

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G. Edward Welmaker, Circuit Court Judge

Unpublished Opinion No. 2013-UP-071
(S.C. Ct.App. filed February 13, 2013)

RECEIVED

JUN 24 2013

S.C. Supreme Court

Maria E. McGaha, Employee, Respondent,

vs.

Honeywell Int'l, Inc., Employer and
Zurich North America, Carrier, Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Kathryn Williams
Kathryn Williams, P.A.
619 North Main Street
P.O. Box 10693
Greenville, SC 29603
(864) 235-6254
Attorney for Respondent

Other Counsel of Record:

Vernon F. Dunbar, Esq.
Turner, Padgett, Graham & Laney, P.A.
P.O. Box 1509
Greenville, SC 29602
(864) 552-4601
Attorney for Petitioner

TABLE OF CONTENTS

Questions Presented 1

Statement of the Case 2

Arguments

 I. The Commission’s determination that McGaha is entitled to temporary total disability compensation benefits from March 4, 2005 to the present and continuing is supported by substantial evidence and, therefore, no special and important reasons exist to warrant review by this Court 10

 II. Honeywell abandoned its argument that the Commission somehow erred in determining McGaha sustained compensable injury to her neck 15

Conclusion 16

QUESTIONS PRESENTED

- I. Should this Court grant *certiorari* review in this case where the both the Court of Appeals and the Circuit Court determined the Workers' Compensation Commission was supported by substantial evidence on the record?
- II. Is the Workers' Compensation Commission's determination that McGaha is entitled to temporary total disability compensation benefits under the circumstances of this case supported by substantial evidence on the record?
- III. By merely mentioning but not arguing the issue in its Petition for Certiorari, has Honeywell abandoned its argument that the Commission somehow erred in determining McGaha sustained compensable injury to her neck?

STATEMENT OF THE CASE

This is an appeal from the Workers' Compensation Commission. By Order dated February 17, 2009, the Hearing Commissioner found Maria McGaha sustained compensable injuries to her neck and left shoulder in addition to the admitted left carpal tunnel syndrome and that she is entitled to past and continuing medical treatment at the recommendation of Dr. Geary. The Commissioner further found that she is entitled to temporary total disability compensation from March 4, 2005 to the present and continuing and that Honeywell International and its workers' compensation insurance carrier, Zurich North America (together "Honeywell"), are not entitled to credit for any short-term disability benefits paid. (R. pp. 1-14)

Both parties appealed to the Full Commission Panel, but by Order dated August 20, 2009, the Commission affirmed the Hearing Commissioner's Order. (R. pp. 15-23)

Honeywell appealed to the Circuit Court for Greenville County contending only that the Commission erred in finding McGaha sustained compensable injury to her neck and erred in finding she is entitled to temporary total disability compensation from March 4, 2005 to the present and continuing. By Order dated January 6, 2011, the Honorable G. Edward Welmaker affirmed the Commission's Order and award in its entirety. (R. pp. 24-31)

Honeywell appealed to the Court of Appeals, which also affirmed the Commissioner's decision by Order dated February 13, 2013. Honeywell petitioned the Court of Appeals to reconsider its opinion, but by Order dated March 22, 2013, the court denied that petition.

STATEMENT OF FACTS

McGaha testified that she began working for employer-defendant in 1998 and that she worked as a deburrer, which required the extensive use of her upper extremities. (R. p. 205, line 8-p. 206, line 19) On or about July or August 2003, she was performing her regular work duties, when she began having pain and problems in her left shoulder, the left side of her neck and down her left arm. McGaha testified that she reported these problems to employer-defendant. She was sent to the company nurse, who referred her to the company doctor at St. Francis Workwell. (R. p. 206, line 20-p. 207, line 7) McGaha was eventually placed on light duty work restrictions by the company doctor. However, Honeywell could not accommodate these restrictions. McGaha was terminated from her job. (R. p. 210, line 9-p. 212, line 24; p. 215, lines 12-19)

McGaha saw Dr. Brunson for her left upper extremity pain, and he recommended an MRI of the left shoulder. However, the insurance carrier denied the MRI. Dr. Brunson also recommended referral to neurosurgeon, Dr. Michael Bucci, and to orthopaedic specialist Dr. Stephen Geary, who recommended possible future left shoulder surgery. McGaha testified that she was unable to have the surgery because her health insurance was cancelled when she lost her job. (R. p. 207, line 7-p. 210, line 6)

