

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

W.C.C. FILE NO.: 1111934

APPELLATE CASE NO.: 2014-001357

RECEIVED

OCT 06 2014

SC Court of Appeals

113776

Thomas Chad Hilton APPELLANT.

v.

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

PETITION FOR REHEARING

Andrew N. Safran, Esquire
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Columbia, South Carolina 29211
(803) 256-6689
Attorney for Appellant, Thomas Chad Hilton

Pursuant to Rules 221 and 240, SCARC, Appellant, Thomas Chad Hilton, petitions this Court to Rehear and Reconsider its ruling in Thomas Chad Hilton, Claimant, Appellant, v. Flakeboard America Limited, Employer and Liberty Mutual Insurance Company, Carrier, Defendants, Respondents, filed September 19, 2014. Mr. Hilton asserts this Court overlooked and/or misapprehended the following points in dismissing his appeal from the South Carolina Workers' Compensation Commission appellate panel's (panel's) May 21, 2014 order:

1) The Court overlook/misconstrued the implications/effect of the panel's determination to vacate the single commissioner's June 4, 2013 order/award in its entirety, as this procedure: (a) exceeded the authority granted by the General Assembly through passage of S.C. Code Ann. Section 42-17-50 (1976, as amended), in violation of multiple rulings of our appellate courts; (b) unlawfully extinguished at least twenty-three (23) unappealed factual findings that constituted the law of this case; and (c) rendered the May 21, 2014 order null and void.

Our State's constitution provides in pertinent part that "[n]o person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights . . . unless by a mode or procedure prescribed by the General Assembly . . ." S.C. Const. art I, Section 22. In view of this limitation, the South Carolina Workers' Compensation Commission, a state administrative agency, "can only exercise those powers which have been conferred upon it by the South Carolina General Assembly." Triska v. Department of Health and Environmental Control, 292 S.C. 190, 355 S.E. 2d 531, 533 (1987); Bazzle v. Huff, 319 S.C. 443, 462 S.E. 2d 273, 274 (1995).

Although the 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). Consequently, the panel: (a) possesses only a qualified *de novo* review, to the extent it may only address the specific issues raised on appeal, but cannot “answer questions . . . [it is] 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) is prohibited from disrupting unappealed factual findings, which “became and are the law of this case” Ham v. Mullins Lumber Company, 93 S.C. 66, 7 S.E. 2d at 15, 16 (1940); Smith v. South Carolina Department of Mental Health, 329 S.C. 485, 494 S.E. 2d 630, 639 (Ct. App. 1997).

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

Notwithstanding the absence of any contention that Respondents were denied the opportunity to present all pertinent evidence, had sought leave to obtain additional evidence, questioned Mr. Hilton’s legal competency or were unaware as to the scope of the January 3, 2013 hearing, the panel effectively “rewrote the entire case.” Specifically, the panel: (a) completely vacated the June 4, 2013 Decision and Order, despite the presence of numerous

unappealed factual findings (including Finding of Fact Nos. 1, 2, 3, 4, 5, 6, 7, 11, 14, 15, 18, 19, 20, 21, 23, 24, 26, 27, 29, 40, 41, 42 and 44); (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, supra.

These actions were clearly violative of longstanding precedent which has repeatedly admonished the commission/panel to refrain from exceeding the scope of exceptions raised through the W.C.C. Form 30. They similarly fell outside the statutory authority granted by the General Assembly, resulting in the May 21, 2014 order becoming “null and void.” Responsible Economic Development v. South Carolina Department of Health and Environmental Control, 371 S.C. 547, 641 S.E. 2d 425, 428 (2007).

Accordingly, Mr. Hilton respectfully requests this Court to grant his Petition, withdraw its prior Order, hear the matter on its merits and issue a decision reversing the panel’s order and requiring that any subsequent determination be limited to the issues raised by Respondents’ W.C.C. Form 30 and the current record, in light of applicable legal authorities.

2) The Court overlook/misconstrued the implications/effect of the panel’s determination to vacate the single commissioner’s June 4, 2013 order/award in its entirety, as this procedure: (a) exceeded the authority granted by the General Assembly through passage of S.C. Code Ann. Section 42-17-50 (1976, as amended), in violation of multiple rulings of our appellate courts; and (b) resulted in an unconstitutional violation of procedural due process.

Article I, Section 22 also “requires an administrative agency to give procedural due process to parties that come before it” Garris v. Governing Board of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E. 2d 48, 52 (1998); South Carolina Ambulatory Surgery Center Association v. South Carolina Workers’ Compensation Commission, 389 S.C. 380, 699 S.E. 2d 146, 152 (2010).

