THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate 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.

APPELLANTS' INITIAL REPLY BRIEF

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ARGUMENTS

I.

THE COMMISSION'S ORDER IS IMMEDIATELY APPEALABLE.

The Commission's Order is immediately appealable under Section 1-23-380. The Administrative Procedures Act permits immediate appeal of an interlocutory order: "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." S.C. Code Ann. § 1-23-380. Therefore, the threshold determination for immediate appealability is whether review of the final agency decision provides an adequate remedy. In this case, review of the final agency decision would not provide an adequate remedy, and this case is immediately appealable.

In a workers' compensation claim the "final agency decision" would necessarily determine maximum medical improvement, the amount of permanent disability, and claimant's entitlement to future medical treatment. The authorized treating physician has a direct impact on each of these determinations by providing an opinion on maximum medical improvement, permanent impairment, work restrictions, and assessing whether particular modalities of treatment would tend to lessen the claimant's disability for a particular period of time, up to the claimant's lifetime. In the instant case, the Commission has stripped the employer of its right to select the authorized treating physician, substituting the judgment of one physician for another, without showing a deficiency in judgment of the employer's preferred physician. Assuming treatment for a year, 18 months, or two years into the future before a final agency decision, there is no way to turn back the clock and "re-treat" the claimant with the employer's preferred physician. The employer cannot take the claimant back to his state of health at the time the treating physician was changed and see if the preferred provider could have achieved a better outcome. Therefore, due to the nature of the

ongoing medical benefits provided under Title 42, the Commission's Order is immediately appealable.

Two interrelated arguments confirm the order changing the authorized physician is immediately appealable. First, Section 42–15–70 places responsibility for the consequences of medical malpractice in a workers' compensation claim on the defendant. Given the volume of South Carolina workers compensation claims, any particular carrier in the state likely has more experience with a wider array of physicians than any particular claimant or claimant's attorney. Therefore, the carrier acquires institutional knowledge not necessarily available to the claimant, claimant's attorney, or even the Workers' Compensation Commission regarding a treating physician's potential to fall short of the proper standard of care compared to other physicians. If the carrier is responsible for the physician's mistakes, it makes sense that the carrier (or employer with the advice of the carrier) is responsible for the selection of the physician.

Second, even more broadly, given the carriers' institutional knowledge of particular providers treating particular injuries, reasonable forecasts can be made for modes of treatment, length of treatment, success of various modalities, etc. If a carrier sends multiple claimants to the same physician for a particular back surgery, because that surgeon tends to have good results with that back surgery, that selection benefits the carrier in lower expected claims costs as well as the claimant who enjoys a higher probability of a successful outcome. This institutional knowledge is a potent policy reason for keeping selection of the authorized treating physician with the carrier.

Because treatment by one physician necessarily supplants treatment by another potential physician, and the employer is responsible for the effects of that treatment, a review of a final agency decision does not adequately protect the employer's substantial right to select the treating physician.

Even assuming arguendo that the Commission's current interlocutory order is not immediately appealable, applying Bone v. U.S. Food Service, 404 S.C. 67, 744 S.E.2d 552 (2013) to require Appellants to wait for a final decision presents significant constitutional problems. Bone's application of Section 1-23-380 violates the due process rights of employers and carriers.

Article I, Section 22 of the South Carolina Constitution 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). Judicial review of a workers' compensation proceeding is a constitutional right in South Carolina. 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. Ambulatory Surgery Ctr. Ass'n v. S.C. Workers' Comp. Comm'n, 389 S.C. 380, 699 S.E.2d 146, 152 (2010). Due process necessarily includes the right to meaningful judicial review:

> The procedural component of the state and federal due process clauses requires the individual whose property or liberty interests are affected to have received adequate notice of the proceeding, the opportunity to be heard in person, the opportunity to introduce evidence, the right to confront and cross-examine adverse witnesses, and the right to meaningful judicial review.

Dangerfield v. State, 376 S.C. 176, 656 S.E.2d 352, 354 (2008) (emphasis added). No South Carolina case has clearly defined what particular process is required for "meaningful" judicial review, but other cases discussing "meaningful" point to 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.' " S.C. Nat'l Bank v. Cent. Carolina Livestock Mkt., Inc., 289 S.C. 309, 345 S.E.2d 485, 488 (1985) (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). In Armstong, a father's parental rights were terminated without any notice to him, although his whereabouts were easily ascertainable. When the subsequent adoption was finalized, and the natural father sought to set aside the proceedings, he had multiple burdens of proof placed on him at that point that would not have been placed on him had proper notice been given. 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). The Supreme Court held that the father's due process rights were violated because he was not provided timely notice and as a result, additional burdens were placed on him. Id. at 551.

