties to the action and leaves nothing to be done by the Full Commission on remand beyond execution of that judgment. Thus, a closer reading of *Charlotte-Mecklenburg* actually supports the opposite conclusion reached by the court of appeals and militates in favor of immediate appellate review. Accordingly, Petitioners respectfully seek reversal of the order of dismissal, as well as reinstatement of the appeal in this matter.

III. THE DECISION BY THE SOUTH CAROLINA COURT OF APPEALS IN *LONG v. SEALED AIR* IS NOT CONTROLLING, WAS WRONGLY DECIDED, AND SHOULD BE REVERSED.

Following this Court's decision in *Charlotte-Mecklenburg* and the order dismissing this appeal, the court of appeals issued its opinion in *Long v. Sealed Air Corp.*, 391 S.C. 483, 706 S.E.2d 34 (Ct. App. 2011). In *Long*, the court of appeals dismissed an appeal as interlocutory and not immediately appealable. Because the order at issue in *Long*, like the circuit court order challenged herein, determined with finality the legal rights of the parties and, thus, constituted a final order subject to immediate appeal. Accordingly, Petitioners respectfully submit that *Long* was wrongly decided and should be reversed.

Claimant in *Long* appealed the single commissioner's determination that she failed to give timely notice of her injury as required by S.C. Code § 42-15-20. *Long*, 391 S.C. at 484, 706 S.E.2d at 34. An appellate panel of Commission and the circuit court affirmed. Following the filing of a motion for reconsideration, however, the circuit court reversed the appellate panel, found that Long had complied with the notice requirement, and remanded for "further investigation." *Id.* Relying on a series of cases beginning with *Montjoy v. Asten-Hill Dryer Fabrics* and culminating with *Charlotte-Mecklenburg*, the court of appeals dismissed the appeal on the basis that "the circuit court's order is not immediately appealable." *Id.* Specifically, the *Long* Court relied upon the distinction between the general appealability statute, section 14-3-330, and the statute governing appeals of workers' compensation matters, section 1-23-380, to deny appellate review whenever a workers' compensation case is remanded. This overly restrictive view results

not only from a mis-reading of *Charlotte-Mecklenburg*, but also ignores the broader body of law defining "final judgment" as that term is used in §§ 1-23-380 and -390.

As aptly noted by the dissent in *Long*, however, "it is untenable to label [an order reaching the merits] as interlocutory merely because it is accompanied by language remanding the case for further proceedings." 391 S.C. at 488, 706 S.E.2d at 37 (Geathers, J. dissenting). Instead, the courts must look to the effect of the order and determine whether, as is this case in this appeal, the ruling "has finality with respect to the issue decided and will become the law of the case if it is not immediately appealed." *Id.* Relying on more recent published authority[2], the dissent persuasively posits that careful attention to the language used in remand orders is the key to determining whether the order "'involves the merits' - and thus reaffirm[s] the legislative intent behind the term 'final judgment' as set forth in section 1-23-390." *Id.* To the extent the majority in *Long* held otherwise, that decision should be reversed.

To the extent this Court may determine that *Long* was correctly decided, which it wasn't, it still should not be read to support dismissal of the instant appeal. As the *Long* Court acknowledged, dismissal is not appropriate where "further proceedings on remand are purely ministerial and do not require the exercise of independent judgment or discretion on the part of the commission." *Long*, 391 S.C. at 485, 706 S.E.2d at 35 (quoting *Hicks v. Piedmont Cold Storage, Inc.*, 324 S.C. 628, 479 S.E.2d 821 (Ct. App. 196). The circuit court at issue here held that the "evidence is susceptible of only one

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[2] Specifically, the dissent in *Long* relied upon the holdings of *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005) and *Mungo v. Rental Uniform Service of Florence, Inc.*, 383 S.C. 270, 678 S.E.2d 825 (Ct. App. 2009) to support the proposition that the legislative intent of permitting immediate review of "final orders" is satisfied by permitting immediate review of "any ultimate decision on the merits." *Long*, 391 S.C. at 489-490, 706 S.E.2d at 37-38.

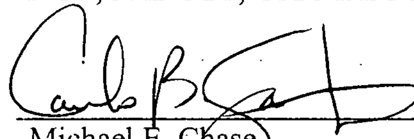
inference" - that inference being that Bone sustained a compensable injury as a matter of law. (App. p. 6) Accordingly, as the order decided the only real legal issue in the case, it meets the "final judgment" threshold and should be subjected to immediate appellate review.

CONCLUSION

For all of the reasons stated herein, Petitioners respectfully submit that a grant of *certiorari* is proper and that the order of dismissal should be reversed and this appeal reinstated.

Respectfully submitted,

TURNER, PADGET, GRAHAM & LANEY, P.A.



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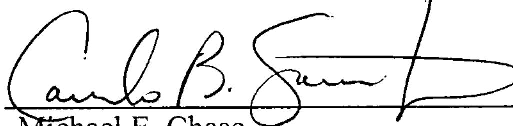

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Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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STATEMENT OF ISSUE ON APPEAL

> Whether section 1-23-390 of the South Carolina Code, which instructs that the losing party in an administrative case may seek appellate review of a circuit court's "final judgment . . . by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases[,]" allows the immediate appeal of a circuit court order that remands a case to an administrative agency for additional proceedings.

STATEMENT OF THE CASE

This is an appeal in a workers' compensation case. The South Carolina Workers' Compensation Commission denied Cathy Bone's claim for benefits on the grounds that Ms. Bone failed to prove she sustained a compensable injury. The circuit court reversed that determination and remanded the case to the commission for additional proceedings. U.S. Food Service (Ms. Bone's employer) and its insurance carrier appealed, and the court of appeals dismissed the appeal on the grounds that the circuit court's order was not immediately appealable. This Court granted certiorari to review that decision.

As the petitioners' statement of the case describes, Ms. Bone initiated this case in August of 2007 by filing a notice with the South Carolina Workers' Compensation Commission claiming she had injured her back at work. (App.p.29). Ms. Bone also alleged that she needed back surgery and temporary total disability benefits. *Id.*

U.S. Food Service filed an answer that denied Ms. Bone had sustained a workplace injury and asserted all defenses available under the Workers' Compensation Act. (App.p.30).

