

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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**S.C. Supreme Court**

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

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

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Appellate Case No. 2015-000493

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

v.

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

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SUPPLEMENTAL APPENDIX

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L. Brenn Watson, Esq.  
Ian C. Gohean, Esq.  
Willson Jones Carter & Baxley, P.A.  
872 S. Pleasantburg Drive  
Greenville, SC 29607  
(864) 527-3292

Attorneys for Respondents

**SUPPLEMENTAL APPENDIX**

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

TELEPHONE 803 256 6389  
FACSIMILE 803 790 1008

MAILING ADDRESS:  
POST OFFICE BOX 12088  
COLUMBIA, SOUTH CAROLINA 29211

June 20, 2014

HAND DELIVERED

The Honorable Daniel B. Shearouse  
Clerk of Court  
South Carolina Supreme Court  
1231 Gervais Street  
Columbia, South Carolina 29201

RE: Thomas Chad Hilton v. Flakeboard America Limited and  
Liberty Mutual Insurance Company  
W.C.C. File No.: 1111934

Dear Mr. Shearouse:

Enclosed please find an original and eleven copies of a common law Petition for Certiorari relative to the above-captioned matter. At this time, I would greatly appreciate your filing these documents and returning five clocked copies of the Petition to my courier.

By copy of this letter, I am serving a copy of the Petition on Brent Watson, counsel for Respondents, the South Carolina Workers' Compensation Judicial Department and the Honorable Jenny Abbott Kitchings, Clerk of Court for the South Carolina Court of Appeals. As always, in the event they have any questions or comments concerning this matter, I invite them to contact me.

Thank you for your cooperation.

With kindest regards, I am

Very truly yours,

  
Andrew N. Safran

ANS/rm

Enclosures

cc: South Carolina Workers' Compensation Judicial Department  
L. Brent Watson, Esquire  
The Honorable Jenny Abbott Kitchings

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

Susan S. Barden, Commissioner  
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W.C.C. FILE NO.: 1111934

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Thomas Chad Hilton ..... PETITIONERS.

v.

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

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PETITION FOR WRIT OF CERTIORARI

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Andrew N. Safran  
Post Office Box 12089  
Columbia, South Carolina 29211  
(803) 256-6689  
Attorney for Respondents/Petitioners,  
Kenneth L. Hudson and Keith B. Hudson

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INTRODUCTION

Pursuant to S.C. Const. art. V, Section 5 and S.C. Code Ann. Section 14-3-10 (1976), Petitioner, Thomas Chad Hilton, petitions this Court to issue a Writ of Certiorari to review the South Carolina Workers' Compensation Commission's (Panel's) decision in Thomas Hilton, Claimant, v. Flakeboard America Limited, Employer, and Liberty Mutual Insurance Company, Carrier, SCWCC File No. 1111934.

Mr. Hilton respectfully asserts the Panel erred in: (a) reversing the single commissioner's determination he had not achieved maximum medical improvement relative to the consequences of an August 17, 2011 compensable injury, required further medical treatment and remained temporarily totally disabled; (b) vacating exhaustive factual findings adopting the uncontradicted opinions of four experts (authorizing treating neurologist, as well as evaluating forensic psychiatrist and two evaluating neuropsychologists) which attributed testimonial discrepancies to cognitive deficits resulting from physical brain damage (pre-accident head trauma requiring craniotomy and aggravating consequences of compensable injury), rather than the fraudulent conduct alleged by Respondents; (c) remanding his claim "to the Jurisdictional Commissioner to determine whether or not [he] . . . is competent to testify and whether or not [he] . . . needs a Guardian ad Litem pursuant to §42-15-55", despite the fact Respondents never questioned his competency at any stage of this proceeding; and (d) further ordering Respondents "to send [him] . . . to a neurologist of their choice for an evaluation as to the causation and extent of [his] . . . problems", notwithstanding the absence of any request for this relief.

Specifically, Mr. Hilton believes the Panel's decision: (a) created "issues", which exceeded the parameters of Respondents' W.C.C. Form 30 Request for Commission Review; (b) as the Panel was precluded from addressing any unpreserved "issues", its determination to vacate the single commissioner's Order for the purposes of affording Respondents an unsolicited opportunity to obtain another neurological evaluation and concomitant competency assessment exceeded the statutory authority granted by the legislature and violated Article I, Section 22 of the South Carolina Constitution; (c) consideration of the unpreserved "issues" also unquestionably resulted in a denial of due process; (d) the May 21, 2014 Order is illegal on its face, as it includes neither findings of fact, rulings of law or an explanation of the rationale underlying its rulings in violation of S.C. Code Ann. Sections 1-23-350 (2005) and 42-17-40 (1976, as amended); (e) the nature of the Panel's rulings render any further action by the Commission null and void; and (f) this amalgamation of legal errors is sufficiently exceptional to warrant expeditious review by the Court.

I. QUESTIONS PRESENTED FOR REVIEW

A. Did the Panel err in vacating the single commissioner's June 4, 2013 Order and remanding this claim for further neurological evaluation, as well as concomitant determinations relative to Mr. Hilton's competency to testify and need for a Guardian ad Litem, because: (a) S.C. Code Ann. Section 42-17-50 (2012 supp.) has been consistently construed to limit Panel review to issues falling within the scope of the Form 30 exceptions; (b) Respondents' Form 30 neither seeks further neurological evaluation, disputes the admissibility of Mr. Hilton's testimony nor challenges the absence of a Guardian ad Litem; (c) the Panel had no authority to reach or create these "issues", which had become the law of this case; (d) its sua sponte creation of these "issues" violated Article I, Section 22 of the South Carolina Constitution; and (e) the Panel's May 21, 2014 Order is consequently null and void.

B. Did the Panel err in vacating the single commissioner's June 4, 2013 Order and remanding this claim for further neurological evaluation, as well as concomitant determinations relative to his competency to testify and need for a Guardian ad Litem, because: (a) S.C. Code Ann. Section 42-17-50 (2012 supp.) has been consistently construed to limit Panel review to issues falling within the scope of the Form 30 exceptions; (b) Respondents' Form 30 neither seeks further neurological evaluation, disputes the admissibility of Mr. Hilton's testimony nor challenges the absence of a Guardian ad Litem; (c) the Panel had no authority to reach or create these "issues", which had become the law of this case; (d) consideration of these unpreserved "issues" resulted in a denial of due process; and (e) this constitutional violation conclusively invalidates the Panel's Order.

C. Did the Panel err in vacating the single commissioner's June 4, 2013 Order and remanding this claim for further neurological evaluation, as well as concomitant determinations relative to his competency to testify and need for a Guardian ad Litem, because: (a) the May 21, 2014 order fails to include either the findings of fact or rulings of law required by S.C. Code Ann. Sections 1-23-350 (2005) and 42-17-40 (1976, as amended); (b) this ruling is also devoid of any explanation of the rationale underlying the Panel's rulings; and (c) these defects, as well as the conclusory nature of the Panel's rulings, render the May 21, 2014 Order illegal on its face.

## II. STATEMENT OF THE CASE

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 subsequently prompted his receipt of assessment through the Marlboro Park Hospital Emergency Room (August 19, 2011), where: (a) examination revealed "a raised, round, red area with obvious bite mark in the center of the . . . [buttocks/upper leg] lesion", as well as "skin discoloration ('bright red'), tenderness and swelling ('edematous') in the 'area surrounding the bite'"; and (b) "diagnosed to have experienced a spider bite", for which he received treatment. (See, June 4, 2013 Decision and Order (attached hereto as Exhibit A), p. 9).

