THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

RECEIVED
JUL 23 2015
SC Court of Appeals

Shirley C. Robinson, Administrative Law Judge

Docket No. 10-ALJ-30-0710-AP

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees or retirees, ... Petitioner,

v.

South Carolina Budget and Control Board, Employee Insurance Program .... Respondents.

PETITION TO CERTIFY APPEAL FOR REVIEW BY SUPREME COURT AND MEMORANDUM IN SUPPORT

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This is the second appeal from the administrative law court in a case which was previously transferred to this Supreme Court pursuant to SCRAP, Rule 204(b). On March 4, 2105, this Court published its opinion reversing the administrative law court on a matter of statutory interpretation related to insurance benefits under the State Health Plan. *See Allen v. SC Pub. Employee Benefit Authority (PEBA)*, 411 S.C. 611, 769 S.E.2d 666 (2015) (Exhibit A).

On remittitur from the *Allen v. PEBA* decision, Petitioner moved for an award of attorneys' fees pursuant to the state action statute, S.C. Code Ann. § 15-77-300 (2015), which provides for an award of reasonable attorneys' fees in cases involving state action if the court finds that the agency acted without substantial justification in pressing its claim, and if there are no special circumstances that would make an attorneys' fee award unjust. Id. On June 17, 2014, the administrative law court issued an Order denying the Motion for Attorneys' Fees. The undersigned served the Notice of Appeal on July 16, 2015. (See Exhibit B).

Allen is seeking review of the administrative law court's order denying the motion for attorneys' fees. This Court previously found that the language of the diabetes insurance mandate was "plain," and that the "ALC erred in finding that the State Health Plan does not provide 'health insurance coverage.'" *Allen v. PEBA*, 411 S.C. at 617, 769 S.E.2d at 669. This Court described the interpretation as urged by the State agency and adopted by the ALC as "a tortured and illogical reading of the statute," and concluded "[n]owhere in the plain language of section 38-71-46 does the General Assembly exclude explicity or implicitly—the State Health Plan from the mandate provided for by this

statute" *Id*

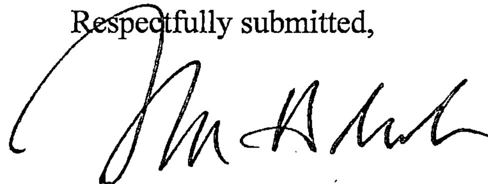
In its recent Order denying the motion for attorneys' fees, the ALC concluded that the state action challenging insurance coverage was reasonable because it concluded that the statute was ambiguous, for reasons including, but not limited to: "its' complicated grammatical structure, longstanding agency practice denying similar claims without contest, and the unique nature of the State Health Plan." Order at 5. This conclusion, and therefore basis for denying the motion for attorneys' fees: that the statute in question was ambiguous, is contrary to this Court's holding in *Allen v. PEBA* and the case law interpreting the state action statute.

Because this Court previously agreed to transfer the underlying appeal involving the statutory interpretation question and is therefore better suited to address the findings of the ALC order relative to the state action attorneys' fee statute requirements, the undersigned respectfully requests the transfer of this appeal from the Court of Appeals to the Supreme Court.

CONCLUSION

For the reasons discussed herein, Appellant respectfully requests that the Court grant the Petition to Certify this case for review by the South Carolina Supreme Court.

Respectfully submitted,



John A. Massalon
Wills Massalon & Allen, LLC
ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Jeffrey D. Allen, on behalf of Jane Doe, Appellant,

v.

South Carolina Public Employee Benefit Authority, Employee Insurance Program, Respondents.

Appellate Case No. 2012-212988

Appeal from the Administrative Law Court
Shirley C. Robinson, Administrative Law Judge

Opinion No. 27504
Heard December 5, 2013 – Filed March 4, 2015

REVERSED

Terry E. Richardson, Jr., of Richardson, Patrick, Westbrook & Brickman, LLC, of Barnwell, and John A. Massalon, of Wills Massalon & Allen, LLC, of Charleston, for Appellant.

Theodore D. Willard, Jr., of Montgomery Willard, LLC, and Stephen Van Camp, both of Columbia, for Respondent.

CHIEF JUSTICE TOAL: Jeffrey D. Allen (Appellant), on behalf of his daughter, appeals the Administrative Law Court's (ALC) order affirming the Appeals Committee of the South Carolina Budget and Control Board Employee Insurance Program's (EIP Appeals Committee) decision to deny Appellant's

insurance claim for his daughter's diabetes educational training session. We reverse.

