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

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

v.

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

INITIAL BRIEF OF RESPONDENT

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May 31, 2017
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1) Did the South Carolina Workers' Compensation Commission (Appellate Panel) correctly find Mr. McDuffie sustained a compensable left leg injury within the meaning of S.C. Code Ann. Section 42-1-160 (2005) while performing his job duties for Johnson Food Services, LLC on September 19, 2014?

2) Did the South Carolina Workers' Compensation Commission (Appellate Panel) appropriately award Mr. McDuffie temporary total disability compensation, particularly in view of the facts: (a) Appellants were unquestionably aware of his restricted duty work status, but unwilling to accommodate his limitations; (b) Appellants' counsel acknowledged his clients' knowledge of these work restrictions, as reflected by his recognition of a need "to accommodate him"; (c) Appellants' failure to provide appropriately restricted job duties resulted in his lost earnings; and (d) his claim for this temporary total disability compensation was encompassed within his Form 50 hearing request (seeking ". . . [a]ppropriate benefits as provided in the Act for the above grounds and **other relief** as the Workers' Compensation Commission may direct as just and proper")?

3) Did the South Carolina Workers' Compensation Commission (Appellate Panel) properly exercise the discretion afforded by S.C. Code Ann. Section 42-15-60 (2015) in determining the current circumstances establish "good cause" per this statute to designate Dr. Christopher G. Mazoue as Mr. McDuffie's treating physician?

4) Does the South Carolina Workers' Compensation Commission's (Appellate Panel's) October 12, 2016 Order fully comply with the requirements of S.C. Code Ann. Sections 42-17-40 (2015) and 1-23-350 (2005)?

STATEMENT OF THE CASE

This is an appeal from the October 12, 2016 Order of the South Carolina Workers' Compensation Commission (Appellate Panel) which determined: (a) the consequences of Respondent's, Timothy A. McDuffie's, September 19, 2014 compensable accident have produced distinct back and left leg (knee) injury components; (b) he required focused care for the essentially untreated left knee injury 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 also produced a post-traumatic facet syndrome which warranted specific treatment per the opinions of Drs. John F. Johnson, Nancy R. Lembo and Ezra B. Riber; (d) Mr. McDuffie had not yet reached the point of maximum medical improvement for either of his compensable injury components; and (e) as his employer had declined to accommodate work restrictions, notwithstanding its obvious awareness of their presence, Mr. McDuffie was entitled to accrued-continuing, temporary total disability compensation.

Essentially, Appellants contend the Commission/Appellate Panel erroneously: (a) found Mr. McDuffie had sustained a compensable left leg injury, despite the documentation of distinct symptoms by one of its providers, as well as Dr. Mazoue's unrefuted opinions relative to causal relationship and the need for treatment; (b) designated Dr. Mazoue as the authorized treater, notwithstanding their unwillingness to even acknowledge this injury component and Mr. McDuffie's expressed confidence in/comfort with the prospect of undergoing surgery with this highly qualified specialist; (c) concluded Mr. McDuffie, whose medical restrictions they knowingly/voluntarily chose not to accommodate, was entitled to temporary total disability

compensation; and (d) failed to generate a legally sufficient order, maintaining several legal conclusions "are not properly stated".

However, despite these assertions, which conveniently ignore the unrefuted evidence and governing legal authorities which provide the bases for the Commission's/Appellate Panel's rulings, Mr. McDuffie respectfully submits: (a) these ruling comport with not only the substantial evidence of record, but also applicable law; and (b) the October 12, 2016 order should be affirmed in its entirety.

FACTS/PROCEDURAL HISTORY

On September 19, 2014, Mr. McDuffie sustained compensable injuries to his back and left leg when he tripped over an exposed pipe at the Johnson Food Services, LLC facility located at Fort Jackson military base in Richland County, South Carolina. Specifically, he: (a) tripped when his left foot came in contact with the exposed pipe; (b) fell forward prior to catching himself before hitting the ground; (c) perceived a pop while attempting to maneuver his left leg away from the pipe; and (d) soon developed **pain involving his back and left leg.** (See, Record on Appeal, pp. __).

Shortly after sustaining this injury, Mr. McDuffie was directed by his employer to Medcare Urgent Care Center (September 20, 2014), where he: (a) reported the presence of back **and left leg pain** following this trauma; (b) exhibited a "[p]ostive . . . [left] leg raised test" response; and (c) received a prescription for Naprosyn in conjunction with instruction to apply warm compresses to his back. (See, Record on Appeal, pp. __). He similarly reported both back **and left lower extremity symptoms**, while also manifesting several critical abnormalities, during a September 23, 2014 examination through the Palmetto Health Baptist emergency room. (See, Record on Appeal, pp. __).

Mr. McDuffie was then directed by Defendants to Dr. Stewart Young of First Care (September 24, 2014), who:

> (a) noted the presence of "mild **medial left knee pain**, some left thigh muscular pain and some low back pain"; (b) was similarly apprised of pain with standing/weightbearing on the left leg; (c) performed a physical examination which revealed "pain in the left thigh musculature with weightbearing/walking", "**tenderness over the MCL area**" and lumbar paraspinous tenderness/spasm; and (d) placed him on sedentary duty work status. (See, Record on Appeal, pp. __).

Inspection of Dr. Young's September 29, 2014 and October 13, 2014 treatment notes further confirms: (a) persistent reports of **both left knee and back pain**; (b) the presence of both left leg and low back symptoms on clinical examination; and (c) this physician's attempt to treat these symptoms with physical therapy. (See, Record on Appeal, pp. __). Additionally, upon reexamining Mr. McDuffie following several physical therapy sessions (November 28, 2014), Dr. Young:

> (a) noted this therapy had not only proved ineffective, but also **"made his left knee worse"**; (b) observed the "left lumbar paraspinous musculature [was] . . . tense and tender to palpation", "pain . . . **[and tenderness] in the medial anterior knee just lateral to the patella"** and "tense"/"tender" left thigh musculature; and (c) restricted him to sedentary work duties, while recommending orthopaedic evaluation for "[p]ersistent low back, left thigh, and **left knee pain** . . . ." (See, Record on Appeal, pp. __).

On December 17, 2014, Defendants directed Mr. McDuffie for an evaluation by Dr. Michael W. Peelle of Moore Orthopedics, who:

> (a) noted the September 19, 2014 tripping injury, as well as resulting pain involving his back, left buttock, left thigh and **left leg**; (b) observed limited lumbar flexion "with reproduction of buttock and hamstring pain on the left side", "a positive straight leg raise test in the seated position", "spinous process tenderness" and a "[n]egative Waddell sign"; (c) **did not reference any**

> **focused examination of the left knee**; (d) offered a diagnosis of left lower extremity radiculopathy, for which he felt an MRI scan was warranted; and (e) restricted his work activities ("[n]o bending or stooping"; 20 lb. lifting/carrying limitation). (See, Record on Appeal, pp. __).

