THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Honorable Melody L. James, Commissioner
W.C.C. File No. 1122484

Appellate Case No. 2014-002070

William W. Huggins, Jr.....Respondent,

v.

City of Mullins and South Carolina Municipal Trust.....Respondent,

Rakesh Chokshi, M.D. .....Appellant.

RETURN TO MOTION TO DISMISS

Appellant, Rakesh Chokshi M.D., pursuant to Rule 240, SCAR respectfully submits this Return to Respondent City of Mullins and South Carolina Municipal Trust's Motion to Dismiss Appellant's appeal of the Order of South Carolina Workers' Compensation Commission ("Commission") compelling Appellant to give his deposition in accordance with fixed fees contained in the South Carolina Workers' Compensation Fee Schedule. This Court should deny Respondent's motion because Appellant has standing to challenge the Full Commission's order under the Administrative Procedures Act ("APA") on the following grounds:

I. Appellant participated in the initial proceeding and is entitled as a matter of right to contest the Commission's Order as it is a final decision affecting Appellant's substantial rights under the Workers' Compensation Act.

II. The Commission retained exclusive jurisdiction over this matter under the Workers' Compensation Act in accordance with S.C. Code Ann. § 42-3-180.

III. If the Court finds the Full Commission lacked jurisdiction, South Carolina's exception to the mootness doctrine applies because the issues on appeal are capable of repetition and Appellant's substantial rights will be affected by the Fee Schedule again.

Appeals in administrative agency matters are handled differently than appeals in other cases, and APA mechanisms for review provide uniform procedures after the exhaustion of administrative remedies, and the APA's provisions are controlling in agency matters and supersede any conflicting provisions. Bone v. U.S. Food Service, 399 S.C. 566, 733 S.E.2d 200 (2012) adhered to on rehearing 404 S.C. 67, 744 S.E.2d 552.

Thus, while appeals from the circuit court in other cases are subject to the general appealability statute of S.C. Code Ann. § 14-3-330, this provision and its concepts that Respondent employs to dismiss this matter are inapplicable here. Under the APA, Appellant's appeal is not moot. This Court can reverse or modify a final decision of the Commission regarding ratemaking where, as here, the substantial rights of Appellant have been prejudiced by a final decision in a contested case.

STATEMENT OF THE CASE

This case arises out of medical evaluation and treatment Rakesh Chokshi M.D. ("Appellant") provided to Respondent William W. Huggins, Jr. ("Claimant") on October 28, 2011 and November 20, 2011. Over a year and a half later, on August 23, 2013, Respondent City of Mullins and South Carolina Municipal Insurance Trust ("Employer") filed a motion to compel Appellant to provide his deposition pursuant to the South Carolina Workers' Compensation Commission 2010 Medical Services Provider Manual Fee Schedule ("Fee Schedule") and accept a fixed fee to offer testimony pertaining to Claimant's injuries in this workers' compensation case. Employer never authorized Appellant's treatment of Claimant. Appellant was first made aware that his treatment of Claimant was associated with a workers' compensation claim on or about January 18, 2013 when Claimant issued a questionnaire to Appellant pertaining to his injuries. Appellant completed the questionnaire. At all times, Appellant received payment for his services to Claimant under Claimant's private insurance policy.

Thereafter, Employer sought Appellant's deposition to cross-examine him with regard to the completed questionnaire without authorizing Appellant's services to Claimant. Employer directed that Appellant's deposition would be compensated $400.00 for the first hour and $100.00 for each quarter hour thereafter pursuant to fixed fees in accordance with the Fee Schedule. In advance of the deposition, Appellant communicated to Employer that his fees for the deposition were accurately reflected in his standard deposition invoice because Appellant's services had not been authorized by Employer under the South Carolina Workers' Compensation Act ("the Act").

Under the 2010 Medical Services Provider Manual, the Fee Schedule allows for a physician's deposition to be compensated by individual consideration outside of the fixed fees offered by Employer. In determining payment by individual consideration, the Medical Services Provider Manual requires a payer to consider the prevailing charges for similar services. Appellant's fees for his deposition are commensurate with fees charged by physicians for their depositions. The fee is $1,000.00 for the first hour and $500.00 for each hour thereafter. Employer refused to take Appellant's deposition in accordance with Appellant's fees and the deposition was cancelled. Employer filed the motion to compel Appellant's deposition pursuant to the Fee Schedule that is the subject of this appeal on August 23, 2013. Appellant formally appeared in this matter on August 30, 2013 to protect his interest and right to establish and enforce his own fees for his deposition.