“If there is such a thing as due process of law, under it a litigant is entitled to notice of the issues to be met on trial, hearing or appeal.” Ham, 7 S.E. 2d at 715; Green, 427 S.E. 2d at 687. “Administrative agencies are required to meet minimum standards of due process”, which limits the panel’s focus to “[o]nly issues within the application for review”, while restraining it from “rewr[iting] . . . the entire case.” Smith, 494 S.E. 2d at 638; Green, *supra.*; Ham, *supra.*

As previously noted, Respondents’ W.C.C. Form 30: (a) neither requests an opportunity to obtain additional medical evidence nor challenges the legal capacity Mr. Hilton (whose testimony was introduced in their case in chief) to testify; (b) specifically identified the factual findings it intended to challenge; and (c) did not afford Mr. Hilton even semblance of notice that the issues ultimately created by the panel, much less the unappealed factual findings, remained the subject of this litigation.

The panel’s determination to erase all aspects of the single commissioner’s order (including the law of this case), while directing the parties to obtain further evidence for the purpose of litigating “issues” it arbitrarily created was clearly violative of due process. As due process must be afforded “before any binding decree, order, or judgment can be made”, its denial rendered the May 21, 2014 order “a nullity”. LaSalle Bank National Association v. Davidson,

386 S.C. 276, 688 S.E. 2d 121, 122 (2009); Adams v. H.R. Allen, Inc., 397 S.C. 652, 726 S.E. 2d 9, 12 (Ct. App. 2012).

Accordingly, Mr. Hilton respectfully requests this Court to grant his Petition, withdraw its prior Order, hear this matter on its merits and issue a decision reversing the panel's Order and requiring that any subsequent determination be limited to the issues raised by Respondents' W.C.C. Form 30 and the current record, in light of applicable legal authorities.

3) The Court overlooked/misconstrued the effect of the panel's failure to include findings of fact, rulings of law or the rationale underlying its determinations to vacate the single commissioner's order in its entirety and allow Respondents to obtain additional unrequested evidence, as this process: (a) not only exceeded its statutory authority, but also unconstitutionally deprived Mr. Hilton of procedural due process (as outlined above); (b) ignored the provisions of S.C. Code Ann. Section 42-17-40 (1976, as amended), which have been routinely construed to require the entry of detailed factual findings, legal analysis and explanation of the reasoning behind the panel's ruling; and (c) led to the creation of an illegal order.

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 panel's determinations. See, Brayboy v. Clark Heating Company, Inc., 306 S.C. 56, 409 S.E. 2d 767, 768 (1991) (Ruling that sufficiently detailed factual findings enabling a reviewing Court to determine presence of evidentiary support and consistency with controlling law were necessary where panel denied compensation entitlement.)

As recognized in Heater of Seabrook, Inc. v. Public Service Commission of South Carolina, 332 S.C. 20, 503 S.E. 2d 739, 742 (1998), given 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, it cannot be seriously disputed "that the Commission is responsible for making factual findings and addressing matters pertinent to the questions and issues before it." James v. Anne's, Inc., 390 S.C. 188, 701 S.E. 2d 730, 737 (2010). This obligation has been exhaustively held to include: (a) entry of specific/express factual findings; and (b) a prohibition against implicit findings. In fact, "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). The panel is also 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).

In this instance, the panel's order: (a) contains no factual findings (other than a listing of the findings contained in the single commissioner's Order that were mysteriously vacated); (b) declined to identify the legal authority for any of its rulings; and (c) offers no explanation as to its reasoning for doing so.

Accordingly, Mr. Hilton respectfully requests this Court to grant his Petition, withdraw its prior Order, hear this matter on its merits and issue a decision reversing the panel's May 21, 2014 order, while requiring any further consideration to be limited to the current evidentiary record, issues raised by Respondents' W.C.C. Form 30 and applicable legal authorities.

4) The Court overlooked/misconstrued the provisions of S.C. Code Ann. Section 1-23-380 (Supp. 2013) in determining this statute simply provides "that a party may appeal after a *final decision* in a contested case". As a consequence of this oversight/misconstruction, the Court has inadvertently limited the scope of appeals authorized by Section 1-23-380, to the extent the absence of immediate review/correction of fundamental legal errors which provide the entire basis for the panel's ruling will realistically deprive Mr. Hilton of an adequate remedy as to the consequences of these errors at any later stage of the proceedings.

Specifically, Section 1-23-380 provides in pertinent part:

. . . A preliminary, procedural or intermittent agency action or ruling **is immediately reviewable** if review of the final agency decision would not provide the adequate remedy. (Emphasis added).

As recognized by the Supreme Court in Allen Packett v. Kittrell, 365 S.C. 332, 617 S.E. 2d 730, 734 (2005), the language of this statute "indicates that whether an intermediate action or ruling is immediately reviewable is to be decided on a case-by-case basis, *i.e.* whether a review of the final decision would not provide an adequate remedy." As the provisions of

Section 1-23-380 (A) are analogous to the exhaustion of administrative remedies concept, logic dictates that the exception should be similarly construed.

