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THE STATE OF SOUTH CAROLINA

OCT 27 2015

IN THE SUPREME COURT

S.C. 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..... PETITIONER.

v.

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

PETITIONER'S REPLY BRIEF

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INDEX

TABLE OF AUTHORITIESii

I. ARGUMENTS1

ARGUMENT I.....1

ARGUMENT II2

ARGUMENT III.....6

ARGUMENT IV.....6

CERTIFICATE OF SERVICE8

TABLE OF AUTHORITIES

CASES

Clark v. Aiken County Government, 366 S.C. 102, 620 S.E. 2d 99, 102 (Ct. App. 2005) ...6

STATUTES

S.C. Code Ann. Regs. 67-701 (A) (3) (a) (2012).....1,2,6

ARGUMENTS

I. MR. HILTON HAS ESTABLISHED A LEGITIMATE NEED FOR REVIEW OF THE APPELLATE PANEL'S MAY 21, 2014 ORDER

A. LAW OF THE CASE

The language of S.C. Code Ann. Regs. 67-701 (A) (3) (2012) leaves no doubt that: (a) “. . . [t]he grounds for appeal . . . [from the single commissioner’s order] must be setout **in detail** on the Form 30”; and (b) each exception to the appealed order “must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error.” (Emphasis added).

Consideration of Respondents’ Form 50 exceptions, in light of these explicit requirements, unequivocally establishes their “General Exceptions”: (a) constitute nothing more than bald allegations; (b) reflect neither the specificity nor the concise (comprehensive) assertion of error demanded by Regulation 67-701 (A) (3); (c) cannot be legitimately construed to “naturally . . . [encompass] every finding of fact” contained in the single commissioner’s order (See, Respondents’ Brief, p. 6); and (d) fail to preserve the 23 unspecified factual findings, which to a material extent, address/analyze uncontradicted medical evidence.

In this regard, even a cursory inspection of this Form 30 further confirms: (a) no less than 102 of Respondents’ exceptions specifically attribute error to particular findings of facts, conclusions of law or directives of the single commissioner; (b) Respondents were intimately familiar with this element of the commission’s appellate procedure; and (c) this document is hardly the product of an “unwary” litigant. (See, Respondents’ Brief, p. 6).

Given Respondents' demonstrated compliance with the obligations imposed by Regulation 67-701 (A) (3), it is inconceivable that 23 factual findings were inadvertently overlooked. In view of this fact, who is truly advancing a "disingenuous" position on this point? (Id.).

II. CREATION OF UNPRESERVED ISSUES

Despite the absence of either objections or exceptions raising/preserving the purported bases for its ruling, Respondents argue the appellate panel "was squarely within its authority to vacate and remand the claim in its entirety" However, this myopic assertion completely ignores not only the nature of appellate process, but also the destabilizing impact of the panel's action in this context.

As previously noted, Respondents commenced the current litigation to effectively terminate Mr. Hilton's claim through filing of a W.C.C. Form 21 alleging: (a) he had reached the point of maximum medical improvement; (b) any disability stemming from his accidental injury had ceased as of September 12, 2011; and (c) his current contention as to continued disability was founded upon material misrepresentations. Their assertion as to maximum medical improvement was founded upon his prior discharge from active care by a general surgeon, while the allegations of fraudulent misrepresentation stemmed from inconsistencies between Mr. Hilton's deposition testimony and certain other documentary evidence.

In response, Mr. Hilton relied upon medical opinions of his treating neurologist and an evaluating pain management specialist to the effect that he had not reached the point of maximum medical improvement and remained temporarily disabled from resuming his former employment. Additionally, he attributed any testimonial

inconsistencies to a pre-accident traumatic brain injury, as well as the apparently aggravating consequences of his August 17, 2011 compensable injury.

The parties then engaged in various aspects of pre-hearing discovery, which included: (a) Mr. Hilton's undergoing both forensic psychiatric and neuropsychological evaluations; (b) his authorized treating neurologist's review of this data; and (c) the depositions of two medical experts (Drs. R. Joseph Healy and Chi-Dai Chen). Significantly, Respondents elected not to depose (cross-examine) any of Mr. Hilton's evaluators (Dr. Donna M. Schwartz-Watts, Dr. Tora L. Brawley, Dr. Ezra B. Riber or Dr. Nicholas A. Lind).

As confirmed by the single commissioner's June 4, 2014 Order, all of this medical evidence was admitted into the hearing record without objection. (See, Appendix, pp. 6 – 7). Although Respondents were unquestionably aware of the unanimous medical opinion that Mr. Hilton's testimonial discrepancies were the product of cognitive deficits resulting from brain injury (rather than the alleged fraudulent misrepresentation), as well as the fact Dr. Chen had deferred to Dr. Healy's opinion relative to maximum medical improvement for continued neurologic symptoms, they: (a) **neither directed Mr. Hilton to nor sought to obtain further evaluation from any other medical specialists relative to the disputed issues;** (b) **insisted, as the moving party, that the hearing proceed on January 3, 2013;** (c) **asserted Mr. Hilton was fully competent to testify, as reflected by their presenting him as a witness during their case in chief;** and (d) **likewise saw no need for the appointment of a *Guardian ad Litem*.**

After considering all evidence of record, the single commissioner correctly ruled: (a) as the focal issues were medically driven, the presence of medical evidence was essential to their determination; (b) the uncontroverted medical evidence firmly established Mr. Hilton has not reached the point of maximum medical improvement, required further treatment and remained temporarily totally disabled; (c) this evidence similarly revealed his testimonial with inconsistencies were the product of cognitive dysfunction, as opposed to the fraudulent behavior alleged by Respondents; and (d) Respondents were obliged to continue payment of temporary total disability compensation, as well as the provision of further medical benefits.