FACTS/PROCEDURAL BACKGROUND

Appellant, a South Carolina public school district employee, is insured under the Group Health Benefits Plan of the Employees of the State of South Carolina, the public school districts, and participating entities (the State Health Plan).[1] The State Health Plan is offered through EIP.[2]

In November 2007, Appellant's daughter was diagnosed with Type 1 diabetes at the age of two years old.[3] Appellant's daughter's doctor prescribed her an insulin pump to regulate her insulin levels. In August 2008—two weeks prior to attaching the pump to Appellant's daughter's body—her family and two school nurses attended a two-hour training session at the Medical University of South Carolina, during which a diabetic educator taught the caregivers how to operate the insulin pump.

Appellant submitted a $560 claim for the educational training session.[4] Blue

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[1] The State Health Plan was created by the South Carolina Budget and Control Board (SCBCB) pursuant to section 1-11-710 of the South Carolina Code, which requires the board to "make available to active and retired employees of this State and its public school districts and their eligible dependents group health, dental, life, accidental death and dismemberment, and disability insurance plans and benefits in an equitable manner and of maximum benefit to those covered within the available resources." S.C. Code Ann. § 1-11-710(A)(1) (Supp. 2013).

[2] SCBCB created EIP to administer the State Health Plan. Recently, a newly created agency, the South Carolina Public Employee Benefit Authority (PEBA), assumed administration of EIP pursuant to Act No. 278, 2012 S.C. Acts 2278, 2319.

[3] Appellant's daughter is insured as a dependent under Appellant's State Health Plan policy.

[4] Appellant also submitted a claim for his daughter's insulin pump, which was covered by his policy.

Cross Blue Shield of South Carolina (Blue Cross) denied the claim on the grounds that the "benefit plan does not cover education and/or training for this condition."[5] Appellant appealed the denial through Blue Cross's appeals process. Ultimately, Blue Cross's Appeals Review Committee upheld the denial of benefits on the basis that diabetes educational training is excluded under the State Health Plan, and that section 38-71-46 of the South Carolina Code,[6] which mandates coverage for diabetes educational training in certain health insurance policies, does not apply to the State Health Plan.

Appellant appealed to the EIP Appeals Committee. The EIP Appeals Committee denied Appellant's claim, concluding that Appellant's State Health Plan policy expressly excluded diabetes educational training and that section 38-71-46 did not apply to the State Health Plan.

Appellant appealed to the ALC. In the ALC, Appellant argued that diabetes educational training is covered under the State Health Plan,[7] and in the alternative, the State Health Plan should be reformed to comply with section 38-71-46. Additionally, Appellant requested that the ALC allow the matter to proceed as a class action lawsuit. On August 13, 2012, the ALC issued an order affirming the EIP Appeals Committee's decision that the terms of the State Health Plan do not cover diabetes educational training because the State Health Plan does not qualify as "health insurance coverage" as defined by the South Carolina Code.[8] In light of the ALC's disposition of the case, the ALC declined to address whether it had the authority to permit the case to proceed as a class action.

Appellant appealed the ALC's order to the court of appeals. This Court certified the appeal pursuant to Rule 204(b), SCACR.

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[5] Blue Cross is the third-party claims administrator for the State Health Plan. As such, Blue Cross processes and pays claims under the State Health Plan and thus, provides the first level of review for coverage requests.

[6] S.C. Code Ann. § 38-71-46 (2002).

[7] Appellant has now abandoned this argument.

[8] For a health insurance policy to be subject to section 38-71-46, it must provide "health insurance coverage" as defined by section 38-71-840(14) of the South Carolina Code. S.C. Code Ann. §§ 38-71-46, -840(14) (2002).

ISSUES

I. Whether the ALC erred in concluding that section 38-71-46 does not apply to the State Health Plan?

II. Whether the ALC erred in failing to address the availability of class action relief?

STANDARD OF REVIEW

A party who has exhausted all administrative remedies available within an agency and who is aggrieved by an ALC's final decision is entitled to judicial review. S.C. Code Ann. § 1-23-380 (Supp. 2012). In an appeal from a decision by the ALC, the Administrative Procedures Act (APA) provides the appropriate standard of review. *See* S.C. Code Ann. § 1-23-610(B) (Supp. 2012). Under the APA, this Court will reverse an ALC's decision if it is:

(a) in violation of constitutional or statutory provisions;

(b) in excess of the statutory authority of the agency;

(c) made upon unlawful procedure;

(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(f) arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion.