When this bite evolved into a "[l]arge, warm, red abscess . . . [area in the] left upper posterior thigh . . . [that measured] approx[imately] . . . 5 inches in diameter [that was] . . . exquisitely painful", Mr. Hilton was referred to Dr. Chi-Dai Chen for surgical assessment (See, June 4, 2013 Decision and Order, p. 10). This physician's August 23, 2011 examination prompted hospitalization "[d]ue to the severity of his symptoms", followed by surgical intervention that led to an "immediate finding of underlying neurototic fat". (*Id.*). As Dr. Chen felt the wound itself had adequately healed by September 12, 2011, he placed Mr. Hilton on PRN status as of that date. (See, June 4, 2013 Decision and Order, p. 11).

Following his release by Dr. Chen, Mr. Hilton was evaluated on two occasions (September 19, 2011 and October 31, 2011) by Dr. W. James Evans (a neurologist), who was not only apprised of left foot pain (attributed by an orthopaedic surgeon to Achilles Tendonitis that was present prior to the August 17, 2011 injury), but also: (a) noted the

development of "pins and needles pain . . . after the spider bite" (October 31, 2011); and (b) "characterized the newly developed left lower extremity symptoms as the 'late complications of the brown recluse spider bite.'" (See, June 4, 2013 Decision and Order, p. 12).

On February 13, 2012, Mr. Hilton was evaluated by Dr. R. Joseph Healy (a neurologist authorized by Respondents), who: (a) noted not only the presence of persistent left leg symptoms, but also the non-traumatic onset of low back pain; (b) performed an BMG, which revealed abnormal nerve function of the left leg that he characterized as "a non-discogenic sciatica". (See, June 4, 2013 Decision and Order, p. 13). Inspection of Dr. Healy's notes/reports for the period April 16, 2012 through July 17, 2012 indicates: (a) his belief Mr. Hilton's left non-discogenic sciatica was the product of compression stemming from the initial consequences of his compensable brown recluse spider bite; and (b) this condition was further compromising Mr. Hilton's gait, affecting the foot and the left ankle, and having a potentially aggravating impact on the pre-injury left Achilles tendon problem. (See, June 4, 2013 Decision and Order, p. 13).

When subsequently questioned as to the source of Mr. Hilton's current left leg symptoms, Dr. Healy verified: (a) an acknowledgement of pre-injury symptoms that were reflective of some degree of neuropathic pain (Healy Deposition, pp. 31 -- 37; 43 -- 44); (b) the pins and needles sensation Mr. Hilton was now experiencing, which was clearly indicative of neuropathic pain, had been neither reported nor identified by any medical record prior to August 17, 2011 (Healy Deposition, pp. 95 & 100); (c) the pre-surgical findings (pain, redness, skin breakdown, swelling, bite marks, fever, nausea and vomiting) were not only indicative of a brown recluse spider bite, but also a "systemic

effect" produced by the injected venom (Healy Deposition, pp. 76 – 79; 85, 87); (d) toxic venom of this nature can, in and of itself, create neuropathic pain of the type described by Mr. Hilton (Healy Deposition, pp. 41, 81 & 122); (e) the nature/degree of Mr. Hilton's pre-surgical symptoms (swelling; size of abscess and surrounding inflammation) were also sufficient to create sciatic nerve compression, even in the absence of muscle tissue damage (Healy Deposition, pp. 80 & 88); (f) Mr. Hilton's current left leg symptoms most probably, to a reasonable degree of medical certainty, result from the consequences of the August 17, 2011 spider bite (venom itself and/or nerve compression caused by pre-surgical wound development) and/or the aggravation/acceleration of preexisting pathology by the consequences of this bite (Healy Deposition, pp. 81 – 84, 89 – 90, 103); (g) the symptoms which temporally resulted from the spider bite, as well as the degree of necrosis documented during surgery, could not be faked (Healy Deposition, pp. 84 – 88); (h) the presence of neuropathic injury had been objectively verified by BMG testing (Healy Deposition, pp. 17 & 125); and (i) he was comfortable with his ability to render this opinion as to causal connection, indicating Mr. Hilton's surgeon was in no better position to address this issue (Healy Deposition, pp. 70 & 90). (See, June 4, 2013 Decision and Order, pp. 22 – 23).

As his low back pain persisted, Mr. Hilton was independently evaluated by Dr. Ezra B. Riber (August 9, 2012), who: (a) was aware of all material aspects of Mr. Hilton's post-injury history; (b) specifically noted the various symptoms which were exhibited prior to Dr. Chen's surgery, as well as Dr. Evans' belief the worsening of "pre-injury leg pain was the result of the spider bite"; (c) observed limited lumbar range of motion "particularly with extension and concomitant left lateral flexion"; (d) discovered

“significant EHL weakness on the left consistent with an L5 radicular syndrome”; (e) noticed Mr. Hilton’s gait favored the left lower extremity; and (f) felt Mr. Hilton had developed “[c]ompensatory low back pain . . . following altered gait” with an associated lumbar facet syndrome. (See, June 4, 2013 Decision and Order, p. 16).

Based upon these findings and Mr. Hilton’s medical history, Dr. Riber made several treatment recommendations, while explaining: (a) the consistency of his clinical findings with previous objective test results; (b) the radicular leg symptoms were attributable to the “initial compression caused by the expanding wound, as well as the venom, which itself can certainly produce nerve root irritation and neuropathic pain”; (c) the current neuropathic leg pain and “likely compensatory” back pain were consequences of the spider bite; and (d) Mr. Hilton had not reached maximum medical improvement and continued to require work restrictions. (See, June 4, 2013 Decision and Order, pp. 16 – 17).

In response to questioning relative to Mr. Hilton’s current back symptoms, Dr. Healy explained: (a) an understanding that “his walking was [not] . . . totally normal” pre-injury (Healy Deposition, p. 44); (b) the consequences of the spider bite had further contributed to gait alteration (Healy Deposition, p. 104); (c) while he noticed this gait disturbance, “it wasn’t dramatic” (Healy Deposition, p. 7); (d) video surveillance footage obtained by Respondents was consistent with his prior observations (Healy Deposition, p. 63); (e) this gait disturbance had resulted in the development of mechanical low back pain (Healy Deposition, p. 72); (e) Mr. Hilton’s current back symptoms were compensatory (due to increased gait alteration attributable to neuropathic pain) and had “come on quicker than . . . might have otherwise [been] . . . expected” due to the

aggravating/accelerating impact of the causally related increase in neuropathic pain by the consequences of the brown recluse spider bite (Healy Deposition, pp. 103 – 104, 122 – 123); (g) the BHL weakness identified by Dr. Riber was a relatively objective finding that was consistent with the sciation confirmed by electrodiagnostic studies and “absolutely” reflective of actual nerve dysfunction (Healy Deposition, pp. 119 – 121, 125 – 126); (i) Mr. Hilton required treatment of the nature outlined by Dr. Riber (Healy Deposition, p. 121); (j) given his longstanding professional relationship with Dr. Riber (who he characterized as “the guru” for pain management care), it was his wish that Mr. Hilton receive this treatment through Dr. Riber (Healy Deposition, pp. 119 & 122); and (k) Mr. Hilton had not yet achieved maximum medical improvement (Healy Deposition, p. 132). (See, June 4, 2013 Decision and Order, pp. 27 – 28).

