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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Cynthia C. Dooley, Chair
T. Scott Beck
Melody L. James

WCC No. 1923480

Appellate Case No.: 2023-001264

Takara L. Stewart,.....Appellant,

v.

South Carolina CVS Pharmacy, LLC, Employer, and
XL Insurance America, Inc., Carrier.....Respondents.

**RESPONDENTS' MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE,
MOTION TO STRIKE IMPROPER PORTIONS OF APPELLANT'S INITIAL
BRIEF AND DESIGNATION OF MATTER FOR NON-COMPLIANCE**

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Pursuant to Rules 240, 208, 209, 210, 267, and 269 of the South Carolina Appellate Court Rules, the undersigned, as attorneys for Respondents South Carolina CVS Pharmacy, LLC and XL Insurance America, Inc. (hereinafter “Respondents”), hereby move this Court for an order striking Appellant’s **second** Initial Brief for deficiencies and dismissing the appeal or, in the alternative, striking improper portions of Appellant’s **second** Initial Brief and Designation of Matter to be Included in the Record on Appeal. In support of this Motion and in accordance with Rule 240(c), SCACR, Respondents have incorporated a memorandum of authority hereto.

ARGUMENT

Appellant filed her **first** Initial Brief and Designation of Matter to be Included in the Record on Appeal (“Designation of Matter”) on December 8, 2023. On December 18, 2023, Respondents filed a Motion to Dismiss the Appeal or, in the alternative, a Motion to Strike for non-compliance. On March 28, 2024, this Court issued an Order denying Respondents’ Motion to Dismiss but granting Respondents’ Motion to Strike Appellant’s Initial Brief and Designation of Matter. This Court required Appellant to file a **new** Initial Brief and Designation of Matter that complied with Rules 208 and 209 of the South Carolina Appellate Court Rules (“SCACR”) within 20 days. Failure to comply with the Order, according to this Court, “**will** result in dismissal of the appeal.” (emphasis added). (Ct. App. Order, March 28, 2024).

On April 17, 2024, Appellant filed a **second** Initial Brief and Designation of Matter which, Respondents contend, still contain numerous failures and deficiencies, which are violations of South Carolina’s Appellate Court Rules and have hindered Respondents’ ability to defend this appeal and comply with the Rules. Thus, this Court should dismiss the appeal in accordance with its March 28, 2024 Order. In the alternative, this Court should strike non-compliant and improper portions of Appellant’s **second** Initial Brief and Designation of Matter.

I. Appellant’s Second Initial Brief and Designation of Matter Violate the Form and Substance Provisions of the Appellate Court Rules.

A. Appellant’s Second Initial Brief Contains Form and Procedural Deficiencies.

Appellant’s **second** Initial Brief still contains form and procedural errors. Rule 208, SCACR, states that “the brief of appellant shall contain. . . a statement of the case,” which “*shall* contain a concise history of the proceedings, insofar as necessary to an understanding of the appeal” and “*shall not* contain contested matters.” Specifically, Rule 208(b)(1)(C) provides that the Statement of the Case *shall* contain the following information:

“the date of the commencement of the action or matter; the nature of the action or matter; the nature of the defense or of the response; the action of the court, jury, master, or administrative tribunal; the date(s) of trial or hearing; the mode of trial; the amount involved on appeal; the date and nature of the order, judgment or decision appealed from; the date of the service of the notice of appeal; the date of and description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal, or may throw light upon the questions involved in the appeal; and any changes made in the parties by death, substitution, or otherwise. Any matters stated or alleged in appellant’s statement shall be binding on appellant.”

The use of the word “shall” indicates that Appellant’s inclusion of this information was mandatory. *See Abbeville County Sch. Dist. v. State*, 335 S.C. 58, 515 S.E.2d 535 (1999) (“Since the education clause uses the term ‘shall’, it is mandatory.”). Appellant’s failure to include the mandatory information is a violation of Rule 208 and fails to properly apprise this Court of the issues before it.¹

Additionally, Rule 208(b)(4), SCACR provides that a

“[B]rief *shall* contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged. References shall also be made to where relevant objections and rulings occurred in the transcript. In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced; e.g., Answer p. 7,

¹ Appellant’s brief includes a “Statements [sic] of the Case.” However, this section includes arguments and reasons why she believes she was denied compensation. Thus, it is not properly considered a Statement of the Case.

Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used.”

Here, Appellant fails to adhere to the aforementioned rules. Appellant’s Statement of the Case consists primarily of her arguments on contested matters. She claims to “state the facts of this claim,” but then proceeds to argue why “bias speculation, unsupported defense narration . . . and socioeconomic mockery” resulted in a denial of her compensation. (App. Brief p. 1, ¶ 1)².

Further, although Appellant provides limited procedural information, she fails to provide the information required by Rule 208(b)(1)(C), SCACR, specifically including the following:

- (1) the date of the commencement of the action or matter;
- (2) the nature of the defense or of the response;
- (3) the action of the court, jury, master, or administrative tribunal;
- (4) the date(s) of trial or hearing;
- (5) the amount involved on appeal;
- (6) the nature of the order;
- (7) the date of the service of the notice of appeal; and
- (8) the description of such orders, judgments, decisions and proceedings of the lower court or administrative tribunal that may have affected the appeal or may throw light upon the questions involved in the appeal.

Further, in multiple instances in her **second** Initial Brief, Appellant purports to cite the Full Commission transcript for the statements she makes. Unfortunately, those transcript cites do not support the information stated in her brief. For example, on page 10 of her **second** Initial Brief,

² Appellant’s second Initial Brief did not consider the cover page when numbering the pages. Page 1 starts on the page after the cover page.

Appellant states that “In review of S.C. Code section 42-15-60, Dr. Snipe’s [sic] findings are not any more admissible than my attending physician Dr. Ashley Hicks (Beckum) (F.C. Hearing Tr. Pg. 10:4-25).” Page 10, lines 4 through 15 of the transcript includes Respondents’ argument on appeal regarding temporary total disability benefits, the time period within which Dr. Hicks took Appellant out of work, and Respondents’ position regarding the change in Dr. Hicks’ testimony during her deposition. Page 10, lines 16 through 19 of the transcript references Dr. Hopkins’ credentials as a Doctor of Education instead of as a Doctor of Medicine. Page 10, lines 20 through 25 references the reasonable degree of medical certainty standard noted in South Carolina Code § 42-15-60 and how Dr. Hicks did not provide her opinion to this standard. (F.C. Hearing Tr. p. 10:4-25). Dr. Snipes is never mentioned in the hearing transcript reference cited, and the proposition argued by Appellant leading up to the cite is not included in the transcript. Again, this is just one of many examples throughout Appellant’s **second** Initial Brief.

Because the faulty Appellant’s citations included in the Statement of the Case relate to contested matters which are not proper under the Appellate Court Rules, this Court has grounds to strike the same from the brief. This Court has additional grounds to strike the faulty Appellant’s citations from the Appellant’s **second** Initial Brief because they include “facts” not contained in the record (transcripts, pleadings, orders, exhibits, etc.). Further, Appellant’s attempted citations to the record is improper as the documents mentioned are not included in the Designation of Matter. Appellant’s improper record citations have greatly hindered Respondents’ and this Court’s ability to understand and intelligibly and responsibly respond to the issues Appellant raises. Accordingly, the brief does not comply with Rule 208, SCACR, as outlined above.

