

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
Melody L. James, Commissioner
Susan S. Barden, Commissioner

W.C.C. FILE NO.: 1413546

APPELLATE CASE NO.: 2018-002283

RECEIVED
AUG 02 2019
SC Court of Appeals

Timothy A. McDuffie, Employee,RESPONDENT.

v.

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

RESPONDENT'S INITIAL BRIEF

Andrew N. Safran
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689
Attorney for Respondent

INDEX

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL1

STATEMENT OF THE CASE.....2

ARGUMENT I.....10

ARGUMENT II16

CONCLUSION.....18

CERTIFICATE OF SERVICE20

CERTIFICATE OF COUNSEL21

TABLE OF AUTHORITIES

CASES

Anderson v. Baptist Medical Center, 343 S.C. 487, 541 S.E. 2d 526, 528 (2001).....12

Ardis v. Combined Insurance Company, 380 S.C. 313, 669 S.E. 2d 628, 632
(Ct. App. 2008)10

Bochette v. Bochette, 300 S.C. 109, 386 S.E. 2d 475, 477 (Ct. App. 1989)13

Bone v. U.S. Food Service, 399 S.C. 566, 733 S.E. 2d 200, 201-203 (2012)17

Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E. 2d 552, 561 (2013)1,16, 17

Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 542 S.E. 2d 732, 733 (Ct. App. 2001)12

Bundy v. Shirley, 412 S.C. 292, 772 S.E. 2d 163 (2015)17

Carter v. Aiken County Government, 366 S.C. 102, 620 S.E. 2d 99, 104 (Ct. App. 2005)14

Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health
and Environmental Control, 387 S.C. 265, 692 S.E. 2d 894-895 (2010)16

Clade v. Champion Laboratories, 330 S.C. 8, 496 S.E. 2d 856 (1998)11

Corbin v. Kohler Co., 351 S.C. 613, 571 S.E.2d 92, 95 (Ct. App. 2002).....12

Ex parte South Carolina Property and Casualty Guaranty Association, 411 S.C. 501,
768 S.E. 2d 670, 672 (Ct. App. 2015)16

Fragosa v. Kade Construction, LLC, 407 S.C. 424, 755 S.E. 2d 462, 465 (Ct. App. 2013)12

Gadson v. Mikasa Corp., 368 S.C. 214, 628 S.E. 2d 262, 266 (Ct. App. 2006)10

Gattis v. Murrells Inlet VFW No. 10420, 353 S.C. 100, 576 S.E. 2d 191, 198
(Ct. App. 2003)14

Gibson v. Spartanburg School District No. 3, 338 S.C. 510, 526 S.E. 2d 725, 729
(Ct. App. 2000)11

Hall v. United Rentals, 371 S.C. 69, 636 S.E. 2d 876, 885 (Ct. App. 2006).....14

Hamilton v. Martin Color-Fi, Inc., 405 S.C. 478, 748 S.E. 2d 76, 79 (Ct. App. 2013).....11

Harbit v. City of Charleston, 382 S.C. 383, 675 S.E. 2d 776, 781 (Ct. App. 2009).....17

