THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellant Panel of the Full Commission

WCC Number: 1413546
Appellate Case No.: 2018-002283

Timothy A. McDuffie, Employee, ... Respondent,

v.

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

RETURN TO RESPONDENT'S MOTION TO DISMISS APPEAL

Appellants, Johnson Food Services, LLC, and Great American Alliance Insurance Co./Strategic Comp. request that Respondent's Motion to Dismiss Appeal be denied. In support, Appellants state as follows:

PROCEDURAL HISTORY

The Respondent sustained a compensable injury to his back on or about September 19, 2014 when he tripped over an exposed pipe. On June 12, 2015, the Respondent filed a Form 50, hearing request, alleging an additional injury to his left leg and entitlement to further medical

treatment for his left leg and back conditions. Accordingly, on July 10, 2015, the Appellants filed a Form 51, denying the Respondent's need for additional medical care and treatment.

On October 29, 2015, a hearing was held before Commissioner Aisha Taylor (hereinafter "Single Commissioner") to determine the issues as outlined in the parties' pleadings, among other things. The Single Commissioner considered testimony from the Respondent and several medical providers and reviewed the medical evidence submitted by the respective parties.

Following the hearing, the Single Commissioner issued a Decision and Order, dated May 16, 2016, whereby she found, in relevant part:

> (1) Defendants "accept financial responsibility for treatment of Mr. McDuffie's lumbar facet syndrome through ***an appropriate specialist of its choosing***, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident" [emphasis added];
>
> (2) Treatment of the left knee injury component would be provided by Dr. Christopher Mazoue; [and]
>
> (3) The Claimant is entitled to treatment for the compensable back injury component, including, but not limited to, the lumbar facet/medial branch blocks identified by these physicians.

Pursuant to the Single Commissioner's Order, the Appellants acknowledged the compensability of Respondent's back injury and subsequently authorized medical treatment with several providers, including Drs. Michael W. Peele of Moore Orthopaedics and Stewart Young of First Care.

On June 1, 2016, Appellants filed a Form 30, Request for Commission Review, appealing the May 16, 2016 Order of the Single Commissioner upon several grounds, including, in pertinent part, ***the Single Commissioner's error in appointing Dr. Mazoue as the authorized treating physician given the Appellants' right to direct medical care and treatment pursuant to Section 42-15-60(a) of the South Carolina Code of Laws.***

A hearing was held before the Full Commission Appellate Panel on August 16, 2016. By Order, dated October 12, 2016, the Appellate Panel affirmed the Single Commissioner's factual findings and conclusions of law and ordered the Appellants, in relevant part, to:

> (a) Accept financial responsibility for all medical modalities previously provided/prescribed by any authorized healthcare specialists, as well as for the charges stemming from Dr. Mazoue's June 10, 2015 evaluation;
>
> (b) Authorized the additional causally related medical treatment, medications, evaluations, diagnostic testing, evaluative procedures, physical therapy, surgical procedures, etc. provided/prescribed by Dr. Mazoue, who is hereby designated as Mr. McDuffie's treating physician relative to the left knee injury component for the purposes of this claim;
>
> (c) Accept financial responsibility for treatment of Mr. McDuffie's lumbar posttraumatic facet syndrome through an appropriate specialist of its choosing, who shall provide treatment for this condition as a causally related result of Mr. McDuffie's compensable accident; [and]
>
> (d) Provide treatment for the compensable back injury component including, but not limited to the lumbar facet/medial branch block injections identified by physicians.

Pursuant to the Appellate Panel's October 12, 2016 Order, Appellants arranged for Nurse Case Manager, Michelle Estep, to schedule an appointment for Respondent with Dr. Karl Lozanne, neurosurgeon, of Midlands Orthopaedic and Neurosurgery. Respondent's counsel was notified via e-mail correspondence on January 2, 2018 of the Respondent's January 12, 2018 evaluation with Dr. Lozanne.

