THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION APPELLATE PANEL

Avery Wilkerson, Commissioner; Andrea C. Roche, Commissioner; Melody James, Commissioner

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W.C.C. File No.: 1108693
Appellate Case No.: 2013-002028

Gail Bruce, Employee, Appellant,

v.

Columbia Heart Clinic, Employer, and Hartford Insurance Company of the Midwest c/o The Hartford, Carrier, Respondents.

FINAL BRIEF OF APPELLANT GAIL BRUCE

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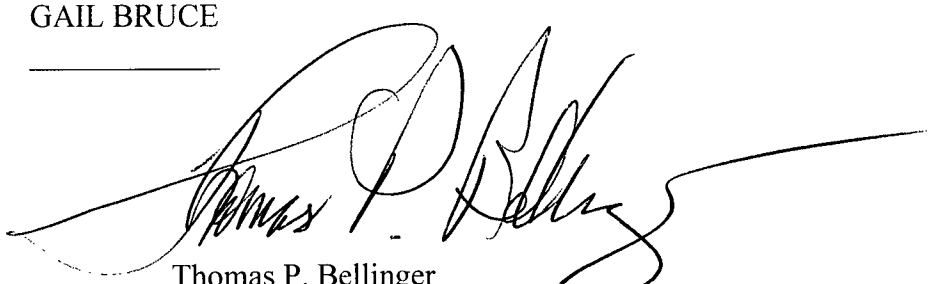

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Commission erred in holding that the personal comfort doctrine only applies to injuries that occur on the Employer's premises or in an area maintained and controlled by the Employer.

2. Whether the Commission erred as a matter of fact and/or law in not addressing whether Claimant's injury occurred during an insubstantial deviation from work duties as the undisputed evidence shows that she only took a few puffs from a cigarette and was away from her duties for as little as four minutes.

3. Whether the Commission erred in concluding as a matter of fact and/or law that timely notice was not given to the Employer regarding Claimant's bilateral knees.

4. Whether the Commission erred as a matter of fact and/or law that had the claim been found compensable the only injury would have been her right shoulder and not her bilateral knees.

STATEMENT OF THE CASE

This is an appeal from an Order of the Full Commission dated September 3, 2013. This is a denied case that originally came before the Single Commissioner on the Forms 50 and 51 on November 8, 2012. Claimant appealed the Single Commissioner's ruling which resulted in an Order of the Full Commission affirming the ruling of the Single Commissioner.

Claimant alleged that she sustained a compensable injury to her right shoulder and bilateral knees in an accident arising out of and during the course of her employment. Claimant contended that her accident is compensable pursuant to the personal comfort doctrine or, in the alternative that her injury occurred during a slight deviation from her employment. Claimant contended that she injured her right shoulder and both knees in the accident, and that she is permanently and totally disabled pursuant to South Carolina Code Section 42-9-10. Additionally, Claimant sought a lump-sum award with *James v. Anne's Inc.* language in the Order, lifetime causally-related medical care or in the alternative medical care pursuant to *Dodge* for her right shoulder and both knees, TTD benefits from date of injury through May 22, 2012, and reimbursement for any causally-related medical care to date.

Defendants alleged that the claim is not compensable and that benefits should be denied in full. Defendants contended that Claimant could not carry her burden of proving an injury by accident, and that Claimant's case is not covered by the personal comfort doctrine. Defendants further alleged that the case of *Matute v. Palmetto Health Baptist*, 391 S.C. 291, 705 S.E.2d 472 (Ct. App. 2001), is directly on point. In the alternative, Defendants alleged that if the claim was compensable, Claimant only injured her right shoulder and that her knees would have required medical treatment prior to the accident. Finally, Defendants deny that TTD is due and payable because Claimant had been returned to work full duty.

The Single Commissioner denied benefits to Claimant. Claimant then appealed to the Full Commission, which affirmed the ruling of the Single Commissioner. This appeal follows the Order of the Full Commission.

FACTS

Claimant was born on February 20, 1954. She is single and lives in Elgin, South Carolina. Claimant graduated from high school and then obtained a two-year radiology technology degree. Prior to working at Columbia heart (hereinafter "Employer"), Claimant worked as an x-ray technician at Doctors Care. She also worked for a chiropractor for seven years. Her job duties at the chiropractor's office included taking x-rays and various managerial tasks. She began working for Employer in August of 1995, and has not worked anywhere else since being hired by Employer. According to Claimant, these three jobs encompass her entire work history.