On November 5, 2007, a single hearing commissioner conducted a hearing in the case. See (App.p.53) (the hearing transcript). The transcript from this hearing details what has, to this point, been the parties' primary disagreement on the merits:

Ms. Bone's job was to wash out the inside of food delivery trailers. (App.p.77, lines 1-25). According to Ms. Bone, she injured her back while lifting two shipping pallets in the back of one of these trailers. (App.p.59, lines 16-23). Ms. Bone did not report this alleged accident to her employer until a week after she claimed it happened. See (App.p.62, lines 7-10; p.76, lines 15-23) (describing that Ms. Bone allegedly injured her back on Tuesday, took a day off Wednesday, worked Thursday, was off Friday and Saturday, worked Sunday and Monday, and reported the alleged injury Tuesday). Ms. Bone sought to explain this delay by offering that although she initially thought her injury to be minor, see (App.p.61, lines 14-16), she continued to experience pain in the days that followed the incident. See (App.p.63, lines 11-21; p.66, lines 11-23).

For its part, U.S. Food Service focused on the testimony of Richard Thompson, the supervisor to whom Ms. Bone had reported the alleged injury. Mr. Thompson testified that in the course of Ms. Bone's reporting the incident with the pallets, she also described that she had experienced a flat tire while driving to work that morning and "had to change her tire." (App.p.84, line 20-p.85, line 20). Mr. Thompson took this to mean that Ms. Bone herself had physically changed the tire, and U.S. Food Service took the position that Ms. Bone had not injured herself at work, but that she had instead injured herself while changing the tire. See (App.p.56, lines 18-20) (the hearing commissioner's summary of U.S. Food Service's position).

Ms. Bone testified that she did not actually change her own tire. According to Ms. Bone, a gentleman who was in the parking lot of a nearby business where she pulled off of the road changed the tire for her. (App.p.73, line 6-p.75, line 11).

In an order dated February 7, 2008 and served February 11, 2008, the hearing commissioner found that Ms. Bone was not credible and that she did not meet her burden of proving she had sustained a work-related injury. (App.pp.15-25). An appellate panel of the commission conducted oral argument on May 29, 2008, and affirmed the hearing commissioner's decision in an order dated and served June 19, 2008. (App.pp.8-14). Ms. Bone sought judicial review of the commission's decision in circuit court, see (App.p.26-28), and in an order dated March 26, 2009, the circuit court reversed the commission's decision and found the evidence established Ms. Bone injured her back while moving pallets at work. (App.pp.3-7). The court remanded the case to the commission for proceedings consistent with the court's order. (App.p.7).

U.S. Food Service and its insurance carrier appealed, and Ms. Bone ultimately filed two motions to dismiss the appeal. In both instances, her argument was that a circuit court order that remands a case to an administrative agency is not immediately appealable under the Administrative Procedures Act because such an order is not a final judgment. See (App.pp.185-194) (first motion); (App.pp.236-241) (second motion).

The petitioners opposed both motions arguing, among other things, that the circuit court's order was immediately appealable because it "affects the merits." (App.p.226) (from the response to the first motion); and (App.p.275) (from the response to the second motion).

The court of appeals granted Ms. Bone's second motion to dismiss, explaining its view that because the circuit's order remanded the case to the commission for additional proceedings, the order was not a final judgment and was not immediately appealable. See (App.pp.284-285) (the court's order). The court of appeals cited four of this Court's

decisions to support dismissal of the appeal. It cited *Montjoy v. Asten-Hill Dryer Fabrics* for the proposition that an order from the circuit court which remands an administrative case for additional proceedings is not immediately appealable; it cited *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control* for the proposition that the general appealability statute (section 14-3-330 of the South Carolina Code) does not apply to administrative cases; and it cited *Adickes v. Allison & Bratton* and *Good v. Hartford Accident & Indemnity Company* for the definition of a "final order." (App.p.285). This order was dated June 30, 2010 and filed July 1, 2010.

On July 16, 2010, the petitioners requested that the court of appeals grant rehearing. See (App.p.291-295). On August 13, 2010, the court of appeals issued a written order denying this request. (App.p.296).

ARGUMENT

According to the petitioners, the court of appeals erred in dismissing this case because the circuit court's order is a "final order" that "reaches the merits or affects a substantial right." (Brief of Petitioners, p.3). The petitioners argue it is not accurate to call the circuit court's order "interlocutory," because the circuit court's order decides what they say is "the only issue in these proceedings—whether or not [Ms.] Bone sustained a compensable injury." *Id.* at 4. In their view, the right to immediate appeal of a circuit court order in an administrative case hinges on whether the circuit court's ruling "will become the law of the case if not immediately appealed" and whether it "involves the merits." *Id.* at 9.

None of these arguments should be persuasive. The Administrative Procedures Act sets the boundaries of the Court's appellate jurisdiction in this area, and the APA provides

that a party generally may not appeal an administrative case until after exhausting all administrative remedies and getting a final decision from the agency. An order that remands a case to an agency is not a "final decision," and in arguing that the court of appeals erred in dismissing this case, the petitioners rely on law that pre-dates the APA. The Court should instruct that this old law is no longer good law. This Court's decisions in *Montjoy v. Asten-Hill Dryer Fabrics* and *Leviner v. Sonoco Products Co.* hold that an order from the circuit court remanding a case to an administrative agency for additional proceedings is not immediately appealable, and that rule is the correct rule. The Court should affirm.

I. With One Exception, the Administrative Procedures Act Limits Immediate Appeal to "Final Decisions" and "Final Judgments."

The Administrative Procedures Act "purports to provide uniform procedures before State Boards and Commissions and for judicial review after the exhaustion of administrative remedies." *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981). The right to judicial review of an agency's decision is sometimes called the right to "appeal" the agency's decision. See, e.g., *Al-Shabazz v. State*, 338 S.C. 354, 376, 527 S.E.2d 742, 754 (2000) (describing "appeal for judicial review" of an agency's decision). As applied to this case, two provisions of the APA are in play in judging when a party can immediately appeal.[1]

The first is section 1-23-380 of the Code (Supp. 2010), which governs taking the case from the agency to the court system. This statute instructs that a party can appeal an agency's decision if he or she "has exhausted all administrative remedies available within the agency

[1]This case focuses on §§ 1-23-380 and -390 of the Code, but there are other provisions of the APA that pertain to appeals. For example, there is a separate statute in the APA when the Administrative Law Court is involved. See S.C. Code Ann. § 1-23-610 (Supp. 2010).

and [] is aggrieved by a final decision in a contested case." *Id.* The statute also provides that "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy."