Thereafter, Respondent's counsel refused to allow the Respondent to attend the appointment with Dr. Lozanne, and by Motion dated January 11, 2018, sought to quash Appellants' directive of medical care for Respondent's back injury with Dr. Lozanne. Respondent's counsel further requested designation of Dr. J. Kelby Hutcheson, a pain management physician, as the authorized treating physician. Specifically, Respondent's counsel contended the

Appellants had been instructed to provide specific treatment, including injections, but that Dr. Lozanne refused to perform the injections as he was a neurosurgeon. Respondent's counsel failed to recognize that Dr. Lozanne's practice is one of the most comprehensive practices in the State and even if Dr. Lozanne could not personally administer the injections, one of his partners could certainly do so.

On January 22, 2018, Appellants responded to Respondent's Motion to Quash and maintained that the appointment with Dr. Lozanne was scheduled for evaluation and current recommendations for treatment in furtherance of the directives of the Appellate Panel and pursuant to the October 12, 2016 Order. Moreover, Appellants asked for the Commission to compel Respondent's attendance to the evaluation with Dr. Lozanne, so that the Respondent's current medical condition could be assessed and a determination could be made for what additional medical care and treatment is needed. Furthermore, Appellants contended that the evaluation with Dr. Lozanne was not inconsistent with the Appellate Panel's Order nor was it an attempt to circumvent obligations, as Respondent's counsel insinuated, but rather was an effort to fulfill certain responsibilities under the rulings prescribed by the October 12, 2016 Order.

A hearing on the motions was held on February 6, 2018 in Columbia, South Carolina before Commissioner Avery Wilkerson, Jr. (hereinafter "Hearing Commissioner"). Although the hearing was not placed on the record, upon information and belief, the Hearing Commissioner received oral argument from both parties and reviewed the relevant portions of the Commission's claim file.

By Order, dated March 13, 2018, the Hearing Commissioner granted Respondent's Motion to Quash and, furthermore, as requested by Respondent's counsel, designated Dr. J. Kelby

Hutcheson of Carolinas Center for the Advanced Management of Pain as the Respondent's treating physician.

On March 27, 2018, Appellants filed a Form 30, Request for Commission Review. On June 18, 2018, the matter was heard before the Appellate Panel of the South Carolina Workers' Compensation Commission and a Decision and Order was issued on November 27, 2018. Upon the decision of the Appellate Panel, the Appellants timely filed their Notice of Appeal with the South Carolina Court of Appeals on December 27, 2018 and submitted their Initial Brief to this Court on February 22, 2019.

ARGUMENT

In the matter before this Court, the Respondent contends that an agency decision that does not decide the merits of a contested case is not a final agency decision subject to judicial review. As contemplated by South Carolina jurisprudence, workers' compensation claims often require multiple hearings to determine issues and entitlement to certain benefits, such as compensability, temporary disability, permanent disability, and the direction of medical treatment, which is the issue at the forefront of the instant case. The South Carolina Supreme Court has recognized that "workers' compensation benefits accrue along a time continuum." Curiel v. Env. Management Services, 376 S.C. 23, 655 S.E.2d 482 (2007). Because of the nature of the benefits available and the potential for protracted litigation, defining a final judgment as requiring the disposal of the whole action impermissibly requires a deprivation of certain due process rights and, furthermore, deprives Appellants of a reasonably timely appeal.

When Appellants are required to provide medical treatment until all issues are finally decided by the fact finder, there exists an impermissible infringement of fundamental rights as guaranteed by the South Carolina Constitution – the right to access to the courts. Article I, Section

9 of the South Carolina Constitution provides that "[a]ll courts shall be public, and every person shall have speedy remedy therein for wrongs sustained."

In effect, in this case, all of the decisions of the South Carolina Workers' Compensation Commission order the Appellants to provide medical treatment and direct care for the Respondent's compensable injuries. If the Order of the Appellate Panel is not appealable, then the scheme offends due process. Specifically, Article I, Section 22 of the South Carolina Constitute provides certain rights regarding procedures before administrative bodies:

> 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; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he **shall have in all such instances the right to judicial review.**

[emphasis added]

As mentioned above, judicial review of a workers' compensation proceeding is a constitutional right in South Carolina, and the rights provided under Article I, Section 22 extend to the limits of due process:

> [W]hen discussing Article I, Section 22, we have consistently indicated that the protections provided under this section are the equivalent of those afforded by the Due Process Clause of our state and federal Constitutions.