Upon a hearing and order dated January 27, 2014 by Commissioner Andrea C. Roche granting Respondent's motion to compel, Appellant timely filed an appeal on February 11, 2014. Appellant's standing or the Commission's jurisdiction to hear this matter was never contested. The appeal was heard by a three-member panel of the Full Commission on June 9, 2014. Although Appellant gave his deposition pursuant to the Fee Schedule to assist in resolving the underlying workers' compensation claim while the appeal was pending, he expressly reserved his right to contest the fee paid to him for the deposition.

On September 3, 2014, the Full Commission affirmed Commissioner Roche's January 27, 2014 order compelling Appellant to receive compensation for his deposition in accordance with the fixed fees set forth in the Fee Schedule. At all times, the Commission retained and exercised exclusive jurisdiction to determine Appellant's fee for

his deposition under the Fee Schedule. Now, on appeal, Respondent contends Appellant lacks standing and the Commission lacked jurisdiction to hear this matter. On the following grounds, this Court should deny Respondent's motion to dismiss.

ARGUMENT

APPELLANT HAS STANDING TO CHALLENGE THE FULL COMMISSION'S ORDER UNDER THE ADMINISTRATIVE PROCEDURES ACT

The APA establishes the standard for judicial review of workers' compensation decisions. Cranford v. Hutchinson Const., 399 S.C. 65, 731 S.E.2d 303 (Ct. App. 2012). An appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. Burnette v. City of Greenville, 401 S.C. 417, 737 S.E.2d 200 (S.C.App. 2012), rehearing denied, certiorari denied.

I. Appellant participated in the initial proceeding and is entitled as a matter of right to contest the Commission's Order as it a final decision affecting Appellant's substantial rights under the Act.

Under the APA, Appellant may appeal a final decision of the Commission affecting his substantial right to establish and enforce fees for his services in a contested case. S.C. Code Ann. § 1-23-380 holds:

> 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 pursuant to this article and Article 1...Except as otherwise provided by law, an appeal is to the court of appeals.

Id. The Legislature intended the APA "to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of [the APA] conflicts with an existing statute or regulation, the provisions of [the APA] are controlling." *See* Act No. 387, 2006 S.C. Acts 3131 (explaining the intent of the 2006 amendments to

the APA); Wofford v. City of Spartanburg ex rel. S. Carolina Mun. Ins. Trust, 410 S.C. 102, 102-03, 763 S.E.2d 53 (Ct. App. 2014). Accordingly:

> "There is a strong presumption in favor of judicial review of administrative actions, and prohibitions against judicial review are to be narrowly construed." 2 Am. Jur. 2d Administrative Law § 446 (2004). The presumption of judicial review may be overcome by: (1) specific language; (2) specific legislative history that is a reliable indicator of legislative intent; or (3) specific legislative intent that is fairly discernible in the detail of the legislative scheme. Id. In the absence of statutory language expressly excluding review, a court determines whether, and to what extent, the relevant statute precludes judicial review by examining the structure and history of the statute to determine whether the requisite legislative intent to bar judicial review is clearly established.

S. Carolina Dep't of Motor Vehicles & Columbia Police Dep't, Practitioners, Docket Number: 06-ALJ-21-0912-AP, 2008 WL 2300345, at *3 (Apr. 30, 2008)

The APA defines a party as "[E]ach person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party." S.C. Code Ann. § 1-23-310(4). While no applicable statute or regulation specifies who is "entitled as of right" to be admitted as a party in an administrative proceeding, at a minimum the complaining party must have "standing" to proceed with the litigation since an individual complaining of a wrong fails to invoke the jurisdiction of an adjudicatory body if the complaining individual lacks standing. Lennon v. South Carolina Coastal Council, 330 S.C. 414, 498 S.E.2d 906 (S.C.App., 1998) (explaining that a lack of standing fails to invoke jurisdiction since "South Carolina courts, like the federal courts, require a justiciable case or controversy before any decision on the merits can be reached.").

