

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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

**Gene McCaskill, Commissioner  
Avery B. Wilkerson, Jr., Commissioner  
R. Michael Campbell, II, Commissioner**

**W.C.C. FILE NO.: 1215681**

**APPELLATE CASE NO.: 2018-000359**

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**Vickie Rummage, Employee, .....Appellant,**

**vs.**

**BGF Industries, Employer, and Great American Alliance Insurance Co., Carrier,  
.....Respondents.**

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**APPELLANT'S REPLY BRIEF**

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OCT 04 2018  
SC Court of Appeals**

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October 4, 2018  
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## ARGUMENT

### I. THE ISSUE RELATIVE TO THE LACK OF LEGALLY COMPETENT EVIDENCE SUPPORTING THE SINGLE COMMISSIONER'S RULING WAS UNQUESTIONABLY RAISED TO AND RULED ON BY THE APPELLATE PANEL/COMMISSION.

Recognizing the fact Dr. Gualtieri's report, while admissible, does not satisfy the requirements of S.C. Code Ann. Section 42-9-35 (2015), Respondents have again attempted to avoid an adjudication on the merits through assertion of a purported procedural flaw. However, inspection of the Appellate Panel's/Commission's February 1, 2018 Order clearly establishes this conclusively dispositive issue is properly before the Court.

After challenging the single commissioner's ruling on numerous grounds, including its utilization of an "unlawful adjudication procedure", hinging on "a legally impermissible medical opinion" and failure to recognize the only reasonable inference arising from the hearing record established Ms. Rummage's compliance with the provisions of S.C. Code Ann. Section 42-9-35 (2015), she file a June 15, 2017 memorandum reiterating these points, particularly the absence of "competent evidence which supports the fact finder's determination [she] . . . did not meet her [statutory] . . . burden of proof . . ."

Additionally, as confirmed by the September 18, 2017 "Full Commission Hearing" transcript, she: (a) reminded that Section 42-9-35 mandated the use of medical evidence in establishing a compensable aggravation; (b) noted evidence stated to a reasonable degree of medical certainty was required to not only establish causative aggravation, but also rebut legally appropriate proof of compliance with this statute per the Supreme Court's ruling in Michau v. Georgetown County, 396 S.C. 589, 723 S.E. 2d 805 (2012); and (c) the absence of "competent evidence to support . . . [the single commissioner's] decision." (See, Record on Appeal, pp. \_\_).

These contentions prompted an Appellate Panel member to inquire as to whether Dr. Gualtieri's opinions were stated to a reasonable degree of medical certainty. (See, Record on

Appeal, p. \_\_). Respondents' counsel then acknowledged, "I don't believe he actually used those - - that terminology in there" (i.e. the reports confirming this physician's generation of opinions **several months prior to actually evaluating Ms. Rummage**). (See, Record on Appeal, p. \_\_).

When Respondents attempted to limit the nature/scope of Ms. Rummage's appeal through submission of a proposed order that excluded several assertions of error, the undersigned requested revision of this document to reflect all issues which were properly raised to and ruled upon by the Panel. After considering the parties' respective positions, the Panel acknowledged:

... Additionally, Appellant: [a] relying on the decision in Michau v. Georgetown County, 396 S.C. 589, 723 S.E. 2d 805 (2012), contend the provisions of § 42-9-35, S.C. Code Ann. not only require medical evidence to prove the aggravation of a preexisting condition, but also to rebut any medical evidence supporting this contention; (b) maintains the record contains no competent evidence which supports the Hearing Commissioner's ruling that she did not meet her burden of proof, as there's no contrary medical evidence that satisfies the requirements of § 42-9-35, as Defendants'/Respondent's expert did not offer any opinions to a reasonable degree of medical certainty; (c) argues the Hearing Commissioner's adverse credibility findings alone are insufficient to rebut the multiple medical opinions confirming the aggravation of her preexisting psychological condition by the consequences of her compensable injury; and (d) claims the denial of her request for treatment resulted from an arbitrary decision-making process to which a medical question was determined through the Hearing Commissioner's rendering expert opinion. (See, Record on Appeal, pp. \_\_) (Emphasis added).

