

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION  
COMMISSION

Appellate Panel

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Appellate Case No. 2012-211870  
Opinion No. 5176 (S.C. Ct. App. filed October 9, 2013)

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APR 17 2015

S.C. Supreme Court

Richard A. Hartzell, Employee.....Petitioner

v.

Palmetto Collision, LLC, Employer,.....Respondent

and

the S.C. Uninsured Employers Fund.....Respondent

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**PETITIONER'S REPLY BRIEF**

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## ARGUMENT

In reply to the Brief of Respondent, the Petitioner respectfully invites the Court's attention to the following:

I. **The Appealability Issue.** The application of the Court's decision in Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E. 2<sup>nd</sup> 552 (2013), is determined by the character of the order from which an appeal is taken. Bone makes clear that an order only determining compensability but not the ultimate award of benefits is not an appealable final judgment. Id. at 404 S.C. 67, 78-79, 744 S.E. 2<sup>nd</sup> 542, 559. The court to which an appeal must be taken is immaterial. The Court of Appeals recognized this in Rose v. JJS Trucking, LLC, Opinion number 5291 (S.C. Ct. App. Filed January 28, 2015) and Levi v. Northern Anderson County EMS, 409 S.C. 374, 362 S.E. 2<sup>nd</sup> 44 (Ct. App. 2014). The Court of Appeals properly followed Bone in those cases which arose after the statutory change providing for appeal from the Worker's Compensation Commission directly to the Court of Appeals.

Respondent argues that cases arising under current Section 1-23-380 are distinguishable because that statute does not use the term "final judgment." The statute provides in its opening sentence:

"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 I."

There is no distinction between a "final judgment" of the Worker's Compensation Commission and a "final decision" as far as appealability under Bone is concerned.

Respondent argues that the Commission's order is not final because Petitioner "may or may not file a claim for additional benefits in the future." (Respondent's Brief p. 7). Petitioner need not file any future claim for benefits. Both the order of the single

commissioner and the order the Appellant Panel direct that Petitioner receive “....any benefits under the Act necessarily resulting from such evaluation and determination.” (R. pp. 7, 18). While a further hearing may be required, no additional claim need be filed. The posture of this case is exactly as contemplated by Bone. That is, an order as to compensability without an ultimate final award is neither a “final judgment” nor a “final decision.”

Respondent argues that since the employer must enter into contractual obligations with medical providers, it is entitled to immediate review under Section 1-23-380. In Bone this court rejected a similar argument:

“Petitioners and the South Carolina Defense Trial Attorneys Association lastly argue that it is ‘unfair’ and ‘inequitable’ to allow a Claimant to receive benefits while the matter is pending on appeal, since there is no stay of an award applicable here.”

The Court went on to state:

“Petitioner’s allegation of unfairness is both unfounded and unpersuasive.” Id. at 404 S.C. 82-83, 744 S.E. 2<sup>nd</sup> 561.

It is respectfully submitted that Respondent’s argument in this case is no more persuasive.

Respondent cites Shatto v. McLeod Regional Medical Center, \_\_\_ S.C. \_\_\_, 759 S.E. 2<sup>nd</sup> 443 (2014) arguing that the Court’s footnote stating that Bone “has no application”, controls this case. Shatto’s procedural circumstances were sufficiently different so that the court’s footnoted statement in that case does not control here. It appears that in Shatto the appealability issue was raised at oral argument but both parties conceded that the Court of Appeals decision was final under appellate court rules and therefore ripe for review by the Supreme Court. Also, the Court of Appeals’ decision

denied claimant benefits against McLeod. Under any definition, a judgment or decision denying benefits is final.

II. **The Substantial Evidence Issue Regarding Notice.** The Respondent's brief raises no new matter and Petitioner therefore relies on the arguments in his prior brief.

III. **The Findings and Conclusions Regarding Injury.** The findings of the Worker's Compensation Commission both in the single commissioner's order and that of the Appellate Panel are not impermissibly vague. Under the Administrative Procedures Act, findings of fact and conclusions of law need not be presented in any particular format, but need only be sufficiently detailed to enable a reviewing court to determine if fact findings are supported by the evidence and whether the law has been correctly applied. Cloyd v. Mabry, 295 S.C. 86, 89-90, 367 S.E. 2<sup>nd</sup> 171, 173 (Ct. App. 1988). Both the single commissioner and the Appellate Panel orders presented a detailed summary of the evidence in the case (R. pp. 4-6, pp. 12-16) and made separate findings of fact and conclusions of law based upon the evidence (R. pp. 6-7, pp. 16-18).