<u>Hilton v. Flakeboard America Limited</u> , 418 S.C. 245, 791 S.E. 2d 719 (2016).....	1, 15,16,18
<u>Hudson v. Lancaster Convalescent Center</u> , 407 S.C 112, 754 S.E. 2d 486, 490 (2012)	13
<u>Jeffrey v. Sunshine Recycling</u> , 386 S.C. 174, 687 S.E. 2d 332, 334 (Ct. App. 2009).....	11
<u>Kurschner v. City of Camden Planning Commission</u> , 376 S.C. 165, 656 S.E. 2d 346, 350 (2008)	17
<u>Lark v. Bi-Lo, Inc.</u> , 276 S.C. 136, 276 S.E. 2d 304, 306 (1981)	11
<u>Martin v. Rapid Plumbing</u> , 369 S.C. 278, 631 S.E. 2d 547, 555 (Ct. App. 2006).....	10, 14
<u>McMillan v. McMillan</u> , 417 S.C. 583, 790 S.E. 2d 216, 225 (Ct. App. 2016).....	13
<u>Pearson v. JPS Converter & Industrial Corp.</u> , 327 S.C. 393, 489 S.E. 2d 219, 221 (Ct. App. 1997)	11
<u>Price v. Peachtree Electrical Services, Inc.</u> , 405 S.C. 455, 748 S.E. 2d 229, 230 (2013).....	16
<u>Robbins v. Walgreens and Broadspire Services, Inc.</u> , 375 S.C. 259, 652 S.E. 2d (Ct. App. 2007)	11
<u>Rose v. JJS Trucking, LLC</u> , 411 S.C. 366, 768 S.E. 2d 412, 413 (Ct. App. 2015)	16,17
<u>South Carolina Property and Casualty Insurance Guaranty Association</u> , 768 S.E. 2d at 672	16,17
<u>South Carolina Second Injury Fund v. Liberty Mutual Insurance Company</u> , 353 S.C. 117, 576 S.E. 2d 199, 202 (Ct. App. 2003)	10
<u>Tims v. J.D. Kitts Construction</u> , 393 S.C. 496, 713 S.E. 2d 340, 343 (Ct. App. 2011).....	10
<u>Thomas v. 5 Star Transportation</u> , 412 S.C. 1, 770 S.E. 2d 183, 187 (Ct. App. 2015).....	11
<u>Turner v. SAIIA Construction</u> , 419 S.C. 98, 796 S.E. 2d 150, 154 (Ct. App. 2016)	10
<u>Watt v. Piedmont Automotive</u> , 384 S.C. 203, 681 S.E. 2d 615, 620 (Ct. App. 2009)	12
<u>White v. Medical University of South Carolina</u> , 355 S.C. 560, 586 S.E. 2d 157, 159 (Ct. App. 2003)	11
<u>Wofford v. City of Spartanburg</u> , 415 S.C. 152, 781 S.E. 2d 146, 149 (Ct. App. 2015)	12
<u>Youmans v. Coastal Petroleum Co.</u> , 333 S.C. 195, 508 S.C. 2d 43, 45 (Ct. App. 1998).....	11

STATUTES

S.C. Code Ann. Section 1-23-380 (2015).....1,15,16,18

S.C. Code Ann. Section 42-15-60 (2015).....1,2, 9, 14,17

S.C. Code Ann. Section 42-17-60 (2015).....18

STATEMENT OF ISSUES ON APPEAL

1) Is South Carolina Workers' Compensation Commission's (Appellate Panel's) determination Mr. Timothy A. McDuffie established "good cause" for its designation of a treating physician per the provisions of S.C. Code Ann. Section 42-15-60 (2015) supported by the substantial evidence of record?

2) Is the South Carolina Workers' Compensation Commission's (Appellate Panel's) interlocutory ruling currently ripe for review by this Court given the facts: (a) it does not constitute "a final decision" within the meaning of S.C. Code Ann. Section 1-23-380 (A) (Supp. 2017); and (b) the current circumstances do not warrant immediate consideration of the Commission's/Panels' ruling, particularly in light of the South Carolina Supreme Court's holdings in Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E. 2d 552 (2013) and Hilton v. Flakeboard America Limited, 418 S.C. 245, 791 S.E. 2d 719 (2016)?

STATEMENT OF THE CASE

This is an appeal from the November 27, 2018 Order of the South Carolina Workers' Compensation Commission (Appellate Panel), which determined: (a) its October 12, 2016 Order explicitly required Appellants, Johnson Food Services, LLC and Great American Insurance Company/Strategic Comp, to "accept financial responsibility for **treatment** of . . . [a] lumbar post traumatic facet syndrome" produced by Respondent's, Timothy A. McDuffie's, September 19, 2014 compensable accident; (b) while its prior Order afforded Appellants the opportunity to designate an appropriate medical specialist, they were likewise obliged to "provide **treatment** for this condition . . . include[ing] . . . performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by" Mr. McDuffie's prior independent medical evaluators; (c) rather than facilitating his receipt of this specified course of care, Appellants had not only attempted to refer him to two surgeons for assessment of a non-surgical condition, but also admitted "a primary purpose for these evaluations [was] . . . to determine . . . **if treatment is necessary**, despite the [prior] . . . unappealed ruling Mr. McDuffie shall receive this facet '**treatment**'"; (d) in view of its prior treatment mandate, Appellants attempt to "obtain an evaluation to determine **whether** treatment is warranted ('if any') certainly constitutes an attempt to relitigate a previously resolved issue"; (e) given the patent inconsistency between Appellants' admitted rationale for again attempting to direct him to a surgeon and the unequivocal import of the October 12, 2016 rulings, Mr. McDuffie had established "good cause" pursuant to S.C. Code Ann. Section 42-15-60 (A) (2015) for Commission appointment of a treating physician; and (f) the current circumstances warranted designation of Dr. J. Kelby Hutcheson as his treating physician.

