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

APPELLATE CASE NO.: 2014-00-1357

Thomas Chad Hilton..... PETITIONER.

v.

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

PETITIONER'S REPLY TO RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

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In support of this Petition for Writ of Certiorari, Mr. Hilton initially cited the provisions of S.C. Const. Art. V, Section 5, which empowers this Court "to issue writs or orders of injunction, mandamus, quo warranto, prohibition, certiorari, habeas corpus, and other original and remedial writs." While he also relies upon the provisions of S.C. Code Ann. Section 14-3-310 (1976), which similarly authorizes the Court to issues writs of this nature, his June 20, 2014 Petition mistakenly references S.C. Code Ann. Section 14-3-10 (1976). Mr. Hilton apologizes for this typographical error.

ARGUMENTS

I. EXHAUSTION OF ADMINISTRATIVE REMEDIES WOULD BE FUTILE IN THIS INSTANCE

As confirmed by a review of the "Statement of the Case" contained in the single commissioner's June 4, 2013 Decision and Order, Respondents sought to terminate Mr. Hilton's temporary total disability compensation based upon three grounds: (a) "Claimant has made direct and material misrepresentations that directly pertain to his alleged disability"; (b) he was "not currently disabled, and ha[d] . . . not been disabled since September 12, 2011"; and (c) "[C]laimant . . . ha[d] reached maximum medical improvement with no impairment . . . ."

In response to these allegations, Mr. Hilton maintained: (a) any inconsistent and/or inaccurate statements contained in the record (deposition testimony or otherwise) were the product of cognitive deficits stemming from his physical brain damage, rather than a purposeful/intentional/volitional attempt to mislead; (b) he had not achieved maximum medical improvement as to the consequences of his compensable accident; (c) Respondents were obliged to authorize the various treatments which had been prescribed/recommended by Dr. R. Joseph Healy, their designated treating physician; and (d) he remained temporarily totally disabled at this time.

As these issues involve the impact of preexisting physical brain damage on Mr. Hilton's current functional status, receipt of further medical care and purported attainment of maximum medical improvement, it was incumbent upon the parties to present medical evidence in support of their respective positions. See, S.C. Code Ann. Sections 42-9-35 (2007) and 42-15-60 (2007); See also, Williams v. South Carolina Department of Mental Retardation, 308 S.C. S.C. 438, 418 S.E. 2d 555 (Ct. App. 1992) (Commission's finding of maximum medical improvement on date that was not identified by physician determined to be erroneous). Accord, Clark v. Wal-Mart,

163 N.C. 686, 594 S.E. 2d 433, 439 (2004), rev'd. on other grounds, 360 N.C. 41, 619 S.E. 2d 491 (2005) ("MMI is a purely medical determination").

Notwithstanding their awareness as to the standard of proof in this context, Respondents' medical evidentiary submissions were limited to: (a) the deposition testimony of Dr. Healy (the treating neurologist), who verified the presence/impact of Mr. Hilton's cognitive deficits, as well as the fact he had **not achieved maximum medical improvement**; (b) the deposition of Dr. Chi-Dai Chen (the general surgeon who treated Mr. Hilton during an approximately three week period in August – September, 2011), who ultimately acknowledged his lack of expertise as to the symptoms ("nerve irritation or nerve damage") for which Mr. Hilton had not reached maximum medical improvement per Dr. Healy, while deferring to the neurologist's opinion on this point; and (c) pre and post-injury medical records generated by various providers. (See, June 4, 2013 Decision and Order, pp. 6 – 7, 22 – 30). Additionally, Respondents: (a) **elicited testimony from Mr. Hilton as an adverse party witness during their case in chief**; (b) offered video surveillance footage; and (c) submitted records from Carnival Cruise Lines.

Mr. Hilton introduced: (a) opinions from four medical experts (authorized treating neurologist, forensic psychiatrist and two neuropsychologists) establishing, to a reasonable degree of medical certainty, both the presence of cognitive deficits resulting from physical brain damage **and** the fact Mr. Hilton's purported "misrepresentations" were the product of these cognitive deficits, rather than the fraudulent conduct alleged by Respondents; and (b) confirmation from both Dr. Healy and a pain management/non-operative spine specialist (Dr. Ezra B. Riber) relative to the causal relationship of Mr. Hilton's persistent physical (back and left leg) symptoms, as well as his need for further treatment and nonattainment of maximum medical improvement as to these injury components. (See, June 4, 2013 Decision and Order, pp.

