

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

69561

APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION COMMISSION

WCC # 12 13162

WILLIAM E MILLER, JR. APPELLANT,

v.

OWEN STEEL COMPANY INC. RESPONDENT

APPELLANTS' MOTION TO REINSTATE THE APPEAL

On behalf of WILLIAM E. MILLER, JR. (APPELLANT), Appellant hereby Moves this Honorable Court to Reinstate the Appeal from the Final Agency Decision/Order of the South Carolina Workers Compensation Commission and Dismissed for failure to file a proof of service for the transcript letter.

August 26, 2013

Holler Garner Corbett Ormond Plante &
Dunn / J. Charles Ormond, Jr.,
Attorney for Claimant/Appellant

1777 Bull Street
Columbia, SC 29201
(803) 765-2968 933-9000

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AUG 26 2013

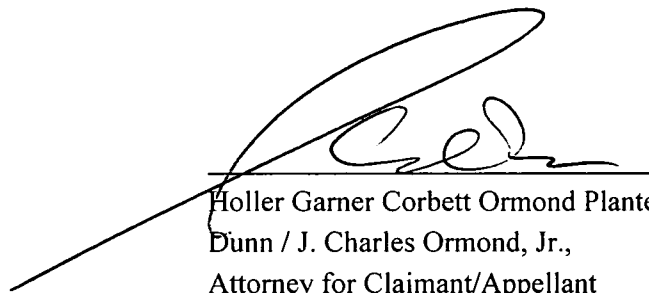
SC Court of Appeals

Counsel for Appellants above, hereby respectfully moves the Court pursuant to Rule 224, SCACR, to reopen the Appeal. Appellant filed the appeal of this Workers Compensation case on July 22, 2013. The Court, not finding a proof of service in its files for the letter requesting the transcript, dismissed the appeal. After receiving the Order on this date (August 26th, 2013) Attorney for Appellant reviewed his files and in fact he did not file a proof of service with the Court. Such proof was in the file and had not been mailed as thought. Such Proof of Service and letter is attached to this motion and the letter was sent to the Court reporter on July 30, 2013. (Attachment 1) The transcript was just received on Friday, August 23, 2013.

(Attachment 2)

This error was solely the fault of the attorney and not his staff or the client. (Attachment 3) Appellant would therefore respectfully request that the Appeal be reinstated and allow the Appellant to move forward with his appeal and file and serve his initial brief and designation of record on appeal within the time limits set forth in the rules.

August 26, 2013



Holler Garner Corbett Ormond Plante &
Dunn / J. Charles Ormond, Jr.,
Attorney for Claimant/Appellant
1777 Bull Street
Columbia, SC 29201
(803) 765-2968 933-9000

ATTACHMENT 1: Letter and Proof of Service (unfiled)

LAW OFFICES
HOLLER, GARNER, CORBETT, ORMOND, PLANTE & DUNN

1777 Bull Street at Laurel
Columbia, South Carolina 29201
(803) 765-2968 / Fax (803) 252-8290

J. Ed Holler
Everett Hope Garner
James J. Corbett
*J. Charles Ormond, Jr.
*Anthony R. Plante
Benjamin A. Dunn, III
* Certified Mediator S.C.

Of Counsel
Stanley G. Freeman
*Steven D. Dennis

Reply To
Post Office Box 11006
Columbia, S.C. 29211

July 30, 2013

Fax: 799-5668
Attn: Crystal Kaminer
Creel Court Reporting
1230 Richland St.
Columbia, SC 29201

RE: Miller v. Owens Steel

Dear Crystal:

I am requesting the transcript of the hearing dated April 16, 2013. Workers' Compensation file number is 12-13162. Please let me know what the cost will be also.