On May 31, 2012, Mr. Hilton participated in a deposition, during which he: (a) disclosed the occurrence of a 2000 motor vehicle accident that produced a head injury initially resulting in a period of unconsciousness; (b) advised that it also required surgery for “. . . [s]ome bleeding”; (c) recalled only one physician visit following this surgery (for staple removal), while denying any problems associated with this head trauma since the single post-injury doctor visit; (d) admitted a June, 2011 vacation cruise, but required review of a card in his wallet to ascertain when this trip occurred; and (e) testified Dr. Healy had been the only neurologist from whom he had ever received treatment. (See June 4, 2013 Decision and Order, p. 14).

Mr. Hilton also testified: (a) the radiating left leg pain that was producing the pins/needles sensation in his foot had only begun some time after the August 17, 2011 spider bite and was distinguishable from the Achilles tendonitis sensations documented

by Dr. O'Dell (which had actually extended upward approximately two inches beyond the ankle); (b) the current leg pain was likewise not associated with an incident (small piece of metal became embedded in the skin around his left ankle) that had occurred some years prior (creating no residual problems); (c) the back pain referenced by Dr. Healy developed gradually and had not been present at the time of his August 17, 2011 injury; (d) his driving had substantially decreased since the accident date (estimating once a week when asked to specifically quantify); (e) typical periods of standing fell in the 15 – 20 minute range; (f) the majority of time at his home was spent laying down; (g) he had not joined his wife on a subsequent (October, 2011) cruise; and (h) his appearance/the manner in which he walked, stood, etc. could vary, particularly if he was having a “bad day”. (See, June 4, 2013 Decision and Order, pp. 14 – 15).

While subsequent review of this testimony, in light of other evidence, led Respondents to characterize Mr. Hilton as a “liar” and allege these discrepancies were reflective of an intentional attempt to mislead, further investigation revealed:

(a) [the 2000] . . . motor vehicle accident resulted in “multiple trauma . . . [including] a closed-head injury”; (b) his particular pathology involved “a subdural and epidural hematoma on the right” that required performance of a craniotomy; (c) receipt of Dilantin therapy for “subsequent seizures”, in conjunction with repeated neurological assessment following the 2000 head trauma; (d) he was medically restricted from resuming truck driving until June 13, 2001 ; and (e) Mr. Hilton was continuing to experience “short-term memory problems” (ex. “putting his keys in the refrigerator and a ham in the cabinet”) following this injury. (See, June 4, 2013 Decision and Order, p. 15).

More significantly, it was discovered that a mere six months before sustaining the spider bite, Mr. Hilton was reevaluated by a neurologist for complaints of persistent “memory loss” and “mood swings”. (See, June 4, 2013 Decision and Order, pp. 15 – 16).

In view of these developments, Mr. Hilton underwent a forensic psychiatric evaluation (August 12, 2012) by Dr. Donna Schwartz-Watts, a clinical professor of forensic psychiatry affiliated with the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science. At that time, Dr. Schwartz-Watts also interviewed Mrs. Hilton, who reported: (a) her husband manifested "violent mood swings which are in part provoked by his lack of memory"; (b) aggressive denial when reminded of statements he could not remember; (c) activity reflective of confabulation, which she described as "a clinical symptom of cognitive impairment, [that] . . . is not volitional"; and (d) a "general expression of decreased . . . emotion . . . unless he is aggressive." (See, June 4, 2013 Decision and Order, p. 17).

Dr. Schwartz-Watts also conducted a mental status examination, which verified: (a) Mr. Hilton "had cognitive impairment including difficulty with visual spatial design"; (b) "[h]e perseverated, . . . a clinical symptom of cognitive impairment"; (c) Mr. Hilton "had difficulty abstracting similarities between difficult objects"; (d) he also encountered "difficulty registering and recalling objects and required prompting and forced choice"; (e) poor performance "on a test of verbal fluency", which was also associated with perseveration; and (f) Mr. Hilton "gave a good effort" in connection with this assessment. (See, June 4, 2013 Decision and Order, pp. 17 – 18).

She further observed: (a) the presence of "end gaze nystagmus" (previously documented by the neurologist who had treated him for the 2000 head trauma); (b) "difficulty performing rapid alternating movements" (which could ultimately be accomplished with practice); (c) pre-August 17, 2011 records referenced various relevant factors (a right sided subdural and epidural hematoma with a resultant focal motor seizure

disorder; "agnosia and olfactory impairment"; "short-term memory problems"; "short-term memory impairment on neurological evaluation"); and (d) neuropsychological assessment was warranted. (See, June 4, 2013 Decision and Order, p. 18).

In accordance with Dr. Schwartz-Watts' directive, Mr. Hilton underwent neuropsychological evaluation by Dr. Tora Brawley of the University of South Carolina School of Medicine's Department of Neuropsychiatry and Behavioral Science (August 16, 2012), who confirmed: (a) her awareness of the fact "discrepancies . . . in his report of personal history facts . . . [had led to] accusations that he was purposefully being dishonest"; (b) "Mr. Hilton had difficulty correctly recalling some personal information . . . [d]uring the clinical interview"; (c) review of relevant medical records "revealed that he suffered both a subdural and epidural hematoma which required surgical evacuation via a right temporal craniotomy" in 2000; (d) memory issues following the 2000 head trauma; (e) reports of "continued problems with memory loss, mood swings, light headedness and sleep difficulties" to Dr. Solomon in February, 2011; and (f) "his difficulties have worsened following complications from a spider bite in August, 2011." (See, June 4, 2013 Decision and Order, pp. 18 – 19).

In conjunction with this evaluation, Dr. Brawley, then an assistant professor with the University of South Carolina School of Medicine, administered ten neuropsychological instruments, including "the Test of Memory Malingering", which "revealed him to have significant deficits in many areas . . ." These deficits included "immediate verbal learning", "immediate verbal memory for prose passages", "recall of a complex figure", "controlled verbal fluency", "judgment of line orientation", "nonverbal abstract reasoning and problem solving" and "trail making ability". Dr. Brawley also

specifically explained that “[f]ormal effort testing was conducted and performance was completely within normal limits, indicating no evidence of an attempt to exaggerate or malingering cognitive symptoms.” (See, June 4, 2013 Decision and Order, pp. 19 – 20).

Based upon Mr. Hilton’s relevant medical history, her clinical interview and the results of this rather extensive neuropsychological testing, Dr. Brawley determined: (a) “testing results revealed the presence of severe cognitive deficits in many areas assessed, including memory”; (b) “[t]hese deficits are consistent with residual organic deficits from his previous head injury and have likely been exacerbated by more recent . . . physical injuries and psychosocial stressors”; (c) “[t]here was no indication of an attempt to malingering on testing”; (d) “any discrepancies noted in his report of personal history or other areas are related to his cognitive deficits, rather than an attempt to purposely report incorrect information”; and (e) “[t]his [conclusion] . . . is further supported by documented reports and medical evidence of continued memory problems in February, 2011.” (See, June 4, 2013 Decision and Order, p. 20).

After considering these neuropsychological test results, in light of her own clinical finding, Mr. Hilton’s medical history and the content of his deposition, Dr. Schwartz-Watts: (a) concluded “to a reasonable degree of medical certainty that Mr. Hilton has severe cognitive impairments, including memory disturbance, confabulation and perseveration which can account for the obvious discrepancies in his deposition testimony”; and (b) expressed “grave concerns about his competency to testify in these proceedings due to his memory deficits and inability to learn new information.” (See, June 4, 2013 Decision and Order, pp. 20 – 21).