16 – 28, 30 – 33). He similarly relied upon portions of Dr. Chen's deposition, particularly this physician's: (a) inability (due to lack of expertise) to identify the source of persistent neurologic symptoms; and (b) deference to Dr. Healy as to the causal relationship between these symptoms and the compensable accident.

After considering the medical evidence relative to these unquestionably complex medical issues (implications of physical brain on cognition; neurologic consequences of spider venom), the single commissioner entered an extremely detailed Order, which determined in pertinent part:

> (a) great weight should be afforded to the opinions expressed by Dr. Healy, particularly with respect to the issue of maximum medical improvement, as this authorized treater not only had the opportunity to assess Mr. Hilton on multiple occasions, but also considered Defendants' allegations (including the assertion his current left leg and back symptoms are purely the result of preexisting conditions) and the products of their surveillance; (b) after reviewing the surveillance footage and being apprised as to aspects of prior medical history which Defendants believe to be particularly relevant, Dr. Healy concluded Mr. Hilton had not achieved maximum medical improvement and required further treatment through Dr. Riber; (d) he similarly verified the consequences of Mr. Hilton's compensable injury continued to prohibit resumption of his pre-injury employment activities; (e) upon reviewing the results of neuropsychological testing, in light of his own clinical observations, Dr. Healy agreed Mr. Hilton's 2000 head trauma had produced appreciable cognitive deficits secondary to physical brain damage; and (f) Defendants' designated authorized treater likewise validated Mr. Hilton's credibility, repeatedly declining to endorse Defendants' contention that this gentleman had presented himself and/or testified in a dishonest, deceptive or misleading fashion. (See, June 4, 2013 Decision and Order, pp. 38 – 39).

He similarly found:

> (a) any discrepancies, inconsistencies, errors, etc. in connection with either Mr. Hilton's testimony or conduct result from the cognitive dysfunction confirmed by no less than four medical specialists; (b) the testimony and conduct which Defendants maintain warrants termination of Mr. Hilton's claim were/are neither volitional nor reflective of dishonesty; (c) entry of a finding as to a lack of credibility is not warranted in this instance; (d) I would not find him not to be credible; (e) the issues currently in dispute, including the presence of cognitive dysfunction explaining/rebutting Defendants' allegations as to a lack of credibility, are

clearly medically driven; and (f) the evidence of record amply supports Mr. Hilton's contentions as to this issue. (See, June 4, 2013 Decision and Order, pp. 41 – 42).

The single commissioner determined: (a) "achievement of maximum medical improvement is a purely medical determination"; (b) "the existence of physical brain damage in the context of the . . . [current] disputes . . . is a medically driven issue"; (c) "the medical evidence of record, including opinions expressed by Mr. Hilton's designated authorized treating neurologist, unequivocally verifies any inaccuracies/inconsistencies in Mr. Hilton's testimony, as well as incorrect/erroneous information he has provided in the context of this litigation, result from cognitive deficits produced by physical brain damage confirmed by four duly qualified medical specialists, rather than a purposeful, intentional, volitional or preconceived attempt to mislead and/or knowingly provide false information"; (d) the medical evidence upon which Respondents relied (Dr. Chen's opinions) "limit any determination of maximum medical improvement to the August 24, 2011 debridement procedure itself"; (e) Dr. Chen "consistently defer[red] . . . to Dr. Healy's judgment/conclusions as to the effects of Mr. Hilton's neurologic/nerve injury"; and (f) the evidence of record (opinions expressed by Drs. Healy and Riber) "firmly establishes Mr. Hilton has not achieved maximum medical improvement". (See, June 4, 2013 Decision and Order, pp. 41 and 43 – 44).

