THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1002925

Neal Beckman, Employee, ... Appellant,

v.

Sysco Columbia, LLC, Employer, and Gallagher Bassett Services, Inc., Carrier ... Respondents.

FINAL BRIEF OF APPELLANT

Fred W. Riesen, Jr.
RIESEN LAW FIRM, LLP
3660 W. Montague Avenue
N. Charleston, SC 29418
(843) 760-2450

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net

Attorneys for Appellant

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Attorneys for Appellant

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STATEMENT OF ISSUES ON APPEAL

Whether the Workers Compensation Commission erred in finding Appellant was limited to a disability award for the back as a scheduled member despite the undisputed fact he suffered a permanent loss of earnings capacity when:

A. The sacroiliac (SI) joint is an unscheduled member as a matter of law; and

B. Appellant suffered documented radiculopathy into his left leg, such that the leg was affected by the back injury as a matter of law.

STATEMENT OF THE CASE

This workers' compensation appeal arises out of work-related injuries sustained by the Appellant, Neal Beckman, on March 25, 2010. The Employer and Carrier accepted Beckman's claim and began providing various benefits under Title 42, the Workers' Compensation Act. Beckman received medical treatment primarily from Dr. Timothy Zgleszewski, M.D. The Employer paid temporary total disability compensation for the period commencing on March 26, 2010.

On March 8, 2012, Employer filed a Form 21 (Employer's Request for Hearing) seeking to terminate temporary compensation and have an award made for permanent disability compensation. [R. p. 34].

A hearing was held before Commissioner Susan S. Barden on April 26, 2012. At that hearing, Employer asserted that Beckman should be entitled to permanent partial disability compensation to the back pursuant to S.C. Code Ann. § 42-9-30 (21) (2007). Beckman asserted the disability compensation should be based on his demonstrated loss of earnings capacity under S.C. Code Ann. § 42-9-20 (2007).

Commissioner Barden issued a Decision and Order on June 18, 2012. Commissioner Barden made the following pertinent findings of fact:

> The Claimant has sustained a 35% permanent loss of use of the spine (encompassing Claimant's entire spine and including any alleged radiculitis) pursuant to § 42-9-30(21).
>
> I find the greater weight of the evidence shows only the Claimant's back was affected by the March 25, 2010 admitted injury by accident. [R. p. 16].
>
> Beckman timely filed a Form 30 (Notice of Appeal) on Jun 26, 2012. [R. pp. 47-48].
>
> The Appellate Panel heard oral arguments on October 22, 2012. The Appellate Panel issued

a Decision and Order on December 5, 2012, in which it affirmed the decision of the Single Commissioner. [R. pp. 21-32].

This appeal followed.

STATEMENT OF THE FACTS

Neal Beckman was employed as a delivery truck driver for the Employer, Sysco, for 6 years. On March 25, 2010, while loading a hand truck for a delivery, Beckman injured his back, buttocks, legs, right foot and SI joints.

Beckman immediately reported his injury to Employer. His workers' compensation claim was accepted, and he was sent for medical treatment the next day on March 26, 2010. He was taken out of work and began receiving temporary total disability compensation.

After the initial treatment at Palmetto Health, Beckman received treatment with Dr. Byron Williams at Coastal Occupational Health from March 29, 2010 through April 12 2010. An MRI scan on March 29, 2010, revealed disc protrusions causing nerve root contact at L3/4 and L4/5.

Due to the seriousness of the injury and the MRI evidence documenting muscle spasms and radiculopathy, Beckman's treatment was transferred to a specialist, Dr. Timothy Zgleszewksi. Dr. Zgleszewski treated Beckman from April 19, 2010 through September 12, 2011. Treatment included:

- Diagnostic bilateral sacroiliac joint (SI joint) injections.
- Therapeutic right SI joint injections.
- Left L4, L5 and S1 epidural steroid injections.
- Percutaneous discectomy.
- Medication and physical therapy.

