

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

S.C. Supreme Court

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

APPELLATE CASE NO.: 2015-000493

Thomas Chad Hilton..... PETITIONER.

v.

Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company,
CarrierRESPONDENTS.

PETITIONER'S RETURN TO
RESPONDENTS' MOTION TO DISMISS

Andrew N. Safran
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689
Attorney for Petitioner, Thomas Chad Hilton

STATEMENT OF THE CASE

Pursuant to Rule 240 SCARC, Petitioner, Thomas C. Hilton, requests the Court to deny Respondents', Flakeboard America Limited's and Liberty Mutual Insurance Company's, Motion to dismiss his Petition for Writ of Certiorari. Specifically, Mr. Hilton respectfully submits: (a) a Motion of this nature is not the proper vehicle through which to contest his Petition, which is premised upon a statutory mechanism that unquestionably authorizes judicial review, notwithstanding the absence of a "final agency decision"; and (b) he has certainly identified errors of law which not only violate fundamental appellate and due process, but also impose an absolutely unlawful procedure that, absent immediate review by this Court, prevents him from obtaining an adequate remedy at a later stage of the proceedings.

On August 17, 2011, Mr. Hilton was bitten in his buttocks/upper leg area by an insect as he was operating a tractor trailer for Flakeboard America Limited. This injury initially prompted treatment, including operative debridement, through Marlboro Park Hospital and a surgeon. However, following his release from treatment by this surgeon, Mr. Hilton was directed by Respondents' to a neurologist, who performed diagnostic testing, confirmed additional consequences of the August 17, 2011 injury and made several treatment recommendations. However, Respondents challenged the causal relationship of these additional medical conditions, alleged Mr. Hilton has achieved maximum medical improvement on his release by the surgeon in September, 2011 and sought an Order of the commission terminating his entitlement to either continued temporary total disability compensation or further medical care.

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 (treating general surgeon), 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. 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 experts (authorized treating neurologist, forensic psychiatrist and two neuropsychologists) establishing, to a reasonable degree of 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. 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.

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.

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".

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.**

After receiving memoranda from the respective parties (attached hereto as Exhibits D and E) and entertaining oral argument on October 14, 2013, the Panel ruled:

FINDINGS OF THE FULL COMMISSION

This matter was heard before the above-mentioned South Carolina Workers' Compensation Commission Appellate Panel during the last term of Review. The Commissioners considered the matter and **vacate and remand** the Decision and Order to the Jurisdictional Commissioner to determine whether or not the Claimant is competent to testify and whether or not the Claimant needs a Guardian ad Litem pursuant to §42-15-55. They also order the Defendants to send the Claimant to a neurologist of their choice for an evaluation as to the causation and extent of Claimant's problems.

ORDER

IT IS THEREFORE ORDERED that this matter is **Vacated and Remanded** to the Jurisdictional Commissioner for the purposes of making a determination as to whether or not the Claimant is competent to testify and whether or not the Claimant needs a Guardian ad Litem pursuant to §42-15-55. It is also Ordered that the Defendants to send the Claimant to a neurologist of their choice for an evaluation as to the causation and extent of Claimant's problems. Such evaluation shall be made available to the single Commissioner for his or her consideration. (See, Exhibit F).

ARGUMENTS

I. MR. HILTON HAS IDENTIFIED A LEGALLY SUSTAINABLE BASIS FOR SEEKING IMMEDIATE REVIEW OF THE COMMISSION'S MAY 21, 2014 ORDER THROUGH A WRIT OF CERTIORARI

The crux of any motion to dismiss is the alleged absence, through substantive or procedural deficiency, of a legally sustainable request for relief. See, generally, Rule 12 (b), SCRCF. Consequently, the current inquiry should focus on whether Mr. Hilton's Petition for Writ of Certiorari raises, on its face, legally cognizable grounds for obtaining review of a commission ruling that, by any analysis, is fatally flawed.

In support of their Motion, Respondents contend: (a) the provisions of S.C. Code Ann. Section 1-23-380 (Supp. 2013) restrict judicial review in this context to "[f]inal decisions" of the Commission; (b) as the Commission's Appellate Panel vacated the single commissioner's June 4, 2013 Order in its entirety, **including 23 unappealed factual findings that constituted the law of this case**, while remanding the claim to the jurisdictional commissioner, "every single issue remains undetermined at this juncture"; and (c) the current appeal does not come within the purview of Section 1-23-380.