During this time period (August 14, 2012), Mr. Hilton was also evaluated by Dr. Nicholas A. Lind of Post Trauma Resources, who observed: (a) apparent memory impairment per mental status examination; (b) "Mr. Hilton's score of 84 . . . [on the MMPI-2-RF] is consistent with the memory problems expected from his 2000 head trauma"; (c) his "memory complaints are consistent with his described head injury and appear legitimate as determined by the validity measures of the psychological testing measures used in this evaluation"; (d) "Mr. Hilton's reported memory deficits are more likely than not, with as much certainty reasonable in the field of psychology, legitimate"; and (e) formal neuropsychological testing would better gauge "the validity and extent of Mr. Hilton's memory deficits . . ." (See, June 4, 2013 Decision and Order, p. 21).

In this regard, after reviewing "the findings and conclusions of Dr. Brawley's 16 August, 2012 neuropsychological evaluation", Dr. Lind (also a practicing neuropsychologist) agreed: (a) "[t]he results are consistent with the psychological evaluation . . . [he had] conducted on 14 August, 2012 and suggests significant deficits in memory as well as executive and dexterity impairments"; and (b) "[t]his additional evidence confirms that Mr. Hilton's reported memory deficits are more likely than not, with as much certainty reasonable in the field of psychology, legitimate and explain the difficulties he continues to experience with recall of his history." (See, June 4, 2013 Decision and Order, pp. 21 – 22).

Additionally, Dr. Healy addressed Mr. Hilton's cognitive capacity, specifically confirming/concluding: (a) while the focus of his treatment had been the neuropathic pain component, he had noticed clinical cognitive limitations (Healy Deposition, p. 45); (b) it was not unusual for someone who has experienced head trauma of the nature Mr. Hilton

sustained in 2000 to develop cognitive loss (Healy Deposition, p. 108); (c) persistent memory loss was actually "referenced as an ongoing symptom to a neurologist" before the August 17, 2011 accident date (Healy Deposition, pp. 109 - 110); (d) neuropsychological testing of the nature performed by Dr. Brawley included "not only specific tests, but actual portions of other tests, that are specifically geared towards ferretting out exaggeration and malingering" (Healy Deposition, p. 111); (e) the absence of malingering and exaggeration of cognitive symptoms, as well as the valid assessment of cognitive function verified by the neuropsychological test battery administered by Dr. Brawley were consistent with his own intuitive impressions (Healy Deposition, p. 112); (f) the results of this testing did not support allegations that Mr. Hilton's actions (including deposition testimony) were reflective of dishonesty and deceit (Healy Deposition, p. 112); (g) these test results were indicative of a "significant problem from the head injury" (Healy Deposition, p. 114); (h) his agreement with Dr. Brawley's determination "that any discrepancies noted in his report of personal history or other areas are related to cognitive deficits rather than an attempt to purposefully report incorrect information" (Healy Deposition, pp. 114 - 115); (i) his impressions were also consistent with those of Drs. Schwartz-Watts and Lind (Healy Deposition, pp. 115 - 116); (j) he had no doubt Mr. Hilton was experiencing "noticeable cognitive damage secondary to brain injury . . . [which is] a very reasonable and more than likely explanation for . . . [the various factual] discrepancies" identified by Respondents (Healy Deposition, pp. 116 - 117); and (k) to a reasonable degree of medical certainty, he was "comfortable that [Mr. Hilton] in his efforts to receive treatment . . . and his testimony has done nothing contrived or purposeful, but rather that any of these discrepancies or conflicts are the

results of his brain injury and results of cognitive deficits . . . .” (Healy Deposition, p. 128). (See, June 4, 2013 Decision and Order, pp. 25 – 26).

After considering the purportedly dishonest behavior alleged by Respondents, Dr. Healy similarly/consistently validated Mr. Hilton’s credibility, testifying: (a) although he recognized the presence of certain discrepancies in Mr. Hilton’s medical history, he had no concerns as to this gentleman’s credibility (Healy Deposition, pp. 31 – 38, 45 - 49); (b) his participation in the October, 2011 cruise was an insufficient basis upon which to characterize Mr. Hilton as “a liar” (Healy Deposition, pp. 55 - 60); (c) the presence of cognitive deficits stemming from the prior brain injury was a reasonable explanation for these alleged inconsistencies (Healy Deposition, p. 117); (d) the need for ones (i.e., testifying accurately after looking at a card bearing the date of a prior cruise) “fits” as an explanation for Mr. Hilton’s ability to recall certain information (Healy Deposition, pp. 117 - 118); (e) Mr. Hilton’s satisfaction of validity criteria, including the absence of malingering or exaggeration per applicable elements of the neuropsychological test battery administered by Dr. Brawley, supported his belief there was no indication this gentleman was not credible (Healy Deposition, pp. 112 - 113); (f) he would “not . . . blindly support somebody who is faking, malingering or being less than candid” (Healy Deposition, p. 127); and (g) Mr. Hilton was a credible patient (Healy Deposition, pp. 70 -- 71, 106, 131 - 132). (See, June 4, 2013 Decision and Order, pp. 26 – 27).

On August 23, 2012, Respondents solicited Dr. Chen’s testimony relative to several aspects of Mr. Hilton’s injuries. While this general surgeon initially opined that he did not believe Mr. Hilton’s abscess or area of inflammation was large enough to create compression on the sciatic nerve, he subsequently conceded: (a) he neither was nor

considered himself an expert in the field of neurology (Chen Deposition, p. 38); (b) he likewise was not an expert in terms of the ultimate implications of venomous bites (Id.); (c) he had no reason to dispute Mr. Hilton was bitten by an insect on August 17, 2011 (Chen Deposition, p. 41); (d) Mr. Hilton's post-injury complaints/symptoms were "consistent with . . . ones that are commonly attributable to a Brown Recluse spider bite" (Chen Deposition, p. 43); (e) the presence of the same reported symptoms upon which Dr. Healy had concluded Mr. Hilton was manifesting "a systemic effect" produced by spider venom (Chen Deposition, pp. 46 - 48); (f) the tissue damage discovered during surgery was consistent with the destructive process caused by venom or infection (Chen Deposition, p. 52); (g) "venom itself can create damage to an underlying nerve" (Id.); and (h) venom can likewise "create nerve irritation and neuropathic pain." (See, Decision and Order, pp. 28 - 29).

Dr. Chen also candidly acknowledged/agreed: (a) nerve root injury "would actually fall more within . . . a neurologist[']s . . . area of expertise than a surgeon's in terms of delineating etiology of nerve irritation or nerve damage" (Chen Deposition, pp. 53 - 54); (b) he would "normally defer to a neurologist in terms of making a conclusion as to what is the cause of nerve root damage in a scenario" (Chen Deposition, p. 54); (c) Dr. Healy's finding of non-discogenic sciatic per electrodiagnostic studies had "some degree of objectivity" (Id.); (d) he would defer to the specialist's (Dr. Healy's) opinion relative to the causal relationship of Mr. Hilton's non-discogenic sciatica and the consequences of the spider bite (Chen Deposition, pp. 54 - 55); (e) he did not "have the specialty or knowledge to disagree with" Dr. Healy's opinion (Chen Deposition, p. 55); (f) Dr. Evans' opinion that Mr. Hilton's current left lower extremity symptoms

represented the late complication of a brown recluse spider bite was consistent with Dr. Healy's conclusion "in terms of etiology" (Chen Deposition, p. 57); (g) he would likewise defer to Dr. Evans' opinion on this point (Id.); and (h) he did not "hold [him]self . . . out as being an expert in [n]eurology . . . (Id.). (See, June 4, 2013 Decision and Order, pp. 29 – 30).

