

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

Appellate Case No. 2015-000493

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S.C. Supreme Court

Thomas Chad Hilton, Claimant.....Petitioner,

v.

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

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Court of Appeals erred in dismissing Petitioner's appeal for lack of a final decision.

STATEMENT OF THE CASE

Petitioner sustained an admitted injury by accident arising out of and in the course of his employment on August 17, 2011, when he was bitten by an insect on the left thigh/buttock. Respondents provided appropriate medical treatment, including a simple debridement procedure of the bite abscess, and on July 6, 2012, Respondents filed a Request for Hearing before the South Carolina Workers' Compensation Commission, arguing Petitioner had reached maximum medical improvement (MMI) and was entitled to no additional benefits. Respondents further argued that Petitioner's continued allegations of disability associated with the accident were fraudulent, that Petitioner was not credible, and that Petitioner had made material misrepresentations throughout the life of his workers' compensation claim.

On January 3, 2013, a hearing was held before Commissioner Avery B. Wilkerson (hereinafter, "the Single Commissioner"). The Single Commissioner issued a Decision and Order on June 4, 2013, finding Petitioner had not reached MMI and was entitled to ongoing temporary disability benefits and medical treatment, and denying Respondents' assertion that Petitioner was not credible. Specifically, the Single Commissioner found that Petitioner's misrepresentations during the life of the claim were the result of a serious cognitive deficit stemming from a physical brain injury.

Respondents timely appealed the Single Commissioner's Order to the Appellate Panel of the Workers' Compensation Commission (hereinafter, "the Appellate Panel"). Respondents raised 106 grounds for appeal. These grounds focused on (1) Petitioner's credibility and alleged cognitive deficits, (2) whether Petitioner's alleged complaints are causally-related to the insect bite of August 17, 2011, and (3) whether Petitioner is

entitled to any additional benefits under the Workers' Compensation Act.

On May 21, 2014, the Appellate Panel issued a Decision and Order, vacating the Order of the Single Commissioner and remanding the claim back to the Single Commissioner for further proceedings. The Appellate Panel further ordered (1) the Single Commissioner to make a determination as to whether Petitioner is competent to testify, (2) the Single Commissioner to make a determination as to whether Petitioner requires a guardian *ad litem*, and (3) Respondents to refer Petitioner for an additional neurological evaluation prior to the claim being re-heard by the Single Commissioner.

Petitioner argues the Appellate Panel raised these "issues" on its own accord; *this is not the case*. In fact, these are not "issues" at all. The *issue* of whether Petitioner is deceitful and fraudulent, or whether his misrepresentations are the result of a serious cognitive deficit stemming from a physical brain injury (as he alleges), and the *issue* of whether Petitioner is entitled to additional benefits and/or medical treatment are the focus of the appeal. These *issues* were clearly preserved for review by the Appellate Panel. In vacating and remanding the claim and requesting specific determinations of the 3 items outlined above, the Appellate Panel properly reacted to the *issues* before it on appeal, all of which were clearly preserved.

On June 20, 2014, Petitioner simultaneously filed a Petition for Writ of Certiorari in the South Carolina Supreme Court's original jurisdiction, and a Notice of Appeal with the South Carolina Court of Appeals, requesting that each Court review the May 21, 2014 Decision and Order of the Appellate Panel. On July 25, 2014, the Supreme Court issued an Order, declining to entertain the Petition for Writ of Certiorari. On September 19, 2014, the Court of Appeals issued an Order, granting Respondents' Motion to Dismiss

Petitioner's appeal.

On October 6, 2014, Petitioner filed a Petition for Rehearing with the Court of Appeals, and on February 6, 2015, the Court of Appeals issued an Order, denying the Petition for Rehearing. On March 9, 2015, Petitioner filed a Petition for Writ of Certiorari with the Supreme Court, again requesting the Court review the May 21, 2014, Decision and Order of the Appellate Panel. For the reasons below, Respondents respectfully request an Order affirming the May 21, 2014 Decision and Order of the Appellate Panel.