B. Appellant’s Second Initial Brief and Designation of Matter Contain Numerous Substantive Deficiencies.

Moving beyond Appellant's numerous form failures, Appellant's second Initial Brief and Designation of Matter contain numerous substantive deficiencies that she cannot overcome. These deficiencies are enumerated below.

i. Deficiencies in Appellant's "Statement of the Case"

First, portions of Appellant's "Statement of the Case," are not factual. Rather, it is a recitation of her allegations. Specifically, the following excerpt is improper for the following reasons:

- p. 1, 1.7-10 (formerly p.3 misnumbered p.2 1.5-8)³ contains contested matters, as well as improper statements and arguments regarding bias speculation, unsupported defense narration, socioeconomic mockery, and "solidarity per justifiable remedy in claimant processing."

ii. Deficiencies in Appellant's "Arguments" and "Conclusion"

Rule 208(E), SCACR, requires the Appellant's brief to be divided into as many parts as there are issues to be argued. In each section, there must be a discussion and citations of authority along with reference to the Record on Appeal. Appellant identifies forty (40) issues on appeal (App. Brief pp. 20-26); however, no clear argument is made relevant to the forty (40) issues., citations are provided to matters **not** included in the Designation of Matter (Record on Appeal), and no clear argument is made in reference to the two statutes and one 1944 case cited in the "Arguments" section. Rather, Appellant moves the information previously located in "Statement of the Case" from her **first** Initial Appellant's Brief, and places it under the "Arguments" heading in her **second** Initial Appellant's Brief with four (4) subheadings which presumably are the arguments:

(1) Bias Speculation;

³ Respondents are providing citations to Appellant's **first** Initial Brief throughout this **second** Initial Brief so that this Court can see that the brief is essentially the same other than the moving allegations into a different order.

- (2) Unsupported Defense Narration Purported with Inconsistent Sequencing of Events and Socioeconomic Mockery;
- (3) Inconsistent Workers' Compensation Commission Solidarity per Justifiable Remedy in Claimant Processing; and
- (4) South Carolina Code 42-1-160

Additionally, Rule 208(F), SCACR, allows for a short conclusion stating the precise relief requested. Although Appellant states the relief she requests in her Conclusion, she again makes improper assertions of defense tactics without evidentiary support in the record which is a violation of the Appellate Court Rules. (App. Brief p.19).

Further, the following excerpts are improper for the following reasons:

- p. 2, 1.12-22 contains “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal;
- p. 3, 1.4-9 contains references to matters not included in the Record on Appeal;
- p. 3, 1.10-14, p. 8, 1.2-8 (formerly p.4 misnumbered p.3 1.1-14) contains “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal;
- p.3, 1.14-18 contains “facts” not contained in the record below and no references;
- p. 3, 1.19-23 – p.4, 1.1-9 (formerly p.4 misnumbered p.3, 1.14-24) contains “facts” not contained in the record below and contains no references;
- p.4, 1.9-12 contains “facts” not contained in the record below and contains no references;
- p.4, 1.18-20 contains “facts” not contained in the record below and contains no references;
- p.4, 1.20-24 – p.5, 1.1-3, 11-14 (formerly p.3 misnumbered p.2 1.9-14, 22-24) contains “facts” not contained in the record below and contains no references;
- p.5, 1.4-11 contains “facts” not contained in the record below and contains no

references;

- p.5, 1.15-18 contains a material transcription error when attempting to cite the Full Commission hearing transcript (“she appeared hurt on the camera” versus “she **didn’t** appear hurt on the camera”), contains improper record citations, and contains references to matters not included in the Record on Appeal;
- p.6, 1.14-21 contains improper references to settlement offers and references to matters not included in the Record on Appeal;
- p. 6, 1.21- 22 - p. 7, 1.1-12 (formerly p.8 misnumbered p.7, 1.6-16) contains improper references to settlement offers, inaccurate statements of admissions of liability, and improper assertions of defense tactics without evidentiary support in the record, contains “facts” not contained in the record below, and references to matters not included in the Record on Appeal;
- p.7, 1.14-18 contains no references;
- p.8, 1.1-8 contains improper record citations, references to matters not included in the Record on Appeal, and, in some portions, no references to “facts”;
- p. 8, 1.8-16 (formerly p.5 misnumbered p. 4, 1.2-6) contains “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal;
- p.8, 1.16-21 (formerly p.5 misnumbered p. 4, 1.8-12) contains “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal;
- p.9, 1.6-15 (formerly p. 10, 1. 6-10) contains assertions with absolutely no evidentiary support, “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal;
- p.9, 1.15-20 (formerly p. 10, 1.10-13) contains improper and untrue references with no evidentiary support, “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal;
- p.9, 1.20-23 – p.10, 1.1-6 (formerly p. 10, 1.13–20) contains assertions with absolutely no evidentiary support, “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal;
- p.10, 1.6-16 (formerly p. 10, 1.20-25 – p.11, 1.1-2) contains assertions with absolutely no evidentiary support, “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal;