Sincerely,

Chuck
J. Charles Ormond 

JCO/arb

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION COMMISSION

WCC # 12 13162

WILLIAM E MILLER, JR. APPELLANT,

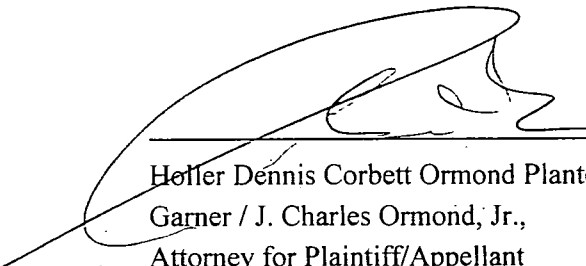
v.

OWEN STEEL COMPANY INC. RESPONDENT

PROOF OF SERVICE

I certify that I have served a copy of the Letter Ordering the Full Transcript from Creel Court Reporting on Respondents (Great American Insurance Group c/o Strategic Comp. Services, by depositing same in the United States Mail, postage prepaid, on August 1, 2013, its/their attorney/s of record, Jason Lockhart, Esq. McAngus Goudelock & Courie, LLC, P.O. Box 12519, Columbia, SC 29211

August 1, 2013



Holler Dennis Corbett Ormond Plante &
Garner / J. Charles Ormond, Jr.,
Attorney for Plaintiff/Appellant
1777 Bull Street
Columbia, SC 29201
(803) 765-2968 933-9000

ATTACHMENT 2: Transcript received

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC No: 1213162

William E. Miller,)
)
Employee,)
)
v.)
)
Owen Steel,)
)
Employer,)
)
and)
)
Great American Alliance Insurance)
Company,)
)
Carrier/Defendants.)
-----)

FULL COMMISSION PANEL HEARING

Tuesday, April 16, 2013
2:06 p.m. - 2:25 p.m.

The Full Commission Panel Hearing was held before the South Carolina Workers' Compensation Commission, 1333 Main Street, 5th Floor, Columbia, South Carolina, on the 16th day of April, 2013 before Jill H. Vickers, Certified Court Reporter and Notary Public in and for the State of South Carolina.

APPEARANCES:

COMMISSION PANEL:

Melody James, Chair
Susan Barden
Scott Beck

J. Charles Ormond, Jr., Esquire
Holler, Dennis, Corbett, Ormond, Plante & Garner
1777 Bull Street
Columbia, South Carolina 29201
Attorney for the Claimant

Jason W. Lockhart, Esquire
McAngus, Goudelock & Courie
1320 Main Street, 10th Floor
Columbia, South Carolina 29201
Attorney for the Defendants

INDEX

PAGE

Certificate 20

EXHIBITS

(There were no exhibits marked during this hearing.)

1 **COURT REPORTER:** Today is April 16th, 2013. This is
2 South Carolina Workers' Compensation Case
3 Number 1213162. This is the case of William E.
4 Miller, Claimant, versus Owen Steel, Employer,
5 and Great American Alliance Insurance Company
6 is the Carrier. The Appellant is the Claimant
7 represented by Charles J. Ormond, Jr.. The
8 Respondent represented by Jason W. Lockhart.

9 **MR. ORMOND:** Thank you, Commissioners. I think the
10 relevant facts in the case are, there was an
11 altercation. We had a seven or eight year
12 employee. He had been with them, and he was a
13 welder, and he was promoted up and finally was
14 in the Maintenance Department. There was an
15 altercation on August 15th. The altercation
16 undisputedly was about work. It was about
17 whether or not power would be in the facilities
18 during the time that maintenance was going to
19 be there that weekend or whether it would not
20 be. The claimant, Miller, stated that he
21 thought it would be, and then the interim lead
22 man, Rollerson, came in and suggested that it
23 would not be. Miller said something under his
24 breath like "Huh", walked away to the bathroom,
25 and Rollerson, a very large man, 340 pounds,

