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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the 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.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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, ... Appellants.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Cathy C. Bone,)
Employee/Claimant,)

C/A NO.: 2008-CP-32-2876

vs.)

WCC File No.: 0710690

U.S. Food Service,)
Employer,)

Indemnity Insurance Company of North)
America,)

Carrier/Defendants.)

ORDER
OF
REVERSAL

BETH A. COFFIN
CLERK OF COURT
JAN 17 2009

2009 MAR 26 P 12:35

FILED

STATEMENT OF THE CASE

THIS MATTER came before the Court on an appeal from the South Carolina Workers' Compensation Appellate Panel Order dated June 19, 2008. Claimant sought benefits for an injury by accident that she suffered while employed by Defendant U.S. Food Service (Defendant) on June 26, 2007. Defendant does not contest the existence or the degree of Claimant's injury. The sole issue is when Claimant's injury occurred.

Claimant is a 49-year-old mother of two children who has worked at U.S. Food Service for at least two years. On July 3, 2007, Claimant reported that she had injured her back at work on June 26, 2007, six days earlier, when she was bending down lifting two pallets. The same day she reported her back injury, Claimant's vehicle had a flat tire while she was on her way to work. Claimant testified that a helpful person at the business where the flat occurred came to her assistance in changing the tire.

At a hearing before the Single Commissioner, Defendant asserted that the injury was not compensable because it did not occur at work but instead while she was changing her tire on July

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3. Claimant argued that the evidence was consistent with her having injured her back on June 27 and that there was no evidence of Claimant having injured her back on July 3. The Honorable Susan S. Barden denied Claimant benefits on February 11, 2008. The Appellate Panel affirmed with modification on June 19, 2008.

Claimant now requests that the Court overturn the Appellate Panel's decision to deny Claimant benefits because the denial of the award was not supported by substantial evidence. Claimant argues the evidence is susceptible of only one inference, that Claimant sustained a compensable injury, thus becoming an issue of law for the Court. I agree.

STANDARD OF REVIEW

S.C. Code Ann. § 1-23-380(A)(5) governs the standard of judicial review of awards of the Workers' Compensation Commission. Lark v. Bi-Lio, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). This section provides:

(5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

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

S.C. Code Ann. § 1-23-380 (Supp. 2007).

Claimant contends that the findings denying the claim are clearly erroneous in view of the substantial evidence and/or can be characterized as arbitrary and capricious. As such, the

2

Circuit Court may properly overturn the ruling of the Workers' Compensation Commission denying benefits. Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E. 2d 122 (1985). Further, where the evidence is susceptible of only one inference, the question is one of law for the court rather than one of fact for the Commission. Mullinax v. Winn Dixie Stores, 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

DISCUSSION

The Commission denied the claim finding Claimant did not suffer an on the job injury, ostensibly finding Claimant injured her back while changing her tire on July 3. However, a review of the records shows no evidence to support this finding.

There is no question Claimant's June 27 accident was reported on July 3 as a work injury. The record presents an abundance of evidence in the record to support a finding that Claimant injured her back on June 27 while lifting or moving pallets to clean a truck. Richard Thompson, Claimant's supervisor, admitted the injury was reported to him as having occurred when Claimant was lifting pallets to clean a trailer, and a statement to this effect was introduced at the hearing. Form 12-A (Accident Report) was admitted as evidence at the hearing before the Single Commissioner. The Form 12-A was dated July 9, 2007, and states:

Employee states she was moving on (sic) of the pallets so she could get to an area inside the trailer when she felt something in her back but thought it was some kind of a stinger and could work through it resulting in an unspecified injury to her back.

Claimant was sent by her employer for medical treatment. She was initially seen at Lexington Medical Center Occupational Health on July 5, 2007. There she gave the same consistent history:

G-7 3

This is an initial Workers Comp visit for this patient. She states that she was picking up pallets at work, which she has done many times at her job, when she felt a sharp pain in her lower back. She continued to work and actually felt a little better as the shift went on. Then she state that she woke up on Sunday and felt a terrible pain in her left side of her hip, which radiates down to her leg. She self treated with Motrin 3 tablets every 6 hours but she got no relief.

(APA p.6) Claimant continued to treat at Occupational Health on July 9, 2007 ("Apparently, the patient injured her back lifting pallets at work.") (APA p.7), July 10, 2007 (APA p.4), and July 13, 2007 (APA pp.1-2).

The insurance adjuster took a recorded statement from Claimant on July 12, 2007. In this statement, which was offered as evidence, Claimant gave the same history of injury while lifting pallets at work.

Perhaps most significantly, there is absolutely no evidence in the record, let alone substantial evidence, that Claimant injured her back while changing a tire on the way to work on July 3, 2007. Defendant cites the testimony of Richard Thompson, whom Claimant told she had a flat tire on the way to work and had to change it. Mr. Thompson must have interpreted this to mean Claimant physically changed the tire herself. Further, Defendant argues the Single Commissioner did not find Claimant a credible witness. However, that finding goes only to the weight afforded Claimants testimony and in no way establishes Claimant's injury occurred on July 3. Even so, the record contains an abundance of other evidence establishing Claimant injured her back on June 27, 2007 when she was moving pallets to clean a truck.

CONCLUSION

The evidence of record shows Claimant sustained a compensable injury. There is absolutely no evidence to the contrary. When the evidence is susceptible of only one inference, then question is one of law for the Court. As such, as a matter of law, the Decision and Order of



the Workers' Compensation Commission is hereby REVERSED and REMANDED to the Commission for proceedings consistent with this Order.

AND IT IS SO ORDERED!



Honorable G. Thomas Cooper, Jr.
Presiding Judge, 11th Judicial Circuit

Columbia, South Carolina

March 25, 2009

APPELLATE PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO. 0710609

CATHY C. BONE,

EMPLOYEE,
CLAIMANT/APPELLANT,

- V -

U.S. FOODS SERVICE,

EMPLOYER,

AND

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, CARRIER,
DEFENDANTS/RESPONDENTS.

Appellate Panel Review held in Columbia,
South Carolina on May 29, 2008 per notices
timely and properly served on all parties of
interest.

Appellate Panel Decision and Order filed
June 19, 2008.

APPEARANCES:

Claimant/Appellant represented by William L.
Smith, II, Esquire, of Columbia, South Carolina.

Defendants/Respondents represented by
Michael E. Chase, Esquire, of Columbia, South
Carolina.

STATEMENT OF CASE

The parties were heard by Commissioner Susan S. Barden on November 5, 2007 in Columbia, South Carolina. On February 11, 2008 she issued the following Order:

IT IS ORDERED that this claim for benefits under the South Carolina Workers' Compensation Act is denied on the basis that the Claimant did not meet the burden of proof by a preponderance of evidence that she sustained an injury by accident arising out of and in the course of employment.

THEREFORE, all claimed benefits are denied.

No hearing costs are assessed in this matter.

AND IT IS SO ORDERED.

Within the statutory period, counsel for the Claimant filed an Application for Review in the case setting forth his reasons, copies of which were furnished to all interested parties, prior to oral argument presented before the Appellate Panel on May 29, 2008. All proffered testimony has been taken. Such, together with all documentary evidence, has been delivered by oral argument to the individual members of the Full Commission and has since been under study and consideration.

By appeal, Claimant respectfully submits the following:

1. The single commissioner erred in finding Claimant's testimony was not credible when the greater weight and preponderance of the evidence shows Claimant's testimony, report to her supervisor, and medical records are all consistent and credible.
2. The single commissioner erred in finding and ordering that Claimant's injury was not compensable, when the greater weight and preponderance of

the evidence shows Claimant's injury arose out of the course and scope of her employment.

In an appellate review, the Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1985), review the Award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefore, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner. After careful review in the instant case, the Commission, by unanimous vote, has determined all of the Hearing Commissioner's Findings of Fact and Conclusions of Law are correct as stated. Accordingly, they shall become, and hereby are, the law of the case, and; therefore, the Order is sustained in its entirety.

FINDINGS OF FACT

1. Claimant alleges she injured her back in a work-related accident on June 26, 2007; a claim that is not found to be supported by the greater weight (preponderance) of the evidence.

2. Claimant is 48 years of age.

3. Claimant is a high school graduate.

4. The hearing commissioner found Claimant's testimony not credible.

This finding was based on observations of the Claimant and on the delivery of her testimony in general. The single commissioner also specifically noted each time Claimant's counsel asked Claimant if she injured her back when changing her tire, she looked down when she answered "No."

5. Claimant performed her regular job duties after the alleged injury on June 26, 2007 until the morning of July 3, 2007, except for her preplanned day off on June 27, 2007 and her normal days off on Friday and Saturday of that week.

6. On the morning of July 3, 2007, Claimant had a flat tire on the way to work. The single commissioner did not find Claimant's testimony credible that she only handed the lug wrench, tire winding tool, and jack to the man who allegedly changed the tire for her.

7. Claimant reported a work-related accident, allegedly occurring on June 26, 2007, on the morning of July 3, 2007. She did not work (and has not worked) again after clocking in the morning of July 3, 2007.

8. Claimant first visited a physician on July 5, 2007.

9. Although Claimant testified that prior to the date the tire was changed she told co-worker Tony Summers about her injury, Claimant did not offer Summers testimony live at the hearing or through his deposition testimony, nor did Claimant proffer an Affidavit from Summers. Summers' testimony would have been pivotal since Claimant gave a statement to the insurance adjuster that she specifically told Summers prior to July 3, 2007 she was hurt and she could not afford to "stay off." (Claimant's Exhibit No. 1, p. 9).

10. Claimant admitted she "may have told" Supervisor Thompson that she herself had to change the tire. In later testimony, she stated she did not "think" she had told Thompson she changed the tire. This testimony is most compelling in the decision in this case.

11. Persuasive is the difference between Claimant's initial testimony that she felt the pain when she bent down to pick up the pallets, and her later testimony that the injury occurred as she was midway through the "lift."

12. It is compelling that Claimant did not initially admit to a previous back injury on cross-examination, although the facts of such previous injury alone would not have affected the compensability of her claim. When defense counsel confronted Claimant with the specific time period of the previous injury, she then admitted to the previous injury. It is noteworthy that in June 2007, Claimant remembered her previous injury while at a physician's office (a visit occurring only four months prior to the date of the hearing), so it is not the situation of a remote injury being long-forgotten. Claimant received a settlement in the motor vehicle accident causing the previous injury, another factor which makes the previous injury memorable. (Testimony of Claimant; Claimant's APA No. 1, p. 2).

13. Also compelling is the fact that the hearing commissioner found, for a full 15 seconds (a fact that a hearing transcript will not reflect), Claimant could offer no description of the man who rescued her on July 3, 2007 when he allegedly changed her tire. The tire was changed approximately just four months prior to the date of the hearing.

14. Claimant reported the accident to health care professionals as work-related. However, Claimant had already reported the accident as work-related to the employer prior to her statements to health care personnel. Also noteworthy is the intake form, particularly as to when Claimant's symptoms first appeared: It is apparent

Claimant initially wrote July 3, then changed it to June 26, then also wrote July 3rd as well after June 26. (Claimant's APA, No. 3, p. 27).

15. Claimant knows what a lug wrench is, and where it is stored in her vehicle. Although Claimant is legally married, she has been on her own for the last 10 years. (Testimony of Claimant; Claimant's Exhibit No. 1).

16. Thompson's, a seven-year employee, testimony appears credible, but the testimony of Thompson in and of itself does not defeat Claimant's claim; she did that herself.

17. Because Claimant did not meet her burden of proving by the greater weight (preponderance) of the evidence that she sustained a work-related injury, her request for benefits under the Act is denied.

18. Claimant's average weekly wage is \$473.55, yielding a compensation rate of \$315.72.

CONCLUSIONS OF LAW

1. Section 42-1-160 and Final Commission Regulations are applicable in determining injury by accident arising out of and in the course of employment.

2. Section 42-17-40 is applicable in governing the conduct of hearings and the renderings of awards.

ORDER

IT IS, THEREFORE, ORDERED the Order of the Single Commissioner filed in the above-captioned matter on February 11, 2008 is hereby affirmed by the Panel, and the same shall constitute the Decision and Order of the Appellate Panel.

IT IS FURTHER ORDERED this claim for benefits under the S. C. Workers' Compensation Act is denied on the basis Claimant did not meet the burden of proof by a preponderance of evidence that she sustained an injury by accident arising out of and in the course of employment. Therefore, all claims are denied.

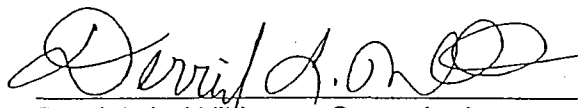
AND IT IS SO ORDERED.

S. C. WORKERS' COMPENSATION COMMISSION


G. Bryan Lyndon, Commissioner

FULL AFFIRMATION

CONCUR:


Derrick L. Williams, Commissioner


David W. Huffstetler, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

WS
MC

(l:\0710609.gbl.app)

This 19 day of June, 2008
By Kim Williams
Administrative Assistant to the Commissioner

DECISION AND ORDER
OF
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NO.: 0710609

CATHY C. BONE, Employee, Claimant,

vs.

U. S. FOOD SERVICE, INC., Employer

and

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Carrier, Defendants

Hearing:	Held in Columbia, South Carolina on November 5, 2007, before Commissioner Susan S. Barden.
Appearances:	Claimant represented by William L. Smith, II, Esquire, of Chappell, Smith & Arden, P.A., Columbia, South Carolina Defendants represented by Michael E. Chase, Esquire, of Turner, Padget, Graham & Laney, P.A., Columbia, South Carolina.
Purpose of Hearing:	To determine the issues as set forth in Forms 50 and 51, and any other issues which may have timely come before the Commissioner.
Decision and Order:	By Susan S. Barden, SC Workers' Compensation Commissioner.
Filed:	<u>February 11, 2008</u>

STIPULATIONS

Counsel for all parties stipulated at the hearing to the following issues:

- (1) The purpose of the hearing was to determine the issues set forth in the Forms 50 and 51, and any other issues which may have timely come before the Commissioner.
- (2) Notice of the hearing was timely and properly served upon all parties of interest.
- (3) The Claimant's average weekly wage and compensation rate are \$473.55 and \$315.72, respectively.
- (4) Venue, set in Richland County, is proper as agreed by all parties.
- (5) The Claimant seeks benefits under the South Carolina Workers' Compensation Act based upon an alleged accidental injury occurring on June 26, 2007 while the Claimant was employed by the employer and, therefore, the South Carolina Workers' Compensation Commission has jurisdiction of the case.

APA/EVIDENTIARY DOCUMENTS

The following records were submitted into evidence under the Administrative Procedure

Act:

Claimant's Submissions:

Occupational Health	07/05/07 – 07/13/07	Pages 1 – 11
Palmetto Imaging	07/19/07	Pages 12 – 14
Thomas J. Holbrook, Jr., M. D.	08/06/07 – 09/17/07	Pages 15 – 32
J. Robert Dunn, M. D.	(To be Submitted)	

Defendants' Submissions:

Written Statement of
Richard Thompson

07/05/07

Pages 33 - 34

Claimant's Recorded Statement (To be Submitted)

STATEMENT OF THE CASE

The Claimant contends that she injured her back while lifting pallets on June 26, 2007. She claims temporary total disability from 7/3/07 to present and continuing, and payment of medical expenses. She concedes she is not at maximum medical improvement.

Defendants deny that the Claimant sustained injury by accident arising out of and in the course of employment on June 26, 2007.

EVIDENCE

The Claimant appeared and testified. She explained that on the alleged date of accident, 6/26/07, she set down a pressure-washer wand in order to pick up a pallet in the back of one of the employer's trucks, in order to clean underneath it. As she bent over, she "felt something pinch." *Hearing Tr., p. 7, ll. 22-23*. She felt the pinch in the middle part of her back, close to the spine. *Hearing Tr., p. 8, l. 1*.

The Claimant then testified that she felt the pinch when she picked the pallets up: "I went to pick them up, and when I got into the middle to pick and stand all the way up, that's when I felt the pinch." *Hearing Tr., p. 8, ll. 7-19*.

The Claimant finished her shift and did not report the alleged injury to the employer on the date in question. *Hearing Tr., p. 9, l. 19, p. 10, l. 3*.

The Claimant testified that on the following day, 6/27/07, she took the day off, which was preplanned, in order to drive to Charlotte for a medical checkup for her eye surgery she had

earlier in the year. She explained that she had Lasik surgery. She indicates that the employer knew in advance that she had planned to take this day off. *Hearing Tr., p. 10, ll. 11-25.*

The Claimant worked full duty the following day, June 28, 2007, from 12:00 P. M. to 7:00 P. M. Her back felt "okay" on this date. *Hearing Tr., p. 11, ll. 4-11.*

The Claimant was off work on Friday and Saturday, June 29 and June 30, 2007. She explained that she has Fridays and Saturdays off.

The Claimant worked full duty on Sunday, July 1, 2007, and Monday, July 2, 2007.

The Claimant contends that she told Tony Summers on Sunday, July 1, 2007, that her legs hurt, but she did not report any work-related accident or injury. *Hearing Tr., p. 11, ll. 11-14.*

Tony Summers is a yard dog driver, and is not a supervisor. *Hearing Tr., p. 12, ll. 15-17.*

The first notification to the employer of an alleged work accident occurred on Tuesday, July 3, 2007. The Claimant contends she waited until July 3rd because she had no one to help her with her bills and she had to work. *Hearing Tr., p. 12, ll. 21-23.*

The Claimant testified on the morning of 7/3/07, while she was on her way to work, she had a flat tire on her truck. The Claimant contends that after she pulled over on the side of the road, a man approached to help her change her tire. She says that she got the lug wrench, the tool to wind down the spare tire, and the tire jack from behind her seat and gave them to the man. She contends that he jacked the truck up and changed the tire. She denies injuring herself in any way and denies changing the tire herself. *Hearing Tr., p. 13, l. 9, p. 14, ll. 1-10.*

When asked on direct testimony by her lawyer as to whether the Claimant told a supervisor, Richard Thompson, that she had changed the tire herself, the Claimant responded: "I don't think I did." *Hearing Tr., p. 15, ll. 15-17.*

When the Court then asked the Claimant: "You don't think you did?," the Claimant responded: "I'm pretty sure I didn't tell him that." *Hearing Tr., p. 15, ll. 15-20.*

The Claimant could not recall the business location where the man came out to help her change her tire. *Hearing Tr., p. 21, ll. 20-25, p. 22, ll. 1-8.*

When asked on cross-examination what the man looked like who changed her tire, the Claimant paused for a long time before giving an answer. When she did respond, she indicated that she was more worried about getting to work than about what the guy looked like. She also did not get his name or the business where he worked. *Hearing Tr., p. 22, ll. 5-23.*

The Claimant admits that when she arrived at work after having the flat tire on 7/3/07, she was crying as she reported her alleged work accident of 6/26/07 to Richard Thompson. *Hearing Tr., p. 23, ll. 23-24.*

The Claimant concedes that she didn't go to any doctor for this alleged injury until after she had the flat tire on 7/3/07. *Hearing Tr., p. 24, ll. 12-14.*

Other than the day she had preplanned to take off and drive to Charlotte for her eye checkup, and her two days scheduled off on Friday and Saturday, she worked full duty the other days between the time of the alleged accident on 6/26/07 and the date she reported her alleged injury on 7/3/07. *Hearing Tr., p. 24, ll. 15-25.*

The Claimant's job requires her to clean out 18-wheeler trailers for the employer. This involves hooking up pressure-washers, and using them to clean the trailers. She has to drag

along pressure-washer hoses into the trailers to clean them. She must drag them all the way to the front of the trailer and back out again. She uses one pressure-washer to soap it down, and another to clean it back out. *Hearing Tr., p. 25, ll. 1-25*. The Claimant denies that the hoses are heavy.

When cross-examined by the defense attorney as to whether the Claimant has ever had a prior back injury, the Claimant initially responded: "No, sir." *Hearing Tr., p. 26, ll. 11-12*.

When then asked whether or not she had a prior back injury about 20 years ago, she conceded that she did. *Hearing Tr., p. 26, ll. 13-19*.

Mr. Richard Thompson appeared and testified. He is a supervisor for the employer. He has worked for the employer since 2000.

Mr. Thompson confirmed that the APA document, pages 33 and 34, is a statement that he hand-wrote on July 5, 2007, documenting his conversation with the Claimant on July 3, 2007. This document was submitted into evidence with no objection from the Claimant.

In this document, Mr. Thompson explains that the Claimant came into work on 7/3/07, clocked in, and then came upstairs looking for "Skeet," another supervisor. Skeet was not in, so she came and found Mr. Thompson. She told him that she "had to change her tire on her truck" on the way to work that morning. Mr. Thompson also noticed that the Claimant had been crying, and also that she did some crying in the conversation she had with him that morning.

Mr. Thompson testified that this is the first notice that the Claimant gave of an alleged work accident back on June 26, 2007.

Mr. Thompson testified that he interpreted the Claimant's statement to him that she had to change her tire on the way to work to mean that she had changed the tire herself. *Hearing Tr., p. 34, ll. 4-16.*

Mr. Thompson further explained that this is why he recorded on the statement: "She had to change her tire on her truck," meaning that she changed the tire herself. *Hearing Tr., p. 34, ll. 23-25.*

Mr. Thompson also testified that the Claimant worked full duty after 6/26/07 and before she reported the alleged accident on 7/3/07. He described those activities. They include moving a five-step metal ladder from one trailer to another, moving pressure-washing equipment, and operating those machines. She also had to drag pressure-washer hoses, which are approximately 60 feet for one machine and 50 feet for the other. She also had to move pallets around the insides of the trailers some of the time.

Mr. Thompson also confirmed that the Claimant was off on 6/27/07 and also on Friday and Saturday of that week. Other than these days, she worked her full duty job as noted above.

FINDINGS OF FACT

It is found as a fact by a preponderance of the evidence that:

1. The Claimant alleges that she injured her back in a work-related accident on June 26, 2007, a claim that I find is not supported by the greater weight (preponderance) of the evidence.
2. The Claimant is 48 years of age.
3. The Claimant is a high school graduate.
4. The Claimant's testimony is not credible. I based this finding on my observations of the Claimant and on the delivery of her testimony in general. I also specifically note that

each time Claimant's counsel asked the Claimant if she injured her back when changing her tire, she looked down when she answered "No."

5. The Claimant performed her regular job duties after the alleged injury on June 26, 2007 until the morning of July 3, 2007, except for her preplanned day off on June 27, 2007 and her normal days off on Friday and Saturday of that week.
6. On the morning of July 3, 2007, the Claimant had a flat tire on the way to work. I do not find credible the Claimant's testimony that she only handed the lug wrench, tire winding tool, and jack to the man who allegedly changed the tire for her.
7. The Claimant reported a work-related accident, allegedly occurring on June 26, 2007, on the morning of July 3, 2007. She did not work (and has not worked) again after clocking in the morning of July 3, 2007.
8. The Claimant first visited a physician on July 5, 2007.
9. Although the Claimant testified that prior to the date the tire was changed, she told co-worker Tony Summers about her injury, the Claimant did not offer Summers' testimony live at the hearing or through his deposition testimony, nor did the Claimant proffer an Affidavit from Summers. Summers' testimony would have been pivotal since the Claimant gave a statement to the insurance adjuster that she specifically told Summers prior to July 3, 2007 that she was hurt and that she could not afford to "stay off."
(Claimant's Exhibit No. 1, p. 9)
10. The Claimant admitted that she "may have told" Supervisor Thompson that she herself had to change the tire. In later testimony, she stated that she did not "think" she had told

Thompson that she changed the tire. This testimony is most compelling in my decision in this case.

11. I find persuasive the difference between the Claimant's initial testimony that she felt the pain when she bent down to pick up the pallets, and her later testimony that the injury occurred as she was midway through the "lift."

12. I find compelling the fact that the Claimant did not initially admit to a previous back injury on cross-examination, although the facts of such previous injury alone would not have affected the compensability of her claim. When defense counsel confronted the Claimant with the specific time period of the previous injury, she then admitted to the previous injury. It is noteworthy that in June 2007, the Claimant remembered her previous injury while at a physician's office (a visit occurring only four months prior to the date of the hearing), so it is not the situation of a remote injury being long-forgotten. The Claimant received a settlement in the motor vehicle accident causing the previous injury, another factor which makes the previous injury memorable. (*Testimony of Claimant; Claimant's APA No. 1, p. 2*).

13. I find compelling the fact that for a full 15 seconds (a fact that a hearing transcript will not reflect), the Claimant could offer no description of the man who rescued her on July 3, 2007, when he allegedly changed her tire. The tire was changed approximately just four months prior to the date of the hearing.

14. I fully take into account the fact that the Claimant reported the accident to health care professionals as work-related. However, I also take into account that the Claimant had already reported the accident as work-related to the employer prior to her statements to

health care personnel. I also find noteworthy the intake form, particularly as to when the Claimant's symptoms first appeared: It is apparent that the Claimant initially wrote July 3, then changed it to June 26, then also wrote July 3rd as well after June 26. (*Claimant's APA, No. 3, p. 27*).

15. The Claimant knows what a lug wrench is, and where it is stored in her vehicle. Although the Claimant is legally married, she has been on her own for the last 10 years. (*Testimony of Claimant; Claimant's Exhibit No. 1*).
16. I find that Thompson, a seven-year employee, is credible (based on my observations of the witness and the delivery of his testimony), but the testimony of Thompson in and of itself does not defeat the Claimant's claim; she did that herself.
17. Because the Claimant did not meet her burden of proving by the greater weight (preponderance) of the evidence that she sustained a work-related injury, her request for benefits under the Act is denied.
18. The Claimant's average weekly wage is \$473.55, yielding a compensation rate of \$315.72.

CONCLUSIONS OF LAW

1. Section 42-1-160 and Final Commission Regulations are applicable in determining injury by accident arising out of and in the course of employment;
2. Section 42-17-40 of the South Carolina Code of Laws is applicable in governing the conduct of hearings and the renderings of awards.

ORDER

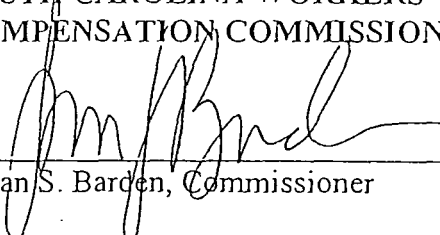
IT IS ORDERED that this claim for benefits under the South Carolina Workers' Compensation Act is denied on the basis that the Claimant did not meet the burden of proof by a preponderance of evidence that she sustained an injury by accident arising out of and in the course of employment.

THEREFORE, all claimed benefits are denied.

No hearing costs are assessed in this matter.

AND IT IS SO ORDERED.

SOUTH CAROLINA WORKERS'
COMPENSATION COMMISSION



Susan S. Barden, Commissioner

Date: 2/7/08

Columbia, South Carolina

024

APP-025

11

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served this order in the above entitled action upon all parties to this cause by depositing a copy herof, postage paid, in the United States mail addressed to the attorney or attorneys for said parties.

*BS
MC*
This 11th day of February, 2008

By KEISTI LOVE
Administrative Assistant to the Commissioner

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

Cathy C. Bone,

Employee/Claimant,

vs.

U.S. Food Service,

Employer,

Indemnity Insurance Company of North
America,

Carrier/Defendants.

CIVIL ACTION NO.: _____

APPEAL FROM WORKERS'
COMPENSATION COMMISSION
WCC FILE NO: 0710609

The appellant would allege as follows:

1. That the appellant, Cathy C. Bone, was an employee of the defendant, U.S. Foodservice, who was insured by Indemnity Insurance Company of North America.
2. That substantial evidence shows the appellant suffered a compensable work-related injury on June 26, 2007, while lifting pallets.
3. That a hearing was held before the Honorable Susan S. Barden on November 5, 2007.
4. That in an order dated February 7, 2008, the Single Commissioner incorrectly found the Claimant did not suffer a compensable injury at work on June 26, 2007. The Single Commissioner incorrectly found that Claimant's testimony was not credible based on her testimony in general and the fact that she looked down when answering. The Single Commissioner also incorrectly found that Claimant actually performed the changing of her tire on July 3, 2007. The Single Commissioner also incorrectly took into account the fact that Claimant worked three more shifts after the injury, did not present Tony Summers' testimony, failed to mention a back injury that happened

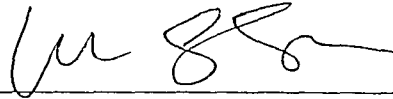
more than 20 years previously, put two dates of injury on her intake form at Columbia Neurological Associates, and had a delay when describing the man who helped her change her tire on July 3, 2007.

5. Claimant sought review of the order contesting the majority of findings. Addressed in Claimant's appellate brief and at the review hearing were the Claimant's contentions that Claimant's testimony, report to her supervisor, and medical records were all credible and consistent, and that Claimant suffered a compensable injury that occurred within Claimant's scope of employment.
6. The Appellate Panel modified the Single Commissioner's credibility findings but found that Claimant did not suffer a compensable work-related injury.
7. That the appellant has been aggrieved by the findings of the Workers' Compensation Commission in that the findings of the Appellate Panel are not supported by substantial evidence of record and are clearly erroneous and amount to an abuse of discretion particularly:
 - A. That the Appellate Panel erred in determining that Claimant's testimony was not credible based on her supervisor's misunderstanding, the fact that Claimant did not call Tony Summers as a witness, an apparent inconsistency in her testimony, a back injury that occurred more than 20 years previously, and her intake form at Columbia Neurological Associates. Substantial evidence showed that Claimant's supervisor was mistaken in believing that she changed the tire herself; Tony Summers' testimony was irrelevant because his knowledge was hearsay that did nothing to establish that her injury was work related; Claimant's testimony consistently described the same incident as the cause of her injury; Claimant had no reason to mention a back injury that had been fully healed for over 20 years and affected a different part of her back than this injury; and Claimant was accurate in putting June 26, 2007, and July 3, 2007, as the date of injury on the intake form at Carolina Neurological because she originally was injured on the former date and felt worsening symptoms on the latter date.

- B. That the Appellate Panel erred in failing to give any weight to the fact Claimant reported the injury to her personal health insurance professionals as work related.
- C. That the Appellate Panel erred in finding that Claimant's injury was not compensable when substantial evidence showed Claimant was injured in the course and scope of her employment.
- D. That the Appellate Panel erred in essentially finding that Claimant injured herself while changing a tire when there is no evidence of record to support such a finding. As such this rises to a matter of law. The decision in this case is based on conjecture and speculation.

WHEREFORE, the Petitioner, having exhausted all administrative remedies now available, requests that this Court review the order of the Full Commission pursuant to §42-17-60 of the South Carolina Code of Laws 1976 (as amended) and the Administrative Procedures Act.

BY:



William L. Smith II
CHAPPELL, SMITH & ARDEN
Attorney for Appellant
Post Office Box 12330
Columbia, SC 29211
(803) 929-3600

Columbia, South Carolina

Dated: July 9, 2008

SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Post Office Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715

WCC File # Unknown

Carrier File #:

Carrier Code #:

Employer FEIN:

Cathy C. Bone 251-29-3953

Claimant's Name SSN
219 Meadowfield Road Gaston, SC 29053

Address City State Zip
(803) 796-0310

Home Phone # Work Phone

US Foodservices

Employer's Name
120 Longs Pond Road Lexington, SC 29072

Address City State Zip
GAB Robins North America

Insurance Carrier

William L. Smith II

(803) 929-3600

Preparer's Name

Phone #

Complete each information blank. To request a hearing, check box 13 b., indicate the kinds of benefits claimed by checking the box(es) at lines 6,7,8, and 9 and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

1. a. The claimant sustained an accidental injury to back injury on 6/26/2007 in Lexington County, State of South Carolina.

2. b. Describe briefly how the accident occurred: Injured back while lifting pallets.

3. Both the claimant and the employee were subject to the South Carolina Workers' Compensation Act at the time of injury.

4. The relationship of employer and employee existed at the time of injury.

5. Notice of the accidental injury was given to the employer on 6/26/2007 in the following manner: Notified Supervisor.

☒ 6. Due to injury, the claimant is in need of (check one):

☐ (a) medical examination and treatment for

☒ (b) additional medical examination and treatment for back surgery needed

☒ 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wage for the period of: 6/26/07 to present and continuing.

☒ 8. Due to injury the claimant requests permanent disability of the following nature and extent: (check one)

☒ (1) General Disability:

☐ Total

☒ Partial

☒ (2) Specific Disability

☐ Total

☒ Partial

Body part(s) affected are: back injury but not at MMI- permanency premature

☐ 9. Due to injury, the claimant has serious bodily disfigurement consisting of: To Be Determined

10.a At the time of injury, the claimant was paid weekly wages of _____ (Form 20 Requested); and demands accounting of days worked and wages earned as provided by law.

10.b Give names and addresses of all employers for whom the claimant has worked since the date of accident:
US Foodservices

11.a Further grounds of claim: As may be developed, claimant reserves the right to amend the form 50.

11.b List names and addresses of all physicians or other medical specialist who have seen or treated the claimant as a result of the accident:
Dr. Thomas Holbrook, Dr. J. Robert Dunn, Occupational Health, Lexington Medical Center, Palmetto Imaging

11.c To the best of your knowledge, did you have any prior permanent disability? No
If yes describe: _____

12. Appropriate benefits as provided by the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

☐ 13.a I am filing a claim. I am not requesting a hearing at this time.

☒ 13.b I am requesting a hearing.

Signature of Claimant/ Representative

Date

RECEIVED

AUG 09 2007

GAB POLISH

Refer to R.67-207, and R. 67-207, and R. 67-615. Questions about the use of this form may be directed to the Commission's Judicial Department.

WCC FORM #50

Rev. Date 9/90

50

Employee's Notice of Claim and/or Request for Hearing.

028

APP-029

Cathy C. Bone 251-29-3953
Claimant's Name SSN
P. O. Box 386 Gaston, SC 29053
Address City State Zip
(803) 796-0310
Home Phone Work Phone

Lexington 5 D, d/b/a US Food Service, Inc.
Employer's Name
120 Longs Pond Road Lexington, SC 29072
Address City State Zip
GAB Robins North America, Inc.
Insurance Carrier

Michael E. Chase 803-227-4241
Preparer's Name Phone #

Complete each information blank. Specify clearly when contentions are admitted in part and denied in part.

The employer-insurance carrier in answer to the claim, respectfully shows:

1. It is denied that the employee sustained an injury on or about the date set forth in the application. The reasons for denial are:
It is denied Claimant sustained injury by accident arising out of and in the course of employment on date in question.
2. It is denied that both the employer and employee were subject to the Workers' Compensation Act at the time in question. The reasons for denial are: See No. 1.
3. It is denied that the relationship of employer and employee existed at the time in question. The reasons for denial are:
See No. 1.
4. It is denied that at the time in question the employee was performing services arising out of and in the course of employment. The reasons for denial are: See No. 1.
5. It is admitted that notice of injury was given the employer. However, Claimant did not give immediate notice; Claimant gave notice on or about July 3, 2007.
6. It is denied that the employee needs/is entitled to additional medical care as a result of injury. The reasons for denial are:
See No. 1.
7. It is denied that the employee is entitled to temporary total disability for the period(s) of: See No. 1.
8. It is denied that the employee is permanently disabled. The reasons for denial are: See No. 1; no competent evidence of any permanent impairment.
9. It is denied that the employee has a serious disfigurement.
10. It is contended that an average weekly wage of \$(Form 20 Requested) applies, according to attached accounting of employee's earnings as provided by law.
11. Further contentions or grounds of defense are: Any and all defenses available and applicable under the Act to include, but not limited to, the affirmative defenses set forth in Reg. 67-603; any and all defenses available under the statutory and case law of this state including, but not limited to, horseplay, intoxication, intentional injury, jurisdiction, *res judicata*, and Cooper v. McDevitt & Street; Medlin v. Greenville County; Miller v. Springs Mill; and Havird v. Columbia YMCA.

I certify that I have served this document pursuant to R.67-212 by delivering a copy to
P. O. Box 12330, Columbia, SC 29211-2330

William L. Smith, II, Esquire,
Name

Address

on the 1st day of November, 2007 by ☐ first class mail; ☒ personal service; ☐ certified mail.


Preparer's Signature

Attorney for Employer and Carrier
Title

11/1/07
Date

Refer to R.67-205 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Judicial Department. Pursuant to R.67-606, a Form 20 must be filed with the Claims Department at least 30 days from the date of filing this form.

APP-030

South Carolina Workers' Compensation Commission
P.O. Box 1715 • 1612 Marion Street
Columbia, South Carolina 29202-1715
(803)737-5700

WCC File # 0710609
Carrier File # NRCF20070803
Carrier Code # 00395
Employer FEIN 521547918

Cathy C. Bone		251-29-3953		US Foodservices	
Claimant's Name		SSN		Employer's Name	
219 Meadowfield Road		Gaston, SC 29053		120 Longs Pond Road Lexington, SC 29072	
Address		City State Zip		Address City State Zip	
(803) 796-0310				GAB Robins North America	
Home Phone #		Work Phone #		Insurance Carrier	
		William L. Smith II		(803) 929-3600	
		Preparer's Name		Phone #	

Request for Commission Review by ☒ claimant ☐ employer (check one) Date of injury: 6/26/2007

The undersigned makes application for review of the findings of the Commissioner in the above captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages, if necessary).

Please see attached.

(Check one) Oral argument ☒ is ☐ is not requested. Appellant's request for oral argument is waived if not indicated on this form.

I certify that _____ I have served this document pursuant to R.67-211 by delivering a copy to _____
Name
Michael E. Chase, attorney for the Defendant

on the 21st day of February, 2008 by ☒ first class mail; ☐ personal service; ☐ certified mail.

Preparer's Signature Attorney Title Date

Check this box if you are not represented by an attorney ☐

If the claimant appeals and is representing himself or herself, the Judicial Department will prepare the additional copies of this form and serve this form on the opposing party. R.67-701 B. Otherwise, file the original and 4 copies of this form with the Judicial Department. The appeal must be Postmarked no later than 14 days from the date of service of the Hearing Commissioner's decision. R.67-701 and R.67-205. Attach the filing fee to this form. Attach a Form 32 if you are unable to pay the filing fee. Refer to R.67-701 through R.67-711 for additional information.

1. Did the Single Commissioner err in her Finding of Fact #1 in finding that Claimant's claim of work-related accident was not supported by the greater weight and preponderance of the evidence when the greater weight of the preponderance of the evidence did show that Claimant suffered a work-related back injury?
2. Did the Single Commissioner err in her Finding of Fact #4 in finding that Claimant's testimony was not credible when the greater weight and preponderance of the evidence show that Claimant's testimony was consistent and credible?
3. Did the Single Commissioner err in her Finding of Fact #6 in finding that Claimant's testimony regarding handing a lug wrench and tire winding tool to someone who helped her change her tire was not credible when the greater weight and preponderance of the evidence shows that this testimony was entirely consistent and credible?
4. Did the Single Commissioner err in her Finding of Fact #9 in finding that Claimant was somehow prejudice by not calling Tony Summers who she had mentioned the accident to as pivotal testimony when Mr. Summers was not present at the time of the accident and was not a supervisor to whom the injury was reported and therefore his testimony would have been irrelevant?
5. Did the Single Commissioner err in her Finding of Fact #10 in finding that Claimant admitted she may have told her supervisor that she herself changed the tire when Claimant testified she didn't think she had told this person that she had changed the tire? The Commissioner's reliance on this issue is completely misplaced when there is no significance whatsoever to the flat tire in that nobody claims Claimant injured herself while changing a tire.
6. Did the Single Commissioner err in her Finding of Fact #11 in making a distinction between Claimant's testimony regarding picking up the pallets for pain occurring midway through the lift when she is describing the same incident in which she injured her back?
7. Did the Single Commissioner err in placing great emphasis on the fact that Claimant did not mention a previous back problem of some 20 years ago which had no relevance whatsoever to this claim?
8. Did the Single Commissioner err in her Finding of Fact #13 in placing great emphasis on a delay in Claimant's answer when trying to describe the man who helped her change her tire? The tire changing incident had nothing to do with this injury and had

occurred some four months prior to the date of the hearing so it was no reason why Claimant should have had any distinct memory of this person.

9. Did the Single Commissioner err in her Finding of Fact #14 in failing to place any significance on the fact that Claimant reported the accident to her health insurance professional as work-related?

10. Did the Single Commissioner err in her Finding of Fact #15 in finding that Claimant knows what a lug wrench is and where it is stored in the vehicle when there is absolutely no significance to this finding as it relates to this accident?