- p. 11, 1.5-9 (formerly p.6 misnumbered p.5, 1.16-20) contains “facts” not contained in the record below, and contains no references;
- p.11, 1.10-19 (formerly p.6 misnumbered p.5, 1.23-26 – p.7 misnumbered p.6, 1.1, 15-17) contains “facts” not contained in the record below, improper record citations, and no references;
- p. 12, 1.2-7 contains “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal;
- p. 12, 1.7-12, 17-20 (formerly p.6 misnumbered p.5. 1.7-13) is irrelevant and contains “facts” not contained in the record below, and references to matters not included in the Record on Appeal;
- p.12, 1.21-22 contains “facts” not contained in the record below and no references;
- p. 13, 1.2-4 (formerly p.6 misnumbered p.5, 1.13-15) contains “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal;
- p. 13, 1.4-7 (formerly p.6 misnumbered p.5, 1.15-16) is irrelevant, contains “facts” not contained in the record below, and contains no references;
- p.13, 1.10-22 (formerly p. 11, 1.3-11) contains incomprehensible arguments, improper and untrue references to mockery by the defense, and no references;
- p.13, 1.22-23 – p.14, 1.1-4 (formerly p. 11, 1.12-15) contains “facts” not contained in the record below, contains no references, and includes improper arguments regarding the questionable credibility of the United States [sic] Workers’ Compensation Commission;
- p.14, 1.4-21 (formerly p. 11, 1.15-26) contains “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal;
- p.14, 1.21 – p.15, 1.1-2 (formerly p. 12, 1.1-4) is irrelevant and contains no references;
- p.15, 1.2-9 (formerly p. 12, 1.4–9) contains “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal;
- p.15, 1.9 (formerly p. 12, 1.9) is irrelevant;
- p.15, 1.10-14 (formerly p. 12, 1.10–12) contains “facts” not contained in the record

below, improper record citations, and references to matters not included in the Record on Appeal;

- p.15, l.14-23 (formerly p. 12, l.13-19) contains improper discussions of settlement offers, improper assertions of defense tactics without evidentiary support in the record, “facts” not contained in the record below, and no references.
- p. 16, l. 16-22 (formerly p.7 misnumbered p.6, l.19-23) contains “facts” not contained in the record below, improper record citations, and references to matters not included in the Record on Appeal; and
- p. 16, l.22 – p. 17, l.1-12 (formerly p. 7 misnumbered p.6, l.24-26 – p.8 misnumbered p.7, l.1-6) contains “facts” not contained in the record below and contains no references;

iii. Deficiencies in Appellant’s Designation of Matter

Appellant cites several items to be included in her Designation of Matter which were not properly before the South Carolina Workers’ Compensation Commission and which could not have formed the basis for the appealed rulings of the Commission.

The South Carolina Appellate Court Rules make clear that Appellant must certify that her Designation of Matter contains no “matter which is irrelevant to the appeal,” Rule 209(b),(c), SCACR, and “only propose[s] to include portions of . . . materials which may be properly included in the Record on Appeal.” Further, “[t]he Record shall not . . . include matter which was not presented to the lower court or tribunal.” Rule 210(c), SCACR. *See also State v. White*, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007 (holding witness statement which was not presented to the lower court could not be properly included in the record on appeal); *see also Reed v. Becka*, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) (stating “[w]e previously noted, however, pursuant to Rule 209(c), SCACR, the matter would not be given substantive consideration if it was not presented to the trial court”).