Although Mr. McDuffie remained symptomatic at the time of a December 31, 2014 follow-up visit, Dr. Peelle: (a) indicated the lumbar MRI scan did not reveal any disc pathology; (b) offered no additional treatment; and (c) discharged him to resume full duty work activities effective January 5, 2015. (See, Record on Appeal, pp. __).

Following dismissal by Dr. Peelle, Mr. McDuffie sought further evaluation (January 12, 2015) from Dr. Ezra B. Riber of Palmetto Pain Management, LLC, who: (a) was apprised of persistent low back pain radiating into the left buttock, **as well as left knee pain**; (b) observed the low back pain was "most closely reproduced with returning upright . . . [from forward flexion] and with extension of less than 10°"; (c) confirmed he displayed **left knee pain, particularly with flexion**, experienced "some low back and gluteal discomfort on the left" in response to straight leg raise testing and had difficulty **standing on his heels/toes**; (d) determined the lumbar symptoms were the product of a post-traumatic facet syndrome, for which he identified a facet treatment algorithm that included medial branch blocks; and (e) also **recommended performance of an intra-articular left knee injection**. (See, Record on Appeal, pp. __).

At the time of his October 12, 2015 reexamination, Dr. Riber:

> (a) noted "his pain and dysfunction had become progressively worse"; (b) again observed "his pain is more closely reproduced with returning upright . . . [from forward flexion] and extension most closely reproduces his pain"; (c) similarly detected "low back, gluteal and hamstring discomfort" in response to straight leg raise testing; (d) perceived slight gait disturbance; (e) reiterated his prior diagnosis of a posttraumatic lumbar facet

> syndrome, as well as the need for medial branch blocks; and (f) **imposed several work restrictions, including "no twisting, stooping or bending and no lifting greater than 10 pounds."** (See, Record on Appeal, pp. __).

During the course of his October 26, 2015 deposition (which occurred following subsequent evaluations by Drs. Lembo and Johnson), Dr. Riber explained:

> (a) Mr. McDuffie displayed no "pain behavior", which he characterized as an "over-dramatic", "unbelievable" or suspicious presentation (See, Record on Appeal, pp. __); (b) he observed no evidence of symptom magnification and had "no reason to doubt . . . the physiological legitimacy of any pain . . . [Mr. McDuffie} report" (See, Record on Appeal, pp. __); (c) he had previously treated posttraumatic facet syndromes on "hundreds" of occasions prior to examining Mr. McDuffie (estimating "at least" 20% of the backs he sees involve a facet syndrome) (See, Record on Appeal, pp. __); (d) he would not rely upon an MRI scan to diagnosis a facet syndrome, as "[y]ou can have a perfectly normal MRI and have a very clear-cut facet syndrome" (See, Record on Appeal, pp. __); (e) diagnosis of this condition is instead "based on the mechanism of injury, which is part of the history, the complaints and then the exam" (See, Record on Appeal, pp. __; and (f) facetogenic pain can include "some nerve involvement" that produces leg pain (See, Record on Appeal, pp. __). (See, Record on Appeal, pp. __).

Dr. Riber further verified:

> (a) lumbar extension "loads the facet joints", to the extent that when an individual "either return[s] . . . upright or extend[s], . . . a facet joint issue . . . [will] declare itself" (See, Record on Appeal, pp. __); (b) his clinical observation of pain with lumbar extension was consistent with the relevant clinical findings identified in Dr. Lembo's June 9, 2015 report, as well as Dr. Johnson's June 11, 2015 report (See, Record on Appeal, pp. __); (c) Mr. McDuffie's positive straight leg raise response was also consistent with the diagnosis of posttraumatic facet syndrome (See, Record on Appeal, pp. __); (d) his updated (October 12, 2015) examination remained reflective of a posttraumatic facet syndrome (See, Record on Appeal, pp. __); (e) Mr. McDuffie's lumbar symptoms resulted from his September 19, 2014 compensable accident (See, Record on Appeal, pp. __); (f) treatment for this back injury component would begin with medial branch blocks,

> with consideration of radiofrequency rhizotomy depending upon his response to these blocks (See, Record on Appeal, pp. __); (g) improvement of Mr. McDuffie's back injury component **would be enhanced by receipt of treatment for his left knee** (See, Record on Appeal, pp. ___); (h) his receipt of treatment for the back injury component was reasonable, medically necessary and aimed toward lessening the ultimate period of disability stemming from the September 19, 2014 compensable accident (See, Record on Appeal, pp. __); and (i) **the restrictions he had assigned were not only geared toward preventing Mr. McDuffie "from getting any worse until he gets some treatment", "but also reasonable and medically necessary" in this instance** (See, Record on Appeal, pp. __).

On June 9, 2015, Mr. McDuffie was evaluated by Dr. Lembo, who: (a) noted he continued to experience left sided low back pain radiating "**into the posterior left side to his knee**" following the September, 2014 tripping injury; (b) found that he displayed "left sided lumbar paraspinal hypertrophy and pain with lumbar extension"; (c) characterized his symptoms to be consistent with lumbar facet and myofacial pain; (d) recommended proceeding with a "lumbar facet joint injection vs. medial branch block to indentify [the] . . . pain generator"; (e) indicated this treatment course was "consistent with" his physical examination and imaging findings; and (f) also felt resumption of Naprosyn and a trial of Robaxin, **in conjunction with a 30 lb. lifting limitation**, were appropriate. (See, Record on Appeal, pp. __).

Inspection of Dr. Lembo's September 10, 2015 deposition testimony confirms:

> (a) Mr. McDuffie's reported symptoms were consistent with his described mechanism of injury and her clinical findings (See, Record on Appeal, pp. __); (b) he exhibited both objective evidence of muscle spasm and pain with lumbar extension, which she indicated were consistent with an injury caused by his compensable accident (See Record on Appeal, pp. __); (c) the presence of painful extension was a "significant" factor in her diagnosis, as this finding is "consistent with a facet pain generator" (See, Record on Appeal, pp. __); (d) facetogenic pain, which she "commonly . . . see[s] in [her] . . . practice" is not diagnosed through MRI scanning (See, Record on Appeal, pp. __); and (e)

> she reaffirmed her July 20, 2015 opinion that Mr. McDuffie's posttraumatic lumbar facet syndrome proximately results from his September 19, 2014 compensable accident (See, Record on Appeal, pp. __).

Additionally, after being apprised of Mr. McDuffie's persistent lumbar symptoms and associated functional difficulties, Dr. Lembo verified:

> (a) his causally related pain was interfering with daily activities (See, Record on Appeal, pp. __); (b) her prior questionnaire response relative to the likelihood his "causally related lumbar symptoms . . . remain[ing] problematic and materially/negatively impact[ing] . . . upon his ability to sustain work activities" remained accurate (See, Record on Appeal, pp. __); (c) these symptoms were "most likely not going to . . . improve . . . absent treatment" (See, Record on Appeal, pp. __); (d) his receipt of any accommodations in connection with his employment was not consistent with unrestricted work activity (See, Record on Appeal, pp. __; and (e) Mr. McDuffie's causally related symptoms warranted imposition of a 30 pound lifting restriction (See, Record on Appeal, pp. __).