11. Did the Single Commissioner err in her finding the testimony of Claimant's supervisor Thompson as credible when the greater weight and preponderance of the evidence showed that this witness was not credible?

12. Did the Single Commissioner err in her Finding of Fact #17 in finding Claimant did not meet her burden of proof that she sustain a work-related injury when the greater weight and preponderance of the evidence showed that Claimant overwhelmingly proved her injury?

13. Did the Single Commissioner err in her Order in denying the claim and any benefits resulting there from when the greater weight and preponderance of the evidence showed that Claimant did sustain a work-related compensable injury?

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF LEXINGTON _) 2008-CP-32-02876

CATHY C. BONE)
) PLAINTIFF
) vs.
) TRANSCRIPT OF RECORD
)
U.S. FOOD SERVICE)
) DEFENDANT

March 9, 2009
Lexington, South Carolina

B E F O R E:

THE HONORABLE G. THOMAS COOPER, JUDGE.

A P P E A R A N C E S:

WILLIAM L. SMITH, II, ESQ.
Attorney for the Plaintiff

MICHAEL E. CHASE, ESQ.
Attorney for the Defendant

CAROL M. THUEME, RPR
Official Court Reporter

APP-034

I N D E X

(There were no witnesses produced.)

EXHIBITS

(There were no exhibits marked.)

1 THE COURT: Kathy Bone versus U.S. Food Service.
2 You're Mr. Smith?

3 MR. SMITH: Yes, your Honor.

4 THE COURT: You're Mr. Chase?

5 MR. CHASE: Yes, sir.

6 THE COURT: All right. I will tell you, this
7 file is rather barren. There's nothing here. Of course,
8 there is no Workers' Comp file. I guess this is after
9 they stopped sending them out. And I don't have anything
10 except the notice of appeal.

11 MR. SMITH: Your Honor, the Commission is these
12 days requiring us to submit a record on appeal and we sent
13 one in a month or so ago. If you don't have it, I'll be
14 glad to provide you my copy.

15 THE CLERK: We're pretty caught up, so I don't
16 know where it would be.

17 THE COURT: Let me just show you what's here.

18 MR. SMITH: Yes, sir.

19 THE COURT: That's all that's here.

20 MR. SMITH: I'll be glad to provide you my copy
21 of this. Mr. Chase already has one. We sent it in on
22 January 21, 2009.

23 THE COURT: To the Clerk here?

24 MR. SMITH: Yes, sir. This is the only copy I
25 have and I'll be glad to let you have that.

1 THE COURT: All right.

2 MR. SMITH: And, your Honor, just the middle of
3 last week or maybe even Thursday I sent in a brief that
4 you don't have either, but I'll be glad, if you don't
5 mind, to hand that up to you.

6 THE COURT: All right. Just give me a history
7 of the case if you will, Mr. Smith.

8 MR. SMITH: Yes, sir, your Honor.

9 I represent Kathy Bone. She is the claimant in
10 this Workers' Compensation claim.

11 Ms. Bone was employed at U.S. Food Service and
12 suffered an injury on June 26th, 2007. This injury
13 happened while she was lifting some pallets at work.

14 Her job was to clean the trailers and stuff at
15 U.S. Food Service after they came in at the end of the
16 day. She lifted pallets in the back of this trailer and
17 felt pain in her back.

18 THE COURT: Where was she?

19 MR. SMITH: She worked at U.S. Food Service and
20 she was in the back of a tractor trailer at U.S. Food
21 Service.

22 THE COURT: A tractor trailer, okay.

23 MR. SMITH: She was back there pressure washing
24 the truck at the end of the day, inside the truck. There
25 were a couple of pallets that were in there and she lifted

1 them up to clean under them, felt pain in her back.

2 Did not report the injury that day. Thought,
3 you know, it was no big deal, thought she would be okay.

4 She was off the following day for the follow-up
5 of an eye surgery that she had had, came back in, worked
6 for a day and then was off for two more days, anyway ended
7 up not reporting the injury until July 3rd.

8 We tried the case, your Honor. Single
9 Commissioner denied the claim. And as I stand here before
10 you today, I realize that as the appellant in a Workers'
11 Compensation claim, it's tough because of the substantial
12 evidence rule. But I would tell you that under Mullinax
13 versus Winn-Dixie, when the evidence is all one way, it is
14 a matter of law for the Court as opposed to a matter of
15 fact for the Workers' Comp Commission. And in this case,
16 all of the evidence supports the fact that Ms. Borne did in
17 fact get hurt at work.

18 As I mentioned to you, she got hurt, did not
19 initially report it. Over the course of the weekend she
20 starts having a lot of pain. She comes into work on
21 Tuesday, July 3rd. On that morning, and she was having
22 pain all weekend, but on that morning on her way to work
23 she has a flat tire. She stops. A gentleman from a
24 business right there changes her tire, but she calls into
25 the office and tells them I may be a little bit late

1 because I've had a flat tire.

2 THE COURT: What day was that?

3 MR. SMITH: That's Tuesday, July 3rd.

4 THE COURT: Okay.

5 MR. SMITH: When she gets into work that morning
6 she's in such pain, she immediately goes to find her
7 supervisor to report it. He's not there so she finds
8 another supervisor. She reports the fact to him that I
9 got hurt on the 26th, about almost a week ago, five days
10 ago. He writes it up. No question this is what he says,
11 you know, this is what she told him, she got hurt at work.

12 They send her to the doctor. Clear history to
13 the doctor. And it's in those APA submissions that were
14 handed up to you, your Honor, but there is a clear
15 history. They send her to Lexington Occupational Health,
16 says she got hurt lifting pallets at work. She goes there
17 for about three visits. Each time there's a history of
18 her having been injured at work.

19 They deny the claim after that point, so she has
20 to go to her family doctor, even has to fill out insurance
21 forms. The insurance forms all indicate got hurt at work.
22 She's contacted by the insurance adjuster to take a
23 statement. We even put the statement in as evidence.
24 Everything in the statement says exactly what she said, I
25 got hurt at work.

1 She goes, she has an MRI scan. MRI scan shows
2 that she has a disc fragment, herniated disc, undergoes
3 surgery with Dr. Holbrook. All the statements to Dr.
4 Holbrook, got hurt at work lifting pallets.

5 The supervisor testified she was a good
6 employee, they had no problems with her. She came to work
7 every day without any difficulty. All of a sudden she's
8 got a herniated disc that requires surgery. It is clear
9 that she has an injury.

10 And Mr. Chase did an excellent job in this case
11 trying to show that she had some injury while changing a
12 flat tire.

13 THE COURT: I thought you said somebody else
14 changed it for her.

15 MR. SMITH: They did. They absolutely did. But
16 when she gets to work the supervisor puts in the report
17 that she changed her tire.

18 And, you know, I think it's just the matter of
19 she said she had a flat tire on the way to work and had to
20 have my tire changed or I had to change my tire, just like
21 I might say I had to change my oil doesn't mean that I
22 changed my oil. But the supervisor interpreted it as she
23 changed the tire. There is absolutely no evidence
24 whatsoever that she changed this tire.

25 And even if she had, there is absolutely no

1 evidence that she got hurt while changing this tire.

2 But she didn't change the tire, that's the whole
3 thing. Somebody else changed the tire for her.

4 THE COURT: Did that somebody testify?

5 MR. SMITH: No, sir. She doesn't even know who
6 the guy was. It's just somebody that helped her on the
7 side of the road, presumably probably worked at that
8 business because he was giving directions to a tractor
9 trailer backing out of the business. But she doesn't even
10 know who he is.

11 Every bit of evidence in this case, every
12 medical report, every statement given to an adjuster,
13 every statement given to a supervisor, everything in this
14 cases says this lady got hurt at work. Single
15 Commissioner for whatever reason did not believe that, but
16 there is no evidence whatsoever to the contrary.

17 THE COURT: The Full Commission affirmed?

18 MR. SMITH: I beg your pardon?

19 THE COURT: The Full Commission?

20 MR. SMITH: Full Commission affirmed it.

21 It was interesting. They softened some findings
22 of fact but they affirmed it.

23 But as I said, this rises to a matter of law
24 under Mullinax versus Winn-Dixie; when there's no evidence
25 to the contrary, it becomes a matter of law and I would

1 ask that you reverse and find this case compensable.

2 THE COURT: Mr. Chase.

3 MR. CHASE: Thank you, your Honor. May it
4 please the Court.

5 The standard, as your Honor well knows, is
6 whether or not in a case of this type from the Commission,
7 whether substantial evidence supports the ruling of the
8 Commission, the Full Commission, which is a full denial.

9 Appellant takes the stance in their notice of
10 appeal that your Honor should look at whether there's
11 substantial evidence to support appellant's position that
12 the claim is compensable. We have an opposing view of
13 that.

14 The only standard in front of your Honor is
15 whether or not there's substantial evidence to support in
16 fact what the Commission found. Even where there's two
17 inconsistent results could have been rendered, evidence to
18 support appellant's view does not allow this Court to
19 reverse the case obviously.

20 THE COURT: He says there's no evidence on your
21 client's side, he said there's no evidence that she
22 injured her back off the job.

23 MR. CHASE: Well, your Honor, we can step
24 through the substantial evidence, and the first thing I
25 would point the Court out to your Honor is finding of fact

1 number four. That's both in the Single Commissioner's
2 order --

3 THE COURT: All right. Well, let me look at
4 that.

5 MR. CHASE: Yes, sir.

6 THE COURT: Plaintiff's testimony is not
7 credible, is that what you're --

8 MR. CHASE: That's right, your Honor. That
9 would be the stepping off point.

10 And, your Honor, also the Full Commission, the
11 appellant panel of the Full Commission did modify the
12 order, but in finding of fact number four in the Full
13 Commission's order likewise affirms by unanimous decision
14 of that appellate panel that the claimant's testimony was
15 not credible. And I would like to just step your Honor
16 through the reasoning and the underlying facts of that
17 that they found claimant not to be credible.

18 THE COURT: Hold on.

19 MR. CHASE: I'm sorry. That would be finding of
20 fact also number four of the Full Commission's decision
21 filed June 19th of '08.

22 THE COURT: Well, that's the exact same language
23 from the Single Commission.

24 MR. CHASE: That's right. They affirm that
25 finding of the Single Commissioner. And here's the basis

1 for the Single Commissioner's ruling in that matter, your
2 Honor.

3 To begin with, this alleged date of accident was
4 June 26th of 2007, a Tuesday. When the claimant
5 testified, your Honor, on direct, she gave inconsistent
6 testimony to begin with on the factual surroundings as to
7 how she alleged she hurt her back that day on the job.
8 She first said, this is hearing transcript page seven,
9 lines 22 to 23, it was as she was bending over to pick up
10 a pallet, your Honor.

11 But then later on in her testimony she changed
12 her story. It then became when she was picking the pallet
13 up. She had a different version as to how she hurt her
14 back. That's hearing transcript page eight, lines seven
15 through 19. And all this is contained in our brief to the
16 Full Commission which is in front of you, your Honor.

17 Beyond that, on the day that she says that she
18 got hurt, she admits she did not report this to the
19 employer that day. That was on Tuesday, June 26th of
20 2007.

21 The very next day, your Honor, on Wednesday, she
22 took the day off. She had a pre-planned eye checkup in
23 Charlotte, North Carolina. She drove to Charlotte, North
24 Carolina and back. Did not report any injury to the
25 employer that day allegedly occurring the day before.

1 Two days later, on Thursday, June 28th, she
2 worked full duty for the employer in a physically
3 demanding job, in and out of these trailers, did not
4 report any injury.

5 She was then off on Friday and Saturday,
6 June 29th and June 30th of 2007.

7 Now the claimant says that then on Sunday, she
8 came into work and she says that she reported this to a
9 co-worker, a Tony Summers, and she says in her testimony
10 she told Mr. Summers simply that her legs hurt. Well, she
11 didn't bring Mr. Summers to the Workers' Comp hearing, she
12 didn't get an affidavit from him, she didn't subpoena him.
13 That would have been critical to her case. He's simply a
14 co-worker, not a manager, but that's someone who could
15 have supported the claimant's story that she was injured
16 that previous week. She didn't bring any of that to the
17 hearing. So she says that happened on Sunday.

18 Well, here's what did happen. Something big
19 happened on July 3rd of 2007. That's the morning that
20 she did report and allege injury to the employer. The
21 something big that happened is that she had a flat tire on
22 her way to work that morning.

23 Now, she told her manager that she had to change
24 her tire on the way to work that morning. She was crying
25 as she told him that. So there's a question that was a

1 question before the Single Commissioner and a question
2 before the Full Commission as to that finding of fact, did
3 she change that tire herself.

4 On direct testimony the claimant says that some
5 good samaritan came out from a business where he was
6 directing traffic and changed her tire. Now she didn't
7 bring this individual to the hearing, your Honor. She
8 didn't subpoena, she didn't try to take his deposition.
9 She knows the location she says of where that business was
10 and where this gentleman could have been found.

11 She admits she got the lug wrench and the tire
12 jack out herself from her vehicle, so she knows where
13 those items were.

14 But now here's what's important, your Honor.
15 When she was asked by her own lawyer if she told her
16 supervisor, her supervisor's name is Richard Thompson,
17 whether or not she told him that she changed the tire
18 herself, this was her response: Quote, I don't think I
19 did, end quote.

20 Well, that sounded pretty weak to the Court,
21 your Honor. And so Commissioner Barden, the Court, then
22 asked the claimant, jumped in and asked the claimant, You
23 don't think you did? This is on hearing transcript page
24 21, lines 20 through 25. And the claimant responded: I'm
25 pretty sure I didn't tell him that. So that again was

1 very weak. It was not no, I didn't tell him that. It was
2 a question of her own mind of what she told her
3 supervisor.

4 Another important point to the trial court, to
5 the Commission, your Honor, is at hearing transcript page
6 22, lines five through 23. When asked on
7 cross-examination, What did this man look like, this good
8 samaritan that changed the tire? The claimant paused for
9 a long time, your Honor. The Commissioner noted for more
10 than 15 seconds and she could not answer. She could not
11 describe this individual that had changed her tire. The
12 Court found that compelling as far as credibility.

13 In addition to that, again, she was crying when
14 she got to work that morning after the flat tire when
15 telling her supervisor, Richard Thompson, about changing
16 the flat tire and at the same time reported an alleged
17 accident and injuring her back a week prior.

18 Again, or furthermore, your Honor, the claimant
19 did not go to the doctor until after she changed the flat
20 tire. This is a week after she says she hurt her back.

21 Again, she worked full duty on the days that she
22 was not off between the date of this alleged accident and
23 the day that she changed her flat tire. The job was
24 physically demanding, pulling hoses, moving pallets up and
25 down ladders, and she worked full duty with no complaint.

1 The Court, your Honor, also on the issue of
2 credibility at hearing transcript page 26, lines 13
3 through 19, also found that the claimant was not credible
4 when questioned about a prior back injury that she had had
5 years ago. She was asked on cross-examination whether she
6 had ever had a prior back injury. Your Honor, she
7 answered no. That question was followed up with one
8 asking her about whether she had a prior back injury 20
9 years ago, and then she conceded that she did.

10 This is not a situation of a remote injury long
11 forgotten because the claimant in some of the doctor's
12 notes had indicated that yes, she did have a back injury
13 some years ago. She also received a settlement from that
14 prior back injury, so she certainly would have remembered
15 that.

16 In addition, your Honor, the Court found, the
17 trial court found that Mr. Thompson's statement, his
18 affidavit and his testimony was credible. And he noted
19 the claimant in his statement and in testimony that she
20 had to change her tire on her truck that morning. That
21 was in his statement and that's what he testified to.

22 He noted these things, your Honor, that claimant
23 was crying that morning when she came in to say that.

24 Mr. Thompson did testify he took the claimant's
25 statement to mean that she changed the tire herself.

1 This was appealed to the Full Commission, the
2 appellate panel. There was a unanimous decision affirming
3 the denial, Commissioners Lyndon, Williams, and
4 Huffstetler.

5 We ask that your Honor affirm this matter based
6 on substantial evidence supporting the denial of the
7 Commission.

8 Thank you.

9 THE COURT: Mr. Smith.

10 MR. SMITH: Thank you, sir.

11 Your Honor, this incident of changing the tire,
12 you know, if she'd wanted to hide this or something, she
13 easily could have, but she told the adjuster about this
14 incident on July 12th. She gave a statement to them
15 roughly 15 days after this accident occurred and told them
16 she didn't change the tire and told them she didn't get
17 hurt doing it, but she did tell them that she had a flat
18 tire on her way to work. She could have easily said
19 nothing about it if she was trying to cover something up
20 and it just doesn't make any sense.

21 The issue of the supervisor that morning, she
22 told him that she had a flat tire. Mr. Chase read from
23 the transcript about, Did you tell him that you got --
24 about that you changed the tire? And she said, that part
25 about where I don't think I did, later on she says, well,

1 I could have said that in the context of having to have
2 the tire changed to having a flat tire, but there is
3 absolutely no evidence whatsoever that this lady changed
4 the tire. And again, even if she did change the tire,
5 there's certainly no evidence that she got hurt while
6 changing the tire. Everything in this case shows that she
7 got hurt at work.

8 Again, this issue about the guy, what did he
9 look like? You know, and the Commissioner saying that she
10 hesitated while answering the question. Her answer was, I
11 was more worried about getting to work than worried about
12 what the guy looked like. I don't like to be late for
13 work. I think he had brown hair and he was kind of husky.
14 Was he black or white? He was white. I mean, she did
15 describe him, but this is a guy she met for a few minutes
16 on one time that helped her out.

17 Again, every piece of evidence in this case
18 shows that she got hurt at work.

19 You know, they keep talking about that she
20 wasn't believable, that she didn't say she got hurt at
21 work -- excuse me, that she'd had back problems 20 years
22 ago. She told them that in her statement when they talked
23 to her 12 days or 15 days after this accident. It's not
24 like she was trying to hide it, but she had not had
25 treatment for 20 years prior to this, and her supervisor

1 said she's a good employee, she comes to work everyday, we
2 didn't have any problems with her.

3 They send her to the doctor. The doctor,
4 there's clear history, every doctor she sees of her having
5 been hurt at work.

6 No, we didn't bring Tony Summers, the co-worker,
7 who she told her legs were hurting, but he wasn't the
8 supervisor. And it was clearly admitted that they had
9 plenty notice of this injury.

10 The supervisor's statement was put into evidence
11 in this case where she told him she got hurt at work
12 lifting the pallets just like is on every accident report,
13 on every medical report, on every health insurance form,
14 everything in this cases says this lady got hurt at work.
15 There's absolutely no evidence to the contrary and again I
16 would ask that you reverse it.

17 THE COURT: All right. Anything further?

18 MR. CHASE: Not further, your Honor.

19 THE COURT: All right. I'd appreciate it if
20 you'd submit proposed orders within ten days.

21 MR. SMITH: Thank you, sir.

22 THE COURT: Thank you.

23 (The proceedings were concluded.)

24 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

25

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

I, CAROL M. THUEME, RPR, Official Court Reporter for the 11th Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Lexington County, South Carolina, on the 9th day of March, 2009.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

July 27, 2009



CAROL M. THUEME, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
CASE NUMBER - 0710609

CATHY C. BONE,)
)
CLAIMANT,) SINGLE COMMISSION HEARING
)
VS.) BEFORE
)
U. S. FOODS,) COMMISSIONER SUSAN S. BARDEN
)
EMPLOYER,)
)
INDEMNITY,)
)
CARRIER,)
)
DEFENDANTS.)
_____)

 COPY

WORKERS' COMPENSATION SINGLE COMMISSION HEARING
TAKEN BEFORE SARA L. QUATTLEBAUM, A NOTARY PUBLIC IN
AND FOR THE STATE OF SOUTH CAROLINA, COMMENCING AT THE
HOUR OF 2:00 PM ON MONDAY, NOVEMBER 5, 2007, WORKERS'
COMPENSATION COMMISSION, 1612 MARION STREET, COLUMBIA,
SOUTH CAROLINA.

QUATTLEBAUM COURT REPORTING
100 OLD CHEROKEE ROAD, PMB 148
LEXINGTON, SC 29072
(803)808-0394

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QUATTLEBAUM COURT REPORTING
 (803)808-0394

1 THE COURT: Today's date is November 5, 2007.
2 This is South Carolina Workers' Compensation
3 Commission File No. 0710609. This is the case of the
4 Claimant, Ms. Cathy Bone, who is present today and
5 represented by Attorney Bill Smith versus the
6 employer, US Foods and its Carrier, Indemnity, both of
7 which are represented by Attorney Mike Chase.

8 The purpose of today's hearing is to determine
9 issues raised in Forms 50 and 51. The parties agree
10 that Ms. Bone's average weekly wage is \$473.55,
11 yielding a compensation rate of \$315.72. The date of
12 this alleged accident was June 26, 2007.

13 Are there any objections to APAs, jurisdiction,
14 venue, or any other items?

15 MR. SMITH: None from the Claimant, Your Honor.

16 MR. CHASE: None, Your Honor.

17 THE COURT: Thank you both. Without objection,
18 the Commission File becomes part of the record with
19 the exception of any self serving declarations and
20 unstipulated medical reports.

21 Prior to going on the record we held a
22 pre-hearing conference. It is the position of the
23 Claimant that she suffered a compensable injury by
24 accident arising out of and in the course and scope of
25 her employment, specifically that she injured her back

1 while she was lifting some pallets on June 26, 2007.

2 She seeks temporary total disability benefits
3 from July 3, 2007 to the present and continuing. She
4 has undergone some surgery, but she is in need of
5 additional medical care and therefore would like me to
6 order the Defendants to provide that for her.

7 She has not reached maximum medical improvement,
8 as I said, and therefore any determination of
9 permanency if this claim is found compensable would be
10 premature and the Claimant also seeks reimbursement
11 for causally related medicals for those expenses she
12 has incurred thus far with regards to the evaluation
13 and treatment of her condition.

14 Conversely, it is the position of the Defendants
15 that benefits under the Act should be denied for this
16 claim specifically for the reason that this incident
17 did not happen at work.

18 It is the Defendants' position that any injury
19 that the Claimant suffered is due to her changing a
20 tire on her own vehicle on July 3, 2007. In any
21 event, any condition from which she suffers relating
22 to her back is not related to either her employment or
23 to a work incident on July 26, 2007.

24 Is that a fair summary, gentlemen, of your
25 positions before we hear from the witnesss?

1 MR. SMITH: Yes, ma'am.

2 MR. CHASE: Yes it is, Your Honor.

3 THE COURT: Thank you both. All right.

4 Mr. Smith, she's going to have her back to you if
5 she's facing me. Do you either want to switch sides
6 or do you want to come stand over here?

7 MR. SMITH: I'll come and stand over here, that
8 way she's facing you.

9 THE COURT: That's good. That will be fine.
10 That way she's facing both of us.

11 CATHY BONE,

12 having been first duly sworn, testified as follows:

13 THE COURT: Please state your full name for the
14 record.

15 THE WITNESS: Cathy Caddin Bone.

16 THE COURT: Your middle name, please?

17 THE WITNESS: Caddin, C-A-D-D-I-N.

18 THE COURT: Thank you very much. Please answer
19 any questions he has. I'm going to ask if you will
20 direct your responses my way if you can. Go ahead,
21 Mr. Smith.

22 MR. SMITH: Ms. Bowen, I'm going to ask you to
23 speak up so she can take down everything we say,
24 okay?

25 THE WITNESS: Yes, sir.

DIRECT EXAMINATION

1

2 BY MR. SMITH:

3 Q How old are you, Ms. Bone?

4 A Forty-eight.

5 Q And are you married?

6 A Yes.

7 Q And do you have children?

8 A Yes.

9 Q How many children do you have?

10 A Two.

11 Q Are those children grown or are they still at home?

12 A I have one at home.

13 Q How far did you go in school?

14 A I graduated.

15 Q From high school?

16 A Yes, sir.

17 Q And tell me briefly what kind of work you have done

18 over the course of your work life.

19 A I worked for the City of Cayce cutting grass, I've

20 worked for Blanchard Machinery on heavy equipment, I

21 worked at Avis Car Rent washing cars and checking

22 under hoods, I worked for Palmetto Bus Sales cleaning

23 buses and doing light mechanic work for them.

24 Q And most recently, have you worked at US Food Service?

25 A Yes, sir.

1 Q And how long have you worked at US Food Service?

2 A I started July 18, '05.

3 Q So at the time of this incident you had been there a
4 couple of years?

5 A Yes, sir.

6 Q And tell me what your job was at US Food Services.

7 A I used a pressure washer to wash out 28 foot - 48 foot
8 trailers and washed 18-wheeler trucks.

9 Q And before June 26, or immediately before June 26,
10 2007, were you having any problems with your back?

11 A No, sir.

12 Q Were you able to go to work everyday and do your job?

13 A Yes, sir.

14 Q Tell me what, if anything, happened to you on June 26
15 of this year.

16 A I went to work, and I don't remember what time it
17 was. I pushed the steps up to the back of the trailer
18 to climb in with the pressure washer wand. And right
19 close to the edge of the trailer was two pallets. And
20 I put down the wand to pick them up to clean up
21 underneath them because food gets underneath them.

22 And when I went to bend over to pick them up, I felt
23 something pinch, but I went on ahead and did my job.

24 Q When you say you felt something pinch, what part of
25 your body did you feel this pinch in?

1 A The middle part of the back close to the spine.

2 Q And so we're clear for the record, when you say
3 middle, are you talking about middle from the neck to
4 your buttocks, or are you talking about the middle
5 from -

6 A From the middle part of the back close to the spine.

7 Q Can you point for us for the record where you are
8 talking about?

9 A Yes, sir. Right in there.

10 THE COURT: A little below the waist?

11 THE WITNESS: A little below the waist.

12 THE COURT: All right.

13 BY MR. SMITH:

14 Q And I'm sorry, you mentioned you were doing something
15 with pallets. Tell me what you were doing at the time
16 that you felt the pain.

17 A I went to pick them up, and when I got into the middle
18 to pick and stand all the way up that's when I felt
19 the pinch.

20 THE COURT: And you picked the pallets up with
21 your hands?

22 THE WITNESS: They were laying flat and I would
23 squat down. And when I got into the middle part of it
24 to lean them this way, that's when I felt the pinch.

25 THE COURT: Was there anything on the pallets?

1 THE WITNESS: No, ma'am.

2 THE COURT: How much do the pallets weigh?

3 THE WITNESS: The tan one is a real light one,
4 real light. The blue ones are really heavy pallets.

5 THE COURT: There was one of each?

6 THE WITNESS: There was the tan one on top of the
7 blue one, and I had no trouble - the tan ones, I can
8 just about throw them around and try to -

9 THE COURT: But no idea how much the blue one
10 weighted?

11 THE WITNESS: No, ma'am.

12 THE COURT: All right.

13 BY MR. SMITH:

14 Q At the time that you felt this problem, did you think
15 it was a big deal?

16 A No, sir.

17 Q Did you continue to work?

18 A Yes, sir.

19 Q Take me through the rest of your work shift, in terms
20 of the difficulties, if any, you had with your back.

21 A At break time, when I got the time to rest, I sat.
22 There's two big brushes where the truck drivers go
23 through with the trucks and drive through. I thought
24 maybe I had just pulled a muscle, so I sat there and I
25 could hold the brush and turn, and I kind of like

1 thought maybe I could work it out.

2 Q Did you report the injury that day?

3 A No, sir.

4 Q Why not?

5 A Because I have bills, and I have to pay my bills, and
6 I feel I have to work.

7 Q Do you recall what day of the week June 26 was on?

8 A Tuesday.

9 Q Were you scheduled to work on Wednesday, the 27th?

10 A Yes, sir.

11 Q Did you work on Wednesday the 27th?

12 A No, sir. I had lasik surgery done June 1 of this year
13 and I had to go back to be checked to see if the
14 healing process was right.

15 THE COURT: So did you do that on the 27th?

16 THE WITNESS: Yes, ma'am.

17 THE COURT: Did you take the whole day off?

18 THE WITNESS: Yes, ma'am.

19 BY MR. SMITH:

20 Q Was your lasik surgery done in town or was it done out
21 of town?

22 A It was done out of town.

23 Q And did the folks at US Food Service know that you
24 were taking the day off?

25 A Yes, sir.

- 1 Q Did you work the next day, which would have been
2 Thursday?
- 3 A Yes, sir.
- 4 Q Tell me, when - did you work Thursday and Friday?
5 Tell me how far you worked there.
- 6 A I worked Thursday. I go in at 12:00 and get off at
7 7:00 in the afternoon.
- 8 Q Did you work on Friday, as well?
- 9 A No, sir. I had Fridays and Saturdays off.
- 10 Q How was your back on Thursday?
- 11 A It felt okay. And then Sunday when I went to work at
12 5:00 in the afternoon, Tony Summers was there, and I
13 just told him, I said, my legs hurt. And I went onto
14 work because I have to work.
- 15 Q Let me back you up for just a second. Tell me how
16 your back did over the course of that weekend, Friday
17 and Saturday.
- 18 A I laid on the couch and used a heating pad and used
19 ice packs.
- 20 Q Did that relieve your pain?
- 21 A The heat did.
- 22 Q And you said you returned to work on Sunday?
- 23 A Yes, sir.
- 24 Q When did you report the injury?
- 25 A I reported it to, I let Kris know. I couldn't find

1 Skeet, so I looked and found Richard. He is just one
2 of my supervisors, and that was on the 3rd.
3 Q Let me back up a second. Tell me, do you know
4 Richard's last name?
5 A I think it's Thomas, Thomas.
6 Q Is he one of your supervisors?
7 A Yes, sir.
8 Q You mentioned someone named Skeet. Do you know
9 Skeet's last name?
10 A Smith.
11 Q And is Skeet one of your supervisors?
12 A Yes, Skeet's the main shop supervisor.
13 Q Now you were starting to tell me something about
14 Sunday and talking to Tony. Who's Tony?
15 A Tony Summers is a yard dog driver out there.
16 Q Is he a supervisor?
17 A No, sir.
18 Q Do you know what day it was that you reported this to
19 Richard?
20 A That was July 3rd.
21 Q And why did you wait until July 3 to report this?
22 A Because I have nobody to help me on my bills, and I
23 have to work.
24 Q Did you think you were going to be okay?
25 A Yes, I thought so.

1 Q Now, at some point during all of this, did you have a
2 flat tire?

3 A Yes, sir.

4 Q When did you have the flat tire?

5 A When I was going to work that day.

6 Q Which day are we talking about?

7 A July 3.

8 Q Tell me what happened with the flat tire.

9 A There's a CMC recycling place on the road I travel. I
10 ran over something and I knew I had a flat because it
11 made the - the truck was driving funny. And up ahead
12 of me was a gentleman helping this 18-wheeler truck
13 driver back out of the lot where he was coming out of.
14 To go into the roadway to get into this business was
15 enough room for me to get over, and I set off the road
16 but not inside the parking lot, because the tire was
17 gone, I mean down. And the 18-wheeler truck, the guy
18 finished helping him back out. And when he got
19 finished helping him, he says, when I get finished
20 helping him, I will change it for you. And he got
21 over there and I got the lug wrench for him, which is
22 behind my seat, and I got the wind up thing from
23 behind the truck, and you have to wind the tire down.
24 I got the jack for him which was behind the seat. I
25 gave it to him. He jacked the truck up, he used the

1 lug wrench to get them off. And he put the tire back
2 on.

3 Q Do you know who this gentleman was?

4 A No, sir.

5 Q Other than the things you mentioned, did you do any of
6 the changing of the tires?

7 A No, sir.

8 Q Did you injure yourself in any way getting out the lug
9 wrench or the jack?

10 A No, sir.

11 Q Going to work that morning on July 3rd before you had
12 the flat tire, what kinds of difficulties were you
13 having with your back that morning?

14 A I had - in the buttocks area, I had a real sharp
15 pain. On the side of the leg here, say if you just
16 laid a watermelon in that area, I had sharp pains here
17 and then -

18 THE COURT: And you're indicating the outside of
19 your left thigh?

20 THE WITNESS: Yes, ma'am. And then on the cap I
21 had the same. It was a sharp area and the foot. The
22 ankle, like if you got on ankle socks, my foot is
23 numb, it was numb.

24 BY MR. SMITH:

25 Q When you got to work that morning, did you report the

1 injury on that day?

2 A Not right at when I got there. I went out there to
3 try to work.

4 Q And what happened?

5 A And I just went to Richard - and I went looking for
6 Skeet and I couldn't find Skeet. So I found Richard
7 in the shop, and I asked him could he get ahold of
8 Skeet.

9 Q And what did you tell him?

10 A I told him I hurt myself at work and my leg was
11 hurting.

12 Q Did you talk to him about the flat tire?

13 A No. I called Kelly and told her I may be late because
14 of the flat tire.

15 Q At any point did you tell Richard that you had changed
16 the tire?

17 A I don't think I did.

18 THE COURT: You don't think you did?

19 THE WITNESS: I'm pretty sure I didn't tell him
20 that.

21 BY MR. SMITH:

22 Q After you told Richard this, what happened?

23 A He called Skeet and then Skeet told him to call human
24 resources.

25 Q And were you taken up to human resources?

- 1 A No, sir. I don't remember going up there.
- 2 Q What happened from there?
- 3 A I know I went to - I left there and went to their
4 doctor.
- 5 Q And where did they send you to the doctor?
- 6 A Lexington something, it's over there on West Dunbar
7 Road.
- 8 Q Was it Lexington Occupational Health?
- 9 A Yes, sir.
- 10 Q And did you tell the doctors there how you got hurt?
- 11 A Yes, sir.
- 12 Q And did they begin treating you?
- 13 A Not the first day. They did a drug test because the
14 fourth of July and they were closed and I had to make
15 another appointment to go back.
- 16 Q Were you seen there on a couple of occasions?
- 17 A Yes, sir.
- 18 Q At some point, did you learn that the insurance
19 company was denying your claim?
- 20 A Yes, sir.
- 21 Q And when that happened, were you allowed to continue
22 treatment at Lexington Occupational Health?
- 23 A No, sir.
- 24 Q Where did you go then?
- 25 A I called human resources, and I was told to be able to

- 1 come back to my job I needed to go see my own doctor.
- 2 Q And did you go see your own doctor?
- 3 A Yes, sir. I went to Robert Dunn.
- 4 Q And Dr. Dunn eventually referred you over to
- 5 Dr. Holbrook?
- 6 A I took the paperwork that I had from their doctors and
- 7 let him read them. And he seemed to - he seen on the
- 8 paper that an MRI would tell him more what was the
- 9 wrong with me. And he ordered the MRI. Then I went
- 10 back to him after the MRI and he sent me to
- 11 Dr. Holbrook.
- 12 Q And have you undergone surgery for your back?
- 13 A Yes, sir.
- 14 Q Has that surgery helped you?
- 15 A Yes, sir. It's helped a lot. I have still a little
- 16 bit of problems but not like I had.
- 17 Q And have the doctors continued to restrict you from
- 18 work?
- 19 A I am right now presently still on light duty.
- 20 Q Have you been allowed to come back to work on light
- 21 duty?
- 22 A No, sir. They said they did not have nothing for me.
- 23 Q When was the last day you worked?
- 24 A On July 3.
- 25 Q Were you able to get your surgery done on your health

1 insurance?

2 A Yes, sir.

3 Q And did you indicate on those forms that this injury
4 happened at work?

5 A Yes, sir.

6 Q Ms. Bone, what do you believe caused this problem with
7 your back?

8 A When I lifted up the two pallets and I got in the
9 middle of that stand to finish lifting.

10 Q Did you in any way hurt your back on the day that you
11 had the flat tire?

12 A No, sir.

13 MR. SMITH: Thank you, ma'am. No further
14 questions.

15 THE COURT: Please answer any questions Mr. Chase
16 has for you.

17 MR. CHASE: Thank you, Commissioner.

18 CROSS EXAMINATION

19 BY MR. CHASE:

20 Q Ms. Bone, on the day that you say you got hurt, June
21 26, 2007, what time was it when you got hurt?

22 A It was probably 8:30 or 9:00 at night.

23 Q And what time did you get to work that day?

24 A I get to work at 3:00 in the afternoon.

25 Q And what time did you finish work that day?

1 A 12:30 in the morning.

2 THE COURT: What time?

3 THE WITNESS: 12:30 the next day.

4 BY MR. CHASE:

5 Q So you continued working on until 12:30?

6 A Yes, sir.

7 Q And you didn't tell anybody that day?

8 A No, sir.

9 Q And if I understand what you said on direct testimony,
10 you said you bent over, that's when you felt the
11 pinch?

12 A When I was coming up with the pallets.

13 Q But didn't you say it's when you bent over?

14 A I went to bend, when I bent over and picked the
15 pallets up. When I got into the middle - is this the
16 best way to show you?

17 Q You can just tell me, you don't need to demonstrate.

18 A You know how you squat, and then you get into middle
19 part of your stand?

20 THE COURT: It's on your way back up?

21 THE WITNESS: On my way back up.

22 BY MR. CHASE:

23 Q And there was nothing on the pallets, right?

24 A No, sir.

25 Q And what you would do is just lean these up against

1 the side of the truck, right?

2 A Yes, sir.

3 Q So you didn't have to lift the total weight of the two

4 pallets off the ground?

5 A No, sir. All you had to do was take them and push

6 them off. We had to scoot them out a little bit and

7 then push them off.

8 Q And the following day you drove all the way to

9 Charlotte and back?

10 A Yes, sir. And my daughter was with me that day.

11 Q Then you worked on Thursday, you did your whole shift

12 on Thursday?

13 A Yes, sir.

14 Q Is that the day you say you told a coworker, Tony

15 Summers?

16 A I know I told him Sunday.

17 Q You told him on Sunday, I'm sorry.

18 A I remember saying, I was going up the steps, and he

19 said, you're going up the steps awful slow. I said,

20 my leg still hurts.

21 Q Because you were off Friday and Saturday, right?

22 A Yes, sir.

23 Q And so on Sunday you told Tony Summers?

24 A Yes, sir. I was the first one upstairs in the break

25 room, I do remember that.

- 1 Q And he's the only person that you testified that you
2 told before the flat tire, right?
- 3 A Yes, sir.
- 4 Q But you didn't bring him here today to back that up?
- 5 A No, sir.
- 6 Q And then on Tuesday morning, July 3, that's when you
7 had your flat tire?
- 8 A Yes, sir.
- 9 Q What road were you on when it happened?
- 10 A It's BM Industrial Road.
- 11 Q And you were on - your truck came to a stop in front
12 of a business out there?
- 13 A I ran over something and the tire didn't go completely
14 flat at that second, and I kept driving. I was trying
15 to find a place to pull over. And I pulled over in
16 this business, and I got right there at their driveway
17 going in.
- 18 Q What was the name of the business? Do you know what
19 it was?
- 20 A No, sir. I traveled that road so many times I don't
21 pay it - I know SCE&G is on that road and CMC or
22 whatever.
- 23 Q But you know where your truck stopped?
- 24 A Yes, sir.
- 25 Q You could find it again if you had to, right?

- 1 A Yes, sir. I could take you to the address if you
2 needed.
- 3 Q And the man came out of the parking lot of that
4 business?
- 5 A All I know is the gentleman was out there directing
6 the 18-wheeler truck to back out on the main highway.
- 7 Q From that business?
- 8 A Yes, sir.
- 9 Q What did he look like?
- 10 A I was more worried about getting to work than worried
11 about what the guy looked like. I don't like to be
12 late for work. I think he had brown hair, and he was
13 kind of husky.
- 14 Q Was he white or black?
- 15 A He was white.
- 16 Q Did he say he worked at that business?
- 17 A No, sir. He just said that when I get finished
18 helping this gentleman get out with the 18-wheeler
19 truck, I'll help you.
- 20 Q Did you assume he worked at that business there?
- 21 A Yes, sir.
- 22 Q Did he tell you his name or anything?
- 23 A No, sir.
- 24 Q Did you jack your truck up or anything?
- 25 A No, sir.

1 Q Did you help at all change your tire?

2 A I got the lug wrench out of the back behind my seat.

3 I got the jack out of the back behind my seat and the
4 wind up.

5 Q And you didn't bring him here today to back up that
6 story, did you?

7 A No, sir.

8 Q And then were you late getting into work then on that
9 day?

10 A No, sir. I was about five minutes before time to
11 clock in. I made it.

12 Q And so when you got there you clocked in?

13 A Yes, sir.

14 Q And you didn't do any work, did you, before you went
15 and reported this to Richard, did you, Richard
16 Thompson?

17 A If I did I maybe worked ten minutes or so.

18 Q Do you remember doing any work that morning?

19 A No, sir. I really don't. I mean, I was so - my leg
20 was hurting so bad that I just felt I needed to go
21 tell him. I just don't remember, I'm sorry.

