

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

MAY 15 2015

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

S.C. Supreme Court

APPELLATE CASE NO.: 2015-000493

Thomas Chad Hilton..... PETITIONER.

v.

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

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

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

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ARGUMENTS

A. THE APPELLATE PANEL'S VACATING 23 FINDINGS OF FACT, WHICH WERE NOT PRESERVED IN ACCORDANCE WITH THE PROVISIONS OF S.C. CODE ANN. REGS. 67-701 (A) (3) (a) (2012), UNQUESTIONABLY: (A) EXCEEDED ITS STATUTORY AUTHORITY, AS THESE UNAPPEALED FACTUAL FINDINGS CONSTITUTE THE LAW OF THIS CASE; (B) RENDERS THE MAY 21, 2014 ORDER NULL AND VOID; AND (C) TAINTS ANY FURTHER PROCEEDINGS BEFORE THE COMMISSION, TO THE EXTENT COMPLIANCE WITH THE MAY 21, 2014 ORDER IS A WHOLLY FUTILE ENDEAVOR.

S.C. Code Ann. Regs. 67-701 (A) (3) (2012) prescribes that when a party seeks appellate panel review of the single commissioner's decision, ". . . [t]he grounds for appeal **must be set out in detail on the Form 30** in the form of questions presented." (Emphasis added). This regulation further requires that ". . . [e]ach question presented **must be concise and concern one finding of fact**, conclusion of law, or other proposition the appellate believes is in error." See, S.C. Code Ann. Regs. 67-701 (A) (3) (a) (2012). (Emphasis added).

Given these explicit directives, it is clear: (a) a party must identify, in the Form 30, the particular findings of fact which it maintains are erroneous; and (b) general assertions of error "are insufficient to preserve an issue" involving a specific factual finding. See, Clark v. Aiken County Government, 366 S.C. 102, 620 S.E. 2d 99, 102 (Ct. App. 2005). Absent compliance with this regulation, the "findings of fact . . . by the hearing commissioner become and are the law of the case" Green v. City of Columbia, 311 S.C. 78, 427 S.E. 2d 685, 687 (Ct. App. 1993); Transportation Ins. Co. and Flagstar Corp. 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.")

In this instance, Respondents obviously recognized the specificity requirement of regulation 67-701, as their Form 30 contains no less than 102 exceptions which attribute error to particular factual findings, legal conclusions and rulings. Conversely, this request for appellate panel review is devoid of any references to 23 (42%) of the single commissioner's exhaustive factual findings. While these findings of fact certainly comprise a portion of the basis for the single commissioner's rulings, Respondents' mere mention of these ultimate determinations under the specious guise of "General Exceptions": (a) is violative of regulation 67-701 (A) (3) (a); (b) gives no insight as to the purported errors committed in connection with the entry of these factual findings, so as to oblige any reviewing tribunal "to 'grope in the dark' to ascertain the precise point at issue" (See, Solley v. Weaver, 247 S.C. 129, 146 S.E. 2d 164 (1966); Connolly v. People's Life Ins. Co. of South Carolina, 299 S.C. 348, 384 S.E. 2d 738, 740 (1989)); and (c) did not preserve any objection to these 23 factual findings, resulting in their becoming the law of this case.

From the outset of this appeal, Mr. Hilton has consistently identified the panel's unceremonious erasure of the law of this case as a primary basis for seeking immediate appellate review. Despite this fact, Respondents' Return completely disregards this issue. While they would surely seek to characterize this omission as inadvertent oversight, Mr. Hilton respectfully submits the conspicuous absence of contradictory argument constitutes Respondents' acknowledgment that there is simply no way to justify, rationalize, explain or defend the panel's attempt to nullify the law of this case, upon which he has an absolute right to rely throughout the remainder of this litigation. As the panel's ruling is legally null and void, it is equally certain that any subsequent rulings by

the Commission will likewise have no legal effect, leaving the parties to futilely “go through the motions” until this fundamental error of law is corrected by the Court.

Given the presence of these two mutually exclusive exceptions to the general preference for exhaustion of administrative remedies, Mr. Hilton respectfully reiterates his requests that the Court grant his Petition, review the Court of Appeals’ Order of Dismissal, permit oral argument and issue a decision finding that: (a) the 23 unappealed factual findings constitute the law of this case; (b) the Commission’s May 21, 2014 Order is null and void; (c) this matter must be remanded to the Commission for rehearing; and (d) this rehearing should be restricted to consideration of the issues framed by the parties’ stipulations, Respondents’ exceptions and the current evidentiary record.

B. THE PANEL CLEARLY EXCEEDED THE SCOPE OF ITS STATUTORY AUTHORITY BY: (A) ALLOWING RESPONDENTS TO OBTAIN FURTHER NEUROLOGICAL EVALUATION, NOTWITHSTANDING THE ABSENCE OF ANY EXCEPTION THAT EITHER SOUGHT OR ALLEGED AN ERRONEOUS DENIAL OF THIS "RELIEF"; (B) IGNORING NOT ONLY THE PARTIES' STIPULATIONS, BUT ALSO ITS OWN REGULATION, IN GIVING RESPONDENTS AN ADDITIONAL CHANCE ("SECOND BITE AT THE APPLE") TO OBTAIN SUFFICIENT EVIDENCE TO CARRY THEIR BURDEN OF PROOF; AND (C) BASING ITS DETERMINATION TO TAKE THIS ACTION ON ITS OWN MEDICAL OPINION.