Mr. McDuffie then (June 10, 2015) underwent focused examination of his left knee by Dr.Mazoue, who: (a) was apprised of the September 19, 2014 mechanism of injury, as well as the nature of his left knee pain; (b) **elicited both medial joint line tenderness and a very positive medial McMurray's test response on clinical examination**; (c) expressed **"concern . . . about a medial meniscus tear of his left knee"**; and (d) recommended obtaining an MRI of the left knee. (See, Record on Appeal, pp. __).

Through questionnaire responses dated July 13, 2015, Dr. Mazoue confirmed: (a) **"the mechanism of injury which Mr. McDuffie described (tripping over a pipe with his left leg followed by jarring while attempting to maintain his balance and avoid falling to the floor) was sufficient to create not only Mr. McDuffie's documented left leg symptoms, but also left medial meniscal pathology"**; (b) the **"documented left leg symptoms, including**

references to pain in the area of his left knee, are most probably consistent with this September 19, 2014 mechanism of injury"; (c) **"[g]iven Mr. McDuffie's mechanism of injury, as well as his documented symptoms of both radicular left leg pain and left medial knee pain . . . at least a portion of his current left leg symptoms most probably result from a left knee injury component"**; (d) **"the left knee symptoms and clinical abnormalities identified in [his] June 10, 2015 report most probably result from the consequences of Mr. McDuffie's September 19, 2014 compensable accident"**; and (e) "the treatment modalities . . . [he had] recommended, including an MRI scan and reevaluation to assess treatment options, are reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by Mr. McDuffie's September 19, 2014 compensable accident . . . ." (See, Record on Appeal, pp. __).

During the course of an October 19, 2015 deposition, Dr. Mazoue verified/explained:

> (a) Mr. McDuffie exhibited "a moderate level of discomfort to palpation" of the medial joint line on examination (See, Record on Appeal, pp. __); (b) **his McMurray's test response was "significantly positive"** (See, Record on Appeal, pp. __); (c) **both the medial joint line tenderness and McMurray's test response have "an objective and subjective portion"** (See, Record on Appeal, pp. __); (d) **Mr. McDuffie's mechanism of injury "was very consistent with the development of a meniscus tear, and his physical exam was highly consistent with a meniscus tear"** (See, Record on Appeal, pp. __); and (e) **this "high likelihood of meniscus tear"** had prompted his recommendation for an MRI scan (Id.). (See, Record on Appeal, pp. __).

This orthopaedic surgeon further confirmed:

> (a) the information contained on Mr. Ernest Roberts' September 23, 2014 statement (See, Record on Appeal, pp. __) generally coincided with his understanding as to Mr. McDuffie's mechanism of injury (See, Record on Appeal, pp. __); (b) it was **not uncommon for leg pain associated with an injury of type to have multiple sources** (See, Record on Appeal, pp. __); (c) a

meniscal tear does not preclude one from exhibiting a relatively normal range of motion (See, Record on Appeal, pp. __); (d) the **results of prior examinations during Mr. McDuffie's post-injury course of treatment, including Dr. Young's findings, were consistent with the results of his clinical examination** (See, Record on Appeal, pp. __); (e) the **McMurray's test is a recognized standard for assessing the presence of a medial meniscal tear** (See, Record on Appeal, pp. __); and (f) **Mr. McDuffie's response to this clinical test constituted a "highly significant" finding, which he believed to be a reliable indication of meniscal pathology** (See, Record on Appeal, pp. __).

On June 11, 2015, Mr. McDuffie was evaluated by Dr. Johnson, who: (a) obtained a history of injury consistent with previous examiners; (b) noted the presence of persistent "low back and buttock pain on the left that radiates **down the left lower extremity to just below the popliteal fossa**"; (c) identified "tenderness to palpation in the left lower lumbar region", "decreased . . . [r]ange of motion . . . particularly with full extension secondary to pain", "worsening pain [with] . . . leg extension" and a positive straight leg raise test response on the left; (d) indicated these symptoms were "a result of the 09-19-14 accident and very likely reflective of posttraumatic facet syndrome", for which he had not reached maximum medical improvement; and (e) recommended "focused treatment that could include medial branch blocks which would be diagnostic as well as therapeutic." (See, Record on Appeal, pp. __).

In this regard, pursuant to questionnaire responses dated July 20, 2015, Dr. Johnson verified, to a reasonable degree of medical certainty, that: (a) "the posttraumatic lumbar facet syndrome . . . [he had] diagnosed proximately results from Mr. McDuffie's September 19, 2014 compensable accident"; (b) "without treatment, Mr. McDuffie's causally related lumbar symptoms will most probably remain problematic and materially/negatively impact upon his ability to sustain work activities"; (c) "the course of treatment . . . [he had] recommended for Mr.

McDuffie's lumbar injury component is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by his September 19, 2014 compensable accident"; and (d) **treatment of the left knee injury component was "likewise reasonable, medically necessary and geared toward lessening [this] . . . ultimate period of disability . . .** ." (See, Record on Appeal, pp. __).

When questioned as to the nature/source of Mr. McDuffie's lumbar symptoms, Dr. Johnson confirmed/reiterated:

> (a) his routine treatment of facetogenic pain, as well as the diagnosis of posttraumatic facet syndrome (See, Record on Appeal, pp. __); (b) facetogenic pain, particularly if traumatic, does not lend itself to accurate diagnosis through MRI scanning (Id.); (c) the diminished lumbar extension referenced by several examiners, as well as the slightly flexed posture of the spine he observed during this clinical examination, were reflective of facetogenic pain (See, Record on Appeal, pp. __); (d) both the left buttock/thigh pain and positive straight leg raise responses he (and several other examiners) observed were likewise consistent with posttraumatic facet syndrome (See, Record on Appeal, pp. __); and (e) Mr. McDuffie's mechanism of injury was likewise consistent with the production of posttraumatic facetogenic pain (See, Record on Appeal, pp. __).

Dr. Johnson further explained:

> (a) Mr. McDuffie's clinical presentation was valid and the product of a genuine effort (See, Record on Appeal, pp. __); (b) the presence of 5/5 muscle strength was not only anticipated, but also "in no way inconsistent with [his] . . . diagnosis of post-traumatic facet syndrome" (See, Record on Appeal, pp. __); (c) given the fact Mr. McDuffie's posttraumatic facet syndrome and left knee pathology had received no focused treatment, the progressive worsening of lumbar symptoms recently documented by Dr. Riber was an expected consequence of his accident (See, Record on Appeal, pp. __); (d) **failure to treat his left knee injury component has "[a]bsolutely" fueled "the continued presence of the facet syndrome and likely prolong[ed] . . . it"** (See, Record on Appeal, pp. __); and (e) Mr. McDuffie **requires**

> **treatment of the left knee in tandem** with focused care of his posttraumatic facet syndrome (See, Record on Appeal, pp. __).