ARGUMENTS

I. **Petitioner will be provided an adequate remedy upon exhaustion of his administrative remedies, and the Court of Appeals properly dismissed Petitioner's appeal.**

There has been no final decision from the South Carolina Workers' Compensation Commission, and Petitioner is required to exhaust his administrative remedies prior to review by this Court.¹ Petitioner argues this claim falls within two exceptions to the general rule requiring exhaustion of administrative remedies: (1) where an administrative agency has acted outside of its authority, and (2) where a party demonstrates that pursuit of administrative remedies would be a vain or futile act. Neither of these exceptions are present in this case, and Petitioner's appeal is interlocutory.

A. **The Appellate Panel has not acted outside of its authority.**

Petitioner first alleges the 23 individual Findings of Fact in the Single Commissioner's Order which were not specifically listed on Respondents' Form 30, Request for Commission Review, have become the law of the case, and the Appellate Panel's vacating those findings constituted legal error. In Respondents' Form 30, Respondents listed 106 exceptions to the Single Commissioner's Order, including these four "General Exceptions":

1. In so far as the hearing commissioner's Findings of Fact, Conclusions of Law, and/or Order specifically state, or imply, that [Petitioner] has not reached maximum medical improvement related to the August 17, 2011 work accident, the same are not supported by the preponderance of the evidence and are errors of law.

¹ The general rule requiring exhaustion of administrative remedies is discussed in detail in Argument Sections II and III.

2. In so far as the hearing commissioner's Findings of Fact, Conclusions of Law, and/or Order specifically state, or imply, that [Petitioner] is entitled to ongoing temporary disability related to the August 17, 2011 work accident, the same are not supported by the preponderance of the evidence and are errors of law.
3. In so far as the hearing commissioner's Findings of Fact, Conclusions of Law, and/or Order specifically state, or imply, that [Petitioner] is entitled to further medical treatment related to the August 17, 2011 work accident, the same are not supported by the preponderance of the evidence and are errors of law.
4. The hearing commissioner erred by not finding that the preponderance of the evidence establishes that the [Petitioner] completely lacks credibility and by not finding his claim for ongoing benefits is fraudulent.

Appendix, p. 50.

Every relevant issue to be decided by the Single Commissioner *was appealed* by Respondents to the Appellate Panel. Petitioner's allegation that those 23 individual Findings of Fact which were not specifically listed on the Form 30 are now the law of the case is untenable. All findings of fact and conclusions of law which fall "within the scope of the exception[s]" brought by Respondents are properly preserved for review. *Hamm v. Mullins Lumber Co.*, 193 S.C. 66, 7 S.E.2d 712 (1940). Respondents appealed every relevant issue and conclusion made by the Single Commissioner, and every finding of fact must naturally fall within the scope of the appeal. Any allegation from Petitioner that he lacked notice that the claim was being appealed in its entirety would seem disingenuous, and the "...rules of appellate procedure should not be interpreted to create a trap for the unwary." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004).

Petitioner next asserts that the following issues were improperly addressed by the Appellate Panel: (1) Petitioner's competency to testify, (2) Petitioner's need for a guardian *ad litem*, and (3) an order for Petitioner to undergo an additional neurological evaluation. The Appellate Panel found that additional actions and information are required before a proper determination of the "issues" of the claim may be decided; the *issues* being: whether Petitioner has reached maximum medical improvement; whether Petitioner is entitled to additional temporary disability benefits; whether Petitioner is entitled to additional medical benefits; and most importantly, whether Petitioner lacks credibility and whether his claim is fraudulent. The Appellate Panel's determination that additional findings are necessary with regard to Petitioner's competency to testify, Petitioner's need for a guardian *ad litem*, and the need for additional neurological evaluation are not "issues" in and of themselves, but they directly relate to the exceptions raised by Respondents on appeal. The Appellate Panel was squarely within its authority to vacate and remand the claim in its entirety and to order the three items noted above.

The heart of this claim centers on Petitioner's credibility. Respondents contend Petitioner's claim is wrought with fraudulent misrepresentations and deceit, and Petitioner's simple and minor abscess healed long ago, with no residual problems. The Single Commissioner found that Petitioner's inaccurate statements throughout the claim were the result of his "cognitive deficits produced by physical brain damage confirmed by four duly qualified medical specialists." Appendix, p. 44. Respondents appealed this determination in the Form 30, Request for Commission Review, specifically appealing the Single Commissioner's failure to find that Petitioner lacks credibility and that the

claim is fraudulent, and appealing the findings that Petitioner was entitled to ongoing and additional benefits and medical treatment.