1 not heavy, but just big, followed him in the
2 bathroom, wanted to know what he said. There
3 was yelling, cursing and pushing. That's
4 undisputed. They came out of the bathroom.
5 There were some witnesses that saw this part
6 and the earlier part. He pushed Miller against
7 the wall. That's most of the testimony.
8 Rollerson said he didn't push him until after
9 Mr. Miller, the claimant, hit him, but either
10 way, he was pushed against the wall. Mr.
11 Miller states he heard a neck pop. They were
12 suspended, both of them. During that week,
13 that time off and the weekend itself during
14 that period of time, Mr. Miller began having
15 significant neck problems, swelling. He
16 couldn't move it. He had a brain freeze. It's
17 undisputed that he had been diagnosed with
18 stenosis, had neck problems, had back problems
19 in the past and had been diagnosed with spinal
20 stenosis about 18 months, I think, earlier
21 prior to this, had neck issues, hadn't missed
22 work for it, but had neck issues and so forth.
23 He came back -- this is undisputed in the
24 record. He told his supervisor, Sloan, that he
25 needed to go see a doctor, that he had been

1 hurt in this altercation, his neck. Sloan
2 stated "Okay. I'll take care of it." Mr.
3 Miller, the claimant, waited for a couple days.
4 The weekend happened, and it got to such a
5 point where he and his wife decided they had to
6 make an appointment with their family
7 physician, the internist, Dr. Levinson. Mr.
8 Miller went to work that following day while
9 his wife called and made the appointment. The
10 appointment was at 1:00. Mr. Miller, it's
11 undisputed, told his supervisor again on Monday
12 morning, "I've got to go to the doctor. You
13 guys haven't sent me to a doctor. I've got to
14 go." He went to the doctor. An MRI was
15 ordered. We have the medical records starting
16 on August 27th. He was written out. That's on
17 Page 70 of the APA. Pain medications were
18 prescribed. Mr. Miller came in the following
19 day, and he was driven by his wife early --
20 prior to work. He gave two people, his
21 supervisor, Sloan, and Samuels, who's the
22 Safety Manager, the leave slip. He also gave
23 them a statement of what happened in this
24 altercation. It looks like then that day,
25 Tuesday, the 28th, all the other folks that

1 were involved in the altercation gave
2 statements, and the Claimant, Miller, was told
3 it was either the 29th or the 30th, called up
4 and told he was fired retroactively on the
5 27th. The medicals continued. He goes for the
6 MRI on the 4th, September 4th. He follows up
7 with doctor Levinson on the 5th. A
8 neurosurgeon is recommended -- or referred, I
9 guess would be the better statement, referred
10 to the neurosurgeon, and the neurosurgeon
11 reviews the medical records, reviews the MRI,
12 looks at the MRI, and decides surgery is the
13 best option after, I think, a couple of days
14 where the claimant was hoping not to have
15 surgery. The claimant agrees to have surgery,
16 and the surgery is done on the 26th. The
17 medical records are the basis of the
18 Commissioner's decision, the Hearing
19 Commissioner's in this case, and there is
20 simply no records which do not state this was
21 an acute trauma, most likely caused by this
22 event. Yes, Mr. Miller had prior stenosis, and
23 as a matter of fact, stenosis is a narrowing
24 that makes you more susceptible to this kind of
25 injury. He clearly was more susceptible, and

1 he had this injury most likely on that date.
2 Dr. Boyd, the neurosurgeon, states
3 specifically, "This is a recent traumatic
4 injury", both in his questionnaire and in his
5 medical records, and he states this to a
6 reasonable degree of medical certainty. In
7 light of the -- even though, essentially, the
8 entire hearing was related to the events of the
9 altercation, at least from my perspective as
10 I've had employee issues with fights with a
11 lawyer. I've seen those issues in employment
12 cases and these kind of cases. The facts
13 really are not that badly disputed. The only
14 dispute that the Commissioner pointed out is he
15 felt Rollerson -- the push came before the neck
16 pop. You wouldn't -- I think he felt like --
17 the Commissioner felt like you wouldn't hit
18 after you had been pushed and you felt a neck
19 pop. I don't see that personally, but that
20 seemed to be the entire issue that the
21 Commissioner focussed on, and I think both
22 defense counsel and myself came into this
23 hearing not worrying too much about the medical
24 issues, although they were provided and
25 developed in the APA. The issue was whether or

