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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Gene McCaskill, Commissioner
Avery B. Wilkerson, Jr., Commissioner
R. Michael Campbell, II, Commissioner

W.C.C. FILE NO.: 1215681

APPELLATE CASE NO.: 2018-000359

Vickie Rummage, Employee, ...Appellant,

vs.

BGF Industries, Employer, and Great American Alliance Insurance Co., Carrier, ...Respondents.

APPELLANT'S FINAL REPLY BRIEF

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

Attorney for Appellant

December 17, 2018
Columbia, South Carolina

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I. THE ISSUE RELATIVE TO THE LACK OF LEGALLY COMPETENT EVIDENCE SUPPORTING THE SINGLE COMMISSIONER'S RULING WAS UNQUESTIONABLY RAISED TO AND RULED ON BY THE APPELLATE PANEL/COMMISSION.

Recognizing the fact Dr. Gualtieri's report, while admissible, does not satisfy the requirements of S.C. Code Ann. Section 42-9-35 (2015), Respondents have again attempted to avoid an adjudication on the merits through assertion of a purported procedural flaw. However, inspection of the Appellate Panel's/Commission's February 1, 2018 Order clearly establishes this conclusively dispositive issue is properly before the Court.

After challenging the single commissioner's ruling on numerous grounds, including its utilization of an "unlawful adjudication procedure", hinging on "a legally impermissible medical opinion" and failure to recognize the only reasonable inference arising from the hearing record established Ms. Rummage's compliance with the provisions of S.C. Code Ann. Section 42-9-35 (2015), she filed a June 15, 2017 memorandum reiterating these points, particularly the absence of "competent evidence which supports the fact finder's determination [she] . . . did not meet her [statutory] . . . burden of proof . . . ." (See, Record on Appeal, p. 102).

Additionally, as confirmed by the September 18, 2017 "Full Commission Hearing" transcript, she: (a) reminded that Section 42-9-35 mandated the use of medical evidence in establishing a compensable aggravation; (b) noted evidence stated to a reasonable degree of medical certainty was required to not only establish causative aggravation, but also rebut legally appropriate proof of compliance with this statute per the Supreme Court's ruling in Michau v. Georgetown County, 396 S.C. 589, 723 S.E. 2d 805 (2012); and (c) the absence of "competent evidence to support . . . [the single commissioner's] decision." (See, Record on Appeal, pp. 127-131).

These contentions prompted an Appellate Panel member to inquire as to whether Dr. Gualtieri's opinions were stated to a reasonable degree of medical certainty. (See, Record on Appeal, p. 136). Respondents' counsel then acknowledged, "I don't believe he actually used those - - that terminology in there" (i.e. the reports confirming this physician's generation of opinions **several months prior to actually evaluating Ms. Rummage**). (Id.).

When Respondents attempted to limit the nature/scope of Ms. Rummage's appeal through submission of a proposed order that excluded several assertions of error, the undersigned requested revision of this document to reflect all issues which were properly raised to and ruled upon by the Panel. After considering the parties' respective positions, the Panel acknowledged:

> . . . Additionally, Appellant: (a) relying on the decision in Michau v. Georgetown County, 396 S.C. 589, 723 S.E. 2d 805 (2012), **contend the provisions of § 42-9-35, S.C. Code Ann. not only require medical evidence to prove the aggravation of a preexisting condition, but also to rebut any medical evidence supporting this contention**; (b) maintains the **record contains no competent evidence which supports the Hearing Commissioner's ruling that she did not meet her burden of proof, as there is no contrary medical evidence that satisfies the requirements of § 42-9-35, as Defendants'/Respondents' expert did not offer any opinions to a reasonable degree of medical certainty**; (c) argues the Hearing Commissioner's **adverse credibility findings alone are insufficient to rebut the multiple medical opinions confirming the aggravation of her preexisting psychological condition** by the consequences of her compensable injury; and (d) claims the denial of her request for treatment **resulted from an arbitrary decision-making process through which a medical question was determined through the Hearing Commissioner's rendering expert opinion**. (See, Record on Appeal, p. 28) (Emphasis added).