South Carolina Department of Social Services v. Wilson, 352 S.C. 445, 574 S.E.2d 730 (2002) reviewed a litigated allegation of child abuse against the minor's father. The minor

requested to testify outside of the presence of the father, over the objection of the father. The father was excluded from the courtroom but could still hear the testimony and had the opportunity to briefly conference with his lawyer prior to cross-examination. However, the South Carolina Supreme Court found that this process did not comport with due process:

> [I]f the child testifies at an intervention proceeding, the due process right to confrontation requires the child testify in the presence of her parent/defendant unless special circumstances are established. Wilson's ability to hear the minor's testimony, discuss her testimony with counsel, and cross-examine her were insufficient to satisfy due process without the determination the minor would be traumatized by testifying in her father's presence. As conceded by DSS at oral argument, the minor was the key witness against Wilson and she may have been less credible if she had testified in his presence. Because Wilson did not have the opportunity to be heard in a meaningful manner, his due process right was violated.

Wilson, 352 S.C. at 458.

Armstrong illustrates meaningful (temporal) notice, and Wilson illustrates meaningful (temporal) opportunity to be heard. Therefore, the right to meaningful judicial review must include contemporaneity. This temporal requirement is reflected in Section 1-23-380 discussed supra: "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." Looking at the plain language of Section 1-23-380, the provision for immediate appeal is provided when an appeal after the passage of time is not adequate. The policy embedded in Section 1-23-380 is what Appellants

seek here. Bone's interpretation of Section 1-23-380 violates Appellants' due process because it requires Appellants to provide benefits over the course of several years before having a meaningful opportunity to be heard on appeal. Therefore the Commission's Order is immediately appealable.

II.

NO GOOD CAUSE EXISTS TO SUPPORT SUPPLANTING THE CARRIER'S SUBSTANTIAL RIGHT TO SELECT THE TREATING PHYSICIAN.

No reported case defines "good cause" in the context of Section 42–15–60. Good cause is defined as "[a] legally sufficient reason. Good cause is often the burden placed on the litigant . . . to show why a request should be granted or an action excused." Black's Law Dictionary 251 (9th ed. 2009). Good cause, therefore, must be contextually specific. In this case, the Commission selecting the authorized treating provider is not supported by the statute and in error.

A close read of Section 42–15–60 shows that there cannot be a finding of good cause in this case: "During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown." There are multiple actors and obligations in this sentence alone. The employer is obligated to provide 1) an attending physician and 2) any medical care or treatment that is considered necessary by the attending physician. The employee is obligated to accept both the physician and the medical care or treatment considered necessary by that physician. This obligation continues "unless otherwise ordered by the Commission for good cause shown." The sentence, in and of itself, does not permit the Commission to change physicians. Rather, the modifying clause beginning with "unless" merely relieves the obligation of the 1) employer to provide or 2) the

employee to accept. In reading the sentences that follow, the statute requires the employee undergo an evaluation by the physician before any good cause could be shown relieving the obligation set forth in Section 42–15–60. In this case, Dr. Lozanne never had the opportunity to evaluate the claimant, and, therefore, a finding of good cause was speculative.

In this case, the Respondent rejected the choice of physician. This is not contemplated by the statute. Rather, continuing from the statutory language above, "[t]he refusal of an employee to accept any medical, hospital, surgical, or other treatment or evaluation when provided by the employer or ordered by the commission bars the employee from further compensation." The obligation of the previous sentence is to accept both the attending physician and the recommended treatment. No plain language in the statute allows the employee to reject the physician prior to evaluation. The General Assembly could have specifically allowed for rejection of the physician with plain language in the statute. It did not. Rather, the employee can reject the recommendation of the physician, in which case, if the rejection is justified, "the commission may order a change in the medical or hospital service." This makes sense because if the employee refuses to undergo a particular modality of treatment, and he is justified in that, a different treatment recommendation, and therefore, another physician, is necessary. Section 42–15–60 implicitly acknowledges that the medical judgment necessary in effecting treatment remain with the doctor.[1] The employee cannot credibly refuse a treatment plan when he doesn't know what the treatment plan is. In this case, based on his anticipation of the treatment plan, the employee refused the physician, which is not contemplated by the statute. Finally, the power of the commission is to order a "change in the medical or hospital service." There can be no change if there was no initial service.

[1] The Commission's finding that certain treatment was required based on three medical opinions, and then selecting an entirely different physician to effectuate that treatment seems to contradict the policy of Section 42–15–60. The judgment of what is medically necessary to treat remains with that particular physician: "an attending physician and any medical care or treatment that is considered necessary by the attending physician . . . ."

This reading of the statute is supported by case law and policy. First, the statute provides the right to the employer to select the physician. For the reasons set forth in the appellant's initial brief, if the employee can reject the selection of the physician outright, the right is of no value, and the statutory language is rendered meaningless. See Ward v. Dick Dyer & Associates, Inc., 403 S.E.2d 310, 304 S.C. 152 (1990) (noting that a statute cannot be rendered without meaning). Second, this reading balances the right of the employer/carrier with an employee's right to refuse certain treatment under particular circumstances. See Scruggs v. Tuscarora Yarns, Inc., 294 S.C. 47, 362 S.E.2d 319 (Ct. App. 1987) (excusing claimant's decision to refuse myelogram after evaluation by a doctor based on age and other health concerns). Third, this would equate a justified refusal (allowing the commission to change the medical or hospital service) with the good cause standard relieving the employer or employee of the obligation to provide or accept the physician and treatment respectively.