The *issue* of whether Petitioner is deceitful and fraudulent, or whether his misrepresentations were accidental and are the result of a serious cognitive deficit stemming from a physical brain injury, cannot be determined unless there is (1) a determination of whether Petitioner is competent to testify, (2) a determination of whether Petitioner requires a guardian *ad litem*, and (3) an additional neurological evaluation, which the Appellate Panel felt was necessary prior to an appropriate determination as to the *issue* of Petitioner's credibility.

Pursuant to the Workers' Compensation Act, a guardian *ad litem* is required to represent a mentally incompetent claimant in a workers' compensation claim ("When a ... mentally incompetent person is a party, a Guardian ad Litem *shall* represent the ... mentally incompetent." Reg. 67-216(A) (emphasis added). Furthermore, Regulation 67-216(E) indicates that, in cases where a mentally incompetent party is present, the "...Commission *shall not* hold a hearing for final determination of benefits until proof of appointment of a Guardian ad Litem is filed with the Commission." Reg. 67-216(E) (emphasis added). In the instant case, Petitioner has alleged that the numerous inconsistencies and misrepresentations throughout his workers' compensation claim are the result of cognitive deficits related to a physical brain injury (i.e., competency), and the Appellate Panel, in direct relationship to the issues on appeal, determined that it was necessary to ensure that Petitioner is competent to testify and determine whether Petitioner requires a guardian *ad litem* before the claim can be properly adjudicated. This was certainly proper for the Commission to do, as it would be *improper* to adjudicate the

claim without a guardian *ad litem* if one is necessary. *Petitioner made his competency an issue in this claim, yet he now objects that his competency is an issue.* Because competency is an issue, the Appellate Panel was legally bound to determine whether appointment of a guardian *ad litem* is required, and whether Petitioner is competent to testify.

Similarly, the Appellate Panel apparently felt that the *issue* of whether Petitioner is deceitful and fraudulent, or whether his misrepresentations were accidental and are the result of a serious cognitive deficit stemming from a physical brain injury, and the *issues* of whether Petitioner is entitled to additional benefits and medical treatment, could not be decided without the results of an additional neurological evaluation. The Appellate Panel acted within the scope of its authority in ordering the additional neurological evaluation. It is elementary that the Appellate Panel hears appeals from the Single Commissioner and may re-weigh the evidence and make its own findings and conclusions:

The Commission is the ultimate fact finder in Workers' Compensation cases and is not bound by the Single Commissioner's findings of fact. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct.App.2006). Pursuant to S.C. Code Ann. § 42-17-50 (Supp.2007), the Commission shall weigh the evidence as presented at the initial hearing and, if good grounds are shown, make its own findings of fact and reach its own conclusions of law consistent or inconsistent with those of the Single Commissioner. *Lowe v. Am-Can Transp. Servs. Inc.*, 283 S.C. 534, 537, 324 S.E.2d 87, 89 (Ct.App.1984); see also *Green v. Raybestos-Manhattan, Inc.*, 250 S.C. 58, 64, 156 S.E.2d 318, 321 (1967) (holding, although it is logical for the Commission to give weight to the Single Commissioner's opinion, the Commission may disagree with his findings based on the credibility of witnesses).

Pack v. State Dept. of Transp., 673 S.E.2d 461, 381 S.C. 526 (S.C.App. 2009).

It is perhaps even more elementary that the Commission has authority to order a workers' compensation claimant to submit to medical examination:

After an injury and so long as he claims compensation, the employee, if so requested by his employer ***or ordered by the commission***, shall submit himself to examination, at reasonable times and places, by a qualified physician or surgeon designated and paid by the employer or the commission.