At the commencement of the hearing before the single commissioner, the parties entered several stipulations, which included framing of the disputed issues. See, Appendix, pp. 5 – 6). Per these stipulations, the single commissioner was requested to determine two medically driven issues that each required submission of expert opinion, as well as a derivative question as to Mr. Hilton's disability status.

In support of their respective positions, the parties introduced various documents pursuant to the Administrative Procedures Act, as well as relatively extensive deposition testimony elicited from two treating physicians. As outlined in his Petition, Mr. Hilton relied upon the opinions of his treating neurologist and Dr. Ezra B. Riber (pain management specialist) in asserting he had not achieved maximum medical improvement as to the consequences of his compensable accident and required further treatment for causally related conditions. Additionally, he submitted uncontradicted opinions from his treating neurologist, a forensic psychiatrist and two neuropsychologists, as well as the valid/reliable results of neuropsychological testing, in support of his contention that any prior testimonial inconsistencies were the product of cognitive deficits stemming from (at minimum) a well documented pre-injury brain injury, as opposed to the conscious/intentional deception alleged by Respondents.

While Respondents were acutely aware their medical expert (Dr. Chi-Dai Chen) had ultimately acknowledged his lack of expertise relative to the symptoms (“nerve irritation or damage”) for which Mr. Hilton had not reached maximum medical improvement (deferring to the treating neurologist’s opinion on this point) and offered no opinion as to the nature of Mr. Hilton’s cognitive status, they nonetheless: (a) actually insisted on proceeding with the January 3, 2013 hearing on these stipulated issues; (b) chose to simply characterize Mr. Hilton as a liar, rather than attempting to obtain the medical evidence required to legally contest his medical evidentiary submissions; (c) elicited his testimony, despite their obvious awareness of overwhelming medical evidence verifying his cognitive deficits; and (d) sought neither leave to submit additional evidence nor postponement of the hearing to further address the uncontradicted opinions offered by Mr. Hilton’s medical experts.

Following receipt of the single commissioner’s Order, which fully addressed the stipulated issues through exhaustive analysis of all evidence of record, Respondents sought appellate panel review. As previously noted, Respondents’ Form 30 specifically challenged roughly 60% of the single commissioner’s factual findings and essentially all legal rulings, while advancing four “General Exceptions” which essentially stated they should have prevailed on all disputed issues. However, consistent with Respondents’ prior course of action, the Form 30 exceptions did not: (a) seek further medical evaluation; (b) maintain they were denied an opportunity to obtain further medical evaluation prior to proceeding with the merits hearing; (c) question Mr. Hilton’s competency to testify; or (d) even imply appointment of a Guardian ad Litem was warranted.

Notwithstanding the absence of any of these contentions, the appellate panel declined to address the previously stipulated issues in dispute, instead electing to “rewr[i]te . . . the entire case.” Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E. 2d 712, 715 (1940). Essentially, for reasons unknown, the panel: (a) disagreed with the single commissioner’s determination; (b) recognized the evidence of record was uniformly adverse to Respondents’ position, to the extent it could not legally support modification of the appealed ruling; (c) unlawfully vacated the underlying Order in its entirety; and (d) instructed Respondents “to send the Claimant to a neurologist of their choice for an evaluation as to causation and the extent of the Claimant’s problems”, despite the absence of any request for this relief!

“A stipulation is an agreement, admission, or concession made in judicial proceedings by the parties thereto or their attorneys. . . [and is] binding upon those who make them.” Thompson v. South Carolina Steel Erectors, 369 S.C. 606, 632 S.E. 2d 874, 879 (Ct. App. 2006); McCrea v. City of Georgetown, 384 S.C. 328, 681 S.E. 2d 918, 921 (Ct. App. 2009). Recalling the parties’ prior stipulations, there was no dispute as to the adequacy as to the evidentiary record or desire of the parties to obtain the determination on the merits of the identified issues.

Additionally, S.C. Code Ann. Regs. 67-613 (A) (2012) provides in pertinent part that the parties “shall arrange and present **all evidence at the hearing**” before the single commissioner. (Emphasis added). As this instruction is contained in a legislatively-approved regulation and has “the force of law”, it is a requirement, not a recommendation. See, Glover by Cauthen v. Suitt Construction Co., 318 S.C. 465, 458 S.E. 2d 535, 537 (1995); James v. Anne’s, Inc., 390 S.C. 188, 701 S.E. 2d 730, 737

(2010). It also obviously goes without saying that an administrative agency “must . . . follow its own regulations” Triska v. Department of Health and Environmental Control, 292 S.C. 190, 355 S.E. 2d 531, 533 (1987).