While administrative remedies must generally be exhausted prior to obtaining judicial review, two commonly recognized exceptions to this rule include circumstances where: (a) “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); and (b) “a party demonstrates that pursuit of administrative remedies would be a vain or futile act.” Brown, 697 S.E. 2d at 611; Storm M. H. ex rel. McSwain v. Charleston County Board of Trustees, 400 S.C. 478, 735 S.E. 2d 492, 497 (2012).

When 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 also unconstitutionally exceeded its statutory authority. Each of these violations renders the panel’s May 21, 2014 order void and without legal effect. Triska, 355 S.E. 2d at 533 (“Any action taken by . . . [an administrative agency] outside of its statutory and regulatory authority is null and void.” Bazzle, 462 S.E. 2d at 274 (“Actions by the commission . . . [which] exceeded their statutory authority . . . were null and void.”); LaSalle Bank National Association, 688 S.E. 2d at 122 (Due process must be afforded “before any binding decree, order, or judgment can be made”); Adams, 726 S.E. 2d at 12 (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.”).

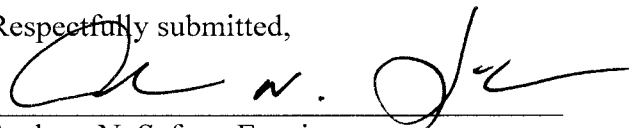
The panel’s failure to include findings of fact, rulings of law and an explanation of its rationale similarly constitutes actions beyond its statutory authority, as: (a) an “award” within the meaning of Section 42-17-40 merely contemplates a determination of disputed issues;

(b) this statute does not authorize the arbitrary/unexplained process utilized by the panel; and (c) the illegality of the panel's order cannot be legitimately disputed.

Additionally, Mr. Hilton respectfully submits he has satisfied the alternative inadequate remedy exception, as the panel's actions will certainly require him to: (a) again establish facts that were the subject of unappealed findings extinguished by the panel in contravention of the law of the case doctrine; (b) relitigate issues that were not preserved for consideration by the panel; (c) necessarily be confronted with new evidence that would not be contained in the record but for the panel's determination to ignore these governing rules of procedure; (d) encounter a legally flawed decision making process that will necessarily be perpetuated given the rejection of governing procedure exemplified by the May 21, 2014 decision; and (e) face new arguments which will surely be advanced by Respondents in the hope of avoiding the legal ramifications of the current record.

Consequently, Mr. Hilton respectfully requests that this Court grant his Petition, withdraw/amend its prior Order, hear the matter on its merits and issue a decision reversing the panel's Order and requiring that any subsequent determination be limited to the issues raised by Respondents' W.C.C. Form 30 and the current record, in light of applicable legal authorities.

Respectfully submitted,



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Attorney for Appellant, Thomas Chad Hilton

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

W.C.C. FILE NO.: 1111934

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SC Court of Appeals

Thomas Chad Hilton APPELLANT.

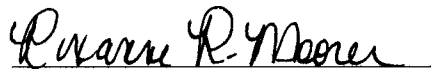
v.

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

CERTIFICATE OF SERVICE

I, Roxanne R. Moorner, paralegal for Andrew N. Safran, Esquire, Attorney for Appellant, do hereby certify that on the 6th day of October, 2014, I caused to be filed, via hand delivery, the original and seven (7) copies of the Appellant's Petition for Rehearing, with the Clerk of the South Carolina Court of Appeals. One (1) copy of the Appellant's Petition for Rehearing was furnished to counsel for Respondents via first class mail at the following address:

L. Brenn Watson, Esquire
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October 6, 2014

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SC Court of Appeals

HAND DELIVERED

The Honorable Jenny Abbott Kitchings
Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

RE: Thomas Chad Hilton, Appellant, v. Flakeboard America Limited, Employer, and
Liberty Mutual Insurance Company, Carrier, Defendants.
Appellate Case No.: 2014-001357

Dear Ms. Kitchings:

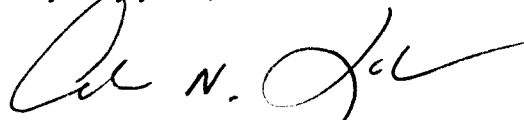
Enclosed please find an original and seven copies of the Appellant's Petition for Rehearing relative to the above-captioned matter. At this time, I would greatly appreciate your filing these documents and returning one clocked copy to my courier.

By copy of this letter, I am serving a copy of this Petition on Brenn Watson, counsel for Respondents. As always, in the event he has any questions or comments concerning this matter, I invite him to contact me.

Thank you for your assistance.

With kindest regards, I am

Very truly yours,



Andrew N. Safran

ANS/rrm

Enclosures

cc: L. Brenn Watson, Esquire