S.C. Code Ann. Section 42-15-80(A) (2007) (emphasis added). Similarly, S.C. Code Ann. Section 42-17-30 states:

The commission or any member thereof may, ... ***upon its own motion***, appoint a disinterested and duly qualified physician or surgeon to make any necessary medical examination of any employee and to testify in respect thereto. ... The commission or any member thereof has the discretion to order either party to pay the fees and expenses of the physician or surgeon..."

S.C. Code Ann. Section 42-17-30 (1990) (emphasis added).

Petitioner argues these statutes are completely inapplicable because the Appellate Panel ordered an examination with a neurologist *to be chosen by Respondents*, rather than to be specifically chosen by the Appellate Panel. However, Section 42-15-80 specifically states that the Appellate Panel has the authority to order examination by a duly qualified physician "**designated and paid by the employer**." S.C. Code Ann. Section 42-15-80 (emphasis added). The Appellate Panel very clearly has authority to order the additional neurological evaluation under this statute, along with the authority to order that the physician be chosen and paid by Respondents. Similarly, Section 42-17-30 states that the Appellate Panel, upon its own motion, may appoint a physician and order either party to pay the fees of that physician. There is no indication in Section 42-17-30 that the Commission lacks the authority to allow selection of that physician to be performed by one of the parties.

In further support of his argument that the Commission lacked authority to order an additional neurological evaluation, Petitioner cites an Arkansas case; *Sea Ark Marine*,

Inc. v. Pippinger, 2009 Ark. App. 223, 303 S.W.3d 102 (2009). Petitioner's Brief, p. 21. In *Pippinger*, the issue before the Administrative Law Judge (ALJ) and Commission was whether or not additional medical treatment was reasonable and necessary pursuant to Arkansas Code Section 11-9-508 (Supp. 2007). The ALJ awarded additional medical benefits to the claimant, per the recommendations of Dr. Ahmad. However, the ALJ made a specific finding that, because Dr. Ahmad did not have all of the claimant's medical records at the time of the doctor's initial evaluation, Dr. Ahmad needed to reevaluate the claimant before proceeding. However, the ALJ noted that a stimulator implant is the preferred course of treatment, and the ALJ *specifically found* that pain-management treatment with Dr. Ahmad was reasonable and necessary to address pain and to stop the claimant's pain syndrome from progressing. The Commission affirmed the ALJ's decision.

The carrier appealed to the Court of Appeals of Arkansas, and the Court noted the following:

Appellants' primary concern appears to be that the Commission awarded appellee additional medical benefits *despite the concession that additional medical proof would be necessary to support their decision*. By affirming and adopting the ALJ's decision, the Commission also adopted the ALJ's ruling that the medical evidence should be developed more fully before the treatment and procedures requested by appellee can be deemed reasonable and necessary. Appellants contend that doing so constituted a failure to hold appellee to the burden of proof placed upon him by the Arkansas Workers' Compensation statutes.

Pippinger, 303 S.W.3d at 105.

Firstly, *Pippinger* is immediately distinguishable from the case at hand. The Commission in *Pippinger* had *already ruled* that additional medical treatment was reasonable and necessary, while also admitting that additional evidence was necessary to

support that ruling. The Appellate Panel in the instant case has not impermissibly ruled on any issues without evidence to support the same; it has merely vacated the Single Commissioner's Order and indicated that additional actions are required prior to a proper adjudication of the claim. *Pippinger* is not applicable to this claim.

Secondly, the Arkansas Supreme Court has addressed a more similar issue to the issue at hand in *Buckeye Cotton Oil v. McCoy*, 613 S.W.2d 590, 272 Ark. 272 (Ark. 1981). In *McCoy*, the Court analyzed the predecessor statute to Arkansas Code Section 11-9-811, which provides:

Upon its own initiative at any time where compensation payments are being made without an award, the Workers' Compensation Commission may and in any case where the right to compensation has been controverted or where payments of compensation have been suspended, or where an employer seeks to suspend payments made under an award, or on application of an interested party, the commission shall make such investigation, cause such medical examination to be made, hold such hearings, and take such further action as the commission deems proper for the protection of the rights of all parties.

