THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

W.C.C. FILE NO.: 1413546

APPELLATE CASE NO.: 2016-002294

RECEIVED
JAN 30 2017
SC Court of Appeals

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

v.

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

REPLY TO APPELLANTS' RETURN TO MOTION TO DISMISS APPEAL

By return dated January 19, 2017, Appellants, Johnson Food Services, LLC and Great American Alliance Insurance Company/Strategic Comp., seek denial of Respondent's Timothy A. McDuffie's January 9, 2017 Motion to Dismiss. Essentially, they maintain the appellate panel's October 12, 2016 order is immediately appealable, as it: (a) "affects the merits of this matter"; (b) constitutes "a final judgment" that is subject to immediate appeal per S.C. Code Ann. Section 1-23-380 (A) (Supp. 2015); and (c) will necessarily become the law of this case absent immediate appeal.

However, despite these contentions, Mr. McDuffie respectfully submits: (a) the panel's ruling unquestionably requires further action, including receipt of medical treatment

pending attainment of maximum medical improvement and ultimate assessment of his degree of residual permanent disability; (b) the "affects the merits" standard, which was rejected by the Supreme Court in Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E. 2d 552 (2013), is inapplicable; (c) the panel's order does not constitute a "final decision" per Bone; and (d) given the interlocutory nature of this order, any issues falling within the scope of the current appeal do not become the law of this case.

FACTS

As confirmed by a review of the October 12, 2016 order, after considering the evidentiary record, the panel addressed several factual disputes between the parties, ruling: (a) Mr. McDuffie's compensable accident had not only produced an admittedly compensable back injury, but also a left knee injury component; (b) he had not reached the point of maximum medical improvement for either of these injuries; and (c) Johnson Food Services, LLC had not afforded Mr. McDuffie with an opportunity to perform restrictive duty work activities.

Additionally, the panel affirmed the single commissioner's: (a) designation of a treating physician for the knee injury component; (b) requiring Appellants to accept financial responsibility a prior assessment of this denied knee injury; (c) determination Appellants are obliged to provide causally related treatment for each of these injury components; and (d) ruling Mr. McDuffie was entitled to receive temporary total disability compensation.

ARGUMENT

Appellants initially contend: (a) the provisions of S.C. Code Ann. Section 42-17-60 (Supp. 2014) "allow . . . an immediate appeal from an interlocutory order of the commission . . . [when] the order 'affects the merits'"; and (b) the Supreme Court's ruling in Chastain v.

Spartan Mills, 28 S.C. 61, 88 S.E. 2d 836 (1955) validates their belief the October 12, 2016 order is subject to immediate appeal. However, this argument has been rejected by the Supreme Court, which ruled that while the "'affecting the merits' language . . . [referenced in Chastain] was correct at the time, . . . [this standard] did not survive the adoption of the" Administrative Procedures Act. Bone, 744 S.E. 2d at 559. Consequently, while some disputes addressed by the panel's order involve and/or affect the merits of Mr. McDuffie's claim, the presence of this element does not create an immediate right of appeal, particularly where, as here, other issues remain unresolved.

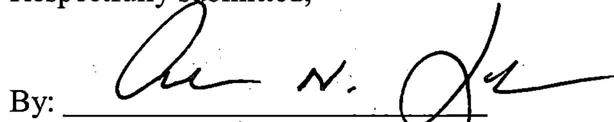
Appellants next argue the October 12, 2016 order constitutes a "final decision" within the meaning of Section 1-23-380. As noted in the January 9, 2017 motion, "a final decision . . . [in this context is one which] disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined." Bone 744 S.E. 2d at 561. The requisite finality exists only where a commission order "resolves the entire action." Rose v. JJS Trucking, LLC, 411 S.C. 366, 768 S.E. 2d 412, 413 (Ct. App. 2015). As the October 12, 2016 order leaves the merits of . . . [Mr. McDuffie's] claim for permanent disability unresolved . . . [pending his receipt of further medical treatment and attainment of maximum medical improvement,] the order is not a final decision and not immediately appealable. Id. This absence of the requisite finality precludes Appellants from engaging in piecemeal litigation of the Commission's factual finding relative to the causal relationship of Mr. McDuffie's knee symptoms to his compensable accident.

While Appellants further maintain their failure to pursue an appeal of this factual determination would result in its "becom[ing] . . . the law of the case", the Supreme Court

has held a litigant's "failure to file an immediate appeal from . . . [an interlocutory] order d[oes] . . . not render the findings of fact and conclusions of law therein the law of the case." Price v. Peachtree Electric Services, Inc., 405 S.C. 55, 748 S.E. 2d 229, 230 (2013).

Accordingly, Mr. McDuffie respectfully requests the Court to grant his motion to dismiss.

Respectfully submitted,



By: ______________________

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ATTORNEY FOR RESPONDENT

Columbia, South Carolina
January 30, 2017

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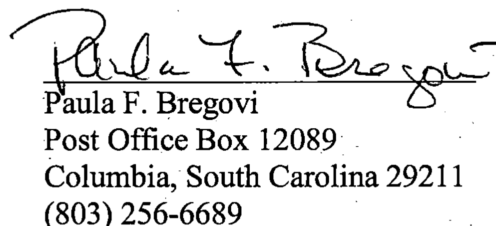
v.

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

CERTIFICATE OF SERVICE

I, Paula Bregovi, Legal Assistant to Andrew N. Safran, Attorney for Respondent, do hereby certify that on the 30th day of January, 2017, I caused to be filed, via hand delivery, the original and six (6) copies of Respondent's Reply to Appellants' Return to Motion to Dismiss Appeal, with the Clerk of the South Carolina Court of Appeals. One (1) copy of the Respondent's Reply to Appellants' Return to 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



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January 30, 2017

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January 30, 2017

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

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SC Court of Appeals

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

Dear Ms. Kitchings:

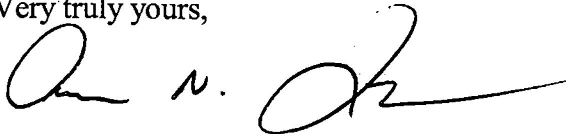
Enclosed please find an original and seven copies of a Reply to Appellants' Return to Respondent's Motion to Dismiss Appeal, which I am filing on behalf of Mr. Timothy McDuffie relative to the above-captioned matter. At this time, I would greatly appreciate your filing these documents and returning one 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