Id. A question of statutory interpretation is one of law for this Court to decide. *CFRE, L.L.C. v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." (citing *City of Rock Hill v. Harris*, 391 S.C. 149, 152, 705 S.E.2d 53, 54 (2011))).

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LAW/ANALYSIS

I. Applicability of Section 38-71-46 to the State Health Plan

Appellant argues that the ALC erred in concluding that section 38-71-46 of the South Carolina Code does not apply to the State Health Plan. We agree.

"All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing *Bohlen v. Allen*, 228 S.C. 135, 141, 89 S.E.2d 99, 102 (1955)). "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will.'" *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). When interpreting a statute, the Court must read the language in a sense which harmonizes with its subject matter and accords with its general purpose. *Eagle Container Co., L.L.C. v. Cnty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 896 (2008) (quoting *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992)).

Section 38-71-46 of the South Carolina Code mandates coverage for diabetes education in "*every* health maintenance organization, individual and group health insurance policy, or contract issued or renewed in this State . . . ." S.C. Code Ann. § 38-71-46(A) (emphasis added). For purposes of the mandate, group policy "health insurance coverage" is defined as:

> benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise *and including* items and services paid for as medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer . . . .

S.C. Code Ann. § 38-71-840(14) (2002) (emphasis added).[9]

We do not read "health care issuer" as modifying all preceding clauses in

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[9] The statute further provides a list of exceptions. S.C. Code Ann. § 38-71-840(14). None of the exceptions are applicable here.

subsection (14). Benefits need not be provided by a "health care issuer" to qualify as "health insurance coverage" under section 38-71-840(14). Therefore, based on the plain language of section 38-71-840(14), the ALC erred in finding that the State Health Plan does not provide "health insurance coverage."

Instead, the words "and including" in section 38-71-840(14) indicate that the General Assembly intended the statute's definition to be read in two parts, notwithstanding the list of exclusions. The first part of the definition provides that health insurance coverage is defined as benefits consisting of medical care provided: (1) directly through insurance; (2) directly through reimbursement; or (3) provided otherwise. S.C. Code Ann. § 38-71-840(14). After "and included," the definition is expanded to include "items and services paid for as medical care under:" (1) any hospital or medical service policy or certificate; (2) any hospital or medical service plan contract; or (3) any health maintenance contract offered by a health insurance issuer. *Id.* Therefore, the plain language of the statute does not require health insurance coverage to be offered by a "health insurance issuer." To conclude otherwise results in a tortured and illogical reading of the statute. *See Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) ("A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.").

Section 38-71-46 is entitled "Diabetes Mellitus coverage in health insurance policies; diabetes education." We find that the General Assembly's choice of title and use of the word "every" in section 38-71-46(A) indicates that, indeed, it intended to mandate coverage for "*every* health maintenance organization, individual and group health insurance policy, or contract issued or renewed in this State . . . ." *See* S.C. Code Ann. § 38-71-46(A) (emphasis added). Nowhere in the plain language of section 38-71-46 does the General Assembly exclude—explicitly or implicitly—the State Health Plan from the mandate provided for by this statute.[10]

Moreover, we must read the language of section 38-71-46 in accordance with the statute's general purpose. *See Eagle Container Co.*, 379 S.C. at 570, 666

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[10] Although section 38-71-46 indicates that the General Assembly intended for the diabetes mandate to apply to the State Health Plan, we do not conclude that the canon of construction "*expression unius est exclusion alterius*" applies here, or that the State Health Plan is governed by *every* general insurance statute where the General Assembly failed to expressly exclude the State Health Plan.

S.E.2d at 896. South Carolina is cursed by diabetes. According to the South Carolina Department of Health and Environmental Control's most recently published statistics, South Carolina ranks seventh highest in the nation for the percentage of its adult population with diabetes. S.C Dep't of Health & Envtl. Control, *Fact Sheet: Diabetes in South Carolina*, SCDHEC.gov, 1 (Nov. 1, 2013), *available at* http://www.scdhec.gov/administration/library/ML-025328.pdf. Diabetes particularly plagues our state's African-American population, as one in seven African-Americans in South Carolina suffers from diabetes. *Id.* Uncontrolled diabetes can lead to serious complications, and is the seventh leading cause of death in South Carolina. *Id.* However, when diabetes is properly managed, people suffering from the disease often live long, healthy lives. *Id.* at 2. With these statistics in mind, we find that the General Assembly sought to alleviate and prevent diabetes' potentially devastating effects on those South Carolinians suffering from the disease by mandating coverage for the equipment, supplies, medication, and education for the treatment of diabetes.