McGaha stated that her husband suffered from several illnesses during this time, including colon cancer in 2000, two strokes in 2005, and liver cancer, and that he continued to have problems to that day, for which he was hospitalized. (R. p. 212, line 25-p. 214, line 13; p. 222, line 24-p. 225, line 17)

McGaha testified that her neck and wrist pain is better, but that she continues to experience pain and problems in her left shoulder. She testified that she has difficulty performing activities involving her left upper extremity. As an example, she stated that she has difficulty lifting juice from the refrigerator with her left arm. While her sisters-in-law help her care for her husband, McGaha testified that she has mostly cared for him on her own. McGaha further testified that she is right-hand dominant but is only able to use her left hand as a helper hand. She testified that she wants further treatment with Dr. Geary and is unable to return to any work as a result of her continuing left shoulder pain. (R. p. 214, lines 13-25; p. 218, line 18-p. 222, line 24; p. 225, line 23-p. 226, line 9)

Mary Gilboy, human resources manager for employer-defendant, testified before the single Commissioner, and her testimony confirms the nature of McGaha's work requiring the use of her upper extremities, as well as the fact that McGaha did complain to employer-defendant about left shoulder problems. She also specifically testified that McGaha was not returned to work because her restrictions were too great for the company to accommodate her and return her to work. (R. p. 227, line 12-p. 229, line 6; p. 230, line 8-p. 231, line 23; p. 234, line 14-p. 240, line 2; p. 240, line 16-p. 241, line 4)

Nurses' notes from McGaha's employment file dated July 17, 2003 indicate that McGaha had been evaluated at Mountain View Family Practice for likely work-related carpal tunnel syndrome, and that she had been written out of work for a period of two weeks. These notes further show that McGaha was experiencing pain in her neck and left arm, but that she did not want to miss time from work. The attending nurse recommended sending McGaha to Workwell to see if she could perform one-handed duty, and noted that McGaha was agreeable to this plan. On July 18, 2003, the attending

nurse noted that Workwell said McGaha could work with restrictions, and on July 23, 2003, it was noted that McGaha had been approved for an MRI. The nurses' notes further indicate that McGaha was offered a lighter duty job which involved "airflow/waterflow." While the attending nurse noted that McGaha was grateful to be offered a job, she noted after an extended conversation that she was favoring her right arm. On August 1, 2003, the company nurse noted that an MRI of the cervical spine revealed degenerative disc disease at C4-5 through C6-7 levels. On October 28, 2003, the attending nurse noted that McGaha had seen Dr. Merriweather at St. Francis Workwell for her return to work evaluation and that he had restricted her from overhead work, interior lifting, and lifting greater than five pounds. However, it was further noted that no work was available within those restrictions and that McGaha was upset that she may lose her job. On April 15, 2004, the attending nurse spoke with McGaha, noted that she continued to have pain in her shoulder and that she may need surgery. She further noted that McGaha had been referred to orthopaedic specialist Dr. Stephen Geary, who recommended surgery, but that McGaha was having issues regarding her insurance. McGaha signed the authorization for defendants to obtain her medical notes from Dr. Geary at that time. (R. pp. 58-63)

On June 21, 2003, Dr. Brunson evaluated McGaha for left arm pain and numbness from her neck to her fingers which had reportedly been present for six months. Dr. Brunson noted that McGaha's job requires the almost continuous use of her arms and hands in a deburring process. He diagnosed carpal tunnel syndrome and cervicalgia. Upon evaluation on July 17, 2003, Dr. Brunson noted that McGaha was unable to wear splints at work due to the nature of her job. He diagnosed work-related carpal tunnel syndrome due to repetitive motion and restricted McGaha from working for a period of two weeks. In a note to employer-defendant, Dr. Brunson further indicated that this

claim should be considered a workers' compensation injury. He noted that McGaha continued to work other jobs for employer-defendant, but still had pain which was exacerbated by work. Dr. Brunson opined that McGaha needed to be out of work while her claim was sorted out and restricted her from work from August 4, 2003 to August 25, 2003. Upon evaluation on August 21, 2003, he recommended an MRI of McGaha's left shoulder and indicated that he had spoken with Gail Pless, the rehabilitation nurse. Dr. Brunson continued to restrict McGaha from work through September 4, 2003. On September 8, 2003, he noted that the MRI of the left shoulder had been denied by McGaha's insurance. (R. pp. 64-86)

