

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

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JAN 09 2017

SC Court of Appeals

T. Scott Beck, Commissioner  
Susan S. Barden, Commissioner  
Gene McCaskill, Commissioner

W.C.C. FILE NO.: 1413546

APPELLATE CASE NO.: 2016-002294

Timothy A. McDuffie, Employee, Claimant, .....RESPONDENT.

v.

Johnson Food Services, LLC, Employer, and Great American Alliance Insurance Co./  
Strategic Comp., Carrier, .....APPELLANTS.

MOTION TO DISMISS APPEAL

Pursuant to Rule 240 SCACR, Respondent, Timothy A. McDuffie, hereby moves the Court to dismiss Appellants', Johnson Food Services, LLC's and Great American Alliance Insurance Company's/Strategic Comp.'s, appeal of the South Carolina Workers' Compensation Commission's (Commission's) October 12, 2016 Order. This Motion is based upon the fact the Commission's ruling, which finds Mr. McDuffie has not achieved maximum medical improvement as to the consequences of an admittedly compensable September 19, 2014 accident, requires further medical treatment for multiple injury components and is entitled to accrued/continuing temporary total disability compensation, clearly does not constitute "a final decision", as required by S.C. Code Ann. § 1-23-

380(A)(Supp. 2015), and is consequently not subject to judicial review. See, Rose v. JJS Trucking, LLC, 411 S.C. 366, 768 S.E. 2d 412 (Ct. App. 2015); Ex parte South Carolina Property and Casualty Insurance Guaranty Association, 411 S.C. 501, 768 S.E. 2d 670 (Ct. App. 2015).

### FACTS

By Order dated May 16, 2016, the single commissioner determined: (a) the consequences of Mr. McDuffie's September 19, 2014 compensable accident had produced distinct back and left knee injury components; (b) he required focused care for the essentially untreated left knee injury component through Dr. Christopher G. Mazoue, who had not only confirmed the causal relationship of his persistent symptoms, but also the potential need for surgery due to clinical findings consistent with a medial meniscus tear; (c) his compensable accident had, per opinions expressed by Drs. John F. Johnson, Nancy R. Lembo and Ezra B. Riber, also produced a post-traumatic facet syndrome that warranted specific treatment; (d) Mr. McDuffie had not yet reached maximum medical improvement for either of these injury components; and (e) as Johnson Food Services, LLC had declined to accommodate work restrictions, notwithstanding an obvious awareness of their presence, Mr. McDuffie was entitled to accrued/continuing temporary total disability compensation.

Following consideration of the issues raised by Appellants' June 1, 2016 W.C.C. Form 30, the Appellate Panel, through Order dated October 12, 2016, fully affirmed each of the single commissioner's determinations, requiring Appellants to:

- (a) accept financial responsibility for all medical modalities previously provided/prescribed by any authorized healthcare specialists, as well as for the charges stemming from Dr. Mazoue's June 10, 2015 evaluation;
- (b) authorize the additional causally related medical treatment, medications, evaluations, diagnostic testing, evaluative procedures, physical therapy, surgical procedures, etc. provided/prescribed by Dr. Mazoue, who is hereby designated as Mr. McDuffie's

treating physician relative to the left knee injury component for the purposes of this claim; (c) accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome through an appropriate specialist of its choosing, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident; and (d) pay temporary total disability compensation effective the day following his last active work date until such time as this obligation is relieved by further Order of this Commission. (Original emphasis).

### ARGUMENT

"Section 1-23-380 of the . . . [Administrative Procedures] Act limits appeals . . . [in this context] to those from a 'final decision' of the commission." Rose, 768 S.E. 2d at 413; South Carolina Property and Casualty Insurance Guaranty Association, 768 S.E. 2d at 672. "An agency decision that does not decide the merits of a contested case is not a final agency decision subject to judicial review." Price v. Peachtree Electrical Services, Inc., 405 S.C. 455, 748 S.E. 2d 229, 230 (2013).