While working for Employer, Ms. Bruce has held a number of positions including Medical Assistant, Team Leader, Supervisor, Manager, and finally as a Clinical Support Manager, which was her position on July 15, 2011. As a Clinical Support Manager, Ms. Bruce managed twenty-one (21) people. She handled all disciplinary matters for the secretaries and medical assistants, managed the patient flow, took x-rays, and assisted with patient care. Before the accident, Claimant was able to manage her own schedule. However, after her injury she was forced to work on the floor every day.

On July 15, 2011, Claimant went downstairs to speak with Angela Jenkins because she had been placed on probation. All of Claimant's administrative duties had been taken away from her. The conversation with Ms. Jenkins upset Ms. Bruce, and she testified that she wanted to "compose herself." (R. p. 82, line 3). Claimant considers herself a "stress smoker", and she borrowed a cigarette from her co-worker, Julie Hunt. Before going outside, Claimant informed her team leader that she was going outside to have a cigarette, and her team leader did not have a problem with her taking a smoke break. The smoking area is approximately 20 feet from the

office building where Employer is located, and is accessible by use of a sidewalk that leads into and out of the building. There is also a parking area surrounding the smoking area.

Claimant testified that it was extremely hot outside, so she only took a few puffs and then started to go back inside the building. (R. p. 82, line 23-p. 24, line 1). However, while walking on the sidewalk that led into the building, she tripped and fell over an area of uneven concrete. Claimant fell down onto her knees and hit her shoulder really hard because she was trying to prevent her face from hitting the sidewalk. (R. p. 84, lines 2-9). While she was smoking, Claimant was outside of the building for approximately four minutes. (R. p. 84, line 20). She never deviated from her path between the office building and the smoking area, and her route was the shortest distance between the two. (R. p. 84, line 16-p. 26, line 6). She did not do anything other than go outside and take a few puffs of a cigarette.

Claimant testified that after she fell she knew she was injured badly. Eventually, she was placed into a wheelchair and transported to the hospital. Angela Jenkins met with Claimant before she was taken to the hospital, and Claimant notified Ms. Jenkins of the injury. Ms. Bruce testified that she has had prior rotator cuff surgery on her right shoulder, but that her shoulder was doing fine before her fall on July 15, 2011. She also had prior bilateral knee surgeries at age eleven (11), and she also had osteoarthritis in both knees prior to her fall. However, she was able to do almost everything she wanted to prior to her fall. She was able to maintain her normal daily living with the assistance of injections as long as she did not "overdo it". After her fall, she testified that she could hardly walk at all. (R. p. 91, line 16). She needs total knee replacement surgery, and testified that prior to her fall she did not plan on having these procedures done until late in her 60's.

Claimant's main complaint at the hospital immediately following her fall was her right shoulder, which was dislocated. She testified that while she was in the hospital, all she could think about was her arm. (R. p. 93, line 1). The doctors in the hospital had to put her shoulder back into place twice. On the day after her fall, she noticed abrasions on her knees, ankles, shins, hands, elbows, and chest. Over the weekend following her fall, Ms. Bruce's right shoulder became dislocated for a third time. At this point, the doctors in the emergency department diagnosed her with a shoulder fracture. Thus, Claimant followed with Dr. Fulton on July 20, 2011. Her shoulder dislocated an additional two (2) times while she was in Dr. Fulton's office. She ultimately underwent surgery for a glenoid fracture, a labral tear, a rotator cuff tear, and a biceps tendon tear.

She followed up with Dr. Fulton on August 3, 2011, and at that point she had started to notice problems with her knees. (R. p. 96, lines 16-22). Dr. Fulton injected her knees on August 3rd, and her knees have been monitored by Dr. Van Dam ever since. She testified that she takes Lortab, Ultram, and Meloxicam for her knee pain. She also uses a quad cane and a rolling walker to help her get around because it is very painful to walk and she is afraid that she would fall without assistance. She testified that her pain is much worse after her fall, and that the shots do not work anymore. (R. p. 98, lines 24-25). She further testified that the pain increased shortly after the fall, but that it was hard to tell initially because she was heavily medicated due to her shoulder injury.

