

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner
Gene McCaskill, Commissioner
Andrea C. Roche, Commissioner

SCWCC File No. 1111934

Thomas Chad Hilton, Claimant.....Petitioner,

v.

Flakeboard America Limited, Employer, and
Liberty Mutual Insurance Company, Carrier, Defendants.....Respondents.

RESPONDENTS' RETURN TO
PETITION FOR WRIT OF CERTIORARI

L. Brenn Watson, Esq.
Ian C. Gohean, Esq.
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607
(864) 527-3292

Attorneys for Respondents

Pursuant to Rule 240 of the South Carolina Appellate Court Rules, Respondents file their Return to Petition for Writ of Certiorari, and Respondents respectfully request the Supreme Court deny Petitioner's Petition based on the following grounds:

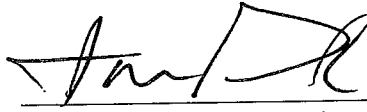
1. The Single Commissioner of the Workers' Compensation Commission issued a Decision and Order on June 4, 2013.
2. Respondents appealed the Single Commissioner's Order to the Appellate Panel of the Commission, and the Appellate Panel issued a Decision and Order on May 21, 2014, vacating the Order of the Single Commissioner and remanding the claim back to the Single Commissioner for further proceedings.
3. On June 20, 2014, Petitioner filed a Petition for Writ of Certiorari with the South Carolina Supreme Court, requesting the Court review the May 21, 2014, Decision and Order of the Appellate Panel.
4. Pursuant to the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(A), S.C. Code Ann. § 1-23-390, and *Bone v. U.S. Food Service*, 744 S.E.2d 552, 404 S.C. 67 (S.C. 2013), this claim is not yet ripe for appellate review.
5. In the alternative, even if the claim is reviewable by the Supreme Court at this time, the Appellate Panel committed no error.

For the foregoing reasons, Respondents respectfully request the Supreme Court deny Petitioner's Petition for Writ of Certiorari, with prejudice. Respondents rely on the Exhibits submitted in the Petition for Writ of Certiorari.

Signature page follows

Respectfully submitted,

WILLSON JONES CARTER & BAXLEY, P.A.

A handwritten signature in black ink, appearing to read "L. Brenn Watson", written over a horizontal line.

L. Brenn Watson, Esquire
Ian C. Gohean, Esquire
872 S. Pleasantburg Drive
Greenville, SC 29607
Attorneys for Defendants

Date: July 11, 2014

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS'
RETURN TO PETITION FOR WRIT OF CERTIORARI

L. Brenn Watson, Esq.
Ian C. Gohean, Esq.
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607
(864) 527-3292

Attorneys for Respondents

STATEMENT OF THE CASE

Petitioner sustained an admitted injury by accident arising out of and in the course of his employment on August 17, 2011, when he was bitten by an insect on the left thigh/buttock. Respondents provided appropriate medical treatment and, on July 6, 2012, filed a Request for Hearing before the South Carolina Workers' Compensation Commission, arguing Petitioner had reached maximum medical improvement (MMI) and was entitled to no additional benefits. Respondents further argued that Petitioner's claim was fraudulent, that Petitioner was not credible, and that Petitioner had made material misrepresentations throughout the life of the claim. On January 3, 2013, a hearing was held before Commissioner Avery B. Wilkerson (hereinafter, "the Single Commissioner"). The Single Commissioner issued a Decision and Order on June 4, 2013, finding Petitioner had not reached MMI and was entitled to ongoing temporary disability benefits and medical treatment, and denying Respondents' assertion that Petitioner was not credible.

Respondents timely appealed the Order of the Single Commissioner to the Appellate Panel of the Workers' Compensation Commission (hereinafter, "the Appellate Panel"), and oral arguments were heard before the Appellate Panel on October 14, 2013. The Appellate Panel issued a Decision and Order on May 21, 2014, vacating the Order of the Single Commissioner and remanding the claim back to the Single Commissioner for further proceedings. On June 20, 2014, Petitioner filed a Petition for Writ of Certiorari with the South Carolina Supreme Court, requesting that the Court review the May 21, 2014, Decision and Order of the Appellate Panel.¹ For the reasons below, Petitioner may not appeal the claim to the Supreme Court at this time, and Respondents respectfully

¹ Petitioner has also filed a Notice of Appeal to the South Carolina Court of Appeals.

request an Order denying the Petition for Writ of Certiorari.