This physician further testified: (a) identification of the source of nerve damage identified by an BMG was outside his area of expertise (Chen Deposition, p. 60); (b) he did not possess the expertise to decide the question of causation (Chen Deposition, p. 60 - 61); (c) he was consequently deferring to the neurologist "in terms of cause and effect as far as what . . . [Mr. Hilton's] current problems are and how they relate to the spider bite" (Chen Deposition, p. 61); (d) any opinions offered in response to defense counsel's questions on this point were "really . . . outside [his] . . . area of specialization and expertise" (Chen Deposition, p. 65); and (e) given this lack of expertise, he "would defer to the [n]eurologist . . . as to his determination of the source of [Mr. Hilton's] . . . symptoms . . ." (See, June 4, 2013 Decision and Order, p. 30).

Pursuant to questionnaire responses dated November 7, 2012, Dr. Schwartz-Watts confirmed: (a) ". . . [g]iven the nature/degree of his previous head trauma (involving both subdural and epidural hematoma requiring surgical evacuation via right temporal craniotomy), [her] . . . clinical findings and the results of his valid neuropsychological testing, . . . Mr. Hilton's current cognitive deficits (including severe memory compromise) most probably result from physical brain damage"; (b) ". . . [i]n view of the nature/degree of Mr. Hilton's previous head trauma, [her] . . . clinical findings and the results of neuropsychological testing, . . . the cognitive deficits attributable to this

physical brain damage have most probably been aggravated by the consequences of his August 17, 2011 work related injury”; (c) “. . . [g]iven the nature/degree of Mr. Hilton’s physical brain damage, [her] . . . olitical findings and the results of neuropsychological testing, . . . inconsistencies/ inaccuracies arising in connection with his testimony, as well as any inconsistent/inaccurate information he has provided when questioned as to prior events and/or statements (i.e., requiring reliance on his memory), are most probably the result of this physical brain damage, rather than a purposeful/intentional/ volitional attempt to mislead”; (d) “the cognitive deficits produced by Mr. Hilton’s physical brain damage (including the aggravation created by the consequences of his August 17, 2011 work related injury) most probably negatively effect and/or impair his behavioral judgment, including the manner in which he responds to stressors and conducts his daily activities”; and (e) “lapses in behavioral judgment would also most probably be attributable to the aggravation of Mr. Hilton’s cognitive deficits by the consequences of his August 17, 2011 work related injury . . . .” (See, June 4, 2013 Decision and Order, pp. 30–31).

A questionnaire executed by Dr. Brawley on November 8, 2012 similarly: (a) attributes “Mr. Hilton’s current cognitive deficits (including severe memory compromise) . . . [to] physical brain damage”; (b) recognizes “the cognitive deficits attributable to this physical brain damage have most probably been aggravated by the consequences of . . . [Mr. Hilton’s] August 17, 2011 work related injury”; (c) relates any “inconsistencies/inaccuracies arising in connection with his testimony, as well as any inconsistent/inaccurate information he has provided when questioned as to prior events and/or statements (i.e., requiring reliance on his memory) . . . [to] the result[s]. . . of this

physical brain damage, rather than an purposeful/intentional/volitional attempt to mislead"; (d) recognized "the cognitive deficits produced by Mr. Hilton's physical brain damage (including the aggravation created by the consequences of his August 17, 2011 work related injury) most probably affect and/or impair his behavioral judgment, including the manner in which he responds to stressors and conducts his daily activities"; and (e) ties these "lapses in behavioral judgment . . . to his previous brain damage and the aggravation of Mr. Hilton's cognitive deficits by the consequences of his August 17, 2011 work related injury . . ." Dr. Lind also offered identical opinions, from a neuropsychological standpoint, via questionnaire responses dated November 8, 2012. (See, June 4, 2013 Decision and Order, p. 32).

Significantly, when asked to address these questions, Dr. Healy verified (agreed): (a) Mr. Hilton's "current cognitive deficits (including severe memory compromise) most probably result from physical brain damage"; (b) "the cognitive deficits attributable to this physical brain damage have most probably been aggravated by the consequences of Mr. Hilton[s] . . . August 17, 2011 work related injury"; (c) the testimonial inaccuracies (which Defendants alleged to be reflective of a knowing effort to deceive) "are most probably the result of this physical brain damage, rather than a purposeful/intentional/volitional attempt to mislead"; and (d) the negative impact Mr. Hilton's aggravated cognitive deficits are producing on his behavioral judgment.

During the course of a lengthy January 3, 2012 hearing, the single commissioner received testimony from Mrs. Hilton, which he found to be "particularly enlightening." Specifically, Mrs. Hilton: (a) corroborated the circumstances surrounding her husband's 2000 head trauma (from a standpoint of someone who was in the vehicle at the time of

impact, on the scene following his ejection from their vehicle and present for most of his treatment); (b) noted Mr. Hilton had changed following this accident; (c) provided examples of the cognitive problems he had exhibited following the 2000 head trauma; (d) acknowledged his recollection of events occurring prior to the 2000 accident remained good; (e) outlined the "routine" they had implemented to facilitate her husband's continued employment rather than pursuing disability benefits; (f) confirmed Mr. Hilton's cognitive compromise had not resolved with the passage of time and remained problematic, to the extent they had returned to Dr. Solomon in the hope of obtaining medical assistance approximately six months prior to the August 17, 2011 spider bite; and (g) indicated his memory lapses, mood swings, level of agitation, ability to measure time, attention/focus and frequency of inaccuracy had clearly worsened following the spider bite. (See, June 4, 2013 Decision and Order, pp. 36 – 37).

She further verified: (a) Mr. Hilton's inability to recall a October, 2011 cruise (absent reviewing something to prompt his memory) was not unusual; (b) her husband's physical activities were noticeably limited during each of the cruises; (c) while she and her husband drank alcohol and generally remained at one of the on-ship venues (as opposed to in the cabin) during the cruises, he did not engage in dancing or spend appreciable times on his feet; (d) she was present during a portion of the March 27, 2012 surveillance period; and (e) actually observing Mr. Hilton sitting (either in her vehicle or on a sofa inside Mr. Covington's building) during her husband's March 27, 2012 visit to this location. (See, June 4, 2013 Decision and Order, p. 37).

The single commissioner also found Mrs. Hilton's testimony was substantially corroborated by Mr. Covington, a longtime friend of her husband. When questioned as to

his observations/impressions, Mr. Covington explained: (a) he had been afforded ample opportunity to interact with Mr. Hilton both before and after the 2000 head trauma; (b) Mr. Hilton exhibited no difficulties with memory, focus, mood disturbance, etc. prior to the 2000 accident; (c) noticeable changes had occurred subsequent to this accident, particularly involving memory and Mr. Hilton's reaction to these memory deficits; and (d) the nature of Mr. Hilton's pre-August 17, 2011 memory dysfunction had caused him to question how his friend was still being allowed to operate a tractor trailer. (See, June 4, 2013 Decision and Order, pp. 37 – 38).

Despite their awareness of Mr. Hilton's cognitive deficits, Respondents neither requested the opportunity for additional neurological evaluation nor maintained he was incompetent to testify, actually eliciting his testimony as an adverse witness during their case in chief. (See, Hearing Transcript, pp. 67 – 70, attached hereto as Exhibit B). After observing/considering this testimony, the single commissioner found:

During exhaustive cross-examination, Mr. Hilton was noticeably confused and did not always remember what he had said during his previous deposition. He actually apologized more than once for inaccurate/incorrect statements made during the deposition, including his failure to remember going on the October, 2011 cruise. Mr. Hilton also recalled certain elements of his post-head trauma medical history (involving not only treatment received for the August 17, 2011 spider bite, but also previous health issues), while confirming his wife generally attended medical appointment with him in order to assist in the provision of information. (See, June 4, 2013 Decision and Order, p. 35).