The Respondents appealed this decision to the commission's appellate panel. Their Form 30 reveals a multitude of exceptions that focus on particular factual findings and associated legal rulings, as well as four "General Exceptions" addressing the parties' basic disputes (attainment of maximum medical improvement, continued receipt of compensation, entitlement to further medical treatment and alleged lack of credibility/fraud). **None** of these exceptions either assert or imply that Respondents were denied the opportunity to obtain further evaluation of Mr. Hilton

by a physician of their choice, a right afforded by S.C. Code Ann. Section 42-15-80 (2007). Had this been their desire, Respondents could have: (a) directed him for evaluation during the approximately six month period which elapsed followed filing of their hearing request; or (b) elected to withdraw the hearing request to ensure they were afforded sufficient time to obtain this evaluation. In the same fashion, Respondents' exceptions did not challenge Mr. Hilton's competency to testify or allege that he required a Guardian ad Litem.

Despite these facts, the appellate panel essentially "rewrote the entire case." The panel: (a) completely vacated the June 4, 2013 Decision and Order, notwithstanding the presence of numerous unappealed factual findings; (b) ordered Respondents to "send . . . [Mr. Hilton] to a neurologist of their choice for an evaluation as to the causation and extent of [his] . . . problems"; (c) remanded the claim "to the Jurisdictional Commissioner for the purposes of making a determination as to whether or not [Mr. Hilton] . . . is competent to testify and whether or not [he] . . . needs a Guardian ad Litem pursuant to §42-15-55"; and (d) declined to address those issues previously framed by the parties and preserved through Respondents' Form 30. See, Ham v. Mullins Lumbar Co., 193 S.C. 66, 7 S.E. 2d 715, 716 (1940).

Although the Appellate Panel can obviously reweigh the evidence when rendering a decision, ". . . [o]nly issues within the application for review under S.C. Code Ann. Section 42-17-50 (1976) are preserved for" appellate purposes. See, Green v. City of Columbia, 311 S.C. 78, 427 S.E. 2d 685, 687 (Ct. App. 1993); Creech v. Ducane Company, 320 S.C. 559, 467 S.E. 2d 114, 116 (Ct. App. 1995). In its appellate capacity, the Commission's Review Panels: (a) "like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." Langley v. Boyter, 284 S.C. 162, 325 S.E. 2d 550, 561 (Ct. App. 1984), quashed on other grounds, 286 S.C. 85, 332 S.E. 2d 100 (1985); Atlantic Coast Builders and Contractors,

LLC v. Lewis, 398 S.C. 323, 730 S.E. 2d 282, 286 (2012); and (b) cannot disrupt unappealed factual findings, which "became and are the law of this case . . . ." Ham, 7 S.E. 2d at 716; Smith v. South Carolina Department of Mental Health, 329 S.C. 485, 494 S.E. 2d 630, 639 (Ct. App. 1997).

The Respondents never sought to submit additional medical evidence before either the single commissioner or panel. They also: (a) consistently denied the presence of cognitive deficits in the face of unanimous medical opinion to the contrary; (b) neither disputed Mr. Hilton's competency to testify, nor asserted there was a need for appointment of a Guardian ad Litem; (c) were acutely aware the medical opinion upon which their contention of maximum medical improvement rested was fatally flawed; and (d) not only chose, but actually demanded, that the parties proceed with a merits hearing relative to these "medically driven" issues.

While Respondents maintain the introduction of the additional evidence contemplated by the panel's remand would "affect" the disputed issues, this argument conveniently overlooks the facts: (a) the purpose of the January 3, 2013 hearing was to fully address these issues; (b) the parties had ample opportunity to submit all evidence which they deemed supportive of their respective positions; (c) Respondents never sought leave to submit additional evidence at any stage of these proceedings; (d) the record contained uncontradicted medical evidence addressing issues that the General Assembly has deemed medically driven; (e) the process through which this claim was litigated before the single commissioner was legally appropriate; (f) absent the presence of a legal error, preserved through the Form 30, the panel is not empowered to erase an entire proceeding for the purpose of granting a "do over"; and (g) the panel's current action is no less erroneous than the attempted reinstatement of abandoned rights seen in Ham, Green, Creech and Smith.

