

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

---

WCC File No. 1009259

---

Jeffery L. McFadden, ..... Appellant,

vs.

City of Lake City and South Carolina Municipal  
Insurance Trust, ..... Respondents.

---

**APPELLANT'S FINAL BRIEF**

---

STEPHEN J. WUKELA  
ATTORNEY FOR APPELLANT  
WUKELA LAW FIRM  
PO BOX 13057  
FLORENCE SC 29504  
843-669-5634

**RECEIVED**

OCT 31 2012

**SC Court of Appeals**

TABLE OF CONTENTS

Table of Authorities ..... iii

Statement of Issues on Appeal ..... 1

Statement of the Case:

    Factual Background ..... 2

    Procedural Background ..... 10

Arguments:

**I. DID THE APPELLATE PANEL ERR AS A MATTER OF FACT AND CONCLUSION OF LAW IN FAILING TO AWARD THE CLAIMANT PENALTIES, INCLUDING ATTORNEY’S FEES AND COSTS AGAINST THE DEFENDANT? ..... 12**

**II. SHOULD THE APPELLATE PANEL ORDER DENYING THE CLAIMANT PENALTIES, INCLUDING ATTORNEY’S FEES AND COSTS AGAINST THE DEFENDANT BE REVERSED ON THE GROUNDS THAT IT VIOLATED S.C. CODE §1-23-350 IN THAT IT LACKED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUFFICIENTLY DETAILED TO ENABLE THE REVIEWING COURT TO DETERMINE WHETHER THE FINDINGS WERE SUPPORTED BY THE RECORD AND WHETHER THE LAW HAS BEEN PROPERLY APPLIED? ..... 16**

**III. DID THE APPELLATE PANEL ERR AS A MATTER OF FACT AND CONCLUSION OF LAW IN ASSESSING HEARING COSTS TO BE PAID BY THE CLAIMANT’S ATTORNEY FOR A FRIVOLOUS APPEAL? ..... 18**

**IV. SHOULD THE APPELLATE PANEL ORDER ASSESSING HEARING COSTS TO BE PAID BY THE CLAIMANT’S ATTORNEY FOR A FRIVOLOUS APPEAL BE REVERSED ON THE GROUNDS THAT IT VIOLATED S.C. CODE §1-23-350 IN THAT IT LACKED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUFFICIENTLY DETAILED TO ENABLE THE REVIEWING COURT TO DETERMINE WHETHER THE FINDINGS WERE SUPPORTED BY THE RECORD AND WHETHER THE LAW HAS BEEN PROPERLY APPLIED? ..... 19**

V. **WAS THE APPELLATE PANEL ORDER ASSESSING HEARING COSTS AGAINST THE CLAIMANT'S ATTORNEY IN ERROR IN THAT IT VIOLATED S.C. CODE §1-23-320 AND DUE PROCESS IN THAT THE PANEL ISSUED A DECISION ON ASSESSING HEARING COSTS AGAINST CLAIMANT'S ATTORNEY WITHOUT NOTICE OR AN OPPORTUNITY FOR HEARING** ..... 20

Conclusion ..... 21

TABLE OF AUTHORITIES

CASES

Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869(2007) ..... 17

In Re Dickey, 395 S.C. 336, 718 S.E.2d 739(2001) ..... 20

Kiawah Property Owners Group v. PSC, 338 S.C. 92, 525 S.E.2d 863(1999) ..... 17

STATUTES

S.C. Code Ann. §1-23-320 (2005 & Supp. 2011) ..... 1,20, 21

S.C. Code Ann. §1-23-350 (1976 as amended) ..... 1,16, 18, 19, 22

S.C. Code Ann §15-36-10 (1976 as amended) ..... 13

OTHER

S.C. Const., Art. I, §22 (2009 & Supp. 2011) ..... 20

**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE APPELLATE PANEL ERR AS A MATTER OF FACT AND CONCLUSION OF LAW IN FAILING TO AWARD THE CLAIMANT PENALTIES, INCLUDING ATTORNEY'S FEES AND COSTS AGAINST THE DEFENDANT?
  
- II. SHOULD THE APPELLATE PANEL ORDER DENYING THE CLAIMANT PENALTIES, INCLUDING ATTORNEY'S FEES AND COSTS AGAINST THE DEFENDANT BE REVERSED ON THE GROUNDS THAT IT VIOLATED S.C. CODE §1-23-350 IN THAT IT LACKED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUFFICIENTLY DETAILED TO ENABLE THE REVIEWING COURT TO DETERMINE WHETHER THE FINDINGS WERE SUPPORTED BY THE RECORD AND WHETHER THE LAW HAS BEEN PROPERLY APPLIED?
  
- III. DID THE APPELLATE PANEL ERR AS A MATTER OF FACT AND CONCLUSION OF LAW IN ASSESSING HEARING COSTS TO BE PAID BY THE CLAIMANT'S ATTORNEY FOR A FRIVOLOUS APPEAL?
  