The following matters should be struck from Appellant’s Designation of Matter because they were not presented to the Commission:

- Item 2, Pending Motion to submit new evidence, pertinent to the record on appeal: Request to submit Psychology Referral by Dr. Ashley Hicks-Beckham; Request to submit Psychology Consultation and Debrief; Request to submit Defense Settlement Offers

Additionally, under Rule 210(c), the following matters are part of Appellant's Initial Brief, not proper for inclusion in Record on Appeal and, ultimately, were not presented to the Commission:

- Item 3, Statement of the Case
- Item 4, Issues on Appeal

The improprieties in the **second** Initial Brief and Designation of Matter discussed in sections i, ii, and iii, *supra*, are in violation of the appellate court rules and have greatly hindered Respondents' and this Court's ability to understand and intelligibly and responsibly respond to Appellant's arguments.

C. Appellant's Appeal Should be Dismissed, or in the Alternative, Portions of the Initial Brief and Record on Appeal Should be Struck.

The aforementioned rule violations and form and substance deficiencies of both Appellant's **second** Initial Brief and Designation of Matter require that the appeal be dismissed, or in the alternative, the improper portions and items be struck and excluded.

Respondents anticipate that Appellant will attempt to excuse her numerous violations under the guise of being a pro se litigant. However, "[a] pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law." *State v. Burton*, 356 S.C. 259, 589 S.E.2d 6, 9 n.5 (2003). As the Supreme Court advised the bar in *Henning v. Kaye*, 307 S.C. 436, 415 S.E.2d 794 (1992), the Appellate Court Rules "are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review." The *Henning* court addressed numerous deficiencies in the appellate brief at issue, including that "the components of the brief [were]

incorrectly organized and labeled, the issues [were] not distinctively headed, the table of authorities [was] not alphabetized or referenced to the body of the brief, the statement of the case contain[ed] contested matter and omit[ted] required information, and the arguments contain[ed] no citations to the record or to the cases listed in the table of authorities.” *Id.* at *1-2, 415 S.E.2d at 795.

In *Henning*, the Supreme Court noted that an appellate court is justified in dismissing an appeal based upon numerous violations of appellate court rules. *Id.* at *2, 415 S.E.2d at 795. Furthermore, Rule 269, SCACR, states that “[w]here an appeal . . . is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days’ notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.”

Here, Appellant’s errors are far greater than those in *Henning*. Not only are the deficiencies and violations discussed in sections A and B, *supra*, in disregard to the appellate court rules, they also have greatly prejudiced Respondents in defending this appeal. The voluminous and permeating deficiencies, both form and substance, have greatly hindered Respondents’ and this Court’s ability to understand and intelligibly and responsibly respond to Appellant’s arguments.

Moreover, the prejudice is circular, as the improper items in the Designation of Matter have led to an improper brief, and Appellant’s improper citations in the brief have prohibited Respondents from discerning which portions of the brief or Designation of Matter, if any, should survive a motion to strike. This Court has already graciously given Appellant one chance at correcting her errors via Order dated March 28, 2024. (Ct. App. Order, March 28, 2024). As clearly shown above through references to both briefs, the majority of the errors in Appellant’s **first** Initial Brief remain in the **second** Initial Brief. It has taken countless hours for Respondents

to go through each, once again, and advise this Court of the continuing errors. As such, the only course which remedies Appellant's violations and promotes fairness to Respondents is dismissing the appeal pursuant to Rule 269, SCACR. However, in the alternative, Respondents respectfully request that the Court strike the enumerated portions of Appellant's brief, all assertions within the brief that are supported by improper record citations or contain no references, and the enumerated improper items designated to be included in the Record on Appeal.

CONCLUSION

In light of the foregoing, Respondents respectfully move for an Order of this Court striking Appellant's **second** Initial Brief for the above-cited deficiencies and dismissing the appeal. In the alternative, Respondents respectfully move for an Order of this Court striking improper portions of Appellant's **second** Initial Brief and Designation of Matter.

Respectfully submitted,

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