On September 17, 2003, Dr. Brunson noted that McGaha was experiencing depression and persistent pain. He further noted that McGaha's health insurance carrier, Cigna, had directed her to orthopaedist Dr. Jernigan, but that Dr. Jernigan wanted to review her records before deciding whether to treat McGaha and that, in the meantime, she was in limbo. McGaha began treatment for depression while Dr. Brunson continued to restrict her from work through October 19, 2003. On October 9, 2003, Dr. Brunson noted that McGaha's short term disability benefits had been denied due to a lack of information, even though he had faxed the notes to a representative for the insurance company. Dr. Brunson continued to restrict McGaha from work from October 14, 2003 through November 15, 2003. On October 22, 2003, he noted that McGaha's short term disability was at its limit and that McGaha must either be released from treatment or returned to work. He further noted that McGaha had been told by employer-defendant that short term disability had been denied due to a lack of information, but that McGaha wanted to return to work. On November 14, 2003, Dr. Brunson noted that McGaha's records had been faxed at least twice, but that employer-defendant claimed those records had never been received. On February 14, 2005, Dr. Brunson opined that

McGaha's left upper extremity and neck problems were caused by her repetitive work at Honeywell. (R. pp. 87-107)

On July 17, 2003, the attending nurse practitioner at St. Francis Workwell noted left neck, arm and hand pain. She further noted that McGaha was motivated and did not want to be out of work, even though she was having difficulty secondary to this pain. On July 21, 2003, the attending physician continued to note left shoulder pain and diagnosed cervical radiculopathy. On August 1, 2003, the attending physician recommended referral to a spine specialist and noted that McGaha would discuss this treatment with Mary at Honeywell. In the meantime, the attending physician recommended limited twisting and bending of the neck at work and restricted McGaha from lifting greater than five pounds with her left arm. (R. pp. 108-115)

Records of Metlife dated October 6, 2003 show that McGaha's disability claim was denied due to lack of information. In her disability claim, McGaha's job was described as involving the repetitive use of both hands seven to eight hours a day, firm grasping with both hands for four hours per day, and use of the head and neck five to six hours a day. (R. pp. 190-196)

Dr. Michael Bucci, of the Piedmont Neurosurgical Group, evaluated McGaha on November 4, 2003 for cervical spine problems due to left upper extremity pain and numbness, and he recommended physical therapy. On December 16, 2003, Dr. Bucci assessed persistent left upper extremity weakness and pain, and sought to rule out primary shoulder pathology and HNP. He recommended an MRI of the left shoulder and a CT myelogram of the cervical spine. On December 30, 2003, he insisted the insurance carrier authorize an MRI of McGaha's left shoulder. (R. pp. 117-120, 122-128, 163-167)

On January 7, 2004, McGaha underwent an MRI of her left shoulder at St. Francis Women's and Family Hospital. The results were read by the reviewing radiologist to reveal mild impingement tendinosis. (R. p. 121)

Pain management specialist Dr. Clifford Monda evaluated McGaha on January 13, 2004 upon referral by Dr. Bucci and assessed pain secondary to her work at Honeywell. He specifically noted left-sided neck, shoulder and arm pain. He noted that McGaha needed to return to work by February 4, 2004 or she would lose her job. He refilled her prescription of the pain medication Lortab, injected the left shoulder, and noted that his office was waiting for the results of McGaha's MRI. In the meantime, he restricted McGaha from lifting, pulling or pushing greater than 10 pounds. (R. pp. 129-131, 171-175)

Orthopaedic specialist Dr. Stephen Geary evaluated McGaha on January 21, 2004 for left shoulder pain and noted the pushing and pulling she was required to perform at work. He diagnosed left shoulder subacromial impingement and cervical spondylosis. He recommended injecting the AC joint, with consideration of future decompression surgery. On February 9, 2005, Dr. Geary opined that McGaha's left shoulder problems were aggravated by her work at Honeywell. (R. pp. 132-135)