ARGUMENT

I. Appeals from the South Carolina Workers' Compensation Commission are controlled by the Administrative Procedures Act, not by the general appealability statute of S.C. Code Ann. § 14-3-330, and a final judgment is required before a claim may be heard by the Appellate Courts.

The Order of the Appellate Panel is not a final judgment subject to judicial review, and Petitioner's request should be denied. "The Administrative Procedures Act (APA) was enacted in 1977 and 'purports to provide uniform procedures before State Boards and Commissions for judicial review after the exhaustion of administrative remedies.'" *Bone v. U.S. Food Service*, 744 S.E.2d 552, 556, 404 S.C. 67, 73 (S.C. 2013) (citing *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981)). The APA establishes the standard for judicial review of decisions of the South Carolina Workers' Compensation Commission. *Bone*, 744 S.E.2d 556; *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 689 S.E.2d 615 (2010); *Lark*, 276 S.C. at 135, 276 S.E.2d at 306; *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 584 S.E.2d 390 (Ct.App.2003).

Under Section 1-23-380(A) of the APA, "[a] party *who has exhausted all administrative remedies* available within the agency and who is aggrieved by a *final decision* in a contested case is entitled to judicial review...." S.C.Code Ann. § 1-23-380(A) (Supp.2007) (emphasis added). Similarly, Section 1-23-390 of the APA, governing further appellate review, provides: "An 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." S.C.Code Ann. § 1-23-390 (Supp.2012) (emphasis added).

In *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env'tl Control*, 387 S.C. 265, 692 S.E.2d 894, (2010), the Supreme Court of South Carolina reviewed an appeal from an Administrative Law Court and reasoned that appeals in administrative agency matters are governed solely by the APA, not by the general appealability statute of Section 14-3-330(1), which permits review of “[a]ny intermediate judgment” involving the merits. *Charlotte-Mecklenburg*, 692 S.E.2d at 894. The *Charlotte-Mecklenburg* Court further indicated that concepts applicable in general appeals were not applicable under the APA, as specialized statutes prevail over more general statutes. *Id.* The Supreme Court reviewed this scenario in the workers’ compensation context in *Bone*, and after reviewing the reasoning in *Charlotte-Mecklenburg*, the Court stated: “We apply this reasoning in concluding that the meaning of a ‘final judgment’ as used in section 1-23-390 is not defined by using the exceptions that are present in the general appealability statute, whether or not the statute is specifically referenced.” *Bone*, 744 S.E.2d 557. Accordingly, the *Bone* decision mandates that a final judgment be issued in a workers’ compensation claim before the claim is appealable to a higher court.

The term “final judgment” was specifically interpreted by the Supreme Court of South Carolina in *Bone* with regard to workers’ compensation appeals:

This Court's jurisprudence is in accord with the definition of a final judgment found in Black's Law Dictionary. It defines a final judgment as “[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs ... and enforcement of the judgment.”

Bone, 744 S.E.2d 558 (citing *Black's Law Dictionary* 919 (9th ed.2009)). The *Bone* Court further specified: “The legislature, in using a well-known term of art such as ‘final judgment,’ meant exactly what ‘final judgment’ has always been understood to mean:

something that finally disposes of the whole subject matter of the action or terminates the action, leaving nothing to be done but to execute the judgment...” *Bone*, 744 S.E.2d 561.

In deciding *Bone*, the Supreme Court made it abundantly clear that (1) the APA governs appeals from the South Carolina Workers’ Compensation Commission, and (2) a decision of the Workers’ Compensation Commission is not appealable until there has been a final judgment which disposes of the action entirely. In this case, there has been no such final judgment, and Petitioner has not exhausted his remedies at the Workers’ Compensation Commission level so as to become entitled to judicial review.

II. The May 21, 2014, Decision and Order of the Appellate Panel does not constitute a final judgment, and the Appellate Panel Order is not immediately appealable.