During the course of treatment, Beckman also took personal steps to improve his physical condition. He quit smoking, lost 40 pounds and started going to the gym regularly.

The medical records consistently document ongoing complaints of left upper thigh pain and radiation down the left lateral thigh to the foot, along with numbness in the foot. Throughout the course of Dr. Zgleszewski's treatment, he continued the diagnosis of lumbar radiculopathy.

At the April 11, 2011 appointment, Dr. Zgleszewski ordered a functional capacity evaluation (FCE) to assess Beckman's current functional status and work capacity. The FCE was done on April 25, 2011. It showed Beckman gave full effort and was able to perform at medium duty. [R. pp. 194-197].

On September 12, 2011, Dr. Zgleszewski completed a Form 14B (Physician's Statement). On the 14B, Dr. Zgleszewski gave his final diagnosis of "Sacroiliitis; lumbar disc injury & radiculopathy." He listed the boy parts injured as the "Back/Spine" and the body parts affected as the "Lower Extremity." He opined that Beckman had reached MMI on May 2, 2011 with a 10% medical impairment to the "Back/Spine" and a 5% medical impairment to the "SI joint" for a combined rating of 15%. Dr. Zgleszewski stated Beckman could return to work with restrictions of "Medium duty with no repetitive bending/twisting or lifting." He further stated Beck would need "Up to 2-3 SI joint injections over the next 2 years." [R. p. 193].

In the interim, Beckman continued to have ongoing symptoms of low back pain radiating into his left leg with numbness around the foot. [R. p. 205]. He also had periodic flare-ups with severe muscle spasms several weeks.

Due to his ongoing symptoms of radiculopathy punctuated with flare-ups, Beckman was sent to Columbia by the Employer for a surgical evaluation with Dr. Scott Boyd. Dr. Boyd confirmed

the history of low back with pain radiating into the left leg and numbness around the foot. Dr. Boyd noted "clear objective evidence of muscular spasm and back pain." He opined that as "any surgery would involve a multi-level fusion which would almost certainly yield very poor results . . . I do not believe that there is any role for surgery here." [R. pp. 205-206]. Dr. Boyd assigned an 8% impairment rating and concurred with the medium duty restrictions and treatment recommendations from Dr. Zgleszewski.

Both parties obtained expert vocational evaluations. The experts agreed that Beckman cannot return to any of his previous employment due to the restrictions from his injury. [R. p. 27]. The experts also agree that Beckman has suffered a permanent loss of earnings capacity.

Beckman's expert, David R. Price, opined Beckman would be capable of working at an entry level semi-skilled position earning approximately $8.00 to $10.00 per hour. As such, his residual earning capacity is lowered all the way down to $320.00 to $400.00 per week. [R. p. 198-204].

Employer's expert, Jan Westmoreland, concluded Beckman's future earnings would range form $18,200.00 up to $27,400.00. On a weekly basis, his residual earning capacity would be reduced to $350.00 to $520.00 per week. [R. p. 207-220].

In his job with Employer, Beckman earned $1,062.94 per week or $55,272.88 per year. Even with Westmoreland's most optimistic scenario, Beckman has lost more than half his earning capacity as a result of his injury.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Commission. Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). Under the APA, the appellate court can reverse or modify the decision of the Commission if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2011).

"[T]he guiding principle undergirding our workers' compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation." Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission's decision "must be founded on evidence of sufficient substance to afford a reasonable basis for it." Wynn v. People's Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

The Commission is permitted to disregard medical evidence only when there is other competent evidence in the record to support their conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). Where a finding is based on "the medical opinion of the single commissioner, adopted by the Commission," rather than on the opinion of a medical provider, the finding must be reversed as unsupported by substantial evidence. Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). A conclusion by the Commission "based on rank speculation . . . cannot now be used as the basis for denying [an injured worker's] claim for lost wages. Hutson at 504, 732 S.E.2d 694.

ARGUMENT

The primary issue on appeal is the erroneous application of the "two body-part rule" set out in Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). Although the primary injury was to the back, Beckman also injured his SI joint. Moreover, his left leg has been affected by the radiculopathy caused by the back injury.