- IV. SHOULD THE APPELLATE PANEL ORDER ASSESSING HEARING COSTS TO BE PAID BY THE CLAIMANT'S ATTORNEY FOR A FRIVOLOUS APPEAL BE REVERSED ON THE GROUNDS THAT IT VIOLATED S.C. CODE §1-23-350 IN THAT IT LACKED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUFFICIENTLY DETAILED TO ENABLE THE REVIEWING COURT TO DETERMINE WHETHER THE FINDINGS WERE SUPPORTED BY THE RECORD AND WHETHER THE LAW HAS BEEN PROPERLY APPLIED?
  
- V. WAS THE APPELLATE PANEL ORDER ASSESSING HEARING COSTS AGAINST THE CLAIMANT'S ATTORNEY IN ERROR IN THAT IT VIOLATED S.C. CODE §1-23-320 AND DUE PROCESS IN THAT THE PANEL ISSUED A DECISION ON ASSESSING HEARING COSTS AGAINST CLAIMANT'S ATTORNEY WITHOUT NOTICE OR AN OPPORTUNITY FOR HEARING?

## **STATEMENT OF THE CASE**

### **FACTUAL BACKGROUND**

Claimant sustained an injury by accident to his low back, legs, neck, left shoulder and left hand on Friday, July 16, 2010, arising out of and in the course of his employment, while driving a vehicle on behalf of the Employer. Claimant lost control of the vehicle when the vehicle fish-tailed while coming around a curve, traveled toward a ditch on the opposite side of the road, and flipped over.

The Carrier admitted the accident, assigned Anthony Alexander, MD as the authorized treating physician, and commenced payment of temporary total disability benefits to the Claimant effective July 24, 2010.

On October 25, 2010, the Claimant saw Dr. Alexander who noted his injury of July 16, 2010 as well as his complaints of pain in his low back radiating down to the level of his knees at least two times a week with numbness and tingling in his left foot and frequent urination. (R. p. 285). Dr. Alexander reviewed an MRI of the Claimant's spine which was completed on September 10, 2010 that revealed, "moderate lower lumbar spine degenerative changes, diffuse posterior disc bulges at L4-5 and L5-S1 levels with hypertrophic changes resulting in moderate spinal canal narrowing at the L4-5 and L5-S1 levels". (R. p. 286). Dr. Alexander recommended electrodiagnostic study of the bilateral lower extremities and lumbosacral spine, ordered a cycle of physical therapy and placed the Claimant at restrictions of no lifting greater than twenty (20) pounds and no frequent bending at the waist. (R. p. 287).

The EMG/NCS examination of the Claimant's bilateral lower extremities and lumbar

spine was completed on December 6, 2010 with resulting impression of "lumbar radiculopathy and/or spinal stenosis at L5-S1 on the right". (R. p. 289).

The Claimant returned to Dr. Alexander on February 2, 2011 with complaints of severe lower back pain radiating down the right leg into his foot. (R. p. 296). Dr. Alexander scheduled a series of lumbar epidural steroid injections and prescribed anti-inflammatory medication and a "Carolina" brace. Dr. Alexander also continued the Claimant's physical therapy and work restrictions. (R. p. 297).

On February 11, 2011, the Claimant received the first of three epidural steroid injections. (R. p. 300).

On February 17, 2011, the Claimant was involved in a second motor vehicle accident in which the Claimant was a passenger in a vehicle that was stopped for traffic and a second vehicle rear-ended the Claimant's vehicle. (R. p. 375). The highway patrolman who responded estimated that the Claimant's vehicle was sitting still and that the other driver's vehicle was driving at an estimated speed of ten (10) miles per hour. (R. p. 375). The Claimant's low back pain increased slightly over the next few days after the second accident but then subsided back to where it was before the second accident.

Claimant's APA No. 10, (R. p. 378), contains photographs of the Claimant's vehicle taken shortly after the accident. These photos demonstrate the Claimant's vehicle sustained no damage with the exception of an approximately 1½" scuff mark in the proximity of the vehicle's left exhaust pipe. In fact, the other driver's insurance company, Farm Bureau, paid the Claimant a grand total of \$21.50 for buffing and polishing to remove the scuff mark from the rear bumper. (R. p. 399).

The Claimant reported to his family doctor after the second accident but was instructed to continue seeing Dr. Alexander. The Claimant returned to Dr. Alexander on February 22, 2011, five (5) days after the motor vehicle accident of February 17, 2011. The Claimant reported the second accident to Dr. Alexander and Dr. Alexander instructed him to continue with physical therapy and continue with the epidural steroid series that was currently underway. (R. p. 302).

Dr. Alexander continued the Claimant under the same restrictions and under his same course of treatment. On April 5, 2011, Dr. Alexander recommended that the Claimant consult with Dr. Rakesh Chokshi, the spine surgeon within his practice, to evaluate the Claimant for lumbar spinal stenosis. (R. p. 307). Dr. Alexander also requested a repeat MRI of the Claimant's lumbar spine as the present one was over six months old. (R. p. 308).

The Carrier refused to provide any further treatment since the second motor vehicle accident of February 17, 2011. (R. p. 314). This, in spite of the fact that when the second accident occurred, the Claimant was already under the care of Dr. Alexander for the admitted, compensable roll-over accident of July 16, 2010.