In South Carolina, a person aggrieved by a final decision of the Commission must have had standing in the initial agency proceeding and he also must have participated in

the case as a "party." Home Health Servs., Inc. v. S. Carolina Dep't of Health & Envtl. Control, 298 S.C. 258, 261, 379 S.E.2d 734, 736 (Ct. App. 1989) (citing D. SHIPLEY, SOUTH CAROLINA ADMINISTRATIVE LAW at 7–29 (1983) "Standing...to become a party before an agency should be broadly recognized... [and] should be awarded...if he is in a position to present, for the benefit of the agency, some considerations which are important for the agency to know about or act upon...."). Labouseur v. Harleysville Mut. Ins. Co., 298 S.C. 213, 218, 379 S.E.2d 291, 293-94 (Ct. App. 1989) aff'd as modified, 302 S.C. 540, 397 S.E.2d 526 (1990) (citing D. SHIPLEY, SOUTH CAROLINA ADMINISTRATIVE LAW at 7-31 (1983)).

Respondent invoked the jurisdiction of the Act and opened the door to allow Appellant to have standing in this case by moving the Commission to compel Appellant to receive compensation for his deposition in accordance with fixed fees established in the Fee Schedule. By Notice of Appearance dated August 30, 2013, Appellant has had standing in the initial agency proceedings to defend and protect his interest in this matter. Neither the parties nor the Commission contested Appellant's appearance in this case. Counsel for Appellant has been notified of every filing in this matter since Appellant appeared in the case. Appellant has timely filed and served all documents necessary and attendant to this appeal. The Commission has accepted briefs and heard argument from Appellant to resolve the justiciable controversy of Appellant's compensation for his deposition under the Act's Fee Schedule in this matter.

Appellant is in a keen position to present for the benefit of the Commission considerations concerning fees for non-authorized physicians in workers' compensation cases. These issues are important to the Commission as physician involvement in the

workers' compensation claims resolution process is a necessary and unavoidable occurrence. Accordingly, Appellant obtained standing in the initial agency proceedings and has participated in this case to properly appeal a final decision of the Commission affecting his compensation for a deposition under the Act's Fee Schedule.

The APA further defines a "contested case" as a "[P]roceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." S.C. Code Ann. § 1-23-310(1). Because a contested case includes an agency proceeding involving ratemaking, S.C. Code Ann. § 1-23-380 confers Appellant with the right to seek judicial review of the Commission's order fixing the rate at which he can be compensated under the Act's Fee Schedule.

There is no specific language or legislative intent supporting Respondent's contention that Appellant lacks standing to appeal the Commission's order. That Appellant was not held in contempt for refusing to comply with Commissioner Roche's order is of no consequence to Appellant's right under the APA to appeal the Full Commission's order. Respondent's reliance on Ex parte Whetstone is misguided as the Supreme Court of South Carolina specifically held in that matter that "[A]n order directing a party to participate in discovery is interlocutory and not directly appealable *under S.C. Code Ann. § 14–3–330* (1976)." Id., 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986) *(emphasis added.)*. While appeals from the circuit court in other cases are subject to the general appealability statute of S.C. Code Ann. § 14-3-330, this provision and its concepts are inapplicable in this matter which is subject to the APA. See Charlotte-Mecklenburg Hosp. Auth. v. S. Carolina Dep't of Health & Envtl. Control, 387 S.C. 265, 266, 692 S.E.2d 894 (2010).

The questions on appeal do not revolve around an order directing a non-party to submit to discovery or provide certain documents as Respondent contends. Rather, the questions on appeal concern the fee and compensation method for Appellant's deposition in this workers' compensation matter. Under the APA, this is a contested case as the central focus of this matter concerns Appellant's rate under the Act's Fee Schedule. Because the Full Commission's order on September 3, 2014 was a final agency decision affecting Appellant's substantial right to compensation under the Act in a contested case, this matter is properly before the Court on appeal and Respondent's motion to dismiss should be denied.

II. The Commission retained exclusive jurisdiction over this matter under the Workers' Compensation Act ("Act") in accordance with S.C. Code Ann. § 42-3-180.

The Commission properly exercised its exclusive jurisdiction over this matter on appeal from Commissioner Roche's order because the Act expressly provides for the Commission's continuing jurisdiction over all questions arising under the Act. S.C. Code Ann. § 42-3-180 plainly provides:

> All questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, shall be determined by the commission, except as otherwise provided in this title.

