THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

The Honorable T. Scott Beck, Commissioner

W.C.C. File No. 1112328
Appellate Case No. 2019-001357

Samuel Rose,
Claimant.....Respondent,

v.

JJS Trucking, LLC, Uninsured Employer, and Chris Thompson Services, Upstream Employer, and Bridgefield Casualty Ins. Co., Carrier for Chris Thompson Services, and The State Accident Fund,.....Appellants.

INITIAL REPLY BRIEF OF THE APPELLANTS

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Arguments

I. The question of issue preservation is properly before the Court of Appeals.

According to the Claimant, the doctrine of *res judicata* precludes the Court of Appeals from addressing the issue preservation argument (Argument I), which has been consistently raised by the Appellants, but never ruled upon. Under the doctrine of *res judicata*, "a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action." Treadaway v. Smith, 325 S.C. 367, 479 S.E.2d 849 (Ct. App. 1996) (citing Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188, 417 S.E.2d 569 (1992) and Foran v. USAA Cas. Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993)). Clearly, the doctrine of *res judicata* does not apply because there has never been a "prior action," much less a "final judgment on the merits" of the Claimant's workers' compensation claim, nor has any "second action" ever been brought.

While there was a previous Commission Order that the Claimant appealed to the Court of Appeals, the Claimant's appeal dealt solely with the application of S.C. Code Ann. § 42-1-560 because he made no argument with regard to his entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30. The Court decided the case, without oral arguments, by unpublished decision dated April 18, 2018. The April 18, 2018 Order merely states, "[w]e reverse the Appellate Panel's order and remand for further proceedings consistent with this opinion." The very fact that the Order of the Court of Appeals requires a remand speaks conclusively to the

fact that there was not yet any "final judgment on the merits" and there has since been no "second action," such that the doctrine of *res judicata* could apply.

Furthermore, the April 18, 2018 Order says nothing of awarding the Claimant medical or compensation benefits and does not purport to expand the Appellate Panel's jurisdiction on appeal, vested by virtue of S.C. Code Ann. § 42-17-50 and the Claimant's Form 30. Indeed, the April 18, 2018 Order of the Court of Appeals does not address the issue preservation argument raised by the Appellants in the present appeal. Therefore, there is no merit in the Claimant's allegation that the Appellants previously "lost this issue before this Court," or that the doctrine of *res judicata* in any way bars the consideration of this argument in the present appeal.

Accordingly, the Appellants respectfully request that the Court of Appeals reverse and vacate the Appellate Panel's June 17 and June 24, 2019, Orders. The Claimant is not entitled to any additional benefits under the Workers' Compensation Act as a matter of law, as the remand and Remittitur from the Court of Appeals merely returned the claim to the Commission to address the issues actually raised in the Claimant's November 14, 2014 Brief to the Appellate Panel, consistent with the Court's analysis of S.C. Code Ann. § 42-1-560, and consistent with the Appellate Panel's jurisdiction under S.C. Code Ann. § 42-17-50.

II. The Commission erred as a matter of law in awarding medical benefits in contravention of S.C. Code Ann. § 42-15-60.

Under S.C. Code Ann. § 42-15-60, an employee is only entitled to medical treatment upon proof that such treatment "will tend to lessen the period of disability as evidenced by

expert medical evidence stated to a reasonable degree of medical certainty." While the Commission and the Claimant cite the opinions of Dr. Wildstein and Dr. Poletti, these opinions do not satisfy the requirements of S.C. Code Ann. § 42-9-260, because these opinions are not stated with only *potentiality*, not the requisite medical *certainty*. According to Dr. Wildstein's report dated December 14, 2011, which does not address causation or lessening the period of disability, the Claimant "*could potentially benefit* from a one level C5-6 ACDF." (emphasis added). Similarly, Dr. Poletti, who evaluated the Claimant once on July 16, 2013 for the purpose of litigation, stated only that the Claimant "has a *potential* surgical lesion in his neck" (emphasis added). While Dr. Poletti's report contains a catch-all "reasonable degree of medical certainty" reference, the fact remains that that he was only reasonably certain that the Claimant had even a "potential" need for surgery, but Dr. Poletti otherwise made no mention of this potential surgery's impact on lessening the Claimant's disability.

In addition, the "potential" need for neck surgery some five to seven years ago is a legally-insufficient basis upon which to conclude that the Claimant presently needs any medical treatment. Indeed, only by resorting to pure speculation did the Commission conclude that prior potentialities have somehow become present certainties, as there is no medical evidence in the record to support any finding or conclusion regarding the Claimant's present medical needs, if any. This alone requires reversal. *See* Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1949) (holding that awards of the Commission may not rest upon surmise, conjecture, or speculation).

In addition, the Claimant's argument that the procedural posture of the claim somehow obviates his burden of proof under S.C. Code Ann. § 42-15-60, or alleviates the

legal constraints placed upon the Commission's authority by the Legislature, is untenable. *See* Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965) (stating "the difficulty in proving a fact in a compensation case does not relieve the party on whom the burden rests of proving it, and does not shift the burden to the other party) (internal citations omitted). According to the Claimant's brief, "[t]he difficulty for Rose is that he has had minimal treatment for his knee." He further argues that because "Rose has never been provided a lumbar spine MRI" the Appellants should be required to provide the MRI "to determine specifically what is causing Rose's pain and what modalities are necessary to treat it." The Court of Appeals squarely rejected a similar argument in Hartzell v. Palmetto Collision, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016). Hartzell argued that because his claim had been denied and his employer had not provided him any medical treatment, it would be unfair to shift the burden of providing medical evidence to him, despite the plain language of S.C. Code Ann. § 42-15-60. The Court of Appeals concluded that the argument advanced by Hartzell (and the Claimant *sub judice*) would lead "to an absurd result" in which the burden of proving entitlement to medical benefits would apply only in admitted claims and not to denied claims. The Court of Appeals further explained that the language of § 42-15-60 constitutes a "heightened standard of medical evidence," which "limit[s] the Appellate Panel's broad discretion" to award future medical benefits. Id.