Essentially, Appellants contend: (a) their directing Mr. McDuffie to a neurosurgeon “for an evaluation and current recommendations for treatment *if any*” is not inconsistent with the Panel’s October 12, 2016 emphatic directive “to provide **treatment**”; (b) their second post-October 12, 2016 attempt to compel Mr. McDuffie’s referral to a spine surgeon for a condition the Panel had previously determined to be nonsurgical, while making no effort to facilitate his receipt of the mandated “**treatment**”, could not be reasonably construed as noncompliance with the governing Order; (c) the Commission’s factual finding Mr. McDuffie had established “good cause” per Section 42-15-60 is not supported by the substantial evidence of record; and (d) this statute affords them unbridled discretion in directing medical care, regardless of any parameters identified by the Commission. (Original emphasis; Italics added).

However, despite these assertions, a review of the record, in light of governing legal authorities unquestionably verifies: (a) the October 12, 2016 Order not only required Appellants to provide Mr. McDuffie with “**treatment**”, but also specifically identified particular non-surgical care he was entitled to receive; (b) Appellants’ persistent refusal to comply with the Panel’s unequivocal directive “to provide **treatment** . . . [including, at minimum,] lumbar facet/medial branch blocks,” while instead seeking to relitigate a question (“*if any* . . . medical care is needed”) *that had already been resolved by the Panel* (“he required . . . treatment . . . for this compensable back injury component”) is *absolutely incompatible* with any notion of compliance with the October 12, 2016 Order; (c) reasonable minds could certainly reach the conclusion Appellants’ actions were reflective of an effort to circumvent the obligations imposed by the October 12, 2016, Order; and (d) the November 27, 2018, ruling is wholly supported by the substantial evidence of record. (Original emphasis; Italics added).

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 Ft. Jackson military base. Following this injury, he initially received treatment through Dr. Stewart Young of First Care, who prescribed physical therapy in conjunction with medication before recommending orthopaedic evaluation for “[p]ersistent low back, left thigh and left knee pain” (See, Record on Appeal, pp.____).

Appellants then directed Mr. McDuffie for evaluation by Dr. Michael W. Peelle of Moore Orthopaedics, who: (a) observed several clinical abnormalities that led him to obtain a lumbar MRI scan; (b) indicated this scan did not reveal any disc pathology; (c) offered no additional treatment; (d) neither assessed nor treated the left knee symptoms documented by Dr. Young; and (e) discharged him effective January 5, 2015. (See, Record on Appeal, pp.____).

As he remained symptomatic, Mr. McDuffie subsequently underwent evaluations by Drs. John F. Johnson, Ezra B. Riber and Nancy R. Lembo, who each: (a) determined the consequences of his compensable injury had produced a facetogenic pain syndrome; (b) recommended treatment in the form of facet injections/medial branch blocks; and (c) confirmed the nature/degree of his causally related symptoms/pathology prohibited him from engaging in unrestricted work activities. (See, Record on Appeal, pp.____).

Additionally, Mr. McDuffie independently obtained assessment by Dr. Christopher G. Mazoue of the University of South Carolina School of Medicine’s Department of Orthopaedic Surgery, who: (a) observed clinical evidence of left knee dysfunction; (b) confirmed, to a reasonable degree of medical certainty, his left knee symptoms resulted from the September 19,

2014 compensable accident; and (c) recommended a course of treatment, commencing with an MRI scan. (See, Record on Appeal, pp. ___)

After considering Mr. McDuffie's testimony, as well as the opinions expressed by Drs. Johnson, Riber and Lembo, the Commission specifically 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. ___)(Emphasis added).

The Commission further 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. ____) (Emphasis added).

Based on this evidence, the Commission concluded:

(a) Mr. McDuffie's receipt of treatment for the posttraumatic lumbar facet syndrome diagnosed by Drs. Johnson, Riber and Lembo is reasonable, medically necessary and geared toward lessening his ultimate period of disability per Section 42-15-60; (b) *this treatment shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by these physicians*; (c) Defendants will be afforded the right to provide **treatment** for Mr. McDuffie's back injury component per Section 42-15-60, but *strictly based upon the undersigned's ruling that Mr. McDuffie's diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable accident, so as to ensure receipt of this **treatment***; and (d) this obligation to provide ongoing medical treatment shall continue until this Commission determines he has achieved maximum medical improvement. (See, Record on Appeal, pp. ____) (Original emphasis; Italics added).