However, this construction of the statute, which was erroneously adopted by the Court of Appeals, misconstrues the plain language of Section 1-23-380.

Section 1-23-380 provides in pertinent part:

A party who has exhausted all administrative remedies available within the agency and who is aggrieved by the final decision in a contested case is entitled to judicial review pursuant to this article and Article 1. This section does not limit utilization of or the scope of judicial review available under other means of review, redress or relief or trial *de novo* provided by law. **A preliminary, procedural or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.**

...

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

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of statutory authority;
- (c) made upon unlawful procedure;
- (d) affected by other error of law; [or] . . .
- (e) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. (Emphasis added).

Despite Respondents' contrary assertions, Section 1-23-380 clearly authorizes immediate review of "[a] . . . preliminary, procedural or intermediate agency action or ruling . . . if review of the final agency decision would not provide an adequate remedy." In this regard, the Court has construed this language to indicate "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." Island Packet v. Kittrell, 365 S.C. 332, 617 S.E. 2d 730, 734 (2005).

Given these authorities, Mr. Hilton respectfully submits: (a) his Petition for Writ of Certiorari obviously seeks legally cognizable relief in the form of expeditious judicial review afforded by Section 1-23-380; (b) the "case-by-case" analysis adopted by the Court in Island Packet envisions a depth of consideration that materially exceeds the

limited inquiry incidental to determination of a motion to dismiss; (c) the current circumstances warrant due consideration of his Petition, which raises significant legal issues; and (d) Respondents' Motion to Dismiss should be denied.

II. **MR. HILTON HAS AMPLY SATISFIED THE REQUIREMENTS OF SECTION 1-23-380**

A. **EXTINGUISHMENT OF LAW OF THE CASE RENDERS MAY 21, 2014 ORDER NULL AND VOID**

Two commonly recognized exceptions to the general rule requiring exhaustion of administrative remedies include situations 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).

In this regard, it is axiomatic that “all findings of fact and law by the . . . [single commissioner] bec[o]me and are the law of this case, except only those within the scope of the exception[s] . . . [of Respondents] . . . and the notice given to the parties by the Commission” Ham v. Mullins Lumbar Co., 193 S.C. 66, 7 S.E. 2d 712, 716 (1940); Transportation Insurance Company and Flagstar Corporation v. South Carolina Second Injury Fund, 389 S.C. 422, 699 S.E. 2d 687, 692 (2010) (“The Fund failed to appeal the single commissioner’s finding to the full commission; thus, it is the law of the case.”) See also, Smith v. South Carolina Department of Mental Health, 329 S.C. 485, 494 S.E. 2d 630, 639 (Ct. App. 1997) (specifically noting commission’s *sua sponte* reduction in unappealed disability assessment was violative of Ham); Hendricks v. Pickens County, 335 S.C. 405, 517 S.E. 2d 698, 703 (Ct. App. 1999) (unappealed finding of maximum medical improvement as to one body part constituted the law of the case in subsequent proceeding following attainment of maximum medical improvement for all other injuries).

This Court has likewise held : (a) rulings that constitute the law of the case are “*res judicata* between the parties.” Greenwood County v. Watkins, 196 S.C. 51, 12 S.E. 2d 545, 550 (1940); (b) “. . . [n]o principle of law is better settled, or more firmly adhered to by the courts, than . . . [the concept] that parties are concluded by . . . [determinations of] questions which have once been litigated between them.” Earle v. City of Greenville, 84 S.C. 193, 65 S.E. 1050 (1909); and (c) this “doctrine is founded upon principles of wise public policy . . . and the wholesome maxim of the common law that no man should be twice vexed for the same cause” Jenkins v. Southern Railway Co., 145 S.C. 161, 143 S.E. 13, 14 (1928).