Further, before the second accident, the Claimant had already undergone an MRI of his lumbar spine on September 10, 2010, which Dr. Alexander previously reviewed, revealing disc bulges at L4-5 and L5-S1 levels resulting in moderate spinal canal narrowing, and had already undergone nerve conduction studies confirming L5-S1 radiculopathy. The Claimant was already under restrictions that did not change after the second accident, and was already involved in a cycle of physical therapy and receiving epidural steroid injections as a result of the first motor vehicle accident.

Nevertheless, the Carrier refused to provide treatment recommended by the authorized treating physician; citing the second motor vehicle accident of February 17, 2011, in spite of the fact that the only damage caused by the second accident was a 1½" scuff mark on the Claimant's rear bumper.

The Claimant filed a Form 50 Request for Hearing on May 19, 2011, seeking an Order requiring the Defendants to provide the lumbar MRI and surgical evaluation recommended by Dr. Alexander.

Claimant took Dr. Anthony Alexander's deposition on June 15, 2011, and asked:

- Q. Well, let me ask you your opinion, Doctor. Do you have an opinion to a reasonable degree of medical certainty as to whether that accident of February the 17<sup>th</sup> of 2011 most probably caused some exacerbation of Mr. McFadden's pain?
- A. Yes, I do.
- Q. And what is that opinion, Doctor?
- A. That the motor vehicle accident – I don't remember the date.
- Q. The second one?
- A. Yeah, the second motor vehicle accident did exacerbate the patient's pain slightly.
- Q. Okay. And do you have an opinion to a reasonable degree of medical certainty as to whether that slight exacerbation was a permanent one?
- A. Yes, I do.
- Q. And tell me your opinion as to that, Doctor?
- A. It was not a permanent exacerbation.
- Q. Okay. And, Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether Mr. McFadden has required treatment since that February 17<sup>th</sup>, 2011 accident that was necessary because of the July 16, 2010 accident?
- A. Yes, I do.
- Q. And tell me your opinion?

- A. I did not treat him any differently from my treatment plan that I had set up prior to the accident after the accident.
- Q. Okay. So do I understand your testimony correctly that your plan for treatment for Mr. McFadden didn't change at all as a result of the February 17<sup>th</sup> accident?
- A. That's correct.
- Q. Okay. Did his restrictions change at all because of the February 17<sup>th</sup> accident?
- A. No, sir.
- Q. All right. Did that intervening accident change his condition in any permanent way?
- A. Not permanently, it did not.
- Q. Okay. And the – do you recommend treatment as we sit here today for Mr. McFadden?
- A. I do.
- Q. Okay. And is that treatment that you recommend necessary because of the first accident, the July 16<sup>th</sup>, 2010, accident?
- A. My treatment recommendations – recommendations are because of the injuries sustained in the first motor vehicle accident. I didn't really treat him any differently or even provide any treatment for or even – yeah, I didn't provide any treatment for the second motor vehicle accident, 'cause he just wasn't that bad.  
(R. p. 102, line 19 - p. 104, line 20).

Dr. Alexander further testified that he recommended that the Claimant have an evaluation from one of the orthopaedic surgeons in his practice and that he undergo an MRI in preparation of that evaluation. (R. p. 106, lines 11-23). He further testified:

- Q. Doctor, what is your opinion to a reasonable degree of medical certainty as to whether that surgery consult and the repeat of the lumbar MRI is necessary as a result of the July 16<sup>th</sup>, 2010 rollover automobile accident?
- A. I think in light of the fact that he did not respond to conservative treatment and that he's possibly looking at surgical intervention an MRI, a repeat MRI of the lumbar spine is very reasonable and medically necessary.

Q. Okay. And you indicated that it is reasonably and medically necessary, do you have an opinion to a reasonable degree of medical certain [sic] as to whether it's necessary because of his injuries in this July the 16<sup>th</sup>, 2010 accident?

A. That's the first accident?

Q. Yes, sir.

A. Yes, my, my opinions are based on that accident.

(R. p. 106, line 24 - p. 107, line 17).

Thus, given Dr. Alexander's unequivocal testimony that the treatment he recommended was necessary from the compensable work accident, the Defendants shifted their position and argued instead that the Claimant's condition was not a result of the compensable and admitted accident but from a pre-existing condition. In support of this contention, defense counsel presented Dr. Alexander with a lumbar MRI which had been taken of Claimant's lumbar spine on March 20, 2008, over two (2) years before the admitted accident. Dr. Alexander testified that the prior MRI did not affect his opinion. In fact, he testified:

Q. And tell me your opinion to a reasonable degree of medical certainty as to whether this accident of July 16<sup>th</sup>, 2010 on the job in which his vehicle rolled over and hit a parked tractor aggravated that pre-existing condition?

A. I believe it did.

Q. Okay. Doctor, Counsel has showed you a prior MRI of his back from March the 20<sup>th</sup>, 2008. Is that consistent with your opinion that he had a pre-existing condition in his back prior to that rollover accident?

A. It is consistent.

Q. All right. And is it – is that MRI different from the MRI that was performed after his rollover accident on September, some date, 2010? Okay. Let's see if I can find that second MRI so I make sure–.

