THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Aisha G. Taylor, Commissioner
Susan S. Barden, Commissioner
H. Gene McCaskill, Commissioner

W.C.C. FILE NOS.: 0725221 and 0921225

APPELLATE CASE NO.: 2019-000393

Deborah G. Duggans, Employee, ...APPELLANT.

v.

South Carolina Department of Mental Health, Employer, and State Accident Fund, Carrier, ...RESPONDENTS.

APPELLANT'S REPLY BRIEF

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I. THE LAW OF THIS CASE UNQUESTIONABLY ESTABLISHES: (A) MS. DUGGANS' DECEMBER 7 , 2009 COMPENSABLE ACCIDENT PRODUCED INJURIES AFFECTING MULTIPLE BODY PARTS; (B) HER PERMANENT AND TOTAL DISABILTY EXCLUSIVELY RESULTS FROM THIS DECEMBER 7, 2009 COMPENSABLE ACCIDENT, RATHER THAN ANY PURPORTED DISABILITY ATTRIBUTED TO HER JULY 16, 2007 CLAIM; (C) WHILE HER RESPECTIVE CLAIMS WERE CONSOLIDATED FOR TRIAL, THEY RETAINED THEIR SEPARATE/DISTINCT LEGAL STATUS; (D) RESPONDENTS' CONTENTION HER PERMANENT DISABILTY COMPENSATION AWARD WAS EITHER DEPENDENT OR PREMISED UPON DISABILITY ATTRIBUTABLE TO THE JULY 16, 2007 CLAIM IS WHOLLY MISPLACED; AND (E) THE COMMISSION'S AFFORDING RESPONDENTS CREDIT FOR TEMPORARY DISABILITY COMPENSATION PAID IN THE CONTEXT OF THE 2007 CLAIM IS LEGALLY FLAWED.

Essentially, Respondents argue: (a) Ms. Duggans' eligibility for a permanent and total disability compensation award necessarily hinged upon merger of her respective claims; (b) she could not establish "total loss of earning capacity under" S.C. Code Ann. Section 42-9-10 (2015) absent incorporation of the July 16, 2007 symptoms; and (c) her permanent and total disability compensation award is necessarily premised upon "the combined consequences of her two injuries." (See, Respondents' Brief, pp. 4 and 6). However, these contentions conveniently ignore the law of this case, which unequivocally verifies: (a) **the consequences of Ms. Duggans' December 7, 2009 compensable accident produced injuries affecting multiple body parts**; (b) her permanent and total disability status **solely resulted from the consequences of her 2009 compensable injuries**; and (c) the Commission's consistent recognition that her respective claims, though consolidated for trial, **remained legally separate/distinct**.

Specifically, after considering the contents of the hearing record, the single commissioner determined:

(a) "despite the presence of ongoing cervical symptoms identified by Dr. Jackson, . . . [Ms. Duggans] had resumed/maintained performance of **full duty work activities** until experiencing the December 7, 2009 accident";

(b) "this trauma not only created lumbar symptoms, **but also aggravated/increased the previously-diagnosed cervical symptoms**";

(c) "the consequences of Ms. Duggans' compensable injury **affect multiple parts of her body (back, right leg and neck)**";

(d) "the evidence establishes she has unquestionably been rendered permanently and totally disabled by the **combined effects** of these compensable injury components";

(e) "she has likewise experienced a 50% (+) permanent disability to (loss of use of) her back as a result of the consequences of her compensable injuries"; and

(f) "Ms. Duggans has been rendered permanently and totally disabled, through both a loss of earning capacity and 50% (+) permanent disability to the back, based upon the symptoms/pathology/limitations produced by her lumbar injury component alone, **regardless of the documented dysfunction attributable to her cervical injury component**". (See, Record on Appeal, pp. __).