22 Q In fact, you were crying when you were talking to him
23 about it, right?

24 A Yes, sir. It hurt.

25 Q And you did tell him that you had to change the tire

- 1 on your truck, didn't you?
- 2 A I may have. I know I had to have a tire changed. I
- 3 know I didn't tell him I changed it.
- 4 Q Are you sure you didn't tell him that you changed
- 5 it?
- 6 A I didn't change it. I know the gentleman who changed
- 7 my tire.
- 8 Q But what did you tell Richard? Could you have told
- 9 Richard that you changed your tire?
- 10 A I could have said that in the context of having to
- 11 have the tire changed to having a flat tire.
- 12 Q And you didn't go to any doctor at all until after you
- 13 had the flat tire, right?
- 14 A Yes, sir.
- 15 Q And so you worked the whole week. I know you obviously
- 16 took a day off and went to Charlotte and had two days
- 17 off, but the other days you worked between the time
- 18 you say this happened and when you reported it to
- 19 Richard, right?
- 20 A I worked that Thursday and that Sunday. I'm off on
- 21 Fridays and Saturdays.
- 22 Q What about Monday?
- 23 A Monday I worked.
- 24 Q And you did your whole shift those days, right?
- 25 A Yes, sir.

1 Q And your job, to be a little more specific about it,
2 you have to clean out the 18-wheel trailers for US
3 Foods, right?

4 A Yes, sir.

5 Q And what that involves, you have to - you all use
6 pressure washers. You have one that soaks down the
7 inside of the truck and then you have a separate one
8 that rinses it out?

9 A Yes, sir.

10 Q And you've got some big stairs that you have to move
11 up to the back of the truck to get in and out, right?

12 A They are metal steps with wheels on them.

13 Q Okay. Because you have got to get the hoses and all
14 from the pressure washer up in the trailer?

15 A Yes, sir. But they have real long hoses that they are
16 - I don't know how many feet they are. But they go
17 all the way up into the back of the trailer where the
18 back wall is that goes up against the back of the
19 18-wheeler truck. It goes all the way up to that and
20 you can pressure washer all the way.

21 Q Okay. So you have to drag the hoses all the way to
22 the front of that trailer and back out again, right?

23 A Yes, sir.

24 Q And that's what you do all day, isn't it?

25 A Yes, sir.

- 1 Q And those hoses are pressurized, aren't they?
- 2 A Yes, sir.
- 3 Q And those hoses are pretty heavy, aren't they?
- 4 A No, sir.
- 5 Q They are not heavy?
- 6 A Not to me.
- 7 Q And how come you didn't tell your supervisor about
- 8 this for a whole week?
- 9 A Because I have to work. I have bills to pay. Nobody
- 10 pays my bills.
- 11 Q Have you ever injured your back in the past?
- 12 A No, sir.
- 13 Q You didn't have a back injury, an old one, about 20
- 14 years ago?
- 15 A Well, I mean, yeah, I had a back injury then, but that
- 16 was lower back. I have not hurt myself on the job
- 17 this time.
- 18 Q You hurt your low back about 20 years ago?
- 19 A Yes, sir.
- 20 Q Who were you working for back then?
- 21 A That was due to a car accident.
- 22 Q And did you go to any hospital or anything?
- 23 A I went to Midlands Orthopedic.
- 24 Q And what did they do for you there?
- 25 A I had cortisone shots done.

1 Q In your low back?

2 A In the very low part of my back.

3 Q Was it lower than where this injury was?

4 A Yes, sir.

5 Q And were you out of work from that car wreck?

6 A No, sir.

7 Q Did you recover any money from your personal injuries
8 from that car wreck?

9 A I only recovered the medical expense and probably - it
10 wasn't a lot of money. I ended up suing my own
11 insurance company because the person was underinsured.

12 Q How much total did you get? How much money?

13 A I think it was \$15,000 from their insurance and \$2,000
14 from mine. And the lawyer got more than I got.

15 Q Have you ever had any Workers' Comp injuries in the
16 past?

17 A No, sir.

18 Q Have you had any other prior back injuries?

19 A No, sir.

20 MR. CHASE: That's all I have, Your Honor.

21 THE COURT: All right. Mr. Smith, do you have
22 anything on redirect?

23 MR. SMITH: Thank you, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. SMITH:

1 Q Ms. Bone, since that car accident 20 years ago, have
2 you had any treatment for your back since that time
3 before this injury?

4 A No, sir.

5 Q You reported this injury to Richard on July 3?

6 A Yes, sir.

7 Q And did you tell Richard what you told the court
8 today?

9 A Yes, sir.

10 Q You saw the doctor on July 5. Did you tell the doctor
11 at that time how you got hurt?

12 A Yes, sir,

13 MR. SMITH: Your Honor, just for the record, this
14 is APA Page 6.

15 THE COURT: Thank you.

16 BY MR. SMITH:

17 Q Now, you've been questioned extensively about this
18 injury today. Were you also contacted by an insurance
19 adjustor who took a recorded statement from you on
20 July 12?

21 A It would have had to have been over the phone.

22 Q Yes, ma'am. Were you contacted by telephone and gave
23 a statement to the insurance adjustor?

24 A Yes.

25 Q Let me ask you to look at this statement. Tell me if

1 that's the statement you gave to the adjustor on July
2 12.

3 A Instead of reading it all, I would - yes.

4 MR. SMITH: Your Honor, I offer that as
5 Claimant's 1.

6 THE COURT: Okay. Any objection?

7 MR. CHASE: No objection.

8 (CMT. EXH. NO. 1, Telephone Statement, was marked
9 for identification.)

10 BY MR. SMITH:

11 Q You told each of these folks that you got hurt just
12 the way you told the Commissioner you got hurt
13 today?

14 A Yes, sir.

15 Q I'll ask you one more time, Ms. Bone. Were you
16 injured in any way in this flat tire incident?

17 A No, sir.

18 MR. SMITH: No further questions.

19 THE COURT: Anything else, Mr. Chase?

20 MR. CHASE: I think just one.

21 RE-CROSS EXAMINATION

22 BY MR. CHASE:

23 Q Ms. Bone, you didn't tell the insurance adjustor that
24 you had said something to Tony Summers, a coworker,
25 did you?

1 A No, sir.

2 Q How come you didn't tell the insurance adjustor that?

3 A It didn't come to mind, I guess.

4 MR. CHASE: Nothing further, Your Honor.

5 THE COURT: All right, and that's the Claimant's
6 case.

7 MR. SMITH: Beg the Court's indulgence. That is
8 in here.

9 THE COURT: I'm going to read it, so if she said
10 something about Tony I will find it. I will make
11 myself a note right now to check it.

12 MR. SMITH: Just for the court - just so you'll
13 know, the page is not numbered but it's on this page
14 right here, Your Honor.

15 THE COURT: Okay.

16 MR. SMITH: The Claimant rests, Your Honor.

17 MR. CHASE: I'd like to call Richard Thompson,
18 Commissioner.

19 THE COURT: Hello, sir. My name is Susan Barden.
20 If you will raise your right hand, please.

21 RICHARD THOMPSON,

22 having been first duly sworn, testified as follows:

23 THE COURT: Please state your full name for the
24 record.

25 THE WITNESS: Richard Thompson.

1 THE COURT: All right. Please answer any
2 questions Mr. Chase has for you, but I'll ask that you
3 have your chair swiveled back the way you had it right
4 there and try to look my way. I appreciate it, do the
5 best you can.

6 All right, Mr. Chase, whenever you are ready.

7 MR. CHASE: Thank you, Commissioner.

8 DIRECT EXAMINATION

9 BY MR. CHASE:

10 Q Mr. Thompson, how long have you been with US Foods?

11 A Since August 21, 2007.

12 Q Are you a supervisor to Ms. Bone?

13 A Yes.

14 Q Was that the correct date of your employment or did
15 you want to add something to that?

16 A No, that was not the correct date. It was the year
17 2000.

18 Q You've been there since 2000, okay. Thank you for
19 that. And did you prepare a written statement in this
20 case? I think you've got a copy of it with you.

21 A Yes.

22 Q And did you actually write that out? The date of it
23 says July 5, 2007.

24 A Yes.

25 MR. CHASE: We submitted that in the APA,

1 Commissioner, so I think you've already got a copy of
2 it.

3 THE COURT: Got it.

4 BY MR. CHASE:

5 Q Mr. Thompson, why did you prepare this statement?

6 A I prepared the statement because the supervisor was
7 not present at the time and normally in a case like
8 that I have to prepare a statement.

9 Q Okay. And tell me what you remember, and you can
10 certainly refer to your statement, when Ms. Bone came
11 to you to report something on July 3, 2007.

12 A I was down at the service desk inside the shop, and I
13 noticed when she came in, she went upstairs. She came
14 back down, looked inside the boss' room, she went back
15 outside. She was looking for my boss, which is Skeet.

16 And she came back to me, she said, is Skeet's
17 office open? I said, yes, it is. She said, I need to
18 talk to you about something. I said, okay, come on
19 up.

20 So we went into the office and she sat down. She
21 proceeded to tell me that she had hurt her back, which
22 was on June 26. It was a week prior to that date. I
23 said, how did you hurt it? She said, moving one of
24 the blue pallets to clean the pallets that was inside
25 the trailer.

1 So she said when she walked sometimes, one of
2 her legs hurt. And she said her son noticed a bruise
3 on the lower part of her back. She thought it was a
4 stinger when she felt the pull, which was on the 26th.
5 She thought she could just work through it. So when
6 she reported it to me, I told her I had to call Skeet,
7 which is my supervisor. So I called Skeet, which he
8 was gone that day. And then he referred me to call
9 HR.

10 Q Mr. Thompson, let me jump in there and ask you a
11 question. Did she have some problem with her personal
12 truck that morning?

13 A Yes, she did.

14 Q Tell me what she told you about that?

15 A Okay, she - on the way to work, she said she run over
16 something in the road and she had to get out and see
17 what it was, and she noticed her tire was flat. So
18 she had to change her tire on the way to work.

19 Q Did you take that to mean she changed her own tire?

20 A Yes.

21 MR. SMITH: Objection, speculative, Your Honor.

22 BY MR. CHASE:

23 Q Why do you take it that way?

24 THE COURT: Wait a minute.

25 MR. CHASE: I'm sorry.

1 THE COURT: Go ahead.

2 MR. SMITH: His mental impressions are not
3 evidence of what occurred.

4 THE COURT: I understand that. She did not - you
5 took it to mean that she had changed it herself?

6 THE WITNESS: Yes.

7 THE COURT: Do you remember the words that she
8 used when she told you that the tire needed changing,
9 whether she did it herself or somebody else was going
10 to do it? She said she had a flat tire that needed
11 changing, is that -

12 THE WITNESS: She said she had to change her
13 tire.

14 THE COURT: She said, I had to change my tire.

15 THE WITNESS: Yes. She had to change her tire.

16 THE COURT: All right. Okay.

17 BY MR. CHASE:

18 Q Mr. Thompson, do you mind reading for us, in fact, how
19 you wrote it down when she told you that? Your
20 statement starts on the bottom of the Page 1 there.

21 A "She did say on her way to work she ran over something
22 in the road. She pulled over to see what was - to see
23 what was, her tire, what was the damage. And it was
24 so, so she had to change her tire on her truck."

25 Q Okay. Did she ever tell you that some nice man

1 changed her tire for her?

2 A No.

3 MR. SMITH: Leading, objection.

4 THE COURT: All right. Sustained, Counsel will
5 refrain from leading.

6 BY MR. CHASE:

7 Q Did she do any work that morning before she told you
8 about this? Or had she just arrived and clocked in?

9 A She had just come into work.

10 Q Was she upset when she was talking to you?

11 A Yes, I did notice that she was crying during the
12 conversation.

13 THE COURT: Was this the conversation where she
14 reported the injury, or the conversation you had with
15 her - did you have a conversation - when she called in
16 and said that she had the flat tire was it you she
17 talked to?

18 THE WITNESS: Yes.

19 THE COURT: So she talked to you by phone?

20 THE WITNESS: No, no.

21 THE COURT: I want to make sure I understand.

22 THE WITNESS: I only had one conversation with
23 her.

24 THE COURT: And that was when she was reporting
25 the injury?

1 THE WITNESS: Right.

2 THE COURT: All right. Go ahead, Mr. Chase.

3 BY MR. CHASE:

4 Q That's fine. I think I was asking Mr. Thompson was
5 she upset when she was talking to you that morning?

6 A When she reported the injury to me?

7 Q Yes.

8 A Yes, she - I did notice she was doing some crying as
9 though she was in pain.

10 Q Did she work her full - her full duty job between June
11 26 and when she reported this on July 3?

12 A Yes.

13 Q And tell us what she has to do? What does she do on
14 her job?

15 A Her job is to clean the inside of trailers.
16 Occasionally there are pallets inside the trailers.
17 We told her and her coworkers not to move them, just
18 wash around them, and to wash tractors, too.

19 Q So she would have been possibly, though, moving some
20 pallets later that week, right?

21 A Possibly.

22 Q After June 26?

23 A Yes.

24 Q Okay. Why is that? Even if you tell them to move it,
25 do they not do what you tell them?

- 1 A No, we ask them not to move them.
- 2 Q Do some of your workers move them anyway?
- 3 A Sometimes.
- 4 Q Do they have to move steps around to get in the
- 5 trailers?
- 6 A Yes.
- 7 Q Describe those steps to me, what are they like?
- 8 A Let's see, I think it's a five step ladder with two
- 9 rails and they are on four wheels and you move it from
- 10 one trailer to the next. The trailers are backed in
- 11 each other, like this.
- 12 Q And then they have to use pressure washing equipment?
- 13 A Yes, they have to use a soap wand, which is the
- 14 pressure washer and they use a rinse wand.
- 15 Q Are those pull-start motors, or how do those work?
- 16 A Push button.
- 17 Q And how much hose are on those washers?
- 18 A I think one side is like 60 feet and the other side is
- 19 like 50, I believe.
- 20 Q All right. And you've got to drag those up into the
- 21 trailer and back out?
- 22 A Yes.
- 23 Q Do you know whether she told any coworker before July
- 24 3, 2007, that she had gotten hurt?
- 25 A I wasn't aware of it.

1 Q Okay. Nobody came to you to say anything?

2 A No.

3 MR. CHASE: That's all I have. Please answer any
4 questions Mr. Smith has.

5 THE COURT: Mr. Smith, if you want to come over
6 here again, you're welcome to.

7 CROSS EXAMINATION

8 BY MR. SMITH:

9 Q Mr. Thompson, how long have you been Ms. Bone's
10 supervisor?

11 A I don't know, since the day she started.

12 Q And she's been here about two years?

13 A Yes.

14 Q Is she a good worker?

15 A Yes.

16 Q Dependable?

17 A Yes.

18 Q No problems with her performing her job up until July
19 3?

20 A No.

21 Q No problems at all with Ms. Bone?

22 A No problems as in?

23 Q With her work?

24 A No.

25 Q Now, she came to you on July 3 and reported an injury

- 1 to you, correct?
- 2 A Correct.
- 3 Q And on that day, she told you exactly how she had done
- 4 it by lifting a pallet, or propping up a pallet,
- 5 correct?
- 6 A Correct.
- 7 Q She told you that she had done it a few days ago,
- 8 thought it was a stinger, and it would work its way
- 9 out?
- 10 A Right.
- 11 Q Now, she told you it happened on the 26th, correct?
- 12 A Correct.
- 13 Q Ms. Bone was scheduled to be off on the 27th for a
- 14 doctor's appointment; is that correct?
- 15 A I'm not sure about that.
- 16 Q Okay. You don't know one way or the other?
- 17 A No.
- 18 Q But she would have worked on the 28th, which would have
- 19 been a Thursday?
- 20 A Correct.
- 21 Q And then she's off on Fridays and Saturdays, so she
- 22 would not have worked the 29th and 30th; is that
- 23 correct?
- 24 A That is correct.
- 25 Q She came back to work on Sunday, which would have been

- 1 the 1st.
- 2 A Yes.
- 3 Q She worked Sunday and Monday, which would have been
- 4 the 1st and 2nd, came and reported to you first thing
- 5 the next morning, the 3rd, with the problems she was
- 6 having?
- 7 A Yes.
- 8 Q So when you say she did her regular job all that week,
- 9 she only really worked three days; is that correct?
- 10 A Yes.
- 11 Q And when she came in and told you that morning about
- 12 her injury, she mentioned to you that she had had a
- 13 flat tire on the way to work?
- 14 A That is correct.
- 15 Q Were you already aware of that that morning because
- 16 she did call and spoke to Kelly?
- 17 A No, I was not aware of that.
- 18 Q But when she came in and told you about having had the
- 19 flat tire, she didn't come in and say, hey, my back's
- 20 killing me, I got hurt changing a flat tire this
- 21 morning, did she?
- 22 A No, she did not say that.
- 23 Q You wrote it up here as she told you as best as you
- 24 can recall?
- 25 A Right.

1 Q In fact, she even told you that there was a bruise on
2 her back?

3 A Yes.

4 Q And that her son had seen that bruise?

5 A Correct.

6 Q Her son didn't bring her to work that morning, did he?

7 A I'm not sure.

8 Q Now, she told you she had had a flat tire, and it's
9 your belief that she told you that she said that she
10 had to change her tire?

11 A Yes.

12 Q Have you ever - I know if I blow an engine in my car I
13 may say I have to fix my engine, but I'm not the one
14 that fixes the engine because I wouldn't have a clue.
15 Have you ever said something like that?

16 MR. CHASE: I'm going to object to that question.
17 I don't think it's relevant, so -

18 THE COURT: I think I understand where both of
19 you are coming from, the way you hold your positions
20 are on that and how it can be construed.

21 MR. SMITH: I withdraw my question.

22 THE COURT: All right, thank you.

23 MR. SMITH: No further questions, Your Honor.

24 THE COURT: All right. Mr. Chase, anything else?

25 MR. CHASE: I would ask that this witness be

1 excused; and we rest at this point, Your Honor.

2 THE COURT: All right. Thank you. That
3 concludes this proceeding.

4 (The hearing concluded at 2:45 PM.)

RECORDED STATEMENT OF CATHY C. BONE

Okay. Today is July 12, 2007. I'm Linda Bushell and I am speaking with Ms. Cathy Bone for the purpose of obtaining information and details pertaining to a claim for workers' compensation benefits.

Q: Ms. Bone, I am confirming that this interview is being recorded and you have given permission for this to be recorded, is that correct?

A: Yes.

Q: Okay, thank you. I'd like to begin by asking you to say and spell your name.

A: Cathy - C A T H Y - Bone - B O N E.

Q: Also please say your home address.

A: Right now I'm at , Gaston, 29053.

Q: Okay, 29053. And that's Gadston?

A: Gaston.

Q: And what State?

A: South Carolina.

Q: How long have you been living at this address?

A: I have been here probably four years. I have another place, I just don't stay at.

Q: Tell me your Social Security Number.

A:

Q: How tall are you?

A: I'm about 5 foot 5.

Q: And your approximate weight.

A: I'm about 167.

APP-095

Q. And are you _____ or _____?

A. _____

Q. I need to know if you're right-handed or left-handed.

A. Right-handed.

Q. Do you have any medical conditions or allergies?

A. No, ma'am.

Q. No high blood pressure or diabetes?

A. No, ma'am.

Q. Have you ever had surgery?

A. Yes. I've had surgery on both feet, I've had my tonsils taken out, and I've had a partial hysterectomy.

Q. When was the surgery on your feet?

A. Well, when I was 12-years-old.

Q. Tonsils?

A. Oh, God, I couldn't remember that now.

Q. Childhood?

A. Yeah, it was childhood.

Q. And you had your _____ how long ago?

A. In 1989, I think it was.

Q. Have you ever smoked?

A. Yes, I smoke.

Q. How often? Or how much a day?

A. A day? About a pack. One pack.

APP-096

Q. Do you ever drink alcohol?

A. No, ma'am.

Q. Do you ever use or take drugs?

A. No, ma'am. Got better things to do with my money besides

_____ that stuff.

Q. Are you single, married or divorced?

A. Well, it's a long story, but I'm married, but I haven't been with the man in probably 10 years now.

Q. Married, but separated?

A. Right.

Q. Do you have dependent children under 18?

A. Well, my son just turned 18 June 10th.

Q. Do you have other children?

A. Yes, ma'am. I have a daughter that's 26.

Q. Do you owe child support?

A. No, ma'am.

Q. And who are you currently employed by?

A. US Food Service.

Q. What is your job title for them?

A. A washer. That's what I do. I wash the trucks and the trailers.

Q. When were you hired?

A. I was hurt June 26th.

Q. No, when were you *hired*?

APP-097

- A. Hired? On July 18th two years ago. July 18th will be two years.
- Q. Did you go to employer or _____ when you were hired?
- A. I went to Job Services, and then I went to and I talked to Steve Smith for orientation – I mean interview.
- Q. What is your salary?
- A. I'm making – well, we get a raise the 1st of July. I'm making a little over – I think around 24 now. I'm now really sure. I'm making \$11.58 now. Somewhere around there.
- Q. Per hour?
- A. Yes, ma'am.
- Q. That's good.
- A. Yeah, it's good for South Carolina, believe me. That's good pay. I know that.
- Q. Are you full-time or part-time?
- A. I'm full-time.
- Q. How many hours a week do you work?
- A. I work 41 hours a week.
- Q. What is the name of your supervisor?
- A. Right now it's Steve Smith.
- Q. Has your employer ever given you any training or directions to do your job? Any instructions?
- A. No, no.
- Q. And what do you wash?

A. I wash 28 foot and 48 foot trailers out.

Q. Do they give you equipment?

A. Oh, yes ma'am. We got a pressure washer.

Q. Oh, okay.

A. It's got one that's got soap, and one that's got hot – um, cold. Well, one's soap and one's rinse.

Q. Okay. And did they teach you how to use that since you started?

A. No, because I had experience doing it. But, nobody really never showed me. You know what I mean?

Q. Okay, alright. Did you have a second job anywhere?

A. No, ma'am. I'm doing good to work that one for the hours I work.

Q. Alright. What is your highest level of education?

A. 12th grade.

Q. Did you graduate?

A. Yes, ma'am.

Q. And have you ever served in the military?

A. No, ma'am.

Q. Alright. And do you have any special jump training from anywhere prior to this work?

A. No, ma'am. I've always washed things. The thing is, I graduated school, but back when I was going to school they didn't care, so they put you through. My reading and my spelling is not what

Q. What you would like it to be?

- A. Yeah.
- Q. Was this first time you've ever been injured at work?
- A. Yes, ma'am. No, wait a minute. I hurt my – I'm sorry. I hurt my thumb at the City of Cayce.
- Q. What happened to your thumb?
- A. I went to throw a swing over on one of the swing sets, and the swing come back and got my thumb and bent it back, but all I was go to Doctor Care with them, and never went to therapy or anything. Just went with them, and they put a brace – you know, one of them wrist brace things on it. But, City of Cayce still made me work anyway. They still put a Weed eater in my hand. Oh, whatever.
- Q. Okay. And how long ago was that?
- A. Oh, that was in – oh, God – 2000 and – I don't remember now. I'd have to go back and look at my records.
- Q. A few years ago?
- A. Oh, yeah. It's been a good while. I've worked for US Food for two years, then I worked for Palmetto Bus I think for six months, and then I worked on my own.
- Q. And what was the date you were injured here at work?
- A. June 26th.
- Q. June 26, 2007. And do you recall what time it was?
- A. It was at 9:00, I'm pretty sure it was.
- Q. 9:00 A. M. or P. M.?
- A. It would be P. M. time.
- Q. And what time did you report to work that day?

A. I report to work on – I would have to go back on the calendar. One day on that – that was a Tuesday. On Tuesday I report to work at 3:00 P. M.

Q. And what time does your work day end?

A. 12:00 A. M. 12:30 A. M.

Q. Did you receive pay for the day that you were injured, 6/26/07?

A. Yes, ma'am. Now 6/27 I took off work for a personal day and went to Charlotte, North Carolina. I had Lasik eye surgery on the 1st and had to go back for my three-weeks check-up. The 26th I got hurt. I worked that night, and then my daughter and I went to Charlotte and I was in pain driving that way. And then I went back ...

Q. How far a drive was that?

A. That's about 100 miles. A little over 100 miles.

Q. Did you stay up there?

A. No, ma'am. I drove all the way up there, went to my eye appointment, and we came back.

Q. Can you please describe for me the incident that caused your injury.

A. I was in a trailer, and I do it all the time. I had a pressure washer wand in my hand. No, I laid that pressure washer wand down. I laid the pressure washer wand down and I went to pick up two pallets, and just pick them up and lean them against the wall so I could clean up underneath them. And, when I went to pick up, I didn't feel anything, you know, as far as, you know, something or hearing anything crunch, but I felt a pinch. You know what I mean?

Q. Where was?

- A. In the lower part of my back.
- Q. How severe was the pain? Was it immediate or was it just light at first?
- A. It was light at first. And then as the night went on, it got a little worse, but I went on ahead and finished it up. Maybe I might have pulled a muscle, but what I would do is I'd sit and, you know how you twist your body – you know, sit and then take a turn and try to get it to work it out? That didn't work. Then I sat on the steps and kind of did a curl back. That eased it off, I guess, because I stretched the spine or something, and that eased it off and I felt pretty good for a while there, and then I went back to work Thursday. And I was doing okay, but they hired the fuel guy – I mean the guy that worked in the wash bay with me – they hired him on the fuel aisle, and I was in the wash bay by myself, and I guess I just really over-did it and imi..... you know that really got it bad now. I didn't lift anything that day.
- Q. Okay. Tell me as best as you can exactly where in your back it hurts.
- A. The back's not hurting, in the hip and on the side of the calf of the leg. And the ankle feels like somebody has put a rubber band around – you know, have you ever put a rubber band around your finger, you know how that feels? Well, the ankle feels that way. And today I am hurting in the hip, and on the side of the calf, and right there at the ankle bone I have a sore – I have a hurting spot that (whispers unintelligibly) – that's a new one. And then I just laid down and took a nap. Not all the time, it's just sometimes I don't remember exactly what I'm doing, but then the C-joint will hurt. Not – you know, it just has a little pain there because I'm doing something different, you know what I'm saying?

Q. Yeah. Okay. Had anyone seen this happen?

A. No, ma'am. I worked in the wash bay by myself then.

Q. Okay. To who did you report your injury?

A. I didn't do it immediately, then I went back to work because there was nobody there and I couldn't afford to be out. This is killing me because I'm having no paycheck really. So I went back work and I worked Sunday, and I was complaining to Tonio (???), an employee there, that I was hurt, but I couldn't afford to stay off and I thought that maybe by working that it would work, you know, work its way out, but it didn't, and then I worked Tuesday because I'm thinking to myself I can't afford this, you know what I'm saying? I have to go to work. I have bills. And I went to work Sunday and Monday, and then Tuesday when I went in, I just told them I can't take this no more. (audible crying) And I think they're a little mad at me because I didn't come to them right away, but I cannot afford to be off. I mean, my paycheck this week was a hundred ... they didn't even pay me for the 4th of July. I drew a hundred _____, and they put \$25.00 in my savings, which that is every week. And then I think it was like \$77.00 in my checking. It wouldn't be so bad if I didn't go have Lasik surgery. That makes it harder when I took \$1,200 – I mean a \$1,000 – out of my savings account. You know, it's hurtin now when you don't know when you're gonna be able to go back to work either.

Q. Okay. So you told them on Tuesday or you told them on ...

A. I told Richard – I don't remember Richard's last name. He's one of the supervisors there. I don't remember his last name. I told Richard Tuesday. Steve

Smith was not there; he went to a funeral. And I asked Richard to go into Steve's office, and I told him, I said, "Look, I hurt myself." And when he called Human Resource, they were like, well, why didn't she say then? And he said, well he finally, you know, he thought he pulled them off so he could work it out.

Q. Well _____ you thought. Okay, What are the name of the _____ that you normally work with?

A. Well, his name is Wesley Smith, but he was already hired on the fuel aisle.

Q. So he wasn't there?

A. No, ma'am. There was nobody in the wash bay with me and I was by myself.

Q. And what do you say caused your injury?

A. When I picked up the pallet.

Q. And how often do you have to pick up pallets?

A. About every day if you want to really clean your trailer real good.

Q. Okay. And how many pallets are usually in a trailer?

A. They can be anywhere from 1 to 10, or more. Now, if there are like 10 – you know what I'm saying – if there's 10 or more up, usually – you know how a trailer is inside. Where the wall is, where the truck hooks up to it, if there are 10 or so pallets there, I just don't move them. It's just too much trouble. But sometimes you have a trailer that may have 2 or 3 laying around all around it, you know, scattered, and the trailer is pretty bad, you pick them up to move them. I do, I mean I move them and lay them over to the side of the wall standing up to clean. I mean these are trailers that food is shipped in, and I don't want my food to go out in these trailers. I _____ tell my mama so I hope

somebody will _____ these _____ on
_____, but oh well.

- Q. Hit. Well, that's okay. Clean it out after they get it out. What do you recommend to keep _____ ? Is there anything they could do there, like just _____ it before you get there?
- A. They're not going to do that. We've already complained about that, and they told us to deal with it. The only thing I can think of is get one of them wheat belt things to put around your waist. But then it's so hot outside, you can't hardly wear the clothes you got now.
- Q. Yeah, but it's better than being hurt. Okay. Did you go to the Emergency Room?
- A. No, ma'am. Let me tell you what they did to me. I went to a place called Lexington Medical on Pine Street West at Dunbar Road. I got there and the door was locked. They called. The directions I had were wrong on the paper, and by the time I found out where it was at, they were locked, and when I got there finally the lady come out and says you're from US Food, and I said, "Yes, ma'am." And she said, well, we're seeing. So when I go in there, they give me a drug test and tell me to make an appointment. I was so mad.
- Q. So did they see you the next day?
- A. We had to do an appointment at 8 O'Clock Monday morning. They told me if I needed to go anywhere, to go to Doctor Care or something. But I started with them and that's who they told me to go to, that's who I was going to go to.
- Q. Okay. So what did the doctor say?

- A. Oh, we got a Nurse Practitioner. The Nurse Practitioner, the first one – let me find my medicine – she gave me medicine for muscle spasms and _____ and I probably wouldn't be able to pronounce them to you, so I'll spell it. Okay. Natroxan, 500 mg.
- Q. How many did they give you? Does it say on there?
- A. It says take 1 tablet 2 times a day with food.
- Q. They give you 30 days or 10 days?
- A. They gave me med refills 30 tablets.
- Q. Okay, for 15 days worth.
- A. Right. Well, and then these were refilled on 7/05.
- Q. Okay then, do you have a follow-up appointment?
- A. Yes, ma'am. I already went back again. I'm going back tomorrow, too. And this is the other medicine they gave me, Skelaxin, 800 mg. And then I went back on Mon... then I went back...that says July 7th bill....July 5th....that wasn't the 5th I went on Thursday. Yeah, it was. It was Thursday. I'm sorry. I went Thursday, the 5th, then I went back July 9th. Want to make sure I'm right. I'm gonna tell you what. This other medicine that I took – I don't know what I'm doing half the time.
- Q. What was that? Was it _____?
- A. This is the new medicine, I think. That was the first medicine they gave me on the 5th. I'm sorry. That was the 8 O'clock appointment.
- Q. What did they give you on the 9th?

A. On the 9th? They gave me Preenisone. And that's 10 mg. and I only take...it was 3 tablets twice a day for 4 days. Then it's 2 tablets twice a day for 3 days. And then 1 tablet twice a day for just 2 more days. I took just 2 tablets when my daughter and I got them filled, I went on ahead and got myself something to eat and I took the 3 and then 12 hours later I took the other 3, and I stayed up I know over 36 hours. I could not go to sleep.

Q. _____ tablet take them all at once?

A. It said to take 3 tablets twice a day for 4 days. That is 6 tablets in a day of this stuff.

Q. And you keep taking the pills?

A. Yes, ma'am, I'm still taking them.

Q. Did you call a doctor and tell him what it did?

A. No, I'm doing fine now. I thought maybe it was because, you know, it was so much and it was in my body, you know what I'm saying. It was so much in it at one time. Now my body....

Q. ...is getting used to it and now it's healthy.

A. Pardon me?

Q. Is that healthy?

A. The _____? No, I'm still having pain. And, you know, I'm on a heating pad, and I do the exercise.

Q. Did he give you exercise?

A. Well, they did this time. I have to do the legs up to the _____, and then I have to lay on my back and take my knees and go to the left and go to

the right, and then the other one I have to take and lay on the floor, put my feet down, and lift my butt.

Q. Okay, yeah, those are good exercises for your back. If you _____ tomorrow, on the 13th, let's see what other _____ I have here. The employer said something about you had to change your tire on the way to work.

A. Yes, I had a flat.

Q. And that was on the day of your injury?

A. That was the day – on that Tuesday I told them I could not come up, and there was a gentleman that changed my tire.

Q. And also was that on the day of or the day after?

A. Oh, that was a while after. That was on the 3rd that I had a flat. And the tire's still sitting in my truck because I'm not going nowhere.

Q. Alright. Have you answered these questions to the fullest?

A. Yes, ma'am.

Q. Do you have anything additional that you would like to add to this statement?

A. No, ma'am, no. Not at this time. Let's put it that way.

Q. Okay, I thank you again for taking your time to do this, and this will complete the recorded statement. Do I have your permission to turn off the recorder?

A. Yes, ma'am.

5

COLUMBIA NEUROSURGICAL ASSOCIATES, P.A.

76526
#4

Please complete this medical questionnaire. The answers to these questions are very important in helping us take care of you. Where appropriate, fill in complete answers. Thank-you for your time and patience.

Name: Cathy C. Bone Date of Visit: 8/6/07

Age: 48 Height: 5'5 Weight: 173 Date of Birth: 1-2-59

Referring Doctor: Robert Dunn Family Doctor: Robert Dunn

1. I am (☒) right handed () left handed.

2. Chief complaint or reason for visit: back + @ leg pain / @ foot numbness

3. When did your symptoms first appear? July 31st July 31st

4. Did you have an injury? () Yes () No If yes, was it work related? () Yes () No () Other

5. I have been treated for this problem by: Dr. Robert Dunn, Robert Dunn

6. What did they do or recommend? Ad. physical therapy, standing, no lifting, no climbing, no bending, no twisting, sleeping on back, ice packs

7. My medication allergies are: () None or list allergies: codeine

8. My current medications are: (include dose and # of times taken per day)

PREVACID NAPA PC 500 morning + night
Ultram 50 mg night before bed

9. PAST MEDICAL HISTORY: List prior injuries & illnesses, conditions, medical problems that you have (ex: diabetes, high blood pressure, heart disease) Write HOSP. beside any for which you were admitted to the hospital.

Approx. date	Reason (Give Diagnosis of problem if known)

10. PAST SURGICAL HISTORY: List all surgeries, even if done as an outpatient.

Approx. Date	Reason
<u>Part</u>	<u>X - bones (extra bones)</u>
	<u>back</u>

11. SOCIAL HISTORY: Please list any habits or behaviors that may affect your health.

☒ I do not use tobacco () I do use tobacco 1 pack packs per day
☒ I do not use beer, wine or liquor () I do use beer, wine or liquor () daily () weekly () monthly
I am () married () widowed () divorced () single Years of formal education 12
I have (2) children ages: 26 / 11
I work as a washer for U.S. Food Service
() I have been disabled since July 3 due to (list reason) back

12. FAMILY HISTORY: Please list any illness that your grand parents, parents, brothers, sisters or children have had. (for example: cancer, diabetes, heart disease, high blood pressure, stroke)

Grand Mother	Grand Father
Mother <u>Cancer</u>	Father <u>Cancer</u>
Sister	Brother <u>Cancer</u>
Children	

13. SYSTEMS REVIEW: Please check any that apply to you:

Constitutional: ☐ Fever in last 72 hrs. ☒ Hot or cold spells
☐ generalized weakness ☐ generalized lack of energy
☐ unplanned weight loss ☐ lbs over ☐ months
Other: back

Eyes: ☐ declining vision ☐ blurred vision ☐ double vision ☐ seeing spots of light
☐ black areas in field of vision ☐ eye disease (cataracts, glaucoma, etc.)
Other: back

Far Nose, Mouth Throat:

☐ ear aches ☐ decreased hearing ☐ ringing in ears
☐ frequent nosebleeds ☐ chronic sinus ☐ mouth ulcers
☐ mouth/throat cancer ☐ voice changes or hoarseness

Other: _____

Cardiovascular:

☐ chest pain () sharp () dull () happens only when exercising
☐ history of heart attack ☐ heart surgery or catheterization
☐ palpitations ☐ heart murmur ☐ heart rhythm disturbance
☐ shortness of breath () happens only when exercising
☐ I have a pacemaker

Other: _____

Respiratory:

History of:

☐ pneumonia ☐ bronchitis ☐ tuberculosis
☐ asthma ☐ emphysema ☐ lung cancer
☐ I cough up blood from time to time

Other: _____

Gastrointestinal:

☐ difficulty swallowing ☐ nausea/vomiting last 48hrs
☐ stomach ulcers ☐ heart burn
☐ diarrhea ☐ change in appetite
☐ stomach or bowel cancer ☐ liver disease
☐ bulimia ☐ anorexia
☐ hernia ☐ hepatitis

Other: _____

Genitourinary:

☐ frequent urinary tract infection ☐ difficulty urinating ☐ painful urination
☐ blood in urine ☐ prostate problems ☐ vaginal infections
☐ miscarriage ☐ venereal disease: () gonorrhea () herpes () syphilis

Other: _____

Musculoskeletal:

☐ joints that dislocate ☐ leg or ankle swelling ☐ osteoporosis
☐ arthritis ☐ gout ☐ fractures ☐ polio
☒ back pain ☐ leg pain () right () left
☐ back pain is relieved completely when I lie down
☐ back pain is relieved mostly when I lie down
☐ Lying down does not help my back pain
☐ neck pain () right side () left side () both sides
☐ arm pain () right () left () both

Integumentary:

☐ skin rashes
☐ skin cancer Type: _____
☐ breast disease

Neurological:

☐ headaches: How often _____ ☐ with nausea ☐ with blurred vision
☐ fainting spells ☐ history of migraines
☐ confusion ☐ declining memory
☐ history of head trauma ☐ history of brain tumor
☐ facial numbness ☐ dizziness
☐ multiple sclerosis ☐ epilepsy
☐ numbness in hands or arms () right () left () both
☐ difficulty using hands () right () left () both
☐ difficulty walking/numbness in legs () right () left () both

Psychiatric:

☐ I have been treated/hospitalized for:
☐ schizophrenia ☐ depression ☐ suicide attempt
☐ alcoholism ☐ chemical dependency

Endocrine:

☐ thyroid ☐ goiter ☐ diabetes
I take the following hormone supplements: _____

Hematologic/lymphatic:

☐ bleeding disorder ☒ easy bruising ☐ anemia
☐ tendency to form blood clots in legs ☐ swollen lymph nodes
☐ AIDS ☐ HIV

Immunologic:

☐ Lupus ☐ Scleroderma ☐ Rheumatoid arthritis

Other:

☐ chicken pox ☐ measles ☐ mumps ☐ Mononucleosis
☐ scarlet fever ☐ whooping cough ☐ typhoid fever ☐ rheumatic fever

14. If you have back, leg, neck or arm pain, please answer the following:

☐ I have taken physical therapy in the last 6 months for this problem
☐ I have taken medicines like Motrin, Aleve, muscle relaxants or pain medicine to help relieve the pain.
☐ I have had steroid injections in my back or neck for this problem.