Dr. Johnson also verified:

> (a) as Mr. McDuffie was attempting to remain employed through performance of regular duty work activities, he did not discourage this effort (See, Record on Appeal, pp. __); (b) he had developed "trust" in Dr. Riber's opinions through their professional experience ("I think he does a fine job") (See, Record on Appeal, pp. __); (c) **his agreement with the work restrictions imposed by Dr. Riber** (Id.); (d) the validity of Mr. McDuffie's description of his persistent lumbar symptoms (See, Record on Appeal, pp. __); and (e) his adherence to the opinions expressed in his July 20, 2015 questionnaire responses (See, Record on Appeal, pp. ___).

Although he obviously attempted to perform full duty work in accordance with Dr. Peelle's instruction, Mr. McDuffie: (a) continued to experience back and left leg symptoms; (b) encountered problems engaging in these job activities, noting receipt of assistance and instances where he "couldn't even . . . stand straight up . . . [and/or his] back had locked up" (See, Record on Appeal, pp. __); (c) **had more recently missed time from work because his "back was giving [him] . . . problems"** (See, Record on Appeal, pp. __); (d) **was instructed by his Employer to obtain "a doctor's slip" in order to resume work following these recent absences** (See, Record on Appeal, pp. __); (e) **provided his Employer with this required documentation following medical reevaluation in October, 2015** (See, Record on Appeal, pp. __); (f) **was nonetheless afforded no opportunity to resume restricted work activities, despite compliance with his Employer's directive** (Id.); (g) **received no explantation as to why his restrictions would not be accommodated other than ". . . I couldn't come back 'til their insurance people talked to my lawyer"** (Id.); and (h) **remained "willing to come back"**. (Id.). (See, Record on Appeal, pp. __).

Mr. McDuffie's testimony also confirms:

> (a) the duties incidental to his job as a Cook II include "cooking in the big pots, cleaning up, putting the pots and pans . . . in the aisles, putting them in the warmers, serving on the line . . . [and] going to the meat room to get the meat" (See, Record on Appeal, pp. __); (b) **these work activities require lifting weights that not only exceed 10 lbs. (the limitation identified by Dr. Riber and endorsed by Dr. Johnson), but also the 30 lb. restriction referenced by Dr. Lembo ("chicken is like the most heaviest thing that we'll pick up. It's probably like 40 to 45 pounds.")** (Id.); (c) he is also **obliged to twist** (See, Record on Appeal, pp. __); (d) **the left knee pain had been present "from the beginning"** (See, Record on Appeal, pp. __); (e) **while Dr. Young had "looked at [his] . . . knee", there had heretofore been no focused treatment of this injury component by any physician to whom he was directed by Defendants** (See, Record on Appeal, pp. __); and (f) **his symptoms had never abated following receipt of the full duty work release from Dr. Peelle** (See, Record on Appeal, pp. __).

After thoroughly reviewing all evidence of record and acknowledging the single commissioner's observations of Mr. McDuffie during the course of the hearing, the Commission/Appellate Panel found:

> (a) his testimony, including description of the injury mechanism and the nature/location of all symptoms associated with this accident, are wholly consistent with the medical evidence; (b) this medical evidence certainly confirms the onset of low back **and left leg pain** shortly after sustaining the admittedly compensable September 19, 2014 trauma; (c) while the apparent absence "of structural abnormalities on his MRI" led Dr. Peelle to discharge him from active care, Drs. Johnson, Riber and Lembo unanimously confirmed a scan of this nature is not diagnostic of facetogenic pain; (d) these medical specialists also convincingly verified/explained the positive correlation between their diagnosis of posttraumatic facet syndrome with not only his relevant clinical findings (including diminished lumbar extension), but also the September 19, 2014 mechanism of injury; (e) these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably established his need for previously unprovided facet-directed treatment; and (f) this treatment, aimed toward a posttraumatic facet syndrome diagnosed by Drs. Johnson,

Riber and Lembo, proximately results from the consequences of his September 19, 2014 compensable accident. (See, Record on Appeal, pp. __).

The Commission/Appellate Panel also found:

> (a) the evidence, including consistent opinions expressed by Drs. Johnson, Riber and Lembo, convincingly indicates Mr. McDuffie's compensable accident has created a lumbar posttraumatic facet syndrome; (b) this causally related condition has produced not only persistent back pain, but also associated left leg symptoms (See, testimony of Drs. Riber and Johnson); (c) Mr. McDuffie has not reached the point of maximum medical improvement relative to this causally related back injury component; (d) the treatment he requires for this compensable back injury component includes, but is not limited to, the lumbar facet/medial branch blocks identified by these physicians; and (e) Mr. McDuffie's receipt of these additional treatment modalities for his back injury component is reasonable, medically necessary and geared toward lessening the ultimate period of disability produced by the consequences of his September 19, 2014 compensable accident. (See, Record on Appeal, pp. __).

It further found:

> (a) **the symptoms stemming from Mr. McDuffie's causally related back injury component have negatively impacted upon his ability to engage in unrestricted work activities, notwithstanding Dr. Peelle's previous full duty work release**; (b) **Dr. Riber (who documented the presence of facetogenic symptoms in January, 2015, as well as the progressive impact of his condition in October, 2015) recommended several work restrictions ("no twisting, stooping or bending and no lifting greater than 10 pounds") in order to avoid further worsening of these symptoms**; (c) **these restrictions were subsequently endorsed by Dr. Johnson, who expressed his "trust" in Dr. Riber's judgment as to work status**; (d) Dr. Lembo **similarly felt Mr. McDuffie was incapable of performing unrestricted work activities, assigning a 30 pound lifting limitation**; and (d) **the work restrictions assigned by these physicians are inconsistent with certain aspects of Mr. McDuffie's "full duty" work regimen**. (See, Record on Appeal, pp. __).

The Commission/Appellate Panel likewise found:

> (a) **after his causally related lumbar symptoms necessitated his absence from work in 2015, Mr. McDuffie attempted to resume performance of his job duties**; (b) **despite his provision of medical documentation authorizing performance of restricted work activities, his Employer has declined to afford him any opportunity to engage in job duties consistent with these medical restrictions**; (c) **the medical evidence firmly establishes these restrictions result from/are attributable to the consequences of his September 19, 2014 compensable accident**; (d) my inspection of the record verifies Mr. McDuffie's **continued absence from work was exclusively the product of Defendants' unwillingness to "accommodate" these work restrictions** (See, Record on Appeal); (e) **although all parties were aware of these work restrictions, as well as Mr. McDuffie's desire to engage in accommodated job duties, Defendants elected not to provide work consistent with these medical limitations**; and (f) **these circumstances have produced a continuing period of temporary total disability**. (See, Record on Appeal, pp. __).

