

WHOLE COURT

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August 23, 2018

In the Court of Appeals of Georgia

A16A0092. MCDUFFIE v. OCMULGEE EMC et al.

MILLER, Presiding Judge.

In *McDuffie v. Ocmulgee EMC*, 338 Ga. App. 200 (789 SE2d 415) (2016), this Court (1) affirmed the Administrative Law Judge's finding that Ocmulgee EMC ("EMC") met its burden of demonstrating that Kasabian McDuffie had returned to his pre-2009-injury condition when EMC suspended McDuffie's indemnity benefits; but (2) remanded this case for factual findings regarding whether EMC had shown that suitable work was available to McDuffie before terminating his benefits. *Id.* at 202-204 (1), (3).

In *Ocmulgee EMC v. McDuffie*, 302 Ga. 640 (806 SE2d 546) (2017), the Supreme Court of Georgia reversed this Court's decision, in part, determining that EMC was not required to show the availability of suitable employment and that no

further factual findings were necessary in this regard. *Id.* at 643-645 (2). Thus, the Supreme Court affirmed in full the decision of the Appellate Division of the State Board of Workers' Compensation. Accordingly, we vacate Division 3 of our prior decision, and the judgment of the Supreme Court is adopted and made the judgment of this Court for Division 3.

Judgment affirmed. Dillard, C.J., Ellington, P.J., McMillian, Mercier, Reese, Brown, JJ., concur. McFadden, P.J., dissents. Gobeil, J. recused.

A16A0092. MCDUFFIE v. OCMULGEE EMC et al.

MCFADDEN, Presiding Judge, dissenting.

The parties filed cross-petitions for certiorari. As the majority explains, our Supreme Court granted Ocmulgee EMC's petition and reversed in part.

McDuffie's petition asked that my dissent be adopted. Our Supreme Court denied his petition and expressly declined to address the conclusion from which I dissented: "We did not grant McDuffie's certiorari petition seeking review of that fact-specific conclusion." *Ocmulgee EMC v. McDuffie*, ___ Ga. ___, __ (2) (___ SE2d ___) (Case No. S17G0038, decided Oct. 16, 2017).

In light of this very particular set of circumstances, I respectfully adhere to my dissent.