The Commission likewise determined: (a) following Appellants' refusal to provide treatment for his left knee symptoms, Mr. McDuffie had "reasonably sought evaluation from Dr. Mazoue;" (b) he had "clearly established" the causal relationship of the left knee injury component to the September 19, 2014 compensable accident; (c) while Appellants' "certainly had ample opportunity to obtain assessment of this left knee injury component, . . . [they simply] chose not to do so"; (d) receipt of the recommended treatment for the left knee satisfied the criteria of Section 42-15-60; and (e) given the current circumstances, including his confidence in this position and Appellants' refusal to provide appropriate care (notwithstanding unrebutted medical evidence corroborating causal connection of this injury component to the compensable accident), Mr. McDuffie had established "good cause", in accordance with the requirements of

Section 42-15-60, to receive this treatment through Dr. Mazoue. (See, Record on Appeal, pp. ____).

On November 10, 2016 Notice, Appellants sought this Court's review of several aspects of the Panel's Order, including the compensability of the left knee injury component, the concomitant designation of Dr. Mazoue as treater for this previously denied accident consequence, Mr. McDuffie's entitlement to receipt of temporary disability compensation and the adequacy of Order's contents. (See, Record on Appeal, pp. ____). However, following submission of the parties' respective Initial Briefs, Appellants authorized Mr. McDuffie to proceed with treatment through Dr. Mazoue, paid the accrued compensation and withdrew their appeal.

Despite the absence of any appeal involving their obligation to provide treatment for Mr. McDuffie's back injury component, Appellants had made no effort to initiate this treatment by March, 2017. (See, Record on Appeal, pp. ____). The undersigned consequently requested provision of this medical care in accordance with the October 12, 2016 Order. (See, Record on Appeal, pp. ____). However, rather than facilitate performance of the facet injections mandated by the Panel's Order, Appellants instead attempted to redirect Mr. McDuffie to Dr. Peelle – **the same physician who had previously not only failed to identify the very condition for which the Panel had ordered focused treatment, but also declined to offer any care.** (See, Record on Appeal, pp. ____). At that juncture, the undersigned: (a) informed defense counsel this course of action was inconsistent with the Commission's October 12, 2016 Order; and (b) objected to either evaluation by Dr. Peelle or his designation as Mr. McDuffie's treater. (See, Record on Appeal, pp. ____).

Although the undersigned assumed Appellants would then arrange for Mr. McDuffie to receive the facet injections, they instead forwarded notice of their intention to refer him to another surgeon. (See, Record on Appeal, pp. ____). As this surgical referral was similarly inconsistent with the Commission's prior recognition of Mr. McDuffie's primary need for non-surgical care, the undersigned filed a January 11, 2018 Motion to Quash, which: (a) included an evidentiary exhibit verifying not only Appellants' designee's status as a surgeon, but also the absence of any indication he engaged in the treatment of posttraumatic facet syndrome; and (b) requested the Commission to "designate an appropriate specialist for treatment in accordance with the October 12, 2018 Order", without identifying any particular medical provider. (See, Record on Appeal, pp. ____).

In response to this Motion, Appellants maintained that, **notwithstanding the Panel's previous ruling relative to Mr. McDuffie's need for/entitlement to treatment of the causally related posttraumatic facet syndrome diagnosed by Drs. Johnson, Riber and Lembo**, he was obliged to undergo an additional evaluation by Dr. Lozanne "to determine what medical care is needed **if any** in this instance." (See, Record on Appeal, pp. ____).

Upon considering the substance of the parties' respective contentions, the current Panel found the governing Order recognizes:

(a) lumbar facet syndrome is initially treated with facet joint injections and/or medial branch blocks; (b) radiofrequency rhizotomy, depending upon the response to these injections/blocks, is also a consideration; (c) this treatment is routinely provided by conservative spine physicians; and (d) the treatment Defendants are obliged to provide does not involve surgical intervention. (See, Record on Appeal, pp. ____).

The Panel also found:

. . . [w]hile the Appellate Panel previously afforded Defendants the opportunity to designate a physician, it likewise: (a) emphasized Defendants' obligation "to provide **treatment**"; (b) required that "this treatment shall include, but not be limited to, performance of lumbar facet/medial branch blocks, in accordance with the treatment recommendations outlined by . . . Drs. Johnson, Riber and Lembo"; and (c) similarly instructed the "**treatment**" of Mr. McDuffie's lumbar post traumatic facet syndrome . . . [be provided] through an appropriate specialist. . . ." (See, Record on Appeal, pp. ____) (Original emphasis).

After reasonably analyzing these purported attempts to "comply" with their unquestionable obligation to provide "**treatment**" of Mr. McDuffie's posttraumatic facet syndrome through injective therapy of the nature identified by Drs. Johnson, Riber and Lembo, the current Panel specifically found:

. . . [t]o date, Defendants have: (a) attempted to refer Mr. McDuffie to two surgeons for assessment of a condition (post-traumatic facet syndrome) this Commission has previously found does **not** require surgery, but instead warrants procedures, (injections and possible radiofrequency rhizotomy) performed by non-surgical spine physicians; (b) indicated a primary purpose for these evaluations is to determine **if treatment is necessary**, despite the Appellate Panel's unappealed ruling Mr. McDuffie shall receive this facet "**treatment**"; and (c) not provided any treatment for the back injury component mandated by the October 12, 2016 Order. (See, Record on Appeal, pp. ____) (Original emphasis).