Thus, given the prevalence of diabetes in South Carolina, coupled with the General Assembly's purpose behind enacting section 38-71-46, we find it inconceivable that the General Assembly intended to exclude South Carolinians insured by the State Health Plan from receiving the benefits of section 38-71-46's mandate. This result is especially unlikely in a case such as this one, where if the policy is interpreted as Respondents argue, it would cover an insulin pump, but not the education on how to use it. Therefore, we believe our reading comports with the general purpose and the plain language of section 38-71-46.

Assuming *arguendo* that section 38-71-840(14) is ambiguous, and that it is necessary to look beyond the plain language of that section, we still do not find that the General Assembly intended to exclude the State Health Plan from section 38-71-46's mandate. According to the ALC, the General Assembly developed a "method" for identifying whether a general insurance statute governs the State Health Plan by choosing whether or not to expressly reference the State Health Plan in each general insurance statute. However, the sections that include an express reference to the State Health Plan were enacted years *after* section 38-71-46, which was enacted in 1999. *See* S.C. Code Ann. §§ 38-71-243, -280, -785 (Supp. 2013).[11] Because these provisions should be viewed in light of when they

[11] Section 38-71-280 was enacted in 2007. Act No. 65, 2007 S.C. Acts 284, 284. Sections 38-71-243 and 38-71-785 were both enacted in 2010. Act. No. 143, 2010 S.C. Acts 1162, 1162–63; Act No. 217, 2010 S.C. Acts 1545, 1549–50.

were enacted, they do not support the ALC's conclusion that the General Assembly did not intend for section 38-71-46's mandate to apply to the State Health Plan.

Likewise, the distinction between Title 1 and Title 38 of the South Carolina Code cannot be relied upon as evidence that the General Assembly intended to exclude the State Health Plan from section 38-71-46's mandate. Title 1, Chapter 11, of the South Carolina Code defines the State Health Plan and sets forth procedures for its administration. *See* S.C. Code Ann. §§ 1-11-10 to -780 (2002 & Supp. 2013). We find that the General Assembly's decision to place the definitions and procedures in Title 1, instead of in Title 38, does not indicate its intent to exclude the State Health Plan from any insurance mandate included in Title 38 where it is not otherwise mentioned. Therefore, the General Assembly's decision to *define* the State Health Plan in Title 1 provides no indication of legislative intent here.

Finally, we find that the ALC erred in distinguishing self-insured plans for purposes of state insurance mandates and in finding that section 38-71-46 has no application to the State Health Plan because it is self-funded. In support of this proposition, the ALC cites *FMC Corp. v. Holliday*, 498 U.S. 52 (1990). However, in *Holliday*, the United States Supreme Court's inquiry was limited to health plans under the Employee Retirement Income Security Act of 1974 (ERISA), as the Court determined whether ERISA preempted the application of a Pennsylvania statute to a self-funded health care plan. *Id.* at 54. *Holliday* has no application to this case. We do not distinguish self-insurers for purposes of insurance mandates, and as discussed, *supra*, section 38-71-46's mandate applies to the State Health Plan.

Therefore, we hold, as a matter of law, that section 38-71-46 applies to the State Health Plan.

II. Failure to Address Class Action Relief

The ALC's disposition of this case permitted it to decline to address the issue of whether class action relief is available in this case. *See Futch v. McAllister Towing of Georgetown, Inc.* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding that a court need not address remaining issues when resolution of a prior issue is dispositive). Based on our holding that section 38-71-46 applies to the State Health Plan, the availability of class action relief in this case is an issue that must be addressed, and a remand to the ALC to consider the class action issue would normally be appropriate. However, because this issue can be resolved as a

matter of law, we choose to address this issue.

Appellant argues that he is entitled to pursue this case as a class action before the ALC based on Rule 23 of the South Carolina Rules of Civil Procedure (SCRCP). He asserts that the SCRCP is applicable pursuant to Rule 68 of the South Carolina Rules of Procedure for the Administrative Law Court (SCRPALC). We disagree.