1 not this fell under the section -- or the
2 provision for whether or not you're going to
3 hurt yourself and others in an altercation
4 setting. I think it's 160 or Section 60. I
5 can't recall. I admit I've never had this
6 issue come up before. The Hearing Officer
7 ruled that he didn't feel that it raised or
8 came to that level, but did rule that the
9 medicals didn't provide causation. I don't see
10 any medical evidence other than the fact that
11 there are two MRIs. One of them is on February
12 8th -- stated in there on the 18th, by
13 Dr. Boyd, but on the 8th of February of 2012,
14 about seven or eight months prior to this, and
15 then the one on September 15th, and certainly,
16 they are similar, but they also have a
17 difference, and both the physicians that
18 reviewed both of those note the difference, and
19 they specifically state they looked at both of
20 those images, and came up both -- at least
21 Dr. Boyd, certainly to the confusion that this
22 was an acute trauma. The MRIs had changed, and
23 Dr. Boyd in specific, obviously as a surgeon,
24 had the opportunity not only to see the remote
25 images, the MRI, but also to get in there and

1 do the surgery himself and see what had
2 happened, see whether it was a traumatic injury
3 and recent.

4 **MR. LOCKHART:** Your Honors, may it please the panel.
5 This afternoon, we're asking you to affirm
6 Commissioner Williams' decision and find that
7 the claimant did not satisfy his burden of
8 proof under either 42-1-160 or 42-9-35. The
9 claimant, in their brief, and to a certain
10 extent in oral argument today, wants to discuss
11 a questionnaire from Dr. Boyd as being sort of
12 the only piece of evidence that you need to
13 look at when considering whether or not this
14 injury was compensable. I point out to the
15 panel, as you know, Section 42-17-40 of the
16 Act, which governs the conduct of hearings,
17 gives you great discretion as the Hearing
18 Officer to consider all the evidence in making
19 a determination as to whether or not someone
20 has satisfied their burden of proof under the
21 Act. And there's one case in particular,
22 Poston Southeastern Construction Company which
23 is a case interpreting 42-17-40 that says, "A
24 medical opinion will not be permitted to
25 control the determination of a factual

1 controversy". In this particular case, there
2 was a controversy, "Was the claimant's neck
3 problems causally related to his work injury or
4 not", and ultimately Commissioner Williams
5 found that it was not. What the appellant is
6 asking you to do, at least in their brief, is
7 asking you to, again, reduce your analysis of
8 this case to one questionnaire, and I think
9 there's too much additional evidence that needs
10 to be considered, and I think there's a
11 significant amount of evidence that
12 Commissioner Williams considered in reaching
13 his decision, evidence based on both testimony
14 provided by lay witnesses as well as medical
15 records. Well, let's look at the medical
16 evidence for just a moment. Mr. Miller was
17 actively treating with his family physician for
18 significant cervical problems in the months
19 leading up to this August of 2012 event as
20 documented in the medical records of
21 Dr. Levinson, who was his family doctor. Going
22 as far back as January of 2012, the claimant
23 was complaining to Dr. Levinson of severe neck
24 pain which was constant and which was
25 worsening. Pages 106, 111 and 115 of our

1 submissions note his complaints. In February
2 of 2012, six months before the date of the
3 injury, approximately, he undergoes an MRI of
4 the cervical spine which shows not just neck
5 issues, I think that they've been termed, but
6 shows that he had a cervical extrusion at C6-7,
7 and this is -- the MRI comparison is noted at
8 Page 18 of our brief. One of the things that
9 Commissioner Williams did was, he looked at the
10 MRI reports, the scans, the radiology reports,
11 and if you look at those as they're outlined in
12 our brief, they appear to be almost identical,
13 and that was a very important piece of evidence
14 to Commissioner Williams based on at least our
15 reading of his order. Another thing that I
16 think is important to point out is, the
17 claimant was not only actively treating with
18 Dr. Levinson in the form of receiving
19 prescription medications, Ultracet, for his
20 neck problems. He underwent two cervical
21 epidural injections in the month leading up to
22 the August, 2012 event, one in February of 2012
23 and a second in April of 2012. Five weeks
24 before this incident takes place during a visit
25 in July of 2012, he's in Dr. Levinson's office