The evidence shows Beckman's injury is not limited to his back. He therefore proved his right to proceed under the loss of earnings capacity statutes. S.C. Code Ann. § 42-9-20 (2007). As the undisputed evidence shows he has suffered a loss of earnings capacity, this case must be reversed and remanded to the Appellate Panel to determine the extent of lost earnings capacity and enter an award under the loss of earnings statute.

1. The Commission erred in limiting Beckman to a scheduled member disability award when the evidence showed disability should have been awarded under the loss of earnings capacity statute.

At the Commission, Beckman consistently argued that his injury was not limited to his back – such that the disability award should have been made for loss of earnings capacity under S.C. Code Ann. § 42-9-20 (2007). Beckman adduced proof that he injured an unscheduled body part – the SI joint – and that his back injury had caused radiculopathy in his left leg. This proof, combined with the definitive proof of an actual loss of earnings capacity, confirm that the Appellate Panel erred in limiting his disability award to a single member under S.C. Code Ann. § 42-9-30 (2007).

The Workers' Compensation Act provides three methods to obtain compensation for permanent disability: 1) total disability under S.C. Code Ann. § 42-9-10; 2) partial disability under S.C.Code Ann. § 42-9-20; and 3) scheduled disability under S.C. Code Ann. § 42-9-30. The first two methods are premised on the economic model. Under the economic model, the injured worker must

prove an actual loss of earnings capacity. The third method conclusively relies upon the medical model with its presumption of lost earning capacity. Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 580 S.E.2d 100 (2003). The Commission is required to apply whichever statute provides the greatest benefits for the Claimant.

In this case, the Commission only addressed disability under the medical model. See S.C. Code Ann. § 42-9-30 (21)(2007)(providing compensation paid for loss of use to the back is 300 weeks). Had Beckman not suffered the injury to his SI joint and radiculopathy into his left leg, such that his injury was entirely limited to his back, then he would be limited to a maximum compensation of 300 weeks – not withstanding the fact he suffered a loss of more than half his pre-injury earning capacity. The basic rule set out in Singleton states, "Where the injury is confined to the scheduled member, and there is no impairment of any other part of the body because of such injury, the employee is limited to the scheduled compensation." Singleton v. Young Lumber Co., 236 S.C. 454, 471, 114 S.E.2d 837, 845 (1960). The principle espoused in Singleton recognizes "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." Wigfall, 354 S.C. 100, 106-07, 580 S.E.2d at 103. This rule is colloquially referred to as the "two-body part rule."

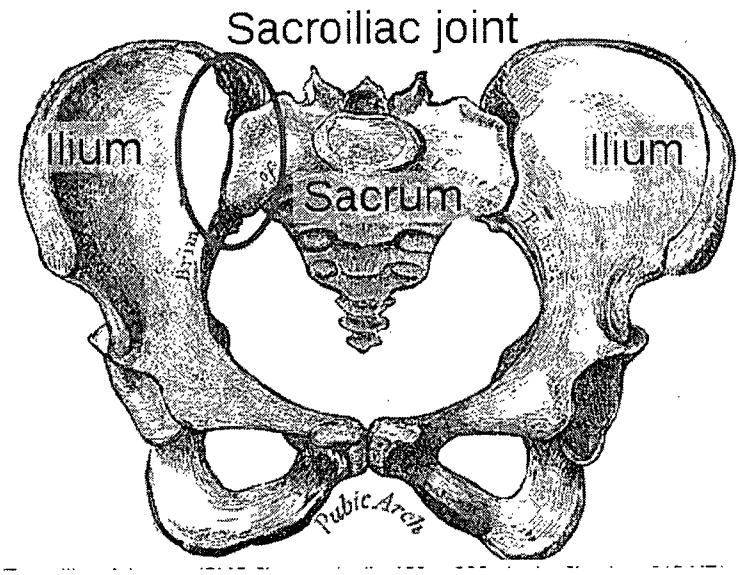
The part of Singleton relevant to this case states, "To obtain compensation in addition to that scheduled for the injured member, claimant must show that some other part of his body is affected." [Id.]. The point here is that if two or more scheduled members are injured, the claimant is entitled to proceed under general disability as a matter of law without further inquiry. However, if the actual injury is confined strictly to one body part, the claimant can still proceed under the general disability