While this case was pending before the ALC, Rule 68, SCRPALC, and the notes to that rule, stated:

> **Applicability of South Carolina Rules of Civil Procedure and South Carolina Appellate Court Rules.** The South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules.
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> **2009 Revised Notes**
>
> The South Carolina Appellate Court Rules may, in the discretion of the presiding administrative law judge, be applied in appellate proceedings before the Court to resolve questions which are not addressed by the Court's appellate rules.

Based on the language of the rule and the accompanying notes, we find that the intent of the ALC in promulgating Rule 68 was to allow the SCRCP to be used to fill in the gaps in the SCRPALC in a contested case before the ALC, and to allow the South Carolina Appellate Court Rules to be used to fill in the gaps in the SCRPALC in an appeal before the ALC.

The present case was an appeal before the ALC. Therefore, the SCRCP, including Rule 23 relating to class actions, is simply inapplicable. Neither the SCRPALC nor the South Carolina Appellate Court Rules provide for a class action to be commenced during an appeal. Therefore, Appellant's request for a class action proceeding before the ALC fails as a matter of law.

Further, since the filing of the appeal with this Court, the ALC has amended Rule 68, SCRPALC, and its notes to read:

> **Applicability of South Carolina Rules of Civil Procedure and South Carolina Appellate Court Rules.** The South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules, in contested cases and appeals respectively, may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these rules.
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> **2014 Revised Notes**
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> In contested cases only, the South Carolina Rules of Civil Procedure may, in the discretion of the presiding administrative law judge, be applied to resolve questions not addressed by these Rules. Furthermore, the South Carolina Appellate Court Rules may be applied in like manner in appellate proceedings only.

The revised rule contains even a more direct statement that the SCRCP is inapplicable to appeals before the ALC. Since this amendment relates to procedure, it is fully applicable to any further proceedings before the ALC, including any remand by this Court. *Fairchild v. S.C.Dept. of Transp.*, 398 S.C. 90, 727 S.E.2d 407 (same rules of construction are used to interpret rules as are used to interpret statutes); *State v. Davis*, 309 S.C. 326, 422 S.E.2d 133 (1992), *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999) ("When a statute is procedural, it ordinarily will be accorded a retroactive application in the sense that it will be applied to pending actions and proceedings.").[12]

[12] Appellant also argues that the EIP Appeals Committee erred in failing to consider his request for class certification. We find that this issue is not preserved for appellate review.

In the document seeking review from the EIP Appeals Committee, Appellant attached and incorporated the allegations of the complaint and other documents filed in a circuit court civil action that he had brought. While these documents were sufficient to put the EIP Appeals Committee on notice that Appellant was seeking class certification in the circuit court action, nothing in these documents was sufficient to place the EIP Appeals Committee on notice that Appellant was seeking to pursue a class action in the proceeding before the Committee. Therefore, any issue regarding the denial of a class action before the EIP Appeals

CONCLUSION

For the foregoing reasons, we reverse the ALC's decision that section 38-71-46 of the South Carolina Code does not apply to this matter. The EIP shall promptly determine and pay the benefits that are due for Appellant's daughter under the State Health Plan.

REVERSED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., dissenting in a separate opinion.

Committee is not preserved for appellate review. *Carson v. S.C. Dept. of Natural Res.*, 371 S.C. 114, 638 S.E.2d 45 (2002) (issue not raised to agency is not preserved for appellate review); *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939) (issues presented for appellate review must have been fairly and properly raised to the lower court).

Further, in the statement of the issues on appeal before the ALC, the sole issue relating to class action stated: "Does the ALC have the authority to certify a class action pursuant [SCRPALC] Rule 68 and SCRCP 23?" This issue did not raise any allegation of error by the EIP Appeals Committee. Therefore, any allegation of error on the part of the EIP Appeals Committee is not before this Court because it was not properly raised to the ALC. *Linda Mc Co. Inc. v. Shore*, 390 S.C. 543, 703 S.E.2d 499 (2010); Rule 37(B)(1), SCRPALC (The brief of a party shall contain "[a] statement of each of the issues presented for review. The statement shall be concise and direct as to each issue and may be stated in question form. Broad general statements may be disregarded by the Court. Ordinarily, no point will be considered that is not set forth in the statement of issues on appeal.").

JUSTICE PLEICONES: I respectfully dissent. I disagree with the majority that S.C. Code Ann. § 38-71-46 (2002) applies to the State Health Plan (Plan).