Claimant testified that she cannot clean her house, cook, or grocery shop like she could prior to her fall, and she needs help with everyday activities on a consistent basis. She can no longer get in and out of the shower, get dressed, or go up and down stairs without assistance. Dr. Van Dam recommended a shower chair and rolling walker for the Claimant. Neither of which

had been recommended prior to Claimant's fall on July 15, 2011. Claimant has also been restricted to limited bending, twisting, turning, no deep squatting, no continuous walking or standing, and no continuous walking without breaks.

Claimant has lost most of her range of motion in her right shoulder, and today struggles with easy tasks like brushing her hair. (R. p. 102, lines 14-23). She also cannot reach with her right arm, and she is willing to undergo a total shoulder replacement in the future if it becomes necessary. Claimant testified that she begged Dr. Fulton to release her to work without restrictions because she did not want to lose her job, but she agrees with Adger Brown's assessment that she is permanently and totally disabled.

On cross-examination, Claimant reaffirmed that she fell on a sidewalk that leads from the smoking area to the entrance of the building where Employer is located. Claimant testified that it was not the only way of ingress and egress to the building, and that Employer does not dictate which doors she must use to get in and out of the building. Employer did not provide her with transportation to and from work. Claimant also stated that she was injured while on a smoke break.

According to Claimant, she has had two prior workers' compensation claims while working for Employer. The most recent claim was a trip and fall that resulted in permanent impairment to both shoulders. Claimant testified that when she fell, both knees were the first thing to hit the ground, but that she was only thinking about her shoulder in the hospital because it hurt so badly. She further testified that she did not initially mention her knees to Dr. Fulton because she was on a high dose of morphine which masked the pain. She also stated that she did not include her knees on her short term disability paperwork because the morphine was masking her pain.

STANDARD OF REVIEW

The Administrative Procedures Act establishes the standard of review for decisions by the South Carolina Workers' Compensation Commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). A "court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(5) (2008). However, a reviewing court may "reverse or modify the decision if substantial rights have been prejudiced because the administrative findings, conclusions, inferences, or decisions" are affected by error of law. *Id.* Thus, this Court may reverse or modify the Commission's Order if it determines that Claimant's rights have been prejudiced because of an error of law.

ARGUMENT

1. THE COMMISSION INCORRECTLY FOUND THAT THE PERSONAL COMFORT DOCTRINE ONLY APPLIES TO INJURIES THAT OCCUR ON THE EMPLOYER'S PREMISES OR AREAS THAT THE EMPLOYER MAINTAINS OR CONTROLS.

Claimant's injury is compensable according to the personal comfort doctrine as it is established under the law of South Carolina. The personal comfort doctrine includes "imperative acts such as eating, drinking, **smoking**, seeking relief from discomfort. . . ." *Osteen v. Greenville County School Dist.*, 333 S.C. 43, 46, 508 S.E. 2d 21, 23 (1998). "Such acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment." *Mack v. Branch No. 12, Post Exchange, Fort Jackson*, 207 S.C. 258, 264, 35 S.E.2d 838, 840 (1945). "That such acts will be done in the course of employment is necessarily contemplated, and they are inevitable incidents. Such dangers as attend them, therefore, are incident dangers." *Id.*

During the hearing before the Full Commission, the cases of *Dukes v. Rural Metro Corp.* and *McCoy v. Easley Cotton Mills* were discussed at length. The Commission seemed to read these cases to require that an accident had to happen on the employer's premises in order for it to be compensable. However, this is not the case. In *Dukes* the employee was injured on a smoke break when a gun accidentally discharged and wounded his leg. The Supreme Court denied compensability because there was no nexus between the claimant's job and a gun. However, the Court did discuss Professor Larson's explanation of the personal comfort doctrine in their opinion. "The purpose of the personal comfort doctrine is to allow employees to attend to their biological personal requirements. . . . Allowing an employee to go to the bathroom, **to walk outside to clear his or her head**, or to take other short breaks is good for the employer's

business. Injuries sustained during those activities should be compensable." (emphasis added) *Dukes v. Rural Metro Corp.*, 356 S.C. 107, 110-11, 587 S.E.2d 687, 689 (2003) (*quoting* Arthur Larson, *Larson's Workers' Compensation Law,* §21.08[4][a] (2002)). In quoting this passage with approval, the Court did not add any language limiting application of the doctrine only to walks outside or other breaks that occur on the employer's premises.