Rate the severity of your pain on a scale from 1 to 10, with 1 the least painful and 10 being the most severe. 8-10

Type of pain:

☒ sharp ☐ dull ☐ throbbing ☒ aching ☒ shooting ☐ burning
☒ tingling ☐ numbness ☒ stiffness ☐ swelling ☒ cramps
 Other: _____

☐ the pain comes and goes If so, how often do you have this pain? _____
☒ the pain is constant

Does the pain interfere with ☐ work ☒ sleep ☒ daily routine ☐ recreation

Activities or movements that are painful to perform:

☒ sitting ☒ standing ☒ walking ☐ bending ☒ lying down

How do you sleep? ☐ back ☒ side ☐ stomach

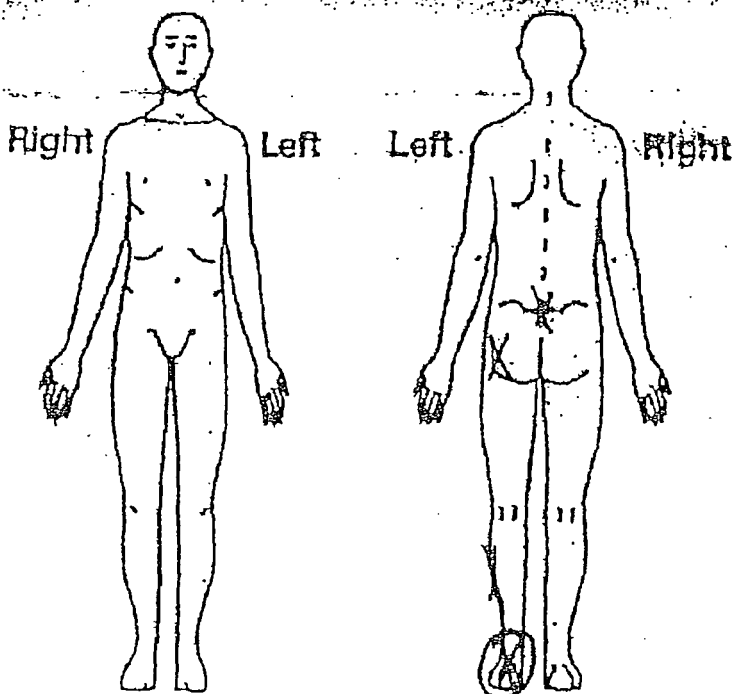
15. Date of your last:

Physical exam _____ Spinal exam _____ MRI/CT or Bone Scan 7-19-07
 Spinal X-ray 11-5-06 Chest x-ray _____ Blood test _____

16. I am claustrophobic (fear of being in a closed/confined place) () Yes () No

I have metal in my body. () Yes () No If yes, where? _____

Mark an X on the picture where you have pain, numbness or tingling.



Cathy C. Bone
 Patient Signature

[Signature]
 Physician Signature

8/6/07
 Date

SUPV STATEMENT

7-5-07

To Whom This May Concern:

I Richard Thompson was standing at the service desk in the shop when Cathy Bone came in to work on 7-3-07. She clocked in and then came upstairs and looked into Skret's office then she came back down stairs, looked into the parts room and then she went back outside. It appeared to me that she was looking for Skret. The whole time she was wearing shades. Then she came back inside and asked me was Skret's office open. That she needed to talk to me about something. We came We went up to Skret's office so she proceeded to tell me that she had hurt her back last Tuesday which was 6-26-07. I said how did you hurt it. She said she was moving one of the blue pallets so she could wash an area inside of the trailer. She said that she felt something in her back, but she said she thought it was some type of stinger and she could work through it. Then she proceeded to tell me that her son looked at her back and he said that you have a big bruise in the lower part of your back. Then she said that from last night to today it has gotten worse. She also said that when she walks one of her legs hurts from the pain in her back. She did say on her way to work she ran over something in the road and pulled over to see was one of her tires was damaged and it was so she

said she had to change her tire on her truck.
I did noticed that she had been crying and also she
was doing some crying in the conversation we had.
I told her that I needed to call Skeet but
he was gone to a funeral. I called him and told me
to call H.R. to get direction on what do. Then I
called H.R. and I talked Cheryl she told me to tell
her that to go to Occupational Health Inc.

Robert Thompson

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No: 2008-CP-32-2876

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SC Court of Appeals

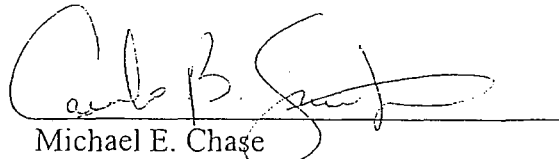
Cathy C. Bone, ...Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

- I. IS THE CIRCUIT COURT ORDER CHALLENGED ON APPEAL IMMEDIATELY APPEALABLE BECAUSE IT INVOLVES THE MERITS AND AFFECTS APPELLANTS' SUBSTANTIAL RIGHTS?
- II. DID THE CIRCUIT COURT ERR IN ITS DETERMINATION THAT THE DENIAL OF BENEFITS WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE?

STATEMENT OF THE CASE

Respondent Cathy C. Bone ("Respondent") 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. Appellants Lexington 5 D, d/b/a US Food Service, Inc. ("Employer") and GAB Robins North America, Inc. ("Carrier") (collectively "Appellants") filed a timely Form 51, Employer's Answer, in which they denied Respondent's claim and asserted all applicable defenses. Specifically, Appellants denied the claim given that it was not reported until July 3, 2007, the same day Respondent 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 that Respondent was not credible, failed to meet her burden of proof, and was not entitled to benefits.

Respondent 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. 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. Respondent 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 Respondent 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. This appeal followed.

STATEMENT OF THE FACTS

Respondent is a fifty year old high school graduate. (R. p. 57, lines 3-16) Her prior work experience includes grass cutting, cleaning, and light mechanical work. (R. p. 57, lines 17-23) Respondent started work with Employer on July 18, 2005, where she was employed to use pressurized hoses to clean 48 foot trailers and 18 wheeler trucks. (R. p. 58, lines 1-2, 6-8) This process involves moving a metal stairway on wheels to the rear of each trailer and pulling the long, pressurized hoses into and out of the trailers in order to clear the interior. (R. p. 58, lines 6-8; p. 76, lines 1-25) From time-to-time, Respondent would move pallets located inside the trailers in order to clean underneath them. (R. p. 58, lines 6-8; p. 76, lines 1-25)

Respondent claims she sustained injury to her lower back on June 26, 2007, when she stepped in to wash a trailer, observed and bent to move two pallets inside the trailer, and, as she bent to move the pallets, felt a "pinch" in her back. (R. p. 58, lines 14-23) She continued to work, completed her shift, and did not report the injury to her superiors. (R. p. 60, line 19 – p. 61, line 3) Respondent took a pre-scheduled day off the next day, June 27, 2007, to attend an unrelated medical appointment in Charlotte, North Carolina. (R. p. 61, lines 11-18) Respondent worked the following day, Thursday, June 28, 2007, at which time her back "felt okay." (R. p. 62, lines 1-11) On Sunday, July 1, 2007, Respondent told co-worker Tony Summers that her "legs hurt" before going on to work a complete shift. (R. p. 62, lines 11-14)

Respondent informed her supervisor Richard Thompson of her back injury for the first time on July 3, 2007. (R. p. 62, line 24 – p. 63, line 2; p. 74, line 25 – p. 75, line 11; p. 84, line 15 – p. 87, line 9) Respondent was crying at the time she informed Mr.

Thompson of back injury that allegedly occurred on June 26, 2007. (R. p. 74, lines 22-24; p. 83, lines 20-25; p. 86, lines 10-12; p. 87, lines 4-9) At the same time, she also told Mr. Thompson that she had a flat tire prior to arriving at work on July 3, 2007. (R. p. 64, lines 1-7) She denied that she injured herself changing the tire and contended that an unidentified "good Samaritan" changed the tire for her. (R. p. 64, line 8 – p. 65, line 10)

STANDARD OF REVIEW

South Carolina Code Ann. § 1-23-380 establishes the “substantial evidence” rule as the standard of review for decisions of the Workers’ Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Pursuant to that rule, the circuit court reviewing an award or denial of benefits may only reverse or modify an agency’s decision if the findings, rulings, and conclusions of the administrative agency are “clearly erroneous in view of the reliable and substantive evidence of the whole record.” *Id.*, 276 S.C. at 135, 276 S.E.2d at 306. Substantial evidence is defined as:

Such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be enough to justify, if the trial went to a jury, refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. This is something less than the weight of the evidence and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.

Id., 276 S.C. at 135-136, 276 S.E.2d at 307.

Appellate courts are not at liberty to substitute their view of the evidence for that rendered by the Commission. Rather, “[t]he Circuit Court’s role is appellate only, and is limited to deciding whether the Commission’s decision is not supported by substantial evidence or is controlled by some error of law.” *Rogers v. Kunja Knitting Mills Co.*, 312 S.C. 377, 440 S.E.2d 401 (Ct. App. 1994). When reviewing an appeal from the Workers’ Compensation Commission, the appellate court may not weigh the evidence or substitute its judgment for that of the Full Commission as to the weight of the evidence and questions of fact. *Farrell v. Jerry’s, Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-895 (2006).

Moreover, “the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.” *Palmetto Alliance, Inc. v. S.C. Pub. Serv. Comm’n*, 282 S.C. 430, 432, 319 S.E.2d 695, 696 (1984). In workers’ compensation cases, the Appellate Panel is the ultimate finder of fact. *Shealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). When the evidence is conflicting over a factual issue, the findings of the Appellate Panel are conclusive. *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599 S.E.2d 604, 611 (Ct. App. 2004). The final determination of witness credibility and the weight to be accorded evidence is reserved for the Appellate Panel. *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005).

ARGUMENT

I. THE CIRCUIT COURT ORDER CHALLENGED ON APPEAL IS IMMEDIATELY APPEALABLE BECAUSE IT INVOLVES THE MERITS AND AFFECTS APPELLANTS' SUBSTANTIAL RIGHTS.

Substituting its own view of the substantial record evidence to the contrary, the court determined, as a matter of law, that Respondent sustained a compensable injury, leaving only the amount of those benefits to be determined by the Commission on remand. Such an order clearly reaches the merits and affects Appellants' substantial rights. Indeed, Respondent concedes "[i]t is true in the instant case the circuit court has made a final determination that [Respondent] has sustained a compensable injury." (Resp.'t's Reply in Support of Mot. to Dismiss p. 3) Nevertheless, Respondent moved to dismiss the instant appeal on the basis that the circuit court's order is "not directly appealable." (Resp.'t's Mot. to Dismiss p. 2) For the reasons stated herein, Respondent's assertion is incorrect, and this Court should exercise its appellate jurisdiction.¹

A. The Circuit Court Order Affects The Merits.

Appellants agree that South Carolina "adheres to the final judgment rule. Accordingly, subject to certain exceptions, an appeal lies only from a final judgment." *Brunson v. American Koyo Bearings*, 367 S.C. 161, 165, 623 S.E.2d 870, 872 (Ct. App. 2005), *reh'g denied* (Jan. 19, 2006), *citing Hagood v. Sommerville*, 362 S.C. 191, 194-195, 607 S.E.2d 707, 708 (2005); S.C. Code Ann. § 14-3-330(1); Rule 201(a), SCACR. Appellate review of interlocutory orders is permitted, however, where the challenged

¹ In its Order filed December 21, 2009, this Court concluded that this "appeal is to proceed" and further instructed the parties "to raise the issue of appealability as the first issue in the parties' briefs." (December 21, 2009, Order p. 1)

order “involve[es] the merits . . . [or] affect[s] a substantial right.” *Id.*, citing S.C. Code Ann. § 14-3-330(1) and (2). Moreover,

[a]ppeals from administrative bodies, such as the Workers’ Compensation Commission, follow the same rules, such that an appeal will not lie from an interlocutory order of the Commission unless the order affects the merits or deprives the appellant of a substantial right.

Id., citing *Green v. City of Columbia*, 311 S.C. 78, 79-80, 427 S.E.2d 685, 687 (Ct. App. 1993).

The challenged order absolutely affects the merits of the underlying action. Specifically, the circuit court’s order overturns the factual findings of both 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.” (R. p. 5) Thus, the circuit court order makes a conclusive finding as to compensability, and the only remaining task for the Commission on remand is to make a final determination of the amount of benefits owed and payable to Respondent. To dismiss the appeal of such an order as interlocutory and not immediately appealable would be inconsistent with a well-developed body of law addressing the finality of orders and unfairly deprive Appellants of the opportunity for meaningful appellate review.

Respondent incorrectly relies on *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994), in support of her argument that this Court should not exercise appellate jurisdiction to consider the circuit court’s order awarding benefits. The holding of *Montjoy*, however, actually supports appellate review. In that case, the court considered respondent’s motion to dismiss the appeal of an order remanding a case to the Commission. 316 S.C. at 52, 446 S.E.2d at 618. Without explaining the facts or bases of

the challenged order, the court denied review, noting it has “consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable.” *Id.* This holding, in fact this very quotation, derives from and is explained by *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). In *Owens*, the court provided greater insight into the content and interlocutory nature of the order challenged on appeal:

The appellant Canal Wood Corporation appeals from a circuit order remanding this workers’ compensation case *for the taking of additional testimony on the existence of an employer-employee relationship*. The order of the circuit court *does not involve the merits* of the action. It is therefore interlocutory and not reviewable by this Court for lack of finality.

Id. (emphasis added)

In reaching its conclusion, the *Owens* Court relied on propositions of law addressed in *Hunt* and *King v. Singer Co.*, 276 S.C. 419, 279 S.E.2d 367 (1981). Like the court in *Owens*, the *King* Court noted the lack of finality of the challenged order:

This appeal is from a circuit court order in an action for workmen’s compensation for alleged disability caused by an occupational disease. The circuit court reversed the Industrial Commission’s determination that the single commissioner had erred by failing to submit the case to a Medical Board. *Because the determination of the Commission is a matter not affecting the merits of the cause of action, its decision is unreviewable by either the circuit court or this Court for lack of finality.*

King, 276 S.C. at 420, 279 S.E.2d at 367 (citations omitted, emphasis added). The *King* holding relies, in turn, on *Chastain v. Spartan Mills*, 228 S.C. 61, 88 S.E.2d 836 (1967) (providing examples of final orders and noting that an order *that neither allows nor denies compensation* is not final and, therefore, not immediately appealable); *Cord v.*

E.H. Hines Construction Co., 220 S.C. 356, 67 S.E.2d 677 (1951) (allowing appeal of an intermediate order entered prior to a final judgment but nevertheless affecting the merits), and S.C. Code Ann. § 14-3-330 (1976).

Similarly, *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000), is not controlling. There, the circuit court issued a form order remanding the case back to the Commission. Neither party filed a Rule 59(e) motion to reconsider the form order, and the trial court's subsequent attempt to issue a more detailed written order was rendered a nullity because it no longer retained jurisdiction over the matter. *Id.* at 127-128, 530 S.E.2d at 493-494. Thus, despite the lack of "adequate findings of fact or conclusions of law to enable the commissioner to know exactly what acts he was to perform on remand. . . .," the original remand order constituted a final order that was not subject to immediate appellate review. *Id.* Similarly, the reader is not provided any information regarding the order on appeal in the one page opinion in *Montjoy*, 316 S.C. 52, 446 S.E.2d 618 (1994), from which to extrapolate any useful comparison to the order challenged in this case. Rather, *Montjoy* simply stands as a recitation of the general rule that under ordinary circumstances, an interlocutory order is not subject to immediate appellate review.

Respondent's reliance on the supreme court's order in *Magaha v. Greenwood Mills, Inc.*, S.C. Sup. Ct. Order dated February 19, 2009, (unpublished) is likewise misplaced. As an initial matter, the order is unpublished and, therefore, has "no precedential value and should not be cited except in proceedings in which [it is] directly involved." Rule 268(d)(2), SCACR. Second, the order addressed in *Magaha* is distinguishable from the one on appeal here. In *Magaha*, the trial court reversed the

Commission's determination that the claimant provided timely notice of a potential claim. Thus, the challenged order did not reach the merits of the underlying claim itself, but rather claimant's ability to pursue her claim. In contrast, the order on appeal in these proceedings actually makes a conclusive finding that goes directly to the merits; to wit, that Respondent is entitled to benefits as a matter of law.

In contrast to *Montjoy*, *Leviner*, and *Magaha*, this Court's holdings in *Canteen v. McLeod Regional Medical Center*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009), *reh'g denied* (Sept. 17, 2009); *Foggie v. General Electric Co.*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008); *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), *reh'g denied* (Dec. 15, 2005), *cert. denied* (Jan. 31, 2007); and *Green v. City of Columbia*, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993), are consistent with the underlying rationale favoring immediate review of orders affecting the merits. In each of those cases, the litmus test for appealability was whether or not the challenged order affected the merits of the action and was, therefore, subject to immediate appellate review.

Canteen and the cases cited therein establish the common thread that the order challenged on appeal must finally determine a contested issue on the merits in order to be subject to immediate appeal. For example, in *Green*, the Full Commission reversed the single commissioner's unchallenged ruling that claimant would be required to elect between claims available to the claimant pursuant to the Act. 311 S.C. at 79, 427 S.E.2d at 686. Employer appealed to the circuit court, which dismissed the appeal as interlocutory and not appealable, and this Court reversed. *Id.* at 80, 427 S.E.2d at 687. In its opinion, the appellate court determined that because the Commission's order "had the

effect of finally determining a substantial matter forming part of a defense [employer] had available, ... the full commission's action affected the merits and was immediately appealable." *Id.* Similarly, this Court determined in *Brown* that an order finding that employee's smoking habit contributed to his disability constituted a final determination of the issue on the merits and was, therefore, immediately appealable. 366 S.C. at 387-88, 622 S.E.2d at 551.

For all of these reasons, reliance on *Montjoy*, *Leviner*, and *Magaha* as controlling in this case is misplaced. At most, these cases stand for the general rule barring immediate appellate review of an order remanding workers' compensation matters for further proceedings. Respondent's analysis simply disregards well-established precedent that counsels in favor of review where the challenged order actually reaches the merits of the underlying action.² In contrast, the holdings in *Owens*, *King*, and *Hunt*, as well as the parameters set forth in S.C. Code Ann. § 14-3-330, all militate in favor of appellate review. Here, the challenged order is by its very nature immediately appealable because it determines a question necessarily affecting the merits (*e.g.*, whether substantial evidence supports an award of benefits) and makes a final determination that cannot be adequately addressed after a final administrative agency decision (*e.g.*, that Appellants' defenses notwithstanding, Respondent is entitled to benefits).

² Contrary to Respondent's assertion, there is no dispute that this Court may review interlocutory orders that affect the merits and involve the substantial rights of a party. Accordingly, there is no "issue of significant public interest or...legal principle of major importance" to warrant certification pursuant to Rule 204(b), SCACR. *See* Resp.'t's Reply p. 5.

B. The Circuit Court Order Implicates Appellants' Substantial Rights.

Respondent's contention that "[a]n appeal ought not be deemed inadequate simply because it will come later. . . ." is so overly simplistic as to merit no serious consideration by this Court. (Resp.'t's Reply in Support of Mot. to Dismiss p. 5) Barring immediate appellate review of the circuit court order, Appellant will be required to pay large sums of money to Respondent the moment the Commission fixes the amount of benefits due and payable, regardless of the likelihood of ultimate success on a later challenge to that award on appeal.

Under well-settled principles of South Carolina Workers' Compensation law, a claimant who has been awarded benefits is entitled to immediate payment of those benefits during the pendency of any appeal of the award. *See, e.g., Godfrey v. Mills Mill No. 2*, 234 S.C. 401, 108 S.E.2d 587, 588 (1959), *citing Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 444, 88 S.E.2d 611 (1955) (affirming order that periodic payments be made during the pendency of appeal from the award notwithstanding the fact that the award was ultimately reversed); *see also* S.C. Code Ann. § 42-17-60 ("In case of an appeal from the decision of the commission on questions of law, the appeal does not operate as a supersedeas and, after that time, the employer is required to make weekly payments of compensation . . . until the questions at issue have been fully determined in accordance with the provisions of this title. Interest accrues on an unpaid portion of the award at the legal rate of interest. . . ."); S.C. Code Ann. § 42-17-70 (judgment on award); S.C. Code Ann. §§ 42-9-90 and -240 (penalties and interest).

Because the circuit court order affects the merits of the underlying claims and defenses, and because it necessarily implicates Appellants' substantial rights, it is

immediately appealable. For these reasons, as explained herein, this Court should exercise its appellate jurisdiction to reverse the erroneous circuit court order challenged on appeal.

II. THE CIRCUIT COURT ERRED IN ITS DETERMINATION THAT THE DENIAL OF BENEFITS WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

In its order reversing the denial of benefits in this case, the circuit court determined that “the denial of the award was not supported by substantial evidence.” (R. p. 3) Stated differently, the circuit court determined the record showed “no evidence” to support the finding that Respondent did not sustain a work-related injury on June 26, 2007, along with an “abundance of evidence” that it did occur. These findings constitute error, however, because they deviate from the deferential standard of review afforded the factual findings of the Commission, depend exclusively upon Respondent’s self-serving statements regarding the injury, and overlook the binding effect of the hearing commissioner’s determination that Respondent’s testimony on these issues was not credible.

A. The Circuit Court Erred In Its Conclusion That No Substantial Evidence Merits The Denial Of Benefits In This Case.

As this Court has observed, “the Commission is the sole fact-finder in workers’ compensation cases, and . . . any questions of credibility must be resolved by the Commission.” *Fishburn v. ATI Systems, Intern.*, 384 S.C. 76, 90, 681 S.E.2d 595, 602 (Ct. App. 2009), *quoting Smith v. S.C. Dep’t of Mental Health*, 329 S.C. 485, 501, 494 S.E.2d 630, 638 (Ct. App.1997). Furthermore, “[i]t is logical for the [Appellate Panel], which did not have the benefit of observing the witnesses, to give weight to the Hearing

Commissioner's opinion." *Id.*, quoting *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 64, 156 S.E.2d 318, 321 (1967). In this case, the single commissioner heard live testimony from Respondent and was able to determine what weight, if any, to which her testimony was entitled. Because the commissioner found Respondent not credible, it necessarily follows that her testimony was not entitled to *any* evidentiary weight. It also follows, then, that the circuit court erred in failing to take Respondent's lack of credibility into account when it reversed the orders of the single commissioner and Appellate Panel.³

The "abundant evidence" of a work-related injury on June 26, 2007, as noted by the circuit court, consists of Respondent's self-report of the injury to Richard Thompson, her self-serving reports of the injury to various medical providers, and the report of the injury Respondent provided in a recorded statement to an insurance adjustor on July 12, 2007. (R. p. 3-4) The circuit court's order completely overlooks, however, the binding effect of the single commissioner's specific finding, as affirmed by the unanimous Appellate Panel of the Full Commission, that Respondent was not a credible witness.

In her Decision and Order, Commissioner Barden made the following specific finding of fact:

³ Specifically, the circuit court order notes that "Defendant argues the Single Commissioner did not find Claimant a credible witness. However, that finding goes only to the weight afforded Claimants [sic] testimony and in no way establishes Claimant's injury occurred on July 3." (R. p. 5) While Respondent's lack of credibility may not conclusively establish an injury occurred on July 3, it absolutely defeats Respondent's contention that a work-related injury occurred on June 26. This is especially true where the *only* evidence of a work-related injury came in the form of Respondent's own self-serving, inconsistent, and unbelievable reports, all of which fall far short of creating the "abundance of other evidence" referred to in the circuit court's order. (*Id.*)

The Claimant's testimony is not credible. I based this finding on my observations of the Claimant and on the delivery of her testimony in general. I also specifically note that each time Claimant's counsel asked the Claimant if she injured her back when changing her tire, she looked down when she answered "No."

(R. p. 20-21) This finding was supported in part by inconsistencies in Respondent's disparate versions of how the June 26, 2007, injury allegedly occurred, her delay in reporting the injury, Respondent's ability to continue working despite having sustained an alleged injury, the manner in which she conveyed news of the alleged injury, and her inability to recall key details of the tire changing incident that occurred July 3, 2007 – the same day Respondent reported her alleged June 26 work-related injury to her supervisor.

As noted in the single commissioner's Decision and Order, Respondent delivered inconsistent versions of the injury she allegedly sustained on June 26, 2007. She initially testified *as she bent over* to pick up or move a pallet that she "felt something pinch" in the middle part of her back close to the spine. (R. p. 16; p. 58, line 22 – p. 59, line 1) She later testified that she felt a pinch in her back *as she lifted* pallets to clean underneath them: "I went to pick them up, and when I got into the middle to pick and stand all the way up, that's when I felt the pinch." (R. p. 16; p. 59, lines 7-19) Respondent then completed her shift and did not report the incident to her superiors. (R. p. 16; p. 60, line 19 - p. 61, line 3) It also is undisputed that Respondent did not seek medical attention until July 5, 2007, well after the alleged June 26 injury and after the tire episode on July 3.

Respondent also worked three additional shifts prior to reporting her injury. Specifically, she worked Thursday, June 28, 2007, at which time her back “felt okay.” (R.p. 62, lines 1-11; p. 71, lines 8-13) Respondent was already scheduled to be off the following Friday and Saturday, but worked on Sunday, July 1 and Monday, July 2, 2007. Respondent claims that she told a co-worker named Tony Summers that her “legs hurt” on Sunday, July 1; however, she completed her shift and did not report the injury to anyone else. (R. p. 62, lines 11-14) Even though Mr. Summers was the only person to whom Respondent reported a work-related incident prior to the July 3, 2007, tire event, Respondent elected not to depose Mr. Summers, secure his affidavit, or compel his presence at the hearing before the single commissioner. (R. p. 71, line 11 – p. 72, line 5) As noted by the single commissioner, “Summers’ testimony would have been pivotal since the [Respondent] gave a statement to the insurance adjustor that she specifically told Summers prior to July 3, 2007 that she was hurt. . . .” (R. p. 21; p. 80, line 23 – p. 81, line 1; p. 94-107)

Respondent’s first report of injury to a supervisor occurred on July 3, 2007, when she reported the June 26 event to Richard Thompson. (R. p. 62, line 24 – p. 63, line 2) Respondent, who was crying at the time she spoke with Mr. Thompson, also indicated that her vehicle had a flat tire on the way into work earlier that morning. (R. p. 63, lines 21-23; p. 64, lines 1-7) According to Respondent, a “good Samaritan” helped her change the tire. (R. p. 64, line 9 – p. 65, line 2). She could not identify the person who came to

her aid, did not get his name, could only give the most general description of his physical characteristics, and did not recall the name of the business where she stopped that morning. (R. p. 65, lines 3-4; p. 72, lines 18-22; p. 73, lines 9-15, 20-25) She also denied that she did anything to change the tire other than to hand the lug wrench and jack out of her truck to the mysterious good Samaritan. (R. p. 74, lines 1-7)

The Commission also found it compelling that Appellant did not initially admit to a previous back injury on cross-examination, although the facts of such previous injury alone would not have affected the compensability of her claim. Only when defense counsel confronted Appellant with the specific time period of the previous injury did she then admit to the previous injury. (R. p. 21; p. 77, line 11 – p. 78, line 19) It is noteworthy that in June 2007, Appellant remembered her previous injury while at a physician's office (a visit occurring only four months prior to the date of the hearing), and so it is not the situation of a remote injury being long forgotten. Appellant also received a settlement in the motor vehicle accident which caused the previous injury, another factor which makes the previous injury memorable. (R. p. 22)

In contrast to Respondent's lack of credibility, her supervisor Richard Thompson testified that Respondent told him that she had to "change her tire on the way to work," which he took to mean she changed her own tire that day. (R. p. 84, lines 14-20) Mr. Thompson's testimony also is consistent with the written statement he prepared on July 5, 2007. (R. p. 85, lines 18-24; p. 111-112) Further, when specifically questioned by the commissioner on this point, Mr. Thompson testified that Respondent told him "I had to

change my tire.” (R. p. 85, lines 7-16) In comparison, Respondent’s testimony on this topic was inconsistent at best. When asked on direct examination by her own lawyer if she had told Mr. Thompson that she changed the tire herself, Respondent responded, “I don’t think I did,” which the single commissioner found questionable. Commissioner Barden then asked Appellant, “You don’t think you did?,” to which the Respondent responded, “I’m pretty sure I didn’t tell him that.” (R. p. 66, lines 15-20) The single commissioner found this and other inconsistencies in Respondent’s version of events as “most compelling” in her decision that Respondent failed to meet her burden of proving a work related injury, and the Full Commission unanimously affirmed.

In this instance, the single commissioner was best suited to make determinations regarding the credibility of the witnesses and the context in which their testimony was offered. It necessarily follows that her determinations regarding the weight of the evidence, the demeanor of the witnesses, and their relative credibility or lack thereof, is entitled to great deference. This deference is well-recognized in South Carolina jurisprudence defining the standard of review of factual findings rendered by the Commission. Nevertheless, the circuit court impermissibly substituted its assessment regarding the strength and weakness of the evidence to determine that no substantial evidence supported the denial of benefits. Because the circuit court failed to apply the appropriate standard of review, and because substantial evidence supports the denial of benefits in this case, the order of reversal below must be reversed and the order denying benefits reinstated.

B. The Circuit Court Erroneously Concluded That “Abundant Evidence” Supports An Award Of Benefits.

It is well-established in this State that in order for an injury to be compensable, it must arise out of and in the course of employment. S.C. Code Ann. § 42-1-160(A) (Supp. 2008). An injury arises out of employment “if a causal relationship between the conditions under which the work is to be performed and the resulting injury is apparent to the rational mind, upon consideration of all the circumstances.” *Rodney v. Michelin Tire Corp.*, 320 S.C. 515, 518, 466 S.E.2d 357, 358 (1996). In addition, “[t]he claimant has the burden of proving facts that will bring the injury within the workers’ compensation law, and such award must not be based on surmise, conjecture or speculation.” *Clade v. Champion Labs.*, 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998). In this case, the circuit court’s conclusion that “Claimant sustained a compensable injury” is based on nothing more than Respondent’s own self-serving statements to others regarding how the alleged injury occurred. In light of Respondent’s lack of credibility, along with her failure to adduce any additional evidence or testimony to support her claims, the circuit court’s finding of a compensable injury impermissibly weighs the evidence and reaches a conclusion solely based upon surmise, conjecture, and speculation. For this reason, the Order of Reversal should be reversed and the denial of benefits reinstated.

As previously noted, the only evidence supporting Respondent’s claim for benefits consists of her own self-serving version of events. Moreover, she failed to adduce any admissible testimony or affidavits from the two witnesses who could most effectively prove her case: Tony Summers and the mysterious good Samaritan. Mr. Summers was a co-worker and presumably readily accessible to testify. Similarly,

Respondent testified she recalled where she stopped on the morning of July 3, 2007, and that she believed the mystery good Samaritan worked at that business. Nevertheless, she failed to make any effort to present these individuals at the initial hearing or to secure any other type of sworn testimony or statement from them.

The only other witness to testify, Richard Thompson, directly supported Appellants' contention that Respondent injured herself on July 3, 2007, while changing a tire on her way to work. The single commissioner strenuously questioned Mr. Thompson on the issue of Respondent's report of injury to him on July 3, 2007, and found Mr. Thompson to be a credible witness. In response to the commissioner's questioning, Thompson testified that Respondent testified "I had to change my tire." (R. p. 85, lines 7-16; p. 111-112) Medical documentation submitted at the initial hearing in this matter also supports the inference that Respondent sustained injury while changing her tire on July 3, 2007, rather than on the job on June 26, 2007, as she alleged. For example, on the Intake Form from Columbia Neurosurgical, particularly as to when Appellant's symptoms first appeared, Respondent initially wrote July 3, then changed it to June 26, then also wrote July 3 as well after June 26. (R. p. 6, 23, 108)

It is clear from the record in this case that the single commissioner devoted substantial thought and consideration to the evidence and testimony before determining that Respondent was not credible and that she failed to meet her burden of proof. These findings are further bolstered by the only other witness in the case, as well as the intake form completed in Respondent's own handwriting. It was error for the circuit court to make its own findings regarding the weight of this evidence in order to find a

compensable injury, and its order reversing the denial of benefits in this case must be overturned.

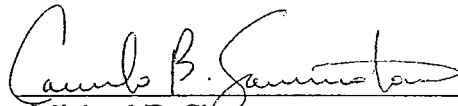
CONCLUSION

For all of the reasons stated herein, the circuit court's Order of Reversal should be reversed, and the Decision and Order denying benefits should be affirmed.

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

May 18, 2010

By:

A handwritten signature in cursive script, appearing to read "Carmelo B. Sammataro", written over a horizontal line.

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In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

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, ... Appellants.

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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court's Order Is Immediately Appealable When the Order Remanded this Case to an Administrative Agency for Further Proceedings and When Review of the Agency's Final Decision Will Provide an Adequate Remedy.
- II. Whether the Appellate Panel of the Workers' Compensation Commission's Decision That Ms. Bone Did Not Sustain a Compensable Injury by Accident Is Clearly Erroneous in View of the Reliable, Probative, and Substantial Evidence in the Record.

STATEMENT OF THE CASE

Respondent Cathy C. Bone initiated this action on August 7, 2007, seeking workers' compensation benefits for what she alleged was a workplace injury. (Form 50). Appellants U.S. Food Service (Ms. Bone's employer) and Indemnity Insurance Company of North America (U.S. Food Service's insurance carrier) (collectively "U.S. Food Service") opposed Ms. Bone's request for workers' compensation benefits. (Form 51). Put simply, U.S. Food Service took issue with Ms. Bone's version of the circumstances surrounding her injury.

According to Ms. Bone, she injured her back while moving some shipping pallets at work, worked the remainder of her shift, and worked two additional shifts over the next few days. See, e.g., (Hearing Commissioner Transcript pp.7-11). On the way to work early in the next week, Ms. Bone experienced a flat tire and according to her, a stranger assisted her in changing the tire after she supplied him with the tools to do so. (Hearing Commissioner Transcript pp.13-14). That same day – which was the seventh day after Ms. Bone alleged that she injured her back – Ms. Bone reported her back injury to a supervisor. (Hearing Commissioner Transcript pp.14-15).

U.S. Food Service argued that this recitation was false and that Ms. Bone had in fact

not been injured while at work the previous week. See, e.g., (Hearing Commissioner Transcript pp.4-5). According to U.S. Food Service's theory of the case, Ms. Bone injured her back while changing her own flat tire. *Id.*

A hearing commissioner of the workers' compensation commission conducted a hearing in the case on November 5, 2007, and in an order filed February 11, 2008, the hearing commissioner denied Ms. Bone's claim for benefits. (Hearing Commissioner Order). Ms. Bone requested that an appellate panel of the commission review the hearing commissioner's decision, (Form 30), and the appellate panel heard Ms. Bone's appeal on May 29, 2008. (Appellate Panel Order). In an order dated June 19, 2008, the appellate panel affirmed the hearing commissioner's decision. *Id.*

Ms. Bone appealed the commission's decision to circuit court, (Appeal from Workers' Compensation Commission dated July 9, 2008), and the circuit court heard Ms. Bone's appeal on March 9, 2009. (Circuit Court Transcript). In an order dated March 26, 2009, the circuit court reversed the commission's decision and found that the evidence in the record established that Ms. Bone injured her back while moving pallets at work. (Circuit Court Order). Because the circuit court found that the evidence showed Ms. Bone's injury was a compensable accident, the court remanded the case to the commission. U.S. Food Service filed and served a notice of appeal of the circuit court's order on April 29, 2009.

ARGUMENTS

I. The Circuit Court's Order Is Not Immediately Appealable Because the Order Remands this Case to an Administrative Agency for Further Proceedings and Because Review of the Agency's Final Decision Will Provide an Adequate Remedy.

In this case, the workers' compensation commission determined that Ms. Bone was not entitled to benefits for what she alleged was a back injury she suffered at work. The circuit court reversed this decision and remanded the case to the commission finding "[t]he evidence of record shows [that Ms. Bone] sustained a compensable injury." (Circuit Court Order p.4). The first question presented in this case is whether this order is immediately appealable.

Relying on the general appealability statute, presently codified at S.C. Code Ann. § 14-3-330, U.S. Food Service contends that the circuit court's order may be immediately appealed if it involves the merits or affects a substantial right. To bolster this argument, U.S. Food Service points to several recent decisions from this Court and five relatively older decisions from the South Carolina Supreme Court.

This argument should not be persuasive. The Administrative Procedures Act controls when a party may seek judicial review of an agency's final decision in a contested case, and the Act limits review of circuit court orders in administrative cases to final judgments. See S.C. Code Ann. § 1-23-390 (Supp. 2009). Much of the law on which U.S. Food Service relies is based on law which predates the enactment of the Administrative Procedures Act, and recent Supreme Court cases strongly suggest that the appealability of circuit court decisions should not be judged by the general appealability statute (§ 14-3-330). These cases

instead stand for the rule that pursuant to the APA, an order from the circuit court remanding a case to an administrative agency is not immediately appealable.

A. Statutory History of Administrative Appeals.

It may be helpful to begin by tracing the evolution of the statutory law governing appeals from the workers' compensation commission as well as appeals generally. From as far back as the 1942 Code of Laws through the 1962 Code, several statutes were relevant to the process of seeking both primary and secondary judicial review of decisions from the workers' compensation commission; referred to at that time as the "South Carolina Industrial Commission." See, e.g., 1952 Code § 72-7. The statute for the first level of judicial review provided that a party aggrieved by the commission's final order in a contested case could seek judicial review in the court of common pleas of the county where the alleged accident occurred. The scope of this review was "for errors of law under the same terms and conditions as govern appeals in ordinary civil cases." See 1962 Code § 72-356; 1952 Code § 72-356; 1942 Code § 7035-63. For review beyond the circuit court level, the relevant statute was the statute dealing with Supreme Court's appellate jurisdiction in law cases. See 1962 Code § 15-123; 1952 Code § 15-123; 1942 Code § 26 (titled "Jurisdiction of the Supreme Court"). The 1976 Code was organized similarly, with S.C. Code Ann. 42-17-60 (1977) governing appeals from the commission to circuit court and § 14-3-330 governing the Supreme Court's appellate jurisdiction in law cases.

The Legislature passed the Administrative Procedures Act in two iterations; first in

1976 and next in 1977¹, and these enactments added to this statutory landscape. Section 14-3-330 of course still governed the Supreme Court's appellate jurisdiction in law cases, but the 1977 version of the APA added § 1-23-380 to the Code. Act. No. 176, 1977 S.C. Acts 391, 405. This statute governed the first level of judicial review after a party had exhausted his or her administrative remedies. Of course, § 42-17-60 remained in the Code as a specific statute dealing with the first level of judicial review in workers' compensation cases. S.C. Code Ann. § 42-17-60 (1977).

Section 1-23-380 provided for review of agency actions in circuit court, and the statute generally limited the right of review to a party aggrieved by an agency's *final decision*. S.C. Code Ann. § 1-23-380 (1986). The statute included an exception allowing immediate judicial review of preliminary and intermediate agency decisions "if review of the final agency decision would not provide an adequate remedy." *Id.* The Legislature amended this statute in 2006 and that amendment moved the first level of judicial review of final agency decisions from the circuit court to this Court. See Act No. 387, 2006 S.C. Acts 3093, 3098-99. A similar amendment to the specific statute dealing with workers' compensation cases (§ 42-17-60) followed the next year. Act No. 111, 2007 S.C. Acts 599, 630-31.

The APA next added to the Code § 1-23-390 governing appeals in administrative cases beyond the first level of judicial review. Act. No. 176, 1977 S.C. Acts 391, 406. In its originally enacted form, this statute provided that a party aggrieved by the circuit court's final order in an administrative case could seek review in the Supreme Court. S.C. Code

¹The 1976 version can be found at Act. No. 671, 1976 S.C. Acts 1758; and the 1977 version at Act No. 176, 1977 S.C. Acts 391.

Ann. § 1-23-390 (1986). The Legislature amended this statute in 1999 to provide that the aggrieved party could seek review of the circuit court's final decision "by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases." See Act No. 55, 1999 S.C. Acts 131, 136. This amendment occurred as a part of the act which altered appellate procedure *from* the process where all notices of appeal were filed in the Supreme Court and cases were thereafter referred to this Court *to* the current process where notices of appeal are filed in this Court if this Court possesses jurisdiction over the appeal. See Act. No. 55, 1999 S.C. Acts 131, 140 (amending S.C. Code Ann. § 14-8-260 to its current form). Because the current statutory scheme provides that this Court conducts the first-level review of an administrative agency's final decision in a contested case, section 1-23-390 accordingly now provides that an aggrieved party may obtain review of a final judgment of the circuit court *or this Court* "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. 2009).

B. History of Case Law on Appealability.

As U.S. Food Service's brief correctly observes, (App.Br.pp.8-12), Ms. Bone's primary authorities for her argument that the order at issue is not immediately appealable are the cases *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 the South Carolina Supreme Court's unpublished order in the case *Magaha v. Greenwood Mills, Inc.*, (S.C. Sup. Ct. filed Feb. 19, 2009). Ms. Bone is acutely aware that memorandum opinions and unpublished orders have no precedential value "and should not be cited except in

proceedings in which they are directly involved.” Rule 268(d)(2), SCACR. Ms. Bone respectfully requests, however, that this Court find the instant case presents a situation where the unpublished order should be discussed. As this analysis will describe, the *Magaha* case is valuable in that it exhibits the diverging approaches the Supreme Court and this Court are adopting with respect to the standard for judging the appealability of circuit court orders which remand a case to an administrative agency for further proceedings.