Recognizing the contents of the October 12, 2016 Order constitute the law of this case in the current context, the Panel concluded:

Given the law of this case, Defendants' attempts to: (a) direct Mr. McDuffie to a surgeon are inconsistent with the Appellate Panel's prior identification of his treatment needs; and (b) obtaining evaluation to determine **whether** treatment is warranted ("if any") certainly constitutes an attempt to relitigate a previously resolved issue. (See, Record on Appeal, pp. ____) (Original emphasis).

In this regard, the Panel further concluded; (a) the provisions of Section 42-15-60 vest it with the authority to countermand Appellants' direction of medical care under appropriate

circumstances; (b) “Mr. McDuffie has established ‘good cause’ per Section 42-15-60 for Commission designation of a treating physician”; (c) “the current circumstances warrant directing him to Dr. Hutcheson for receipt of treatment in accordance with the Appellate Panel’s October 12, 2016 Order”; and (d) “the contents of the record neither support Defendants’ assertion Mr. McDuffie was allowed to direct his own care nor their contention designation of Dr. Hutcheson was inconsistent with the terms of Section 42-15-60.”

This Appeal followed.

ARGUMENT

I. THE SOUTH CAROLINA WORKERS’ COMPENSATION COMMISSIONS/APPELLATE PANEL’S DETERMINATION MR. MCDUFFIE HAD ESTABLISHED “GOOD CAUSE” PER S.C. CODE ANN. SECTION 42-15-60 (2015) FOR DESIGNATION OF DR. J. KELBY HUTCHESON AS HIS TREATING PHYSICIAN 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). When reviewing the record, 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). Where they are reflective of reasonable and accurate assessment of the underlying circumstances, 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).

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. APPELLANTS’ ATTEMPTS TO CIRCUMVENT OBLIGATIONS IMPOSED BY OCTOBER 12, 2016 ORDER, RATHER THAN PROVIDE SPECIFIED TREATMENT, CONSTITUTED “GOOD CAUSE” FOR COMMISSION DESIGNATION OF TREATING PHYSICIAN.

Although they initially appealed certain elements of the Panel’s Order, Appellants did not contest the fundamental determinations relative to Mr. McDuffie’s back injury component, particularly: (a) “his need for non-surgical treatment . . . [that] includes, but is not limited to, the lumbar facet/medial branch blocks identified by” Drs. Johnson, Lembo and Riber; (b) “these specialists, who each regularly encounter facetogenic pain in their respective practices, likewise reliably *established his need* for previously unprovided facet-directed treatment”; (c) *their direction of his receipt of medical care was qualified* to the extent Appellants were simply “afforded the right to provide **treatment** for Mr. McDuffie’s back injury component per Section 42-15-60, but strictly based upon the . . . [Commission’s] ruling that Mr. McDuffie’s diagnosed posttraumatic facet syndrome is causally related to the consequences of his compensable

accident so as to ensure receipt of **treatment**”; and (d) this “**treatment**” of Mr. McDuffie’s lumbar posttraumatic facet syndrome . . . [would be provided] through an appropriate specialist”. (Original emphasis; Italics added). These findings/conclusions/rulings consequently constitute the law of this case. See, Hudson v. Lancaster Convalescent Center, 407 S.C 112, 754 S.E. 2d 486, 490 (2012). See also, Wofford v. City of Spartanburg, 415 S.C. 152, 781 S.E. 2d 146, 149 (Ct. App. 2015) (“the unappealed ground will become the law of the case”).

Additionally, inspection of Appellants’ brief reveals: (a) they have not disputed the current Panel’s finding “the treatment Defendants are obliged to provide does not involve surgical intervention”; and (b) the absence of any legitimate need for surgical assessment cannot be properly disputed at this stage of the proceedings. See, Bochette v. Bochette, 300 S.C. 109, 386 S.E. 2d 475, 477 (Ct. App. 1989); McMillan v. McMillan, 417 S.C. 583, 790 S.E. 2d 216, 225 (Ct. App. 2016).