S.C. Coastal Conservation League v. S.C. Dep't. of Health and Environmental Control, 380 S.C. 349, 669 S.E.2d 899 (Ct. App. 2008).

Due process necessarily includes the right to meaningful judicial review and while no South Carolina case has clearly defined what particular process is required for "meaningful" judicial review, several cases suggest that "meaningful" review considers the *temporal* nature of due process. "The fundamental requirement of due process is the opportunity to be heard 'at a

meaningful time and in a meaningful manner.'" South Carolina Nat. Bank v. Central Carolina Livestock Market, Inc., 345 S.E.2d 485, 289 S.C. 309 (S.C., 1985) (citing Armstrong v. Manzo, 380 U.S. 545 (1965)). In fact, in Armstrong, the Supreme Court of the United States noted that "[a] fundamental requirement of due process is 'the opportunity to be heard.' It is an opportunity which must be granted at a meaningful time and in a meaningful manner." Armstrong, 380 U.S. at 552 (internal citations omitted). In addition, this "temporal requirement" is reflected in Section 1-23-380: "A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable ***if review of the final agency decision would not provide an adequate remedy"*** [emphasis added]. S.C. Code Ann. 1-23-380.

Here, in its November 27, 2018 Order, the Appellate Panel ordered the Appellants to direct the Claimant for medical treatment with Dr. J. Kelby Hutcheson, the physician hand-selected by Respondent's counsel. Therefore, if the Appellate Panel Order stands as-is, Appellants shall be responsible for the continuation of care of the Respondent for an unknown period of time into the future with a provider solely chosen by Respondent's counsel. Such a decision deprives the Appellants of due process and certain rights afforded by the South Carolina Constitution and the Workers' Compensation Act. More specifically, the Workers' Compensation Act provides that the employer retains the right to name the authorized treating physician once a case has been accepted. Clark v. Aiken County of Gov't, 366 S.C. 102, 113, 620 S.E.2d 99, 104 (Ct. App. 2005). Furthermore, S.C. Code Ann. Reg. 67-509 provides, "[t]he employer's representative chooses an authorized health care provider and pays for authorized treatment." By order of the Commission, the Respondent's injuries were accepted as compensable and, as a result, the Appellants retained the right to name the authorized treating physician. However, upon the November 27, 2018 Order of the Appellate Panel, this right has since been diluted.

By depriving the Appellants of their right to direct medical care and treatment, the Appellants maintain the position that the Appellate Panel committed an error of law, and "[a]n appellate court can reverse or modify the Commission's decision if it is affected by an error of law or clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record. Fishburne v. ATI Systems Intern., 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009) (citing S.C. Code Ann. §1-23-380). Accordingly, the only adequate remedy Appellants have to challenge the Appellate Panel's Decision and Order is to appeal the case to this Court. Failure to allow such appeal would be a clear violation of Appellants' due process rights.

CONCLUSION

FOR THE FOREGOING REASONS, Appellants respectfully request this Court issue an Order denying Respondent's Motion to Dismiss the Appeal.

BY: _____

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Attorney for Appellants

Date: April 5, 2019

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PROOF OF SERVICE

I certify that I have served the Return to Respondent's Motion to Dismiss on Timothy McDuffie by depositing a copy of it in the United States Mail, postage prepaid, on April 5, 2019, addressed to his attorney of record, Andrew Safran, P.O. Box 12089, Columbia, South Carolina 29211.

April 5, 2019

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April 5, 2019

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Timothy A. McDuffie, Employee, Respondent v. Johnson Food Services, LLC, Employer, and Great American Alliance Insurance Co./Strategic Comp., Carrier, Appellants.
Appellate Case No. 2018-002283
WCC File No.: 1413546 DOI: 9/20/2014
Carrier: Great American Alliance Insurance Company - Claim No.: 564615078
WJC&B File No.: 0285.00489

Dear Honorable Kitchings:

Enclosed for filing is a Return to Respondent's Motion to Dismiss in the above case. Also enclosed are the following:

(1) Proof of Service of the Return to Respondent's Motion to Dismiss on the Respondent;
(2) Six (6) copies of the Return to Respondent's Motion to Dismiss.