The South Carolina Supreme Court’s recent pronouncements in this area have not been equivocal. As U.S. Food Service correctly notes, the Supreme Court’s *Montjoy* decision is not lengthy. The only background offered in the decision is that “[t]his appeal is from an order of the circuit court remanding this case to the Workers’ Compensation Commission.” 316 S.C. at 52, 446 S.E.2d at 618. The court’s analysis consists of a citation to the APA’s statute allowing for Supreme Court review of circuit court orders (§ 1-23-390) and concludes “[a]ccordingly, 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.

The court provided some more context for its decision in the *Leviner* case. Also a workers’ compensation case, in *Leviner* the commission determined that the injured worker had reached maximum medical improvement and awarded the worker disability benefits. 339 S.C. at 493, 530 S.E.2d at 127. In a form order containing no analysis or reasoning, the circuit court reversed and remanded the case to the commission. *Id.* at 493, 530 S.E.2d at 127. Citing only *Montjoy*, the Supreme Court instructed that the circuit court’s form order, “[w]hile final, [] was not directly appealable since it remanded the matter to the single

commissioner for further proceedings.” *Leviner*, 339 S.C. at 128, 530 S.E.2d at 494. The rule of *Montjoy* and *Leviner* can be stated simply: A circuit court order remanding a case to an administrative agency for further proceedings is not immediately appealable. There is no reasonable dispute that this is what the language of these cases say.

To support its argument that an interlocutory order from the circuit court remanding a case to an administrative agency may be immediately appealed, U.S. Food Service looks behind *Montjoy*’s language and relies on the cases *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984), *Hunt v. Witt*, 279 S.C. 343, 306 S.E.2d 621 (1983), *King v. Singer Company*, 276 S.C. 419, 279 S.E.2d 367 (1981), *Chastain v. Spartan Mills*, 228 S.C. 61, 88 S.E.2d 836 (1955), *Cord v. E.H. Hines Construction Co.*, 220 S.C. 356, 67 S.E.2d 677 (1951), and several recent decisions from this Court. See (App.Br.pp.8-11). This analysis is based on the fact that the *Montjoy* opinion cites both *Owens* and *Hunt* as authority for the proposition that “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,” see *Montjoy*, 316 S.C. at 52, 446 S.E.2d at 618; on the fact that *Owens* and *Hunt* cite *King* for the same proposition; and on the fact that *King* relies on *Chastain* and *Cord* as authority for this same proposition. Taking the fact that each of these cases expressly recite the “involve the merits” language in announcing that the orders under appeal were not immediately appealable interlocutory orders, U.S. Food Service argues that the rubric to judge immediate appealability in this area remains the traditional § 14-3-330 analysis which is that an interlocutory order is nevertheless immediately appealable if the order involves the merits or affects a substantial right.

Ms. Bone will concede that *Owens*, *Hunt*, *King*, *Chastain*, and *Cord* say precisely what U.S. Food Service says they say. Specifically, *Owens* instructs that the order there is not appealable because it does not involve the merits, 281 S.C. at 492, 316 S.E.2d at 385; *Hunt* says the same thing, 279 S.C. at 343, 306 S.E.2d at 622; and *King* provides a similar rule and cites directly to § 14-3-330 of the Code. 276 S.C. at 420, 279 S.E.2d 367.

But just as *Montjoy* and *Leviner* do not contain any substantial analysis, *Owens*, *Hunt*, and *King* do not contain the weight of analysis supporting the rules those cases announce. That heavy lifting is found in the cases *Chastain v. Spartan Mills* and *Cord v. E.H. Hines Construction Company*. The *Chastain* opinion instructs that because the workers' compensation appeal statute then in effect (§ 72-356 of the 1952 Code) provided that appeals in the court of common pleas were "under the same terms and conditions as govern appeals in other civil actions," the circuit court could not hear appeals of interlocutory orders unless those orders involve the merits or affect a substantial right. 228 S.C. at 65, 88 S.E.2d at 837 (citing *Cord*, 220 S.C. at 356, 67 S.E.2d at 677). The court then discussed what types of administrative orders were not and would never be reviewable, and instructed that appeals in compensation cases would generally be restricted to final orders. *Chastain*, 228 S.C. at 65-67, 88 S.E.2d at 837-88.

The first problem with using *Owens*, *King*, *Chastain*, and *Cord*, as the measuring stick for appealability is that they all pre-date *Montjoy* and *Leviner*, and neither *Montjoy* nor *Leviner* contain the "involve the merits" language which was so characteristic of the Supreme Court's earlier decisions. The rule of *Chastain* and *Cord* came by way of an analysis of what types of intermediate agency orders could be appealable, and that standard

is now supplied by § 1-23-380 which limits immediate review of an agency's preliminary, procedural, or intermediate ruling "if review of the final agency decision would not provide an adequate remedy." S.C. Code Ann. § 1-23-380 (Supp. 2009). After the passage of the APA, the statutes *Chastain* and *Cord* analyze no longer apply in this area.

The conclusion that §§ 1-23-380 and -390 provide the exclusive guideposts in this area is bolstered by the well-established principle that a statute dealing with a specific subject in a more detailed way will prevail over a statute which deals with a similar general subject more broadly. See, e.g., *Wilder v. S.C. State Hwy. Dep't*, 228 S.C. 448, 454-55, 90 S.E.2d 635, 638 (1955); see also Act. No. 387 § 53, 2006 S.C. Acts 3093, 3131 ("This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling.").

In this vein, it may also be helpful to observe that the Supreme Court in *Montjoy* did not cite § 14-3-330 in its appealability analysis; it cited § 1-23-390. *Montjoy*, 316 S.C. at 52, 446 S.E.2d at 618. The *Montjoy* court did this despite the fact that the motion to dismiss in that case relied expressly on § 14-3-330 and its "involving the merits or affecting a substantial right" analysis.² *Leviner* similarly does not contain reference to § 14-3-330. *Leviner*, 339 S.C. at 494, 530 S.E.2d at 128. If the Supreme Court is using § 14-3-330 and its "involve the merits" or "affect a substantial right" language to judge the appealability of

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The motion to dismiss in *Montjoy* is available on microfilm in the Supreme Court library. See *Stanley Smith & Sons, Inc. v. Dumas*, 315 S.C. 30, 33, 431 S.E.2d 595, 596 (Ct. App. 1993) (where this Court took notice of the contents of the appellate record in a separate and unrelated case).

these orders, it is not citing that statute or terminology in its orders.

The second problem with U.S. Food Service's argument is that it cannot be squared with the Supreme Court's action in *Magaha v. Greenwood Mills*. In *Magaha*, the commission determined that Ms. Magaha had failed to prove that she suffered a compensable injury and failed to give notice to her employer of having sustained an injury. Op. No. 2008-UP-244 (S.C. Ct. App. filed Apr. 24, 2008) (slip op. at 3). By way of background, the Workers' Compensation Act requires an injured employee to give his or her employer notice of a job-related accident, and the failure to give notice is a bar to an injured worker's claim for benefits. See S.C. Code Ann. § 42-15-20 (Supp. 2009). The circuit court in *Magaha* reversed the commission's decision and found as a matter of law that Ms. Magaha had met the statutory notice requirement; and the court accordingly remanded the case to the commission for further proceedings. *Id.*, slip op. at 4-5. Distinguishing *Montjoy* from its precedent based ultimately on *Chastain* and *Cord*, this Court held – in an unpublished opinion – that the order was immediately appealable. *Id.*, slip op. at 6.

After the employer petitioned for certiorari, the Supreme Court vacated this Court's unpublished opinion. *Magaha v. Greenwood Mills, Inc.*, (S.C. Sup. Ct. filed Feb. 19, 2009). The Supreme Court cited only *Montjoy* and instructed that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable. *Id.*

The analysis this Court undertook in *Magaha* is the same analysis it went through in *every one* of its post *Montjoy* and *Leviner* decisions on which U.S. Food Service relies. See *Canteen v. McLeod Regional Medical Center*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009);

Foggie v. General Electric Company, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008); and *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005). Those cases rely expressly on *Green v. City of Columbia*, a decision from this Court which draws from *Chastain's* pre-APA analysis. *Green*, 311 S.C. 78, 79-80, 427 S.E.2d 685, 687 (Ct. App. 1993) (citing *Chastain v. Spartan Mills*, 228 S.C. 61, 88 S.E.2d 836 (1955)). It is admittedly an analysis that the Supreme Court used in at least three post-APA cases. See *Owens*, 281 S.C. at 492, 316 S.E.2d at 385; *Hunt*, 279 S.C. at 343, 306 S.E.2d at 622; and *King*, 276 S.C. at 420, 279 S.E.2d 367. But each of those cases derive their holdings from the analysis in *Chastain v. Spartan Mills* and *Cord v. E.H. Hines Construction Company*; both of which pre-date the enactment of the APA and adopt an analysis that has been abrogated by the provision for review of an agency's preliminary decision contained in § 1-23-380.

This Court's decision in *Green v. City of Columbia* is particularly instructive because there is no meaningful distinction between the order at issue in that case and the order at issue in *Magaha*. The hearing commissioner in *Green* had required the injured worker seeking alternative types of disability awards to elect which type of award he wished to proceed and the appellate panel reversed. 311 S.C. at 79, 427 S.E.2d at 686. The circuit court dismissed the employer's appeal as interlocutory, and this Court reversed. *Id.* at 79-80, 427 S.E.2d at 686-87. This Court reasoned that after the hearing commissioner's ruling the employer could "rely on the fact that it did not have to address the issue of election on review by the [appellate panel]," and that because the appellate panel's reversal and remand "had the effect of finally determining a substantial matter forming part of a defense [the employer] had available," the appellate panel's order "involved the merits" and was immediately

appealable. *Id.* at 80, 427 S.E.2d at 687.

This is identical to the circuit court in *Magaha*'s final decision that Ms. Magaha complied with the Workers' Compensation Act's notice requirement. It similarly is identical to the circuit court's decision in the instant case that Ms. Bone suffered a compensable injury. The orders at issue in *Green*, *Magaha*, and the instant case all would "involve the merits" under a § 14-3-330 analysis, but *Montjoy*, *Leviner*, and *Magaha* all suggest that the Supreme Court is not *using* that analysis.

The only justification Ms. Bone can discern for the Supreme Court's order in *Magaha* is that despite *Montjoy*'s citation to what is ultimately pre-APA law, the Supreme Court's approach to this issue is that a circuit court order remanding a case to an administrative agency is not directly appealable. Where in the past it was reasonable to say that the Supreme Court was applying a § 14-3-330 analysis to this issue, Ms. Bone respectfully submits that conclusion cannot withstand any serious scrutiny.

C. Appeal at Final Judgment Will Provide an Adequate Remedy.

U.S. Food Service argues that postponing the appeal of the circuit court's finding that Ms. Bone suffered a compensable accident will not provide an adequate remedy because Ms. Bone will be entitled to immediate payment of benefits once the commission enters its final decision in this case. (App.Br.p.13). This argument should not be persuasive.

First, if U.S. Food Service prevailed in an appeal of the commission's final decision awarding benefits, U.S. Food Service would be entitled to seek restitution of all benefits paid during the pendency of the appeal. *Moore v. N. Am. Van Lines*, 319 S.C. 446, 447-48, 462 S.E.2d 275, 275-76 (1995). This is because "reversal of a judgment on appeal has the effect

of vacating the judgment and leaving the case standing as if no judgment had been rendered.”
Id. at 448, 462 S.E.2d at 276.

Second, U.S. Food Service’s brief to this Court takes a bit of liberty with Ms. Bone’s reply filing in support of her motion to dismiss. That filing came after U.S. Food Service’s return to the motion to dismiss undertook no discussion of why an appeal after the commission’s final decision would be inadequate, and Ms. Bone’s argument was not simply that “an appeal ought not be deemed inadequate simply because it will come later.” (App.Br.p.13). Ms. Bone specifically argued that in a review of the commission’s final decision, this Court would absolutely be able to fully review the circuit court’s intermediate ruling that Ms. Bone sustained a compensable injury. (Reply pp.4-5). U.S. Food Service has now offered an argument as to the adequacy of a belated appeal, but in light of the *Moore* case, that argument should not be persuasive.

This Court should accordingly reject U.S. Food Service’s argument that a belated appeal of the circuit court’s decision that Ms. Bone suffered a compensable injury will not be adequate.

D. Certification Pursuant to Rule 204(b), SCACR May Be Appropriate.

The heart of this appealability question is whether this Court may review a circuit order remanding a case to an administrative agency, and as the *Canteen*, *Foggie*, *Brown*, and *Magaha* cases demonstrate, this Court has dealt with this question on numerous previous occasions. This Court has endeavored very understandably to analyze the rule of *Montjoy* and *Leviner* by examining the cases cited in those opinions and reading those cases in

harmony with one another. See, e.g., *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 386-88, 622 S.E.2d 546, 551 (Ct. App. 2005). Although the Supreme Court's order in the *Magaha* case is unpublished, it strongly suggests that this approach is not the proper one.

Ms. Bone requested that the Court consider certification of this question to the Supreme Court under Rule 204(b), SCACR, because the appropriate standard for determining the appealability of orders in administrative cases is an important legal issue affecting docket management issues in this Court and in administrative agencies. The instant case is following the same track as the *Magaha v. Greenwood Mills* case. After the appellant in that case filed its notice of appeal, Ms. Magaha filed a motion to dismiss the appeal citing *Montjoy* and *Leviner*. This Court denied the motion to dismiss, held that the order was immediately appealable, and after two years of merits briefing, rehearing briefing, and briefing on a request for a writ of certiorari, the Supreme Court vacated this Court's unpublished opinion and cited *Montjoy* for the proposition that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not immediately appealable.

Neither this Court's resources nor the time and efforts of the parties are served by playing out this same dispute over a similar timeline. That justification drove Ms. Bone to ask that this Court consider Rule 204(b) certification in her motion to dismiss and in her reply in support of the motion.

II. Whether the Appellate Panel of the Workers' Compensation Commission's Decision That Ms. Bone Did Not Sustain a Compensable Injury by Accident Is Clearly Erroneous in View of the Reliable, Probative, and Substantial Evidence in the Record.

U.S. Food Service argues that the circuit court erred when it reversed the commission's decision that Ms. Bone failed to meet her burden of proving that she sustained a work-related accident. This Court should disagree.

On review of a decision of the workers' compensation commission, the circuit court may not substitute its judgment for the agency's judgment as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(5) (Supp. 2009). The circuit court may reverse or modify the agency's decision if the decision is, among other things, affected by an error of law; clearly erroneous in view of the reliable, probative, and substantial evidence in the record; or arbitrary or capricious or characterized by an abuse of or unwarranted exercise of discretion. *Id.*

To obtain workers' compensation benefits an injured worker is required to prove the facts which will entitle him or her to benefits by the preponderance of the evidence. See, e.g., *Lorick v. S.C. Elec. & Gas Co.*, 245 S.C. 513, 517-18, 141 S.E.2d 662, 664 (1965). In this case, the circuit court correctly reversed the commission's decision that Ms. Bone did not carry this burden. On the whole, the commission's finding was based on extremely minor or manufactured inconsistencies in Ms. Bone's recitations of the circumstances of her alleged injury and on a credibility determination that was completely arbitrary in light of the evidence in the entire record.

A. Ms. Bone Did Not Give Inconsistent Testimony.

The alleged inconsistencies noted in U.S. Food Service's brief and the commission's decision consist of Ms. Bone's testimony to the hearing commissioner regarding the circumstances of her injury. According to Ms. Bone's testimony, her job with U.S. Food Service was to pressure wash the insides of empty tractor-trailers. (Hearing Commissioner Transcript p.7). At the hearing, Ms. Bone told the hearing commissioner that she felt the pinch in her back – her alleged injury – as she bent over to pick up and wash underneath two shipping pallets that were sitting on the floor of a trailer she was cleaning. (Hearing Commissioner Transcript p.7, lines 19-20). Ms. Bone testified that there were two pallets close to the edge of the trailer she was cleaning, (Hearing Commissioner Transcript p.7, lines 19-20); that she put down her pressure washing wand in order to pick the pallets up to clean underneath them, *id.*, lines 20-21; and that when she went to bend over to pick the pallets up, she felt the pinch. *Id.*, lines 22-23. Discussing the accident in more detail, Ms. Bone described that she went to pick the pallets up, that the pallets were laying flat, that she squatted down to lift the pallets, and that when she got into the lift, she felt the pinch. *Id.*, at 8, lines 17-24.

The hearing commissioner deemed this recitation as containing inconsistencies; characterizing the first part of Ms. Bone's statement as implying that she injured her back while bending to move the pallets and the second part of the statement as implying that Ms. Bone felt the pinch in her back while actually lifting the pallets – in the hearing commissioner's words "midway through the lift." (Hearing Commissioner Order p.9; Appellate Panel Order p.5). This is a dramatically myopic reflection of Ms. Bone's

testimony and reflects an unnecessarily literal parsing of Ms. Bone's narrative. Ms. Bone made both statements while being examined by her attorney and they occurred as part of the same narrative; a narrative spanning only two pages of the transcript from the hearing. (Hearing Commissioner Transcript pp.7-8). At no point during the hearing did the hearing commissioner explore what she characterized as Ms. Bone's disparate versions of her injury, and Ms. Bone's narrative was consistent when U.S. Food Service explored the circumstances of the alleged injury on cross-examination. (Hearing Commissioner Transcript p.19). The hearing commissioner and the appellate panel called this "inconsistency" a "persuasive difference," see (Hearing Commissioner Order p.9; Appellate Panel Order p.5), but Ms. Bone respectfully submits that a full review of her testimony demonstrates no inconsistency that could have legitimately made any sort of a reasonable difference to the outcome of her case. The conclusion that Ms. Bone's two-page testimony regarding the circumstances of her accident was internally inconsistent was at least clearly erroneous if not wholly arbitrary.

B. Though the Commission Is Generally Entitled to Deference with Respect to Credibility Determinations, the Evidence in this Case Suggests That the Commission Arbitrarily Determined That Ms. Bone Was Not Credible.

As U.S. Food Service's brief correctly suggests, the merits of this case turn for the most part on the commission's determination that Ms. Bone was not credible. Ms. Bone submits that the commission's uncommonly narrow construction of her testimony about the circumstances of her accident is characteristic of all of the bases the commission used for its credibility determination. The commission's decision that Ms. Bone was not credible was completely arbitrary, and when that decision is discarded, the only conclusion supportable

by reliable, probative, and substantial evidence in the record is that Ms. Bone suffered a work-related injury.

The hearing commissioner's first recitation with respect to Ms. Bone's credibility was that the commissioner did not find Ms. Bone credible based "on her observations of [Ms. Bone] and on her testimony in general." (Hearing Commissioner Order p.7). The hearing commissioner gave no context for this determination except for "specifically not[ing]" that each time Ms. Bone's lawyer asked Ms. Bone if injured her back changing her own tire "[Ms. Bone] looked down when she answered 'no.'" *Id.*, at 7-8.

As a primary matter, the transcript from the hearing reflects that Ms. Bone's lawyer never asked her if she "injured her back when changing her tire." Ms. Bone's lawyer asked her if she knew the identity of the person who helped change her tire and she responded that she did not. (Hearing Commissioner Transcript p.14). Ms. Bone's lawyer asked her if she changed her own tire and she responded that she did not. *Id.* Ms. Bone's lawyer asked her if she injured her back getting out the lug wrench or the jack to give to the unidentified individual who assisted her and she responded that she did not. *Id.* This three-question dialogue constitutes the sum and substance of the testimony the hearing commissioner referenced for Ms. Bone's denial of allegedly injuring herself while changing her own tire. (Hearing Commissioner Order p.4). If it is impractical to parse the hearing commissioner's order in such a literal way, it is no more of a literal parsing than the hearing commissioner applied to Ms. Bone's testimony.

As a secondary matter, it is difficult to discern why it would be important if Ms. Bone was looking down when engaging in any dialogue with her attorney or with the

commissioner. It would be one thing if the hearing commissioner had explained that Ms. Bone's answers were evasive, that Ms. Bone generally responded to questions by making eye contact but looked in a different direction when answering these specific questions, or gave some other substantive context for this determination. An isolated and unexplained notation that Ms. Bone was not credible because she "looked down" when answering questions does not give a reviewing court much in the way of a factual basis for reviewing the commissioner's conclusion. See *Able Communications, Inc. v. South Carolina Pub. Serv. Comm'n*, 290 S.C. 409, 411, 351 S.E.2d 151, 152 (1986) ("The findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings.").

The same goes for the importance the commission placed on the determinations (1) that Ms. Bone completed her shift after her alleged injury and continued to work shifts over the next several days before reporting her alleged injury; and (2) that Ms. Bone's testimony that she did not change her own tire but instead handed the tools for changing her tire to the unidentified passerby who allegedly assisted. (Hearing Commissioner Order p.8; Appellate Panel Order p.4). Neither the hearing commissioner's order nor the appellate panel's order provides *any context* for these determinations, why the determinations were not resolved in Ms. Bone's favor, or why they are even relevant to the commission's ultimate decision.

As to the delay in reporting her injury, Ms. Bone consistently explained at the hearing that she continued to work after her injury because at first she did not think the injury was a "big deal" and she hoped that she would be able to continue to work despite the injury in

order to meet her financial obligations. (Hearing Commissioner Transcript, pp.9-10; 12). As to the determination that Ms. Bone's testimony about her role in the tire-changing was not credible, no context whatsoever is supplied for the commissioner's determination that Ms. Bone was not being truthful. See *Able Communications*, 290 S.C. at 411, 351 S.E.2d at 152 ("Implicit findings of fact are not sufficient[,] [and] [w]here material facts are in dispute, the administrative body must make specific, express findings of fact."). Ms. Bone offered testimony in her own favor with respect to both determinations, and although the appellate panel and the hearing commissioner were not required to believe Ms. Bone's testimony, they of course could not reject the testimony for an arbitrary reason.

The hearing commissioner also found "most compelling" that Ms. Bone "admitted that she 'may have told' her supervisor that she herself had to change [her] tire[,] [and] [i]n later testimony, she stated that she did not 'think' she [] told [her supervisor] that she changed the tire." (Hearing Commissioner Order, pp.8-9; Appellate Panel Order p.4). This too is not an accurate characterization of the transcript. When first questioned as to whether Ms. Bone told her supervisor that she changed her own tire, Ms. Bone responded "I don't think I did." (Hearing Commissioner Transcript p.15, line 17). The commissioner immediately questioned Ms. Bone on this topic and Ms. Bone responded "I'm pretty sure I didn't tell him that." *Id.*, lines 19-20). When U.S. Food Service questioned Ms. Bone about the encounter U.S. Food Service asked Ms. Bone "[a]nd you did tell him that you had to change the tire didn't you?" (Hearing Commissioner Transcript pp.23-24). Ms. Bone responded, "I may have. I know I had to have a tire changed. *I know I didn't tell him I changed it.*" (Hearing Commissioner Transcript p.24) (emphasis added).

The fair reading of this testimony should not be isolated to Ms. Bone's statement that she may have told the supervisor she changed her tire. The fair reading is that Ms. Bone consistently testified that she did not think she told her supervisor that she changed her own tire. Even if the record fairly reflected the commissioner's version of the testimony, this disparity could not genuinely have been "compelling" as the hearing commissioner and the appellate panel described. (Hearing Commissioner Order pp.8-9; Appellate Panel Order p.4). Like the alleged disparity in Ms. Bone's version of the precise moment when she felt the pinch in her back while moving the pallets in the trailer bed, this minutia is more suggestive of cherry-picking a record to support a tenuous credibility characterization than a genuinely compelling inconsistency.

Unlike Ms. Bone's testimony as to the precise moment she felt the pinch when she was moving of the shipping pallets or her inability to recall the specific words she used when informing her supervisor both of her alleged injury and of her being late to work on account of a flat tire, the critical testimony in this case was Ms. Bone's testimony with respect to her flat tire. With an alleged back injury, a delay in reporting the injury, and the circumstance of having a flat tire the morning the alleged injury was reported, it is understandable that U.S. Food Service sought to explore Ms. Bone's testimony with respect to this issue. The commission's only findings with respect to Ms. Bone's story regarding the circumstances of the tire-changing are that the commission "[did] not find credible [Ms. Bone's] testimony that she only handed the lug wrench, tire winding tool, and jack to the man who allegedly changed the tire for her," and that "for a full fifteen seconds (a fact that the transcript will not reflect), [Ms. Bone] could offer no description of the man who rescued her . . . when he

allegedly changed her tire.” (Hearing Commissioner Order pp.8-9; Appellate Panel Order pp.4-5).

Once again, the commission’s decision gives no context for its credibility determination. The reason the Administrative Procedures Act requires specific and detailed findings of fact is that without such findings, a reviewing court cannot determine whether the commission’s findings are supported by substantial evidence. See, e.g., *Baldwin v. James River Corp.*, 304 S.C. 485, 486-87, 405 S.E.2d 421, 422 (Ct. App. 1991). A commissioner could conceal any number of improper motives behind a sham determination of credibility, and although Ms. Bone knows of no improper motives at work in her case, the commission’s conclusory finding of credibility certainly did not provide the circuit court with much of a basis for review in support of the commission’s finding.

The same is true for the commission’s observation about Ms. Bone’s failure to describe the circumstances of her flat tire with more particularity. Ms. Bone explained that although she has traveled the road where she had the flat tire many times, she did not know the name of the business at the precise location where she had the flat. (Hearing Commissioner Transcript, p.21). She testified that the gentleman who assisted her was in front of the business directing an eighteen-wheeler truck out to the roadway and that he was white, had a husky build, and may have had brown hair. *Id.*, at 22. Since this testimony is not referenced anywhere in the hearing commissioner’s order or the appellate panel’s order, the testimony obviously did not carry any weight with the commission.

Finally, the commission found it “compelling” that “[Ms. Bone] did not initially admit to a previous back injury”; an injury that by the commission’s acknowledgment

“would not have affected the compensability of her claim.” (Hearing Commissioner Order p.9; Appellate Panel Order p.5). The fair reading of that portion of the transcript reflects a two-question dialogue – again unexplored in any substantial way during the hearing – which follows after an extended dialogue in which Ms. Bone was describing her job duties. Ms. Bone described having to move hoses up inside the trailers she cleaned and having to climb stairs up into the trailers. (Hearing Commissioner Transcript pp.25-26). On the heels of that dialogue U.S. Food Service’s lawyer asked Ms. Bone if she had ever injured her back in the past. *Id.*, at 26. Ms. Bone responded “no,” and after being asked whether she had injured her back about twenty years previously, Ms. Bone responded “[w]ell, I mean, yeah, I had a back injury then, but that was lower back. I have not hurt myself on the job this time.” *Id.*

The commission and U.S. Food Service would have the court read this dialogue as an example of a witness with suspect credibility conveniently failing to remember an old injury; albeit one that had no relevance whatsoever to the compensability of Ms. Bone’s alleged workplace injury. Of course, this ignores the possibility that because Ms. Bone had just completed describing her job’s requirement of dragging hoses up and throughout trailers, she may have thought that she was being asked whether she had injured her back *at work* previously. Nevertheless, this possibility was not explored at the hearing, is not accounted for in the commission’s decision, and Ms. Bone’s testimony is described as a “compelling” failure to admit a previous injury. The transcript itself does not suggest that the parties to the hearing thought that the topic was terribly important. The relevant testimony comprises less than three pages of the transcript. (Hearing Commissioner Transcript pp.25-27).

Ms. Bone submits that what drove the circuit court’s decision in this case was its

accurate perception that the commission had assigned undue weight to hyper-technical or manufactured flaws in Ms. Bone's testimony. Ms. Bone's narratives regarding the circumstances of her alleged injury, her reporting the alleged injury to her supervisor, and her interaction with a stranger who allegedly changed Ms. Bone's flat tire did not carry any weight with the commission, but the commission's decisions do not give much of a factual basis for anything other than a summary finding that Ms. Bone was not credible. Ms. Bone did not produce the co-worker in whom she confided about her alleged injury, but Ms. Bone did not know her testimony would be found to be not credible, and the commission's decision suggests that Ms. Bone's testimony formed the sole basis for its decision that she failed to carry her burden of proving by a preponderance of the evidence that she had sustained a compensable injury. (Hearing Commissioner Order p.10; Appellate Panel Order p.6) (both noting Ms. Bone's supervisor's testimony did not defeat Ms. Bone's claim; "she did that herself.").

The circuit court did not weigh the evidence in reversing the commission's decision, and scrutiny of the hearing commissioner's findings reveals that the hearing commissioner could not have invested serious consideration to the determination that Ms. Bone was not credible. Because the commission's credibility findings are lean on facts that can withstand any genuine analysis, the circuit court was left with an administrative record pitting a credibility finding with extremely little in the way of probative evidentiary support on one hand and Ms. Bone's consistent testimony on the other. Ms. Bone respectfully submits that the commission's decision in this case cannot survive legitimate scrutiny and that the commission's credibility determination was completely arbitrary. The Court should

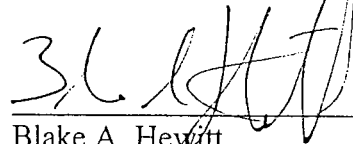
accordingly affirm the circuit court's decision if the Court reaches the merits of this case.

CONCLUSION

This Court should dismiss this appeal because an order from the circuit court which remands a case to an administrative agency is not immediately appealable. If the Court reaches the merits of this case, the court should affirm the circuit court's decision finding that the only conclusion supported by reliable, probative, and substantial evidence in the record was that Ms. Bone suffered a compensable accidental injury.

February 19, 2010

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court Of Common Pleas

SC Court of Appeals

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, ... Appellants.

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S.C. Code Ann. § 1-23-390.....	1-4
S.C. Code Ann. § 14-3-330	1
Rule 59, SCRCF.....	5
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ARGUMENT

I. THE CIRCUIT COURT ORDER INVOLVES THE MERITS, AFFECTS APPELLANTS' SUBSTANTIAL RIGHTS, AND IS, THEREFORE, SUBJECT TO IMMEDIATE REVIEW.

The first paragraph of Respondent's Initial Brief quotes from the circuit court's merits determination that "the evidence of record shows [she] sustained a compensable injury." (Resp.'t's In. Br. p. 3) While acknowledging the circuit court's order reaches the merits by concluding as a matter of law that she is entitled to benefits, Respondent 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. Respondent's argument is fatally flawed, however, because it relies on a misperceived distinction between appeals of interlocutory appeals in workers' compensation proceedings and appeals of interlocutory orders in the broader class of civil actions in general. Careful examination of applicable authority, however, compels the conclusion that orders in workers' compensation cases like the one at issue here are equally subject to the final judgment rule and subject to immediate review where they involve the merits of the underlying action or affect a party's substantial rights.

A. The Administrative Procedures Act Affords Immediate Review.

Respondent's premise rests on the incorrect proposition that "recent Supreme Court cases strongly suggest that the appealability of circuit court decisions should not be judged by the general appealability statute (§ 14-3-330). These cases instead stand for the rule that pursuant to the APA, an order from the circuit court remanding a case to an administrative agency is not immediately appealable." (Resp.'t's In. Br. p. 3-4) This

statement is not only incorrect, but also has been expressly rejected in controlling authority on this precise issue.

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 or the South Carolina Supreme Court.

This Court analyzed what constitutes a "final judgment" pursuant to Section 1-23-390 in the case of *Oakwood Landfill, Inc. v. South Carolina Department of Health and Environmental Control*, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009). In its opinion, the *Oakwood* Court was careful to distinguish (and explain the distinctions) between interlocutory orders that are not appealable versus interlocutory orders that are immediately appealable because they reach the merits or affect the substantial rights of the parties. Addressing the appealability of an order pursuant to Section 1-23-390, the court explained:

The question . . . is whether the circuit court order is a 'final judgment' under section 1-23-390. Generally, an order is a final judgment on one or more issues if it constitutes an ultimate decision on the merits. In *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984), one of the two cases cited by the *Montjoy* court, the supreme court found '[t]he order of the circuit court *does not involve the merits* of the action. It is therefore interlocutory and not reviewable by this Court for lack of finality. Similarly, in *Hunt v. Whitt*, 279 S.C. 343, 306 S.E.2d 621 (1983), the supreme court held that '[b]ecause the interlocutory order of the circuit court does not involve the merits of the action, it is not reviewable by this Court for lack of finality.' Accordingly, in determining whether the court's order finally decides an issue on the merits.

Oakwood Landfill, 381 S.C. at 130, 671 S.E.2d at 652, quoting *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 387-388, 622 S.E.2d 546, 551 (Ct. App. 2005) (internal citations omitted) (emphasis in the original).

Continuing its quote from the *Brown* opinion, the *Oakwood* Court also examined what constitutes a final determination of an issue on the merits. In *Brown*, the challenged order remanded a workers' compensation case to the Commission to apportion claimant's injuries between a compensable and a non-compensable cause and the resulting reduction of claimant's award. As such, the court's order was:

[A] decision on the merits because it decid[ed] with finality whether [employer] is required to reduce its compensation. . . . Although the judge left the percentage of apportionment to the commission on remand, the panel would have no choice but to allocate some part of [claimant's] disability to the non-compensable cause. Accordingly, the circuit court's order constitutes a final decision on the issue of apportionment and is appealable.

Oakwood, 381 S.C. at 131, 671 S.E.2d at 652; quoting *Brown*, 366 S.C. at 387-388; 622 S.E.2d at 551. This analysis is controlling as to whether the order at issue in the instant appeal is subject to immediate review. Like the order challenged in *Brown*, the circuit court's order in this case "decides with finality" that Respondent sustained a

compensable injury and is, therefore, entitled to compensation. On remand, the Commission “would have no choice” but to fix the amount of benefits that the circuit court has determined Respondent is entitled to receive. Thus, the circuit court order “constitutes a final decision” on the issue of compensability and is immediately appealable.

Similarly, Respondent’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)¹ is misplaced, as those decisions simply do not signal a departure from the final judgment rule in the South Carolina Supreme Court’s workers’ compensation jurisprudence. Indeed, this authority actually supports construction of Sections 1-23-380 and -390 in a manner that supports immediate review.

In *Montjoy*, the supreme court affirmed dismissal of an order characterized as “interlocutory and not directly appealable.” *Id.* 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 the court’s holding is its citation to Section 1-23-390 or that the APA mandates dismissal in this case. 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) indicate the court was relying on the traditional formulation of the final judgment rule. In *Owens*, the court dismissed an appeal because

¹ Appellants maintain that *Magaha* lacks precedential value and cannot be relied upon as persuasive or controlling authority. Rule 268(d)(2), SCACR.

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 merely 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.

Respondent 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 was nevertheless 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. Stated differently, 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 from the face of the form order. (Resp.’t’s In. Br. p. 9)

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.

B. A Delayed Appeal Is Not A Sufficient Remedy.

Contrary to the arguments advanced in Respondent's motion to dismiss and her initial brief, the circuit court order in this case clearly constitutes a final judgment. Thus, any argument that Appellants may have the right to seek restitution in the event the award is ultimately overturned is irrelevant. Reaching the merits of Respondent's argument on this issue, however, it is clear she reads *Moore v. North Amercian Van Lines*, 319 S.C. 446, 462 S.E.2d 275 (1995), too broadly and that the equities in this case favor immediate appellate review.

The issue in the *Moore* decision was not whether the claimant sustained a compensable injury. Rather, it was whether South Carolina could exercise jurisdiction over the claimant's case when he was not hired in this State. 319 S.C. at 447, 462 S.E.2d 275. Here, the parties do not contest jurisdiction and instead find themselves involved in a legitimate dispute as to whether or not Respondent sustained a compensable injury. Arguably, there would be no basis for a claim of unjust enrichment in the event the award of benefits in this case is ultimately reversed, and such a claim conflicts with current workers' compensation practice. Indeed, there is no mechanism in place to ensure that funds paid in benefits to Respondent will be available in the event the award is later overturned. Instead, barring an immediate appeal of the final judgment in this case will deprive Appellants of the review to which they are entitled and require them to pay large sums of money to Respondent during an unnecessarily delayed resolution of this matter.

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 there is no undecided or important legal issue at play that would warrant certification pursuant to Rule 204(b), SCACR. As such, this Court should proceed to a consideration of the merits of the instant appeal without further delay.

II. THE CIRCUIT COURT ERRED IN ITS DETERMINATION THAT THE DENIAL OF BENEFITS WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The circuit court impermissibly substituted its view of the evidence in this case for that of the Commission in contravention of the scope of appellate review. The bounds of circuit court review in workers' compensation cases are clearly defined. Pursuant to the substantial evidence rule, the circuit court may reverse or modify the agency's findings, rulings, and conclusions if and only if the agency's determinations are "clearly erroneous." S.C. Code Ann. § 1-23-380; *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). The circuit court is not at liberty to weigh the evidence or to substitute its judgment for that of the Full Commission as to the weight of the evidence and questions of fact. *Farrell v. Jerry's, Inc.*, 370 S.C. 22, 26, 633 S.E.2d 893, 894-895 (2006). The Commission is the ultimate finder of fact, and the circuit court must yield to the conclusive findings of the Appellate Panel regarding conflicting evidence, the weight of the evidence, and the credibility of witnesses. *Sealy v. Aiken County*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000); *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 290, 599

S.E.2d 604, 611 (Ct. App. 2004); *Bass v. Kenco Group*, 366 S.C. 450, 458, 622 S.E.2d 577, 581 (Ct. App. 2005). In light of the substantial deference afforded to the agency's evidentiary findings, the challenged order in this case must be reversed.

A. The Single Commissioner Was In The Best Position To Gauge The Inconsistencies In Respondent's Testimony And To Judge Her Lack Of Credibility.

The single commissioner heard live testimony, was in the best position to weigh the evidence, and acted within her discretion to assess the credibility of the witnesses. It was not, as Respondent asserts, the commissioner's burden to "explore . . . [Respondent's] disparate versions of her injury." (Resp.'t's In. Br. p. 18) Instead, the single commissioner made an express finding that Respondent's testimony was "not credible" and supported her finding with specific references to Respondent's demeanor and the inconsistencies in her versions of events. (R. p. 20-21) It necessarily follows that Respondent's testimony was entitled to no weight and that she lacked any substantial evidence to support her claims.

The single commissioner's finding also find ample support in the record. For example, on direct examination regarding her alleged injury, Respondent testified the injury occurred "when I went to bend over to pick them up, I felt something pinch, but I went on ahead and did my job." (R. p. 58, lines 14-23) Later, still on direct examination, she altered her earlier version of events and stated "when I got into the middle part of it to lean them this way, that's when I felt the pinch." (R. p. 59, lines 14-24) Respondent offered yet a third version of events on cross-examination when she testified that the injury occurred "[o]n my way back up." (R. p. 70, lines 9-21)

The inconsistencies in Respondent's testimony continued in her description of how she informed her employer of her alleged injury:

Q. And you did tell him that you had to change the tire on your truck, didn't you?

A. I may have. I know I had to have a tire changed. I know I didn't tell him I changed it.

Q. Are you sure you didn't tell him that you changed it?

A. I didn't change it. I know the gentleman who changed my tire.

Q. But what did you tell Richard? Could you have told Richard that you changed your tire?

A. I could have said that in the context of having to have the tire changed to having a flat tire.

(R. p. 74, line 25-p. 75, line 11)

Not only is her testimony less than persuasive on the question of whether or not she changed her own tire, it directly conflicts with the credible testimony of her supervisor, Richard Thomas, who testified that Respondent told him she had to "change her tire on the way to work." (R. p. 84, lines 14-20) This testimony also is consistent with the earlier written statement Mr. Thomas prepared. Additionally, the hearing commissioner specifically questioned Mr. Thomas on this point in the following colloquy:

The Court: I understand that. She did not – you took it to mean that she changed it herself?

The Witness: Yes.

The Court: Do you remember the words that she used when she told you that the tire needed changing, whether she did it herself or somebody else was going to do it? She said she had a flat tire that needed changing, is that –

The Witness: She said she had to change her tire.

The Court: She said, I had to change my tire.

The Witness: Yes. She had to change her tire.

The Court: All right. Okay.