Their assertion that the Panel was somehow justified in vacating all prior proceedings to address unpreserved issues relative to Mr. Hilton's ability to testify and potential need for a Guardian ad Litem is equally misplaced, as: (a) there has never been an allegation of mental incompetency, but rather compromised cognition; (b) assuming *arguendo* an issue as to his testimonial competency had been properly raised, this assessment would necessarily rest upon the very evidence which comprises the current record; (c) after thorough consideration of this record, including the statutorily mandated medical evidence, the single commissioner found/concluded Mr. Hilton's testimonial inaccuracies/inconsistencies were the product of physical brain damage, as opposed to the alleged fraud; (d) the unpreserved issue relative to the need for a Guardian ad Litem is derivative of any potential incompetency, it would likewise be resolved through assessment of the current record; and (e) neither of these issues constitute a sufficient legal basis upon which to invalidate the June 4, 2013 Decision and Order, including unappealed factual findings that are the law of this case.

Once the panel chose to expand the issues previously framed by the parties, invalidate the prior Order and materially alter essential aspects of this claim, it not only denied Mr. Hilton procedural due process, but it also unconstitutionally exceeded its statutory authority. Each of these violations renders the panel's May 21, 2014 void and without legal effect. Triska v. Department of Health and Environmental Control, 292 S.C. 190, 355 S.E. 2d 531, 533 (1987) ("Any action taken by . . . [an administrative agency] outside of its statutory and regulatory authority is null and void."); Bazzle v. Huff, 319 S.C. 443, 462 S.E. 2d 273, 274 (1995) ("Actions by the commission . . . [which] exceeded their statutory authority . . . were null and void."); LaSalle Bank National Association v. Davidson, 386 S.C. 276, 688 S.E. 2d 121, 122 (2009) (Due process must be afforded "before any binding decree, order, or judgment can be

made . . . ."); Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E. 2d 9, 12 (Ct. App. 2012) (Proceeding which violated "constitutional guarantee of procedural due process . . . was a nullity . . . ."); Ware v. Ware, 404 S.C. 1, 743 S.E. 2d 817, 822 (2013) ("A void judgment is one that, from its inception, is a complete nullity and is without legal effect.").

Given the nature of the panel's actions, which is tantamount to a violation of hornbook law, any future proceedings within the Commission will necessarily have no legal effect, resulting in meaningless litigation. Consequently, Mr. Hilton's previously stated belief that this "fundamental error of law cannot be cured short of vacating the May 21, 2014 Order . . . [because the process has now become] "irreparably tainted" can hardly be characterized as "audacious", "impudent", or "dramatic".

In response to the contention there is "no authority which will allow the . . . Court to entertain [this] . . . Petition", Mr. Hilton would respectfully note that writs of certiorari pursuant to Article V, Section 5 of the South Carolina Constitution and Section 14-3-310 "may be issued when exceptional circumstances exist." In re Breast Implant Product Liability Litigation, 331 S.C. 540, 503 S.E. 2d 445, 447 (1998); Hollman v. Woolfson, 384 S.C. 571, 683 S.E. 2d 495, 498 (2009). The Court has identified several factors which can satisfy this requirement, including misinterpretation of prior rulings and the promotion of judicial economy. See, In re Breast Implant Product Liability Litigation, supra; Laffitte v. Bridgestone Corporation, 381 S.C. 460, 674 S.E. 2d 154, 160 (2009); Compton v. South Carolina Department of Probation, Parole and Pardon Services, 385 S.C. 476, 685 S.E. 2d 175, 176 (2009).

Additionally, exhaustion of administrative remedies is not an absolute prerequisite to consideration of issues falling within the jurisdiction of a state agency. Specifically, ". . . [a] general exception to the requirement of exhaustion of administrative remedies exists when a

party demonstrates that pursuit of them would be a vain or futile act." Law v. South Carolina Department of Corrections, 368 S.C. 424, 629 S.E. 2d 642, 650 (2006); Storm M.H. ex rel. McSwain v. Charleston County Board of Trustees, 400 S.C. 478, 735 S.E. 2d 492, 497 (2012). "Another exception to the exhaustion requirement is recognized when an agency has acted outside of its authority." Brown v. James, 389 S.C. 41, 697 S.E. 2d 604, 611 – 612 (Ct. App. 2010).