With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.

Benjamin M. Renfrow

Enclosures: as noted
Cc: Andrew N. Safran
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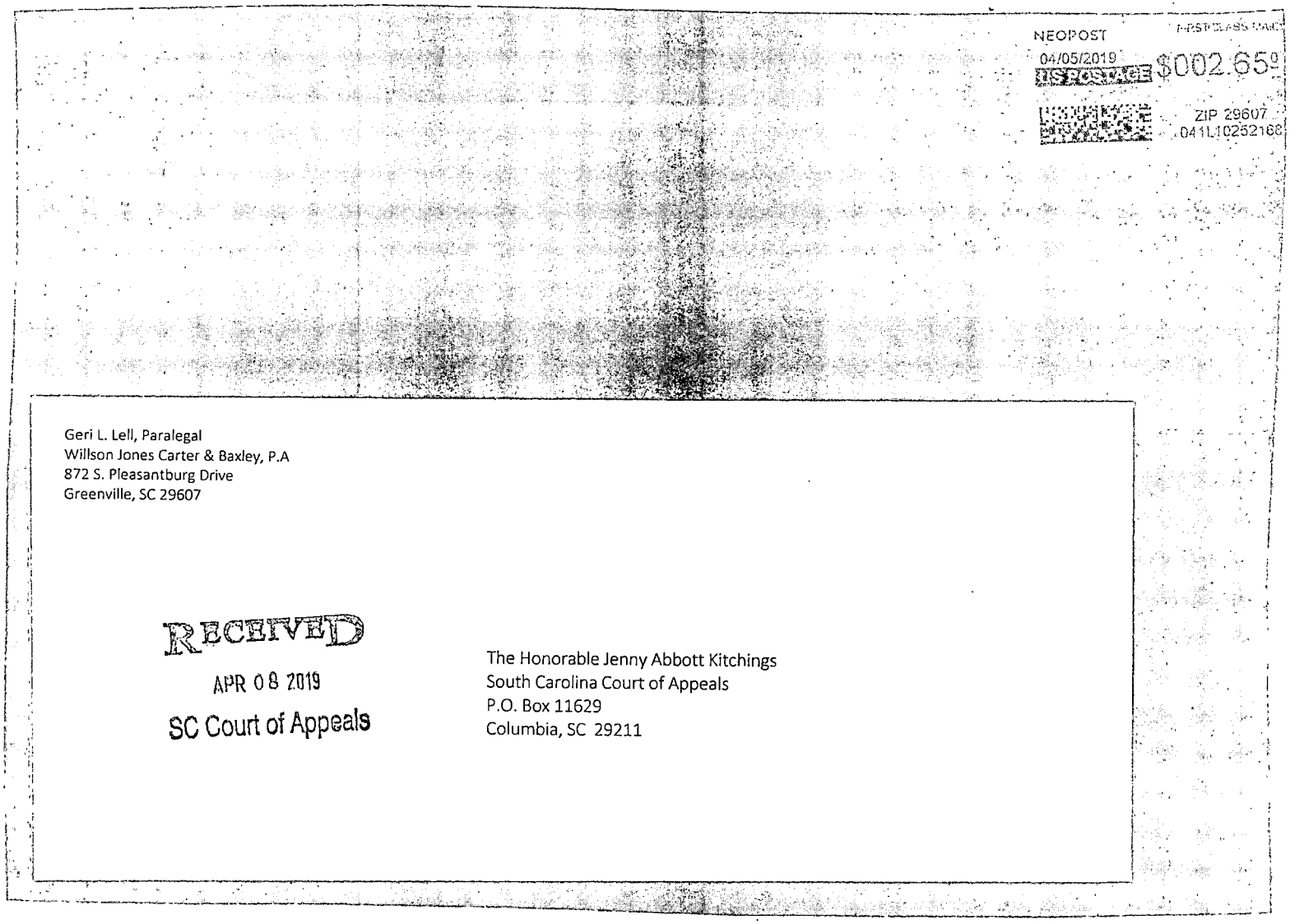
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