Given the unassailable vitality of the Commission’s determinations on these points, reasonable minds could (and did) find *Appellants were keenly aware*: (a) of their primary obligation to provide Mr. McDuffie with nonsurgical treatment, through performance of lumbar facet/medial branch blocks, in accordance with the recommendations of Drs. Johnson, Lembo and Riber; (b) this treatment *did not involve surgical intervention*; (c) their prior designee (Dr. Peelle, a surgeon) had *not only been unable to diagnose Mr. McDuffie’s causally related post-traumatic facet syndrome, but also declined to provide further treatment*; and (d) the attempt to direct Mr. McDuffie to yet another surgeon “for an *evaluation* and current recommendations for treatment *if any*” was materially inconsistent with the emphatic October 12, 2016 mandate to provide him with this “**treatment**”. (See, Record on Appeal, pp. ____) (Original emphasis; Italics added) .

It is equally certain that upon considering these uncontroverted facts, the current Panel could reasonably find/conclude: (a) Appellants had been afforded ample time and opportunity to provide Mr. McDuffie with the required nonsurgical treatment; (b) their attempt to facilitate his return to Dr. Peelle was not indicative of a legitimate effort to comply with the October 12, 2016 Order; (c) demanding an “evaluation” by another *surgeon* “to determine what medical care is needed *if any*” simply did not mesh with a binding Order *compelling* their provision of this non-surgical “**treatment**” and (d) Appellants’ persistent failure to provide this “**treatment**” was indicative of a rather obvious effort to circumvent the responsibilities imposed by the October 12, 2016 Order. (Original emphasis; Italics added).

As the Panel’s determinations are not only reasonable, but amply supported by the substantial evidence of the record (January 11, 2018 motion exhibits, law of the this case embodied in the October 12, 2016 Order and admissions contained in Appellants’ January 22, 2018 Response), it is respectfully submitted they should be affirmed.

Section 42-15-60 (A) grants the employer/carrier an opportunity to direct medical care “unless otherwise ordered by the commission for good cause shown.” In this regard, it is axiomatic the Commission is empowered to “override the employer’s choice of providers and order a change in the medical or hospital service provided” in the event a controversy arises between the parties and “good cause” for this designation is established by the employee. See, Carter v. Aiken County Government, 366 S.C. 102, 620 S.E. 2d 99, 104 (Ct. App. 2005); Hall v. United Rentals, 371 S.C. 69, 636 S.E. 2d 876, 885 (Ct. App. 2006).

This Court has likewise recognized the Commission is vested with authority to designate a treating physician in accordance with its assessment of an individual’s particular medical needs. See, Gattis v. Murrell’s Inlet, VFW, 353 S.C. 100, 576 S.E. 2d 191, 198 (Ct. App. 2003).

(“Where it deems it necessary, the . . . [C]ommission may override an employer’s choice of medical provider. . . .”; See also, Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E. 2d 547, 555 (Ct. App. 2006).

In this instance, Appellants: (a) unquestionably understood the nature of medical care they were obliged to provide Mr. McDuffie; (b) could have easily directed him to a nonsurgical specialist for receipt of the facet injections, as well as the incidental medical modalities envisioned by the October 12, 2016 Order; (c) purposely sought to avoid the legal implications of this Commission’s rulings by their attempted surgical referrals, including an effort to return him to a physician who had already demonstrated an inability to recognize or treat the posttraumatic facet syndrome; and (d) have admitted *a legally inappropriate motive* for the current referral, i.e. questioning *the need for “**treatment**” they have been instructed to provide*. (Original emphasis; Italics added).

Based upon these facts, the Panel: (a) correctly ruled Mr. McDuffie had established “good case” for its intervention in the direction of his medical care; and (b) properly exercised its statutory authority in referring him to another physician to ensure compliance with the October 12, 2016 Order.

II. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION'S (APPELLATE PANEL'S) INTERLOCUTORY RULING IS NOT CURRENTLY RIPE FOR REVIEW BY THIS COURT GIVEN THE FACTS: (A) IT DOES NOT CONSTITUTE "A FINAL DECISION" WITHIN THE MEANING OF S.C. CODE ANN. SECTION 1-23-380 (A) (SUPP. 2017); AND (B) THE CURRENT CIRCUMSTANCES DO NOT WARRANT IMMEDIATE CONSIDERATION OF THE COMMISSION'S/PANELS' RULING, PARTICULARLY IN LIGHT OF THE SOUTH CAROLINA SUPREME COURT'S HOLDINGS IN BONE V. U.S. FOOD SERVICE, 404 S.C. 67, 744 S.E. 2D 552 (2013) AND HILTON V. FLAKEBOARD AMERICA LIMITED, 418 S.C. 245, 791 S.E. 2D 719 (2016).