Though this appeal is premature, neither the Respondent nor the Court of Appeals has suffered any apparent difficulty in determining the issues.

The evidentiary summary in both orders contains numerous citations to the transcript and adequately supports the findings of fact in each order that:

“2. Based upon the medical records and testimony, I find that the Claimant sustained and injury by accident on or about February 25, 2009, while moving a heavy frame machine while the cleaning up the employer's shop.” (Single Commissioner's Order, R. p. 6).

Almost identical language is found in the Appellate Panel's Finding #3 (R. p. 17).

The Respondent presented his own testimony concerning the manner of his injury while moving the heavy frame machine and his resulting low back pain. The pain got progressively worse until the following day when he reported the injury to Mike Stallings, the owner (R. p. 43, line 4 – p. 45, line 12). Corroborative of his testimony is the fact that he sought treatment with a chiropractor (Dr. Austin Murray) and fixed the date of injury as February 25, 2009. Petitioner stated on his intake form that the injury was work related (R. p. 174). Dr. Murray evaluated Petitioner on April 1, 2009, and noted that his current symptoms started on February 25, 2009. He noted a history of pain in the spine, ribs and pelvis including the left medial low back region. He noted that the symptoms were described as “occasional sharp, diffuse, localized and dull aching.” The pain was described as pressure over the pelvis when standing and walking. Dr. Murray noted that Petitioner had a functional impairment of 3 out of 10 at rest and 8 out of 10 during activity (R. p. 175). Dr. Murray observed mild to moderate tenderness at “spinous or facet joint” with recent history of mild to moderate trauma and observed mild limitation of lumbar extension and both left and right lateral flexion. His primary objective problems were lumbar segmental dysfunction and lumbosacral strain (R. p. 176).

Mike Stallings testified that Respondent “had no business ‘messing’ with the frame machine” but acknowledged that Respondent was the type of employee that would clean up the shop on his own and was not “scared to pick up a broom”, move tires and possibly move the frame machine. (R. p. 134, line 9- p. 135, line 20).

The Petitioner’s recollection of the circumstances of his injury is substantial evidence. The Appellate Panel found that Respondent’s testimony on this issue was more

credible than that of Mike Stallings (R. p. 14). In a worker's compensation case the task of assessing the credibility of the witnesses is reserved to the Appellate Panel. Canteen v. McLeod Regional Medical Center, 400 S.C. 551, 557, 735 S.E. 2<sup>nd</sup> 246, 249 (Ct. App. 2012). The record contains substantial evidence to support the finding of injury.

IV. **The Finding as to Section 42-15-60.** The question framed by this issue is whether Section 42-15-60 (A) requires an expert medical opinion where the employer has not first provided initial treatment as mandated. That section provides:

“The employer shall provide medical, surgical, hospital, and other treatment including medical and surgical supplies as reasonably may be required, for a period not exceeding ten (10) weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the Commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty....”

To reach its conclusion in favor of Petitioner, the Appellate Panel first looked at the general purposes of the Worker's Compensation Law. The panel cited Yeomans v. Anheuser Busch, Inc. 198 S.C. 65, 15 S.E. 2<sup>nd</sup> 833 (1941) :

“The basic purpose of the Compensation Act is inclusion of employers and employees and not their exclusion.” Id. at 15 S.E. 2<sup>nd</sup> 835

and Caughman v. Columbia YMCA 212 S.C. 337, 47 S.E. 2<sup>nd</sup> 788 (1948):

“To great extent the whole scheme of workman's compensation is to place the economic burden of industrial accidents upon industry rather than upon the worker's and their dependents, and as to the latter thereby rendered indigent, upon the state.” Id. at 15 S.E. 2<sup>nd</sup> 789-790.

The panel also cited Elliot v. South Carolina Department of Transportation 362 S.C. 234, 607 S.E. 2<sup>nd</sup> 90 (Ct. App. 2004), wherein the Court observed:

“The Workman's Compensation Act is remedial legislation enacted to protect the worker and therefore the law is given a broad construction in order to accomplish that end.” Id. at 362 S.C. 237, 607 S.E. 2<sup>nd</sup> 92.