statutes if he can "show that some other part of his body is affected." Id. See, also Simmons v. City of Charleston, 349 S.C. 64, 75, 562 S.E.2d 476, 482 (Ct.App.2002) (injury to scheduled member that affected other parts of body compensable as general disability). It is enough that the other body part be *affected.* There is no requirement that a separate impairment rating be given. "The Singleton Court intended 'impairment' to encompass a physical deficiency." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 103, 580 S.E.2d 100, 101 (2003). Cf. Peoples v. Henry Co., 364 S.C. 123, 611 S.E.2d 527 (Ct. App. 2005)(award of 68% to leg affirmed because ruptured Achilles tendon not limited to foot because pain traveled up into leg); Mixson v. Westinghouse Elec. Corp., 304 S.C. 31, 402 S.E.2d 893 (Ct. App. 2005)(for workers' compensation purposes, there is no requirement that loss of use, or partial loss of use, of member of body requires evidence of direct injury to member itself).

A. SI Joint Injury.

The Appellate Panel found as a fact that: "We find the greater weight of the evidence shows only the Claimant's back was affected by the March 25, 2010 admitted injury by accident. [R. p. 28]. This finding is patently erroneous. See Burnette v. City of Greenville,737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)("the medical opinion of the single commissioner, adopted by the Commission," is not evidence and cannot form the basis of a finding). Beckman also injured his sacroiliac joint. The SI joint is an unscheduled member as a matter of law. See Gilliam v. Woodside Mills, 461 S.E.2d 818, 319 S.C. 385 (1995)("as a matter of law the hip socket is part of the pelvis and not part of the leg for workers' compensation purposes").

The SI joint is the articulation between the sacrum and the ilium of the hip bone. Taber's Medical Dictionary. The sacrum supports the spine and is supported in turn by an ilium on each side. The illustration below shows the exact location of the SI joint:



The SI joint is by definition an unscheduled body part. Virtually the same issue presented here was definitively addressed in Gilliam v. Woodside Mills, 461 S.E.2d 818, 319 S.C. 385 (1995). In Gilliam, the employee injured her hip and required a hip replacement. She had no other injuries. The Commission refused to made a general disability award, instead holding that Gilliam was limited to a scheduled member award because the hip socket was part of the leg. This Court and the Supreme Court reversed holding "the hip socket is part of the pelvis and not part of the leg for

workers' compensation purposes."[1] Id. The Supreme Court held the issue was one of law – expressly rejecting the employer's contention that it was a substantial evidence issue. As the injury was to an unscheduled member, the Court remanded to the Appellate Panel for a determination of disability under the general disability statute.

Gilliam commands reversal in the instant case. The evidence is overwhelming that the SI joint was permanently injured in the accident. Dr. Zgleszewski specifically assigned a 5% medical impairment to the SI joint. [R. p. 193]. The Appellate Panel found as a fact that "The authorized treating physician assigned a 15% combined impairment rating for the back and SI joint." [R. p. 26]. The Panel further found "Claimant is entitled to receive injections per the recommendation of the authorized treating physician, Dr. Zgleszewski." [R. p. 28]. As the injections are specifically "SI joint injections," the Commission must necessarily have found that the SI joint was injured in the accident.