The second statute in play is section 1-23-390 (Supp. 2010), which allows additional appellate review after the case is in the court system. This statute provides:

> An aggrieved party may obtain a review of a final judgment of the circuit court or the court of appeals . . . by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases.

Id.

Any inquiry into what types of orders in administrative cases are immediately appealable has to start with these statutes. Getting outside the agency requires either a "final decision in a contested case" or an intermediate decision for which review after the final agency will not provide an adequate remedy. Going beyond the first level of judicial review requires a "final judgment of the circuit court or the court of appeals."[2]

II. This Has Not Always Been the Rule; Administrative Appeals Used to Go by the Rules That Applied in Civil Actions at Law. Remnants of this Law Remain, and They Conflict with the APA.

In an action at law, a party may immediately appeal any intermediate judgment or order that "involv[es] the merits" or "affect[s] a substantial right." See S.C. Code Ann. § 14-

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[2]Administrative appeals used to be heard in circuit court, see S.C. Code Ann. § 1-23-380(A)(1) (2005), but a 2006 amendment to § 1-23-380 provided that the court of appeals was responsible for reviewing *most* administrative cases pending on or after July 1, 2006. See Act. No. 387, 2006 S.C. Acts 3093, 3098-99 (amending § 1-23-380); and *id.* at 3132 (effective date). Workers' compensation cases were not governed by this change. See § 1-23-380 (Supp. 2010) ("*Except as otherwise provided by law*, an appeal is to the court of appeals") (emphasis added); and *Pee Dee Reg'l Transp. v. South Carolina Second Injury Fund*, 375 S.C. 60, 61-62, 650 S.E.2d 464, 465 (2007) (noting the 2007 amendment to the Workers' Compensation Act that moved appeals from circuit court to the court of appeals).

3-330 (1977). This Court has defined an order that "involves the merits" as an order that "finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense[.]" *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). This means exactly what it says. Final judgments are always immediately appealable, and the test for whether an intermediate order is immediately appealable is whether the order "involves the merits" or "affects a substantial right."

In *Chastain v. Spartan Mills*, this Court interpreted the Workers' Compensation Act to allow for appeals under these same conditions; specifically, to allow interlocutory appeals in workers' compensation cases so long as the order "affects the merits." 228 S.C. 61, 65, 88 S.E.2d 836, 837 (1955). The Court reached this conclusion by looking at the appeals statute in the Workers' Compensation Act which allowed a party to appeal the commission's decision "under the same terms and conditions as govern appeals in ordinary civil actions." *Id.* at 65, 88 S.E.2d at 837 (interpreting section 72-356 of the 1952 Code of Laws).

This statute is still a part of the Workers' Compensation Act, compare 1952 Code § 72-356 with S.C. Code Ann. § 42-17-60 (Supp. 2010), and as recently as August of 2011, this Court observed that it had interpreted this statute "to allow an immediate appeal from an interlocutory order of the Commission [] where the order 'affects the merits.'" *Allison v. W. L. Gore*, Op. No. 27031 (S.C. Sup. Ct. filed Aug. 22, 2011) (Shearouse Adv. Sh. No. 28 at 78, 80) (citing *Chastain*).

Here is the problem: this appealability rule pre-dates the adoption of the Administrative Procedures Act by over 20 years. *Chastain* was decided in 1955, and the Generally Assembly passed the first version of the APA in 1976. See Act. No. 671, 1976

S.C. Acts 1758. The statutes relevant to these particular appeals (§§ 1-23-380 and -390) were added by the 1977 version of the APA. See Act No. 176, 1977 S.C. Acts 391, 405-06.

This creates a conflict. On one hand is the Administrative Procedures Act, which by and large limits immediate appellate review to final judgments. On the other hand is this previous interpretation of the Workers' Compensation Act, which allows immediate appeals under the same terms that apply in civil cases at law. These rules do not agree. The APA requires that the contested case be entirely over—it requires a "final decision in a contested case."[3] Under *Chastain*'s construction of the comp act, a party may immediately appeal any order that "finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense[.]" *Mid-State Distribs.*, 310 S.C. at 334, 426 S.E.2d at 780.

An example may help to make the point. In a civil case, an order that determines liability in favor of the plaintiff but leaves open the question of damages is immediately appealable because it involves the merits. This was the holding in *Nauful v. Milligan*, where the defendant in a claim for assault and battery appealed a grant of partial summary judgment to the plaintiff. 258 S.C. 139, 143, 187 S.E.2d 511, 513 (1972). The Court said:

> The interlocutory adjudication in this case determines that the defenses interposed by defendant are without merit and that he is liable to the plaintiff on the claim asserted in the complaint, leaving only the amount of the damages at issue. It thus finally decides the merits of every issue in the case, except that of damages.

Id. at 143, 187 S.E.2d at 513.

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[3]There are exceptions to the requirement that a party exhaust his or her administrative remedies, see *Law v. South Carolina Department of Corrections*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (generally discussing the exhaustion doctrine), but this has not been an issue in this case.

Under the APA, this order would not be immediately appealable. Though the order has the effect of finally deciding some issues in the case (it decides liability), the order is interlocutory—there is more to the case than liability. If *Nauful* was an administrative case, appellate review of the order would have occurred along with the review of the agency's final decision. More accurately, appellate review of this intermediate decision would have been postponed *unless* the exception in § 1-23-380 applied; unless something in the summary judgment ruling could not be adequately reviewed after the final decision. Immediate appeal was possible in *Nauful* only because the order "involved the merits."