A. Here you go.

Q. Oh, sure. Okay. Are those two MRIs different, Doctor?

A. Yes, sir, they are.

Q. Tell me how?

A. The first MRI shows mild findings of bulging disc at L4-5 and L5/S1, and it doesn't show any spinal canal stenosis. It doesn't show a lot of degenerative changes of the lumbar spine on the 3/20/2008 MRI scan. But on the September 10, 2010 MRI scan, it shows that he has moderate spinal canal narrowing at the L4-5 and L5/S1 levels related to large diffuse posterior disc bulges with extension hypertrophic ligamentum flavum and facet joint reaction, which means he has a lot of degenerative changes that have occurred between the time of the first MRI scan that we discussed and the second MRI scan which would put him at high risk for having back problems if he suffered trauma.

Q. Doctor, are those reports consistent with your opinion that Mr. McFadden suffered an aggravation of his pre-existing condition in this work-related accident?

A. Yes. Yes, sir.

(R. p. 168, line 19 - p. 170, line 8).

In the intervening months, the Defendants did not approve the treatment recommended by their authorized treating physician in spite of his unequivocal testimony and instead went on a fishing expedition; issuing some 29 subpoenas to every physician, hospital, or insurance company that came to mind, including the Claimant's dentist, the relevance of which escapes comprehension. In spite of requests by the Claimant, the Defendants produced only two (2) of those 29 Subpoena responses prior to Claimant's APA submission deadline. In fact, by letter dated August 31, 2011, Claimant's counsel wrote the defense indicating:

... if there is some other basis in evidence for the carrier to continue to refuse medical treatment at the hands of Dr. Alexander, I would like to know it.

Please provide me your subpoena responses and direct me to any evidence in the record that supports the carrier's continued denial. Short of that, if I am forced to go forward at this hearing on October 4, 2011, I will have no alternative but to seek sanctions and attorney's fees, costs, and penalties for the carrier's refusal to provide Mr. McFadden treatment in this admitted case at the hands of his authorized treating physician.  
(08/31/11 letter from Claimant's counsel to defense counsel, R. pp. 466-468).

As of the date of the Claimant's pre-hearing brief filing of September 16, 2011, Claimant had yet to receive any response.

It is not surprising that the Defendants did not produce the responses received to their Subpoenas. The Defendants subpoenaed the records of the Claimant's family physician, Dr. Morris Brown who ordered the MRI of the Claimant's low back in March of 2008. They did not produce the response they received to that Subpoena so the Claimant requested Dr. Brown's records which reveal that, while the Claimant did complain of low back pain to Dr. Brown in March of 2008, and Dr. Brown did order a lumbar MRI, the Claimant saw Dr. Brown again on April 2, 2008 and Dr. Brown indicated "current symptoms: back pain: improved" and further indicated "A: low back pain resolved with normal activity tolerance... pt advised to resume normal activities. Work restrictions: none." (R. p. 423; see also, R. pp. 401-464).

Dr. Brown's records further reflect the fact that in the intervening years between that April 2, 2008 note and the instant accident of July 16, 2010, the Claimant made absolutely no further complaints of back pain whatsoever.

In sum, the defense refused the Claimant benefits in an accepted compensable accident. They did so in spite of having accepted the case and paid Claimant benefits for over a year. They elected to cease doing so because the Claimant was in an intervening automobile accident in which he was rear-ended by a vehicle traveling approximately 10 miles per hour and suffering only a 1½" scuff mark on his bumper. The Claimant's authorized treating physician testified that the intervening accident had no effect on the doctor's opinion that the Claimant required an MRI and surgical consultation because of the first accident. The Defendants then changed tactics, arguing for the first time in the year long history of the case that the Claimant's treatment was necessary, not because of the admitted accident, but because of a pre-existing condition; citing a lumbar MRI from two (2) years before the accident. When the physician indicated that the prior MRI did not change but, in fact, supported his opinion that the Claimant's back was injured in the compensable accident, the Defendants still did not authorize treatment but instead went on a fishing expedition issuing 29 subpoenas to every medical provider, including Claimant's dentist, and then failed to produce to the Claimant the responses they received.

#### **PROCEDURAL BACKGROUND**

For these reasons, the Claimant filed a Form 50 Request for Hearing, along with a Motion for Sanctions for the Defendants' denial of Claimant's claim for medical treatment without any reasonable belief that their defense was valid. The defense filed a Form 51 denying the requested treatment and also filed a cross-claim seeking costs, fines and sanctions.

The parties submitted their Pre-hearing Briefs and exchanged APA Submissions, and a hearing was scheduled on this matter before Commissioner Lyndon for October 20, 2011. Prior to the scheduled hearing date, the parties and the Commissioner had an extensive office conference on October 10, 2011 regarding the issues in dispute, during which the parties submitted their APA Submissions to the Single Commissioner. Upon his own Motion and without holding a formal hearing or addressing the merits of the case, the Single Commissioner made the following determination:

1. The Hearing scheduled for October 20, 2011, in Florence, South Carolina, is cancelled.
2. The defendants will schedule an appointment with Dr. Thomas J. Holbrook for a surgical evaluation and/or treatment for anything casually-related to the first motor vehicle accident (not the alleged intervening accident on February 17, 2011.)
3. The undersigned denies the request for costs, fines or sanctions filed by Claimant's counsel and the similar cross-claim filed by defense counsel in the Response.
4. This Order is appealable, to which the parties agree, as any other Order would be under the rules, and the parties did submit their APA Submissions for review to the undersigned.
5. The parties will take depositions or conduct other additional discovery rather than have live medical testimony at a Hearing.