". . . [I]ssues raised [to] . . . and ruled upon by the commission are cognizable on appeal". Stone v. Roadway Express, 367 S.C. 575, 627 S.E. 2d 695, 698 (2006); Levi v. Northern Anderson County EMS, 409 S.C. 374, 762 S.E. 2d 44, 47 (Ct. App. 2014). As confirmed by the

Appellate Panel/Commission, Ms. Rummage raised and it ruled on all issues which are the subject of the current appeal, including: (a) the fact Dr. Gualtieri's report, while admissible, did not constitute competent evidence upon which to premise a denial of Ms. Rummage's aggravation claim due to non-compliance with the requirements of Section 42-9-35; (b) the absence of any competent evidence to rebut the numerous medical opinions (offered to a reasonable degree of medical certainty) verifying the causal aggravation of Ms. Rummage's preexisting psychological condition; (c) the legislatively mandated need for medical evidence in this context; and (d) the inadequacy/impropriety of an order premised upon "the medical opinion of the single commissioner, adopted by the Commission." Burnette v. City of Greenville, 401 S.C. 417, 737 S.E. 2d 200, 206 (Ct. App. 2012).

Frankly, if Respondents believed the Appellate Panel's/Commission's ruling on the scope of the appeal was erroneous, it would appear they were not only entitled, but obliged, to seek reconsideration per S.C. Code Ann. Section 1-23-380 (1) (Supp. 2017). Their failure to do so should operate as a waiver of any right to raise the issue at this stage.

Further, assuming arguendo, the Appellate Panel/Commission had not explicitly confirmed its consideration and determination of these issues, resolution of their merits is certainly warranted, as: (a) this "Court is concerned with the substance of an appeal, not technical differences in the issues raised by the exceptions." Bartles v. Livingston, 282 S.C. 448, 319 S.E. 2d 707, 717 (Ct. App. 1984); (b) "substance will generally take precedence over technical rules in considering exceptions." Brock v. Board of Adjustment and Appeals of the City of Rock Hill, 308 S.C. 539, 419 S.E. 2d 773, 776 (1992); (c) "a party is not required to use the exact name of a legal doctrine in order to preserve the issue." Herron v. Century BMW, 395

S.C. 461, 719 S.E. 2d 640, 642 (2011); (d) "appellate courts should remain 'mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner'". Amisub of South Carolina, Inc. v. South Carolina Department of Health and Environmental Control, 423 S.C. 50, 813 S.E. 2d 719, 721 (2018); and (e) the absence of statutory compliance is dispositive. See, Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E. 2d 145, 149-150 (Ct. App. 2016).

Accordingly, Ms. Rummage respectfully requests the Court to reverse the Appellate Panel's/Commission's ruling and remand this matter for the sole purpose of providing her with treatment for her aggravated psychological condition in accordance with the competent medical evidence of record.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I, Paula F. Bregovi, Paralegal for Andrew N. Safran, Esquire, Attorney for Appellant, do hereby certify that on the 17th day of December, 2018, I caused to be filed, via hand delivery, the original and fourteen (14) copies of Appellant's Final Reply Brief with the Clerk of the South Carolina Court of Appeals. One (1) copy of the Appellant's Final Reply Brief was furnished to counsel for Respondents via first class mail at the following address:

To: **VIA FIRST CLASS MAIL**
Michael A. Farry, Esquire
Horton, Drawdy, Ward, Mullinax & Farry, P.A.
307 Pettigru Street
Greenville, South Carolina 29601

Paula F. Bregovi

Paula F. Bregovi
Post Office Box 12089
Columbia, South Carolina 29211
(803) 256-6689

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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

Attorney for Respondent

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