As noted in Mr. McDuffie's March 21, 2019 Motion to Dismiss, the Panel's November 27, 2018 Order: (a) reaffirmed an October 12, 2016 ruling requiring Appellants to provide treatment for Mr. McDuffie's compensable back injury component; (b) simply designates a treating physician for this injury component due to Appellants' failure to comply with the October 12, 2016 ruling; (c) clearly does not constitute "a final decision" within the meaning of S.C. Code Ann. Section 1-23-380 (A) (Supp. 2017); and (d) is not subject to judicial review, as it unquestionably **does not** "resolve . . . the entire action." Ex parte South Carolina Property and Casualty Guarantee Association, 411 S.C. 501, 768 S.E. 2d 670, 672 (Ct. App. 2015); Rose v. JJS Trucking, LLC, 411 S.C. 366, 768 S.E. 2d 412, 413 (Ct. App. 2015).

In this connection, . . . "Section 1-23-380 of the . . . [Administrative Procedures] Act limits appeals . . . [in this context] to those from a 'final decision' of the commission." Rose, 768 S.E. 2d at 413; South Carolina Property and Casualty Insurance Guaranty Association, 768 S.E. 2d at 672. "An agency decision that does not decide the merits of a contested case is not a final agency decision subject to judicial review." Price v. Peachtree Electrical Services, Inc., 405 S.C. 455, 748 S.E. 2d 229, 230 (2013).

As recognized by the Supreme Court in Charlotte-Mecklenburg Hospital Authority v. South Carolina Department of Health and Environmental Control, 387 S.C. 265, 692 S.E. 2d

894-895 (2010), “a final decision” within the purview of the Administrative Procedures Act “disposes of the whole subject matter of the action or terminates the particular proceeding or action, leaving nothing to be done but to enforce by execution what has been determined.” See also, Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E. 2d 552, 561 (2013). Consequently, “[a]n order of the commission is not a final decision unless it resolves the entire action.” Rose, *supra*; South Carolina Property and Casualty Insurance Guaranty Association, *supra*.

In this instance, the Appellate Panel has: (a) simply enforced a prior ruling that Appellants had chosen to disregard; (b) done nothing more than exercise its statutory authority to ensure the provision of treatment Mr. McDuffie has been attempting to obtain for several years; and (c) not rendered a “final decision” as to the merits of this claim, which remain unresolved pending receipt of the treatment necessary for him to attain maximum medical improvement. Once he reaches this plateau, the Commission will, at minimum, be obliged to render additional rulings as to Mr. McDuffie’s degree of residual permanent disability and entitlement to extended medical care per the provisions of Section 42-15-60.

While Appellants contend refusal to consider the merits of their appeal at this stage results in a denial of due process, “. . . [t]he fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.” Kurschner v. City of Camden Planning Commission, 376 S.C. 165, 656 S.E. 2d 346, 350 (2008). “. . . [D]ue process is flexible and calls for such procedural protection as the particular situation demands.” Harbit v. City of Charleston, 382 S.C. 383, 675 S.E. 2d 776, 781 (Ct. App. 2009); Bundy v. Shirley, 412 S.C. 292, 772 S.E. 2d 163 (2015).

As recognized by the Supreme Court in Bone v. U.S. Food Service, 399 S.C. 566, 733 S.E. 2d 200, 201-203 (2012), judicial review in this context is generally triggered through entry

of a “final judgment” per Section 1-23-380 (A). While Appellants couch their argument in terms of a denial of due process, it is respectfully submitted: (a) the “final judgment” requirement is certainly consistent with the flexibility of procedure long recognized by this Court, to the extent compliance with Section 1-23-380 (A) does not “offend due process”; (b) they have not challenged the constitutionality of this statute, but rather an effect which has been validated by this Court on more than one occasion; (c) the crux of their position is actually the absence of supersedeas in terms of Mr. McDuffie’s receipt of treatment that was initially ordered **nearly three years ago**; and (d) this focus on a nonexistent due process deprivation stems from a recognition that any notion the provisions of S.C. Code Ann. Section 42-17-60 (2015) impose an undue hardship was wholly rejected by the Supreme Court in Bone, 744 S.E. 2d at 561.

Finally, the substance of this appeal: (a) is neither unique, unusual nor extraordinary; and (b) essentially involves consideration of the substantial evidence, in light of the authority vested in the Panel by Section 42-15-60. The current circumstances clearly do not meet the “hens’ teeth” standard identified in Hilton.