This case is controlled by section 38-71-46(D), which defines what "health insurance polic[ies]" are covered under the diabetes education mandate in section 38-71-46(A).[13] Since the Plan is a group health plan, section 38-71-46(D) requires the use of S.C. Code Ann. § 38-71-840(14) (2002) to determine whether the Plan provides "health insurance coverage," so as to be a "health insurance policy" covered by this diabetes education mandate. In my opinion, it does not.

Section 38-71-840(14) provides:

> "Health insurance coverage" means benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer....

Ultimately, whether the Plan qualifies as "health insurance coverage" depends onwhat the phrase "offered by a health insurance issuer" modifies in S.C. Code Ann. § 38-71-840(14) (2002).

I read section 38-71-840(14) differently than does the majority. I read "benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care" as describing what types of provided benefits qualify as "health insurance coverage." I read the next section "under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer" as describing what types of insuring agreements offer "health insurance coverage." The term "offered by health insurance issuer" modifies the three types of insurance agreements in the statute,

[13] While section 38-71-46(A) states that "every health maintenance organization, individual and group health insurance policy" is covered under this mandate, section 38-71-46(D) requires that these policies provide "health insurance coverage" before this mandate is to apply. *See* § 38-71-46(D) ("For purposes of this section: "Health insurance policy" means a health benefit plan, contract, or evidence of coverage providing health insurance coverage as defined in Section 38-71-670(6) and Section 38-71-840(14).").

that is, (1) a hospital or medical service policy or certificate, (2) a hospital or medical service plan contract, or (3) a health maintenance organization contract. Accordingly, to qualify as "health insurance coverage" the policy, certificate, or contract must be issued by a "health insurance issuer." . .

The next step is to determine whether the EIP is a "health insurance issuer." This term is defined in S.C. Code Ann. § 38-71-840(16) (2002):

> "Health insurance issuer" or "issuer" means any entity that provides health insurance coverage in this State. For purposes of this section, "issuer" includes an insurance company, a health maintenance organization, and any other entity providing health insurance coverage which is licensed to engage in the business of insurance in this State and which is subject to state insurance regulation. . . .

I agree with the ALC's conclusion that the EIP is not a "health insurance issuer" because the EIP is not licensed to engage in the business of insurance in this State and not subject to State insurance regulation. *See* S.C. Code Ann. § 1-11-780 (Supp..2013) ("[t]he State Employee Insurance Program. . . is not under the jurisdiction of the Department of Insurance"). Since the EIP is not a "health insurance issuer" under section 38-71-840(16), the Plan does not provide "health insurance coverage" as defined in section 38-71-840(14). Further, since section 38-71-46 only mandates diabetes education coverage for a "health insurance policy" that provides "health insurance coverage" as defined by section 38-71-840(14), I agree with the ALC that Appellant's claim was properly denied.

Assuming, however, that we must reach the issue of intent, I would reach the same result.[14] The General Assembly has chosen to separate the Plan from general insurance regulation by placing the Plan's governing statutes in Title 1, Chapter 11 of the S.C. Code, rather than in Title 38, Chapter 71 (General Insurance Statutes).[15] Since the General Assembly separated the Plan from the General Insurance

[14] If the language of a statute gives rise to doubt or uncertainty as to legislative intent, the construing court may search for that intent beyond the borders of the statute itself. *Wade v. Berkeley County*, 348 S.C. 224, 229, 559 S.E.2d 586, 588 (2002).

[15] I reiterate that the General Assembly has specified that EIP, and correspondingly the Plan, is not subject to regulation by the South Carolina Department of Insurance. S.C. Code Ann. § 1-11-780 (Supp. 2013).

Statutes, it has included an express reference to the Plan in the General Insurance Statutes when those statutes are to apply to the Plan. *See* S.C. Code Ann. § 38-71-785(B) (Supp. 2013) ("This section applies. . .including the state health plan. . ."); S.C. Code Ann. § 38-71-243(B) (Supp. 2013) ("This section applies. . .including the state health plan. . ."). Furthermore, in the context of coverage mandates, the General Assembly has made a direct reference to the Plan when it intends for a mandate found in the General Insurance Statutes to apply to the Plan. *See* S.C. Code Ann. § 38-71-280 (Supp. 2013) (mandating coverage for autism spectrum disorder, "[i]t includes the State Health Plan. . . 'State Health Plan' means the employee and retirees insurance program provided for in Article 5, Chapter 11, Title 1"). The diabetes education mandate, however, contains no reference to the Plan either in the text or the enacting legislation. Accordingly, I find that the General Assembly did not intend for the diabetes education mandate in section 38-71-46 to apply to the Plan.