Despite the enactment of the APA, at least 13 published decisions from South Carolina appellate courts link appealability in administrative cases to the "involve the merits" analysis that applies under § 14-3-330. This tally does not count *Chastain*; these 13 cases are all post-APA cases. The cases are listed in the Appendix at the end of this brief, and in every one of them, the appealability analysis is rooted in *Chastain*, which was decided when there was no Administrative Procedures Act and when statutory law did not require a "final decision" from the administrative agency or a "final judgment" from the lower court before appealing.[4] Some of these cases do not even mention the APA when discussing appealability. See *Green v. City of Columbia*, 311 S.C. 78, 79-80, 427 S.E.2d 685, 687 (Ct. App. 1993); and *King v. Singer Co.*, 276 S.C. 419, 420, 279 S.E.2d 367, 367 (1981). Some of the cases expressly rely on § 14-3-330. See *Walker v. Springs Indus., Inc.*, 298 S.C. 249,

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[4]The Court decided *Chastain* in 1955. In the 1952 Code, section 72-356 governed appeals from the commission to the court system. Section 15-123, which set the Court's appellate jurisdiction in actions at law, applied to further appellate review. This section is the statutory predecessor to § 14-3-330.

250, 379 S.E.2d 729, 730 (Ct. App. 1989); *King*, 276 S.C. at 420, 279 S.E.2d at 367. This Court has directly overruled two of the cases in the Appendix "to the extent [those cases] rely on § 14-3-330 to permit the appeal of interlocutory orders of the [Administrative Law Court] or an administrative agency[,]" *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control*, 387 S.C. 265, 266, 692 S.E.2d 894, 894 (2010), but the remaining cases listed in the Appendix portend to contain good law.[5]

III. The APA Controls this Analysis, and the Court Should Overrule Any Post-APA Decisions That Rely this Old Law to Analyze Immediate Appealability.

Where the APA and the Workers' Compensation Act conflict, the APA controls. In *Lark v. Bi-Lo*, the Court used this principle to hold that the standard of appellate review contained in the Workers' Compensation Act (in § 42-17-60) had been repealed by implication with the passage of the APA. See 276 S.C. at 131-135, 276 S.E.2d at 305-306 (finding the two standards were "inconsistent" and could not apply "without conflict"). *Lark* is not an outlier. The Court has used the principle that the APA generally "trumps" other statutes in other cases. See *Williams v. South Carolina Dep't of Wildlife*, 295 S.C. 98, 100, 367 S.E.2d 418, 419 (1987) (overruled on other grounds (statute does not circumscribe *subject matter* jurisdiction) by *Dove v. Gold Kist*, 314 S.C. 235, 239, 442 S.E.2d 598, 601 (1994)); cf. *Charlotte-Mecklenburg*, 387 S.C. at 266, 692 S.E.2d at 894 (as the more specific statute, the APA prevails over § 14-3-330, the general appealability statute).

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[5]*Charlotte-Mecklenburg* overruled the decisions of the court of appeals in *Canteen v. McLeod Reg'l Med. Ctr.*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) and *Oakwood Landfill, Inc. v. South Carolina Dep't of Health and Envtl. Control*, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009). *Canteen* was a workers' compensation case in which the court of appeals used the same analysis the petitioners are using in this appeal.

Lark invalidated the standard of review in § 42-17-60, and the same should be true of the language in that statute allowing immediate appeal of interlocutory orders that involve the merits. *Chastain*'s construction of this statute would allow these appeals, but the "final judgment" rule in the APA does not. There is no way to read these statutes in harmony. *Chastain* was decided when statutory law treated workers' compensation appeals the same as appeals in actions at law. The APA treats them differently.

Candor requires acknowledging that the language interpreted in *Chastain* — "under the same terms and conditions as govern appeals in ordinary civil actions" — is similar to some of the language in § 1-23-390. Section 1-23-390 instructs that an aggrieved party may appeal a final judgment of the circuit court or the court of appeals "by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases." S.C. Code Ann. § 1-23-390 (Supp. 2010).

The "final judgment" language in § 1-23-390 prevents interpreting this language the way the *Chastain* Court interpreted the Workers' Compensation Act, because interpreting § 1-23-390 to allow immediate interlocutory appeals that involve the merits would divest the final judgment requirement of all force and effect. And as a practical matter, interpreting the APA's scheme to be identical to the scheme in civil cases would not make much sense in terms of statutory drafting. If this was the APA's goal, the General Assembly would have done better to leave out the "exhaust[ing] all administrative remedies," "final decision," and "final judgment" language from §§ 1-23-380 and -390. The easier thing would have been to repeat the terms of § 14-3-330 verbatim. If the APA's purpose was to maintain the status quo from *Chastain*, any sweat equity in drafting §§ 1-23-380 and -390 was not well-spent.

The APA's appeals statutes did not re-codify the pre-APA appellate practice for administrative appeals; the APA changed the rules of the game. Just as this Court jettisoned some of the old law in *Charlotte-Mecklenburg*, this Court should overrule the cases listed in the Appendix to the extent that they rely on *Chastain* and its progeny, or on § 14-3-330, in judging the appealability of orders in administrative cases. *Chastain* was right when it was decided, but its rule did not survive the adoption of the APA.

IV. A Circuit Court Order That Remands a Case to an Administrative Agency for Additional Proceedings Is Not Immediately Appealable.

The meat of the petitioners' arguments fall under this sub-heading, and their arguments go along two lines. First, they say that an order qualifies as a final order if it "reaches the merits or affects a substantial right." (Brief of Petitioners, pp.3-5). They call this "the traditional formulation of the final judgment rule," *id.* at 5, and they say Judge Cooper's order is a "final judgment" because it is a final decision on the issue of the compensability of Ms. Bone's injury and, according to them, compensability is "the only real legal issue in the case." *Id.* at 10. Second, the petitioners contend immediate review is necessary because Judge Cooper's order "will become the law of the case if it is not immediately appealed." *Id.* at 9 (quoting the dissent in *Long v. Sealed Air Corp.*).