In *McCoy,* the claimant lost his left eye when he was struck in the face by a fellow employee with copper tube while he was on a smoke break. In discussing the personal comfort doctrine, the Court in *McCoy* stated that it was "well settled that an employee, in order to be entitled to compensation, need not necessarily be engaged in the actual performance of work at the time of injury; it is enough if he is upon his employer's premises . . . ." *McCoy v. Easley Cotton Mills*, 218 S.C. 350, 356, 62 S.E.2d 772, 774 (1950). In other words, the Court did not make it a **requirement** that the employee be on the premises in order for the case to be compensable. Rather, they merely stated that it is enough if an employee is on the employer's premises. This is not a bright-line requirement, it is simply one way for an employee to fall within the Act.

The personal comfort doctrine was also discussed in *Mack v. Branch No. 12, Post* Exchange. In *Mack* the claimant burned himself while trying to light a cigarette shortly after he arrived at work. In discussing the case, the Supreme Court of South Carolina adopted the personal comfort doctrine as the law of South Carolina. In finding the claimant's injury compensable they stated, "[w]e have the tobacco habit with us, and must deal with it as it is." *Id.*, 207 S.C. at 265, 35 S.E.2d at 841. The Court also cited to 71 C.J. 675 which states "[i]f the employee is injured on account of circumstances attending the employment while taking a smoke, there being no objection on the part of the employer to his smoking, the injury arises out

of the employment, and is in the course thereof." *Id.*, 207 S.C. at 266, 35 S.E.2d at 841. It is true that the injury in *Mack* occurred on the employer's premises; however the Court in reaching their conclusion placed no emphasis on that fact. The Court simply stated that accidents occurring while the claimant is performing an act covered by the personal comfort doctrine are ". . . accidents resulting from the employment." *Id.* 207 S.C. at 265, 35 S.E.2d at 840.

Defendants argue, and the Single Commissioner agreed, that the cases of *Matute v. Palmetto Health Baptist*, 391 S.C. 291, 705 S.E.2d 472 (2011) and *Howell v. Pacific Columbia Mills*, 291 S.C. 469, 354 S.E.2d 384 (1987) are directly on point and require that an accident take place on an employer's premises to be compensable. However, these cases are easily distinguishable from the present situation. In *Matute*, the claimant had completed her work day and was injured on a sidewalk as she was walking home. In *Howell*, the claimant was hit by a car on a public street as she was going to work. Neither case dealt with the situation where an employee is participating in an activity that is expressly included in the personal comfort doctrine. In the instant case the claimant was injured when she was returning from a smoke break outside of her office building, and as stated earlier smoking is included in the personal comfort doctrine.

Finally, the South Carolina Court of Appeals also addressed the personal comfort doctrine in *Ardis v. Combined Insurance Company*. In *Ardis*, the claimant died in a hotel fire while on a business trip. The court noted that "[s]leeping is expressly included in the personal comfort doctrine," and found claimant's death compensable under the Act. *Ardis v. Combined Ins. Co.*, 380 S.C. 313, 324, 669 S.E.2d 628, 634 (Ct. App. 2008). **The fact that the claimant's death occurred in a hotel illustrates the fact that the personal comfort doctrine does not only cover accidents that occur on the employer's premises.**

As stated above, Claimant's accident is covered by the personal comfort doctrine and is compensable under the law of South Carolina. Claimant was injured while she was on a smoke break, which according to *Osteen* and *Mack* is expressly covered by the personal comfort doctrine. Claimant took a smoke break to clear her head because she had been relieved of some of her work duties, which is also covered by the personal comfort doctrine. To be compensable in South Carolina, an injury by accident must arise out of and in the course of employment. S.C. Code Ann. § 42-1-160 (1976). *Mack* holds that accidents and injuries occurring while performing an act covered by the personal comfort doctrine are "deemed to have arisen out of the employment." *Mack v. Branch No. 12, Post Exchange, Fort Jackson*, 207 S.C. 258, 264, 35 S.E.2d 838, 840 (1945). *Mack* also quotes 71 C.J. 675 which states that injuries occurring while smoking both arise out and happen in the course of employment. *Id.* Furthermore, the "in the course of" requirement is satisfied if the employee is injured while fulfilling work-related duties or "something incidental thereto". *Broughton v. South of the Border*, 336 S.C. 488, 498, 520 S.E.2d 634, 639 (Ct. App. 1999). According to *Mack*, acts covered by the personal comfort doctrine are incidental to the employment. *Id.* Since smoking is expressly included in the personal comfort doctrine, Claimant's accident arose out of and occurred during the course of her employment. Thus, Claimant's injury is compensable under South Carolina law. As is mentioned above, and as illustrated by *Ardis*, there is no requirement that the injury actually occur on the employer's premises.