1 complaining of severe neck pain that had
2 worsened, as well as what sounds like radicular
3 complaints of neck pain in the back of his
4 neck, posterior neck pain radiating into the
5 area between his shoulder blades. So, his
6 complaints that he provides both prior to and
7 subsequent to this accident are essentially
8 identical. One of the things that's
9 problematic about Dr. Boyd's records -- and the
10 Claimant at the hearing and in his brief points
11 to the medical records of Dr. Boyd in support
12 of his position. One of the things that's
13 problematic about Dr. Boyd's medical records is
14 it's clear the claimant didn't provide him with
15 accurate information regarding the extent of
16 his pre-existing problems during his initial
17 examination with Dr. Boyd. If you look at Page
18 131 of the APA submissions, and this is the
19 medical questionnaire that the claimant
20 completed before his initial exam with
21 Dr. Boyd, he made no mention of his prior neck
22 problems and said his neck problems began or on
23 about August 15th of 2012. He does not
24 indicate that he had been actively under the
25 care of Dr. Levinson for nearly seven months

1 before this work injury occurred. When given
2 the opportunity when asked if he had undergone
3 any previous epidural injections, he indicated
4 -- he left that part of the report blank. In
5 his complaints to Dr. Boyd during this initial
6 examination in Dr. Boyd's office, when compared
7 to his complaints to Dr. Levinson throughout
8 the spring and summer of 2012, are again
9 similar, if not identical, severe neck pain
10 peripheral neuropathy, complaints of radiation
11 from the posterior neck into his shoulder
12 blades. And essentially, Commissioner Williams
13 agreed with our contention that if the case
14 should be denied based on the defenses outlined
15 in 42-9-60, the intentional act or the fight,
16 that the claimant couldn't satisfy his burden
17 of proof under either 42-9-35 or 42-1-160. The
18 credibility of this claimant is one of many
19 factors that Commissioner Williams considered
20 in making his decision, and there are multiple
21 findings of fact in the order that address that
22 the claimant was not a particularly believable
23 person. On cross examination -- and really,
24 why it's important again goes to the weight to
25 be given to Dr. Boyd's medical records. On

1 cross examination, the claimant testified that
2 he didn't tell Dr. Boyd about the extent of his
3 prior neck problems, that he didn't inform him
4 that he had had two cervical steroid
5 injections. He also went on to say on cross
6 examination that he had not actually been
7 released from the care of Dr. Levinson for his
8 neck pain or problems prior to this event in
9 August of 2012. Testimony from co-employees,
10 two in particular, said that in the months
11 leading up to this event in August, the
12 claimant was complaining in the workplace about
13 not only his neck pain but the fact that he was
14 under the active care of a physician for neck
15 problems, and this was at the Pages 102 and 121
16 of the hearing transcript where those witnesses
17 were asked about the claimant providing
18 complaints in the workplace, and the claimant
19 reluctantly admitted that he had the same
20 symptoms both prior to and subsequent to this
21 August 2012 event, although his contention is
22 that they increased in severity. We would
23 argue that the medical records show that they
24 basically had not changed. One of the things
25 that's also problematic from our standpoint

