

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

**APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION**

**Melody L. James, Commissioner
Mike Campbell, Commissioner
Avery B. Wilkerson, Jr., Commissioner**

W.C.C. FILE NO.: 1215107

APPELLATE CASE NO.: 2016-002416

RECEIVED

JAN 30 2017

SC Court of Appeals

Randy Faulkenberry, Employee, Claimant RESPONDENT.

v.

**Conbraco Industries, Inc., Employer, and Great American Alliance Insurance Company,
Carrier, Appellants 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's/Strategic Comp., seek denial of Respondent's Randy Faulkenberry's January 13, 2017 Motion to Dismiss. Essentially, they maintain the appellate panel's November 1, 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. Faulkenberry 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 appellate 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 November 1, 2016 order, the panel addressed several factual disputes between the parties, ruling: (a) Mr. Faulkenberry experienced a compensable back injury on June 19, 2012; (b) symptoms documented by various physicians since that time proximately resulted from the consequences of this trauma; (c) he has not reached the point of maximum medical improvement for this injury; and (d) Mr. Faulkenberry requires focused treatment of his causally related back symptoms/pathology.

Additionally, the panel confirmed the single commissioner's: (a) designation of a treating physician for this back injury; (b) requiring Appellants to accept financial responsibility for causally related treatment of this injury; and (c) ruling Mr. Faulkenberry 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, some issues addressed by the panel’s order involve and/or affect the merit of Mr. Faulkenberry’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 November 1, 2016 order constitutes a “final decision” within the meaning of Section 1-23-380. As noted in the January 13, 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 November 1, 2016 order leaves the merits of . . . [Mr. Faulkenberry’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.

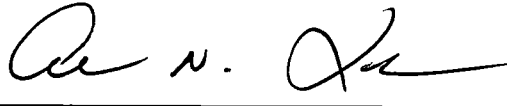
Additionally, the mere fact the panel’s order involves a question of compensability does not afford Appellants an immediate right of appeal, as: (a) the Bone decision specifically rejected the notion a ruling that “an employee’s injury is

compensable as a matter of law is tantamount to a final judgment and is immediately appealable”; (b) this holding is equally applicable to the requirement of a “final decision” in the current context; and (c) the panel’s finding that further action, including provision of medical benefits necessary to reach the point of maximum medical improvement, is required in this instance does “not dispose of the entirety of the action leaving nothing else for determination, nor did it terminate the proceedings. . . .” Bone, 744 S.E. 2d at 556 – 557.

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. Faulkenberry respectfully requests the Court to grant his motion to dismiss.

Respectfully submitted,

By: 

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

ATTORNEY FOR RESPONDENT

Columbia, South Carolina
January 30, 2017

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Randy Faulkenberry, Employee, Claimant RESPONDENT.

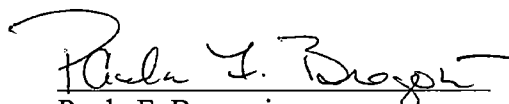
v.

Conbraco Industries, Inc., Employer, and Great American Alliance Insurance Company,
Carrier, Appellants APPELLANTS.

CERTIFICATE OF SERVICE

I, Paula F. Bregovi, Legal Assistant to Andrew N. Safran, Esquire, 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



Paula F. Bregovi
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Columbia, South Carolina 29211
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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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JAN 30 2017

SC Court of Appeals

RE: Randy Faulkenberry v. Conbraco Industries, Inc. and
Great American Alliance Insurance Company
Appellate Case No.: 2016-002416

Dear Ms. Kitchings:

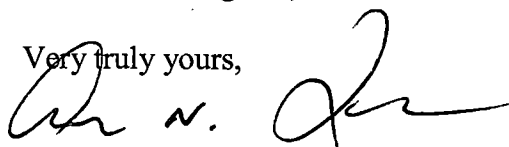
Enclosed please find an original and seven copies of a Reply to Appellants' Return to Respondent's Motion to Dismiss Appeal, which I am filing on behalf of Mr. Randy Faulkenberry relative to the above-captioned matter. At this time, I would greatly appreciate your filing these documents and returning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