(R. pp. 3-4).

Following that Order, the Claimant timely filed an appeal to the Workers' Compensation Commission Appellate Panel arguing that the Single Commissioner erred in failing to award penalties including attorney's fees and costs. The Defendants made no appeal.

The appeal was argued before the Appellate Panel of the Workers' Compensation Commission on March 19, 2012. Thereafter, the Appellate Panel issued its Order dated May 23, 2012, (R. pp. 5-9), in which they issued the following findings of fact:

1. The claimant's request for costs, fines, or sanctions to be imposed upon the defendants is denied.
2. The claimant is assessed Hearing costs in the amount of One Thousand Fourteen and 86/100 (\$1,014.86) Dollars for a frivolous appeal. The claimant's attorney, not the claimant, must pay the fine.

This appeal followed.

### ARGUMENT

#### **I. THE APPELLATE PANEL ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN FAILING TO AWARD THE CLAIMANT PENALTIES, INCLUDING ATTORNEY'S FEES AND COSTS AGAINST THE DEFENDANT.**

The Appellate Panel decision denying Claimant attorney's fees and costs was arbitrary, capricious, and contrary to the substantial evidence in the record. Claimant moved before the Single Commissioner pursuant to S.C. Code §15-36-10 seeking attorney's fees and costs pursuant to the Frivolous Procedures and Sanctions Act. §15-36-10 provides that the signature of an attorney on a pleading filed in an administrative action constitutes a certificate to the court that:

... a reasonable attorney in the same circumstances would believe that under the facts his claim or defense may be warranted under the existing law or, if his claim or defense is not warranted under the existing law, a good faith argument exists for the extension, modification, or reversal of existing law;

... a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of civil cause is not intended merely to harass or injure the other party; and

... a reasonable attorney under the same circumstances would believe his claim or defense is not frivolous, interposed for delay, or brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Code §15-36-10(A)(3)(b-d)(1976 as amended).

The statute goes on to provide for sanctions for filing of frivolous pleadings in violation of these certifications.

Claimant argued that the Defendants refused medical treatment recommended by the authorized treating physician in an admitted claim forcing Claimant to file a Form 50 Hearing Request to obtain said treatment. Claimant argued that the Employer and Carrier persisted in their defense and denial without any reasonable belief that their defense had any support in fact or law.

The defense pointed to the fact of the Claimant's involvement in an intervening car accident during the course of the claim as reasonable grounds for their defense in denying the treatment recommended by the authorized treating physician. The defense ignored the fact, however, that the deposition of the Claimant's authorized treating physician was taken in which he testified:

Q. Well, let me ask you your opinion, Doctor. Do you have an opinion to a reasonable degree of medical certainty as to whether that accident of February the 17<sup>th</sup> of 2011 most probably caused some exacerbation of Mr. McFadden's pain?

A. Yes, I do.

Q. And what is that opinion, Doctor?

- A. That the motor vehicle accident – I don't remember the date.
- Q. The second one?
- A. Yeah, the second motor vehicle accident did exacerbate the patient's pain slightly.
- Q. Okay. And do you have an opinion to a reasonable degree of medical certainty as to whether that slight exacerbation was a permanent one?
- A. Yes, I do.
- Q. And tell me your opinion as to that, Doctor?
- A. It was not a permanent exacerbation.
- Q. Okay. And, Doctor, do you have an opinion to a reasonable degree of medical certainty as to whether Mr. McFadden has required treatment since that February 17<sup>th</sup>, 2011 accident that was necessary because of the July 16, 2010 accident?
- A. Yes, I do.
- Q. And tell me your opinion?
- A. I did not treat him any differently from my treatment plan that I had set up prior to the accident after the accident.
- Q. Okay. So do I understand your testimony correctly that your plan for treatment for Mr. McFadden didn't change at all as a result of the February 17<sup>th</sup> accident?
- A. That's correct.
- Q. Okay. Did his restrictions change at all because of the February 17<sup>th</sup> accident?
- A. No, sir.
- Q. All right. Did that intervening accident change his condition in any permanent way?
- A. Not permanently, it did not.
- Q. Okay. And the – do you recommend treatment as we sit here today for Mr. McFadden?
- A. I do.
- Q. Okay. And is that treatment that you recommend necessary because of the first accident, the July 16<sup>th</sup>, 2010, accident?
- A. My treatment recommendations – recommendations are because of the injuries sustained in the first motor vehicle accident. I didn't really treat him any differently or even provide any treatment for or even

– yeah, I didn't provide any treatment for the second motor vehicle accident, 'cause he just wasn't that bad.  
(R. p. 102, line 19 - p. 104, line 20).