Dr. Robert Schwartz evaluated McGaha on February 21, 2005 for complaints of sharp shoulder pain related to work. He noted that she had last worked in September 2003. On February 22, 2005, Dr. Schwartz again evaluated McGaha for complaints of left shoulder pain due to work and diagnosed subacromial arthritis. (R. pp. 136-138, 154-162; R. supp. p. 2) On March 4, 2005, Dr. Schwartz noted that he had seen McGaha for neck pain after a motor vehicle accident in 1990, but further noted her complaints of new shoulder pain related to her work for employer-defendant. (R. supp. p. 2)

Employment records show that McGaha reported her work injury on July 17, 2003. McGaha alleged neck and shoulder pain into her arm and hand due to her work with employer-defendant. In a fax to Workwell dated July 17, 2003, Mary Gilboy indicated that employer-defendant would accommodate any restriction. On August 4, 2003, McGaha requested family medical leave and it was noted that McGaha had been restricted to a maximum lift of five pounds; however, Mary Gilboy indicated that these restrictions were not work-related. On August 6, 2003, it was noted that the pain in McGaha's left arm and shoulder had been aggravated by repetitive motion at work and that McGaha was restricted from working with her left hand. On January 14, 2004, Ms. Gilboy noted that McGaha's physician had cleared her to return to work. She indicated that this would need to be cleared through the company doctor before employer-defendant would allow her to return. (R. pp. 139-144,176-177, 184-189; R. supp. p.1)

Dr. Robert Dameron performed an independent medical evaluation on December 19, 2008. He noted that McGaha started having problems with her neck and left upper extremity in 2003 and that her job required repetitive activity. Dr. Dameron opined that McGaha's left shoulder problems began with work, that she was not at maximum medical improvement, and that she needed to return to Dr. Geary. (R. pp. 145-147)

ARGUMENTS

- I. **The Commission's determination that McGaha is entitled to temporary total disability compensation benefits from March 4, 2005 to the present and continuing is supported by substantial evidence and, therefore, no special and important reasons exist to warrant review by this Court.**

A review of the evidence on the record shows that McGaha has been unable to work because of her injuries since August 1, 2003, and under applicable workers' compensation law, she would therefore be entitled to temporary total disability compensation from that date to the present and continuing until she reaches maximum medical improvement.

McGaha alleged the same at the original hearing of this matter, but Honeywell responded with the allegation that she should not be allowed benefits for that entire period since she spent part of that time caring for her sick husband. In a spirit of compromise, McGaha alternatively contended that she should be awarded benefits from August 1, 2003 to March 5, 2005 and then from December 19, 2008 to the present and continuing. In obvious such compromise, the single Commissioner determined that McGaha is entitled to temporary total disability benefits from March 4, 2005 to the present and continuing. That decision was affirmed by the Commission's Appellate Panel, and in further spirit of compromise, McGaha opted not to appeal further concerning the period from August 1, 2003 to March 4, 2005.

On Honeywell's appeal to the Circuit Court, the Honorable G. Edward Welmaker determined that "[a]s the evidence actually shows that McGaha has been totally disabled because of her injuries since August 4, 2003, the Commission's compromise determination that she is entitled to temporary

total disability compensation for the lesser time period from March 4, 2005 to the present and continuing is clearly supported by substantial evidence and is affirmed.” (R. pp. 28-31) The Court of Appeals affirmed the Circuit Court’s determination and also held that the Commission’s decision was supported by substantial evidence.

Rule 242, SCACR, requires “special and important reasons” in order for this Court to grant *certiorari* review, and the record in this case is simply devoid of any such reasons. The record rather fully supports the decisions from both the Court of Appeals and the Circuit Court that the Commission’s determination on this issue is supported by substantial evidence on the record.

Workers’ compensation law provides that an injured employee is entitled to and an employer is liable for temporary total disability compensation benefits for all periods of total disability, or inability to earn wages because of the injury in the same or any other employment, until the Commission determines that the worker has reached maximum medical improvement. Smith v. S.C. Dep’t of Mental Health, 335 S.C. 396, 517 S.E.2d 694 (1999); S.C. Code Ann. §§ 42-1-120, 42-9-10 (2003). The injured employee is entitled to such continuing temporary total disability compensation benefits so long as his disability continues, despite a subsequent termination from employment. Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1995).