A. Judge Cooper's Order Is Interlocutory; it Is Not a Final Order.

Black's Law Dictionary defines "interlocutory" as "[s]omething intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." *Black's Law Dictionary* 731 (5th ed. 1979). In

contrast, "final judgment" is "a term of art noting the disposition of *all* issues in the action." *Link v. Sch. Dist. of Pickens County*, 302 S.C. 1, 5 n.3, 393 S.E.2d 176, 178 n.3 (1990) (emphasis in original). A final judgment "disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 894-95 (citing *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942)). A "final judgment" has been described as a party "arriv[ing] at the end of the road[,]" *Mid-State Distribs.*, 310 S.C. at 335, 426 S.E.2d at 780, and this Court has explained that a final judgment "must show intrinsically and distinctly, and not inferentially, that the matters in the record have been determined in favor of one of the litigants, or that the rights of the parties in the litigation have been adjudicated." *Good*, 201 S.C. at 41, 21 S.E.2d at 212. "The object of this requirement . . . is to present the whole cause for determination in a single appeal and thus to prevent the unnecessary expense and delay of repeated appeals." *Id.* at 41, 21 S.E.2d at 212.

Judge Cooper's order does not decide the whole subject matter of this case, it decides that Ms. Bone sustained a compensable injury; and there is a good deal more to a workers' compensation case than the fact of an injury. For example, Ms. Bone claimed she needed surgery and that she had not reached the point of maximum medical improvement. See (App.p.29) (Ms. Bone's initial filing with the Workers' Compensation Commission). Judge Cooper's order says nothing about these issues; probably because the commission never reached them. As another example, in the proceedings below, the parties agreed that Ms. Bone's compensation rate would be $315.72. (App.p.55). This impacts Ms. Bone's claim

for temporary total disability benefits—another part of the case the commission did not reach. The Petitioners may or may not contest these issues on remand; Ms. Bone has no way of knowing. These examples should make two things relatively clear. First, Judge Cooper's order does not show "intrinsically and distinctly" that the entire subject matter of this case has been resolved in Ms. Bone's favor. Second, the Petitioners have not reached "the end of the road"—there is no judgment in this case to enforce. Judge Cooper's order is important, but if there is such a thing as an interlocutory order, this order qualifies.

B. Judge Cooper's Ruling Will Not Become the Law of the Case If it Is Not Immediately Appealed.

The "law of the case" doctrine is a procedural tool used by appellate courts. It provides that any ruling a party does not challenge in the course of an appeal is the "law of the case." See, e.g., *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282 n.5, 701 S.E.2d 742, 745 n.5 (2010). This is a specie of the principle that an appellate court can affirm a lower court's decision for any ground appearing in the record, see Rule 220(c), SCACR, and the "two issue" rule. See *Jones v. Lott*, 387 S.C. 339, 348, 692 S.E.2d 900, 904 (2010) (describing the law of the case and the "two issue" rule); *Ex parte Morris*, 367 S.C. 56, 65, 624 S.E.2d 649, 653-54 (2006) (string citing Rule 220 and the law of the case).

These principles do not require a party to immediately challenge intermediate rulings that "involve the merits" lest those rulings become the law of the case. In a civil case, those interlocutory rulings may be challenged immediately, or, they may be challenged after final judgment. This Court's decision in *Link v. School District of Pickens County* is an example. 302 S.C. 1, 393 S.E.2d 176 (1990). The plaintiff in *Link* lost one claim (a claim for breach

of contract) on summary judgment, and lost another claim (promissory estoppel) by jury verdict. After the verdict, he appealed the grant of summary judgment. This Court held that although the plaintiff *could* have immediately appealed summary judgment order, he was also within his rights to wait and appeal after the final judgment. *Id.* at 6, 393 S.E.2d at 179.

The dissent in the court of appeals decision of *Long v. Sealed Air Corp.* does not apply these principles correctly. Looking to the part of § 14-3-330 instructing that a review of a final judgment will include review of any intermediate order or decree that affects the judgment, the dissent argues that because the APA has no similar "safeguard," intermediate rulings that "involve the merits" in agency cases *must* be immediately appealed or they become the law of the case. *Long*, 391 S.C. 483, 490-91, 706 S.E.2d 34, 38 (2011).

The power to review intermediate orders that affect the final judgment is part of the final judgment rule, and it is therefore part of the APA. One purpose of the final judgment rule is to present the "whole cause for determination in a single appeal," and this includes appellate review of any questions that "will be inherent in an appeal from that judgment." *Good*, 201 S.C. at 41, 21 S.E.2d at 212. The final judgment rule does not prevent review of intermediate orders, it holds them over and ensures that the issues presented in an appeal are issues that affect the final judgment. In taking a contrary position, the dissent in *Long* goes further than it advertises. It goes beyond re-affirming the rule of *Chastain* and allowing interlocutory appeals under the same terms as § 14-3-330, it *requires* immediate appeals of these interlocutory orders. This does not prevent piecemeal appeals, it guarantees them.

Judge Cooper's order will not become the law of the case if it is not immediately appealed. This order will be reviewed as part of any appeal after final judgment.

C. This Court's Decisions in *Montjoy v. Asten-Hill Dryer Fabrics* and *Leviner v. Sonoco Products Co.* Are Correct and Control this Outcome.

The case *Montjoy v. Asten-Hill Dryer Fabrics* was an appeal from a circuit court's order that remanded a case to the workers' compensation commission. Citing § 14-3-330, see (App.p.154) (describing the motion to dismiss in *Montjoy*), the respondent moved to dismiss the appeal on the grounds that "the order [was] interlocutory and not directly appealable." 316 S.C. 52, 52, 446 S.E.2d 618, 618 (1994). This Court granted the motion to dismiss. The Court cited § 1-23-390 and said "we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable." *Id.* at 52, 446 S.E.2d at 618.

In similar fashion, the case *Leviner v. Sonoco Products Co.* was a case where the circuit court issued an order remanding a case to the workers' compensation commission. There was an odd aspect of the circuit court's decision in *Leviner*: the circuit issued a form order remanding the case and then, without any party making a motion, issued a written order that went further than the form order (the second order found the claimant totally disabled). 339 S.C. 492, 493, 530 S.E.2d 127, 127 (2000). In an unpublished decision, the court of appeals found that the circuit court had exceeded its authority in finding the claimant totally disabled. *Id.* at 493, 530 S.E.2d at 127 (citing *Leviner v. Sonoco Products Co.*, Op. No. 98-UP-280 (S.C. Ct. App. re-filed Aug. 28, 1998)). This Court granted certiorari and held that the court of appeals should have dismissed the appeal. Citing *Montjoy*, the Court wrote that the circuit court's order "was not directly appealable since it remanded the matter to the single commissioner for further proceedings." *Leviner*, 339 S.C. at 494, 530 S.E.2d at 128.