The Commission further concluded:

(a) ". . . [a]fter **resuming full duty work activities**, Ms. Duggans sustained additional injuries to her back (lumbar and cervical) within the meaning of Section 42-1-160 on December 7, 2009";

(b) "the consequences of Ms. Duggans' **December 7, 2009 compensable accident affect multiple body parts**";

(c) "the combination of impairments/limitations stemming from her compensable injury components (**especially the back and right leg**) prohibit her from resuming the types of work activities she has performed throughout her adult life";

(d) she "has sustained a 50% (+) permanent partial disability to (loss of use of) her back within the meaning of S.C. Code Ann. Section 42-9-30 (21) (2015) **as a result of her December 7, 2009 compensable accident**";

(e) "**this degree of residual disability to the back** per Section 42-9-30 (21) **exceeds 50% regardless of the presence of her neck injury component**";

(f) "she has likewise been rendered permanently and totally disabled within the meaning of Section 42-9-10 by the **combined consequences of her December 7, 2009 compensable injuries, particularly the back and right leg symptoms**"; and

(g) "the nature/degree **of the back (lumbar) injury component resulting from this injury (affecting both her back and right leg) are sufficient to, in and of themselves, produce a total loss of earning capacity warranting an award of permanent and total disability compensation per Section 42-9-10**" (See, Record on Appeal, pp. __).

As these determinations were not appealed to the Appellate Panel, which actually incorporated them in its February 5, 2019 Order, they constitute the law of this case. See, Colonna v. Marlboro Park Hospital, 404 S.C. 537, 745 S.E.2d 128, 134 (Ct. App. 2013); Hilton v. Flakeboard America Limited, 401 S.C. 245, 791 S.E.2d 719, 721 (2016). Given these facts, Respondents cannot: (a) deny Ms. Duggans' **December 7, 2009 compensable accident produced multiple injuries affecting her back, neck and right leg**; (b) dispute her permanent and totally disability award was wholly/exclusively based upon not only the 50% (+) back disability produced **by her December 7, 2009 compensable accident**, but also "the **combined consequences of her December 7, 2009 compensable injuries**, particularly the back and right leg symptoms"; (c) attribute any degree of permanent disability to either Ms. Duggans' July 16, 2007 claim or an unrelated cause; and (d) seek to relitigate any of these issues at this stage. See, Hudson ex. rel. Hudson v. Lancaster Convalescent Center, 407 S.C. 112, 754 S.E. 2d 486, 490 (2014) ("a party is precluded from re-litigating issues decided" in a prior order). See also, Brunson v. American Koyo Bearings, 367 S.C. 161, 623 S.E. 2d 70, 872 (Ct. App. 2005) (ruling that the single commissioner become and are the law of the case unless excepted to by appellant) *abrogated in part on other grounds by* Bone v. U.S. Service, 404 S.C. 67, 744 S.E. 2d 552 (2013).

It is equally certain: (a) ". . . [t]here is a marked distinction between an actual consolidation, and an order that cases merely be tried together for convenience" (Kennedy v. Empire State Underwriters Watertown, N.Y., 202 S.C. 38, 24 S.E. 2d 78, 79 (1942); McKinney v. Greenville Ice & Fuel Co., 232 S.C. 257, 101 S.E. 2d 659, 660 (1958)); (b) where, as here, claims are "consolidated for trial", "they do not merge into one", but instead remain legally separate/distinct (Id.); (c) inspection of the single commissioner's unappealed determination absolutely reflects a

recognition of the continued independent viability of Ms. Duggans' respective claims; and (d) Respondents' characterization of these claims as "combined", as opposed to merely tried together, likewise materially conflicts with the law of this case.

II. RESPONDENTS' "UNCLEAN HANDS" ARGUMENT, WHICH SIMILARLY MISCONSTRUES THE LAW OF THIS CASE AND UNDERLYING PROCEDURAL HISTORY, IS BASELESS.

Respondents next argue the Appellate Panel's credit assessment should be affirmed on equitable grounds, maintaining: (a) consolidation of Ms. Duggans' respective claims for hearing purposes "guarantee[d] . . . total disability under § 42-9-10 if she could not receive it under § 42-9-30"; and (b) the parties' agreement to this procedural consolidation somehow resulted in her "now appear[ing] . . . before this court with 'unclean hands'". However, these contentions are both legally and factually misplaced.