The Commissioner here found that McGaha has not yet reached maximum medical improvement from her injuries and is in need of additional medical treatment in order to reach that plateau. (R. p. 12, Finding of Fact #20) Contrary to Honeywell’s argument to this Court that there is no evidence supporting the Commission’s determination on this issue, the evidence actually shows that McGaha has been totally disabled because of her injuries since August 1, 2003. The Commission’s compromise determination that she is entitled to temporary total disability

compensation for the lesser time period from March 4, 2005 to the present and continuing is clearly supported by substantial evidence.

Dr. Brunson opined that McGaha needed to be out of work while her claim was sorted out and restricted her from work from August 4, 2003 to August 25, 2003. (R. pp. 69-70, 72-74) He continued to restrict McGaha from work through September 4, 2003 and noted on that date that the MRI he had recommended was denied. (R. pp. 75, 81, 85, 90) He continued to help her pursue medical evaluation and treatment with orthopaedic and neurosurgical specialists and continued to restrict her work duties through November 15, 2003. (R. p. 97, 141-144)

Employer-defendant sent McGaha to Dr. Merriwether's office, and in a fax to that office dated July 17, 2003, Mary Gilboy indicated that employer-defendant would accommodate *any* restriction. (R. p. 196) McGaha was restricted to light duty work by Dr. Merriwether's office, and Dr. Merriwether finally restricted McGaha from twisting and bending of the neck at work and from lifting greater than five pounds with her left arm when he last saw her on August 1, 2003. (R. p. 114) There is no evidence that this restriction was ever lifted.

The plant nurse, Ms. Gilboy, noted that McGaha became quite upset that she would lose her job when she was told that there was no work available within Dr. Merriwether's restrictions. (R. p. 61) In fact, McGaha testified that she was terminated because the employer told her that no work was available under those restrictions, despite Honeywell's assertion to Dr. Merriwether. (R. p. 210, line 6-p. 211, line 15)

Of course, there can be no dispute that an employee is totally disabled because of her injuries and entitled to full temporary total disability compensation if the employer fails to provide light duty work recommended by the treating physician, as is the case here. Failure to provide light duty work

is tantamount to an admission that the injured worker is totally disabled from working and entitled to temporary total disability compensation under the Workers' Compensation Act. It is "inability to earn wages because of the injury in the same or any other employment" referred to in S.C. Code Ann. §§ 42-1-120 and Smith v. S.C. Dep't of Mental Health, 335 S.C. 396, 517 S.E.2d 694 (1999). Such a finding of entitlement to temporary total disability compensation is especially warranted where, as here, *Honeywell specifically told the treating physician that light duty work would be provided and then terminated McGaha stating that those light duty restrictions could not be accommodated.*

Nevertheless, the Commission – as a part of an obvious compromise – determined that McGaha was disabled from working because of her injuries and entitled to temporary compensation benefits from March 4, 2005 to the present. McGaha testified that her husband suffered from several illnesses, including several bouts with cancer and strokes, during this time that she has been out of work due to the injuries sustained at Honeywell (R. p. 212, line 14-p. 214, line 12), and defendants argue that they should not be held responsible for temporary total disability benefits alleging that her need to be with him and care for him is the real reason that she has not worked. However, the fact that some other circumstance also contributes to the worker's inability to work is immaterial and does not remove an employer's liability for compensation benefits. See Orr v. Elastomeric Products, 323 S.C. 342, 474 S.E.2d 448 (Ct. App. 1996)(claimant entitled to continued temporary disability benefits despite intervening pregnancy where disability caused by work-related injury, not pregnancy).

Honeywell chooses to focus on the March 4, 2005 date and a specific report from Dr. Schwartz that has no bearing on this issue and argues that there is no medical record dated on or

about that date which proves McGaha became totally disabled at or around that time. However, Honeywell is merely putting a “red herring” before this Court, since the Court must look at the entire record and the circumstances of this claim in order to understand the Commission’s decision. Judge Welmaker picked up on this, and the following exchange between him and Honeywell’s attorney is especially telling:

The Court: So if the Commissioner had found that temporary total should have started in 2003, you really wouldn’t have had a complaint?