Indeed, Respondents do not even dispute that the SI joint was permanently injured. Instead, they "contend that the SI joint is not a separate scheduled body part as the sacrum is a portion of the spine located below the lumbar vertebral column; therefore Claimant was properly compensated under § 42-9-30 (21) for his total impairment [sic] to his back." This is the same argument the employer made to the Appellate Panel in Gilliam – completely overlooking the fact that the SI joint by definition is the joint between the sacrum and the ilium (which itself is part of the pelvis). And,

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[1]In 2007, the Legislature amended the Act to add the hip and shoulder as scheduled members with a value of 300 weeks each. S.C. Code Ann. § 42-9-30 (2007). The fact the hip and shoulder are given greater value as scheduled members than the leg (195 weeks) and arm (220 weeks) recognizes "the common-sense fact that, when two or more scheduled injuries [or a scheduled and non-scheduled injury] occur together, the disabling effect may be far greater than the arithmetical total of the schedule allowances added together." Wigfall v. Tideland Utilities, Inc., 354 S.C. 100, 106-7, 580 S.E.2d 100, 103 (2003).

as in Gilliam, the Appellate Panel erred as a matter of law in finding the SI joint was limited to the back.

The SI joint is an unscheduled member. As in Gilliam, an injury to an unscheduled member allows an injured worker to proceed under the general disability statute. Accordingly, the decision below must be reversed and the case must be remanded for a determination of Beckman's loss of earnings capacity.

B. Radiculopathy.

The overwhelming weight of the evidence shows that Beckman's back injury resulted in radiculopathy into his left leg. Dr. Zgleszewski diagnosed Beckman with radiculopathy throughout the entire course of treatment, culminating with the specific diagnosis of "lumbar disc injury & radiculopathy" upon reaching MMI. Dr. Zgleszewski explicitly opined that the "Lower Extremity" was a body part affected by the back/spine injury. [R. p. 193]. See Hutson v. S.C. State Ports Authority, 390 S.C. 108, 700 S.E.2d 462 (Ct.App. 2010), *reversed on other grounds,* 732 S.E.2d 500, 399 S.C. 381 (2012)(affirming Commission's finding that radicular symptoms in the right leg showed an injury to the back "with affects to the right leg.").[2] Moreover, the 10% medical impairment to the back/spine necessarily encompasses radiculopathy (as does the 8% assigned by Dr. Boyd).

The Commission's disability award of 35% loss of use of the spine recognized the existence

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[2]Hutson's radicular symptoms met the requirements of Singleton and Wigfall. As such, he was legally entitled to prosecute his disability claim under both the wage loss model and the medical model. The Court of Appeals held his wage loss claim failed for a lack of proof of wage loss; not because of the two-body part rule. The Supreme Court reversed holding the Commission's finding regarding no proof of wage loss was based on "rank speculation." Hutson v. S.C. State Ports Authority, 732 S.E.2d 500, 399 S.C. 381 (2012)

of the radiculopathy, as the award "encompass[ed] Claimant's entire spine and *including any alleged radiculitis* . . ." [R. p. 28]. The Commission would not make such a statement nor base an award on radiculitis had there not been sufficient evidence to do so.

The crux of the error below is that the Appellate Panel substituted its own medical opinion for that of the doctors. The specific error is shown where the Appellate Panel states:

> There is no evidence of radiculopathy. The authorized treating physician diagnoses radiculitis based upon Claimant's subject complaints. At one point (post discectomy on April 2011), Claimant reported no leg pain at all. [R. p. 25].

It is facially absurd for the Appellate Panel to state there is *no* evidence of radiculopathy. The authorized treating physician (Dr. Zgleszewski) diagnosed radiculopathy. He never waivered from this opinion – repeating it on September 12, 2011. [R. p. 193]. Signs and symptoms of radiculopathy are present in virtually every medical report – save the one in April 2011 where Beckman reported short-term improvement of his radicular symptoms following the percutaneous discectomy – which was before he reached MMI. These same symptoms had returned by the time Beckman saw Dr. Zgleszewski on May 2, 2011, and were still present when he saw Dr. Boyd on February 27, 2012. [R. pp. 205-206].