Id. Appellant and Respondent have not settled the questions on appeal. Because Appellant's appeal focuses squarely under how much he should be compensated for his deposition under the Act's Fee Schedule, Respondent's contention that the Commission lacked jurisdiction because the underlying workers' compensation claim was resolved has no effect on the Commission's exclusive jurisdiction to determine all questions, including Appellant's, arising under the Act.

Indeed, the authority cited by Respondent in support of its position only concerns the jurisdiction of the Commission to decide questions incidental to pending employee claims for compensation such as cancellation, coverage, construction of insurance contracts, and the like once the pending employee claim for compensation is resolved:

> ... [W]hen there is a pending employee claim for compensation, the exclusive jurisdiction for the determination of questions concerning cancellation, coverage, construction of insurance contracts, and the like, is in the Workers' Compensation Commission. On the other hand, *when there exists no pending employee claim for compensation, the Commission lacks the jurisdiction to decide such questions.*

S. Carolina Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractor's Self-Insurers Fund, 303 S.C. 368, 370-71, 401 S.E.2d 144, 145 (1991) citing Labouseur v. Harleysville Mutual Insurance Company, 298 S.C. 213, 379 S.E.2d 291 (Ct.App.1989) *(Emphasis added.)*.

The questions on appeal before the Court do not concern or touch upon the employee's claim for compensation in this matter. The Commission properly retained exclusive jurisdiction to resolve Appellant's questions arising under the Act's Fee Schedule in accordance with S.C. Code Ann. § 42-3-180. Therefore, this Court should deny Respondent's motion to dismiss this appeal.

III. South Carolina's exception to the mootness doctrine applies because the issues on appeal are capable of repetition and Appellant's rights will be affected under the Fee Schedule again.

Should the Court find that the Commission lacked its exclusive jurisdiction to decide all questions arising under the Act in this appeal, Appellant's appeal is nevertheless properly before the Court because it falls squarely within South Carolina's exception to the "mootness doctrine." This exception allows courts to examine matters if "the issue raised is 'capable of repetition but evading review'." Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (citing In re Darlene C., 278 S.C. 664, 665, 301 S.E.2d 136, 137 (1983) (quoting Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973))

(See also South Carolina Dep't of Mental Health v. State, 301 S.C. 75, 390 S.E.2d 185 (1990) (although specific case is moot, appeal allowed because it raises a question that is capable of repetition, but which usually becomes moot before it can be reviewed); Evans v. South Carolina Dep't of Social Servs., 303 S.C. 108, 399 S.E.2d 156 (1990) (although development renders case moot, controversy presents a recurring dilemma which the Court will address to clarify the law); Steinle v. Lollis, 279 S.C. 375, 307 S.E.2d 230 (1983) (issues are not moot given that the underlying dispute is one capable of repetition yet evading review)).

Here, the questions on appeal are not only capable of repetition but in fact do repeat themselves daily in the workers' compensation arena. Appellant has appealed the same questions in a sister case *Chris Chapman v. Georgia Pacific, Self-Insured Employer, W.C.C. File No. 1209379, Appellate Case No. 2014-002069*. Medical providers across South Carolina are routinely confronted with the issue of compensation under the Act's Fee Schedule for services rendered in a workers' compensation matter when their treatment and services have not been authorized by an employer or carrier. It is hardly surprising that medical providers opt to assist the parties in resolving an underlying workers' compensation claim by giving their deposition or participating in discovery instead of refusing to comply and be held in contempt of court.

Medical providers are limited to seeking review of questions arising under the Act's Fee Schedule by appearing in the underlying workers' compensation claim that requires their services. When the underlying claim is resolved but the question of compensation under the Fee Schedule persists, providers should be afforded the opportunity to appeal final decisions of such questions when the questions constitute a recurring dilemma in their

profession. ("It would seem to be plain, upon well-settled and fundamental principles, that no order or judgment affecting the rights of a party to the cause should be made or rendered without notice to the party whose rights are to be thus affected, for otherwise a party would be deprived of his day in Court."). Sabella v. S. Carolina Alcoholic Beverage Control Comm'n, 289 S.C. 400; 402, 346 S.E.2d 530, 531 (Ct. App. 1986)(see also Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) ("It is a fundamental doctrine of law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or opportunity to be heard, and that without due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights.")).

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court deny Respondent's motion to dismiss as the Commission properly retained exclusive jurisdiction over this matter and Appellant has standing to challenge the Commission's order under the Administrative Procedures Act.