While Mr. Hilton is obviously aware of this Court's decision in Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E. 2d 552 (2013), he would respectfully submit the panel's order is reflective of a basic misinterpretation of this ruling, to the extent it: (a) ignores basic legal requirements by not only redefining previously framed issues, but also invalidating unappealed determinations that were legally "set in stone"; (b) necessarily compels a *de novo* hearing, despite the absence of any legally cognizable rationale for literally/legally erasing all aspects of the prior hearing process; (c) afforded Respondents an unrequested and unwarranted "second bite at the apple"; and (d) obviously determined any type of remand would obviate the need for the requisite factual findings, legal conclusions and explanation for its actions.

The current circumstances also illustrate the "groundhog day" potential that misapplication of Bone creates, as the panel's ruling: (a) apparently (and impermissibly) instructs a party to remedy the substantial flaws in its case, notwithstanding completion of a full merits hearing and absolutely no request for this relief; (b) reflects a belief that it may ignore longstanding, fundamental rules of procedure so long as it does not render a "final decision" (i.e., through remand); (c) similarly construes its interlocutory power to include altering the foundation of a claim, regardless of procedural safeguards, to seek a desired end; and (d) could easily be replicated following completion of the process outlined in the May 21, 2014 Order.

Consequently, despite Respondents' contentions to the contrary, analysis of the current circumstances certainly establishes: (a) the panel's rejection of elementary legal principles, as well as the pervasive impact of these errors (both in the current scenario and systemically), warrant review through writ of certiorari; and (d) expeditious review will clearly promote judicial economy "by limiting numerous inevitable appeals raising these issues"; (c) exhaustion of administrative remedies is not required, as the panel has obviously exceeded its statutory authority and further litigation within the Commission will be futile; (d) absent prompt review, Mr. Hilton will be obliged to participate in a course of litigation that must ultimately be deemed a nullity; and (e) all participants in the workers' compensation process will surely benefit from further elucidation as to the Bone implications in this context.

Mr. Hilton would finally note that while S.C. Code Ann. Section 1-23-380 (2007) arguably allows direct appeal of the panel's Order to the Court of Appeals, he understands/recognizes that Bone is being routinely construed to require dismissal in the absence of a "final decision". Should this Court determine Section 1-23-380 ensures direct appeal to the Court of Appeals, he requests an instructive ruling to this effect, which will allow adjudication of these issues through a concurrent appeal pending before that Court; otherwise, Mr. Hilton would respectfully request this Court to grant his Petition, review the panel's decision, permit oral argument and issue a decision finding that: (a) the May 21, 2014 ruling exceeded the commission's legislatively granted authority, while also depriving him of due process; (b) the Order is consequently null and void; and (c) review of the single commissioner's June 4, 2013 Order must be limited to the exceptions raised per Respondents' Form 30, governing legal authorities and the current evidentiary record.

II. THE PANEL'S FAILURE TO PROVIDE ANY FACTUAL FINDINGS, LEGAL CONCLUSIONS OR RATIONALE FOR ITS RULINGS RENDERED THE MAY 21, 2014 ORDER "ILLEGAL"

Respondents also maintain that because the May 21, 2014 ruling was not a "final decision" or "award" the panel was not obliged to enter findings of fact, identify applicable legal authorities or provide the rationale for its determinations. This position not only ignores the import of S.C. Code Ann. Section 42-17-40 (1976, as amended), but also numerous rulings of this Court.

Section 42-17-40 provides in pertinent part that the commission's "award, together with a statement of the findings of fact, rulings of law and other matters pertinent to the questions at issue, must be filed . . . ." Additionally, S.C. Code Ann. Section 42-17-60 (2007) prescribes that any "award of the commission . . . may [be] . . . appeal[ed] . . . to the court of appeals."

"The Workers' Compensation Act should be read *in pari materia* when possible." United Technologies v. South Carolina Second Injury Fund, 318 S.C. 213, 456 S.E. 2d 901, 904 (1995). As Section 42-17-60 necessarily envisions various forms of "awards", including denial of compensation, this statute required inclusion of factual findings, legal ruling and explanation of the underlying rationale for any of the commission's determinations.