Arkansas Code Annotated Section 11-9-811 (Repl.2002). In *McCoy*, the Arkansas Court of Appeals interpreted the predecessor to this statute to allow the Court of Appeals (rather than the Commission) to order an additional medical evaluation, and the Court ordered an evaluation and remanded the claim back to the Commission. On appeal to the Supreme Court of Arkansas, the Supreme Court found the Court of Appeals lacked such authority, but implicitly found that the Commission had the authority to grant such an evaluation, stating the following:

The Court of Appeals, without directly addressing the question of substantial evidence, found the proof to be inconclusive and sent the case back to the Commission for further investigation, with the possible employment of a medical examiner pursuant to Ark.Stat.Ann. § 81-1319(i) (Repl.1976). That statute provides that the Commission shall "make such investigation, cause such medical examination to be made, hold such

hearings, and take such further action as the Commission deems proper for the protection of the rights of the parties." (Our italics.) Thus *the discretion to require a medical examination is conferred not upon an appellate court but upon the Commission, which has heard the testimony and is in a superior position to decide whether some additional investigation is appropriate.* The Court of Appeals misconstrued the statute in setting aside the Commission's decision and remanding the case.

McCoy, 613 S.W.2d at 591 (emphasis added).

As is the case in Arkansas, the South Carolina Legislature has explicitly provided the South Carolina Workers' Compensation Commission with the power to order an evaluation where the Commissioner or Appellate Panel determines it is necessary, pursuant to Sections 42-15-80 and 42-17-30. Even Petitioner admits that "the panel could have properly directed [Petitioner] to its appointed physician per Section 42-17-30," but Petitioner argues that such a referral would only have been permissible if there had been conflicting medical evidence in the record (i.e., if Respondents had submitted a neurological evaluation into evidence). Petitioner's Brief, p. 22. Nowhere in Sections 42-15-80 or 42-17-30 is it stated that the Commission's power to order a medical evaluation is limited to instances where there are competing medical opinions, nor does Petitioner cite any authority to support such an interpretation of the statutes.

Instead, in support of the argument that conflicting medical evidence is required for the Appellate Panel to order an evaluation, Petitioner cites *Burnette v. City of Greenville*, 401 S.C. 417, 737 S.E.2d 200 (Ct.App.2012), and Petitioner states that the Appellate Panel's ordering of an additional neurological evaluation "can only be deemed the product of an impermissible formulation of a medical opinion." Petitioner's Brief, p. 22. *Burnette* is not applicable to the case at hand. In the instant case, the Appellate Panel has not formulated any medical opinions or rendered any decisions; the Panel merely

ordered an additional evaluation, vacated, and remanded for further proceedings. To argue that the Appellate Panel has somehow *formed a medical opinion* by vacating and remanding the claim is a misclassification.

In fact, *Burnette* actually lends support to the actions of the Appellate Panel. In *Burnette*, the South Carolina Court of Appeals found there was “...*no evidence* that challenge[d] the conclusions of Burnette's doctors” in the record, and consequently, the Court reversed the findings of the Commission. However, the Court in *Burnette* also noted that, “[a]lthough medical evidence ‘is entitled to great respect,’ the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other competent evidence in the record.” *Burnette*, 737 S.E.2d at 206 (citing *Potter v. Spartanburg Sch. Dist. 7*, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct.App.2011); *see also Hargrove v. Titan Textile Co.*, 360 S.C. at 294, 599 S.E.2d at 613). *Burnette* does not stand for the proposition that conflicting medical reports are required before the Commission has the authority to order a medical evaluation. In fact, *Burnette* actually indicates that medical evidence is *not required* for the Commission to make a finding contrary to an uncontradicted medical opinion in the record, so long as there is competent evidence to dispute the medical opinion.

In the case at hand, there was ample evidence in the record to dispute the opinions of Petitioner’s doctors, including the extensive evidence indicating that Petitioner is not credible, and that Petitioner’s subjective complaints/reports to his physicians are unreliable. The Appellate Panel was not required to blindly accept the opinions of Petitioner’s doctors simply because there was not a conflicting medical opinion. This notion has been cited time and time again by our Courts:

No fact finding body is compelled to blindly accept an expert's opinion. While there may be circumstances where medical testimony is conclusive, ordinarily such opinions, although uncontradicted, are not conclusive in the sense that they must be accepted as true. They may be rejected if found inconsistent with the facts or otherwise unreasonable.