Petitioner sustained an admitted injury on August 17, 2011, when he was bitten by an insect on the left thigh/buttock and developed a small abscess. Respondents provided appropriate medical treatment, including a simple debridement procedure to excise the abscess. On July 6, 2012, Respondents filed a Request for Hearing before the South Carolina Workers’ Compensation Commission, alleging Petitioner had reached MMI and was entitled to no additional benefits. Respondents further argued that Petitioner had made purposeful and material misrepresentations with regard to the workers’ compensation claim. On January 3, 2013, a hearing was held before Commissioner Avery B. Wilkerson, who issued a Decision and Order on June 4, 2013, finding Petitioner had not reached MMI and was entitled to ongoing temporary disability benefits and medical treatment. The Single Commissioner found that Petitioner’s misrepresentations throughout the claim were attributable to a level of cognitive dysfunction, which stemmed from a motor vehicle accident and brain injury years ago.

Respondents timely appealed the Order of the Single Commissioner to the Appellate Panel, and the Appellate Panel issued a Decision and Order on May 21, 2014, vacating the Order of the Single Commissioner and remanding the claim back to the Single Commissioner for determination of whether Petitioner is competent to testify, or whether Petitioner requires a Guardian *ad Litem*, pursuant to Section 42-15-55. The Appellate Panel further ordered Respondents to provide a neurological evaluation for Petitioner to further address the issues of the cause and extent of Petitioner's alleged conditions.

Petitioner has now requested review of the May 21, 2014, Decision and Order of the Appellate Panel, but it is plainly evident that the Order is not a final judgment, and it is not immediately appealable or reviewable. Not only do *some* issues remain undetermined by the Workers' Compensation Commission, but *every single issue* remains undetermined at this juncture, as the Single Commissioner's Order was vacated and the claim remanded. As there has been no final judgment, the claim is not immediately appealable or reviewable.

III. Petitioner cites no authority which would allow the Supreme Court to entertain his Petition for Writ of Certiorari at this juncture.

As authority for requesting Supreme Court review, Petitioner indicates the Appellate Panel has committed errors of law, and Petitioner argues that the "amalgamation of errors" allegedly committed by the Appellate Panel "is sufficiently exceptional to warrant expeditious review by the Court." (Petition for Writ of Certiorari, p. 2) In support of this statement, Petitioner specifically cites S.C. Const. art. V, Section 5; S.C. Code Ann. §14-3-10; S.C. Const. art. I, Section 22; due process; and S.C. Code

Ann. §§ 1-23-350 and 42-17-40. As discussed below, none of these authorities provide the Supreme Court with authority to review the May 21, 2014, Decision and Order of the Appellate Panel, and Petitioner must first exhaust his remedies at the Commission level, pursuant to *Bone*.

a. S.C. Const. art. V, Section 5.

S.C. Const. art. V, Section 5 provides: “The Supreme Court shall have power to issue writs or orders of ... certiorari.... The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe.” As noted above, the General Assembly *has* specifically prescribed the authority of the Supreme Court to address workers’ compensation appeals, and that authority is outlined in the APA, and was specifically interpreted in *Bone*. The APA and *Bone* require a final judgment from the Workers’ Compensation Commission before a workers’ compensation claim may be appealed to the appellate courts. This section of the Constitution provides no basis for granting the Petition for Writ of Certiorari at this stage.

b. S.C. Code Ann. §14-3-10.

S.C. Code Ann. § 14-3-10 simply provides for the composition of the Supreme Court and the election of the justices, and it in no way provides authority of the Court to entertain the Petition for Writ of Certiorari.

c. S.C. Const. art. I, Section 22.

S.C. Const. art. I, Section 22, provides for the right to judicial review in administrative agency decisions, providing: “No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights ...

unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.” Again, the General Assembly *has* specifically set forth the authority of the Supreme Court to address workers’ compensation appeals, and that authority is outlined in the APA, and has been specifically interpreted in *Bone*. This section of the Constitution simply ensures that administrative decisions will be subject to judicial review, and Petitioner in this instance will certainly be entitled to that review upon a *final judgment* of the Commission.

d. Due Process and Issues Outside the Scope of Review.