While Respondents challenged approximately 60% of the single commissioner's factual findings, refusal to enter an adverse credibility determination and conclusions relative to their obligation to provide ongoing compensation/medical benefits, they neither contested the adequacy of the hearing record, sought leave to submit additional evidence, challenged Mr. Hilton's competency nor even intimated the hearing process was somehow flawed due to the absence of a *Guardian ad Litem*. They also knowingly declined to contest 23 factual findings.

As more fully analyzed in Petitioner's Brief, the scope of an appellate tribunal's review is limited to the particular questions raised by the litigants. This longstanding rule prohibits the reviewing body from reshaping the points of controversy, creating new issues or redefining any elements of the previously established parameters of the underlying dispute. It also precludes dismissal of any unappealed factual or legal determinations embodied in the underlying order.

Based upon the governing authorities, including a Commission regulation that requires submission of all evidence at the time of the hearing, in light of the absence of any objections/exceptions seeking to either exclude or add additional evidence, the appellate panel was obliged to consider only the previously stipulated evidentiary record when addressing Respondents' appeal. This process would necessarily involve determining whether Respondents had proven, through submission of medical evidence, that Mr. Hilton: (a) had reached maximum medical improvement; (b) did not require further medical treatment; (c) experienced a termination of his period of disability; and (d) provided materially inconsistent testimony due to a purposeful intent to deceive, rather than diminished cognition.

Although the appellate panel may well have been concerned by Respondents' allegations, it was not empowered to grant them a "second bite at the apple" through affording an unrequested opportunity for further medical evaluation or creation of an issue as to Mr. Hilton's basic ability to testify. However, notwithstanding this absence of authority, the panel, presumably recognizing the stipulated record legally compelled affirmance, ignored longstanding appellate process and has attempted to require a "do over".

In sum, this claim was litigated by the respective parties before the single commissioner with "all eyes open". Mr. Hilton recognized the obvious need for supportive medical evidence as to the disputed issues. Respondents apparently did not. While the appellate panel may have preferred a different outcome, it was not within their province to facilitate one.

III. DUE PROCESS

Respondents' Form 30 clearly reflects a thorough understanding as to the requirements of regulation 67-701 (a) (3). Additionally, it is axiomatic that general assertions of error "are insufficient to preserve an issue" involving a specific factual finding. (See, Clarke v. Aiken County Government, 366 S.C. 102, 620 S.E. 2d 99, 02 (Ct. App. 2005).

The hallmark of due process is notice of the issues which need to be addressed on appeal. Based upon the contents of Respondents' Form 30, Mr. Hilton: (a) appropriately recognized Respondents' appeal, while vigorous, did not extend to unspecified factual findings; (b) has an absolute right to rely upon these unappealed factual findings during the remainder of this litigation; (c) was not afforded any notice as to the issues spawned by the appellate panel; and (d) should not be required to litigate these fabricated disputes, which are legally null and void.

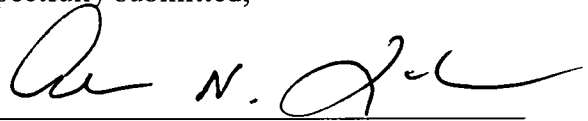
IV. ABSENCE OF RATIONALE

Perhaps the most significant error committed by the panel is the absence of any explanation for its ruling. While Respondents have attempted to excuse this omission by pointing to the intermediate nature of the May 21, 2014 order, it is inconceivable that any statute or judicial ruling authorizes an administrative agency to utilize a procedure which necessarily leaves the rationale underlying its action to speculation.

In this instance, the appellate panel was presented with a highly detailed Order that exhaustively analyzed extensive medical evidence and governing legal authorities. Fundamental rules of appellate process, as well as fundamental fairness, required the panel to address the underlying dispute, as framed by the parties and on the existing

evidentiary record, in a manner which allows a reviewing court to fully understand, right or wrong, the rationale behind its determination.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. N. Safran", written over a horizontal line.

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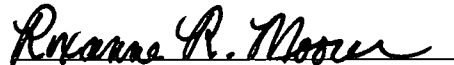
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CERTIFICATE OF SERVICE

I, Roxanne R. Moorer, paralegal for Andrew N. Safran, Esquire, Attorney for Petitioner, do hereby certify that on the 27th day of October, 2015, I caused to be filed, via hand delivery, the original and fifteen (15) copies of the Petitioner's Reply Brief, with the Clerk of the South Carolina Supreme Court. One (1) copy of the Petitioner's Reply Brief was furnished to counsel for Respondents via first class mail at the following address:

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October 27, 2015