I also disagree with the majority that the separate treatment of the Plan does not evidence intent for the Plan to be treated differently. Further, I disagree with the majority's contention that because sections 38-71-243, 38-71-280, and 38-71-785 were enacted after section 38-71-46, they cannot support the proposition that when the General Assembly intends for a General Insurance Statute to apply to the Plan, it expressly references the Plan. If a General Insurance Statute applies to the Plan even when the Plan is not mentioned, then there would have been no reason to include the express reference to the Plan in any General Insurance Statute. In construing a statute, we are to assume the General Assembly was aware of past statutes, and we are to give effect to all the words in a statute. *Whitner v. State,* 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) (noting the basic presumption that the legislature has knowledge of previous legislation); *Matter of Decker,* 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citing 82 C.J.S. *Statutes* § 346) (noting that courts are to give effect to all words in a statute). The majority's reading renders the references in the later statutes superfluous and leads to the absurd result that all General Insurance Statutes apply to the Plan unless the Plan is expressly excluded.

Finally, while I am not unsympathetic to the thousands of South Carolinians who suffer from the devastating effects of diabetes, the existence of this health scourge, while tragic, is, in my opinion, of no assistance in our task of statutory construction. Therefore, I disagree with the majority's reliance on the prevalence of a disease in determining whether a coverage mandate found in a General Insurance Statute applies to the Plan.

I would affirm the ALC's holding that section 38-71-46 does not apply to the Plan and uphold the denial of Appellant's claim.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 10-ALJ-30-0710-AP

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees or retirees, ...Appellant,

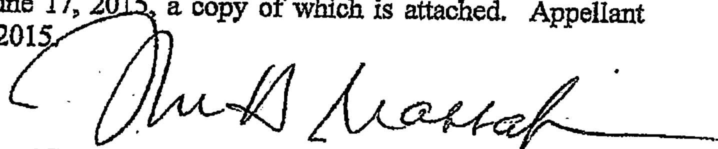
v.

South Carolina Budget and Control Board, Employee Insurance Program ....Respondent.

NOTICE OF APPEAL

Appellant, Jeffrey D. Allen, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees or retirees, appeals the Order of the Honorable Shirley C. Robinson dated June 17, 2015, a copy of which is attached. Appellant received a copy of the Order on June 19, 2015.

July 15, 2015



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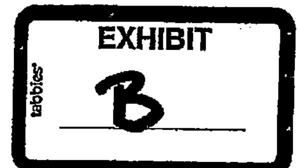

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FILED

JUN 17 2015

SC ADMIN. LAW COURT

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Jeffrey D. Allen, on behalf of [redacted],	)	Docket No. 10-ALJ-30-0710-AP
Appellant,	)	
v.	)	**ORDER DENYING MOTION FOR ATTORNEY'S FEES**
South Carolina Budget and Control Board, Employee Insurance Program,	)	
Respondent.	)	

Appellant Jeffrey D. Allen originally appealed this matter to the Administrative Law Court ("the ALC" or "the Court") pursuant to section 1-11-710(C) of the South Carolina Code (2008) and section 1-23-600(D) and (E) of the South Carolina Code (2008). In this matter, Appellant, on behalf of [redacted], sought review of Respondent South Carolina Public Employee Benefit Authority, Employee Insurance Program's[1] ("Respondent's") decision denying coverage for diabetes education pursuant to the "diabetes mandate statute"[2] through the Group Health Benefits Plan of the Employees of the State of South Carolina, the Public School Districts, and Participating Entities ("the State Health Plan"). This Court affirmed Respondent's decision that the diabetes mandate statute did not apply to the State Health Plan. However, on March 4, 2015, the South Carolina Supreme Court reversed this Court to hold the South Carolina diabetes mandate statute applies to the State Health Plan and, therefore, diabetes education was covered under the State Health Plan.