To allow employers and carriers to escape liability for injuries occurring during smoking breaks would be both inequitable and would cut against the established law under the personal comfort doctrine in South Carolina. When the doctrine was originally adopted in South Carolina, smoking was allowed on employers' premises. This remained true until relatively

recently when bans on smoking indoors, on airplanes, on the job, etc., became prevalent. Today, for health reasons, smoking is only permitted outdoors or in designated smoking areas. In many instances, such as the instant case where many different employers occupy a single building, the smoking area is likely to be outside of the building in an area that is controlled by a landlord or some other entity that may not be the employer. Employers and carriers should not be able to evade liability for injuries that occur during a smoke break because of the modern reality that smoking takes place in outdoor areas and many employers occupy only a portion of a building that is owned by another entity. Smoking is expressly covered under the personal comfort doctrine in South Carolina, and there is no requirement that an injury covered by the personal comfort doctrine occur on the employer's premises. Thus, Claimant's injury is compensable under the South Carolina Workers' Compensation Act.

2. THE COMMISSION ERRED IN NOT ADDRESSING THE FACT THAT CLAIMANT'S INJURY OCCURRED DURING AN INSUBSTANTIAL DEVIATION FROM HER WORK DUTIES.

In the alternative, Claimant's injury occurred during a slight deviation from her employment. The Court in *Mack*, prior to discussing the personal comfort doctrine stated, "granting that the accidental injury resulted from his effort to gratify his desire to smoke, such activity did not remove Mack from the protection of the compensation law." *Mack v. Branch No. 12, Post Exchange, Fort Jackson*, 207 S.C. 258, 264, 35 S.E.2d 838, 840 (1945). In comparing the principle to the doctrine of detour, the Court stated "[s]light deviations are no defense under most state decisions. Thus a slight deviation to get a chew of tobacco, or to ask a fellow employee the time, or to throw away a cigarette, is harmless. . . ." *Id.* (*quoting* Horovitz, Workmen's Compensation Laws, p. 117.)

In the instant case, Claimant borrowed a cigarette from a co-employee and went outside on a smoke break. Her supervisor did not object to her taking a smoke break. The undisputed testimony shows that Claimant went straight from the building to the smoking area and only took a few puffs from the cigarette. Prior to her fall, she had only been outside for around four (4) minutes before she started to go back inside. Additionally, the route Claimant was on to go back into the building when she fell was the shortest route between the smoking area and the building. Claimant's smoke break was a slight or insubstantial deviation from her job duties. Thus, she remained under the "protection of the compensation law", and her fall should be found compensable under the South Carolina Workers' Compensation Act.

3. THE COMMISSION ERRED IN CONCLUDING AS A MATTER OF LAW THAT PURSUANT TO S.C. CODE § 42-15-20, TIMELY NOTICE WAS NOT GIVEN FOR CLAIMANT'S BILATERAL KNEE PROBLEMS.

South Carolina Code Annotated Section 42-15-20 states in pertinent part that injured employees shall "on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a notice of the **accident**" (emphasis added). This section requires employees to give their employers notice that they were injured in a work-related accident within 90 days of the accident. The statute, by its terms, does not require the employee to describe each injured body part. It only requires the employee to give the employer notice that an accident has happened.

In the instant case, the employer had notice of the accident within minutes of its occurrence. Angela Jenkins, who works in Employer's human resources department spoke with Claimant while she was being taken to the hospital from the scene of the fall. Claimant initially only complained of shoulder problems, because her shoulder was the part of her body that was in the most pain following the accident. However, after the pain medicine began to wear off she

began experiencing worsened problems with her knees. Ultimately, on August 3, 2011, less than one month after the fall, Claimant sought treatment for her knees and her shoulder from Dr. Fulton. While it is true that Claimant had bilateral knee problems prior to her fall, her knee problems worsened after the work accident. She could no longer make it through her everyday life with the use of occasional injections. She needs further pain medication and will need total knee replacements sooner than expected. Claimant's worsened knee problems did not arise until at least two weeks after the accident. Thus, Claimant did not notify the employer at the scene of the accident that she was experiencing knee problems. However, as stated above this is irrelevant for purposes of complying with S.C. Code Ann. § 42-15-20. In order to comply with the statute, Claimants must only notify their employer of an accident within 90 days of the accident. It is clear in this case that notice of the accident was given on the same day as the accident, and therefore claimant complied with the statute.