Wyndham v. City of Florence, 221 S.C. 350, 359, 70 S.E.2d 553, 556 (1952) (citing *Anderson v. Campbell Tile Co.*, 202 S.C. 54, 24 S.E.2d 104; *In re Crawford*, 205 S.C. 72, 30 S.E.2d 841; *Poston v. Southeastern Construction Co.*, 208 S.C. 35, 36 S.E.2d 858; *Kilpatrick v. Brotherhood of Railroad Trainmen Insurance Department*, 210 S.C. 379, 42 S.E.2d 891). The Commission determines the weight and credit to be given to the expert testimony, and once admitted, expert testimony is to be considered just like any other testimony. *Tiller v. Nat'l Health Care Ctr. of Sumter*, 334 S.C. at 340, 513 S.E.2d at 846 (1999). Accordingly, the Appellate Panel acted within the scope of its authority in ordering an additional neurological evaluation.

The Appellate Panel has not raised or addressed any additional or unpreserved issues; it has simply ordered additional actions so that the *appealed issues* may be appropriately addressed, and to ensure that Petitioner is competent to testify, as is required by the Workers' Compensation Act. The issues addressed at the hearing before the Single Commissioner were the issues of credibility, MMI, and Petitioner's entitlement to additional benefits under the Workers' Compensation Act. After the Single Commissioner's Order was issued, Respondents appealed the findings related to the issues of credibility, MMI, and Petitioner's entitlement to additional benefits under the Workers' Compensation Act; *all of the issues which were before the Single Commissioner*. The Appellate Panel was within the scope of its authority when it determined that these *issues* could not properly be decided (1) before a determination of

whether Petitioner is competent to testify, (2) before a determination of whether Petitioner requires a guardian *ad litem*, and (3) without an additional neurological evaluation.

Petitioner also argues the Appellate Panel Order is statutorily required to make specific factual findings and conclusions of law, and because the Appellate Panel merely vacated the Single Commissioner's Order and remanded the claim back to the Single Commissioner, the Appellate Panel Order is null and void. S.C. Code Ann. Section 1-23-350 requires findings of fact and conclusions of law be expressly stated when there is a "final decision" of an administrative agency. In this case, there is clearly no final decision or judgment being issued, as the Appellate Panel vacated and remanded the claim back to the Single Commissioner for further proceedings. Similarly, Section 42-17-40 (cited by Petitioner) indicates that the "award" shall include findings of fact and conclusions of law. In this case, there is no award being issued, as the claim is being remanded for further proceedings. Accordingly, the Appellate Panel acted within the scope of its authority in ordering a determination of whether Petitioner is competent to testify or requires a guardian *ad litem*, in ordering an additional neurological evaluation, and in vacating the Single Commissioner's Order and remanding the claim back to the Single Commissioner.

B. Petitioner has not demonstrated that his pursuit of further administrative remedies would be a vain or futile act.

Petitioner next contends that further pursuit of administrative remedies would be futile, and he insists there is no adequate remedy, short of immediate review by this Court. "Futility, however, must be demonstrated by a showing comparable to the

administrative agency taking ‘a hard and fast position that makes an adverse ruling a certainty.’” *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 438, 629 S.E.2d 642, 650 (2006) (citing *Thetford Props. IV Ltd. P'ship v. U.S. Dep't of Hous. & Urban Dev.*, 907 F.2d 445, 450 (4th Cir.1990)). It is outlandish to allege that the eventual outcome of the proceedings at the workers’ compensation level are a certainty at this point in time. The Appellate Panel vacated the Order of the Single Commissioner and remanded the claim for further proceedings. ***For all intents and purposes, Petitioner is currently in the same position he enjoyed prior to the initial hearing with the Single Commissioner***, and his allegation that the remainder of the proceedings at the workers’ compensation level will be futile is incomprehensible. How can Petitioner state that his remedies will be a vain or futile act when ***all of his administrative and legal remedies remain before him?***