As recognized by this Court in Heater of Seabrook, Inc. v. Public Service Commission of South Carolina, 332 S.C. 20, 503 S.E. 2d 739, 742 (1998) in view of the "wide latitude . . . afforded . . . [to administrative agencies] in making decisions, . . . the writing of orders without sufficient detail or analysis, . . . can make their decisions as a practical matter unassailable on appeal." Recognizing this potential for "arbitrary or capricious" action on the part of the agency, the Court has "repeatedly emphasized the need for specificity in administrative orders." Id.

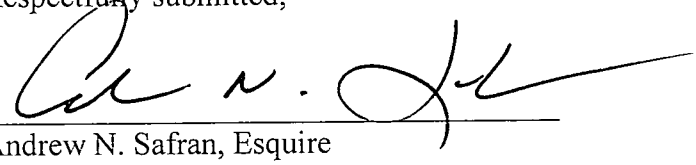
In this regard, the Court has consistently held that the Panel: (a) must make specific, expressed factual findings; (b) cannot rely upon implicit findings; and (c) "awards without . . .

[these] specific findings do not comply with the requirements of the [workers' compensation] act and are illegal." Shealy v. Algernon Blair, Inc., 250 S.C. 106, 156 S.E. 2d 646, 648 (1967). Additionally, the Panel is obliged to explain the reasoning behind its rulings, rather than leave the rationale to speculation. Able Communications, Inc. v. South Carolina Public Service Commission, 290 S.C. 409, 351 S.E. 2d 151, 152 (1986); Kiawah Property Owners Group v. Public Service Commission of South Carolina, 338 S.C. 92, 525 S.E. 2d 863, 865 (1999).

Additionally, as even Respondents acknowledge Mr. Hilton "will certainly be entitled to . . . review" of the Panel's decision at some stage of these proceedings, both logic and this Court's repeated admonitions dictate that: (a) the Panel's Order contained sufficient factual findings, legal rulings and analysis to identify how it reached the current determination; and (b) the failure to do so at this juncture will ultimately necessitate reversal.

Accordingly, Mr. Hilton respectfully requests this Court to grant his Petition, review the Panel's decision, grant oral argument and issue a decision finding that: (a) the Panel's May 21, 2014 Order is illegal; (b) these legal errors nullify the Panel's ruling; and (c) review of the single commissioner's June 4, 2013 Order must be limited to the exceptions raised per Respondents' Form 30, governing legal authorities and the current record.

Respectfully submitted,



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Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company, Carrier .....**RESPONDENTS.**

CERTIFICATE OF SERVICE

I, Roxanne R. Moorer, paralegal for Andrew N. Safran, Esquire, Attorney for Petitioner, do hereby certify that on the 25th day of July, 2014, I caused to be filed, via hand delivery, the original and six (6) copies of the Petitioner's Reply to Respondents' Return to Petition for Writ of Certiorari, with the Clerk of the South Carolina Supreme Court. One (1) copy of the Petitioner's Reply to Respondents' Petition for Writ of Certiorari was furnished to counsel for Respondents via first class mail at the following address:

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The Honorable Jenny Abbott Kitchings
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July 25, 2014

HAND DELIVERED
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: Thomas Chad Hilton, Petitioner, v. Flakeboard America Limited, Employer and Liberty Mutual Insurance Company, Carrier/Respondents
Appellate Case No.: 2014-00-1357

Dear Mr. Shearouse:

Enclosed please find an original and eight copies of Petitioner's Reply to Respondents' Return to Petition for Writ of Certiorari relative to the above-captioned matter. At this time, I would greatly appreciate your filing these documents and returning two clocked copies of the Reply to my courier.

By copy of this letter, I am serving a copy of the Reply on Brenn Watson, counsel for Respondents, the South Carolina Workers' Compensation Judicial Department and the Honorable Jenny Abbott Kitchings, Clerk of Court for the South Carolina Court of Appeals. As always, in the event they have any questions or comments concerning this matter, I invite them to contact me.

Thank you for your cooperation.

With kindest regards, I am

Very truly yours,

Andrew N. Safran

ANS/rrm

Enclosures

cc: South Carolina Workers' Compensation Judicial Department
L. Brenn Watson, Esquire
The Honorable Jenny Abbott Kitchings

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