CONCLUSION

For the reasons above, the Appellants assert that good cause to reject medical treatment cannot exist unless and until the employee is actually evaluated by the physician, and, therefore, good cause did not exist in this case. Furthermore, review of a final agency decision is not an adequate remedy. Therefore, the Commission's Order is immediately appealable and in error.

August 16, 2019

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PROOF OF SERVICE

I certify that I have served the Appellants' Initial Reply Brief on Timothy McDuffie by depositing a copy of it in the United States Mail, postage prepaid, on August 16, 2019, addressed to his attorney of record, Andrew Safran, P.O. Box 12089, Columbia, South Carolina 29211.

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August 16, 2019

The Honorable Jenny Abbott Kitchings
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1220 Senate Street,
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Re: Timothy McDuffie vs. Johnson Food Services, LLC
WCC File No.: 1413546 DOI: 9/20/2014
Carrier: Great American Alliance Insurance Company - Claim No.: 564615078
WJC&B File No.: 0285.00489
Appellate Case No.: 2018-002283

Dear Ms. Kitchings:

Please find enclosed the following documents regarding the above-mentioned appeal.

1. Appellants' Reply brief (original and one copy with stamped envelope);
2. Proof of service.

With kindest regards,

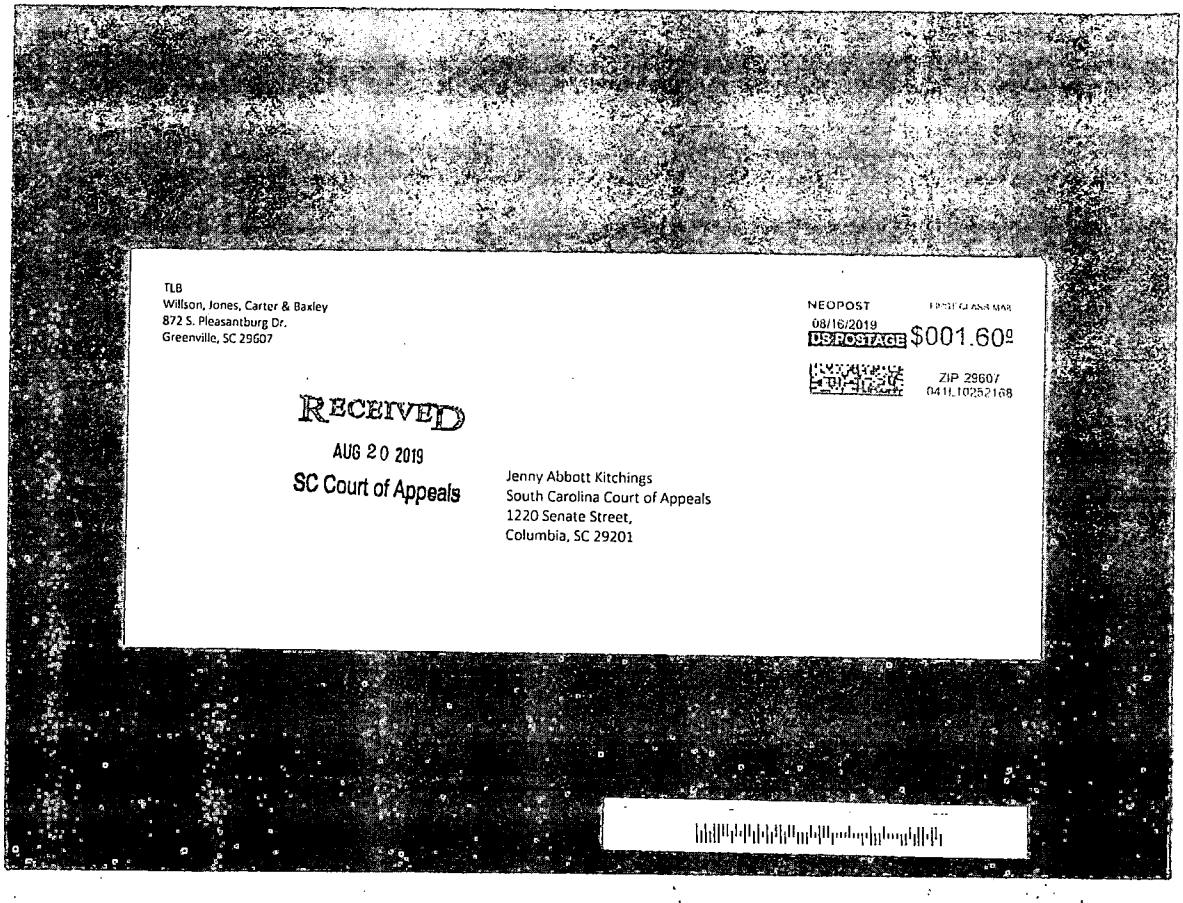
WILLSON JONES CARTER & BAXLEY, P.A.

Benjamin M. Renfrow

BMR/tlb

Enclosures

cc: Andrew Safran, Esq.



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