1 about the medical records of Dr. Boyd is, that
2 in the medical records of Dr. Boyd, the
3 claimant notes that he had experienced gradual
4 improvement of his neck problems over time.
5 When you look at Dr. Levinson's records, he's
6 constantly indicating that his problems are
7 worsening during the time he was under
8 Dr. Levinson's care. So, clearly, we have
9 contradictory evidence or information when you
10 compare the medical records in this case. He
11 also told Dr. Boyd that he had quote "never had
12 similar symptoms" similar to the ones that he
13 complained to Dr. Boyd about during his initial
14 examination, and that clearly is not supported
15 by the medical evidence when you look at
16 Dr. Levinson's records. So, we would argue
17 again that any opinion that Dr. Boyd provided
18 was based upon information, based upon quite
19 candidly a cascade of falsities that the
20 claimant provided to Dr. Boyd during his
21 initial examination, and Commissioner Williams
22 did not find the claimant to be particularly
23 believable. He didn't use the terms "He is not
24 credible" in his findings, but if you read the
25 findings in total, you will see that he placed

1 more weight upon what was said by the defense
2 witnesses than what was said by the claimant.
3 I know that there was an appeal raised by the
4 appellant in his brief, in his 130, about
5 Commissioner Williams erring in making findings
6 of fact about the events of August 15th. I
7 think that findings regarding the credibility
8 of the witnesses are tantamount in any denied
9 case which is certainly what this one was. I
10 think Commissioner Williams exercised his
11 discretion in 42-17-40 to weigh the testimony
12 to determine the credibility of the witnesses.
13 You all do that on a regular basis. In
14 determining whether or not a witness is
15 credible is essential to evaluating the
16 validity or the integrity of medical evidence
17 that's submitted in support of the parties'
18 respective positions, and that's exactly what
19 Commissioner Williams did in this case. Again,
20 multiple Findings of Fact, Finding of Fact 7,
21 9, 10, 12 and 13 all address the claimant's
22 suspect testimony, quite honestly, and he
23 specifically said in Finding of Fact 9 that he
24 didn't believe that the claimant injured his
25 neck before the claimant, not only punched, but

1 he also kicked a co-employee as part of this
2 altercation on August 15th of 2012. So, we
3 maintain that substantial evidence supports
4 Commissioner Williams' decision, and we would
5 ask you to affirm that decision today. Thank
6 you.

7 **MR. ORMOND:** In view of the record, there was
8 testimony from co-workers that Mr. Miller had
9 complained about his neck and back, and Mr.
10 Miller never suggested otherwise, but never
11 said he was under a Doctor's Care, and even
12 though he was, that is not in the record.
13 Other employees said that Miller stated he was
14 under a Doctor's Care. I don't know how
15 relevant that would be, but that's just not in
16 there from my recollection. There is -- any
17 administrative agency must base their findings
18 on substantial evidence. There must be some
19 evidence. There is no dispute that there was
20 an altercation and that Mr. Miller was pushed
21 up against the wall. There was nobody
22 suggesting otherwise. The only difference in
23 testimony was the chronology of events, whether
24 or not Mr. Miller punched and was then pushed
25 up against the wall, or whether he was pushed

1 up against the wall and punched, and the reason
2 why I brought up the credibility issue is,
3 there's credibility as far as whether disputed
4 facts -- one set of disputed facts wins over
5 another set of disputing facts, but in this
6 case, if you look at the testimony and the
7 statements in the record of Mr. Miller and all
8 but Mr. Rollerson, all state that he was pushed
9 up against the wall and then punched. I'm not
10 sure how much that matters, but it sure
11 mattered to the Hearing Commissioner, and
12 that's why I brought that up. And it's easy
13 when you're listening to a bunch of folks
14 describe a fight, each one of them from a
15 different perspective, each one of them
16 thinking about it in a different time frame,
17 all of whom said this took about a minute.
18 None of them were likely lying about what they
19 understood happened. The medical records when
20 you're talking about whether or not a surgery
21 is indicated and it was the result of a
22 traumatic very recent injury is up to a doctor.
23 That is something that a lay jury, for example,
24 couldn't determine on their own. If there was
25 another doctor or any other medical evidence,

1 any other medical evidence suggesting that, no,
2 this was not the cause, then, certainly, you
3 could make a determination in the record as to
4 which is more likely, which is disputable, but
5 in this case, there's nothing medically that
6 suggests this was not the cause. And if you
7 really think about the lie that Mr. Miller
8 would have to tell all the way prior to his
9 termination to make this work and then go
10 through surgery, it makes absolutely no sense.