Dr. Alexander further testified that he recommended that the Claimant have an evaluation from one of the orthopaedic surgeons in his practice and that he undergo an MRI in preparation of that evaluation. (R. p. 106, lines 11-23). He further testified:

Q. Doctor, what is your opinion to a reasonable degree of medical certainty as to whether that surgery consult and the repeat of the lumbar MRI is necessary as a result of the July 16<sup>th</sup>, 2010 rollover automobile accident?

A. I think in light of the fact that he did not respond to conservative treatment and that he's possibly looking at surgical intervention an MRI, a repeat MRI of the lumbar spine is very reasonable and medically necessary.

Q. Okay. And you indicated that it is reasonably and medically necessary, do you have an opinion to a reasonable degree of medical certain [sic] as to whether it's necessary because of his injuries in this July the 16<sup>th</sup>, 2010 accident?

A. That's the first accident?

Q. Yes, sir.

A. Yes, my, my opinions are based on that accident.

(R. p. 106, line 24 - p. 107, line 17).

Further, the defense ignored the fact that even after the Briefs were submitted in anticipation of the October 4, 2011 hearing, and the APA Submissions were exchanged, and presented to the Single Commissioner on October 10, 2011, the Defendants offered no evidence whatsoever contradictory to the testimony of Dr. Alexander.

Nevertheless, the Single Commissioner denied Claimant's motion for costs. The Appellate Panel affirmed the denial of Claimant's Motion for costs and sua sponte, and without notice of hearing, awarded costs against Claimant's counsel.

That decision was unsupported by any evidence, much less substantial evidence. This Court is left to speculate as to the logic of the Commission as both the decisions of the Single Commissioner and the Panel denying attorney's fees and costs made no findings of fact whatsoever, much less findings sufficient to allow this Court to review their decision. Instead, both tribunals simply held that the Claimant's requests for costs, fines and sanctions against the Defendants were denied.

**II. THE APPELLATE PANEL ORDER DENYING THE CLAIMANT PENALTIES, INCLUDING ATTORNEY'S FEES AND COSTS AGAINST THE DEFENDANT SHOULD BE REVERSED ON THE GROUNDS THAT IT VIOLATED S.C. CODE §1-23-350 IN THAT IT LACKED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUFFICIENTLY DETAILED TO ENABLE THE REVIEWING COURT TO DETERMINE WHETHER THE FINDINGS WERE SUPPORTED BY THE RECORD AND WHETHER THE LAW HAS BEEN PROPERLY APPLIED.**

The Administrative Procedures Act (APA) was enacted by the Legislature largely to ensure due process in the decisions of the Administrative agencies of State government.

Among the due process protections created by the Administrative Procedures Act is the requirement that final decisions be made by Administrative hearings officers, (or Commissioners in the Workers' Compensation context):

... in writing or stated in the record. A final decision shall 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.  
S.C. Code §1-23-350 (1976 as amended).

Of course, this requirement is intended to protect parties from arbitrary and capricious decisions by administrative bodies by requiring agencies to make findings of fact and conclusions of law that are “sufficiently detailed to enable a reviewing court to determine whether the findings are supported by the evidence in the record and whether the law has been applied properly to those findings.” See Grant v. Grant, 372 S.C. 196 (S.C. 2007); see also, Kiawah Property Owners Group v. The Public Service Commission of SC, 338 S.C. 92 (S.C. 1999).

The Single Commissioner found:

3. The undersigned denies the request for costs, fines or sanctions filed by Claimant’s counsel and the similar cross-claim filed by defense counsel in the Response.  
(R. p. 4).

The Appellate Panel Findings of Fact set out in full are as follows:

1. The claimant’s request for costs, fines, or sanctions to be imposed upon the defendants is denied.
2. The claimant is assessed Hearing costs in the amount of One Thousand Fourteen and 86/100 (\$1,014.86) Dollars for a frivolous appeal. The claimant’s attorney, not the claimant, must pay the fine.  
(R. p. 8).

Neither made any evidentiary findings at all as to the elements of Claimant’s motion. They certainly provided this Court with no detail whatsoever in order to enable this Court to determine whether the findings of the Commission were supported by the evidence of the record or whether the law was properly applied.

Claimant’s counsel appealed the summary ruling by the Single Commissioner; whereupon, the Panel not only summarily affirmed, without providing any more specific

evidentiary or legal findings, but the Panel went on to summarily, and sua sponte sanction the Claimant's counsel for seeking a review of the Single Commissioner's summary denial.

**III. THE APPELLATE PANEL ERRED AS A MATTER OF FACT AND CONCLUSION OF LAW IN ASSESSING HEARING COSTS TO BE PAID BY THE CLAIMANT'S ATTORNEY FOR A FRIVOLOUS APPEAL.**

As described above, the Single Commissioner denied the Claimant's request for sanctions against the Defendants contrary to the uncontradicted testimony of the Claimant's authorized treating physician and without reciting any evidence whatsoever in support of the Single Commissioner's decision.

Claimant's counsel appealed that decision to the Appellate Panel which also summarily denied Claimant's request for sanctions against the Defendants, also without citing any supporting evidence whatsoever; and, moreover, the Panel sanctioned Claimant's counsel for appealing the summary decision of the Single Commissioner.