Application of the law of the case doctrine results in “a party [being] . . . precluded from re-litigating issues decided in . . . [the prior] order” Hudson ex. rel. Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 754 S.E. 2d 486, 490 (2014). It similarly entitles the adverse party to rely upon the law of the case, to the extent he “is not required to relitigate unchallenged findings” Brunson v. American Koyo Bearings, 367 S.C. 161, 623 S.E. 2d 870, 872 (Ct. App. 2005).

Inspection of Respondents’ Form 30, in light of the single commissioner’s June 4, 2013 Order, confirms: (a) the absence of any exceptions to Finding of Fact Nos. 1 – 7, 11, 14 – 15, 18 – 21, 23 – 24, 26 – 27, 29, 40 – 42 and 44; (b) these 23 factual findings are the law of this case; and (c) the Commission’s obliteration of these findings not only exceeded the authority granted by the General Assembly through passage of S.C. Code Ann. Section 42-17-50 (1976, as amended), but also violated basic hornbook law.

As verified by the above-cited authorities, these 23 factual determinations have been decided with **absolute finality**. In view of this fact, Mr. Hilton has an unassailable right to rely upon each of these determinations, which are legally deemed to be set in stone, throughout the duration of this litigation. As a consequence, the Commission's attempt to extinguish the law of this case is necessarily "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).

Mr. Hilton respectfully submits: (a) absent immediate appellate review, he will be required to relitigate the multitude of factual findings which comprise the law this case; (b) this relitigation, which will be both time consuming and costly, is wholly inconsistent with the *res judicata* effect demanded by the law of the case doctrine; (c) his participation in these extended proceedings will prove to be a futile endeavor given the invalidity of the Commission's actions; and (d) this amalgamation of factors firmly establishes the absence of any adequate remedy short of immediate review by this Court.

Additionally, given the commission's refusal to recognize/apply a rule as basic as the law of the case doctrine, concerns necessarily arise as to: (a) whether it will identify other unpreserved "issues" on subsequent review; and (b) when there will be a truly final decision, rather than future efforts to supplement the contents of a record which was not, in and of itself, the source of dispute.

Accordingly, Mr. Hilton respectfully requests the Court to deny Respondents' Motion to Dismiss, while granting his Petition for Writ of Certiorari.

B. THE COMMISSION'S MAY 21, 2014 ORDER EXCEED ITS CONSTITUTIONAL AUTHORITY, WHICH RENDERS IT 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 Commission can obviously reweigh the evidence when rendering a decision, ". . . [o]nly issues within the application for review under . . . 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 commission: (a) simply possesses 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, 7 S.E. 2d at 716; Smith, 494 S.E. 2d at 639.

In this instance, Respondents: (a) never sought to submit additional medical evidence before either the single commissioner or full commission 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 commission effectively "rewrote the entire case." Ham, 7 S.E. 2d at 715. Specifically, the commission: (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.

These actions were clearly violative of longstanding precedent which has repeatedly admonished the commission 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.” 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.”).

In this connection, Mr. Hilton would reiterate: (a) despite the obvious impropriety of the commission’s action, he will be obliged to engage in extensive relitigation of unpreserved “issues” unless afforded the opportunity for immediate review by this Court; (b) this lengthy process can only be characterized as a futile undertaking, as the commission’s *sua sponte* creation of unpreserved “issues” will ultimately necessitate nullification of its May 21, 2014 Order; and (c) no adequate remedy, short of immediate review by this Court, exists, as delay will force his active and costly participation in senseless litigation of “non-issues”.

Accordingly, Mr. Hilton respectfully requests that the Court deny Respondents’ Motion to Dismiss and grant his Petition for Writ of Certiorari.

C. VIOLATION OF DUE PROCESS RENDERS THE MAY 21, 2014 ORDER NULL AD VOID

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 commission’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 disputes the legal capacity of 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 a semblance of notice that the issues ultimately **created** by the commission, much less the unappealed factual findings, remained the subject of further litigation.

The commission’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 spawned 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).

In this regard, Mr. Hilton respectfully submits: (a) absent immediate review by this Court, it will be incumbent upon him to actively engage in the timely and costly litigation of multiple unpreserved issues; (b) given the obvious implications of the

Commission's denial of due process, his necessary participation in these extended proceedings will prove to be a futile endeavor; and (c) pursuit of this extensive litigation in the face of numerous fatal legal errors certainly does not constitute an adequate remedy in this instance.