The one scintilla of evidence which arguably undercuts the radiculopathy diagnosis is the EMG/NCS study. This is obviously the basis for the Appellate Panel's finding as they state: "The Claimant also underwent an EMG/NCS study that revealed normal results with no objective evidence of radiculopathy." [R. p. 25].

The problem here is that this statement is based on the Single Commissioner's own medical opinion – not that of Dr. Zgleszewski. See Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012)(medical opinion of a commissioner is not evidence). Dr. Zgleszewski

personally reviewed and interpreted the EMG/NCS study – and maintained his diagnosis of radiculopathy. He repeatedly stated that the test is an "imperfect diagnostic tool" for diagnosing radiculopathy. [R. pp. 153, 158]. The EMG/NCS is a confirmatory test. If positive, it confirms the clinical diagnosis of radiculopathy. However, as it is prone to a high percentage of false negatives, a normal test in the face of clinical evidence means nothing.

There is nothing magical about so-called objective testing versus the clinical diagnoses made by medical providers. See Crisp v. SouthCo Inc., 738 S.E.2d 835, 844, 401 S.C. 627 (2013)("In light of [testimony for multiple valid methods of diagnosing brain injury], we are reluctant to require use of a specific diagnostic tool in proving these medically-technical brain injury cases."). The Appellate Panel must rely on the opinions of the doctors involved in treating and evaluating the patient. These opinions may be based on imaging studies and other technology based diagnostic tools – or they may be based on physical examination along with the history and complaints reported by the patient.

Dr. Zgleszewski has a double advantage over the Commissioners. He is a trained physician and he treated Beckman for over a year. To be sure, the Appellate Panel has the authority to reject Dr. Zgleszewski's expert opinions – but only if there is other competent evidence in the record to support a different conclusion. Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 716 S.E.2d 123 (Ct. App. 2011). In this case, there is no other evidence. Beckman consistently presented with signs and symptoms of radiculopathy in his left leg and foot. Dr. Boyd never addressed the issue one way or the other – but did document continuing radicular symptoms of pain in the left leg and numbness around the foot. [R. pp. 205-206].

As in Burnette, "The record contains [Beckman's] medical records and testimony, as well as written opinions by [his] treating physicians and a vocational rehabilitation expert. We find no

evidence that challenges the conclusions of [Beckman's] doctors concerning [his . . .] development of radiculopathy." Burnette v. City of Greenville, 737 S.E.2d 200, 401 S.C. 417 (Ct. App. 2012). The Appellate Panel repeated the error it made in Burnette when it substituted its own medical opinions for the opinions of the doctors. This is reversible error. This Court should reverse the finding that the injury is limited to the back and remand to the Appellate Panel for a determination of Beckman's loss of earnings capacity.

CONCLUSION

For the foregoing reasons, the Court should reverse the Decision and Order of the Appellate Panel and remand for a determination of Beckman's loss of earnings capacity under S.C. Code Ann. § 42-9-20 (2007).

Respectfully Submitted,

Fred W. Riesen, Jr.
RIESEN LAW FIRM, LLP
3660 W. Montague Avenue
N. Charleston, SC 29418
(843) 760-2450

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000
stephen@samuelslawfirm.net

Attorneys for Appellant

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Columbia, South Carolina

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CERTIFICATE OF COUNSEL

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

Stephen B. Samuels
SAMUELS LAW FIRM, LLC
1320 Richland Street
Columbia, SC 29201
(803) 779-4000

Fred W. Riesen, Jr.
RIESEN LAW FIRM, LLP
3660 W. Montague Avenue
N. Charleston, SC 29418
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Attorneys for Appellant

Columbia, South Carolina
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PROOF OF SERVICE

I certify that I am paralegal to Stephen B. Samuels and I have served the **Final Brief of Appellant** upon the Respondents by mailing a copy of the same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on **September 12, 2013**, addressed as follows:

J. Hubert Wood, III, Esquire
Attorney for Respondents
Wood & Warder, LLC
One Wesley Drive
Charleston, SC 29407

Angi O'Connell

Columbia, South Carolina

September 12, 2013