Both the decisions of the Single Commissioner and the Appellate Panel were contrary to the substantial evidence of the record which contained the uncontradicted testimony of the authorized treating physician was that the treatment recommended was necessary and related to the accident. Nevertheless, even if this Court were to agree with the Appellate Panel that the substantial evidence supported their decision to deny the Claimant's Motion for sanctions against the Defendants, this Court would still be left with the fact that the Single Commissioner's decision and, indeed, the Appellate Panel's decision, to deny Claimant's Motion for sanctions were in direct violation of S.C. Code §1-23-350 in that their denial was not accompanied by a concise and explicit statement of the underlying facts supporting the

denial. That error alone was sufficient to justify Claimant's counsel's appeal of the Single Commissioner's denial of his motion.

**IV. THE APPELLATE PANEL ORDER ASSESSING HEARING COSTS TO BE PAID BY THE CLAIMANT'S ATTORNEY FOR A FRIVOLOUS APPEAL SHOULD BE REVERSED ON THE GROUNDS THAT IT VIOLATED S.C. CODE §1-23-350 IN THAT IT LACKED FINDINGS OF FACT AND CONCLUSIONS OF LAW SUFFICIENTLY DETAILED TO ENABLE THE REVIEWING COURT TO DETERMINE WHETHER THE FINDINGS WERE SUPPORTED BY THE RECORD AND WHETHER THE LAW HAS BEEN PROPERLY APPLIED.**

As with the Single Commissioner's and Appellate Panel's denial of the Claimant's Motion for sanctions against Defendants, the Appellate Panel summarily sanctioned Claimant's attorney for frivolous appeal. The Appellate Panel's entire finding of fact in support of that decision is as follows:

2. The claimant is assessed Hearing costs in the amount of One Thousand Fourteen and 86/100 (\$1,014.86) Dollars for a frivolous appeal. The claimant's attorney, not the claimant, must pay the fine.

(R. p. 8).

Once again, the Appellate Panel did not set out any statement, much less a concise and explicit statement, of the underlying evidence supporting their findings. The Panel's decision left this Court nothing to review in order to determine whether the Commissioner's decision was supported by the evidence of the record or whether the law was properly applied. Moreover, this summary decision by the Court to sanction Claimant's counsel

further violated due process in that it was made without any notice or opportunity for hearing whatsoever.

**V. THE APPELLATE PANEL ORDER ASSESSING HEARING COSTS AGAINST THE CLAIMANT'S ATTORNEY WAS IN ERROR IN THAT IT VIOLATED S.C. CODE §1-23-320 AND DUE PROCESS IN THAT THE PANEL ISSUED A DECISION ON ASSESSING HEARING COSTS AGAINST CLAIMANT'S ATTORNEY WITHOUT NOTICE OR AN OPPORTUNITY FOR HEARING.**

The South Carolina Constitution provides that in procedures before administrative agencies: "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard ..." S.C. Const. Art. I, §22 (2009 & Supp. 2011).

Procedural due process requirements are not technical; no particular form of procedure is necessary. The United States Supreme Court has held, however, that at a minimum certain elements must be present. These include (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses.

In re Dickey, 395 S.C. 336, 360, 718 S.E.2d 739, 751(2011) (quoting In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)).

The Administrative Procedures Act (APA) requires that, in a contested case, all parties must be afforded the opportunity for a hearing. S.C. Code Ann. §1-23-320(A)(2005 & Supp. 2011). In particular, S.C. Code §1-23-320(I) provides: "(I) Findings of fact must be based exclusively on the evidence and on matters officially noticed."

The Appellate Panel gave Claimant's counsel no such notice or opportunity for hearing and left Claimant's counsel with the summary finding that "The claimant is assessed Hearing costs in the amount of One Thousand Fourteen and 86/100 (\$1,014.86) Dollars for a frivolous appeal. The claimant's attorney, not the claimant, must pay the fine." (R. pp. 5-9).

### CONCLUSION

This is an admitted Workers' Compensation accident with an authorized treating physician. The Defendants refused to provide treatment, (MRI and surgical consultation), recommended by the Claimant's authorized treating physician, in spite of having accepted the claim and paying benefits for over a year. They elected to do so because the Claimant was in an intervening automobile accident in which he was rear-ended by a vehicle traveling at a speed of 10 miles per hour and suffering a 1½" scuff mark on his bumper. They persisted in their refusal in spite of the fact that the authorized treating physician testified that the intervening accident had no effect on the doctor's opinion that the Claimant required an MRI and surgical consultation because of the admitted accident.

The Defendants then changed tactics, arguing for the first time in the year long history of the case that the Claimant's treatment was necessary, not because of the admitted accident, but because of a pre-existing condition, citing a lumbar MRI from (2) years prior to the accident. When the authorized treating physician testified that the prior MRI did not change but, in fact supported his opinion, the Defendants still did not authorize treatment and they continued their defense without any reasonable belief that the defense had any support in fact or law.

When the matter was set for hearing before the Workers' Compensation Commission the Single Commissioner, on his own motion and without conducting the formal hearing, received and reviewed the parties' APA Submissions, and ordered the Defendants to provide the requested referral to a neurosurgeon for a surgical evaluation.