Mr. Dunbar: I don’t think I would have had much of a leg to stand on, to be quite candid. Because then there are medical documents in the record to support temporary total beginning on that date.

(CCt tr. p. 268, lines 16-22)

This admission by defendants *concedes* the very argument they are now making before this Court. If there is substantial evidence to support McGaha’s entitlement to temporary total disability compensation since 2003, then there is substantial evidence to support the Commission’s award of benefits for the shorter period of time.

The “special and important reasons” required under Rule 242, SCACR, are not present in this case. This case is simply a substantial evidence case, and under the applicable standard of review, when substantial evidence exists on the record, affirmance is required. See Brown v. Greenwood Mills, Inc., 366 S.C. 379, 622 S.E.2d 546 (Ct. App. 2005)(an appellate court’s “review is limited to deciding whether the appellate panel's decision is unsupported by substantial evidence or is controlled by some error of law”).

II. Honeywell abandoned its argument that the Commission somehow erred in determining McGaha sustained compensable injury to her neck.

Before the Circuit Court and Court of Appeals, Honeywell argued that the Commission erred in determining that McGaha sustained compensable injury to her neck. However, in its petition to this Court, Honeywell merely mentioned the issue in its “Question Presented” and did not actually argue the issue.

Failure to argue an issue in an appellate brief is abandonment of the issue. Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970)(where party failed to file exception to an alternative ground or argue against alternative ground in brief, alternative ground “right or wrong, is the law of this case and requires affirmance”); Young v. Warr, 252 S.C.179, 165 S.E.2d 797 (1969)(exception not argued in the brief is deemed abandoned).

Honeywell abandoned its argument as to the neck injury, and such should not be the basis for any review by this Court.

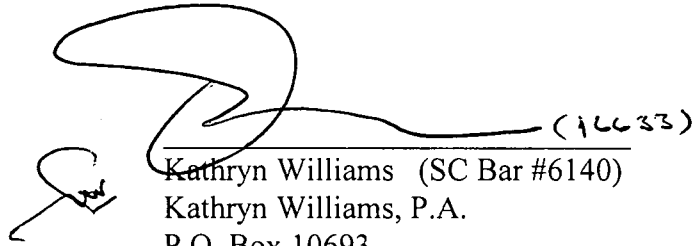
CONCLUSION

This Court's rules concerning further review of a decision by the Court of Appeals requires the identification of "special and important reasons" for such review. Honeywell has failed to show any such valid reason for further review. Simply put, the Commission's decision regarding temporary total disability compensation is based on substantial evidence on the record. Both the Circuit Court and the Court of Appeals so found, and Honeywell has not identified any valid reason that those decisions should be overturned. Honeywell actually conceded the issue of McGaha's entitlement to such benefits before the Circuit Court. Honeywell has identified no issue that has been wrongly decided, overlooked, or misunderstood.

Honeywell abandoned its argument as to McGaha's neck injury, and such should not be the basis for any review by this Court.

Because the Commission's decisions in this case, as affirmed by the Circuit Court and the Court of Appeals, are supported by substantial evidence and in keeping with the law of this state, McGaha urges the Court to deny Honeywell's plea for further review.

Respectfully submitted,



(16633)
Kathryn Williams (SC Bar #6140)
Kathryn Williams, P.A.
P.O. Box 10693
Greenville, SC 29603
(864) 235-6254
Attorney for Respondent

Date: 6/19/13

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

JUN 24 2013

G. Edward Welmaker, Circuit Court Judge

S.C. SUPREME COURT

Unpublished Opinion No. 2013-UP-071
(S.C. Ct.App. filed February 13, 2013)

Maria E. McGaha, Employee, Respondent,

vs.

Honeywell Int'l, Inc., Employer and
Zurich North America, Carrier, Petitioner.

CERTIFICATE OF SERVICE

This is to certify that the undersigned did cause the **RETURN TO PETITION FOR WRIT OF CERTIORARI** to be served upon the below-named by mailing a copy as addressed by U.S. Mail, proper postage paid, on the 19th day of June, 2013.

Vernon F. Dunbar, Esq.
Turner, Padgett, Graham & Laney, P.A.
P.O. Box 1509
Greenville, SC 29602



Kathryn Williams, P.A.
P.O. Box 10693
Greenville, SC 29603
(864) 235-6254
Attorney for Respondent