CONCLUSION

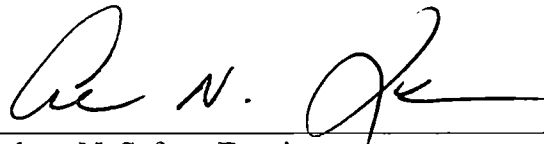
While Appellants have characterized the Panel’s action as the unwarranted deprivation of their absolute right to direct medical care, they have disingenuously obscured the fundamental/uncontroverted facts: (a) the October 12, 2016 Order absolutely obliged them to provide Mr. McDuffie with treatment of his causally related posttraumatic facet syndrome in accordance with the recommendations of his three evaluators; (b) this final ruling unquestionably required the performance of lumbar facet/medial branch blocks; (c) their initial “effort” at compliance involved the attempted redirection of Mr. McDuffie to a surgeon who had already proven he neither could nor would offer additional care; (d) after this proposed action was

rebuffed, they then sought to compel an “evaluation” by yet another surgeon for the admitted purpose of determining “**if any**” treatment “**is needed**”; (e) these acknowledged purposes were completely incompatible with not only the explicit October 12, 2016 treatment mandate, but also the prior **legal removal of “if” from the treatment equation**; and (f) their actions are actually reflective of a desire **to do anything but comply** with the October 12, 2017 Order.

After recognizing this obvious disconnect, the current Panel: (a) realized Appellants’ behavior was not reflective of a good faith attempt to abide by the prior ruling; and (b) properly exercised its discretion to direct Mr. McDuffie for treatment in accordance with the October 12, 2017 ruling.

As the Panel’s action was appropriate from both factual and legal standpoints, Mr. McDuffie respectfully requests that its ruling be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "A. N. Safran", written over a horizontal line.

Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689
Attorney for Respondent

August 1, 2019
Columbia, South Carolina

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
Melody L. James, Commissioner
Susan S. Barden, Commissioner

W.C.C. FILE NO.: 1413546

APPELLATE CASE NO.: 2018-002283

RECEIVED
AUG 02 2019
SC Court of Appeals

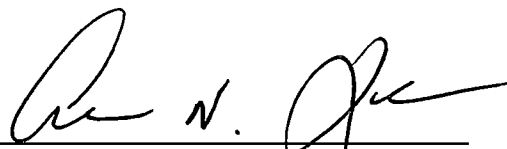
Timothy A. McDuffie, Employee, Claimant,RESPONDENT.

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Initial Brief complies with Rule 209,
SCACR.



Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689
Attorney for Respondent

August 1, 2019

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
Melody L. James, Commissioner
Susan S. Barden, Commissioner

W.C.C. FILE NO.: 1413546

APPELLATE CASE NO.: 2018-002283

RECEIVED
AUG 02 2019
SC Court of Appeals

Timothy A. McDuffie, Employee, Claimant,RESPONDENT.

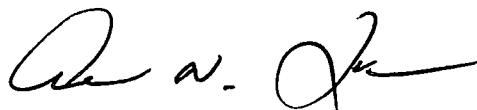
v.

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

CERTIFICATE OF SERVICE

I, Andrew N. Safran, Esquire, Attorney for Respondent, do hereby certify that on the 2nd day of August, 2019, 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:

Benjamin M. Renfrow, Esquire
Willson, Jones, Carter & Baxley, PA
872 S. Pleasantburg Drive
Greenville, SC 29607



Andrew N. Safran, Esquire
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

ANDREW N. SAFRAN, LLC
ATTORNEY AT LAW
1400 PICKENS STREET, SUITE 300
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE 803.256.6689
FACSIMILE: 803.799.1003

MAILING ADDRESS
POST OFFICE BOX 12089
COLUMBIA, SOUTH CAROLINA 29211

August 2, 2019

HAND DELIVERED

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

RECEIVED
AUG 02 2019
SC Court of Appeals

RE: Timothy McDuffie v. Johnson Food Service, LLC and
Great American Alliance Insurance Co./Strategic Comp.
Appellate Case No.: 2018-002283

Dear Ms. Kitchings:

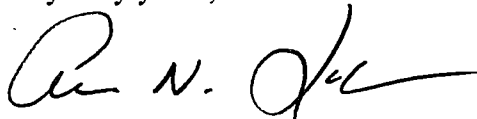
Enclosed please find an original and one copy of the Respondent's Initial Brief and Designation of Matter to be Included in the Record on Appeal relative to the above-captioned case. At this time, I would appreciate your filing these documents and returning one clocked copy to my courier.

By copy of this letter, I am serving a copy of these documents on Ben Renfrow, counsel for Appellants. As always, in the event he has any questions or comments concerning this matter, I invite him to contact me.

Thank you for your cooperation.

With kindest regards, I am

Very truly yours,



Andrew N. Safran

ANS/as

cc: Benjamin M. Renfrow, Esquire