It additionally found:

> (a) after sustaining the September 19, 2014 trauma, Mr. McDuffie **reported the presence of both back and left leg pain**; (b) as time progressed, the left leg pain persisted from his buttocks **to his knee**; (c) **despite Dr. Young's clinical identification of left knee symptoms and recommendation of orthopaedic referral for assessment of ". . . [p]ersistent low back, left thigh and left knee pain", Defendants' designated physician (Dr. Peelle) did not perform a focused examination of Mr. McDuffie's left knee**; and (d) he was consequently **obliged to obtain an independent medical evaluation by Dr. Mazoue**. (See, Record on Appeal, pp. __).

In this connection, the Commission/Appellate Panel found Dr. Mazoue (the only orthopaedic surgeon who scrutinized Mr. McDuffie's left knee):

> (a) **discovered significant clinical evidence of medial meniscus pathology**; (b) **explained these clinical findings had "an objective" element; (c) indicated the September 19, 2014 mechanism of injury "was very consistent with the development of a meniscus tear"**; (d) **attributed Mr.**

> **McDuffie's left knee symptoms to the consequences of his compensable accident**; and (e) recommended further treatment, commencing with performance of an MRI scan. (See, Record on Appeal, pp. __).

It similarly found:

> (a) the reliable medical evidence, particularly the opinions expressed by Dr. Mazoue, **amply establish a causal relationship between Mr. McDuffie's focal left knee symptoms and his September 19, 2014 compensable accident**; (b) he requires further treatment for this injury component, including an MRI scan and follow-up care through Dr. Mazoue; (c) Mr. McDuffie has not yet achieved maximum medical improvement relative to his causally related left knee injury component; (d) his receipt of further treatment is reasonable, medically necessary and will tend to lessen the period of disability produced by the consequences of the September 19, 2014 compensable accident; and (e) **notwithstanding their full awareness of Dr. Mazoue's determination as to the nature/source/medical requirements of Mr. McDuffie's causally related left knee symptoms, as well as the absence of any contrary opinion relative to these symptoms, Defendants chose to deny liability for this left knee injury component.** (See, Record on Appeal, pp. __).

The Commission/Appellate Panel finally found:

> The medical treatment, medications, evaluations, diagnostic testing, physical therapy, etc. which Mr. McDuffie has heretofore received/undergone through any authorized medical providers were reasonable, medically necessary and tended to lessen his ultimate period of disability. I also find Dr. Mazoue's June 10, 2015 evaluation was reasonable, medically necessary and tended to lessen Mr. McDuffie's ultimate period of disability. (See, Record on Appeal, pp. __).

Based upon the evidence of record, the Commission/Appellate Panel concluded: (a) Mr. McDuffie had sustained compensable injuries to both his back and left leg within the meaning of S.C. Code Ann. Section 42-1-160 (2015); (b) he has "clearly established" the causal relationship of both is current lumbar and left knee symptoms to the consequences of this compensable accident; and (c) Mr. McDuffie required further treatment for each of these injury components in

accordance with the provisions of S.C. Code Ann. Section 42-15-60 (2015) See, Record on Appeal, pp. __)

In this regard, the Commission/Appellate Panel further concluded:

> We further conclude: (a) despite their knowledge (through report, questionnaire responses and deposition testimony) of Dr. Mazoue's opinions relative to Mr. McDuffie's left knee injury component and the absence of any conflicting medical opinion relative to this injury component, Defendants maintained their denial of liability; (b) notwithstanding this denial, they certainly had ample opportunity to obtain assessment of this left knee injury component, but chose not to do so; (c) given the nature of his left knee symptoms, Mr. McDuffie reasonably sought evaluation from Dr. Mazoue (whose qualifications to treat this condition have not been challenged); (d) Mr. McDuffie has developed sufficient confidence in Dr. Mazoue to proceed with surgery by this physician (a likely scenario); and (e) the current circumstances constitute good cause for designation of Dr. Mazoue as Mr. McDuffie's authorized treater relative to the left knee injury component per Section 42-15-60. See also, Clark v. Aiken County Government, 366 S.C. 102, 620 S.E. 2d 99, 104 (Ct. App. 2005); Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E. 2d 876, 885 (Ct. App. 2006) (See, Record on Appeal, pp. __).

The Commission/Appellate Panel also squarely addressed the issue relative to Mr. McDuffie's entitlement seek an award of temporary total disability compensation, concluding:

> Additionally, the email correspondence requested Commissioner Taylor to address Mr. McDuffie's entitlement to temporary total disability compensation. In response, counsel for Defendants maintained that as the Form 50 did not specifically request this compensation, the issue was not ripe for determination.
>
> In this regard, counsel for the respective parties directed Commissioner Taylor, as well as this Panel, to portions of the hearing transcript which they believe are particularly relevant to this issue. Based upon our review of the pertinent portions of the hearing transcript, We conclude: (a) while the parties were obviously preoccupied with the issue involving withdrawal of Dr. Lembo's report (a circumstance which is thoroughly addressed in the May 16, 2016 Order), Mr. McDuffie's counsel nonetheless indicated his client was not currently working due to his

> Employer's unwillingness to honor restrictions identified by unauthorized physicians (Drs. Riber and Lembo) (See, Record on Appeal, pp. __); (b) Defendants were obviously aware of Mr. McDuffie's restricted duty work status, as reflected by their counsel's recognition of a need "to accommodate him" (See, Record on Appeal, pp. __); (c) Mr. McDuffie provided relatively detailed testimony outlining not only his efforts to resume restricted duty work activities, but also his Employer's inability/failure to provide duties consistent with his medical restrictions (See, Record on Appeal, pp. __); (d) the Form 50 contained "a boilerplate claim for '[a]ppropriate benefits as provided in the [Workers' Compensation] Act for the above ground and **other relief** as the Workers' Compensation Commission may direct as just and proper" (See, Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E. 2d 146, 149 (Ct. App. 2000)); and (e) in view of this proviso, as well as the parties' mutual recognition of the fact his absence from work was due to Defendants' disinclination "to accommodate" him, Mr. McDuffie's entitlement to temporary total disability compensation is properly before this Commission for consideration. See also, Harbin v. Owens-Corning Fiberglas, 316 S.C. 423, 450 S.E. 2d 112, 115 (Ct. App. 1994) ("As to the merits of the pleading issue, Harbin's claim for any and all rights under the Act was a sufficient pleading.").

This appeal followed. By motion dated January 9, 2017, Mr. McDuffie sought dismissal of this appeal in view of his belief the Commission's/Appellate Panel's October 12, 2016 Order was not subject to judicial review. While this motion was subsequently denied per Order dated March 2, 2017, Mr. McDuffie hereby preserves all arguments, positions, etc. contained in his motion and January 30, 2017 Reply to Appellants' Return.