Here again, candor requires acknowledging something: the Court cited § 1-23-390 in *Montjoy*, and when it observed that it had "consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable," the Court cited its decisions in *Owens v. Canal Wood Corp.* and *Hunt v. Witt*. See *Montjoy*, 316 S.C. at 52, 446 S.E.2d at 618. *Owens* and *Hunt* are both listed in the Appendix to this brief, and although both get the right result (they find the orders unappealable), both use the pre-APA analysis of *Chastain*—both judge immediate appealability according to whether the order involves the merits.[6] In *Brown v. Greenwood Mills, Inc.*, yet another case involving a circuit court order that remanded a case to the workers' compensation commission, the court of appeals looked to *Montjoy*'s citation of *Hunt* and *Owens* and said "in determining whether the court's order constitutes a final judgment, we must inquire whether the order finally decides an issue on the merits." 366 S.C. 379, 386-87, 622 S.E.2d 546, 551 (Ct. App. 2005).

Brown is wrong, and the majority decision of the court of appeals in *Long v. Sealed Air Corp.* gets this issue right. The majority in *Long* focuses on the APA, on this Court's holdings in *Montjoy* and *Leviner*, and it describes that multiple decisions from the court of appeals, including *Brown*, pair administrative appeals with the analysis used in § 14-3-330. See *Long*, 391 S.C. at 484-487, 706 S.E.2d at 35-36. *Brown*'s statement that a "final judgment" relies on whether an order "decides an issue on the merits" is not an accurate statement of the final judgment rule. A final judgment settles *all* of the issues on the merits.

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[6]Both cases cite *King v. Singer Co.*, which relied on *Chastain* and § 14-3-330. See *King*, 276 S.C. at 420, 279 S.E.2d at 367; *Hunt*, 279 S.C. 343, 343, 306 S.E.2d 621, 622 (1983) (citing *King*); *Owens*, 281 S.C. 491, 492, 316 S.E.2d 385, 385 (1984) (citing *Hunt* and *King*).

The only caveat to describing *Long* as getting these issues right is that *Long* cites the case *Hicks v. Piedmont Cold Storage, Inc.*, as a situation where the court of appeals allowed immediate appeal of a circuit court's order remanding a case to the workers' compensation commission because "additional proceedings were not required." *Long*, 391 S.C. at 485, 706 S.E.2d at 35. *Hicks* did that very thing, but it cited no authority allowing it to do so. *Hicks* was a case brought by the estate of an injured worker, and the commission denied the case on the grounds that the accident was not compensable. See *Hicks*, 324 S.C. 628, 479 S.E.2d 831 (Ct. App. 1996). The circuit court reversed this determination and "remanded the case to the commission for calculation of the amount of death benefits payable to Hicks' minor children." *Id.* at 632, 479 S.E.2d at 834. Distinguishing *Montjoy*, the court of appeals took the view that the circuit court's order was immediately appealable because no additional proceedings were required. *Id.* at 632 n.2, 479 S.E.2d at 834 n.2. The court of appeals said that any further proceedings on remand were ministerial and "[did] not require the exercise of independent judgment or discretion on the part of the commission." *Id.* at 632 n.2, 479 S.E.2d at 834 n.2.

The order in *Hicks* was not immediately appealable under the APA because it was not a "final judgment." Indeed, the circuit court was sending the case back to the commission for the judgment to be determined. It may well be that the only tasks remaining at the commission were ministerial, but there are two problems with using that as the vehicle for immediate appellate review. First, it ignores the "final judgment" requirement of the APA and the fact that a final judgment settles *all* of the issues in a case. The circuit court's order in *Hicks* was not the end of the road—an order with a remand never is, unless it is a

remand with instructions to enter a specific judgment. Second, saying that something is "the only issue in a case" is guesswork. It may be educated guesswork, but it is guesswork nonetheless. Postponing the appeal until after the remand and the final judgment would have ensured that the whole case was being presented to the appellate court in a single sitting. This Court overturned *Hicks* on a different point (on compensability of the accident), see 335 S.C. 46, 515 S.E.2d 532 (1999), but this distinguishing of *Montjoy* remains on the books.

The actual rule of *Montjoy* and *Leviner*—not the cases they cite as past examples of the right result, but the rule—is that a circuit court order remanding a case to an administrative agency is not immediately appealable. Because the APA limits further appellate review to "final judgments," *Montjoy* and *Leviner*'s rule is the correct rule.

V. As a Housekeeping Matter, this Court May Wish to Note the 2007 Rule Change That Moved These Cases out of the Circuit Court.

In all cases where the date of injury is on or after July 1, 2007, the appeal from the workers' compensation commission will go to the court of appeals, not the circuit court. See *Pee Dee Reg'l Transp.*, 375 S.C. at 61-62, 650 S.E.2d at 465 (interpreting the 2007 amendments to the Workers' Compensation Act). For this reason, the question presented in this case (circuit court orders remanding cases to an agency) should be, as a practical matter, one that is presented with diminishing frequency. Workers' compensation cases have a three year statute of limitations. See S.C. Code Ann. § 42-15-40 (Supp. 2010). Cases governed by the old law should be getting less common.

But where this issue of immediate appealability used to arise when there was an appeal from the circuit court to the court of appeals, it will now arise in cases where the court

of appeals issues a decision remanding a case to an administrative agency. Ms. Bone raises this point only as a matter of housekeeping which the Court may wish to note in its decision.

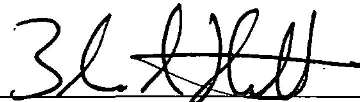
CONCLUSION

Cathy Bone has no philosophical objection to an appeal of the circuit court's decision being heard now. She briefed the merits of the appeal, see (App.pp.160-170), and as that brief outlines, she firmly believes that the hearing commissioner's credibility determination was arbitrary and that the circuit court correctly reversed the finding that Ms. Bone did not suffer a work-related accident.

But process matters, and the fact of the matter is that the APA limits appellate review to final judgments. Judge Cooper's order is not a final judgment. It is the end of the road on an important issue in the case, but it is not the end of the road. This Court should affirm the decision of the court of appeals to dismiss this appeal.

