

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

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JAN 11 2016

Appellate Case No. 2015-000493

S.C. SUPREME COURT

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

v.

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

RESPONDENTS' REPLY BRIEF TO
AMICUS BRIEF OF INJURED WORKERS' ADVOCATES

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January 7, 2016

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ARGUMENTS

I. **The Amicus Brief of the Injured Workers' Advocates and the Exhibits attach thereto are beyond the scope of this appeal and should not be considered by the Court.**

Rule 213 of the South Carolina Appellate Court Rules states that a brief of an amicus curiae "...shall be limited to argument of the issues on appeal as presented by the parties..." The Amicus Brief of the Injured Workers' Advocates (IWA) argues there is "an emerging trend" of the Appellate Panel of the South Carolina Workers' Compensation Commission vacating decisions of a hearing commissioner and remanding those claims for a *de novo* hearing, but the IWA does not specify any argument applicable to this case. (Amicus Brief: Injured Workers' Advocates, p. 4)

In fact, the IWA admittedly seeks to address an issue *outside* the scope of this appeal, stating the following in the Brief:

- "IWA takes no position on the question whether the order Thomas Hilton received from the appellate panel of the Workers' Compensation Commission is an order that must be reviewed immediately in order to provide an adequate remedy." (Amicus Brief: Injured Workers' Advocates, p. 1)
- "IWA is concerned with an issue that is related, but different." (Amicus Brief: Injured Workers' Advocates, p. 1)
- "Again, IWA takes no position on the question presented, which centers on appealability." (Amicus Brief: Injured Workers' Advocates, p. 4)

As the Amicus Brief is not limited to the issues on appeal as presented by the parties, it is violative of Rule 213 of the South Carolina Appellate Court Rules, and Respondents respectfully request that the Amicus Brief be excluded from the Court's review of this appeal. Similarly, the 11 Exhibits attached to the IWA's Amicus Brief do not appear in

the Record on Appeal, and they should not be considered by the Court pursuant to Rule 210(h), SCACR.

II. Even if the Amicus Brief is properly before the Court, there is no emerging trend of the Appellate Panel vacating and remanding decisions.

The IWA argues there is an “emerging trend” of the Appellate Panel vacating hearing commissioners’ orders and remanding claims for *de novo* hearings, introducing 11 cases collected via survey of the IWA’s 190 members as evidence of such a trend. Firstly, Respondents strongly disagree with the IWA’s characterization of 11 orders in nearly a six year timeframe (IWA’s Exhibit No. 2 is an Order dated April 29, 2009) as a trend. From July 1, 2009 through June 30, 2015, the Appellate Panel issued 1,837 decisions.¹ The IWA has indicated that at least 11 of these decisions were vacations and remands by the Appellate Panel. 11 of 1,837 decisions represents less than one percent (1%) of the decisions issued by the Appellate Panel,² and it represents less than two decisions per year. Respondents assert that this can hardly be described as a “trend.”

Even more importantly, although the IWA indicates that the Appellate Panel offers no explanation for its remands in nine of the 11 orders introduced as Exhibits, this is not the case. In fact, the Appellate Panel offered specific reasons for the remand in the orders included in Exhibits 1, 2, 6, 7, 8, 9, 10, and 11, leaving only three orders where

¹ The South Carolina Workers’ Compensation Commission issues Annual Reports each year and posts them online for the public to view. The Reports for the Fiscal Years (July 1 to June 30) of 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, and 2014-2015, indicate that a total of 1,837 Decisions and Opinions were issued by the Full Commission or Panel during that six year timespan. The Annual Reports can be found at <http://www.wcc.sc.gov/Agency%20Reports/Pages/default.aspx>, and Respondents respectfully request that this Court take judicial notice of the total number of Decisions and Opinions issued by the Full Commission or Panel from July 1, 2009 to June 30, 2015, which totals 1,837.

² 11 of 1,837 represents approximately .6%.

there is no specifically delineated reasoning behind the remand. 11 remands in six years is not a trend, and certainly three is not either.³ There is no “trend” of unreasoned vacations and remands being issued by the Appellate Panel of the Workers’ Compensation Commission, and Respondents assert that the Amicus Brief of the IWA should have no bearing on the case at bar.

III. Even if the Amicus Brief is properly before the Court, the arguments in the Brief are inapplicable to this appeal, as the Appellate Panel clearly delineated the reason for vacating and remanding the Single Commissioner’s Decision and Order in the case at bar.

In vacating and remanding the claim back to the Single Commissioner, the Appellate Panel specifically ordered (1) a determination of whether Petitioner is competent to testify, and (2) an additional neurological evaluation, both of which the Appellate Panel ordered to be completed prior to a remand hearing being held by the Single Commissioner. As outlined in great detail in Respondents’ previous Brief to this Court, a hearing *cannot* be held if Appellant is not competent to testify, and in light of Appellant’s own allegations of competency issues, the Appellate Panel ordered a determination of competency and a remand hearing to ensure that a proper and valid hearing is conducted. None of the 11 orders submitted by the IWA contain an issue of whether or not a witness was competent to testify, and the case at bar is plainly distinguishable. Similarly, the Appellate Panel felt that an additional neurological evaluation was necessary to fully adjudicate the claim, and they acted within the scope of their authority in ordering the same.⁴

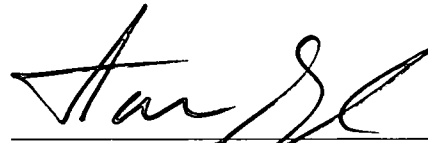
³ 3 of 1,837 represents approximately .16%.

⁴ Again, this issue is argued in its entirety in Respondents’ previous Brief to this Court, and those arguments will not be restated here.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Amicus Brief of the IWA be excluded from the Court's review of this appeal pursuant to Rule 213, and that the 11 Exhibits attached to the IWA's Amicus Brief be excluded pursuant to Rule 210(h). In the alternative, Respondents argue there is no trend of unreasoned vacations and remands from the Appellate Panel, and even if there is any such trend, the case at bar does not fall within such a class, as the Appellate Panel specified the reasoning behind vacating and remanding this claim to the Single Commissioner.

Respectfully submitted,



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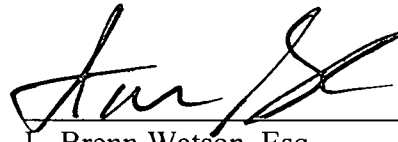
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PROOF OF SERVICE

I certify that I have served the original and fifteen (15) copies of the Respondents' Reply Brief to Amicus Brief of Injured Workers' Advocates on the Clerk of the South Carolina Supreme Court by depositing the same in the United States Mail, sufficient first class postage prepaid, on January 7, 2016. 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 January 7, 2016, addressed to his attorney of record, Andrew N. Safran, Andrew N. Safran, LLC, Post Office Box 12089, Columbia, South Carolina 29211, and that I have served a copy of the Brief on the Injured Workers' Advocates by depositing the same in the United States Mail, sufficient first class postage prepaid, on January 7, 2016, addressed to the Advocates' attorney of record, Blake A. Hewitt, Bluestein, Nichols, Thompson & Delgado, LLC, Post Office Box 7965, Columbia, South Carolina 29202.

(Signature page follows)



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