He further found "Mr. Hilton's testimony remained consistent relative to: (a) his recollection that the previous incidents referenced by Respondents (involving his left leg and back) had not resulted in any permanent or long term symptoms/limitations; (b) his receipt of treatment from Dr. O'Dell for left leg symptoms prior to the August 17, 2011 accident date; (c) the distinction between symptoms attributable to Achilles tendonitis

and the left leg pain which developed in the aftermath of the brown recluse spider bite; and (d) the nature of his current back symptoms." (See, June 4, 2013 Decision and Order, p. 36).

After thoroughly reviewing all evidence of record (which included deposition testimony, testimony elicited during the hearing, multiple medical opinions and various documents) and observing each witness to assess credibility, the single commissioner specifically found:

(a) "Mr. Hilton's presentation (both live and through deposition) is completely consistent with the material level of cognitive dysfunction confirmed by Drs. Healy, Schwartz-Watts, Brawley and Lind"; (b) "the inaccuracies/inconsistencies in his 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 documented by at least four duly qualified specialists, rather than a purposeful, intentional, volitional or preconceived attempt to mislead and/or knowingly provide false information"; (c) "Mr. Hilton has been experiencing cognitive dysfunction since the 2000 head trauma, which clearly produced some degree of physical brain damage (as evidenced by his post-motor vehicle accident pathology, need for brain surgery and the symptoms documented through February 11, 2011)"; (d) "the persistent symptoms referenced by Dr. Solomon in 2011, coupled with the unanimous opinions expressed by Drs. Healy, Schwartz-Watts, Brawley and Lind, firmly establish the presence of appreciable cognitive dysfunction prior to August 17, 2011"; (e) "these experts, as well as the lay testimony, also verify his current level of cognitive dysfunction"; (f) "this explanation for any alleged credibility issues is founded upon uncontradicted medical evidence (objective and/or wholly validated through use of devices specifically aimed toward identifying malingering/embellishment)"; and (g) "the current circumstances unquestionably verify the legitimacy of Mr. Hilton's cognitive loss, while dispelling any notion that the implications of his pre-existing brain damage were contrived." (See, June 4, 2013 Decision and Order, pp. 38 - 39).

He further found:

(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"; (c) "he similarly verified the consequences of Mr. Hilton's compensable injury continued to prohibit resumption of his pre-injury employment activities"; (d) "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 (e) "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." (See, June 4, 2013 Decision and Order, pp. 39 - 40).

The single commissioner likewise found:

"Mrs. Hilton's testimony to be a key element in connection with my assessment of her husband's presentation", as she: (a) "provided a compelling account of the circumstances surrounding the 2000 head trauma, as well as its impact on Mr. Hilton's cognitive abilities (as compared to his prior state)"; (b) "convincingly outlined the nature/persistence of Mr. Hilton's cognitive dysfunction in a manner which was wholly consistent with his valid neuropsychological test results and the unanimous opinions expressed by the medical experts"; (c) "made no effort to disavow the occurrence of various activities which were the focus of Defendants' credibility allegations, instead offering explanations for this conduct in the context of his longstanding cognitive problems"; and (d) "reliably noted the current state of his cognitive disorder." (See, June 4, 2013 Decision and Order, p. 40).

He also found:

(a) "Mr. Hilton has not achieved maximum medical improvement relative to the consequences of his compensable accident, which continue to produce left leg and back symptoms"; (b) "his left leg and back symptoms proximately result from the aggravation of preexisting, nondisabling conditions by the consequences of his August 17, 2011 compensable accident"; (c) "Mr. Hilton requires further treatment for these injury components in accordance with Dr. Healy's recommendations"; (d) "his receipt of this treatment is reasonable, medically necessary and geared toward lessening the ultimate period of

disability produced by the consequences of his compensable accident"; (e) "the current circumstances warrant Dr. Healy's continued service as Mr. Hilton's authorized treating physician, as well as his receipt of particular treatment modalities identified and/or endorsed by this neurological specialist"; and (f) "Mr. Hilton remains temporarily totally disabled by the consequences of his compensable accident." (See, June 4, 2013 Decision and Order, p. 41).

The single commissioner finally 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) "[he] . . . 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" (See, June 4, 2013 Decision and Order, pp. 41 - 42).

Based upon these findings, the single commissioner concluded: (a) Mr. Hilton remained temporarily totally disabled; (b) "any inaccuracies/inconsistencies in Mr. Hilton's testimony, as well as incorrect/erroneous information he has provided in the context of this litigation, results 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"; (c) an adverse credibility finding is neither warranted nor justified in this instance"; (d) Mr. Hilton was entitled to receive "additional medical treatment modalities provided/prescribed/recommended by Dr. Healy relative to [his] . . . compensable left leg and back injury components, including the particular modalities identified by Dr. Ribex"; and (e) the issue involving whether the consequences of Mr. Hilton's compensable

accident have produced injury components other than his left leg and back shall be held in abeyance . . . ." (See, June 4, 2013 Decision and Order, pp. 43 – 46).

Pursuant to a W.C.C. Form 30 Request for Commission Review dated June 17, 2013, Respondents appealed numerous portions of the June 4, 2013 Order. In this regard, they generally challenged: (a) the single commissioner's determinations as to maximum medical improvement, entitlement to ongoing temporary disability compensation and Mr. Hilton's need for further medical care, as well as his refusal to enter an adverse credibility finding; while (b) specifically excepting to 31 of the 54 findings of fact and 7 of the 9 conclusions of law contained in this Order. However, this lengthy review request contains no assignments of error involving any purported failure to direct Mr. Hilton for another neurological evaluation (which was never sought), his competency to testify or the absence of a Guardian ad Litem. (See, June 17, 2013 W.C.C. Form 30 Request for Commission Review, as hereto as Exhibit C).

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).

### III. ARGUMENTS

A. THE PANEL ERRED IN VACATING THE SINGLE COMMISSIONER'S JUNE 4, 2013 ORDER AND REMANDING THIS CLAIM FOR FURTHER NEUROLOGICAL EVALUATION, AS WELL AS CONCOMITANT DETERMINATIONS RELATIVE TO MR. HILTON'S COMPETENCY TO TESTIFY AND NEED FOR A GUARDIAN AD LITEM, BECAUSE: (A) S.C. CODE ANN. SECTION 42-17-50 (2012 SUPP.) HAS BEEN CONSISTENTLY CONSTRUED TO LIMIT PANEL REVIEW TO ISSUES FALLING WITH THE SCOPE OF THE FORM 30 EXCEPTIONS; (B) RESPONDENTS' FORM 30 NEITHER SEEKS FURTHER NEUROLOGICAL EVALUATION, DISPUTES THE ADMISSIBILITY OF MR. HILTON'S TESTIMONY NOR CHALLENGES THE ABSENCE OF A GUARDIAN AD LITEM; (C) THE PANEL HAD NO AUTHORITY TO REACH OR CREATE THESE "ISSUES", WHICH HAD BECOME THE LAW OF THIS CASE; (D) ITS SUA SPONTE CREATION OF THESE "ISSUES" VIOLATED ARTICLE I, SECTION 22 OF THE SOUTH CAROLINA CONSTITUTION; AND (E) THE PANEL'S MAY 21, 2014 ORDER IS CONSEQUENTLY NULL AND VOID.