ARGUMENT

I. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S/APPELLATE PANEL'S DETERMINATION MR. MCDUFFIE SUSTAINED A COMPENSABLE LEG INJURY PER S.C. CODE ANN. SECTION 42-1-160 (2015) IS WHOLLY SUPPORTED BY THE SUBSTANTIAL EVIDENCE OF RECORD.

A. STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission." Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E. 2d 262, 266 (Ct. App. 2006); Tims v. J.D. Kitts Construction, 393 S.C. 496, 713 S.E. 2d 340, 343 (Ct. App. 2011). In the absence of legal error, a reviewing court will only reverse or modify the Commission's factual findings or ultimate decision if it is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." South Carolina Second Injury Fund v. Liberty Mutual Insurance Company, 353 S.C. 117, 576 S.E. 2d 199, 202 (Ct. App. 2003); Turner v. SAIIA Construction, 419 S.C. 98, 796 S.E. 2d 150, 154 (Ct. App. 2016). However, the Court "will not substitute its judgment for that of the Appellate Panel[/Commission] . . . as to the weight of the evidence on questions of fact." Robbins v. Walgreens and Broadspire Services, Inc., 375 S.C. 259, 652 S.E. 2d (Ct. App. 2007); Thomas v. 5 Star Transportation, 412 S.C. 1, 770 S.E. 2d 183, 187 (Ct. App. 2015).

"The substantial evidence rule of the Administrative Procedures Act governs the standard of review in a workers' compensation decision." Jeffrey v. Sunshine Recycling, 386 S.C. 174, 687 S.E. 2d 332, 334 (Ct. App. 2009); Hamilton v. Martin Color-Fi, Inc., 405 S.C. 478, 748 S.E. 2d 76, 79 (Ct. App. 2013). This rule limits the Court's review "to deciding whether the commission's decision is unsupported by substantial evidence or is controlled by some error of law." White v. Medical University of South Carolina, 355 S.C. 560, 586 S.E. 2d 157, 159 (Ct.

App. 2003); Ardis v. Combined Insurance Company, 380 S.C. 313, 669 S.E. 2d 628, 632 (Ct. App. 2008).

" 'Substantial evidence' is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action." Lark v. Bi-Lo, Inc., 276 S.C. 136, 276 S.E. 2d 304, 306 (1981); Gibson v. Spartanburg School District No. 3, 338 S.C. 510, 526 S.E. 2d 725, 729 (Ct. App. 2000). In this connection, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Pearson v. JPS Converter & Industrial Corp., 327 S.C. 393, 489 S.E. 2d 219, 221 (Ct. App. 1997); Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E. 2d 856 (1998).

Similarly, where there is: (a) "a conflict in the evidence, either of different witnesses or of the same witness, the findings of fact of the . . . commission, as triers of fact, are conclusive." Anderson v. Baptist Medical Center, 343 S.C. 487, 541 S.E. 2d 526, 528 (2001); Watt v. Piedmont Automotive, 384 S.C. 203, 681 S.E. 2d 615, 620 (Ct. App. 2009); and (b) "conflicting medical evidence, the findings of fact of the commission are conclusive." Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E. 2d 320, 321 (1995); Nettles v. Spartanburg School District No. 7, 341 S.C. 580, 535 S.E. 2d 146, 152 (Ct. App. 2000).

Given this deferential standard of review, the "findings of . . . [the Appellate Panel] are presumed correct and will be set aside only if unsupported by substantial evidence." Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92, 95 (Ct. App. 2002); Fragosa v. Kade Construction, LLC, 407 S.C. 424, 755 S.E. 2d 462, 465 (Ct. App. 2013). Consequently, ". . . [a] reviewing

court should affirm a decision by the commission unless it is clearly erroneous in view of the substantial evidence on the whole record." Youmans v. Coastal Petroleum Co., 333 S.C. 195, 508 S.C. 2d 43, 45 (Ct. App. 1998); Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E. 2d 732, 733 (Ct. App. 2001).

B. CAUSAL RELATIONSHIP OF LEFT LEG INJURY

After sustaining the admittedly compensable September 19, 2014 accident, Mr. McDuffie reported the presence of both back and left leg pain. As time progressed, the left leg pain persisted from his buttocks to his knee. Despite Appellants' designated physician's (Dr. Young's) clinical identification of left knee symptoms and recommendation for orthopaedic referral to assess all ongoing symptoms, no focused examination of the left knee was performed by their designated orthopaedic surgeon. In view of this fact, Mr. McDuffie was obliged to obtain independent evaluation by Dr. Mazoue.

During his June 10, 2015 examination, Dr. Mazoue, whose qualifications are undisputed, discovered significant evidence of medial meniscus pathology through clinical testing that included "an objective element". He also indicated the September 19, 2014 mechanism of injury was "very consistent with the development of a meniscus tear", which prompted his attributing Mr. McDuffie's left knee symptoms to the consequences of this accident. He subsequently elaborated on the underlying rationale for this opinion, verifying: (a) the presence of "an objective pathological basis" for Mr. McDuffie's symptoms; and (b) to a reasonable degree of medical certainty, this pathology is likely a medial meniscus tear that most probably results from the September 19, 2014 accident. (See, Record on Appeal, pp. __).

While Appellants were fully aware of Dr. Mazoue's opinion as well as the presence of left knee symptoms documented by an authorized physician (Dr. Young), they declined to obtain

further orthopaedic assessment of Mr. McDuffie's left knee. In this regard, Mr. McDuffie respectfully submits: (a) the Commission's/Appellate Panel's finding that his September 19, 2014 accident produced a left knee injury component is fully supported by the substantial evidence of record; and (b) this determination should be affirmed.

II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION (APPELLATE PANEL) APPROPRIATELY AWARDED MR. MCDUFFIE TEMPORARY TOTAL DISABILITY COMPENSATION, PARTICULARLY IN VIEW OF THE FACTS: (A) APPELLANTS WERE UNQUESTIONABLY AWARE OF HIS RESTRICTED DUTY WORK STATUS, BUT UNWILLING TO ACCOMMODATE HIS LIMITATIONS; (B) APPELLANTS' COUNSEL ACKNOWLEDGED HIS CLIENTS' AWARENESS OF THESE WORK RESTRICTIONS, AS REFLECTED BY HIS RECOGNITION OF A NEED "TO ACCOMMODATE HIM"; (C) APPELLANTS' FAILURE TO PROVIDE APPROPRIATELY RESTRICTED JOB DUTIES RESULTED IN HIS LOST EARNINGS; AND (D) HIS CLAIM FOR THIS TEMPORARY TOTAL DISABILITY COMPENSATION WAS ENCOMPASSED WITHIN HIS FORM 50 HEARING REQUEST (SEEKING "... [A]PPROPRIATE BENEFITS AS PROVIDED IN THE ACT FOR THE ABOVE GROUNDS AND OTHER RELIEF AS THE WORKERS' COMPENSATION COMMISSION MAY DIRECT AS JUST AND PROPER").