Therefore, the Appellants respectfully contend that a neck surgery mentioned as mere potentiality some five to seven years ago and low back or knee treatment that has never been recommended, much less with medical certainty, simply does not satisfy the

requirements of S.C. Code Ann. §4-15-60 as a matter of law. As such, the Commission's award of medical benefits under S.C. Code Ann. § 42-15-60 should be reversed.

III. Only the Commission is empowered to decide whether the Claimant's subsequent falls at home were the natural consequence of any work-related injury and, having failed to address this issue, the Court of Appeals should remand.

Based upon the Claimant's own admission, the proximate cause of his neck and low back problems is not work-related, but instead his problems are due to falls down a flight of stairs at home in November 2011 and again in January of 2012. Hearing Commissioner Taylor's September 4, 2014 Order explicitly states that

> "the Claimant testified that he fell down a flight of stairs at his mother's house in November 2011 and again in January of 2012 and re-injured his back and neck on both occasions. (Hrg. Transcript p. 34, ll.2—7)." (9/14/14 Order p.7, para.1).

The Appellate Panel similarly noted the Claimant's admission of this fact in the Order of February 8, 2016.

While the Appellants maintain that the fact of these two subsequent, intervening accidents breaking the chain of causation should be moot given the conclusive nature of Hearing Commissioner Taylor's denial of benefits S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30, the Appellants contend that if the Commission is authorized to address benefits under these statutes on remand, it was incumbent upon the

Appellate Panel to address the legal ramifications of these intervening, non-work-related accidents which were laid bare in the evidentiary record. The issue was not previously relevant because the Commission determined that the Claimant was not entitled to any benefits as a matter of law on other grounds.[1]

Even the Claimant's Brief to the Court of Appeals acknowledges the legal consequences of a subsequent, intervening accident and argues that the Claimant's admitted injuries at home in November 2011 and January of 2012 were merely the natural consequence of his work accident. However, the Commission did not address this argument, nor make any finding of fact on this material issue in its June 2019 Orders. While the Commission's Conclusion of Law #3 acknowledges that an "intervening cause" can break the chain of causation, the Commission utterly failed to apply this law to the facts of the case. This constitutes plain error, as the appellate courts have "repeatedly emphasized the need for specificity in administrative orders" and remanded those found to be insufficient. Heater of Seabrook, Inc., v. Public Service Comm'n, 505 S.E.2d 739 (1998). This is because

> "[t]he findings of fact of an administrative body must be sufficiently detailed to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings. Implicit findings of fact are not sufficient. Where material facts are in dispute, the administrative body must make

[1]The Claimant argues that the subsequent intervening accident issue should have been raised at a previous hearing before Commissioner McCaskill. The issue was raised at that hearing, which resulted in an interlocutory order in which the extent of any injuries causally-related to the work accident was not determined. The issue was then raised again before Commissioner Taylor, as memorialized in her Order at page 7.

specific, express findings of fact. *Able Communications, Inc. v. PSC*, 290 S.C. 409, 411, 351 S.C. 151, 152 (1986). *See also* S.C. Code Ann. § 1-23-350 (1986) ("A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."); *Hamm v. PSC*, 302 S.C. 132, 394 S.E.2d 311 (1990)." Id.

Here, the Commission made no findings of fact on the issue of the intervening accidents, much less findings of sufficient detail "to enable the reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings." Id. Therefore, the Appellants respectfully request that the issue be remanded to the Commission.

Conclusion

As argued in the Appellants' Brief and for the reasons set forth herein above, the Appellants, Chris Thompson Services and Bridgefield Casualty, respectfully request that the June 17 and June 24, 2019 Orders of the Workers' Compensation Commission be REVERSED.

Respectfully submitted,

February 24, 2020

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118\133\initial reply brief

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

The Honorable T. Scott Beck, Commissioner

W.C.C. File No. 1112328
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Samuel Rose, Claimant.....Respondent,

v.

JJS Trucking, LLC, Uninsured Employer, and Chris Thompson Services, Upstream Employer, and Bridgefield Casualty Ins. Co., Carrier for Chris Thompson Services, and The State Accident Fund,.....Appellants.

PROOF OF SERVICE

The undersigned hereby certifies that the Initial Reply Brief of the Appellants (Chris Thompson Services and Bridgefield Casualty Insurance Company) was served on Samuel A. Rose, the South Carolina Uninsured Employers Fund, and JJS Trucking, Inc. by depositing a copy of the same in the United States Mail, first class postage prepaid, on February 24, 2020, addressed to the legal representatives of the parties of record as follows:

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February 24, 2020

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W.C.C. File No.: 1112328
Appellate No.: 2019-001357
Carrier File No.: 0196-943450
Date of Accident: August 10, 2011

Dear Ms. Kitchings:

Enclosed herewith for filing, please find the Initial Reply Brief of the Appellants, Chris Thompson Services and Bridgefield Casualty Insurance Company, along with original Proof of Service, in the above-referenced matter. By copy of this letter, I am serving the other counsel of record with a copy of these documents. If you should have any questions, please do not hesitate to contact me.

Yours very truly,

Kirsten L. Barr

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