(R. p. 85, lines 4-16)

Setting aside the issue of Respondent's lack of credibility, and contrary to Respondent's argument on appeal, the record evidence militates in favor of the findings and conclusions of the hearing commissioner, unanimously affirmed by the Appellate Panel: the competing testimony a credible witness versus Respondent's non-credible versions of events; Respondent's demeanor; her failure to seek immediate medical attention; her ability to work additional shifts following the alleged injury; her failure promptly to report any injury to her employer; her failure to identify and elicit corroborating testimony from the alleged good Samaritan or the co-worker to whom she allegedly reported her injury; and her failure to offer any other additional evidence or testimony beyond her own self-serving version(s) of events. All of these matters support the hearing commissioner's determinations that Respondent was not credible and that she failed to meet her burden of demonstrating entitlement to workers' compensation benefits, and it was error for the circuit court to set these findings aside in favor of its own view of the evidence.

B. No Abundant Evidence Supports An Award Of Benefits In This Case.

Disregarding the ample record evidence supporting the denial of benefits, the circuit court nevertheless determined "Claimant sustained a compensable injury." This

finding is based on nothing more than Respondent's self-serving recitation of events – a recitation the commissioner specifically noted was not credible. In light of Respondent's lack of credibility, combined with her failure to adduce any additional supporting evidence or testimony, the circuit court order must necessarily derive from an impermissible substitution of its view of the evidence for that rendered by the agency. For all of the reasons set forth in Appellants' initial brief, there simply was no reliable record evidence upon which the circuit court could make a determination that Respondent sustained a compensable injury. As such, the circuit court clearly exceeded the scope of its appellate review in this case, and its order of reversal must be set aside.

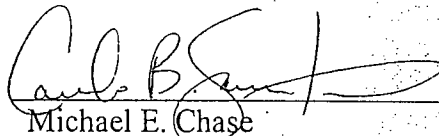
CONCLUSION

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, that order should be reversed as impermissibly exceeding the circuit court's scope of appellate review, and the Decision and Order denying benefits should be reinstated.

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

May 18, 2010

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

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, ... Appellants.

MOTION TO DISMISS APPEAL

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent Cathy C. Bone requests that this Court dismiss this appeal. This is an appeal from an order of the circuit court which reversed a decision of the South Carolina workers' compensation commission and remanded Ms. Bone's case to the commission for further proceedings. Because any order from the circuit court remanding a case to an administrative agency for additional proceedings is not directly appealable, this Court should dismiss this appeal.

FACTUAL/PROCEDURAL BACKGROUND

Respondent Cathy C. Bone initiated this action on August 7, 2007, seeking workers' compensation benefits for what she alleged was a workplace injury. According to Ms. Bone,

she injured her back while moving some materials at work.

Appellants U.S. Food Service (Ms. Bone's employer) and Indemnity Insurance Company of North America (U.S. Food Service's insurance carrier) (collectively "U.S. Food Service") opposed Ms. Bone's entitlement to workers' compensation benefits. Put simply, U.S. Food Service took issue with Ms. Bone's version of the circumstances surrounding her injury. According to Ms. Bone, she injured her back while moving some shipping pallets at work, worked the remainder of her shift, and worked two additional shifts over the next few days. On the way to work early in the next week, Ms. Bone experienced a flat tire and according to her, a stranger assisted her in changing the tire after she supplied him with the tools to do so. That same day, Ms. Bone reported her back injury to a supervisor. U.S. Food Service argued that this recitation was false and that Ms. Bone had in fact not been injured while at work the previous week. According to U.S. Food Service's theory of the case, Ms. Bone injured her back while changing her own flat tire.

U.S. Food Service prevailed at both the hearing commissioner level and before an appellate panel of the workers' compensation commission, and Ms. Bone appealed the commission's decision to circuit court. The circuit court reversed the commission's decision and found that the bulk of evidence in the record established that Ms. Bone injured her back while moving pallets at work. (Attachment A). Because the circuit court found that the evidence showed Ms. Bone's injury was a compensable accident, the court remanded the case to the commission. U.S. Food Service filed and served a notice of appeal of the circuit court's order and has filed an initial brief, but because the circuit court's order is not directly appealable, this Court should dismiss this appeal immediately.

ARGUMENT

I. Supreme Court Precedent Clearly Establishes That any Order from the Circuit Court Remanding a Case to an Administrative Agency for Additional Proceedings Is Not Directly Appealable.

The South Carolina Supreme Court's decision in the case *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994) controls this case. Like the instant appeal, the order at issue in *Montjoy* was an order of the circuit court which remanded a case to the workers' compensation commission. The court began by citing to S.C. Code Ann. § 1-23-390 (Supp. 2008), the statute which allows the Supreme Court to review a lower court's judicial resolution of a contested administrative case, and recited "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." *Montjoy*, 316 S.C. at 52, 446 S.E.2d at 618.

The Supreme Court has reiterated its adherence to this approach on more than one occasion. In the case *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000), the Supreme Court granted certiorari to review a decision from this Court which remanded a workers' compensation case to the commission. This Court had held that the circuit court had "exceeded its appellate jurisdiction" and should instead have simply remanded the case to the commission. *Id.* at 493-94, 530 S.E.2d at 127-28. In affirming the decision to remand the case, the Supreme Court held that the circuit court's order, "was not directly appealable since it remanded the matter to the single commissioner for further proceedings." *Id.* at 493-94, 530 S.E.2d at 127-28.

More recently, the case *Magaha v. Greenwood Mills, Inc.*, Op. No. 2008-UP-244

(S.C. Ct. App. filed April 24, 2008) (Attachment B) was an appeal to this Court from an order of the circuit court which reversed the workers' compensation commission's determination that the claimant had failed to comply with the notice requirement contained in the Workers' Compensation Act. See S.C. Code Ann. § 42-15-20 (Supp. 2008) (generally imposing a ninety-day reporting requirement for an accidental injury). The circuit court found that the claimant had satisfied the notice requirement and the court accordingly ordered that the case be remanded to the commission. The claimant's employer appealed to this Court, and this Court denied the claimant's motion to dismiss the employer's appeal. See (Attachments C and D). This Court's opinion in the case distinguished *Montjoy* and cited two court of appeals cases for the proposition that "remand orders from the circuit court to an administrative agency may be immediately appealable where the circuit court's order constitutes a final decision on the merits and the remand order has no effect on the finality of the decision." *Magaha*, slip. op. at 6. The losing party on the merits petitioned for certiorari, the Supreme Court denied certiorari, and in the order of denial, the Supreme Court vacated this Court's opinion. See (Attachment E). The Supreme Court wrote:

The petition for a writ of certiorari is denied because the order on appeal is not immediately appealable. *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994) (an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable). We therefore vacate the Court of Appeals' opinion.

Id.

There is no meaningful distinction between the procedural posture present in the instant case and the postures of the cases presented in the *Montjoy*, *Leviner*, and *Magaha* cases. On each occasion, the Supreme Court has unequivocally stated that an order from the

circuit court remanding a case to an administrative agency for additional proceedings is not immediately appealable. This Court should accordingly dismiss this appeal.

II. The Cases *Foggie v. General Electric Company*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008), *Brown v. Greenwood Mills*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), and *Green v. City of Columbia*, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993) Are Not Good Law on this Question.

Despite the firm pronouncements from the Supreme Court on this subject, a series of cases from this Court purport to allow the review of interlocutory decisions remanding cases from the circuit court to an administrative agency or from an appellate division of an administrative agency to an administrative hearing officer. See, e.g., *Canteen v. McLeod Reg. Med. Ctr.*, __ S.C. __, 682 S.E.2d 504 (2009). These decisions are contrary to controlling Supreme Court precedent as well as the current statutory law and they should not control.

The Court may find an examination of the recent *Canteen* opinion instructive. That case was an appeal to the circuit court from the appellate panel of the workers' compensation commission which had reversed the single hearing commissioner's finding with respect to the claimant's brain injury and remanded the case to the hearing commissioner for further proceedings. The circuit court dismissed the appeal on the grounds that it did not have jurisdiction and this Court reversed – finding that the order was indeed immediately appealable. *Id.* at __, 682 S.E.2d at 504-507. In doing so, this Court relied on the cases *Foggie v. General Electric Company*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008), *Brown v. Greenwood Mills*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), and *Green v. City of Columbia*, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993). A close analysis of this

jurisprudence shows this reliance to be misplaced.

Ms. Bone submits that the Supreme Court's opinion in the case *Chastain v. Spartan Mills*, 228 S.C. 61, 88 S.E.2d 836 (1955) is the best starting point for an examination of this area of this Court's jurisprudence. *Chastain* contains a pronouncement from the Supreme Court of the common law policy of requiring that administrative orders be final before they are subject to judicial review. In *Chastain*, the court examined and adopted the policy of requiring final agency action before allowing judicial review of administrative determinations and instructed, at the close of its analysis:

In the case at bar, the Commission's order . . . is not a final one. It neither allows nor denies compensation. Not does it affect the merits. It is, therefore, not appealable prior to the Commission's final determination of its review of the Hearing Commissioner's award.

Id. at 66, 88 S.E.2d at 838.

Ms. Bone submits that the *Green – Brown – Foggie* line of cases has focused on *Chastain's* use of the phrase “affect the merits” to justify analyzing the appealability of these types of interlocutory orders under the general appealability statute, S.C. Code Ann. § 14-3-330 (1985 & Supp. 2008). In addition to allowing appeals from final judgments, § 14-3-330 allows for immediate appellate review of an interlocutory decision which involves the merits or affects a substantial right. *Id.* *Chastain* admittedly gives direct support to this interpretation. In addition to including the phrase “affect the merits” in the court's opinion, the court there distinguished two of its previous cases where it had granted immediate appellate review of interlocutory orders remanding administrative cases to the workers' compensation commission and commented with respect to one of the cases that it had

allowed review because the lower tribunal's decision had "deprived [a party] of a substantial right." 228 S.C. at 66-67, 88 S.E.2d at 838. This Court's decision in *Green v. City of Columbia* relied exclusively on *Chastain*, see *Green*, 311 S.C. at 79-80, 427 S.E.2d 685, and *Green* has been the bedrock of the cases on this issue that have followed. See *Brown*, 366 S.C. at 386-88, 622 S.E.2d at 550-51 (distinguishing *Montjoy* and applying *Green*); *Foggie*, 376 S.C. at 388-89, 656 S.E.2d at 397-98 (distinguishing *Montjoy* and relying on *Brown*); *Magaha*, slip op. at 6 (distinguishing *Montjoy* and relying on *Foggie* and *Brown*); and *Canteen*, __ S.C. at __, 682 S.E.2d at 505-07 (relying on *Brown*, *Foggie*, and *Green*).

But importantly, *Green* and *Chastain* both pre-date *Montjoy* and *Leviner*; and despite the language that appears in *Chastain* and upon which *Green* and its progeny have seized, the Supreme Court's decisions in *Montjoy* and *Leviner* do not contain any echos of the analysis courts use to determine whether interlocutory appeals are nevertheless immediately reviewable under § 14-3-330. Put simply, neither *Montjoy* nor *Leviner* have anything to say about interlocutory decisions affecting substantial rights or involving the merits. Those cases unquestionably stand for the proposition that an order from the circuit court remanding a case to an administrative agency is not directly appealable. As this Court is bound by Supreme Court precedent, *Montjoy* and *Leviner* must control. See S.C. Const. art. V, § 9 (providing that "The decisions of the Supreme Court shall bind the Court of Appeals as precedents.").

The explanation for this disconnect between the Supreme Court's "affecting the merits/substantial right" language in *Chastain* and the more categorical approach expressed in *Montjoy*, *Leviner*, and *Magaha* lies in the passage of the Administrative Procedures Act. Before the passage of the APA, appeals from the workers' compensation commission were

governed by two statutes. The first statute allowed for appeals to circuit court from the commission's final decisions. See 1962 Code § 72-355. The second statute was the predecessor to current § 14-3-330, the general appealability statute. See 1962 Code § 15-123. In the case *Cord v. E. H. Hines Construction Company*, 220 S.C. 356, 67 S.E.2d 677 (1951), the Supreme Court reviewed the commission's denial of an employer's request to have a claimant undergo a medical evaluation. The circuit court had affirmed the decision, and on appeal, the claimant contended that the order was not immediately appealable because it was not the commission's "final order." *Id.* at 362, 67 S.E.2d at 679. Rejecting this assertion, the Supreme Court cited to the then-applicable version of the general appealability statute and stated that "[t]he applicability of the general statutes relating to appeals from the Court of Common Pleas to this court in matters originating before the [commission]" had already been established. *Id.* The Supreme Court held the order reviewable because it affected the employer's "substantial right[s]." *Id.*

The passage of the Administrative Procedures Act – first in 1976 and then in revised form in 1977 – changed this landscape dramatically. Both iterations of the act required a party seeking judicial review to have exhausted his administrative remedies and that the party be aggrieved by an agency's final decision in a contested case. See Act No. 176 § 8, 1977 S.C. Acts 391, 403-04; see also Act No. 671 § 24, 1976 S.C. Acts 1758, 1768. The final decision requirement remains the centerpiece of the current statutory construct for the judicial review of agency decisions. See S.C. Code Ann. §§ 1-23-380 and -390 (Supp. 2008). The only qualification found in the current law's prohibition of review of intermediate agency determinations is the portion of § 1-23-380 providing 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.”

To the extent that the general statutes relating to the judicial appeals process used to apply to reviews of decisions from the workers’ compensation commission and to decisions of lower judicial courts reviewing an administrative agency’s resolution of a contested cases, the passage of the Administrative Procedures Act was a sea change. The *Cord* case’s citation to the general appealability statute can no longer bear the weight the *Chastain* opinion put on it, see *Chastain*, 228 S.C. at 66-67, 88 S.E.2d at 838 (citing *Cords*), and *Chastain*, as a pre-Administrative Procedures Act case, cannot bear the weight of *Green*, *Foggie*, and *Brown*; all post-Administrative Procedures Act cases. See *Green*, 311 S.C. at 79-80, 427 S.E.2d 685 (relying exclusively on *Chastain*); *Brown*, 366 S.C. at 386-88, 622 S.E.2d at 550-51 (distinguishing *Montjoy* and applying *Green*); *Foggie*, 376 S.C. at 388-89, 656 S.E.2d at 397-98 (distinguishing *Montjoy* and relying on *Brown*). See also Act No. 387 § 53, 2006 S.C. Acts 3131 (“This Act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling.”). The rubric which applies to judicial review of agency decisions is supplied by §§ 1-23-380 and -390, and the cases of *Montjoy* and *Leviner* control the question whether a circuit court order remanding a case to an administrative agency is reviewable.¹

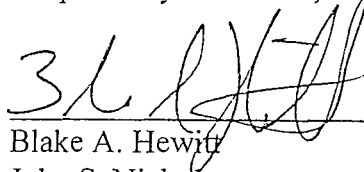
¹ Because the root of these conflicting approaches are drawn from irreconcilable language in *Chastain* and *Montjoy*, an option this Court may wish to pursue is certifying this case, including this motion, to the Supreme Court pursuant to Rule 204(b), SCACR.

CONCLUSION

The Supreme Court's pre-Administrative Procedures Act and pre-*Montjoy* and *Leviner* decisions relating to the appealability of interlocutory decisions from administrative agencies fully support the view of appealability expressed in the *Green*, *Foggie*, *Brown* cases. Those recent cases fail, however, to take into account the fact that the Supreme Court jurisprudence forming their foundations is based on a statutory construct that is no longer applicable. Under current law, any order from the circuit court remanding a case to an administrative agency is not immediately appealable. The Supreme Court's decision in *Magaha* should be taken for the clear signal that it provides and this Court should accordingly dismiss this appeal.

October 29, 2009

Respectfully submitted,


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Attachment A

APP-195

ORIGINAL

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Cathy C. Bone,)
Employee/Claimaint,)
vs.)

C/A NO.: 2008-CP-32-2876

WCC File No.: 0710690

U.S. Food Service,)
Employer,)
Indemnity Insurance Company of North)
America,)
Carrier/Defendants.)

ORDER
OF
REVERSAL

BETH A. CANNON
CLERK OF COURT
LEXINGTON, SC

2009 MAR 26 P 12:35

FILED

STATEMENT OF THE CASE

THIS MATTER came before the Court on an appeal from the South Carolina Workers' Compensation Appellate Panel Order dated June 19, 2008. Claimant sought benefits for an injury by accident that she suffered while employed by Defendant U.S. Food Service (Defendant) on June 26, 2007. Defendant does not contest the existence or the degree of Claimant's injury. The sole issue is when Claimant's injury occurred. W

Claimant is a 49-year-old mother of two children who has worked at U.S. Food Service for at least two years. On July 3, 2007, Claimant reported that she had injured her back at work on June 26, 2007, six days earlier, when she was bending down lifting two pallets. The same day she reported her back injury, Claimant's vehicle had a flat tire while she was on her way to work. Claimant testified that a helpful person at the business where the flat occurred came to her assistance in changing the tire.

At a hearing before the Single Commissioner, Defendant argued that the injury was not compensable because it did not occur at work but instead while she was changing her tire on July

BR

3. Claimant argued that the evidence was consistent with her having injured her back on June 27 and that there was no evidence of Claimant having injured her back on July 3. The Honorable Susan S. Barden denied Claimant benefits on February 11, 2008. The Appellate Panel affirmed with modification on June 19, 2008.

Claimant now requests that the Court overturn the Appellate Panel's decision to deny Claimant benefits because the denial of the award was not supported by substantial evidence. Claimant argues the evidence is susceptible of only one inference, that Claimant sustained a compensable injury, thus becoming an issue of law for the Court. I agree.

STANDARD OF REVIEW

S.C. Code Ann. § 1-23-380(A)(5) governs the standard of judicial review of awards of the Workers' Compensation Commission. Lark v. Bi-Lio, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). This section provides:

(5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

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

S.C. Code Ann. § 1-23-380 (Supp. 2007).

Claimant contends that the findings denying the claim are clearly erroneous in view of the substantial evidence and/or can be characterized as arbitrary and capricious. As such, the

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Circuit Court may properly overturn the ruling of the Workers' Compensation Commission denying benefits. Massey v. W.R. Grace & Co., 286 S.C. 434, 334 S.E. 2d 122 (1985). Further, where the evidence is susceptible of only one inference, the question is one of law for the court rather than one of fact for the Commission. Mullinax v. Winn Dixie Stores, 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

DISCUSSION

The Commission denied the claim finding Claimant did not suffer an on the job injury, ostensibly finding Claimant injured her back while changing her tire on July 3. However, a review of the records shows no evidence to support this finding.

There is no question Claimant's June 27 accident was reported on July 3 as a work injury. The record presents an abundance of evidence in the record to support a finding that Claimant injured her back on June 27 while lifting or moving pallets to clean a truck. Richard Thompson, Claimant's supervisor, admitted the injury was reported to him as having occurred when Claimant was lifting pallets to clean a trailer, and a statement to this effect was introduced at the hearing. Form 12-A (Accident Report) was admitted as evidence at the hearing before the Single Commissioner. The Form 12-A was dated July 9, 2007, and states:

Employee states she was moving on (sic) of the pallets so she could get to an area inside the trailer when she felt something in her back but thought it was some kind of a stinger and could work through it resulting in an unspecified injury to her back.

Claimant was sent by her employer for medical treatment. She was initially seen at Lexington Medical Center Occupational Health on July 5, 2007. There she gave the same consistent history:

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#3

This is an initial Workers Comp visit for this patient. She states that she was picking up pallets at work, which she has done many times at her job, when she felt a sharp pain in her lower back. She continued to work and actually felt a little better as the shift went on. Then she state that she woke up on Sunday and felt a terrible pain in her left side of her hip, which radiates down to her leg. She self treated with Motrin 3 tablets every 6 hours but she got no relief.

(APA p.6) Claimant continued to treat at Occupational Health on July 9, 2007 ("Apparently, the patient injured her back lifting pallets at work.") (APA p.7), July 10, 2007 (APA p.4), and July 13, 2007 (APA pp.1-2).

The insurance adjuster took a recorded statement from Claimant on July 12, 2007. In this statement, which was offered as evidence, Claimant gave the same history of injury while lifting pallets at work.

Perhaps most significantly, there is absolutely no evidence in the record, let alone substantial evidence, that Claimant injured her back while changing a tire on the way to work on July 3, 2007. Defendant cites the testimony of Richard Thompson, whom Claimant told she had a flat tire on the way to work and had to change it. Mr. Thompson must have interpreted this to mean Claimant physically changed the tire herself. Further, Defendant argues the Single Commissioner did not find Claimant a credible witness. However, that finding goes only to the weight afforded Claimants testimony and in no way establishes Claimant's injury occurred on July 3. Even so, the record contains an abundance of other evidence establishing Claimant injured her back on June 27, 2007 when she was moving pallets to clean a truck.

CONCLUSION

The evidence of record shows Claimant sustained a compensable injury. There is absolutely no evidence to the contrary. When the evidence is susceptible of only one inference, then question is one of law for the Court. As such, as a matter of law, the Decision and Order of

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the Workers' Compensation Commission is hereby REVERSED and REMANDED to the Commission for proceedings consistent with this Order.

AND IT IS SO ORDERED!



Honorable G. Thomas Cooper, Jr.
Presiding Judge, 11th Judicial Circuit

Columbia, South Carolina

March 25, 2009

Attachment B

APP-201

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Bessie M. Magaha, Respondent,

v.

Greenwood Mills, Inc., Appellant.

Appeal From Greenwood County
J. Cordell Maddox, Jr., Circuit Court Judge

Unpublished Opinion No. 2008-UP-244
Submitted April 1, 2008 – Filed April 24, 2008

AFFIRMED

Roy R. Hemphill, of Greenwood; for Appellant.

Carole Marie Dennison, of Greenville; John S.
Nichols, of Columbia; for Respondent.

PER CURIAM: Greenwood Mills, Inc. (the Mill) appeals the circuit court's order in this workers' compensation action. We affirm.¹

FACTS

Bessie M. Magaha was employed with the Mill for over thirty years as a weaver. In November of 1998, the Mill transferred Magaha to work on a larger loom. Magaha alleged she sustained an injury to her right shoulder, arm, and hand. She first sought treatment for the pain from her family doctor on January 11, 1999. Magaha had two surgeries on her shoulder and sought payment of medical expenses and temporary total and permanent total disability. The Mill denied Magaha sustained an injury by accident and alleges it did not receive notice of the injury until it received a Form 50 on December 29, 2000, almost two years after the alleged accident.

At the hearing before the single commissioner, Magaha argued she suffered repetitive trauma to her right shoulder after moving to the larger loom. Magaha is five-feet, one-inch tall, was in her sixties at the time of the alleged accident, and has a seventh grade education. Magaha testified she informed Ronnie Butler, her supervisor at the Mill, of problems with her shoulder on the first day she used the new loom. At a prior deposition, Magaha testified she told Butler the soreness in her shoulder and arm was getting worse but did not explicitly tell Butler the soreness was related to her work. She explained at the hearing that she "figured he probably would [think] . . . that it's something . . . from work." Butler testified before the single commissioner that he did not remember whether Magaha told him about her injury. Nor did he remember whether Magaha complained about the new loom. Butler claimed he would have noted any complaints on Magaha's attendance card, pursuant to the Mill's policy. Butler conceded Magaha was a good worker, retired without any warnings, and rarely, if ever, complained.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

Magaha began receiving short-term disability benefits in March or April of 1999. On her application for short term disability, Magaha represented that her injuries were not work-related. On cross-examination on the issue, Magaha testified that the Mill did not explain the short-term disability form to her and she did not remember checking a box on the form denying her injury was work-related. Magaha has suffered a stroke, has had a guardian ad litem appointed for her, and could not remember whether the Mill helped her fill out the disability forms.

After shoulder surgery in March of 1999, Magaha returned to work. Within two weeks, the pain returned. Magaha retired in July of 2000, had carpal tunnel surgery in October of 2000, and had a second shoulder surgery in February of 2002.

Dr. Michael Bryant, Magaha's treating physician, wrote the Mill after Magaha's first consultation. By letter dated January 19, 1999, Dr. Bryant informed the Mill:

Ms. Magaha had been seen in my office on 1/11/99 with impingement syndrome with continued pain and discomfort. She had some decreased strength secondary to the pain as well as pain on internal and external rotation of the right upper extremity **She is no longer doing the job that caused the impingement syndrome** but continues to be debilitated at work working in pain. . . . I would appreciate your consideration in helping her cover this expense, as I think it will be less costly overall in her treatment. (Emphasis added.)

The Mill stipulated it received this letter.

The single commissioner found Magaha failed to prove a compensable injury and failed to give sufficient notice of having sustained an injury by accident. With one dissent, the full commission adopted the findings of the single commissioner.

Magaha appealed the issues of notice and compensability to the circuit court. In closing arguments at the circuit court hearing, Magaha's counsel argued:

I think notice is everything. If she gave notice that she started an investigation to see if it was work related. Clearly the hearing commissioner was also concerned because . . . he asked the supervisor whether the [new loom] was bigger than the one she used to work on and he said it was, he admitted it was by probably an inch or two. So, that crucial two inches is very important and it is going down to whether she had to stretch further. And I think it is not appropriate and it is not fair and . . . [it] is not supported by substantial evidence. They didn't even conduct any kind of investigation, it is not legal, it is not proper for them to take Dr. Bryant's notes and put [them] in a personnel file without going out on the floor. [Magaha's supervisor] couldn't remember anything and that was one of the biggest problems in the case. . . . And if a proper investigation had been done, looking at the whole record then they would of (sic) found the case was compensable.

The discussion portion of the circuit court's order states:

In this case, Dr. Bryant provided all the information that the Employer needed to properly investigate [Magaha's] injury. He told [the Mill] that a job change had caused the impingement syndrome, that Claimant was experiencing pain and discomfort in her right upper extremity which was her predominant arm for work, and that he was requesting that the Employer cover the expense of medical treatment.

This information should have launched an investigation by the Employer into the specifics of Claimant's medical problems and whether or not a work related injury had occurred. Unfortunately for Claimant, the record does not contain any evidence that the Employer made any reasonable effort to determine the cause of the injury or to question the Claimant or plant personnel when their memories were still fresh. Under these circumstances, the Employer would be unable to properly determine whether or not Claimant's medical problems were work-related.

As a further result, the Claimant was not afforded the opportunity to be provided medical care and treatment by the Employer. **If this injury is later conclusively deemed work related on remand**, the Employer has lost the chance to supervise and to direct her medical care and treatment. (Emphasis added.)

The order concludes:

The only evidence in the record is that Claimant has met the statutory notice requirements of Section 42-15-20 as a matter of law. The decision of the Commission is hereby reversed and the matter is remanded to the Commission for further findings of fact consistent with this order.

The Mill appeals.

STANDARD OF REVIEW

"The Full Commission is the ultimate fact finder in Workers' Compensation cases." Etheredge v. Monsanto Co., 349 S.C. 451, 454, 562 S.E.2d 679, 681 (Ct. App. 2002). "The findings of the Commission are presumed correct and will be set aside only if unsupported by substantial

evidence.” Id. However, “[s]ubstantial evidence is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.” Lark v. Bi-Lo, Inc., 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981). A court may reverse or modify a decision of the commission if substantial rights of a party have been prejudiced because the findings, inferences, conclusions, or decisions are affected by other error of law. Etheredge, 349 S.C. at 456, 562 S.E.2d at 682.

LAW/ANALYSIS

APPEALABILITY

Our initial consideration in this case centers on whether the circuit court’s order is immediately appealable. The Mill argues the circuit court reversed the commission’s finding on the issue of timely notice but failed to rule on the issue of compensability of the injury and therefore the order is final and immediately appealable. Magaha argues the circuit court’s order remands the action for further proceedings and therefore the issue is not immediately appealable pursuant to Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994).

The South Carolina appellate courts “have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable.” Montjoy, 316 S.C. at 52, 446 S.E.2d at 618. However, our appellate courts also recognize that remand orders from the circuit court to an administrative agency may be immediately appealable where the circuit court’s order constitutes a final decision on the merits and the remand order has no effect on the finality of the decision. Foggie v. General Elec. Co., 376 S.C. 384, 389, 656 S.E.2d 395, 397 (Ct. App. 2008). In Brown v. Greenwood Mills, Inc., this court found the circuit court’s order finally determined an issue on the merits and the remand merely directed the commission to make the necessary findings to effectuate the circuit court’s order. 366 S.C. 379, 387, 622 S.E.2d 546, 551 (Ct. App. 2005). Viewing the order based on the Mills’ interpretation, solely for the issue of appealability, we find the order immediately appealable.

NOTICE

The Mill first argues the circuit court erred in reversing the commission's finding that Magaha gave timely notice of the accident. We disagree.

Section 42-15-20 of the Workers' Compensation Act requires that every injured employee give the employer notice of a job-related accident within ninety days after its occurrence. S.C. Code Ann. § 42-15-20 (Supp. 2007). "Section 42-15-20 provides no specific method of giving notice, the object being that the employer be actually put on notice of the injury so he can investigate it immediately after its occurrence and can furnish medical care for the employee in order to minimize the disability and his own liability." Bass v. Isochem, 365 S.C. 454, 472-73, 617 S.E.2d 369, 379 (Ct. App. 2005). The notice requirement is to be construed liberally in favor of claimants. Etheredge, 349 S.C. at 458, 562 S.E.2d at 683.

The Mill conceded it received Dr. Bryant's letter, in which he informs the Mill of Magaha's injury and its relationship to her work. In Etheredge, this court found a letter from the employee's family physician provided notice to employer. Id. at 458, 562 S.E.2d at 683. In light of the law requiring the liberal construction of the notice provision of the Workers' Compensation Act, we conclude Dr. Bryant's letter provided notice to the Mill.

COMPENSABILITY OF INJURY

The Mill next argues the circuit court's remand does not affect the commission's ruling on the compensability of Magaha's injury, and thus the issue of compensability is "law of the case." We disagree.

"Law of the case" is a doctrine dissuading courts from revisiting settled issues. John R. Knight, The Law of the Case Doctrine: What Does it Really Mean?, 43-Oct. Fed.R.Law. 8 (1996). Where a litigant fails to appeal a ruling on a particular issue, that ruling becomes law of the case. See Resolution Trust Corp. v. Eagle Lake & Golf Condominiums, 310 S.C. 473,

475, 427 S.E.2d 646, 648 (1993) (finding an unappealed ruling is law of the case).

After a thorough review of Magaha's notice of appeal to the circuit court, the transcript of the hearing, and the circuit court's order, we find the doctrine of "law of the case" does not apply. First, Magaha raised the issue of compensability in her notice of appeal to the circuit court. Furthermore, reading the circuit court's order as a whole, we find the emphasized language in the order indicates the circuit court expects the commission to revisit the issue of whether Magaha suffered an injury by accident arising out of and in the course and scope of her employment. We recognize the circuit court did not specifically rule on the issue in the conclusion portion of the order. However, given the circuit court's clear reversal on the issue of notice, there was no need for the court to remand with instructions for "further findings of fact consistent with this order" unless the court expected further proceedings on the issue of injury by accident.

CONCLUSION

The circuit court's order reversing the commission's finding on notice and remanding the action to the commission for further proceedings on the issue of whether Magaha suffered an injury by accident arising out of and in the course and scope of her employment is

AFFIRMED.

ANDERSON, SHORT, and THOMAS, JJ., concur.

Attachment C

APP-210

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

J. Cordell Maddox, Circuit Court Judge

Case No. 04-CP-24-1606

Bessie M. Magaha, ... Respondent,

v.

Greenwood Mills, Inc., ... Appellant.

MOTION TO DISMISS

Pursuant to Rule 224, SCACR, the Respondent, Bessie M. Magaha, hereby moves the Court to dismiss the appeal in this matter. This is an appeal from an order of the circuit court reversing a decision of the Workers' Compensation Commission and remanding the matter to the Commission for further proceedings. This matter therefore involves an unappealable interlocutory order. Accordingly, the Respondent hereby moves this Court to dismiss this appeal for the reasons discussed below.

I. The Circuit Court's Order is Not Directly Appealable

The order in this case remanded the matter to the full workers' compensation commission for further proceedings consistent with the circuit court's order. (Order of Judge Maddox, Exhibit A). Case law from the Supreme Court is clear that such an order is not immediately appealable to

the Court of Appeals. *See, e.g., Leviner v. Sonoco Products Co.*, 338 S.C.492, 530 S.E.2d 127 (2000) (circuit court's order, though final, was not appealable since it remanded the matter to the single commissioner for further proceedings; accordingly, appeal should have been dismissed); *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994) (order remanding matter to workers' compensation commission not directly appealable); Jean Hoefer Toal, *et al.*, *Appellate Practice in South Carolina (Second Ed.)*, pp. 101-102 (2002 S.C. Bar).

In *Chastain v. Spartan Mills*, 228 S.C. 61, 88 S.E.2d 836 (1955), the Supreme Court of South Carolina *sua sponte* raised the question of whether the full commission's order was appealable and, if not, the circuit court and the Supreme Court would have had no jurisdiction except to dismiss. The Court listed matters from other jurisdictions held unappealable because they lacked finality:

- (1) an order of the commission allowing a claimant to amend his claim;
- (2) an order vacating the order of the single commissioner denying compensation, and holding the case in abeyance for later determination of disability;
- (3) an order granting both parties the right to take further testimony;
- (4) an order setting aside the examiner's findings and award and ordering the matter scheduled for further hearing;
- (5) an order of the commission granting claimant's petition for introduction of further evidence;
- (6) an order of the compensation appeal board remanding a compensation case to the commissioner for further development of proof.

The Supreme Court added:

That the appealability of the order...has not been questioned or discussed by either party is of no consequence. The order not being either a final one or an intermediate one affecting the merits or depriving appellants of a substantial right, the circuit court was without jurisdiction, in the state of the proceedings, to consider the appeal on its merits.

Id., 228 S.C. at 67.

In fact, subject matter jurisdiction may not be waived, and must be raised when found to be lacking, even by the Court on its own motion. *Brown v. Greenwood School District 50*, 344 S.C. 522, 544 S.E.2d 642 (Ct. App. 2001) (issues relating to subject matter jurisdiction may be raised at any time and should be taken notice of by the appellate court on its own motion; case dismissed because interlocutory order transferring equity case to non-jury roster not appealable).

In three (3) recent matters this Court has refused to entertain direct appeals from circuit court orders that remanded a case to the Workers' Compensation Commission for additional proceedings. See *Nesbitt v. Duke Energy Corp.*, Order (S.C. Ct. App. filed Oct. 30, 2002); *Rinehart v. Darlington County School District*, Order (S.C. Ct. App. filed June 20, 2002); *Ott v. Pony Express*, Order (S.C. Ct. App. filed Oct. 18, 2001). Copies of the orders dismissing these matters are attached to this motion. (Exhibits B, C, and D).

II. *Green v. City of Columbia and Brown v. Greenwood Mills*

In her letter to this Court, Respondent pointed out the case of *Brown v. Greenwood Mills Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), *certiorari pending*, in which this Court held an order of the circuit court was immediately appealable despite the fact that the order remanded the matter to the commission for apportionment between compensable and non-compensable causes of claimant's byssinosis. This Court held the order finally determined an issue on the merits – that claimant's smoking, a non-compensable cause, contributed to his disability – and the circuit court's order mandating apportionment finally determined with finality an issue affecting the merits. The Court distinguished *Montjoy* and made no reference to *Leviner*.

The Court in *Brown* relied upon an earlier Court of Appeals decision, *Green v. City of*

Columbia, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993), in which the Court found a Commission order that *sua sponte* reversed a single commissioner on the issue of election of remedies involved the merits of the case so as to be immediately appealable to the circuit court pursuant to *Henderson v. Wyatt*, 8 S.C. 112 (1877) (“An order to involve the merits must finally determine some substantial matter forming the whole or a part of some cause of action or defense in the case in which the order is entitled”).

In its letter to this Court of February 14, 2006, the Employer cited to *Green* and *Brown*¹ in support of its position that the circuit court’s order is, in fact, appealable. These cases, however, should not control. First, *Green* appears to conflict with the Supreme Court cases of *Montjoy* and *Leviner*. In *Montjoy*, the Supreme Court did not describe the appealed order in detail, but issued an order which reads as follows in its entirety:

This appeal is from an order of the circuit court remanding this case to the Workers’ Compensation Commission. Respondent moves to dismiss the appeal on the ground the order is interlocutory and not directly appealable. We agree and dismiss the appeal.

S.C. Code Ann. § 1-23-390 (1986) provides:

An aggrieved party may obtain a review of any final judgment of the circuit court under this article by appeal to the Supreme Court. The appeal shall be taken as in other civil cases.

Accordingly, 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. *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984); *Hunt v. Whit*, 279 S.C. 343, 306 S.E.2d 621 (1983). To the extent our recent decision in *Blakely v. State Board of Medical Examiners*, 310 S.C. 29, 425 S.E.2d 37 (1993), may be read to allow such an appeal, it is hereby overruled.

Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. at 52-53, 446 S.E.2d at 618. *Green* is a “pre-

¹ *Brown* involved the same employer and employer’s counsel as the case *sub judice*.

Montjoy case,” as pointed out by this Court in the *Nesbitt* order. (Exhibit D). As the Court stated in the *Nesbitt* order:

This court is bound by precedent of the South Carolina Supreme Court. *Daniels v. City of Goose Creek*, 314 S.C. 494, 431 S.E.2d 256 (Ct. App. 1993). While sometimes compelling arguments can be made that certain circuit court orders remanding to the commission should be immediately appealable, *Montjoy* is controlling authority unless clearly distinguishable.

Nesbitt, p. 8. Inasmuch as *Green* cannot be reconciled with *Montjoy* and *Leviner*, *Green* is no longer good law.

Second, insofar as *Green* has not been impliedly overruled by *Montjoy*, *Green* is distinguishable. In *Green*, the hearing commissioner required the claimant to elect between a claim under S.C. Code Ann. § 42-9-20 (general disability statute) and S.C. Code Ann. § 42-9-30 (scheduled member statute), and rather than objecting, the claimant elected to proceed under § 42-9-20. The commissioner denied benefits and claimant filed an application for appellate panel review, but that application did not assert error in forcing the election. The appellate panel, however, *sua sponte* held the forced election was an error of law, affirmed the denial of benefits under § 42-9-20, and remanded the matter to the hearing commission for a new hearing to determine benefits under § 42-9-30. The employer appealed to the circuit court, claiming the appellate panel’s ruling exceeded the scope of the issues before it since claimant had not raised the election issue in the application for review. The circuit court dismissed the appeal, finding the appellate panel’s remand order was interlocutory and not appealable. The employer then appealed to this Court.

The Court of Appeals began its analysis by noting that the hearing commissioner’s findings of fact and law became the “law of the case” to the extent they were not challenged by

the claimant's exceptions to the appellate panel. Because the hearing commissioner required the election between § 42-9-20 and § 42-9-30, that ruling became the law of the case even though it may have been error. The Court held the employer could therefore rely on the fact that it did not have to address the election issue on review by the appellate panel. Hence, the panel's reversal and remand had the effect of finally determining a substantial matter forming part of a defense the employer had available, that is, that the election issue was the law of the case and claimant could not pursue benefits under § 42-9-30. The Court held that the panel's action affected the merits and was therefore immediately appealable.

In this case, the circuit court ruled that the only evidence in the record was that Claimant had met the statutory notice requirements of S.C. Code Ann. § 42-15-20 as a matter of law. The Circuit Court reversed the Commission's order and remanded the matter "for further findings of fact consistent with this order." (Exh. A, Order of Judge Maddox, p. 8). The order does not preclude the Employer from proceeding on the remaining issues in the case. (Exh. A, Form 4). The order is most like the order held to be not appealable in *Nesbitt*, in which the circuit court reversed the commission's due to an error of law, not of fact, ruling that Claimant did not establish an "injury by accident" and remanded for further proceedings. Hence, the employer in *Nesbitt* "lost" the defense of failure to prove the existence of an injury by accident as required by the Workers' Compensation Act.

Because *Brown v. Greenwood Mills* relies upon *Green v. City of Columbia* in finding the order in *Brown* appealable, *Brown* also does not control insofar as it conflicts with *Montjoy* and *Leviner*.

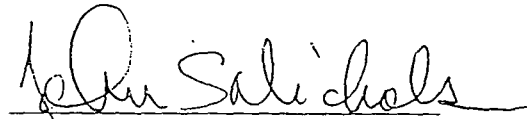
Under *Montjoy* and *Leviner*, this interlocutory order is not appealable under S.C. Code

Ann. § 14-3-330, as this Court has previously found in *Nesbitt, Rinehart, and Ott*. Although this Court recently held an order remanding a matter was indeed appealable in *Brown v. Greenwood Mills, Inc.*, that opinion is based upon analysis set forth in *Green v. City of Columbia*, a case that pre-dated the Supreme Court opinions in *Montjoy* and *Leviner*.

III. Conclusion

For the reasons stated, Respondent respectfully requests this Court look into this matter, find the order on appeal is an unappealable interlocutory order, and dismiss the appeal without prejudice.