S.C. Code Ann. Section 1-23-380 (5) (2008), which governs judicial review of these matters, provides in pertinent part:

(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.

It is axiomatic that ". . . [o]nly issues within the application for review under S.C. Code Ann. §42-17-50 (1976) are preserved for appeal to the commission." Green v. City of Columbia, 311 S.C. 78, 427 S.E. 2d 685, 687 (Cl. App. 1993); Creech v. Ducaue

Company, 320 S.C. 559, 467 S.E. 2d 114, 117 (Cl. App. 1995) ("South Carolina Code Ann. §42-17-50 (1985) provides a party may file an application for review of the single commissioner's ruling; however, only issues within the application for review are preserved for the full commission."). In the absence of an exception which reasonably identifies a specific issue, the: (a) Panel does "not have authority to reach the . . . issue" on appeal; and (b) the single commissioner's determinations "bec[ame] . . . and are all the law of [the] . . . case . . ." Green, supra.; Hain v. Mullins Lumber Co., 193 S.C. 66, 7 S.E. 2d 712, 716 (1940). See also, Jones v. Anderson Cotton Mills, 205 S.C. 247, 31 S.E. 2d 447, 450 (1944).

While Respondents offered 106 exceptions to the single commissioner's Order, none can even be remotely be construed to either seek (much less contest the denial of) further medical evaluation, dispute the admissibility of Mr. Hilton's testimony (which they introduced) or question that absence of a Guardian ad Litem. Given these undisputed facts, the Panel, whose appellate powers are derived from Section 42-17-50, was prohibited from: (a) raising or addressing these "issues"; and (b) allowing them to serve as the basis for vacating the single commissioner's Order.

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. The South Carolina Workers' Compensation Commission "is a state administrative agency and 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.B. 2d 273, 274 (1995). "Any action taken by . . . the commission . . . outside of its statutory and regulatory authority is null and void."

(Id.).

In this instance, the Panel's Order clearly exceeds the statutory authority granted by the General Assembly, to the extent: (a) its ruling constitutes a legal nullity; (b) this fundamental error of law cannot be cured short of vacating the May 21, 2014 Order; and (c) any further proceedings with the Commission will likewise be irreparably tainted.

Accordingly, Mr. Hilton requests this Court to grant his Petition, review the Panel's decision, permit oral argument and issue a decision finding that: (a) the May 21, 2014 Order exceeded the commission's legislatively granted authority; (b) the Panel's rulings are consequently null and void; and (c) review of the single commissioner's June 14, 2013 Order must be limited to the exceptions raised per Respondents' Form 30 and governing legal authorities.

**B. THE PANEL ERRED IN VACATING THE SINGLE COMMISSIONER'S JUNE 4, 2013 ORDER AND REMANDING THIS CLAIM FOR FURTHER NEUROLOGICAL EVALUATION, AS WELL AS CONCOMITANT DETERMINATIONS RELATIVE TO HIS COMPETENCY TO TESTIFY AND NEED FOR A GUARDIAN AD LITEM, BECAUSE: (A) S.C. CODE ANN. SECTION 42-17-50 (2012 SUPP.) HAS BEEN CONSISTENTLY CONSTRUED TO LIMIT PANEL REVIEW TO ISSUES FALLING WITH THE SCOPE OF THE FORM 30 EXCEPTIONS; (B) RESPONDENTS' FORM 30 NEITHER SEEKS FURTHER NEUROLOGICAL EVALUATION, DISPUTES THE ADMISSIBILITY OF MR. HILTON'S TESTIMONY NOR CHALLENGES THE ABSENCE OF A GUARDIAN AD LITEM; (C) THE PANEL HAD NO AUTHORITY TO REACH OR CREATE THESE "ISSUES", WHICH HAD BECOME THE LAW OF THIS CASE; (D) CONSIDERATION OF THESE UNPRESERVED "ISSUES" RESULTED IN A DENIAL OF DUE PROCESS; AND (E) THIS CONSTITUTIONAL VIOLATION CONCLUSIVELY INVALIDATES THE PANEL'S ORDER.**

"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 due process, which limits the Panel's focus to "[o]nly issues within the application for review", while restraining it from "rewr[ittin]g . . . then entire case." Smith v. South Carolina Department of Mental Health, 329 S.C. 485, 494 S.E. 2d 630, 638 (Ct. App. 1998); Green, supra.; Ham, supra. The pervasive impact of this unlawful procedure is further highlighted by the extinguishment of unappealed factual findings, which certainly constituted the law of this case. See, Brunson v. American Koyo Bearings, 367 S.C. 161, 623 S.E. 2d 870, 872 (Ct. App. 2005) ("Brunson, however, is not required to relitigate unchallenged findings -- which are the law of the case . . .").

The deprivation of due process of law prohibits any tribunal from issuing a "binding decree, order, or judgment . . . [and renders any purported ruling] a nullity." LaSalle Bank National Association v. Davidson, 386 S.C. 276, 688 S.E. 2d 121, 122 (2009). As the presence of a due process violation in this instance cannot be reasonably

disputed, the Panel's May 21, 2014 Order "is without legal effect." Ware v. Ware, 404 S.C. 1, 743 S.E. 2d 817, 822 (2013). While the Panel Order proscribes further action and does not purport to be a "final judgment", the nullifying implications of the due process violation will nonetheless invalidate any further proceedings.

Accordingly, Mr. Hilton respectfully requests this Court to grant his Petition, review the Panel's decision, permit oral argument and issue a decision finding that: (a) the May 21, 2014 ruling is violative of due process; (b) the Order is consequently null and void; and (c) review of the single commissioner's June 14, 2013. Order must be limited to the exceptions raised per Respondents' Form 30 and governing legal authorities.

C. THE PANEL ERRED IN VACATING THE SINGLE COMMISSIONER'S JUNE 4, 2013 ORDER AND REMANDING THIS CLAIM FOR FURTHER NEUROLOGICAL EVALUATION, AS WELL AS CONCOMITANT DETERMINATIONS RELATIVE TO HIS COMPETENCY TO TESTIFY AND NEED FOR A GUARDIAN AD LITEM, BECAUSE: (A) THE MAY 21, 2014 ORDER FAILS TO INCLUDE EITHER THE FINDINGS OF FACT OR RULINGS OF LAW REQUIRED BY S.C. CODE ANN. SECTIONS 1-23-350 (2005) AND 42-17-40 (1976, AS AMENDED); (B) THIS RULING IS ALSO DEVOID OF ANY EXPLANATION OF THE RATIONALE UNDERLYING THE PANEL'S RULINGS; AND (C) THESE DEFECTS, AS WELL AS THE CONCLUSORY NATURE OF THE PANEL'S RULINGS, RENDER THE MAY 21, 2014 ORDER ILLEGAL ON ITS FACE.

In this context, the fact finding duty imposed by Sections 1-23-350 and 42-17-40 "requires not only . . . [that] findings of fact be made upon the essential factual issues, but that they . . . [also] be sufficiently definite and detailed to enable the appellate court to properly determine whether the findings of fact are supported by the evidence and whether the law has been properly applied to those findings." Drake v. Raybestos-Manhattan, Inc., 241 S.C. 116, 127 S.E. 2d 288, 292 (1962); Hill v. Jones, 255 S.C. 219, 178 S.E. 2d 142, 144 (1970).