Although the appellate panel can 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 panel: (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 v. South Carolina Department of Mental Health, 329 S.C. 485, 494 S.E. 2d 630, 639 (Ct. App. 1997).

In addressing analogous situations, the Arkansas Court of Appeals concluded allowing further medical evaluation of the nature ordered by the appellate panel was wholly inappropriate and violative of a similar requirement that all evidence be presented at the initial hearing. Specifically, in Sea Ark Marine, Inc. v. Pippinger, 2009 Ark. App. 223, 303 S.W. 3d 102, 105 - 106 (2009) the Court concluded: (a) where the record was “replete” with evidence supporting one litigant’s position relative to the need for further medical care, the Commission’s deferring determination of the issue to allow further

development of the medical evidence was “a tacit admission that the record did not contain evidence sufficient to rule outright that additional treatment” was warranted; (b) if evidence supporting the need for further treatment was lacking and requiring bolstering “the time for that to have occurred should have been prior to the hearing”; and (c) the commission committed legal error when affording this litigant “a ‘second bite at the apple’ by giving her another opportunity to present evidence substantial enough to carry her burden.” See also, Burkett v. Exxon Tiger Mart, Inc., 209 Ark. App. 93, 304 S.W. 3d 2 (2009).

While Respondents argue the panel’s ruling relative to the additional neurological examination was authorized by S.C. Code Ann. Section 42-15-80 (A) (2007), it should be noted the current circumstances do not involve a situation where the commission is directing an injured employee to a physician of its choice. See, e.g., S.C. Code Ann. Section 42-17-30 (1976, as amended). Rather, the panel’s Order instructs Respondents “to send the Claimant to a neurologist of their choice for an evaluation as to the causation and extent of the Claimant’s problems.”

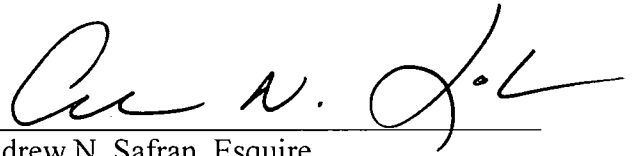
In this regard, Mr. Hilton would note that had there been conflicting medical evidence, the panel could have properly directed him to its appointed physician per Section 42-17-30. However, as the medical evidence relating to the stipulated issues in dispute was completely one-sided, the panel’s actions can only be deemed the product of an impermissible formulation of a medical opinion, which can hardly support its current action. See, Burnette v. City of Greenville, 401 S.C. 417, 737 S.E. 2d 200 (Ct. App. 2012). Further, given the nature of the panel’s ruling - - allowing Respondents to select an evaluator - - logic and fundamental fairness demands that this action be consistent

with the parties' stipulation and Respondents' Form 30 exceptions. Absent this connection, the granting of an unsolicited "mulligan", which clearly exceeds the scope of the Commission's legislatively created authority, cannot be condoned.

Based upon these authorities, Mr. Hilton would respectfully submit: (a) the parties' identification/framing of the issues, per their hearing stipulations, is binding on the appellate panel; (b) the Form 30 exceptions, which do not deviate from the stipulations, likewise limit the scope of appellate panel review; (c) as Respondents never sought to introduce additional evidence, the record cannot be supplemented through introduction of the medical evidence identified by the appellate panel; and (d) the panel's directive to this effect is null and void. To hold otherwise would undoubtedly: (a) provide Respondents "with a 'second bite at the apple'", notwithstanding their insistence on proceeding with a merits hearing utilizing the current record; (b) constitute "a significant . . . [, unjustified] departure from our rules." Therrell v. Jerry's, Inc., 370 S.C. 22, 633 S.E. 2d 893, 897 (2006); and (c) require lengthy and futile litigation toward an ultimate reversal as a matter of law.

As the panel's actions surely exceeded its statutory authority, Mr. Hilton respectfully reiterates his requests that the Court grant his Petition, review the Court of Appeals Order of Dismissal, permit oral argument and issue a decision finding: (a) the Commission's May 21, 2014 rulings exceeds the statutory authority granted by Section 42-17-50; (b) the Commission's May 21, 2014 Order is null and void; (c) the matter must be remanded to the Commission for rehearing by the panel; and (d) this rehearing must be restricted to consideration of the issues framed by the parties' stipulations and Respondents' exceptions, as well as the current evidentiary record.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Andrew N. Safran". The signature is written in a cursive style with a horizontal line underneath it.

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

THE STATE OF SOUTH CAROLINA

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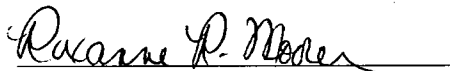
v.

Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company,
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CERTIFICATE OF SERVICE

I, Roxanne R. Moorer, paralegal for Andrew N. Safran, Esquire, Attorney for Petitioner, do hereby certify that on the 14th day of May, 2015, I caused to be filed, via first class mail, the original and six (6) copies of the Petitioner's Reply to Respondents' Return to Petition for Writ of Certiorari, with the Clerk of the South Carolina Supreme Court. One (1) copy of the Petitioner's Reply 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. Moorer
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

May 14, 2015