Respectfully submitted,

September 14, 2011



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APPENDIX

Supreme Court Cases

King v. Singer Co., 276 S.C. 419, 279 S.E.2d 367 (1981) (citing *Chastain* and § 14-3-330)

Hunt v. Witt, 279 S.C. 343, 306 S.E.2d 621 (1983) (citing *King*)

Owens v. Canal Wood Corp., 281 S.C. 491, 316 S.E.2d 385 (1984) (citing *Hunt* and *King*)

Allison v. W. L. Gore, Op. No. 27031 (S.C. Sup. Ct. filed Aug. 22, 2011) (Shearouse Adv. Sh. No. 28 at 78) (citing *Chastain*, *King*, and *Brunson v. Am. Koyo Bearings*, which is listed below)

Court of Appeals Cases

Walker v. Springs Indus., Inc., 298 S.C. 249, 379 S.E.2d 729 (Ct. App. 1989) (citing § 14-3-330)

Green v. City of Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993) (citing *Chastain*)

Brown v. Greenwood Mills, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005) (citing *Owens*, *Hunt*, and *Green*)

Brunson v. Am. Koyo Bearings, 367 S.C. 161, 623 S.E.2d 870 (Ct. App. 2005) (citing *Green*, *Chastain*, and § 14-3-330)

Foggie v. Gen. Elec. Co., 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008) (citing *Hunt*, *Owens*, and *Brown*)

Canteen v. McLeod Reg'l Med. Ctr., 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) (citing *Green*, *Brown*, *Foggie*, *Owens*, and *Hunt*)

Oakwood Landfill, Inc. v. South Carolina Dept. of Health and Envtl. Control, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009) (citing *Green*, *Foggie*, *Brown*, *Owens*, and *Hunt*)

McCrea v. City of Georgetown, 384 S.C. 328, 681 S.E.2d 918 (Ct. App. 2009) (citing *Foggie* and *Brown*)

Mungo v. Rental Unif. Serv. of Florence, Inc., 383 S.C. 270, 678 S.E.2d 825 (Ct. App. 2009) (citing *Foggie* and *Brown*)

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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SEP 14 2011
S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2008-CP-32-2876

Cathy C. Bone, ... Respondent,

v.

U.S. Food Service and Indemnity
Insurance Company of North America, ... Petitioners.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioners with a copy of the *Brief of Respondent* by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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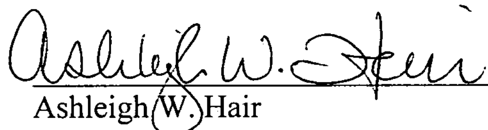

Ashleigh W. Hair

September 14, 2011
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court Of Common Pleas

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SEP 26 2011
S.C. Supreme Court

G. Thomas Cooper, Jr., Circuit Court Judge

Order of Dismissal (S.C. Ct. App. Filed July 1, 2010)

Cathy C. Bone, ...Respondent,

v.

U. S. Food Service and Indemnity Insurance Company of North America,...... Petitioners.

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ARGUMENT

I. THE CIRCUIT COURT ORDER IS SUBJECT TO IMMEDIATE REVIEW.

Contrary to Bone's position that Petitioners describe compensability as the only issue on appeal, the challenged order itself provides that "[t]he ***sole issue*** is when Claimant's injury occurred." (Resp.t's Br. p. 4; App. p. 3) (Emphasis added)[1] Indeed, the circuit court adopted Respondent's contention below that "the evidence is susceptible of only one inference, that Claimant sustained a compensable injury." (App. p. 4) While acknowledging the order concludes as a matter of law that she is entitled to benefits, Bone nevertheless urges this Court to determine erroneously that the challenged order is interlocutory and not immediately appealable pursuant to S.C. Code Ann. § 1-23-390. Bone's argument fails because she relies upon a misperceived distinction between interlocutory appeals in workers' compensation proceedings and appeals of interlocutory orders in the broader class of civil actions in general where no such distinction exists. Careful examination compels the conclusion that dispositive orders in workers' compensation cases like this one are equally subject to the final judgment rule and immediate review where they involve the merits or affect a party's substantial rights.

A. The Administrative Procedures Act Affords Immediate Review.

In her brief, Bone attempts to make a distinction without a difference in explaining that the Administrative Procedures Act conflicts with the statute governing

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[1] The parties stipulated as to Respondent's average weekly wage and compensation rate. (App. p. 16) Respondent's Form 50, Request for Hearing, sought temporary total disability, noted that back surgery would be needed, and asserted that Respondent had not yet attained maximum medical improvement. (App. p. 28) Petitioners denied Respondent sustained a compensable injury and asserted she was entitled to no benefits. (App. p. 29)

appeals in workers' compensation proceedings, S.C. Code Ann. § 42-17-60.[2] (Resp.t's Br. p. 7) It is uncontested that S.C. Code Ann. §§ 1-23-380 and -390 govern appellate review of final administrative agency decisions. At the same time, these provisions clearly permit review of an interlocutory order in a workers' compensation proceeding where that order reaches the merits or affects a substantial right. For example, Section 1-23-380 authorizes review of "a final decision in a contested case" and "does not limit utilization of or the scope of judicial review, redress, relief or trial de novo provided by law." Further, Section 1-23-390 provides that "[a]n aggrieved party ***may obtain a review of a final judgment of the circuit court*** or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules ***as in other civil cases***." (Emphasis added) Thus, a plain reading of the relevant statutory provisions supports immediate review of the order challenged in this appeal, and neither provision should be read to signal a departure from or modification of the final judgment rule as applied in the precedents of this Court.

As this Court recently recognized, there is insufficient tension between §§ 1-23-380 and -390 on the one hand and 42-17-60 on the other to warrant dismissal of this appeal pending remand to the agency. To the contrary, "[p]ursuant to § 42-17-60 (1990), an appeal from the Commission may be taken to circuit court 'under the same terms and conditions as govern appeals in ordinary civil actions.'" *Allison v. W.L. Gore*, Op. No. 27031 (S.C.Sup.Ct. filed August 22, 2011) (Shearouse Adv.Sh. 28 at 79), *reh'g denied*

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[2] Petitioners maintain there is no real conflict between the appeal statutes of the APA and their workers' compensation counterparts, as both sets of provisions contemplate immediate review of final orders. To the extent any such discord exists, however, this Court will construe the provisions so that "both can stand." *City of Spartanburg v. Blalock*, 223 S.C. 252, 262-263, 75 S.E.2d 361, 366 (1955).