The Single Commissioner also summarily denied Claimant's motion for costs, fines, or sanctions which Claimant made on the grounds that the Employer had defended their denial of treatment without any reasonable belief that the Defendants had any support in fact or in law.

The Single Commissioner also denied the Defendants' cross-motion for costs. This decision was made by the Single Commissioner after the parties had submitted briefs for a hearing, provided their APA Submissions, and were ready for trial.

The Defendants did not appeal this decision, nor did they appeal the Single Commissioner's denial of the cross-claim which defense counsel had made for fines, sanctions and costs against the Claimant.

The Single Commissioner's summary decision to deny Claimant's Motion for costs without any statement of the underlying facts supporting his decision was contrary to §1-23-350, and contrary to the substantial evidence in the record.

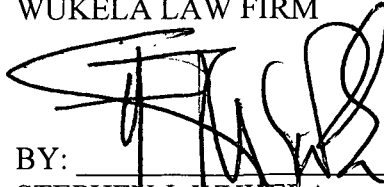
Claimant's counsel appealed the Single Commissioner's decision to the Workers' Compensation Commission Appellate Panel, whereupon the Appellate Panel affirmed, issuing its own summary denial of Claimant's motion, also in violation of §1-23-350. Also, without notice or opportunity for hearing, the Commission awarded costs against Claimant's counsel, also without any statement of evidence or legal findings supporting their decision.

Based on the foregoing, the decisions of the Workers' Compensation Appellate Panel  
should be reversed.

Respectfully submitted,

October 29<sup>th</sup>, 2012

WUKELA LAW FIRM



BY: \_\_\_\_\_  
STEPHEN J. WUKELA  
ATTORNEY FOR CLAIMANT/RESPONDENT  
PO BOX 13057  
FLORENCE SC 29504  
843-669-5634

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

---

---

WCC File No. 1009259

---

Jeffery L. McFadden, ..... Appellant,

vs.

City of Lake City and South Carolina Municipal  
Insurance Trust, ..... Respondents.

---

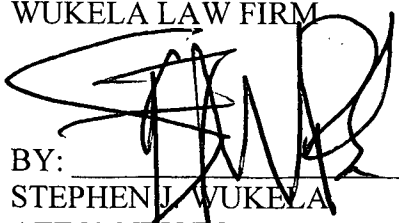
**CERTIFICATE OF COMPLIANCE**

---

The undersigned certifies that the Appellant's Final Brief complies with the Supreme Court Order of August 13, 2007, in that there are no personal data identifiers included in the Appellant's Final Brief, or they have been redacted where necessary.

October 24<sup>th</sup>, 2012

WUKELA LAW FIRM

  
BY: \_\_\_\_\_  
STEPHEN J. WUKELA  
ATTORNEY FOR APPELLANT  
WUKELA LAW FIRM  
PO BOX 13057  
FLORENCE SC 29504  
843-669-5634

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

---

---

WCC File No. 1009259

---

Jeffery L. McFadden, ..... Appellant,

vs.

City of Lake City and South Carolina Municipal  
Insurance Trust, ..... Respondents.

---

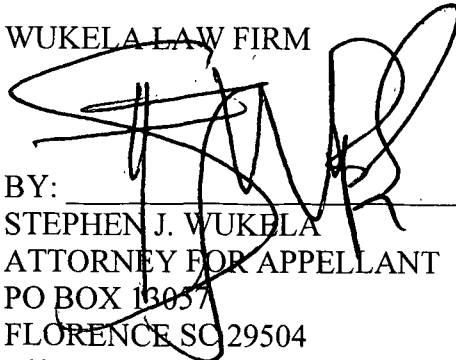
**CERTIFICATE OF COUNSEL**

---

The undersigned certifies that this Final Brief complies with Rule 211(b),  
SCACR.

October 29<sup>th</sup>, 2012

WUKELA LAW FIRM

  
BY: \_\_\_\_\_  
STEPHEN J. WUKELA  
ATTORNEY FOR APPELLANT  
PO BOX 13057  
FLORENCE SC 29504  
843-669-5634

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

WCC File No. 1009259

**RECEIVED**  
OCT 31 2012  
SC Court of Appeals

Jeffery L. McFadden, ..... Appellant,

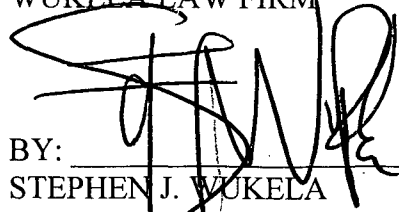
vs.

City of Lake City and South Carolina Municipal  
Insurance Trust, ..... Respondents.

**PROOF OF SERVICE**

I certify that the Appellant's Final Brief was served on Respondents, by hand-delivery, on October 31, 2012, addressed to their attorney of record, Grady L. Beard, at his office at 1310 Gadsden Street, Columbia, SC, 29211.

WUKELA LAW FIRM



BY: \_\_\_\_\_  
STEPHEN J. WUKELA  
ATTORNEY FOR APPELLANT  
PO/BOX 13057  
FLORENCE SC 29504  
843-669-5634