Petitioner offers no true explanation for his assertion that further pursuit of administrative remedies would be futile, essentially offering two arguments: (1) that the Appellate Panel has acted outside the scope of its authority, so further administrative remedies would be futile, and (2) that relitigation “...will be both time consuming and costly.” Petitioner’s Brief, p. 15. Firstly, Petitioner has merely restated his argument that the Appellate Panel acted outside its authority in an attempt to assert a second alleged exemption to the exhaustion of administrative remedies requirement. As outlined above, the Appellate Panel did not act outside its authority, and this exemption has not been satisfied. Secondly, “[a] party is not excused from seeking administrative relief because he feels that he will encounter delay by the agency in acting on his requests.” *Moore v. Sumter County Council*, 300 S.C. 270, 387 S.E.2d 455 (1989) (citing *Gates Mills Invest. Co. v. Village of Pepper Pike*, 59 Ohio App.2d 155, 392 N.E.2d 1316 (1978)). If there is

a cost to the parties in this lengthy and delayed litigation process, it is borne by Respondents, who have been forced to continue weekly payments of Petitioner's workers' compensation benefits while he files one interlocutory appeal after another.

II. Appeals from the South Carolina Workers' Compensation Commission are controlled by the Administrative Procedures Act, and a final judgment is required before a claim may be heard by the Appellate Courts.

The Order of the Appellate Panel is not a final judgment subject to judicial review, and this appeal is interlocutory. “The Administrative Procedures Act (APA) was enacted in 1977 and ‘purports to provide uniform procedures before State Boards and Commissions for judicial review after the exhaustion of administrative remedies.’” *Bone v. U.S. Food Service*, 744 S.E.2d 552, 556, 404 S.C. 67, 73 (2013) (citing *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 132, 276 S.E.2d 304, 305 (1981)). The APA establishes the standard for judicial review of decisions of the South Carolina Workers' Compensation Commission. *Bone*, 744 S.E.2d 556; *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 689 S.E.2d 615 (2010); *Lark*, 276 S.C. at 135; *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 584 S.E.2d 390 (Ct.App.2003).

Under Section 1-23-380(A) of the APA, “[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....” S.C. Code Ann. § 1-23-380(A) (Supp.2007) (emphasis added). Similarly, Section 1-23-390 of the APA, governing further appellate review, provides: “An aggrieved party may obtain a review of a final judgment of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases.” S.C. Code Ann. Section 1-23-390 (Supp.2012) (emphasis added).

In *Charlotte-Mecklenburg Hosp. Auth. v. S.C. Dep't of Health & Env'tl Control*, 387 S.C. 265, 692 S.E.2d 894 (2010), the Supreme Court of South Carolina reviewed an appeal from an Administrative Law Court and reasoned that appeals in administrative

agency matters are governed solely by the APA, not by the general appealability statute of Section 14-3-330(1), which permits review of “[a]ny intermediate judgment” involving the merits. *Charlotte-Mecklenburg*, 692 S.E.2d at 894. The *Charlotte-Mecklenburg* Court further indicated that concepts applicable in general appeals were not applicable under the APA, as specialized statutes prevail over more general statutes. *Id.* The Supreme Court reviewed this scenario in the workers’ compensation context in *Bone*, and after reviewing the reasoning in *Charlotte-Mecklenburg*, the Court stated: “We apply this reasoning in concluding that the meaning of a ‘final judgment’ as used in section 1-23-390 is not defined by using the exceptions that are present in the general appealability statute, whether or not the statute is specifically referenced.” *Bone*, 744 S.E.2d 557. Accordingly, the *Bone* decision mandates that a final judgment be issued in a workers’ compensation claim before the claim is appealable to a higher court.

The term “final judgment” was specifically interpreted by the Supreme Court of South Carolina in *Bone* with regard to workers’ compensation appeals:

This Court’s jurisprudence is in accord with the definition of a final judgment found in Black’s Law Dictionary. It defines a final judgment as “[a] court’s last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs ... and enforcement of the judgment.”