Respectfully submitted,



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Attorneys for Respondent

February 17, 2006

Attachment D

APP-218



The South Carolina Court of Appeals

KENNETH A. RICHSTAD
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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June 8, 2006

Roy R. Hemphill, Esquire
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P.O. Box 1547
Greenwood, SC 29648

John S. Nichols, Esquire
Bluestein & Nichols, LLC
P.O. Box 7965
Columbia, SC 29202

Re: Magaha, Bessie v. Greenwood Mills

Dear Mr. Hemphill:

The following Order has been endorsed on your Motion in the above entitled case on appeal.

"Granted.

s/ Jasper M. Cureton A.J.

June 08, 2006."

Dear Mr. Nichols:

The following Order has been endorsed on your Motion to Dismiss in the above entitled case on appeal.

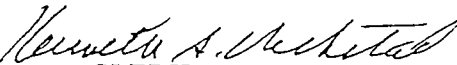
"Denied.

s/ Jasper M. Cureton A.J.

June 08, 2006."

Please be advised that the appellant must send written notification immediately upon the receipt of the transcript of record in this case on appeal.

Very truly yours,


CLERK

KAR/et

cc: Carole M. Dennison, Esquire

Attachment E

APP-221

The Supreme Court of South Carolina

Bessie M. Magaha,

Respondent,

v.

Greenwood Mills, Inc.

Petitioner.

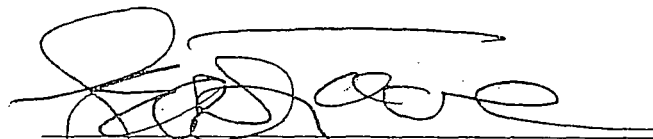
RECEIVED

FEB 20 2009

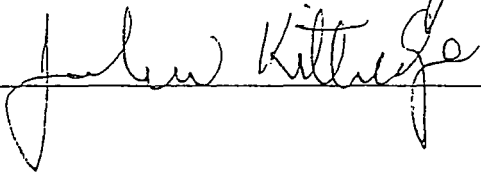
SC Court of Appeals

ORDER

This matter is before the Court by way of a petition for a writ of certiorari to review the Court of Appeals' decision in Magaha v. Greenwood Mills, Inc., Op. No. 2008-UP-244 (S.C. Ct. App. filed April 24, 2008). The petition for a writ of certiorari is denied because the order on appeal is not immediately appealable. Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994) (an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable). We therefore vacate the Court of Appeals' opinion.

 C. J.
 J.
 J.



J.


J.

Columbia, South Carolina

February 19, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2008-CP-32-2876

Cathy C. Bone, ... Respondent,

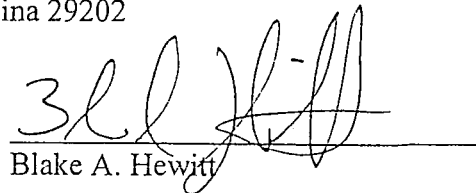
v.

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

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for the Appellant with a copy of Respondent Cathy C. Bone's Motion to Dismiss by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

Michael E. Chase, Esquire
Carmelo B. Sammataro, Esquire
Tuner, Padgett, Graham & Laney, P.A.
Post Office Box 1473
Columbia, South Carolina 29202


Blake A. Hewitt

October 29, 2009
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No: 2008-CP-32-2876

RECEIVED
NOV 09 2009
SC Court of Appeals

Cathy C. Bone,.....Respondent,

v.

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

RETURN TO RESPONDENT'S MOTION TO DISMISS

Pursuant to Rules 240(e) and 267, SCACR, Appellants U.S. Food Service and Indemnity Insurance Company of North America ("Appellants") submit this return in opposition to Respondent's motion to dismiss appeal, filed on or about October 29, 2009. For the reasons set forth below in greater detail, Appellants submit that the challenged order directly involves the merits of this action, relates to matters which cannot be adequately remedied if reviewed subsequent to a final agency decision, and is, therefore, immediately appealable. For these reasons, Appellants respectfully submit that Respondent's motion lacks merit and should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Following a denial of benefits at the single commissioner and Full Commission levels, Respondent appealed to the Court of Common Pleas for Lexington County, which reversed the Full Commission and determined, as a matter of law, that "[t]he evidence of

record shows [Respondent] sustained a compensable injury.” (March 26, 2009, Order p. 4) Appellants timely appealed the circuit court order and refer the Court to the statement of the case and statement of the facts as set forth in their Initial Brief.

ARGUMENT

Respondent’s motion to dismiss should be denied because the challenged order absolutely affects the merits of the underlying action and makes a final determination that cannot be adequately addressed following a final administrative agency decision. Specifically, the circuit court’s order overturns the factual findings of both 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.” (March 25, 2009, Order p. 4) Thus, the circuit court order makes a conclusive finding as to compensability, and the only remaining task for the Commission on remand is to make a final determination of the amount of benefits owed and payable to Respondent. To dismiss the appeal of such an order as interlocutory and not immediately appealable would be inconsistent with a well-developed body of law addressing the finality of orders and unfairly deprive Appellants of the opportunity for meaningful appellate review.

Respondent correctly cites *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994), for the proposition that, under normal circumstances, “an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable.” The holding of *Montjoy*, however, is derived from policy considerations that actually support appellate review of the order at issue.

In *Montjoy*, the court considered respondent’s motion to dismiss the appeal of a circuit court order remanding a case to the Workers’ Compensation Commission. 316 S.C. at 52, 446 S.E.2d at 618. Without explaining the facts or bases of the circuit court

order, the court denied the appeal, noting that the court has “consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable.” *Id.* This holding, in fact this very quotation, derives from and is explained by *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). In *Owen*, the court provides greater insight into the content and interlocutory nature of the order challenged on appeal:

The appellant Canal Wood Corporation appeals from a circuit order remanding this workers’ compensation case *for the taking of additional testimony on the existence of an employer-employee relationship*. The order of the circuit court *does not involve the merits* of the action. It is therefore interlocutory and not reviewable by this Court for lack of finality.

Id. (emphasis added)

This holding is based on the propositions of law addressed in *Hunt* and *King v. Singer Co.*, 276 S.C. 419, 279 S.E.2d 367 (1981). Like the court in *Owen*, the *King* Court’s order notes the lack of finality of the challenged order:

This appeal is from a circuit court order in an action for workmen’s compensation for alleged disability caused by an occupational disease. The circuit court reversed the Industrial Commission’s determination that the single commissioner had erred by failing to submit the case to a Medical Board. *Because the determination of the Commission is a matter not affecting the merits of the cause of action, its decision is unreviewable by either the circuit court or this Court for lack of finality.*

King, 276 S.C. at 420, 279 S.E.2d at 367 (citations omitted, emphasis added). The *King* holding relies, in turn, on *Chastain v. Spartan Mills*, 228 S.C. 61, 88 S.E.2d 836 (1967) (providing examples of final orders and noting that an order that neither allows nor denies compensation is not final and, therefore, not immediately appealable), *Cord v. E.H. Hines Construction Co.*, 220 S.C. 356, 67 S.E.2d 677 (1951) (noting the appealability of an

intermediate order entered prior to a final judgment but nevertheless affecting the merits), and *S.C. Code Ann.* § 14-3-330 (1976).

Similarly, and contrary to Respondent's criticisms, this Court's holdings in *Canteen v. McLeod Regional Medical Center*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009), *reh'g denied* (Sept. 17, 2009)¹; *Foggie v. General Electric Co.*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008); *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), *reh'g denied* (Dec. 15, 2005), *cert. denied* (Jan. 31, 2007); and *Green v. City of Columbia*, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993), are consistent with the underlying rationale favoring immediate review of orders affecting the merits. (Resp't's Motion p. 5-9) In each of these cases, whether appeal was made from an agency or a circuit court order, the litmus test for appealability was whether or not the challenged order affected the merits of the action and was, therefore, subject to immediate appellate review.

Respondent's motion to dismiss erroneously asserts that *Montjoy* "controls this case." (Resp't's Mot. p. 3) For Respondent, *Montjoy* equates with a broad statement barring all appeals of circuit court orders remanding workers' compensation matters for further proceedings, regardless of whether or not the challenged order affects the merits of the action. (*Id.*, p. 4-5) However, this conclusory statement disregards the controlling precedent that compelled the outcome in *Montjoy*. *Owen*, *King*, *Hunt*, and *S.C. Code Ann.* § 14-3-330 all require this Court to assess the "lack of finality" or its impact on the "merits of the case" in deciding whether to review the challenged order or whether the

¹ In *Canteen*, the Court discussed at length its prior holdings in *Green*, *Brown* and *Foggie*, as well as the underlying rationale of *Owens* and *Montjoy*, and noted the common thread that the challenged order must finally determine a contested issue on the merits in order to be subject to immediate appeal.

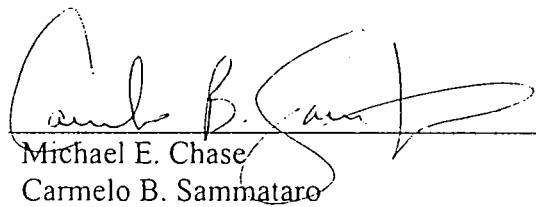
order is truly interlocutory and, therefore, not immediately appealable.² Instead, the challenged order is by its very nature immediately appealable because it determines a question necessarily affecting the merits (e.g., whether substantial evidence supports an award of benefits) and makes a final determination that cannot be adequately addressed after a final administrative agency decision (e.g., that Respondent is entitled to benefits).

CONCLUSION

Because the circuit court order concludes that Respondent's claim to benefits is supported by the substantial record evidence, the challenged order necessarily reaches the merits and is, therefore, subject to immediate appeal. For this reason, Respondent's motion to dismiss should be denied.

TURNER PADGET GRAHAM & LANEY P.A.

November 9, 2009



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ATTORNEYS FOR APPELLANTS

² Respondent's reliance on *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000), is similarly misplaced. Like all of the cases addressed in Respondent's motion, *Leviner* stands for the proposition that an interlocutory order is not subject to immediate appeal when that order remands for further proceedings on the merits of the case, such as a determination of whether or not claimant has reached maximum medical improvement.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

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, ... Appellants.

**REPLY IN SUPPORT OF
RESPONDENT'S MOTION TO DISMISS APPEAL**

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Respondent Cathy C. Bone files this reply in support of her request that this Court dismiss this appeal.

In their return in opposition to Ms. Bone's request, Appellants offer two reasons why Ms. Bone's motion should be denied. First, Appellants offer that the cases of *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994) and *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000) are not inconsistent with allowing a party to seek immediate appellate review of a circuit court's interlocutory order in a workers' compensation case if the order "involves the merits." Second, Appellants offer that an order from the circuit court finding that a worker's injury is compensable but remanding

the case to the worker's compensation commission for additional proceedings cannot be adequately addressed on appeal if the appeal is postponed until after the final administrative decision. Neither argument should be persuasive.

ARGUMENT

I. To the Extent That *Montjoy* and *Leviner* Could Be Read to Endorse the Rule That the General Appealability Statute Can Be a Part of this Appealability Analysis, That Reading Cannot Be Squared with the Supreme Court's Decision in *Magaha*.

Appellants offer that the cases of *Montjoy* and *Leviner* are not inconsistent with allowing a party to seek immediate appellate review of a circuit court's interlocutory order in a workers' compensation case if the order "involves the merits." Put simply, Appellants argue that despite *Montjoy* and *Leviner*'s pronouncements that a party cannot take a direct appeal from a circuit court order remanding a case to the workers' compensation commission for additional proceedings, a party may nevertheless take an immediate appeal from the interlocutory order using the rubric provided by the general appealability statute, S.C. Code Ann. § 14-3-330 (1985 & Supp. 2008) (allowing the immediate appeal of an order "involving the merits" or affecting a substantial right"). This argument should not be persuasive.

Appellants' argument analyzes the two cases cited in the *Montjoy* opinion and extrapolates from that opinion's use of those citations the principle that because those cases judged appealability by using § 14-3-330 or one of its predecessor statutes, it is permissible to continue to use the § 14-3-330 analysis to determine the appealability of a circuit court's interlocutory order in a workers' compensation case. On its face, this is a perfectly reasonable reading of *Montjoy*. This is, in fact, precisely the analysis this Court went through

in the case *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 386-88, 622 S.E.2d 546, 551 (Ct. App. 2005) (analyzing *Montjoy*'s citation to *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984) and *Hunt v. Witt*, 279 S.C. 343, 306 S.E.2d 621 (1983)).

The problem with this reading is that it cannot be squared with the South Carolina Supreme Court's use of the *Montjoy* and *Leviner* decisions. It is true that in the instant case the circuit court has made a final determination that Ms. Bone has sustained a compensable injury. This is like the circuit court in *Magaha*'s final determination that Ms. Magaha gave sufficient notice of her injury to her employer. See *Magaha v. Greenwood Mills, Inc.*, Op. No. 2008-UP-244 (S.C. Ct. App. filed April 24, 2008). The *Magaha* opinion read the law to allow the immediate appeal of an order remanding a case to the workers' compensation commission when "the remand order has no effect on the finality of the decision" or when "the remand merely directed the commission to make the necessary findings to effectuate the circuit court's order." Slip op. at 6. And yet when the employer petitioned the South Carolina Supreme Court to review the *Magaha* opinion on certiorari, the Supreme Court denied the writ and vacated the *Magaha* opinion – an opinion that was unpublished. (Motion Attachment E). The Supreme Court cited *Montjoy* for the unequivocal proposition that an order of the circuit court remanding a case to an administrative agency for additional proceedings is not immediately appealable. (Motion Attachment E).

The most that can accordingly be said for the Supreme Court's citations in *Montjoy* to the cases *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984) and *Hunt v. Witt*, 279 S.C. 343, 306 S.E.2d 621 (1983) are that those citations merely list two examples of denials of appeals from circuit court orders remanding cases to an administrative agency.

The Supreme Court does not appear to be subscribing to the underlying analysis of *Hunt*, *Owens*, and their predecessor cases – an analysis that proceeds back to a time before the Administrative Procedures Act – but has instead shifted to utilizing the Administrative Procedures Act’s appellate review statutes, S.C. Code Ann. § 1-23-380 and -390 (Supp. 2008), to provide the rules of the road in this arena. This would explain the conspicuous absence in the *Magaha*, *Montjoy*, and *Leviner* cases of any citation to § 14-3-330 and its “involving the merits” and “affecting substantial rights” language.

As the court in *Leviner* described, the circuit court’s order in the instant case is unquestionably “final.” See 339 S.C. at 494, 530 S.E.2d at 128. But it is not directly appealable since it remands this case to an administrative agency for further proceedings. See *id.* Appellants’ reading of *Montjoy* and *Leviner* is plausible on its face, but that reading cannot be persuasive in light of the Supreme Court’s application of those decisions.

II. Under the Proper Procedure, the Appeal Is Postponed but Is Fully Adequate.

If this appeal is postponed until after the commission has rendered its final decision in this case, the appeal will nevertheless be completely adequate. As a first matter, the administrative appeal statute allows for immediate appellate review of an intermediate agency decision if review of the final agency decision would not provide an adequate remedy. See S.C. Code Ann. § 1-23-380. There is accordingly no need to look outside the Administrative Procedures Act for an answer to the concern that a categorical denial of the right to immediate appeal will cause an un-fixable hardship in some cases.

But more directly, the circumstances of the instant case do not create any sort of

adequacy problem if the appeal is postponed. On remand, the commission will determine the proper award of compensation for Ms. Bone. Appeal from that determination will lie in the circuit court, see § 1-23-380, and appeal from the circuit court's final order will lie in this Court, see § 1-23-390. In an appeal of the commission's final decision, this Court will absolutely be able to review whether the commission's intermediate determination that Ms. Bone did not sustain a compensable injury was clearly erroneous in view of the reliable, probative, and substantial evidence in the record. This Court will also be able to review at that time any other issues that arose during the remand proceedings.

Limiting appellate review to final orders has the advantage of ensuring that this Court will be asked to pass on each case only once. An appeal ought not be deemed inadequate simply because it will come later. The evidence in the current administrative record will not spoil with the passage of time.

III. This Court May Wish to Certify this Case and this Motion to the Supreme Court.

It may be difficult to characterize which approach to administrative appeals best accounts for concerns of judicial economy. On one hand, allowing immediate appeal of the circuit court's order would have the advantage of immediately resolving the question of whether the circuit court erred in reversing the commission's finding that Ms. Bone's accident was not compensable. On the other hand, postponing the appeal until after the commission enters a final decision in the case has the advantage of ensuring that this Court will pass on this case only once. It ought to be clear, however, that judicial economy would not be served by proceeding through an appeal of the merits of the circuit court's order in the

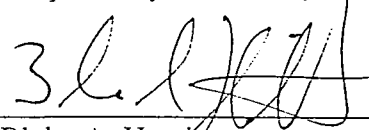
instant case only to have the Supreme Court vacate the resolution of the appeal on the grounds that the circuit court's order was not immediately appealable. In the *Magaha* case, the Supreme Court's order vacating this Court's opinion came three years, three briefs, one opinion, and three certiorari filings after Ms. Magaha moved to dismiss the appeal. As this Court is aware, Rule 204(b), SCACR, provides a vehicle for this Court to certify this case and this motion to the Supreme Court should this Court deem certification appropriate.

CONCLUSION

For the foregoing reasons, this Court should grant Respondent Cathy C. Bone's motion to dismiss the appeal. In the alternative, this Court should certify this case and this motion to the Supreme Court of South Carolina pursuant to Rule 204(b), SCACR.

November 12, 2009

Respectfully submitted,



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(Attorneys for Respondent)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

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, ... Appellants.

RESPONDENT'S SECOND MOTION TO DISMISS APPEAL

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent Cathy C. Bone requests that this Court dismiss this appeal. This is an appeal of interlocutory decision in a workers' compensation case. The order at issue is an order from the circuit court reversing the workers' compensation commission's decision and remanding the Respondent's case to the commission for further proceedings.

The Respondent previously filed a motion to dismiss this appeal in which she argued that a circuit court order which remands a case to the commission is not immediately appealable. See (Attachment A). The Appellants opposed the motion to dismiss. See (Attachment B). This Court denied the motion to dismiss and instructed the parties to brief

the issue of appealability as the first issue on appeal. See (Attachment C).

The parties have briefed the issue of appealability, and according to the deadlines established by the South Carolina Appellate Court Rules, the parties' final briefs are due May 19, 2010. The Court should order the parties to forego final briefing, however, and dispose of this case immediately because the Supreme Court has settled the conflict that necessitated giving the parties the opportunity to brief the issue of appealability. The Supreme Court has overruled this Court's jurisprudence which provided that the immediate appealability of interlocutory decisions in administrative cases was governed by the "involving the merits" or "affecting a substantial right" language of S.C. Code Ann. § 14-3-330 (Supp. 2009). The order in question is therefore not immediately appealable and the Respondent respectfully submits that there is no reason for the parties or the Court to expend the necessary resources involved with preparing and filing final briefs and deciding this case on its merits. Instead, the Court should dismiss this case immediately.

FACTUAL/PROCEDURAL BACKGROUND

Cathy Bone initiated this case in 2007 seeking workers' compensation benefits for what she alleged was a workplace injury. U.S. Food Service (Ms. Bone's employer) and Indemnity Insurance Company of North America (U.S. Food Service's insurance carrier) opposed Ms. Bone's entitlement to workers' compensation benefits. They took issue with Ms. Bone's version of the circumstances surrounding her injury. According to Ms. Bone, she injured her back while moving some shipping pallets at work, worked the remainder of her shift, and worked two additional shifts over the next few days. On the way to work early in the next week, Ms. Bone experienced a flat tire and according to her, a stranger assisted

her in changing the tire after she supplied him with the tools to do so. That same day, Ms. Bone reported her back injury to a supervisor. U.S. Food Service and its carrier argued that this recitation was false and that Ms. Bone had in fact not been injured while at work the previous week. According to U.S. Food Service's theory of the case, Ms. Bone injured her back while changing her own flat tire.

U.S. Food Service prevailed at both the hearing commissioner level and before an appellate panel of the workers' compensation commission. Ms. Bone appealed the commission's decision to circuit court. The circuit court reversed the commission's decision and found that the bulk of evidence in the record established that Ms. Bone injured her back while moving pallets at work. Because the circuit court found that the evidence showed Ms. Bone's injury was a compensable accident, the court remanded the case to the commission.

ARGUMENT

The briefing on the Respondent's previously-denied *Motion to Dismiss* and the arguments set forth in the parties' initial briefs describes the competing approaches to appealability that the parties have offered throughout this appeal. In moving to dismiss the appeal, the Respondent relied on the cases *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994), *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000), and the notion that two statutes passed as part of the Administrative Procedures Act, specifically, S.C. Code Ann. §§ 1-23-380 and -390 (Supp. 2009), controlled the question of whether a circuit court order remanding a case to an administrative agency is reviewable. To support their argument in favor of immediate appealability, the Appellants relied on the cases *Oakwood Landfill, Inc. v. South Carolina Department of Health and Environmental*

Control, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009), *Canteen v. McLeod Regional Medical Center*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009), *Foggie v. General Electric Company*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008), *Brown v. Greenwood Mills*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), and *Green v. City of Columbia*, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993). The Appellants have correctly described that these cases draw support from an older line of Supreme Court precedent which uses § 14-3-330 to determine whether an interlocutory decision in an administrative case is nevertheless immediately appealable. Throughout this appeal, the Respondent's reply to that argument has been that the Supreme Court has jettisoned this analysis and now views the Administrative Procedures Act as providing the exclusive vehicle to judge the appealability of agency cases.

After the briefing in this case closed, the Supreme Court of South Carolina settled this question. In a published order in the case *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health & Environmental Control* (S.C. Sup. Ct. filed Apr. 8, 2010) (Shearouse Adv. Sh. No. 14 at 85) (copy attached as Attachment D), the Supreme Court certified multiple appeals (but from a single order) pursuant to Rule 204(b), SCACR, and dismissed the appeals because the underlying order was not immediately appealable. *Charlotte-Mecklenburg Hospital Authority* (Shearouse Adv. Sh. No. 14 at 86). The order at issue in *Charlotte-Mecklenburg Hospital Authority* was an order from the Administrative Law Court which remanded the case to the South Carolina Department of Health and Environmental Control. In its order, the Supreme Court noted that although § 14-3-330 "provides that an interlocutory order is immediately appealable if it involves the merits[] . . . where there is a specialized statute, § 14-3-330 does not govern the right to review." *Id.*

at 86-87. The Supreme Court overruled this Court's decisions in *Canteen* and *Oakwood Landfill* "[t]o 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* (Shearouse Adv. Sh. No. 14 at 87).

For its authority on appealability, *Oakwood Landfill* looked to the cases the Supreme Court cited in *Montjoy* and then drew from this Court's decisions in *Green*, *Foggie*, and *Brown*. See *Oakwood*, 381 S.C. at 129-133, 671 S.E.2d at 651-653. This is precisely the analysis the Appellants undertook in their initial briefing and in response to the Respondent's *Motion to Dismiss*. This is the same analysis performed in *Canteen*. See 384 S.C. at 621-624, 682 S.E.2d at 505-07. With its order in *Charlotte-Mecklenburg Hospital Authority*, the Supreme Court has overruled this analysis. The order at issue in this appeal is an order remanding the Respondent's case to the workers' compensation commission for the purposes of determining the amount of the Respondent's award. Under the controlling authority, such an order is not immediately appealable. See *Montjoy*, 316 S.C. at 52, 446 S.E.2d at 618 (providing that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable); see also *Leviner*, 339 S.C. at 493-94, 530 S.E.2d at 127-28 (same).

The Respondent is sensitive to the fact that this Court has considered her first *Motion to Dismiss* and instructed the parties to address the issue of appealability in briefing. The Respondent has also availed herself of the procedure provided by Rule 208(b)(7), SCACR, for providing the Court with supplemental citations when significant and pertinent authority comes to the attention of a party after initial briefs have been served and filed. See

Attachment A

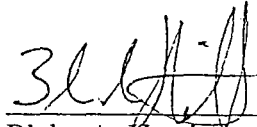
(Attachment E). The Respondent is again moving to dismiss this appeal, however, because the Supreme Court's decision in *Charlotte-Mecklenburg Hospital Authority* applies the argument the Respondent offered in her motion to dismiss and her briefing to this Court, rejects the argument the Appellants have offered, and stands for the proposition that this order is not immediately appealable. The Respondent respectfully submits that there is no reason to hear this case on its merits when controlling authority compels dismissal.

CONCLUSION

For the foregoing reasons, this Court should grant the Respondent's motion and dismiss this appeal.

May 6, 2010

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

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, ... Appellants.

MOTION TO DISMISS APPEAL

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondent Cathy C. Bone requests that this Court dismiss this appeal. This is an appeal from an order of the circuit court which reversed a decision of the South Carolina workers' compensation commission and remanded Ms. Bone's case to the commission for further proceedings. Because any order from the circuit court remanding a case to an administrative agency for additional proceedings is not directly appealable, this Court should dismiss this appeal.

FACTUAL/PROCEDURAL BACKGROUND

Respondent Cathy C. Bone initiated this action on August 7, 2007, seeking workers' compensation benefits for what she alleged was a workplace injury. According to Ms. Bone,

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she injured her back while moving some materials at work.

Appellants U.S. Food Service (Ms. Bone's employer) and Indemnity Insurance Company of North America (U.S. Food Service's insurance carrier) (collectively "U.S. Food Service") opposed Ms. Bone's entitlement to workers' compensation benefits. Put simply, U.S. Food Service took issue with Ms. Bone's version of the circumstances surrounding her injury. According to Ms. Bone, she injured her back while moving some shipping pallets at work, worked the remainder of her shift, and worked two additional shifts over the next few days. On the way to work early in the next week, Ms. Bone experienced a flat tire and according to her, a stranger assisted her in changing the tire after she supplied him with the tools to do so. That same day, Ms. Bone reported her back injury to a supervisor. U.S. Food Service argued that this recitation was false and that Ms. Bone had in fact not been injured while at work the previous week. According to U.S. Food Service's theory of the case, Ms. Bone injured her back while changing her own flat tire.

U.S. Food Service prevailed at both the hearing commissioner level and before an appellate panel of the workers' compensation commission, and Ms. Bone appealed the commission's decision to circuit court. The circuit court reversed the commission's decision and found that the bulk of evidence in the record established that Ms. Bone injured her back while moving pallets at work. (Attachment A). Because the circuit court found that the evidence showed Ms. Bone's injury was a compensable accident, the court remanded the case to the commission. U.S. Food Service filed and served a notice of appeal of the circuit court's order and has filed an initial brief, but because the circuit court's order is not directly appealable, this Court should dismiss this appeal immediately.

ARGUMENT

I. Supreme Court Precedent Clearly Establishes That any Order from the Circuit Court Remanding a Case to an Administrative Agency for Additional Proceedings Is Not Directly Appealable.

The South Carolina Supreme Court's decision in the case *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994) controls this case. Like the instant appeal, the order at issue in *Montjoy* was an order of the circuit court which remanded a case to the workers' compensation commission. The court began by citing to S.C. Code Ann. § 1-23-390 (Supp. 2008), the statute which allows the Supreme Court to review a lower court's judicial resolution of a contested administrative case, and recited "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." *Montjoy*, 316 S.C. at 52, 446 S.E.2d at 618.

The Supreme Court has reiterated its adherence to this approach on more than one occasion. In the case *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000), the Supreme Court granted certiorari to review a decision from this Court which remanded a workers' compensation case to the commission. This Court had held that the circuit court had "exceeded its appellate jurisdiction" and should instead have simply remanded the case to the commission. *Id.* at 493-94, 530 S.E.2d at 127-28. In affirming the decision to remand the case, the Supreme Court held that the circuit court's order, "was not directly appealable since it remanded the matter to the single commissioner for further proceedings." *Id.* at 493-94, 530 S.E.2d at 127-28.

More recently, the case *Magaha v. Greenwood Mills, Inc.*, Op. No. 2008-UP-244

(S.C. Ct. App. filed April 24, 2008) (Attachment B) was an appeal to this Court from an order of the circuit court which reversed the workers' compensation commission's determination that the claimant had failed to comply with the notice requirement contained in the Workers' Compensation Act. See S.C. Code Ann. § 42-15-20 (Supp. 2008) (generally imposing a ninety-day reporting requirement for an accidental injury). The circuit court found that the claimant had satisfied the notice requirement and the court accordingly ordered that the case be remanded to the commission. The claimant's employer appealed to this Court, and this Court denied the claimant's motion to dismiss the employer's appeal. See (Attachments C and D). This Court's opinion in the case distinguished *Montjoy* and cited two court of appeals cases for the proposition that "remand orders from the circuit court to an administrative agency may be immediately appealable where the circuit court's order constitutes a final decision on the merits and the remand order has no effect on the finality of the decision." *Magaha*, slip. op. at 6. The losing party on the merits petitioned for certiorari, the Supreme Court denied certiorari, and in the order of denial, the Supreme Court vacated this Court's opinion. See (Attachment E). The Supreme Court wrote:

The petition for a writ of certiorari is denied because the order on appeal is not immediately appealable. *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994) (an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable). We therefore vacate the Court of Appeals' opinion.

Id.

There is no meaningful distinction between the procedural posture present in the instant case and the postures of the cases presented in the *Montjoy*, *Leviner*, and *Magaha* cases. On each occasion, the Supreme Court has unequivocally stated that an order from the

circuit court remanding a case to an administrative agency for additional proceedings is not immediately appealable. This Court should accordingly dismiss this appeal.

- II. The Cases *Foggie v. General Electric Company*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008), *Brown v. Greenwood Mills*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), and *Green v. City of Columbia*, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993) Are Not Good Law on this Question.

Despite the firm pronouncements from the Supreme Court on this subject, a series of cases from this Court purport to allow the review of interlocutory decisions remanding cases from the circuit court to an administrative agency or from an appellate division of an administrative agency to an administrative hearing officer. See, e.g., *Canteen v. McLeod Reg. Med. Ctr.*, ___ S.C. ___, 682 S.E.2d 504 (2009). These decisions are contrary to controlling Supreme Court precedent as well as the current statutory law and they should not control.

The Court may find an examination of the recent *Canteen* opinion instructive. That case was an appeal to the circuit court from the appellate panel of the workers' compensation commission which had reversed the single hearing commissioner's finding with respect to the claimant's brain injury and remanded the case to the hearing commissioner for further proceedings. The circuit court dismissed the appeal on the grounds that it did not have jurisdiction and this Court reversed – finding that the order was indeed immediately appealable. *Id.* at ___, 682 S.E.2d at 504-507. In doing so, this Court relied on the cases *Foggie v. General Electric Company*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008), *Brown v. Greenwood Mills*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), and *Green v. City of Columbia*, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993). A close analysis of this

jurisprudence shows this reliance to be misplaced.

Ms. Bone submits that the Supreme Court's opinion in the case *Chastain v. Spartan Mills*, 228 S.C. 61, 88 S.E.2d 836 (1955) is the best starting point for an examination of this area of this Court's jurisprudence. *Chastain* contains a pronouncement from the Supreme Court of the common law policy of requiring that administrative orders be final before they are subject to judicial review. In *Chastain*, the court examined and adopted the policy of requiring final agency action before allowing judicial review of administrative determinations and instructed, at the close of its analysis:

In the case at bar, the Commission's order . . . is not a final one. It neither allows nor denies compensation. Not does it affect the merits. It is, therefore, not appealable prior to the Commission's final determination of its review of the Hearing Commissioner's award.

Id. at 66, 88 S.E.2d at 838.

Ms. Bone submits that the *Green – Brown – Foggie* line of cases has focused on *Chastain's* use of the phrase “affect the merits” to justify analyzing the appealability of these types of interlocutory orders under the general appealability statute, S.C. Code Ann. § 14-3-330 (1985 & Supp. 2008). In addition to allowing appeals from final judgments, § 14-3-330 allows for immediate appellate review of an interlocutory decision which involves the merits or affects a substantial right. *Id.* *Chastain* admittedly gives direct support to this interpretation. In addition to including the phrase “affect the merits” in the court's opinion, the court there distinguished two of its previous cases where it had granted immediate appellate review of interlocutory orders remanding administrative cases to the workers' compensation commission and commented with respect to one of the cases that it had

allowed review because the lower tribunal's decision had "deprived [a party] of a substantial right." 228 S.C. at 66-67, 88 S.E.2d at 838. This Court's decision in *Green v. City of Columbia* relied exclusively on *Chastain*, see *Green*, 311 S.C. at 79-80, 427 S.E.2d 685, and *Green* has been the bedrock of the cases on this issue that have followed. See *Brown*, 366 S.C. at 386-88, 622 S.E.2d at 550-51 (distinguishing *Montjoy* and applying *Green*); *Foggie*, 376 S.C. at 388-89, 656 S.E.2d at 397-98 (distinguishing *Montjoy* and relying on *Brown*); *Magaha*, slip op. at 6 (distinguishing *Montjoy* and relying on *Foggie* and *Brown*); and *Canteen*, __ S.C. at __, 682 S.E.2d at 505-07 (relying on *Brown*, *Foggie*, and *Green*).

But importantly, *Green* and *Chastain* both pre-date *Montjoy* and *Leviner*; and despite the language that appears in *Chastain* and upon which *Green* and its progeny have seized, the Supreme Court's decisions in *Montjoy* and *Leviner* do not contain any echoes of the analysis courts use to determine whether interlocutory appeals are nevertheless immediately reviewable under § 14-3-330. Put simply, neither *Montjoy* nor *Leviner* have anything to say about interlocutory decisions affecting substantial rights or involving the merits. Those cases unquestionably stand for the proposition that an order from the circuit court remanding a case to an administrative agency is not directly appealable. As this Court is bound by Supreme Court precedent, *Montjoy* and *Leviner* must control. See S.C. Const. art. V, § 9 (providing that "The decisions of the Supreme Court shall bind the Court of Appeals as precedents.").

The explanation for this disconnect between the Supreme Court's "affecting the merits/substantial right" language in *Chastain* and the more categorical approach expressed in *Montjoy*, *Leviner*, and *Magaha* lies in the passage of the Administrative Procedures Act. Before the passage of the APA, appeals from the workers' compensation commission were

governed by two statutes. The first statute allowed for appeals to circuit court from the commission's final decisions. See 1962 Code § 72-355. The second statute was the predecessor to current § 14-3-330, the general appealability statute. See 1962 Code § 15-123. In the case *Cord v. E. H. Hines Construction Company*, 220 S.C. 356, 67 S.E.2d 677 (1951), the Supreme Court reviewed the commission's denial of an employer's request to have a claimant undergo a medical evaluation. The circuit court had affirmed the decision, and on appeal, the claimant contended that the order was not immediately appealable because it was not the commission's "final order." *Id.* at 362, 67 S.E.2d at 679. Rejecting this assertion, the Supreme Court cited to the then-applicable version of the general appealability statute and stated that "[t]he applicability of the general statutes relating to appeals from the Court of Common Pleas to this court in matters originating before the [commission]" had already been established. *Id.* The Supreme Court held the order reviewable because it affected the employer's "substantial right[s]." *Id.*

The passage of the Administrative Procedures Act – first in 1976 and then in revised form in 1977 – changed this landscape dramatically. Both iterations of the act required a party seeking judicial review to have exhausted his administrative remedies and that the party be aggrieved by an agency's final decision in a contested case. See Act No. 176 § 8, 1977 S.C. Acts 391, 403-04; see also Act No. 671 § 24, 1976 S.C. Acts 1758, 1768. The final decision requirement remains the centerpiece of the current statutory construct for the judicial review of agency decisions. See S.C. Code Ann. §§ 1-23-380 and -390 (Supp. 2008). The only qualification found in the current law's prohibition of review of intermediate agency determinations is the portion of § 1-23-380 providing 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.”

To the extent that the general statutes relating to the judicial appeals process used to apply to reviews of decisions from the workers’ compensation commission and to decisions of lower judicial courts reviewing an administrative agency’s resolution of a contested cases, the passage of the Administrative Procedures Act was a sea change. The *Cord* case’s citation to the general appealability statute can no longer bear the weight the *Chastain* opinion put on it, see *Chastain*, 228 S.C. at 66-67, 88 S.E.2d at 838 (citing *Cords*), and *Chastain*, as a pre-Administrative Procedures Act case, cannot bear the weight of *Green*, *Foggie*, and *Brown*; all post-Administrative Procedures Act cases. See *Green*, 311 S.C. at 79-80, 427 S.E.2d 685 (relying exclusively on *Chastain*); *Brown*, 366 S.C. at 386-88, 622 S.E.2d at 550-51 (distinguishing *Montjoy* and applying *Green*); *Foggie*, 376 S.C. at 388-89, 656 S.E.2d at 397-98 (distinguishing *Montjoy* and relying on *Brown*). See also Act No. 387 § 53, 2006 S.C. Acts 3131 (“This Act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling.”). The rubric which applies to judicial review of agency decisions is supplied by §§ 1-23-380 and -390, and the cases of *Montjoy* and *Leviner* control the question whether a circuit court order remanding a case to an administrative agency is reviewable.¹

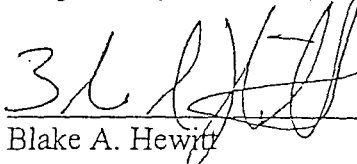
¹ Because the root of these conflicting approaches are drawn from irreconcilable language in *Chastain* and *Montjoy*, an option this Court may wish to pursue is certifying this case, including this motion, to the Supreme Court pursuant to Rule 204(b), SCACR.

CONCLUSION

The Supreme Court's pre-Administrative Procedures Act and pre-*Montjoy* and *Leviner* decisions relating to the appealability of interlocutory decisions from administrative agencies fully support the view of appealability expressed in the *Green*, *Foggie*, *Brown* cases. Those recent cases fail, however, to take into account the fact that the Supreme Court jurisprudence forming their foundations is based on a statutory construct that is no longer applicable. Under current law, any order from the circuit court remanding a case to an administrative agency is not immediately appealable. The Supreme Court's decision in *Magaha* should be taken for the clear signal that it provides and this Court should accordingly dismiss this appeal.

October 29, 2009

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Attachment B

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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,.....Appellants.

RETURN TO RESPONDENT'S MOTION TO DISMISS

Pursuant to Rules 240(e) and 267, SCACR, Appellants U.S. Food Service and Indemnity Insurance Company of North America ("Appellants") submit this return in opposition to Respondent's motion to dismiss appeal, filed on or about October 29, 2009. For the reasons set forth below in greater detail, Appellants submit that the challenged order directly involves the merits of this action, relates to matters which cannot be adequately remedied if reviewed subsequent to a final agency decision, and is, therefore, immediately appealable. For these reasons, Appellants respectfully submit that Respondent's motion lacks merit and should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

Following a denial of benefits at the single commissioner and Full Commission levels, Respondent appealed to the Court of Common Pleas for Lexington County, which reversed the Full Commission and determined, as a matter of law, that "[t]he evidence of

record shows [Respondent] sustained a compensable injury.” (March 26, 2009, Order p. 4) Appellants timely appealed the circuit court order and refer the Court to the statement of the case and statement of the facts as set forth in their Initial Brief.

ARGUMENT

Respondent’s motion to dismiss should be denied because the challenged order absolutely affects the merits of the underlying action and makes a final determination that cannot be adequately addressed following a final administrative agency decision. Specifically, the circuit court’s order overturns the factual findings of both 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.” (March 25, 2009, Order p. 4) Thus, the circuit court order makes a conclusive finding as to compensability, and the only remaining task for the Commission on remand is to make a final determination of the amount of benefits owed and payable to Respondent. To dismiss the appeal of such an order as interlocutory and not immediately appealable would be inconsistent with a well-developed body of law addressing the finality of orders and unfairly deprive Appellants of the opportunity for meaningful appellate review.

Respondent correctly cites *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994), for the proposition that, under normal circumstances, “an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable.” The holding of *Montjoy*, however, is derived from policy considerations that actually support appellate review of the order at issue.

In *Montjoy*, the court considered respondent’s motion to dismiss the appeal of a circuit court order remanding a case to the Workers’ Compensation Commission. 316 S.C. at 52, 446 S.E.2d at 618. Without explaining the facts or bases of the circuit court

order, the court denied the appeal, noting that the court has “consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable.” *Id.* This holding, in fact this very quotation, derives from and is explained by *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). In *Owen*, the court provides greater insight into the content and interlocutory nature of the order challenged on appeal:

The appellant Canal Wood Corporation appeals from a circuit order remanding this workers’ compensation case *for the taking of additional testimony on the existence of an employer-employee relationship*. The order of the circuit court *does not involve the merits* of the action. It is therefore interlocutory and not reviewable by this Court for lack of finality.