Review of pp. ___ of the Record on Appeal confirms:

> ... **defense counsel acknowledged his awareness of Mr. McDuffie's out-of-work status due to medical restrictions, stating: (a) "I want to sit down and talk to the employer, and see if we can put him back to work, because the guy did work for a period of time"; and (b) "I would like to accommodate him"**

Despite this acknowledgement of Mr. McDuffie's causally related restrictions, and the absence of any effort to accommodate them, Appellants contend he could not pursue an award of temporary total disability compensation simply because this request was not specifically pled in his June 12, 2015 Form 50 hearing request. However, this argument, which is premised upon a purported denial of due process, inexplicably ignores both undisputed facts and relevant legal authority.

In this regard, the evidence unquestionably establishes: (a) although he had attempted to engage in full duty work activities following release by Dr. Peelle, he continued to experience back and leg symptoms; (b) these symptoms created problems performing new job activities, which prompted his receipt of assistance and led to instances where he encountered increased dysfunction; (c) his back symptoms had caused him to "recently miss time from work", after which he was "instructed by his Employer to obtain 'a doctor's slip' in order to presume work following these absences"; (d) although he provided his employer with the required documentation following medical evaluation in October, 2015, Mr. McDuffie was not afforded an opportunity to resume restricted work activities; and (e) the only explanation he received from his employer was that he "couldn't come back 'til their insurance people talked to my lawyer." (See, Record on Appeal, pp. __)

The evidence further indicates: (a) Mr. McDuffie's June 12, 2015 Form 50 (filed while he continued to work as best he could) not only specifically sought medical care, but also prayed for " . . . [a]ppropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper"; (b) Appellants were obviously aware of Mr. McDuffie's restricted duty work status (as reflected by counsel's recognition of a need "to accommodate him"); and (c) despite his express willingness to engage in restricted work activities, Mr. McDuffie was not offered the opportunity to do so. (See, Record on Appeal, pp. __)

This Court has consistently held "a boilerplate claim for '[a]ppropriate benefits is provided in the [Workers' Compensation] Act for the above ground and other relief as the Workers' Compensation Commission may direct as just and proper' constitutes a sufficient pleading" in this context. See, Nettles v. Spartanburg School District No. 7, 341 S.C. 580, 535

S.E. 2d 146, 149 (Ct. App. 2000); see also, Harbin v. Owens-Corning Fiberglas, 316 S.C. 423, 450 S.E. 2d 112, 115 (Ct. App. 1994). In view of the impact of this proviso, as well as the parties' mutual recognition Mr. McDuffie's absence from work was due to Appellant's disinclination "to accommodate" him, the Commission/Appellate Panel was certainly empowered to consider his entitlement to temporary total disability compensation.

"Under the Workers' Compensation Act, a claimant is entitled to compensation for a total disability resulting from a work-related injury." Last v. MSI Construction Company, Inc., 305 S.C. 349, 409 S.E. 2d 334, 336 (1991). In this regard, the Supreme Court of South Carolina has consistently held that "the loss of earning capacity caused by the physical injury is the pertinent measure of compensable disability." (Id.); See also, Bowen v. Chiquola Manufacturing Company, 238 S.C. 322, 120 S.E. 2d 99 (1961); Shealy v. Algeron Blair, Inc., 250 S.C. 106, 156 S.E. 2d 640 (1967). Consequently, the issue is "whether the injury ha[s]. . . resulted in some loss of. . . [the Claimant's] earning capacity." Orr v. Elastomeric Products, 323 S.C. 342, 474 S.E. 2d 448, 449 (Ct. App. 1996); Last, 409 S.E. 2d at 336. (See, Record on Appeal, pp. __).

Additionally, a review of the relevant portions of S.C. Code Ann. Section 42-9-260 (1976, as amended), as well as S.C. Code Ann. Regs. 67-505 (2012) and 67-506 (2012), verifies: (a) disability is presumed to continue until an employee has returned to work for the requisite fifteen day period with the employer responsible for the payment of temporary disability compensation; and (b) this compensation remains payable unless the injured employee is either released by the treating physician to work "without restriction", provided with "limited duty work consistent with. . . [restrictions assigned by] the treating physician" or actively working. (See, Record on Appeal, pp. __).

Our Appellate Courts have similarly held: (a) the incarceration of an injured worker did not terminate his period of temporary total disability (rejecting an argument that imprisonment, rather than work related injury, produced inability to work). Last, supra; (b) an intervening pregnancy did "not change the fact that . . . [a compensable] injury" continued to prohibit an employee from performing her previous job. Orr, 474 S.E.2d at 449; (c) a "seasonal" employee remained temporarily totally disabled due to injury, notwithstanding his "return to school on a full-time basis . . . [purportedly] removed him from the labor market . . . ." Hines v. Hendricks Canning Company, 263 S.C. 399, 211 S.E.2d 220, 223 (1975); and (d) an employer "can be relieved of the liability to pay . . . [temporary total disability compensation] by either offering or procuring" suitable employment for the injured worker. Coleman v. Quality Concrete Products, Inc., 245 S.C. 625, 142 S.E.2d 43, 46 (1965); See also, S.C. Code Ann. Section 42-9-190 (1976). (See, Record on Appeal, pp. __).

Essentially, "when the injured worker is under work restrictions, the employer must either offer suitable employment within the injured worker's capacity or pay temporary total disability compensation." Pollack v. Southern Wine & Spirits of America, 405 S.C. 9, 747 S.E. 2d 430, 433 (2013) (Court indicated it "d[id] . . . not disagree with [this] . . . proposition . . . ."). As Appellants knowingly declined to offer suitable employment, temporary total disability compensation is payable.

The Commission's/Appellate Panel's award of this compensation should consequently be affirmed.

III. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION (APPELLATE PANEL) PROPERLY EXERCISED THE DISCRETION AFFORDED BY S. C. CODE ANN. SECTION 42-15-60 (2015) IN DETERMINING THE CURRENT CIRCUMSTANCES ESTABLISH "GOOD CAUSE" PER THIS STATUTE TO DESIGNATE DR. CHRISTOPHER G. MAZOUE AS MR. MCDUFFIE'S TREATING PHYSICIAN.

Section 42-15-60 provides in pertinent part:

> (a) . . . During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician in any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown.