Bone, 744 S.E.2d 558 (citing *Black’s Law Dictionary* 919 (9th ed.2009)). The *Bone* Court further specified: “The legislature, in using a well-known term of art such as ‘final judgment,’ meant exactly what ‘final judgment’ has always been understood to mean: something that finally disposes of the whole subject matter of the action or terminates the action, leaving nothing to be done but to execute the judgment...” *Bone*, 744 S.E.2d 561.

In deciding *Bone*, this Court made it abundantly clear that (1) the APA governs appeals from the South Carolina Workers' Compensation Commission, and (2) a decision of the Workers' Compensation Commission is not appealable until there has been a final judgment which disposes of the action entirely. In this case, there has been no such final judgment, and Petitioner has not exhausted his remedies at the Workers' Compensation Commission level so as to become entitled to judicial review. As Petitioner does not qualify for an exception to the exhaustion of administrative remedies rule, his appeal is interlocutory.

III. The May 21, 2014, Decision and Order of the Appellate Panel does not constitute a final judgment, and the Order is not immediately appealable.

Petitioner sustained an admitted injury on August 17, 2011, when he was bitten by an insect on the left thigh/buttock and developed a small abscess. Respondents provided appropriate medical treatment, including a simple debridement procedure to excise the abscess. On July 6, 2012, Respondents filed a Request for Hearing before the South Carolina Workers' Compensation Commission, alleging Petitioner had reached MMI and was entitled to no additional benefits. Respondents further argued that Petitioner had made purposeful and material misrepresentations with regard to the workers' compensation claim. On January 3, 2013, a hearing was held before the Single Commissioner, who issued a Decision and Order on June 4, 2013, finding Petitioner had not reached MMI and was entitled to ongoing temporary disability benefits and medical treatment. The Single Commissioner found that Petitioner's misrepresentations throughout the claim were attributable to a level of cognitive dysfunction, which stemmed from a motor vehicle accident and brain injury years ago.

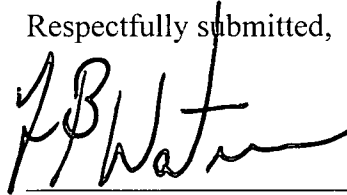
Respondents timely appealed the Order of the Single Commissioner to the Appellate Panel, and the Appellate Panel issued a Decision and Order on May 21, 2014, vacating the Order of the Single Commissioner and remanding the claim back to the Single Commissioner for determination of whether Petitioner is competent to testify, or whether Petitioner requires a guardian *ad litem*. The Appellate Panel further ordered Respondents to provide a neurological evaluation for Petitioner to further address the issues of the cause and extent of Petitioner's alleged conditions.

Petitioner has requested review of the May 21, 2014, Decision and Order of the Appellate Panel, but it is plainly evident that the Appellate Panel's Order is not a final judgment, and it is not immediately appealable or reviewable. Not only do *some issues* remain undetermined by the Workers' Compensation Commission, but *every single issue* remains undetermined at this juncture, as the Single Commissioner's Order was vacated and the claim remanded for further proceedings. As there has been no final judgment, the claim is not immediately appealable or reviewable unless a final decision by the Workers' Compensation Commission would not provide an adequate remedy, which is not the case in this instance.

CONCLUSION

For the reasons set forth above, Respondents respectfully request an Order affirming the Court of Appeals dismissal of Petitioner's appeal as interlocutory.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "L. Brenn Watson". The signature is written in a cursive style with a large initial "L" and "W".

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October 16, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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

Appellate Case No. 2015-000493

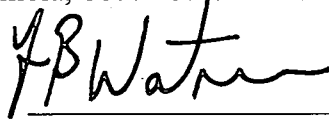
Thomas Chad Hilton, Claimant.....Petitioner,

v.

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

PROOF OF SERVICE

I certify that I have served the original and fifteen (15) copies of the Brief of Respondents on the Clerk of the South Carolina Supreme Court by depositing the same in the United States Mail, sufficient first class postage prepaid, on October 16, 2015. I further certify that I have served a copy of the Brief on Petitioner Thomas Chad Hilton by depositing the same in the United States Mail, sufficient first class postage prepaid, on October 16, 2015, addressed to his attorney of record, Andrew N. Safran, Andrew N. Safran, LLC, Post Office Box 12089, Columbia, South Carolina 29211.



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