While the Supreme Court previously recognized the provisions of S.C. Code Ann. Section 42-9-400 (1976, as amended) allowed an injured worker to pursue a permanent disability award based upon "the combined effects of . . . preexisting impairment and subsequent injury", the ability to "stack" impairments in this fashion was extinguished through the 2007 amendment of this statute. See, Bartley v. Allendale County School District, 392 S.C. 300, 709 S.E. 2d 619 (2011); and Dinkins v. Lowe's Home Centers, Inc. – Sumter, SC, 396 S.C. 556, 722 S.E. 2d 808 (Ct. App. 2012). As a consequence, Ms. Duggans **could not** obtain a total disability award premised upon loss of earning capacity through the combination of any impairments attributable to her 2007 injury, but was instead required to rely upon the independent and/or aggravating effects of the 2009 trauma.

In this regard, inspection of the appellate record confirms Ms. Duggans, recognizing this legal impediment to the combination of unrelated impairments, consistently focused on establishing: (a) her "full duty" work status prior to the date of her December 7, 2009 compensable accident; (b) the **aggravating** effects of this subsequent trauma on her preexisting cervical symptoms; (c) the 2009 creation of not only a new lumbar injury component, which also generated right leg pain, but also an appreciable worsening of her prior cervical condition; and (d) the consequences of her second accident affected multiple body parts, independent of her aggravated cervical symptoms (See, Record on Appeal, pp. ___).

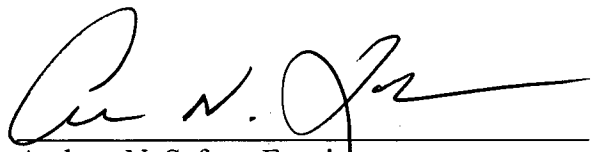
"The expression 'clean hands' . . . refer[s] to some misconduct in regard to the matter in litigation of which the opposite party can, in good conscience, complain in a Court of equity." Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E. 2d 735, 738 (1943). See also, Anderson v. Buonforte, 365 S.C. 482, 617 S.E. 2d 750, 756 (Ct. App. 2005). The essence of this remedy requires: (a) unfair behavior; and (b) the presence of an action in equity. See, Aaron v. Mahl, 381 S.E. 585, 67 S.E. 2d 482, 487 (2009).

In this instance: (a) Respondents agreed to a consolidation of claims for trial that was aimed toward conclusively resolving all issues; (b) the parties' consensual action not only insured finality as to each of Ms. Duggans' respective claims, but also precluded potential manipulation of the nature addressed by this Court in Harrison v. Owens Steel Company, Inc., 422 S.C. 132, 810 S.E. 2d 433 (2018); (c) Ms. Duggans established permanent and total disability in two legally sufficient fashions; and (d) the record is devoid of any indication Respondents, who could have easily objected to the trial consolidation, were misled, deceived or the recipient of any forms of unfair treatment.

Further, although our Appellate Courts have recognized the applicability of certain equitable doctrines in the workers' compensation context, they have never held determination of permanent disability per the South Carolina Workers' Compensation Act or enforcement of specific statutory requirements relative to the assessment of credit are grounded in equity. Absent this nexus, it is respectfully submitted the Appellate Panel, which "has only [those] . . . powers as have been conferred by law" did not possess the equitable discretion to award a credit. See, Aaron, 674 S.E. 2d at 487. See also, Bazzle v. Huff, 319 S.C. 443, 462 S.E. 2d 273 (1995).

Accordingly, Ms. Duggans respectfully requests the Court to reverse the Appellate Panel's assessment of credit and reinstate the single commissioner's determination.

Respectfully submitted,



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December 5, 2019
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CERTIFICATE OF SERVICE

I, Paula Bregovi, do hereby certify that on the 5th day of December, 2019, I filed, via hand delivery, the original of Appellant's Reply Brief with the Clerk of the South Carolina Court of Appeals, while serving one (1) copy of same on counsel for Respondents via first class mail at the following address:

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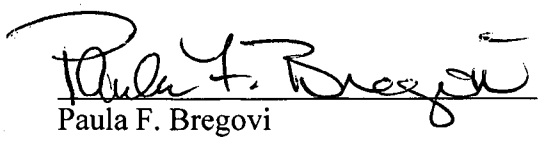

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December 5, 2019

HAND DELIVERED
The Honorable Jenny Abbott Kitchings
Clerk
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RE: Deborah Duggans v. SCDMH and State Accident Fund
Appellate Case No.: 2019 - 000393

Dear Ms. Kitchings:

Enclosed please find an original and one copy of Appellant's Reply Brief 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 David Keller, 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: David Hill Keller, Esquire