Id. (emphasis added)

This holding is based on the propositions of law addressed in *Hunt* and *King v. Singer Co.*, 276 S.C. 419, 279 S.E.2d 367 (1981). Like the court in *Owen*, the *King* Court’s order notes the lack of finality of the challenged order:

This appeal is from a circuit court order in an action for workmen’s compensation for alleged disability caused by an occupational disease. The circuit court reversed the Industrial Commission’s determination that the single commissioner had erred by failing to submit the case to a Medical Board. *Because the determination of the Commission is a matter not affecting the merits of the cause of action, its decision is unreviewable by either the circuit court or this Court for lack of finality.*

King, 276 S.C. at 420, 279 S.E.2d at 367 (citations omitted, emphasis added). The *King* holding relies, in turn, on *Chastain v. Spartan Mills*, 228 S.C. 61, 88 S.E.2d 836 (1967) (providing examples of final orders and noting that an order that neither allows nor denies compensation is not final and, therefore, not immediately appealable), *Cord v. E.H. Hines Construction Co.*, 220 S.C. 356, 67 S.E.2d 677 (1951) (noting the appealability of an

intermediate order entered prior to a final judgment but nevertheless affecting the merits), and *S.C. Code Ann.* § 14-3-330 (1976).

Similarly, and contrary to Respondent's criticisms, this Court's holdings in *Canteen v. McLeod Regional Medical Center*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009), *reh'g denied* (Sept. 17, 2009)¹; *Foggie v. General Electric Co.*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008); *Brown v. Greenwood Mills, Inc.*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), *reh'g denied* (Dec. 15, 2005), *cert. denied* (Jan. 31, 2007); and *Green v. City of Columbia*, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993), are consistent with the underlying rationale favoring immediate review of orders affecting the merits. (Resp't's Motion p. 5-9) In each of these cases, whether appeal was made from an agency or a circuit court order, the litmus test for appealability was whether or not the challenged order affected the merits of the action and was, therefore, subject to immediate appellate review.

Respondent's motion to dismiss erroneously asserts that *Montjoy* "controls this case." (Resp't's Mot. p. 3) For Respondent, *Montjoy* equates with a broad statement barring all appeals of circuit court orders remanding workers' compensation matters for further proceedings, regardless of whether or not the challenged order affects the merits of the action. (*Id.*, p. 4-5) However, this conclusory statement disregards the controlling precedent that compelled the outcome in *Montjoy*. *Owen*, *King*, *Hunt*, and *S.C. Code Ann.* § 14-3-330 all require this Court to assess the "lack of finality" or its impact on the "merits of the case" in deciding whether to review the challenged order or whether the

¹ In *Canteen*, the Court discussed at length its prior holdings in *Green*, *Brown* and *Foggie*, as well as the underlying rationale of *Owens* and *Montjoy*, and noted the common thread that the challenged order must finally determine a contested issue on the merits in order to be subject to immediate appeal.

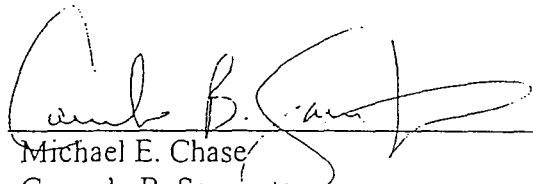
order is truly interlocutory and, therefore, not immediately appealable.² Instead, the challenged order is by its very nature immediately appealable because it determines a question necessarily affecting the merits (e.g., whether substantial evidence supports an award of benefits) and makes a final determination that cannot be adequately addressed after a final administrative agency decision (e.g., that Respondent is entitled to benefits).

CONCLUSION

Because the circuit court order concludes that Respondent's claim to benefits is supported by the substantial record evidence, the challenged order necessarily reaches the merits and is, therefore, subject to immediate appeal. For this reason, Respondent's motion to dismiss should be denied.

TURNER PADGET GRAHAM & LANEY P.A.

November 9, 2009



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² Respondent's reliance on *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000), is similarly misplaced. Like all of the cases addressed in Respondent's motion, *Leviner* stands for the proposition that an interlocutory order is not subject to immediate appeal when that order remands for further proceedings on the merits of the case, such as a determination of whether or not claimant has reached maximum medical improvement.

Attachment C

The South Carolina Court of Appeals

Cathy C. Bone,

Respondent

v.

U. S. Food Service,

Indemnity Insurance Company North
America,

Appellants

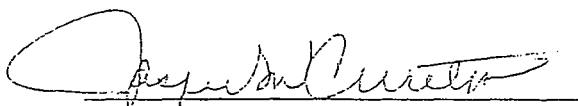
The Honorable G. Thomas Cooper, Jr.
Lexington County
Trial Court Case No. 2008-CP-32-02876

ORDER

Respondent filed a motion to dismiss, arguing the appeal from the circuit court which reversed a decision of the Workers' compensation Commission and remanded the case to the commission is not immediately appealable pursuant to Montjoy v. Asten-Hill Drver Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994). Appellants, relying on numerous recent cases from this Court, maintain the circuit court's order affects the merits and, therefore, is subject to immediate appellate review.

After careful consideration, the appeal is to proceed. Both parties are instructed to raise the issue of appealability as the first issue in the parties' briefs.

AND IT IS SO ORDERED.

 A.S.

Columbia, South Carolina

12/21, 2009

cc: Michael E. Chase, Esquire
Carmelo B. Sammataro, Esquire
Blake Alexander Hewitt, Esquire
William L. Smith, II, Esquire

FILED
12/21/09

Attachment D

The Supreme Court of South Carolina

The Charlotte-Mecklenburg
Hospital Authority d/b/a
Carolinas HealthCare System
and Presbyterian Healthcare
System d/b/a Presbyterian
Hospital-York, LLC,

Petitioners,

Of whom Presbyterian
Healthcare System d/b/a
Presbyterian Hospital-York,
LLC is

Appellant/Respondent,

and the Charlotte-Mecklenburg
Hospital Authority d/b/a
Carolinas Healthcare System is

Respondent/Appellant,

v.

South Carolina Department
of Health and Environmental
Control,

Respondent,

and Amisub of South Carolina,
Inc. d/b/a Piedmont Healthcare
System d/b/a Fort Mill Medical
Center,

Respondent/Appellant.

ORDER

Petitioners and Respondent/Appellant Amisub of South Carolina, Inc. filed notices of appeal in the Court of Appeals from an order of the Administrative Law Court (ALC) dated December 9, 2009. That order granted Amisub's motion for partial summary judgment, granted petitioners motion for summary judgment, and remanded the case to the Department of Health and Environmental Control (DHEC) for a determination as to which party, if any, was entitled to a certificate of need. The Court of Appeals consolidated the appeals.

Petitioner Presbyterian Healthcare System has now filed a motion to certify the appeals to this Court pursuant to Rule 204(b), SCACR, and a motion to expedite the proceedings. Neither Petitioner Charlotte-Mecklenburg Hospital Authority nor Amisub oppose the motions. We hereby certify the appeals to this Court pursuant to Rule 204(b), SCACR. However, we dismiss the appeals because the order of the ALC is not immediately appealable.

The right of appeal arises from and is controlled by statutory law. *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006). South

Carolina Code Ann. § 14-3-330(1) (1976) provides that an interlocutory order is immediately appealable if it involves the merits. However, where there is a specialized statute, § 14-3-330 does not govern the right to review. *Ex parte Capital U-Drive-It, Inc., supra.*

South Carolina Code Ann. § 1-23-610(A)(1) (Supp. 2009) provides that judicial review may only be sought from a *final* decision of the ALC. Therefore, although § 14-3-330 permits appeals from interlocutory orders which involve the merits, that section is inapplicable in cases where a party seeks review of a decision of the ALC because the more specific statute, § 1-23-610, limits review to final decisions of the ALC. *Ex parte Capital U-Drive-It, Inc., supra. See also Spectre, LLC v. S.C. Carolina Dep't of Health and Envtl. Control*, 386 S.C. 357, 688 S.E.2d 844 (2010) (a specific statute prevails over a more general statute). To the extent *Canteen v. McLeod Reg'l Med. Ctr.*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009). and *Oakwood Landfill, Inc. v. S.C. Dep't of Health and Envtl. Control*, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009), rely on §14-3-330 to permit the appeal of interlocutory orders of the ALC or an administrative agency, those cases are overruled.

The order of the ALC in this case is not a final order. If there is some further act which must be done by the court prior to a determination of the rights of the parties, the order is interlocutory. *Hooper v. Rockwell*, 334 S.C. 281, 513 S.E.2d 358 (1999); *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993); *Adickes v. Allison & Bratton*, 21 S.C. 245 (1884). A judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment. *Hooper v. Rockwell*, *supra*; *Mid-State Distributors, Inc. v. Century Importers, Inc.*, *supra*; *Good v. Hartford Accident & Indemnity Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942). 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. *Good v. Hartford Accident & Indemnity Co.*, *supra*.

The ALC's order upholds DHEC's finding that Amisub was a competing applicant for the certificate of need at issue in this matter. However, the ALC found DHEC erroneously interpreted the State Health Plan to allow only existing providers to obtain a certificate of need. Based on this finding, the ALC remanded the matter to DHEC to determine whether

any of the applicants were entitled to the certificate of need. Although the ALC decided questions of law involved in this matter, a final determination as to the certificate of need has not been made. Therefore, the order of the ALC is interlocutory and is not a final decision which is immediately appealable under § 1-23-610. Accordingly, we dismiss this matter.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

April 8, 2010

Attachment E



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
ATTORNEYS AT LAW

Margaret Miles Bluestein
John Shannon Nichols
Stacy Elizabeth Thompson
John Dennis Delgado
Allison Paige Sullivan
Ashley Trout Thompson

PLEASE RESPOND TO COLUMBIA OFFICE
April 26, 2010

VIA HAND DELIVERY

The Honorable Tanya Gee
Clerk
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Cathy C. Bone v. U.S. Food Services and Indemnity Insurance Company of
America
Case Tracking No.: 2009125246

Dear Ms. Gee:

Pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules, I would like to advise you of pertinent and significant authority that has come to my attention after my initial brief in this case was filed and served.

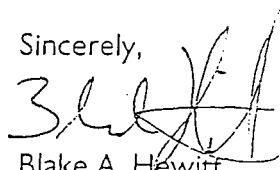
On April 8, 2010, the Supreme Court of South Carolina issued an order in the case of *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health & Environmental Control* (S.C. Sup. Ct. filed Apr. 8, 2010) (Shearouse Adv. Sh. No. 14 at 85). In this order, the Supreme Court addressed the interplay between section 14-3-330 of the South Carolina Code, which deals with the appealability of orders in general, and section 1-23-610, which deals specifically with appeals from the Administrative Law Court. In addressing this issue, the Supreme Court overruled this Court's decisions in *Canteen v. McLeod Regional Medical Center*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009), and *Oakwood Landfill, Inc. v. South Carolina Department of Health and Environmental Control*, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009), to the extent that those cases permit the appeal of interlocutory orders of the Administrative Law Court or an administrative agency. *Charlotte-Mecklenburg Hospital Authority* (Shearouse Adv. Sh. No. 14 at 85, 87).

The instant case is an appeal from an order of the circuit court which remanded the case to an administrative agency, and one of the issues in the case is whether the order is immediately appealable (the Appellants contend that it is, the Respondent contends that it is not). The Supreme Court's order in *Charlotte-Mecklenburg Hospital Authority* is relevant to this argument.

The parties' arguments on the question of appealability can found principally on pages 7-12 of the *Amended Initial Brief of Appellants*, pages 3-15 of the *Initial Brief of Respondent*, and pages 1-6 of the *Initial Reply Brief of Appellants*.

Thank you in advance for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Blake A. Hewitt', written over a horizontal line.

Blake A. Hewitt

BLUESTEIN, NICHOLS, THOMPSON
& DELGADO, LLC

BAH
Enclosure

cc: William L. Smith, II, Esquire
Michael E. Chase, Esquire
Carmelo B. Sammataro, Esquire

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2008-CP-32-2876

Cathy C. Bone, ... Respondent,

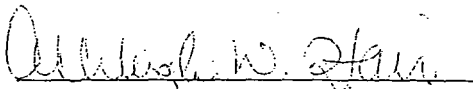
v.

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

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Appellants with a copy of the *Respondent's Second Motion to Dismiss Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Michael E. Chase, Esquire
Carmelo B. Sammataro, Esquire
Tuner, Padget, Graham & Laney, P.A.
Post Office Box 1473
Columbia, South Carolina 29202


Ashleigh W. Hair

May 6, 2010
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No: 2008-CP-32-2876

RECEIVED
MAY 17 2010
SC Court of Appeals

Cathy C. Bone,.....Respondent,

v.

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

RETURN TO RESPONDENT'S SECOND MOTION TO DISMISS

Pursuant to Rules 240(e) and 267, SCACR, Appellants U.S. Food Service and Indemnity Insurance Company of North America ("Appellants") submit this return in opposition to Respondent's Second Motion to Dismiss Appeal, filed on or about May 6, 2010. For the reasons set forth below in greater detail, Appellants once again submit that the order challenged on appeal constitutes a final order that is immediately appealable. Accordingly, Respondent's motion lacks merit and should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural underpinnings of the instant appeal are set forth at length in Appellants' Return in Opposition to Respondent's Motion to Dismiss, Initial Brief, Amended Initial Brief, and Initial Reply Brief. For the sake of brevity, the factual and procedural background as set forth in those papers is incorporated herein by reference and need not be repeated in the instant return.

ARGUMENT

Once again, Respondent's motion to dismiss misapprehends the applicable standard governing review of interlocutory orders and should be denied because the challenged order makes a final determination that cannot be adequately addressed following further administrative agency decisions. Specifically, the circuit court's order overturns the factual findings of both 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." (March 25, 2009, Order p. 4) Going further, the circuit court order concludes that "as a matter of law, the Decision and Order of the Workers' Compensation is hereby REVERSED and REMANDED to the Commission for proceedings consistent with this Order." (March 25, 2009, Order p. 5) (Emphasis in the original) Thus, the circuit court made a conclusive finding as to compensability, and the only remaining task for the Commission on remand is to enforce that order by fixing the amount of benefits owed Respondent. Inasmuch as the challenged order constitutes a final order with regard to the issue of compensability, it is immediately appealable, and Respondent's motion should once again be denied.

A. The Circuit Court Order Is Subject To Immediate Review Because It Constitutes A Final Decision Pursuant to S.C. Code Ann. § 1-23-380.

As noted in Appellants' Initial Reply Brief, S.C. Code Ann. § 1-23-380(a) contemplates judicial review of a final decision in a contested case such as this. Further, S.C. Code Ann. § 1-23-390 provides for appellate review of "any final judgment of the circuit court." The circuit court order is just such a final decision. Respondent's misstatement to the contrary – that "[b]ecause the circuit court found that the evidence showed [Respondent's] injury was a compensable accident, the court remanded the case to the commission." (Motion, p. 3) – fails to accurately describe the effect of the circuit

order and implies that further fact finding by the Commission is necessary. To the contrary, the circuit court order effectively decides the only issue in these proceedings – whether or not Respondent sustained a compensable injury. Thus, the order is not “interlocutory” in the sense urged by Respondent because it determines with finality the only legal question presented.

B. The Decision By The South Carolina Supreme Court In *Charlotte-Mecklenburg Hospital Authority* Does Not Counsel In Favor Of Dismissal.

Respondent erroneously argues the decision of the South Carolina Supreme Court in *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control*, S.C. Sup. Ct. Order dated April 8, 2010 (Shearouse Adv. Sh. No. 14), “settled the conflict that necessitated giving the parties the opportunity to brief the issue of appealability,” no such conflict ever existed. (Motion, p. 2) Respondent’s argument fails to explain why the order in *Charlotte-Mecklenburg* was not immediately appealable and overlooks the applicable statutes providing for immediate review of final orders. This is most likely the case given the fact that the *Charlotte-Mecklenburg* hits on exactly the distinction between final orders and truly interlocutory orders presented in Appellants’ substantial briefing on this issue. Because the circuit court order here finally determined the issue of compensability, it is a final order subject to immediate review, and Respondent’s motion should be dismissed.

The *Charlotte-Mecklenburg* decision emphasizes the 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* Court emphasized 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.” (Order, p. 4)

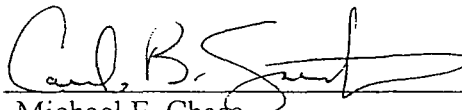
In that case, the administrative law court order was not immediately reviewable because it remanded the action specifically for a determination of whether the applicants involved were entitled to a certificate of need. Thus, the lower tribunal was necessarily tasked with undertaking an additional fact finding mission. In contrast, the order here concluded, as a matter of law, that Respondent sustained a compensable injury – a finding that unquestionably constitutes a final determination of the merits of the action. As such, Respondent’s successive motion is unfounded and should be denied.

CONCLUSION

Because the circuit court order concludes that Respondent’s claim to benefits is supported by the substantial record evidence, the challenged order necessarily reaches the merits and is, therefore, subject to immediate appeal. For this reason, Respondent’s Second Motion to Dismiss should be denied.

TURNER PADGET GRAHAM & LANEY P.A.

May 17, 2010



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Columbia, SC 29202
Phone: (803) 254-2200
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ATTORNEYS FOR APPELLANTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
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, ... Appellants.

REPLY IN SUPPORT OF RESPONDENT'S
SECOND MOTION TO DISMISS APPEAL

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Respondent Cathy C. Bone files this reply in support of her second motion to dismiss this appeal.

In their return in opposition to the motion to dismiss, the Appellants argue that the circuit court's order is immediately appealable because the order makes a final determination as to the "compensability" of Ms. Bone's case. The Court should reject this argument.

The circuit court's order is not immediately appealable unless it is a final order. S.C. Code Ann. § 1-23-390 (Supp. 2009). An order is not a "final order" simply because it resolves *one* issue in a case with finality. To be final, an order must "dispose[] of the *whole* subject matter of the action or terminate[] the particular proceeding or action, *leaving nothing to be done but to enforce by execution* what has been determined." *Charlotte-Mecklenburg*

Hosp. Auth. v. South Carolina Dep't of Health & Envtl. Control (S.C. Sup. Ct. filed Apr. 8, 2010) (Shearouse Adv. Sh. No. 14 at 85, 88) (citing *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942) (emphasis added)). Ms. Bone initiated this case seeking workers' compensation benefits for her alleged temporary total disability and she asked her employer to pay for her past and future medical treatment. The commission reached only one of the relevant issues – the dispute about whether Ms. Bone injured her back while at work. The commission determined that Ms. Bone did not injure her back at work. It found instead that she injured her back while changing a tire on the way to work. Ms. Bone appealed that decision to circuit court, and the circuit court reversed the commission's decision and remanded the case for additional proceedings.

The circuit court's order is not a final order because there is more to be done in this case at the agency level. On remand, the parties will almost certainly dispute whether Ms. Bone is temporarily disabled, whether Ms. Bone's past medical treatment was reasonable and necessary, and whether any future treatment is necessary. The question of whether Ms. Bone injured her back at work or changing a tire is accordingly not "the only issue in these proceedings," (Return, p.3), and the circuit court's order cannot be a final order. The order contains no provision ordering the payment of temporary benefits and it contains no finding that Ms. Bone is temporarily totally disabled. There is nothing in the order to "enforce" or "execute." The circuit court's order is interlocutory in the purest sense of the word.

The starting and finishing points for resolving this motion to dismiss should be the Supreme Court's opinions in *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994) and *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000).

An order from the circuit court remanding an administrative case to an agency for additional proceedings is simply not immediately appealable. It is not a “final judgment,” and the statute that provides for appeals from the circuit court in administrative cases limits the right of appeal to “final judgment[s].” S.C. Code Ann. § 1-23-390 (Supp. 2009).

The Appellants must not be serious when they suggest that this Court’s decision to give the parties the opportunity to brief the issue of appealability did not derive from a conflict in the relevant case law. See (Return, p.3). In their return to Ms. Bone’s first motion to dismiss the Appellants argued that the circuit court’s order was immediately appealable because the order “reaches the merits.” (First Return, p.5). The Appellants noted that under this Court’s jurisprudence, “the litmus test for appealability [] was whether or not the challenged order affected the merits of the action and was, therefore, subject to immediate review,” and the Appellants argued that the circuit court’s order in this case “affects the merits of the underlying action and makes a final determination that cannot be adequately addressed following a final administrative agency decision.” (First Return, p.2).

As Ms. Bone has repeatedly conceded, the Appellants are reading this Court’s cases correctly. Those cases are *Canteen v. McLeod Regional Medical Center*, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009), *Foggie v. General Electric Company*, 376 S.C. 384, 656 S.E.2d 395 (Ct. App. 2008), *Brown v. Greenwood Mills*, 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005), and *Green v. City of Columbia*, 311 S.C. 78, 427 S.E.2d 685 (Ct. App. 1993); and the reasoning set forth in those cases is echoed in this Court’s opinion in *Oakwood Landfill, Inc. v. South Carolina Department of Health and Environmental Control*, 381 S.C. 120, 671 S.E.2d 646 (Ct. App. 2009). All of those cases judge appealability based on an analysis

traceable to the general appealability statute, S.C. Code Ann. § 14-3-330 (Supp. 2009), and those cases allow the immediate appeal of interlocutory orders which “involve the merits” under that statute. Ms. Bone relied on different authorities for her motion to dismiss, and this Court’s order instructing the parties to brief the issue of appealability described the conflicting approaches in these terms:

Respondent filed a motion to dismiss, arguing the appeal from the circuit court which reversed a decision of the Workers’ Compensation Commission and remanded the case to the commission is not immediately appealable pursuant to *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994). Appellants, relying on numerous recent cases from this Court, maintain that the circuit court’s order affects the merits and, therefore, is subject to immediate appellate review.

Bone v. U.S. Food Serv., S.C. Ct. App. Order dated Dec. 21, 2009.

There was a conflict in authority at play and the Supreme Court’s order in *Charlotte-Mecklenburg* settles it. This Court’s jurisprudence had used the “involve the merits” analysis derived from § 14-3-330 to allow the immediate appeal of interlocutory orders in administrative cases, and even though this analysis came from some earlier Supreme Court cases,¹ the Supreme Court in *Charlotte-Mecklenburg* said “no” – the same thing it said in *Montjoy* and the same thing it said in *Leviner*. If there was no conflict in authority, there would have been no need to overrule *Canteen* and *Oakwood Landfill*, but the Supreme Court did so – expressly. See *Charlotte-Mecklenburg Hosp. Auth.* (Shearouse Adv. Sh. No. 14 at 87). The Administrative Procedures Act provides the exclusive guidepost for determining

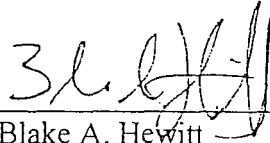
¹This analysis derives from the Supreme Court’s decisions in the cases *Owens v. Canal Wood Corp.*, 281 S.C. 491, 316 S.E.2d 385 (1984); *Hunt v. Witt*, 279 S.C. 343, 306 S.E.2d 621 (1983); *King v. Singer Company*, 276 S.C. 419, 279 S.E.2d 367 (1981); *Chastain v. Spartan Mills*, 228 S.C. 61, 88 S.E.2d 836 (1955); and *Cord v. E.H. Hines Construction Co.*, 220 S.C. 356, 67 S.E.2d 677 (1951).

the appealability of the order in this case and the appealed order is an interlocutory order from the circuit court. The Court should therefore dismiss this case immediately.

Ms. Bone is not attempting to avoid resolution of this case on the merits, but no one's interests are served by having the Supreme Court vacate this Court's decision on the merits when the losing party – whomever it may be – petitions the Supreme Court for certiorari. Though citation to unpublished decisions is disfavored, the *Magaha v. Greenwood Mills, Inc.*, case demonstrates that this has happened before. See Op. No. 2008-UP-244 (S.C. Ct. App. filed Apr. 24, 2008) (vacated by S.C. Sup. Ct. Order dated Feb. 19, 2009). Ms. Bone submits that it will happen again if this appeal proceeds and is resolved on the merits.

May 24, 2010

Respectfully submitted,



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Bluestein, Nichols, Thompson &
Delgado, LLC
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(803) 779-8995 (facsimile)
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(Attorneys for Respondent)



The South Carolina Court of Appeals

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1015 SUMTER STREET
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www.sccourts.org

December 21, 2009

Blake Alexander Hewitt, Esquire
Bluestein, Nichols, Thompson & Delgado, LLC
1614 Taylor St
Columbia, SC 29201-3451

Re: Bone, Cathy v U.S. Food Service
Case Tracking #: 2009125246

Dear Mr. Hewitt:

Enclosed is a copy of an Order of the Court in regards to the above case.

All parties are advised that the Court will allow the Appellant thirty days to serve and file an Amended Appellant's Initial Brief. If the Appellant does not want to serve and file an amended brief, the Court requests confirmation in writing within ten days of the date of this letter.

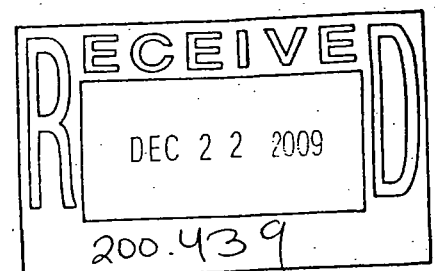
Very truly yours,

Tanya D. Ge
ACTING CLERK

TAG/ec

cc: Michael E. Chase, Esquire
Carmelo B. Sammataro, Esquire
William L. Smith, II, Esquire

APP-281



The South Carolina Court of Appeals

Cathy C. Bone,

Respondent

v.

U. S. Food Service,

Indemnity Insurance Company North
America,

Appellants

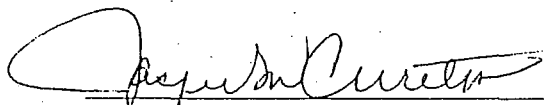
The Honorable G. Thomas Cooper, Jr.
Lexington County
Trial Court Case No. 2008-CP-32-02876

ORDER

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After careful consideration, the appeal is to proceed. Both parties are instructed to raise the issue of appealability as the first issue in the parties' briefs.

AND IT IS SO ORDERED.

 A.S.

Columbia, South Carolina

12/21, 2009

cc: Michael E. Chase, Esquire
Carmelo B. Sammataro, Esquire
Blake Alexander Hewitt, Esquire
William L. Smith, II, Esquire

FILED
12/21/09 WWH

The South Carolina Court of Appeals

Cathy C. Bone,

Respondent,

v.

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

Appellants.

The Honorable G. Thomas Cooper, Jr.
Lexington County
Trial Court Case No. 2008-CP-32-02876

ORDER

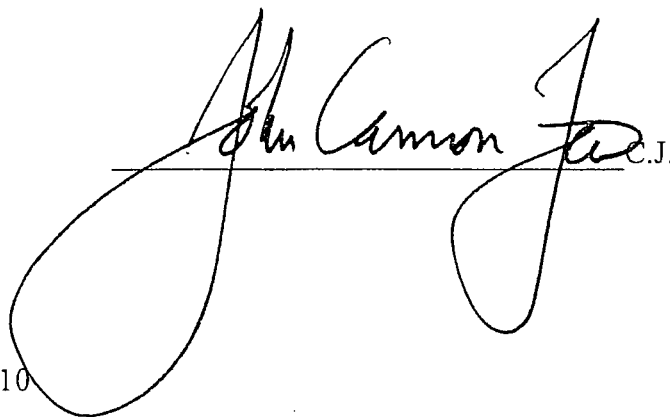
Cathy Bone initiated this workers' compensation action against Appellants, seeking workers' compensation benefits for an alleged workplace injury. Appellants denied Bone's request for benefits, concluding Bone did not suffer a compensable work related injury. After a hearing, the single commissioner denied benefits to Bone, and the Appellate Panel affirmed. Bone appealed to the circuit court, which reversed, finding Bone injured her back while moving pallets at work. Because the circuit court found Bone's injury was compensable, the circuit court remanded the action to the Appellate Panel "for proceedings consistent with [the circuit court's] order." Appellants then appealed the circuit court's order to this Court.

Bone first filed a motion to dismiss in October 2009, arguing the circuit court's order is not immediately appealable. This Court issued an order allowing the appeal to proceed and instructing the parties to brief the issue of appealability. Our Supreme Court subsequently issued an order in the case of Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl.

Control, S.C. Sup. Ct. Order filed April 8, 2010 (Shearouse Adv. Sh. No. 14 at 85). Pursuant to the reasoning set forth in the Charlotte-Mecklenburg Hospospital Authority order, Bone has filed a second motion to dismiss. Appellants have filed a Return, and Bone has filed a Reply.

After careful consideration of the parties' filings and applicable case law, we hereby dismiss Appellants' appeal. The 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. See Montjoy v. Asten-Hill Dryer Fabrics, 316 S.C. 52, 52, 446 S.E.2d 618, 618 (1994) (stating our courts "have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable"); Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Envtl. Control, S.C. Sup. Ct. Order filed April 8, 2010 (Shearouse Adv. Sh. No. 14 at 85-87) (reiterating that appeals from administrative agencies may only be sought from final decisions, explaining the general appealability statute, section 14-3-330 of the South Carolina Code (1976 & Supp. 2009), does not apply to appeals from administrative agencies, and overruling this court's opinion in Canteen v. McLeod Regional Medical Center, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009), to the extent it relied on § 14-3-330 to permit the appeal of interlocutory orders of the administrative law court or an administrative agency); Adickes v. Allison & Bratton, 21 S.C. 245, 259 (1884) (holding if there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory); Good v. Hartford Accident & Indem. Co., 201 S.C. 32, 41, 21 S.E.2d 209, 212 (1942) (holding if a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment).

AND IT IS SO ORDERED.

C.J.

Columbia, South Carolina

 June 30, 2010

cc: Michael E. Chase, Esquire
Carmelo B. Sammataro, Esquire
Blake Alexander Hewitt, Esquire
William L. Smith, II, Esquire

FILED
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2008-CP-32-2876

RECEIVED
JUL 20 2010
SC Court of Appeals

Cathy C. Bone, ... Respondent,

v.

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

RESPONDENT CATHY BONE'S RETURN IN OPPOSITION
TO APPELLANTS' PETITION FOR REHEARING

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, Respondent Cathy C. Bone files this return in opposition to the petition for rehearing filed by U.S. Food Service and Indemnity Insurance Company of North America.

In their petition for rehearing, the Appellants repeat the same argument they advanced in their return to Ms. Bone's motion to dismiss this appeal. This argument is that the circuit court's order is immediately appealable because the order makes a final determination as to the "compensability" of Ms. Bone's case.

The Court should reject the Appellants' argument because the order on appeal is not a "final order." It may be a final determination on the issue of compensability, but it is not an order that concludes this case. A final order "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 Hosp. Auth. v. South Carolina Dep’t of Health & Envtl. Control* (S.C. Sup. Ct. Order filed Apr. 8, 2010) (Shearouse Adv. Sh. No. 14 at 85, 88) (citing *Good v. Hartford Accident & Indem. Co.*, 201 S.C. 32, 21 S.E.2d 209 (1942) (emphasis added)). As Ms. Bone described in her reply in support of her motion to dismiss, the order on appeal contains no provision ordering the payment of workers’ compensation benefits and it contains no finding that Ms. Bone is temporarily totally disabled. There is nothing in the order to “enforce” or “execute.”

This is the reason the Appellants’ argument based on the *Charlotte-Mecklenburg* case should be unpersuasive. *If* the administrative law court’s order in that case *had* made a final determination as to the parties’ entitlements to certificates of need, the ALC’s order would nevertheless not be immediately appealable unless that order was a final order. See *Charlotte-Mecklenburg Hosp. Auth.* (Shearouse Adv. Sh. No. 14 at 87). Whether a particular issue is the “central issue in a case” may be relevant to an “involves the merits” or “affect substantial rights” analysis, but a final order *must* dispose of the whole case.

The circuit court’s order did more than just determine that Ms. Bone’s accident was compensable – it remanded the case to the workers’ compensation commission for additional proceedings. This helps to make the point. The circuit court’s order is not a final order because there is more to be done in this case at the agency level. On remand, the parties will probably dispute whether Ms. Bone is temporarily disabled, whether Ms. Bone’s past medical treatment was reasonable and necessary, and whether any future medical treatment is necessary. In short, the parties will litigate any other issues involved in the run-of-the-mill

workers' compensation case once this case is remanded. It would be odd to call the order on appeal a final order if this much was left to be done in the case. The answer is that the order is not a final order.

The posture of this case should also be instructive. At the circuit court level, "compensability" was the central issue the circuit court had to deal with only because the commission had resolved the issue of compensability against Ms. Bone and ended its analysis. But that does not mean that compensability is the only issue in the case. The Appellants' analysis would transform the final order requirement in agency cases into a twin of the rule allowing immediate appeal of interlocutory orders that "involve the merits" or "affect substantial rights." See S.C. Code Ann. § 14-3-330 (Supp 2009). This rule does not apply in administrative cases. *Charlotte-Mecklenburg Hosp. Auth.* (Shearouse Adv. Sh. No. 14 at 86-87). An order from the circuit court remanding an administrative case to an agency for additional proceedings is not immediately appealable. The cases of *Montjoy v. Asten-Hill Dryer Fabrics*, 316 S.C. 52, 446 S.E.2d 618 (1994), and *Leviner v. Sonoco Products Company*, 339 S.C. 492, 530 S.E.2d 127 (2000) state this rule and are directly on point.

There is a distinction between the "last order" a circuit court will issue in a case and a "final order" for the purposes of immediate appealability. Language from *Leviner* makes the point. In *Leviner*, the Supreme Court instructed that "the final order here was the January remand order. While final, this 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.

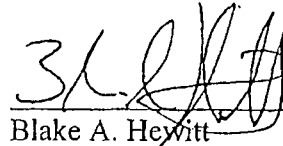
As used in *Leviner*, "final order" meant "last order," and because the last order

remanded the case to the workers' compensation commission, it was not immediately appealable. In Ms. Bone's case, the circuit court has made its final pronouncement on the issue of whether Ms. Bone suffered a compensable accident. But because that pronouncement does not resolve Ms. Bone's workers' compensation case and included an instruction that the case be remanded for additional proceedings, that pronouncement is simply not a "final order" for the purposes of immediate appealability.

The Court should accordingly deny the Appellants' request for rehearing.

July 20, 2010

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court Of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No: 2008-CP-32-2876

RECEIVED
JUL 16 2010
SC Court of Appeals

Cathy C. Bone,.....Respondent,

v.

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

PETITION FOR REHEARING BY APPELLANTS U.S. FOOD SERVICE AND
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA

Appellants U.S. Food Service and Indemnity Insurance Company of North America (hereinafter "Appellants") hereby petition this Court for rehearing, pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules, of its Order filed July 1, 2010. That order dismissed the instant workers' compensation appeal as interlocutory pursuant to *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010). Appellants' petition seeks rehearing and reconsideration of the Court's order to the extent that the dismissal of this appeal rests upon an overly broad, incorrect reading of the supreme court's holding in that case.

FACTUAL AND PROCEDURAL BACKGROUND

Following a denial of benefits by the single commissioner and a unanimous panel of the Full Commission, Respondent appealed to the Court of Common Pleas for Lexington County, which reversed the denial of benefits by the Full Commission and determined, *as a matter of law*, that “[t]he evidence of record shows [Respondent] sustained a compensable injury.” (March 26, 2009, Order p. 4) Accordingly, the circuit court reversed the Full Commission order and remanded this action to the Commission “for proceedings consistent with this Order. . . .”, *e.g.*, a calculation of the compensation benefits due. (*Id.*) Appellants timely appealed the circuit court order and refer the Court to the statement of the case and statement of the facts as set forth in their Initial Brief.

ARGUMENT

This Court’s Order dismissing the instant appeal as interlocutory results from an erroneous and overly broad reading of the holding in *Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control*, 387 S.C. 265, 692 S.E.2d 894 (2010). Upon closer examination, that case actually supports immediate review of the circuit court’s order in this case because the challenged order makes a final determination of the legal rights of the parties; to wit, the legal conclusion that Respondent sustained a compensable injury in the course and scope of her employment. Specifically, the circuit court’s order overturns the factual findings of both 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.” (March 25, 2009, Order p. 4) Thus, the circuit court made a conclusive finding as to compensability, and the only remaining task for the Commission on remand is to fix 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 Appellant is entitled to immediate appellate review.

A. The Circuit Court Order Is Subject To Immediate Review Because It Constitutes A Final Decision Pursuant to S.C. Code Ann. § 1-23-380.

South Carolina Code Ann. § 1-23-380(a) contemplates judicial review of a final decision in a contested case such as this. Further, S.C. Code Ann. § 1-23-390 provides for appellate review of “any final judgment of the circuit court.” The circuit court order is just such a final decision. This Court’s finding to the contrary – 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.” (Order, p. 2) – fails to accurately describe the effect of the circuit order and implies that further fact finding on the legal question at issue (entitlement to compensation benefits) by the Commission is necessary. To the contrary, the circuit court order effectively decides the only issue in these proceedings – whether or not Respondent sustained a compensable injury. Thus, the order is not “interlocutory” in the sense contemplated in this Court’s Order because it determines with finality the only legal question presented.

B. The Decision By The South Carolina Supreme Court In *Charlotte-Mecklenburg Hospital Authority* Does Not Counsel In Favor Of Dismissal.

This Court’s Order dismissing the instant appeal as interlocutory relies upon an incorrect and overly broad reading of the holding in *Charlotte-Mecklenburg*. Without analysis of why the order in that case was not subject to immediate review, this Court’s Order would deny appellate review in any case wherein 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 in Appellants' substantial briefing on this issue and accepted by this Court in its dismissal. Because the circuit court order here finally determined the issue of compensability, it is a final order subject to immediate review, and Respondent's motion should be dismissed.

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* Court emphasized 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 Respondent 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 other than execute that judgment. Thus, a closer

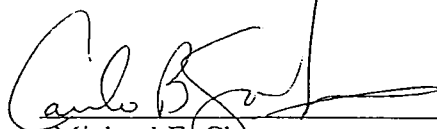
reading of *Charlotte-Mecklenburg* actually supports the opposite conclusion reached in this Court's Order and militates in favor of immediate appellate review. Accordingly, Appellants respectfully seek reconsideration of that Order and reinstatement of the appeal in this matter.

CONCLUSION

For all of the reasons stated herein, Appellants request that this Court grant its petition for rehearing of the issues presented in the instant appeal.

TURNER PADGET GRAHAM & LANEY P.A.

July 16, 2010

A handwritten signature in black ink, appearing to read "Michael E. Chase", is written over a horizontal line.

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The South Carolina Court of Appeals

Cathy C. Bone,

Respondent,

v.

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

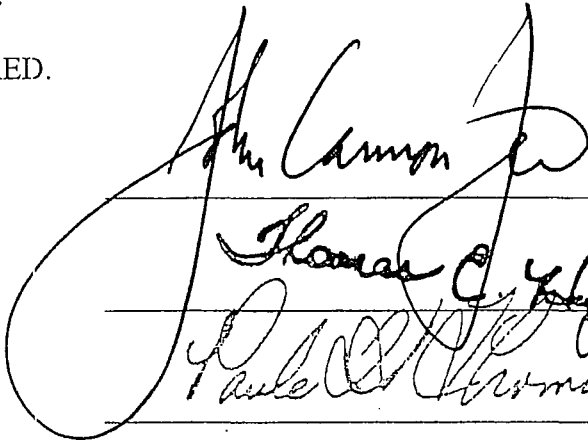
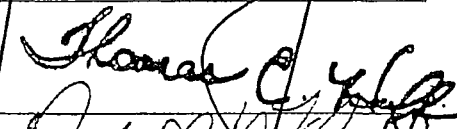
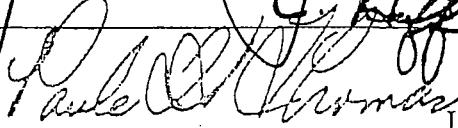
Appellants.

The Honorable G. Thomas Cooper, Jr.
Lexington County
Trial Court Case No. 2008-CP-32-02876

ORDER DENYING PETITION FOR REHEARING

Appellants petition our Court to rehear the dismissal their appeal. After a careful consideration, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing or reinstating the appeal.

IT IS SO ORDERED.


C.J.



Columbia, South Carolina

8/13, 2010

cc: Michael E. Chase, Esquire
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Blake Alexander Hewitt, Esquire
William L. Smith, II, Esquire

FILED
8/13/10 