(Sept. 22, 2011). In *Allison*, this Court recognized that an order denying a party's motion to dismiss was not subject to immediate review in part because it did "not affect the merits." *Id.* Contrary to Bone's argument, the court of appeals got it right in *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005) in relying on the "involves the merits" framework because it relied upon § 1-23-390, as well as "case law cited by our supreme court in *Montjoy* to interpret 1-23-390."[3] The same result followed in *Charlotte-Mecklenburg Hosp. Auth. v. South Carolina Dep't. of Health & Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010). There, the Court overruled a number of cases to the extent the lower courts applied S.C. Code Ann. § 14-3-330 to "permit the appeal of interlocutory orders of the ALC or an administrative agency. . . ." *Id.*, 387 S.C. at 266, 692 S.E.2d at 894) (collecting cases). It did not, however, reject the traditional "rights of the parties" framework. *Id.*, 387 S.C. at 267, 692 S.E.2d at 894-895 ("A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment.").

In this case, the circuit court didn't merely determine the applicable law. Indeed, the applicable law was never in dispute. What the circuit court decided, and why this appeal should be permitted to proceed, is that there was no other possible conclusion but that Bone is entitled to benefits. Thus, absent immediate review in the appellate courts, there is "nothing to be done but to enforce by execution what has been determined." *Charlotte-Mecklenburg*, 387 S.C. at 267, 692 S.E.2d at 895, citing *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942). Like the decision

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[3] *Montjoy v. Astern-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994). Moreover, this Court denied *certiorari* in *Brown*, which, for the reasons stated herein, employed the correct analytical framework and should be viewed as persuasive authority in the instant proceedings.

addressed by the dissent in *Long v. Sealed Air Corp.*, the circuit court's decision that Bone sustained a compensable injury as a matter of law "is a final decision on the merits, and the remand language in the order has no effect on the finality of that decision." 391 S.C. 483, 493, 706 S.E.2d 34, 39 (Ct. App. 2011) (Geathers, J., dissenting). Also like the order at issue in *Long*, the circuit court order in this case "does not allow the Commission to pursue the issue . . . any further, and thus the decision is the law of the case unless immediately appealed." *Id.* Respectfully, Petitioners urge this Court to conclude, consistent with its holdings in prior cases, the dissenting judge in *Long* was correct in his assertion that "the legislature could not have possibly intended to preclude the immediate appeal of a determination that will otherwise become the law of the case when such a result would deny parties to administrative proceedings a meaningful opportunity to be heard." *Id.*

Here, the circuit court order absolutely decides the central question (and Petitioners' primary defense) as to whether Bone's injury is work-related or, as Petitioners urge, a non-compensable injury that resulted from changing a tire. To adopt the rationale employed by the court of appeals in this case and in *Long* would prevent further litigation of this contested issue on remand, subject Petitioners to immediate liability for the payment of benefits they contend are not due and owing, and deprive Petitioners of immediate and meaningful review to which they are entitled by both the Administrative Procedures and Workers' Compensation Acts in contravention of existing statutory and case law precedent. For these reasons, the order dismissing this appeal, as well as the decision by the court of appeals in *Long*, are in error and should be reversed.

B. A Delayed Appeal Is Not A Sufficient Remedy.

Bone's arguments to the contrary notwithstanding, the circuit court order in this case clearly constitutes a final judgment. It is, therefore, subject to immediate review. Any argument that Petitioners may have the right to seek restitution in the event the award is ultimately overturned is irrelevant. Here, the parties do not contest jurisdiction and instead find themselves involved in a legitimate dispute as to whether or not Bone sustained a compensable injury, and there is no mechanism in place to ensure that funds paid in benefits to Bone will be available in the event the award is later overturned. Barring immediate appeal of the final judgment in this case will deprive Petitioners of the review to which they are entitled and require them to pay large sums of money to Bone during an unnecessarily delayed resolution of this matter.

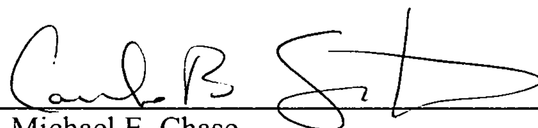
As has been noted, the circuit court order finds as a matter of law that Bone sustained a work-related injury, which entitles her to the temporary total disability payments she requested in her Form 50, Request for Hearing. (App. p. 28) The challenged order is by its very nature subject to immediate appeal because it determines a question necessarily affecting the merits (*i.e.*, whether substantial evidence supports an award of benefits) and makes a final determination that cannot be adequately addressed after final administrative agency decision (*i.e.*, that Respondent is entitled to benefits). Nothing in the APA or authority construing that statute militates in favor of delayed review, and this Court should direct the court of appeals to proceed to a consideration of the merits of the instant appeal without further delay.

CONCLUSION

For all of the reasons stated herein, as well as those set forth in Appellants' prior briefing in this appeal, the circuit court's Order of Reversal is subject to immediate appellate review.

Respectfully submitted,

TURNER, PADGET, GRAHAM & LANEY, P.A.

September 26, 2011 By: 

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CERTIFICATE OF COUNSEL

The undersigned certifies that the Reply Brief of Petitioners complies with Rule 211(b), SCACR, as well as the South Carolina Supreme Court's Order dated August 13, 2007.

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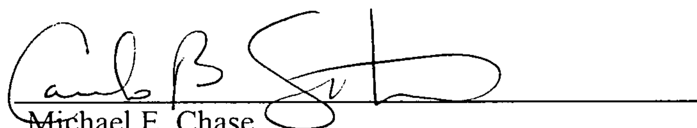
September 26, 2011



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PROOF OF SERVICE

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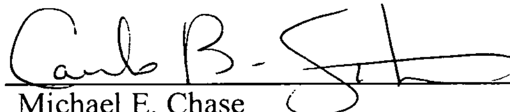

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