The Appellate Panel correctly recognized that the legal principles above cited prohibit placing undue burdens upon the employee. The panel therefore concluded that the requirement of expert medical evidence is not triggered until the employer has complied with the Act by providing medical treatment for the initial ten (10) week period after the date of injury (Appellate Panel Decision and Order p. 7). The panel reasoned that to do otherwise would shift the burden of providing initial treatment “to effect a cure or give relief” to the employee which is inconsistent with the statute and the purposes of the Act.

The Appellate Panel further relied upon settled rules of statutory construction.

“Words used in a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation” (Citation omitted). “The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.” Smith v. South Carolina Insurance Company 350 S.C. 82, 87, 564 S.E. 2<sup>nd</sup> 358, 361 (Ct. App. 2002).

It considered State v. Woody 345 S.C. 34, 545 S.E. 2<sup>nd</sup> 521 (Ct. App. 2001) wherein this Court held:

“...the Court should not consider a particular clause in isolation but should read it in conjunction with the purpose of the whole statute and the policy of the law.” Id. at 345 S.C. 37, 545 S.E. 2<sup>nd</sup> 522,

and Heape v. Heape 335 S.C. 420, 517 S.E. 2<sup>nd</sup> 1 (Ct. App. 1999) where it was stated:

“A statute must, as a whole be interpreted practically, fairly, and reasonably such that the interpretation harmonizes with the purpose, design, and policy of the lawmakers.” Id. at 335 S.C. 424, 517 S.E. 2<sup>nd</sup> 2.

The Appellate Panel concluded that under these rules of construction and in order to be consistent with the Act’s statutory purpose to place the economic burden of worker’s accidents upon industry and favor inclusion rather than exclusion, Section 42-

15-60 (A) should not be interpreted to deny an employee the right to employer provided medical treatment where the employer had failed to provide such treatment during the initial ten (10) week period. Otherwise, the panel reasoned, the phrase “....and for additional time as in the judgment of the Commission will tend to lessen the period of disability...” would be made meaningless by eliminating the distinction between employer responsibility to provide initial treatment and the Claimant’s responsibility to demonstrate by expert opinion the need for additional treatment; see Barnhill v. Bank of America, N.A. 318 F. Supp., 2<sup>nd</sup> 696 (DSC 2005) wherein United States District Judge Herlong observed:

“It is a cardinal principal of statutory construction that statutes, ought, upon the whole to be construed that, if it can be prevented, no clause, sentence or words shall be superfluous, void or insignificant.” Id. at 700.

In the routine case, the expert medical opinion required by 42-15-60 (A) is rendered by the physician chosen by the employer to provide mandatory initial treatment. The interpretation urged by the Respondent would require that, before receiving treatment, the employee identify a doctor willing to accept a workers compensation case without the usual prior employer approval, and procure and pay for an expert opinion. Such a burden on the employee would be unreasonable and inconsistent with our Appellate Courts’ interpretation of the purposes of the Act.

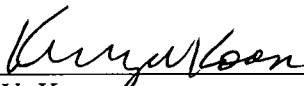
### ***CONCLUSION***

The Court of Appeals was without appellate jurisdiction to hear this matter and the case should be remanded to the Worker’s Compensation Commission for further proceedings according to the single commissioner order and the order of the Appellate Panel. In the event that the Court deems the appeal to have been appropriate, the Court of

Appeals should be reversed the case remanded for further proceedings consistent with the single commissioner and Appellate Panel's order.

Respectfully submitted,

April 15, 2015

  
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THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION

COMMISSION

Appellate Panel

Appellate Case No. 2013-002611

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and

The S.C. Uninsured Employers Fund.....Respondent

**PROOF OF SERVICE**

I certify that I have served Petitioner's Reply Brief upon Respondents, by depositing a copy of same in the United States mail, postage prepaid, on April 16, 2015, addressed to their attorney of record, Kirsten Barr, Esq. and to the attorney for the S.C. Uninsured Employers Fund, Lisa Glover, Esq., as follows:

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April 16, 2015



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April 16, 2015

VIA FEDEX # 8043 3720 1472

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**RE: Richard A. Hartzell v. Palmetto Collision, LLC**  
**Appellate Case #: 2013-002611**

Dear Mister Clerk,

Please find herewith the original and 14 copies of the Petitioner's Reply Brief in the above referenced matter together with Proof of Service of the brief on opposing counsel.

With kindest regards, I am

Very truly yours,



Kerry W. Koon

KWK:mm  
Enclosures

cc: Kirsten Barr, Esq.  
Lisa Glover, Esq.

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