"[I]ssues raised [to] and ruled on by the commission are cognizable on appeal". Stone v. Roadway Express, 367 S.C. 575, 627 S.E. 2d 695, 698 (2006); Levi v. Northern Anderson County EMS, 409 S.C. 374, 762 S.E. 2d 44, 47 (Ct. App. 2014). As confirmed by the Appellate Panel/Commission, Ms. Rummage raised and it ruled on all issues which are the subject of the

current appeal, including: (a) the fact Dr. Gualtieri's report, while admissible, did not constitute competent evidence upon which to premise a denial of Ms. Rummage's aggravation claim due to non-compliance with the requirements of Section 42-9-35; (b) the absence of any competent evidence to rebut the numerous medical opinions (offered to a reasonable degree of medical certainty) verifying the causal aggravation of Ms. Rummage's preexisting psychological condition; (c) the legislatively mandated need for medical evidence in this context; and (d) the inadequacy/impropriety of an order premised upon "the medical opinion of the single commissioner, adopted by the Commission." Burnette v. City of Greenville, 401 S.C. 417, 737 S.E. 2d 200, 206 (Ct. App. 2012).

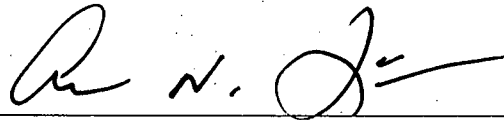
Frankly, if Respondents believed the Appellate Panel's/Commission's ruling on the scope of the appeal was erroneous, it would appear they were not only entitled, but obliged, to seek reconsideration per S.C. Code Ann. Section 1-23-380 (1) (Supp. 2017). Their failure to do so should operate as a waiver of any right to raise the issue at this stage.

Further, assuming arguendo, the Appellate Panel/Commission had not explicitly confirmed its consideration and determination of these issues, resolution of their merits is certainly warranted, as: (a) this "Court is concerned with the substance of an appeal, not technical differences in the issues raised by the exceptions." Bartles v. Livingston, 282 S.C. 448, 319 S.E. 2d 707, 717 (Ct. App. 1984); (b) "substance will generally take precedence over technical rules in considering exceptions." Brock v. Board of Adjustment and Appeals of the City of Rock Hill, 308 S.C. 539, 419 S.E. 2d 773, 776 (1992); (c) "a party is not required to use the exact name of a legal doctrine in order to preserve the issue." Herron v. Century BMW, 395 S.C. 461, 719 S.E. 2d 640, 642 (2011); (d) "appellate courts should remain 'mindful of the need

to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner””. Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control, 423 S.C. 50, 813 S.E. 2d 719, 721 (2018); and (e) the absence of statutory compliance is dispositive. See, Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E. 2d 145, 149-150 (Ct. App. 2016).

Accordingly, Ms. Rummage respectfully requests the Court to reverse the Appellate Panel’s/Commission’s ruling and remand this matter for the sole purpose of providing her with treatment for her aggravated psychological condition in accordance with the competent medical evidence of record.

Respectfully submitted,



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Attorney for Appellant

October 4, 2018  
Columbia, South Carolina

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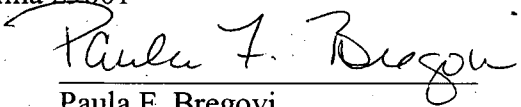
CERTIFICATE OF SERVICE

Paula F. Bregovi, being first duly sworn, says that she is a paralegal for the firm of Andrew N. Safran, LLC, Attorney at Law, with offices at Columbia, South Carolina, that on the 4<sup>th</sup> day of October, 2018, she served the foregoing Claimant's Reply Brief and Amended Designation of Matter in the following fashion:

To:

VIA FIRST CLASS MAIL

Michael A. Farry, Esquire  
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October 4, 2018

**HAND DELIVERED**

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

RE: Vickie Rummage v. BGF Industries and  
Great American Alliance Insurance Co./Strategic Comp.  
Appellate Case No.: 2018-000359

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Dear Ms. Kitchings:

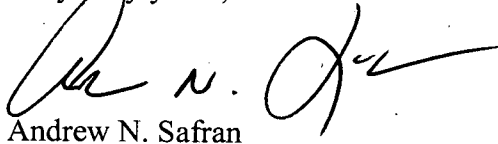
Enclosed please find an original and one copy of Appellant's Reply Brief and Amended Designation of Matter to be Included in the Record of Appeal relative to the above-captioned case. At this time, I would appreciate your filing these documents and returning one clocked copy to my courier.

By copy of this letter, I am serving a copy of these documents on Mike Farry, attorney for Respondents. 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: Michael A. Farry, Esquire