Accordingly, Mr. Hilton respectfully requests that Respondents' Motion to Dismiss be denied and that this Court grant his Petition for Writ of Certiorari.

D. THE COMMISSION'S FAILURE TO ENTER FACTUAL FINDINGS OR LEGAL CONCLUSIONS THAT IDENTIFY THE RATIONALE FOR/REASONING BEHIND ITS RULING RENDER THE MAY 21, 2014 ORDER ILLEGAL ON ITS FACE

S.C. Code Ann. Section 42-17-40 (1976, as amended) 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. 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 commission 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.

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 commission 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).

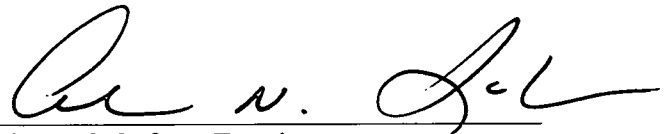
In this instance, the commission’s order: (a) contains no factual findings (other than a listing of the findings contained in the single commissioner’s Order that

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.

Mr. Hilton respectfully submits: (a) the commission is statutorily required to identify the rationale underlying its rulings through entry of sufficiently detailed factual findings in conjunction with relevant legal analysis; (b) compliance with this obligation is crucial, where, as here, the single commissioner's Order contains elements of legally mandated finality that have far reaching implications on the course of this litigation; (c) noncompliance with this Court's prior rulings as to the contents of administrative decisions not only renders the May 21, 2014 Order illegal, but also establishes a process through which entry of a "final decision" can be indefinitely delayed (via repeated remands of this nature); (d) notwithstanding these legal deficiencies, he will nonetheless be forced to actively participate in the timely and costly relitigation of this claim; (e) given the inadequacy of the Commission's May 21, 2014 Order, further litigation and compliance with these baseless directives will be futile; and (f) his only adequate remedy is immediate review by this Court.

Accordingly, Mr. Hilton respectfully requests the Court to deny Respondents' Motion to Dismiss, while granting his Petition for Writ of Certiorari.

Respectfully submitted,



Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689
Attorney for Petitioner

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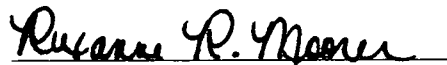
v.

Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company,
CarrierRESPONDENTS.

CERTIFICATE OF SERVICE

I, Roxanne R. Moorner, paralegal for Andrew N. Safran, Esquire, Attorney for Petitioner, do hereby certify that on the 30th day of March, 2015, I caused to be filed, via hand delivery, the original and six (6) copies of the Petitioner's Return to Respondents' Motion to Dismiss, with the Clerk of the South Carolina Supreme Court. One (1) copy of the Petitioner's Return was furnished to counsel for Respondents via first class mail at the following address:

L. Brenn Watson, Esquire
Willson, Jones, Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607


Roxanne R. Moorner
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

March 30, 2015

ANDREW N. SAFRAN, LLC
ATTORNEY AT LAW
1400 PICKENS STREET, SUITE 104
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE 803 256 6689
FACSIMILE 803 799 1003

MAILING ADDRESS:
POST OFFICE BOX 12089
COLUMBIA, SOUTH CAROLINA 29211

March 30, 2015

RECEIVED

MAR 30 2015

S.C. Supreme Court

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 and
Liberty Mutual Insurance Company, Respondents
Appellate Case No.: 2015-000493

Dear Mr. Shearouse:

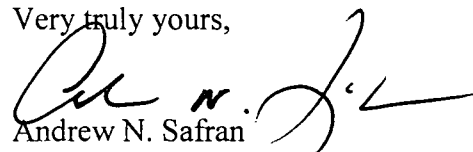
Enclosed please find an original and eight copies of Petitioner's Return to Respondents' Motion to Dismiss relative to the above-captioned matter. At this time, I would greatly appreciate your filing these documents and returning two clocked copies to my courier.

By copy of this letter, I am serving a copy of the Return 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 cooperation.

With kindest regards, I am

Very truly yours,


Andrew N. Safran

ANS/rrm

Enclosures

cc: L. Brenn Watson, Esquire