It is also axiomatic that "[i]f a material fact is contested . . . [the Commission] must make a specific, express finding on it." Aristizabal v. I.J. Woodside-Division of Dan River, Inc., 268 S.C. 366, 234 S.E. 2d 21, 23 (1977). It is equally certain: (a) conclusory findings of fact "are insufficient." Baldwin v. James River Corporation, 304 S.C. 485, 405 S.E. 2d 421, 422 (Ct. App. 1991); (b) "a recital of conflicting testimony followed by a general conclusion is patently insufficient to enable a reviewing court to address the issues." Able Communications, Inc. v. South Carolina Public Service Commission, 290 S.C. 409, 351 S.E. 2d 151, 152 (1986); and (c) "implicit findings of fact are . . . [likewise] not sufficient." Brayboy v. Clark Heating Company, Inc., 306 S.C. 56, 409 S.E. 2d 767, 768 (1991). See also, Heater of Seabrook, Inc. v. Public Service

Commission of South Carolina, 332 S.C. 20, 503 S.E. 2d 739, 742 (1998); Porter v. South Carolina Public Service Commission, 333 S.C. 12, 507 S.E. 2d 328, 332 (1998).

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); Nettles v. Spartanburg School District No. 7, 341 S.C. 580, 535 S.E. 2d 146, 151 (Ct. App. 2000).

Inspection of the single commissioner's June 4, 2013 Order reflects a highly detailed analysis of all evidence expressed through 54 factual findings. This ruling likewise applies controlling legal authorities to the various factual determinations.

Conversely, the Panel's May 21, 2014 Order: (a) contains no factual findings (other than a recitation of those contained in the single commissioner's award); (b) references one general citation to S.C. Code Ann. Section 42-15-55 (1976, as amended), (which allows, but does not mandate, appointment of a Guardian ad Litem); and (c) simply expresses bald conclusions that do not arise from the exceptions raised per Respondents' Form 30.

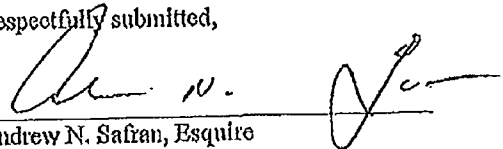
While our Appellate Courts have repeatedly sought to "require the administrative agency to make specific findings of fact and explain its rationale", the Panel's Order: (a) makes no factual findings; (b) declines to address the expansive findings entered by the single commissioner or even acknowledge the unanimous medical opinions upon which he relied in resolving complex medical issues; (c) fails to assess the absence of any medical evidence that rebuts the opinions expressed as to Mr. Hilton's current treatment needs (back and radiolar leg pain), his current work status or the presence/consequences

of his cognitive deficits; and (d) provides no basis for either its determination to vacate the June 4, 2013 Order or decision to take any further action. Porter, 507 S.E. 2d at 338.

As meaningful consideration of the evidence, including undisputed medical opinion on several contested points was essential to the resolution of the issues raised by Respondents' Form 30, the absence of specific findings on the material facts makes it impossible for any Court to review the Panel's ruling "since the reasons underlying the decision are left to speculation." Able, 351 S.E. 2d at 152; Klawah Property Owners Group v. Public Service Commission of South Carolina, 338 S.C. 92, 525 S.E. 2d 863, 865 (1999). An appellate court "will not accept an administrative agency's decision at face value without requiring the agency to explain its reasoning." (*Id.*). As the Panel's conclusory findings provide no explanation for its ruling, the May 21, 2014 Order is illegal on its face and should be vacated.

Accordingly, Mr. Hilton respectfully requests this Court grant his Petition, review the Panel's decision, permit oral argument and issue a decision finding that: (a) the above-referenced deficiencies render the May 21, 2014 Order illegal; (b) these legal errors nullify the Panel's ruling; and (c) review of the single commissioner's June 14, 2013 Order must be limited to the exceptions raised per Respondents' Form 30 and governing legal authorities.

Respectfully submitted,

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

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

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

W.C.C. FILE NO.: 1111934

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Thomas Chad Hilton ..... PETITIONER.

v.

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

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CERTIFICATE OF SERVICE

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I, Roxanne R. Moore, paralegal for Andrew N. Safran, Esquire, Attorney for Petitioner, do hereby certify that on the 20<sup>th</sup> day of June, 2014, I caused to be filed, via hand delivery, the original and six (6) copies of the Petitioner's Petition for Writ of Certiorari, with the Clerk of the South Carolina Supreme Court. One (1) copy of the Petitioner's Petition for Writ of Certiorari was furnished to counsel for Respondents via first class mail at the following address:

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

The Honorable Jonny Abbott Kitchings  
Clerk  
South Carolina Court of Appeals  
1015 Sumter Street  
Columbia, South Carolina 29201

South Carolina Workers' Compensation Commission  
Judicial Department  
Post Office Box 1715  
Columbia, South Carolina 29202-1715

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

June 20, 2014

The Supreme Court of South Carolina

Thomas Chad Hilton, Petitioner,

v.

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

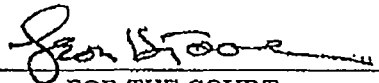
Appellate Case No. 2014-001360 ...

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ORDER

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Petitioner has filed a petition for a writ of certiorari in this Court's original jurisdiction. We decline to entertain the petition in our original jurisdiction. Rule 245(a) and (b), SCACR. *See also In re Breast Implant Product Liability Litigation*, 331 S.C. 540, 503 S.E.2d 445 (1998)(this Court will generally not accept matters on a writ of certiorari that can be entertained in the trial court or on appeal unless exceptional circumstances exist).

 C.J.  
FOR THE COURT

Columbia, South Carolina

July 25, 2014

cc:

Andrew Nathan Safran, Esquire

Lawson Brenn Watson, Esquire

S. C. Workers' Compensation Commission

# WILLSON JONES CARTER & BAXLEY, P.A.

ATTORNEYS AT LAW

GREENVILLE

CHARLESTON

COLUMBIA

CHARLOTTE

RALEIGH

L. Brenn Watson  
Direct (864) 527-3292  
Fax (864) 235-6015  
lbwatson@wjlaw.net

872 S. Pleasantburg Drive  
Greenville, SC 29607  
www.wjclaw.net

May 7, 2015

The Honorable Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

RECEIVED

MAY 12 2015

Re: Thomas Hilton vs. Flakeboard America Limited  
Appellate Case No. 2015-000493  
WCC File No.: 1111934 DOI: 8/17/2011  
Carrier: Liberty Mutual - Claim No.: WC555-A26831  
WJC&B File No.: 0010.03789

S.C. Supreme Court

Dear Mr. Shearouse:

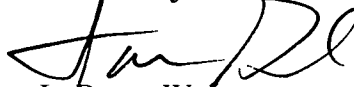
Respondents previously filed a Return to Petition for Writ of Certiorari in the above-captioned case, along with two Exhibits to the Return. Per the request of your office, we have now created a Supplemental Appendix, which encompasses the two documents previously submitted as Exhibits.

Enclosed for filing are an original and six copies of Respondents' Amended Return to Petitioner's Petition for Writ of Certiorari and accompanying Memorandum in Support in the above-referenced matter. Also enclosed are two copies of the Supplemental Appendix (one bound and one unbound), and a Proof of Service.

By copy of this letter, and as indicated by the Proof of Service, we now serve the above-referenced documents on Petitioner's Counsel.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.



L. Brenn Watson  
Ian C. Gohean

Enclosures

cc: Andrew N. Safran, Esquire  
South Carolina Workers' Compensation Judicial Department