[Signature on following Page]

Respectfully Submitted,

Carl E. Pierce, II (S.C. Bar No. 7946)
Benjamin C. Smoot, II (S.C. Bar No. 101372)
Pierce, Herns, Sloan & Wilson, LLC
321 East Bay Street (29401)
PO Box 22437 (29413)
Charleston, South Carolina 29413
(843) 722-7733
carlpierce@phswlaw.com
bensmoot@phswlaw.com
Attorneys for Appellant

2/10, 2015

Other Counsel of Record:

Natalie Stevens-Graziani, Esquire
Stevens Law Firm, PC
P.O. Drawer 127
Loris, SC 29569-0127
Attorney for Respondent William W. Huggins, Jr.

Grady L. Beard
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, S.C. 29211
(803) 929-1400
Attorney for City of Mullins and S.C. Municipal Trust

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Honorable Melody L. James, Commissioner
W.C.C. File No. 1122484

Appellate Case No. 2014-002070

William W. Huggins, Jr.....Respondent,

v.

City of Mullins and South Carolina Municipal Trust.....Respondents,

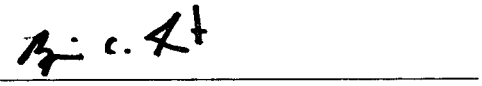
Rakesh Chokshi, M.D. .....Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on February 10, 2015 he served one copy of the Return to Motion to Dismiss by emailing and placing same in an envelope with proper first class postage affixed thereto, and addressed as follows to their attorneys of record:

Natalie Stevens-Graziani, Esquire
Stevens Law Firm, PC
P.O. Drawer 127
Loris, SC 29569-0127
Attorney for Respondent William W. Huggins, Jr.

Grady L. Beard, Esquire
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211
(803) 929-1400
Attorney for Respondent City of Mullins and S.C. Municipal Trust



Carl E. Pierce, II (S.C. Bar No. 7946)
Benjamin C. Smoot, II (S.C. Bar No. 101372)
Pierce, Herns, Sloan & Wilson, LLC
321 East Bay Street (29401)
PO Box 22437 (29413)
Charleston, South Carolina 29413
(843) 722-7733
carlpierce@phswlaw.com
bensmoot@phswlaw.com
Attorneys for Appellant

Charleston, South Carolina

2/10, 2015

PIERCE, HERNS, SLOAN & WILSON, LLC

ATTORNEYS AND COUNSELORS AT LAW

THE BLAKE HOUSE • 321 EAST BAY STREET
CHARLESTON, SOUTH CAROLINA 29401

POST OFFICE BOX 22437
CHARLESTON, SOUTH CAROLINA 29413

(843) 722-7733
(843) 722-7732 FAX
www.phswlaw.com

CARL E. PIERCE, II
LOUIS P. HERNS
ALLAN P. SLOAN, III ✱◆
JOSEPH C. WILSON, IV †
JAMES G. KENNEDY
WILLIAM P. EARLY

M. TODD RAINSFORD
SONALY K. HENDRICKS
KRISTEN B. FEHSENFELD
CHRISTINA VON ZIELINSKI
RYAN K. MILLER
WHIDBEE S. PERRIN
BENJAMIN C. SMOOT, II

✱ MEMBER SC & FL BAR
◆ CERTIFIED SC CIRCUIT COURT MEDIATOR
† MEMBER SC, FL & GA BAR

Direct Dial: 843-725-7709
Email: bensmoot@phswlaw.com

February 10, 2015

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

Re: *Huggins v. City of Mullins and South Carolina Municipal Trust*
Appellate No.: 2014-002070
WCC File No.: 1122484
Our File No.: D2391.02

Dear Ms. Kitchings:

Enclosed, please find the original and seven (7) copies of the Appellant's Proof of Service and Return to Motion to Dismiss regarding the above-referenced matter. Please file the documents and return the clocked copy within the self-addressed stamped envelope.

Please do not hesitate to contact me with any questions, concerns, or should you need anything else at this time. Please note that all counsel of record has been copied on this correspondence.

With kind regards,

Sincerely,

Brenda Casey

Brenda Casey
Paralegal to Carl E. Pierce, II and
Benjamin C. Smoot, II

/bdc

cc: Natalie Stevens-Graziani, Esquire (*via email & USPS Mail - with enclosures*)
Grady L. Beard, Esquire (*via email & USPS Mail - with enclosures)*

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