As previously recognized by this Court, the Appellate Panel "is afforded much discretion under Section 42-15-60." Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 576 S.E. 2d 191, 198 (Ct. App. 2003). While this statute was amended in 2007, the Legislature included a proviso ("unless otherwise ordered by the commission for good cause shown"), which clearly evinces an intent that the Commission/Appellate Panel: (a) retain "discretion to order medical treatment under . . . [S]ection 42-15-60 when a controversy . . . arises" (See, Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E. 2d 547, 555 (Ct. App. 2006); (b) maintain its ability to "override the employer's choice of providers" (Clark v. Aiken County Government, 366 S.C. 102, 620 S.E. 2d 99, 104 (Ct. App. 2005); and (c) remain "authorized and empowered to order further medical care and payment for that medical care when controversies arise between a claimant and the employer." See, Hall v. United Rentals, Inc., 371 S.C. 69, 636 S.E. 2d 876, 885 (Ct. App. 2006).

Despite Appellants' contrary contention, this Court's ruling in McKinney v. Kimberly Clark Corporation, 376 S.C. 636, 658 S.E. 2d 112 (2008) is neither inconsistent with the above-

cited authorities nor dispositive of the current issue. Specifically, in McKinney, supra, the single commissioner required employer "to pay for causally related medical treatment and ordered it to select a treating physician for McKinney." However, rather than complying with this order, McKinney: (a) appealed the determination to the Appellate Panel; and (b) unilaterally obtained unauthorized treatment during the pendency of the appeal. In rejecting McKinney's contention she could independently "select her treating physician after being determined permanently and totally disabled", this Court: (a) noted "no particular physician was designated by the appellate panel to treat McKinney"; (b) ruled "McKinney's argument is inconsistent with . . . [Section] 42-15-60 . . . , which . . . **gives great deference to the appellate panel**"; and (c) declined to construe this statute in a manner that "**undermines the authority of the appellate panel, as prescribed by the legislature.**" McKinney, 658 S.E. 2d at 114.

In this instance, the substantial evidence of record verifies: (a) despite their knowledge (through report, questionnaire responses and deposition testimony) of Dr. Mazoue's opinions relative to Mr. McDuffie's left knee injury component and the absence of any conflicting medical opinion relative to this injury component, Appellants maintain[ed] their denial of liability; (b) notwithstanding this denial, they certainly had ample opportunity to obtain assessment of this left knee injury component, but chose not to do so; (c) given the nature of his left knee symptoms, Mr. McDuffie reasonably sought evaluation from Dr. Mazoue (whose qualifications to treat this condition have not been challenged); and (d) Mr. McDuffie has developed sufficient confidence in Dr. Mazoue to proceed with surgery by this physician (a likely scenario).

Given these circumstances, it cannot be legitimately argued the Commission/Appellate Panel abused the discretion afforded by Section 42-15-60 in allowing Mr. McDuffie to obtain

treatment through Dr. Mazoue, a physician who is intimately familiar with the nature/degree of his causally related knee pathology. A contrary ruling not only undermines the authority of the Commission/Appellate Panel in a manner this Court previously deemed inappropriate, but also rewards Appellants for their utter indifference to Mr. McDuffie's physical well being. Accordingly, he respectfully requests that the Commission's/Appellate Panel's ruling on this issue be affirmed.

IV. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S/APPELLATE PANEL'S OCTOBER 12, 2016 ORDER FULLY COMPLIES WITH THE REQUIREMENTS OF S.C. CODE ANN. SECTIONS 42-17-40 (2015) AND 1-23-353 (2005).

It is axiomatic that the provisions of S.C. Code Ann. Section 42-17-40 (1976, as amended) simply oblige this Commission to make "findings of fact . . . upon the essential factual issues. . . ." Hill v. Jones, 255 S.C. 219, 178 S.E. 2d 142, 144 (1970); Airco, Inc. v. Hollington, 269 S.C. 152, 236 S.E. 2d 804, 808 (1977). While these findings must "be sufficiently definite and detailed to enable the appellate court to properly determine whether the findings of fact are supported by the evidence and whether the law has been correctly applied to those findings . . . [, n]o particular format is required." Brayboy v. Clark Heating Company, Inc., 306 S.C. 56, 409 S.E. 2d 767, 768 (1991).

S.C. Code Ann. Section 1-23-350 (2005) likewise "requires that '[a] final decision . . . include findings of fact and conclusions of law, separately stated. Findings of Fact if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.'" Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E. 2d 145, 148 (Ct. App. 2016). Like Section 42-17-40, the provisions of this statute merely require

sufficient detail to allow the Court an opportunity to assess "whether the evidence supports the findings and whether the law was properly applied to those findings." (Id.)

Inspection of the Commission's/Appellate Panel's order unquestionably verifies: (a) the presence of voluminous findings which address all factual issues through exhaustive analysis of the evidence; (b) identification of the evidentiary basis for its ultimate factual determine; (c) proper application of the law governing the disputed issues; and (d) it satisfies all applicable criteria.

CONCLUSION

It cannot be legitimately argued that the Commission's compensability determination is not supported by the substantial evidence of record. Given Mr. McDuffie's confidence in Dr. Mazoue and Appellant's consistent denial of this aspect of his claim, the Commission/Appellate Panel was certainly empowered to designate Dr. Mazoue as the treating physician per Section 42-15-60.

While Appellants seek to portray the Commission's/Appellate Panel's disposition of the temporary total disability compensation issue as unjust and violative of due process, there is no denying their awareness of his causally related symptoms and concomitant need for work accommodations. It is equally certain Appellants were aware that in the absence of an offer of duly restricted work activities, they were legally obliged to provide temporary total disability compensation. The notion that they were deprived of any legal rights through the Commission's enforcing a basic tenet of workers' compensation law is nonsensical.

As the October 12, 2016 Order comprehensively analyzes the evidence of record, while correctly applying applicable legal rules, Appellants' challenges to its sufficiency are incomprehensible.

All aspects of the Commission's/Appellate Panel's decision are consistent with both the substantial evidence of record and controlling legal authorities. Accordingly, Mr. McDuffie respectfully prays that the October 12, 2016 Order be affirmed in its entirety.

Respectfully submitted,

Andrew N. Safran, Esquire
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(803) 256-6689

Attorney for Respondent

May 31, 2017
Columbia, South Carolina

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

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

v.

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

CERTIFICATE OF SERVICE

I, Paula F. Bregovi, Legal Assistant for Andrew N. Safran, Esquire, Attorney for Respondent, do hereby certify that on the 31st day of May, 2017, I caused to be filed, via hand delivery, the original of Respondent's Initial Brief and Designation of Matter, with the Clerk of the South Carolina Court of Appeals. One (1) copy of the Respondent's Initial Brief and Designation of Matter was furnished to counsel for Appellants via first class mail at the following address:

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May 31, 2017

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 one copy of the Respondent's Brief and Designation of Matter to be Included in the Record on Appeal relative to the above-captioned case. At this time, I would appreciate your filing these documents and returning one clocked copy to my courier.

By copy of this letter, I am serving a copy of these documents 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/pfb

cc: E. Ros Huff, Jr., Esquire