4. THE COMMISSION ERRED IN FINDING THAT, SHOULD THE CLAIM BE FOUND COMPENSABLE, ONLY CLAIMANT'S RIGHT SHOULDER WAS INJURED IN THE ACCIDENT.

The Commission erred in finding that Claimant's bilateral knee problems would not be compensable even if the accident was found compensable. It is undisputed that Claimant had pre-existing bilateral knee osteoarthritis. Claimant testified at the hearing that she could make it through her everyday activities, as long as she did not "overdo it", only with the assistance of injections. (R. p. 90, line 24-p. 91, line 13). She stated that she generally did not have much pain unless she "overdid". (R. p. 91, lines 4-5). Claimant testified that she was aware that she would eventually have to undergo bilateral knee replacement, but that it is elective surgery. (R. p. 91, lines 16-18). She stated that she wanted to put it off as long as she possibly could, and even wait until later in her 60's. (R. p. 91, line 19).

While it is clear that Claimant had pre-existing bilateral knee problems, the evidence establishes that these problems were exacerbated by her fall on July 15, 2011. Dr. Van Dam stated to a reasonable degree of medical certainty that Claimant's fall aggravated her pre-existing osteoarthritis. (R. p. 300). Dr. Van Dam also stated, to a reasonable degree of medical certainty; that restrictions, medications, and need for knee replacements were due to the aggravation of her knee problems. (Id.) As previously stated, Claimant did not immediately complain of her knee problems because the main source of pain after her fall was her dislocated shoulder. However, she began experiencing worsened knee problems following her fall on July 15, 2011, and sought treatment from Dr. Van Dam for those problems on September 15, 2011. Claimant testified that she cannot clean her house, cook, or grocery shop like she could prior to her fall, and she needs help with everyday activities on a consistent basis. She can no longer get in and out of the shower, get dressed, or go up and down stairs without assistance. Dr. Van Dam recommended a shower chair and rolling walker for the Claimant. Neither of which had been recommended prior to Claimant's fall on July 15, 2011. Claimant has also been restricted to limited bending, twisting, turning, no deep squatting, no continuous walking or standing, and no continuous walking without breaks.

It is clear from both the medical evidence and Claimant's testimony that Claimant's pre-existing bilateral knee problems were exacerbated by her fall on July 15, 2011. Thus, Claimant's injuries should not be limited to her right shoulder in the event the claim is found compensable.

CONCLUSION

Based upon the foregoing, Claimant respectfully requests this Court to REVERSE the Order of the Full Commission and find Claimant's bilateral knee injuries and right shoulder injury compensable under the South Carolina Workers' Compensation Act.

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Employee, Appellant's
Certificate of Service

I, on February 5, 2014, served the Employee, Appellant's Final Brief and Certificate of Service upon respondents by depositing a copy in the United States Mail, sufficient postage prepaid, addressed to their counsel of record:

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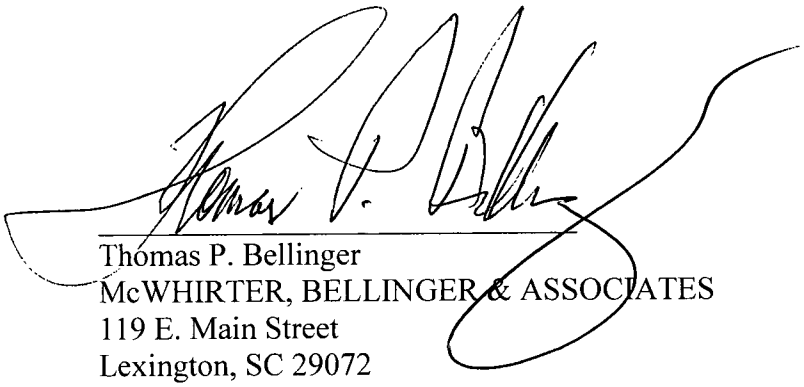
Respectfully Submitted,



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