Petitioner argues the Appellate Panel Order is null and void on its face, arguing the Panel addressed issues which were not raised in Respondents’ Request for Commission Review, and which were therefore the law of the case and not reviewable. Respondents certainly disagree with this contention, but for purposes of this section, it is of little consequence.² Yet again, if Petitioner feels he has been deprived of due process, he is entitled to judicial review, and the process for that review has been specifically and succinctly outlined by the APA and the Courts. Petitioner must first exhaust his administrative remedies, and only then can he seek review by the appellate courts. Petitioner’s contention that any alleged error requires immediate review by the Supreme Court is without merit or authority to support such a notion.

Instead of citing specific authority for such an expedited review, Petitioner makes the audacious and impudent statement that the Appellate Panel’s Order represents a “fundamental error of law [which] cannot be cured short of vacating the May 21, 2014 Order,” and that “any further proceedings with the Commission will likewise be irreparably tainted.” (Petition for Writ of Certiorari, p. 30) In this dramatic statement,

² Petitioner’s arguments are addressed in Section IV, below.

Petitioner calls into question the equity and fairness of the entire judicial system, implying that the remainder of his judicial and appellate remedies are somehow “irreparably tainted;” this is, to say the least, erroneous.

e. S.C. Code Ann. §§ 1-23-350 and 42-17-40.

Petitioner argues the Appellate Panel Order violates S.C. Code Ann. §§ 1-23-350 and 42-17-40, because the Order fails to make specific findings of fact and conclusions of law. Section 1-23-350 specifically requires findings of fact and conclusions of law be expressly stated when there is a “final decision” of an administrative agency. In this case, there is clearly no final decision or judgment being issued, as the Appellate Panel vacated and remanded the claim back to the Single Commissioner for further proceedings. Similarly, Section 42-17-40 indicates that the “award” shall include findings of fact and conclusions of law, and in this case, there is not an award being issued, as the claim is being remanded for further proceedings. Neither of these statutes was violated by the Appellate Panel’s Order.

IV. Even if the Petition for Writ of Certiorari could be granted at this time, there was no error committed by the Appellate Panel of the Workers’ Compensation Commission, and the Appellate Panel did not violate S.C. Code Ann. § 42-17-50, S.C. Const. art. I, Section 22, due process, S.C. Code Ann. § 1-23-350 or S.C. Code Ann. § 42-17-40.

Petitioner argues the Panel committed errors of law because it addressed issues which were not raised in Respondents’ Form 30, Request for Commission Review. Specifically, Petitioner asserts the following issues were improperly addressed by the Appellate Panel: (1) Petitioner’s competency to testify, (2) Petitioner’s need for a guardian *ad litem*, and (3) an order for Petitioner to undergo an additional neurological evaluation. Petitioner is correct that “only issues within the application for review are

preserved for the full commission,” but Petitioner erroneously classifies the three items above as *issues*. The Appellate Panel’s determination that additional findings are necessary with regard to Petitioner’s competency to testify, Petitioner’s need for a guardian *ad litem*, and the need for additional neurological evidence, are not “issues” in and of themselves, and the Appellate Panel was squarely within its authority to vacate and remand the claim for further findings with respect to the three items above.

The heart of this claim centers on Petitioner’s credibility and testimony. Respondents contend Petitioner’s claim is wrought with fraudulent misrepresentations and deceit, and Petitioner’s simple and minor abscess healed long ago, with no residual problems. Petitioner argues that his misrepresentations throughout the claim are the result of a previous brain injury and cognitive defect, rather than any intentional attempt to lie. The Single Commissioner found that Petitioner’s inaccurate statements throughout the claim were the result of his cognitive dysfunction, rather than a volitional attempt to mislead. Respondents appealed this determination in the Form 30, Request for Commission Review, specifically appealing the Single Commissioner’s failure to find that Petitioner lacks credibility and that the claim is fraudulent, and appealing the findings that Petitioner was entitled to ongoing and additional benefits and medical treatment.