As recognized by the Supreme Court in Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control, 387 S.C. 265, 692 S.E. 2d 894-895 (2010), "a final decision" within the purview of the Administrative Procedures Act "disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." See also, Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E. 2d 552, 561 (2013). Consequently, "[a]n order of the commission is not a final decision unless it resolves the entire action." Rose, *supra*; South Carolina Property and Casualty Insurance Guaranty Association, *supra*.

In this regard, while S.C. Code Ann. § 42-17-60 (Supp. 2014) requires Appellants "to make weekly payments of compensation and to provide medical treatment ordered by the commission involved in the appeal" pending final determination, this obligation: (a) does not deprive Appellants of "an adequate remedy in that they may raise the . . . [disputed issues] on

appeal of a final award"; and (b) the balance struck by this statute, which denies Mr. McDuffie a year's worth of accrued temporary total disability compensation, is reasonable. See, Bone, 744 S.E. 2d at 561; see also, Rose, 768 S.E. 2d at 413-414.

Inspection of the Commission's October 12, 2016 Order unquestionably verifies Mr. McDuffie's compensable injury components require treatment to facilitate his attainment of maximum medical improvement. Until he reaches this medical plateau: (a) Mr. McDuffie remains eligible (subject to the functional limitations identified by his treating physicians and Appellants' willingness to accommodate any medical restrictions) for temporary disability compensation; and (b) his degree of residual permanent disability is not ripe for assessment. Given these facts, the appealed Order is not "a final decision", as several aspects of Mr. McDuffie's claim remain unresolved.

Accordingly, Mr. McDuffie respectfully prays that the Court conclude the current appeal is interlocutory and dismiss it, without prejudice, pending the Commission's ultimate entry of a final decision that is properly appealable per Section 1-23-380(A).

Respectfully submitted,

By: 

ANDREW N. SAFRAN  
P.O. Box 12089  
Columbia, S.C. 29211  
Phone: (803) 256-6689

ATTORNEY FOR RESPONDENT

Columbia, South Carolina  
January 9, 2017

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v.

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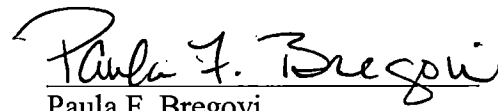
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**CERTIFICATE OF SERVICE**

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I, Paula F. Bregovi, Legal Assistant for Andrew N. Safran, Esquire, Attorney for Respondent, do hereby certify that on the 9<sup>th</sup> day of January, 2017, I caused to be filed, via hand delivery, the original and six (6) copies of Respondent's Motion to Dismiss Appeal, with the Clerk of the South Carolina Court of Appeals. One (1) copy of the Respondent's Motion to Dismiss Appeal was furnished to counsel for Appellants via first class mail at the following address:

E. Ros Huff, Jr., Esquire  
Post Office Box 1935  
Irmo, South Carolina 29063

  
Paula F. Bregovi  
Post Office Box 12089  
Columbia, South Carolina 29211  
(803) 256-6689

January 9, 2017

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SC Court of Appeals

**HAND DELIVERED**

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

RE: Timothy McDuffie v. Johnson Food Service, LLC and  
Great American Alliance Insurance Co./Strategic Comp.  
Appellate Case No.: 2016-002294

Dear Ms. Kitchings:

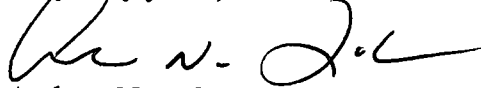
Enclosed please find an original and seven copies of Respondent's Motion to Dismiss Appeal, which I am filing on behalf of Mr. Timothy McDuffie relative to the above-captioned matter. I have also enclosed my firm's check in the amount of Twenty-five and no/100 (\$25.00) Dollars. At this time, I would greatly appreciate your filing these documents and returning one clocked copy to my courier.

By copy of this letter, I am serving a copy of this Motion on Ros Huff, attorney for Appellants. As always, in the event he has any questions or comments concerning this matter, I invite him to contact me.

Thank you for your cooperation.

With kindest regards, I am

Very truly yours,



Andrew N. Safran

ANS/as

cc: E. Ros Huff, Jr., Esquire  
South Carolina Workers' Compensation Judicial Department