11 (Whereupon, the Full Commission Panel Hearing
12 concluded at 2:25 o'clock p.m.)
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ATTACHMENT 3: Attorney Affidavit

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION COMMISSION

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WILLIAM E MILLER, JR. APPELLANT,

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Affidavit of J. Charles Ormond, Jr.

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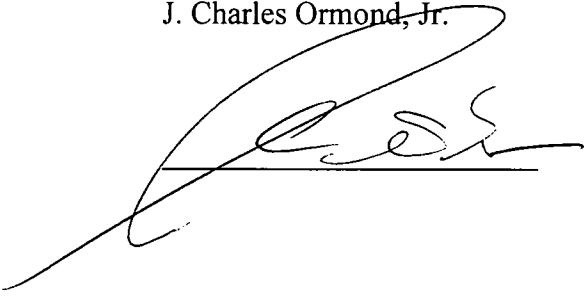
I, J. Charles Ormond, Jr. of Holler Garner Corbett Ormond Plante & Dunn, state as follows to the best of my independent knowledge and under oath:

- 1) I am the Attorney of Record for the Appellant in this matter and filed the Notice of Appeal on or about July 22 of 2013. After a discussion with opposing counsel regarding limiting the transcript of the Workers Compensation Full Commission Hearing, I obtained the name of the Court Reporter and ordered the entire transcript by letter dated July 30, 2013.
- 2) I prepared a proof of service form and signed it. I apparently did not place it in the box for mailing however with the letter itself as the copies were in the file when I looked after receiving the order. I had mistakenly understood or assumed the proof of service and letter had gone out and was filed. I apparently did not get it to our receptionist who does our mailings.

- 3) The letter, however, was sent and I informed orally at least the opposing side that the transcript had in fact been ordered. I have today re-mailed the transcript order letter with the proof of service and attached a copy with this motion.

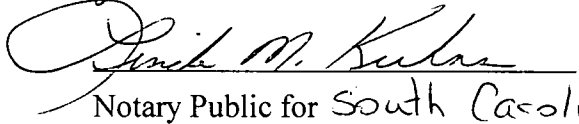
- 4) I apologize to the Court for this error and this affidavit is made to the best of my knowledge and recollection and under oath.

J. Charles Ormond, Jr.



Sworn before me this 26th day of

August, 2013



Notary Public for South Carolina

State of South Carolina

Commission expires: 12/14/20

August 26, 2013

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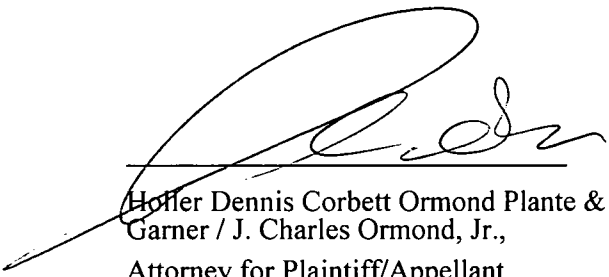
v.

OWEN STEEL COMPANY INC. RESPONDENT

PROOF OF SERVICE

I certify that I have served a copy of the MOTION TO REINSTATE APPEAL on Respondents (Great American Insurance Group c/o Strategic Comp. Services, by depositing same in the United States Mail, postage prepaid, on August 26, 2013, its/their attorney/s of record, Jason Lockhart, Esq. McAngus Goudelock & Courie, LLC, P.O. Box 12519, Columbia, SC 29211

August 26, 2013


Hoffer Dennis Corbett Ormond Plante &
Garner / J. Charles Ormond, Jr.,
Attorney for Plaintiff/Appellant
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