Quite clearly, the issue of whether Petitioner is deceitful and fraudulent, or whether his misrepresentations are the result of a serious cognitive defect, will be affected by (1) the factual determination of whether Petitioner is competent to testify, (2) the factual determination of whether Petitioner requires a guardian *ad litem*, and (3) the results of an additional neurological evaluation, which the Panel felt was necessary prior

to an appropriate determination as to the issue of Petitioner's credibility. Similarly, the issue of whether Petitioner requires additional benefits and medical treatment will be affected by (1) the determination of whether Petitioner is competent to testify, (2) the determination of whether Petitioner requires a guardian *ad litem*, and (3) the results of an additional neurological evaluation, which the Panel felt was necessary prior to an appropriate determination as to the issue of Petitioner's need for additional benefits or treatment.

It is elementary that the Appellate Panel hears appeals from the Single Commissioner and may re-weigh the evidence and make its own findings and conclusions:

The Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct.App.2006). Pursuant to S.C.Code Ann. § 42-17-50 (Supp.2007), the Commission shall weigh the evidence as presented at the initial hearing and, if good grounds are shown, make its own findings of fact and reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. *Lowe v. Am-Can Transp. Servs. Inc.*, 283 S.C. 534, 537, 324 S.E.2d 87, 89 (Ct.App.1984); see also *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 64, 156 S.E.2d 318, 321 (1967) (holding although it is logical for the Commission to give weight to the Single Commissioner's opinion, the Commission may disagree with his findings based on the credibility of witnesses).

Pack v. State Dept. of Transp., 673 S.E.2d 461, 381 S.C. 526 (S.C.App. 2009).

In the instant case, the Appellate Panel reviewed the evidence and testimony, and the Panel determined that the *issues* of the claim could not properly be decided before (1) a determination of whether Petitioner is competent to testify, (2) a determination of whether Petitioner requires a guardian *ad litem*, and (3) without an additional neurological evaluation. The Panel has not raised or addressed any additional or

unpreserved issues; it has simply remanded the claim so that the *issues* may be more appropriately addressed.

CONCLUSION

For the reasons set forth above, the Supreme Court lacks authority to hear the claim at this juncture, and Respondents respectfully request an Order denying the Petition for Writ of Certiorari, with prejudice. In the alternative, Respondents contend the Appellate Panel committed no legal error, and Respondents again request the Petition be denied, with prejudice.

Respectfully submitted,



L. Brenn Watson, Esq.
Ian C. Gohean, Esq.
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607
(864) 527-3282

Attorneys for Respondents

July 11, 2014

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PROOF OF SERVICE

I certify that I have served the Return to Petition for Certiorari and accompanying Memorandum in Support on Thomas Chad Hilton by depositing a copy in the United States Mail, postage prepaid, on July 11, 2014, addressed to his attorney of record, Andrew N. Safran, Esquire, Andrew N. Safran, LLC, Post Office Box 12089, Columbia, South Carolina 29211.



L. Brenn Watson, Esq.
Ian C. Gohean, Esq.
Willson Jones Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, SC 29607
(864) 527-3292

Attorneys for Respondents

WILLSON JONES CARTER & BAXLEY, P.A.

ATTORNEYS AT LAW

GREENVILLE CHARLESTON COLUMBIA CHARLOTTE RALEIGH

L. Brenn Watson
Direct (864) 527-3292
Fax (864) 235-6015
lbwatson@wjlaw.net

872 S. Pleasantburg Drive
Greenville, SC 29607
www.wjcbllaw.net

July 11, 2014

The Honorable Daniel E. Shearouse
Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

JUL 14 2014

SC Court of Appeals

Re: Thomas Hilton vs. Flakeboard America Limited
WCC File No.: 1111934 DOI: 8/17/2011
Carrier: Liberty Mutual - Claim No.: WC555-A26831
WJC&B File No.: 0010.03789

Dear Mr. Shearouse:

Enclosed for filing are an original and six copies of Respondents' Return to Petition for Certiorari and accompanying Memorandum in Support in the above-referenced matter. Also enclosed is a Proof of Service of the Return.

By copy of this letter and as indicated by the Proof of Service, we now serve the above-referenced documents on Petitioner's Counsel.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



L. Brenn Watson
Ian C. Gohean

Enclosure

cc: Andrew N. Safran, Esquire
South Carolina Workers' Compensation Judicial Department
The Honorable Jenny Abbot Kitchings