Appellant now moves this Court to grant Appellant attorney's fees pursuant to section 15-77-300 of the South Carolina Code (Supp. 2009).[3] Section 15-77-300 provides the request for attorney's fees must be filed within thirty days of the final disposition of the case. When there is an appeal, final disposition of the case occurs when the remittitur is filed. <u>See Brackenbrook North Charleston, LP v. County of Charleston</u>, 366 S.C. 503, 507, 623 S.E.2d 91, 93 (2005). In this case,

[1] Effective July 1, 2012, the Employee Insurance Program (EIP), a division of the South Carolina Budget and Control Board ("Board"), was transferred from the Board to a newly created agency, the South Carolina Public Employee Benefit Authority pursuant to Act 278 of 2012.
[2] S.C. Code Ann. § 38-71-46 (Supp. 2009).
[3] Effective February 24, 2010, section 15-77-300 was amended. This administrative appeal was initially filed September 30, 2009. Accordingly, this Court will rely on the version of section 15-77-300 applicable in 2009.

the remittitur was issued on March 20, 2015, and Appellant filed its request for attorney's fees on April 17, 2015. Accordingly, Appellant's request is timely.

Attorney's Fees Under the State Action Statute

Section 15-77-300 provides, in relevant part:

> In any civil action brought by the State, any political subdivision of the State or any party who is contesting state action, unless the prevailing party is the State or any political subdivision of the State, the court may allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in pressing its claim against the party; and
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

There is no question that Appellant satisfies the requirements of being a party in a contested state action and prevailing in that action. The question presented in this motion is whether Respondent acted without substantial justification in pressing its claim and whether there are any special circumstances that would make the award of attorney's fees unjust. See § 15-77-300(1) & (2).

Appellant contends Respondent's claim was without substantial justification and there are no special circumstances that would make an award of attorney's fees unjust. In support of its argument that Respondent was not substantially justified, Appellant cites to several cases, including McDowell v. South Carolina Department of Social Services, 304 S.C. 539, 405 S.E.2d 830 (1991) and Layman v. State, 376 S.C. 434, 445, 658 S.E.2d 320, 325 (2008).

In McDowell, the appellant brought an action against the South Carolina Department of Social Services ("DSS"), arguing DSS erred in finding her ineligible for food stamps. 304 S.C. at 541, 405 S.E.2d at 832. In its decision, DSS had decided a car jointly titled in the appellant's name and her son's name was an asset of the appellant's for the purpose of establishing whether she met the financial requirements for food stamps. Id. The circuit court affirmed DSS's decision; however, the South Carolina Court of Appeals reversed, finding the appellant held the car as trustee of a resulting trust in favor of her son and the car was not her asset. Id. Appellant then requested attorney's fees under § 15-77-300 and the case came before the South Carolina Supreme Court. In determining whether DSS was substantially justified in pressing its claim, the supreme court cited to Heath v. County of Aiken, 302 S.C. 78, 394 S.E.2d 709 (1990), which held substantial justification means "justified to a degree that could satisfy a reasonable person." Id. at 542, 405 S.E.2d at 832. Or, stated differently, "[a]n agency action supported by substantial justification is

one which has a reasonable basis in law and fact." Id. Accordingly, in analyzing a request for attorney's fees under the state action statute, a court looks to "the agency's position in litigating this case to determine whether it is one which has a reasonable basis in law and fact." Id.

Applying this standard to the facts in McDowell, the Supreme Court found:

> DSS ruled [] that for a resulting trust to arise, the property could not be jointly titled. This conclusion is incorrect under established South Carolina precedent. When property is titled jointly, a resulting trust does not arise *unless there is evidence to the contrary,* as in this case. [] DSS therefore relied on an erroneous legal conclusion in defending its decision in proceedings before the circuit court and Court of Appeals. DSS's litigation position was not substantially justified because it had no reasonable basis in law and fact.

Id. at 542-43, 405 S.E.2d at 833. Essentially, the Supreme Court held that the applicable law was clear and unambiguous and, therefore, DSS had no reasonable basis in law and fact to press its claim against the appellant.

In Layman, the Supreme Court further clarified what "substantial justification" means under section 15-77-300. It clarified that "[a]lthough an agency's loss on the merits does not create a presumption that its position was not substantially justified, Video Gaming Consultants, Inc. v. S.C. Dept. of Revenue, 358 S.C. 647, 650, 595 S.E.2d 890, 892 (Ct.App.2004), the substance and outcome of the matter litigated is nevertheless relevant to the determination of whether there was substantial justification in pressing a claim." Layman, 376 S.C. at 445, 658 S.E.2d at 326. In Layman, the South Carolina Retirement System upheld the application of a statute that breached a contract with certain "TERI" participants in the retirement system. Applying the substantial justification framework, the Supreme Court determined:

> [T]he State's and the Retirement System's breach of an unambiguous contract with the TERI participants is analogous to the County's violation of an unambiguous statute in Heath. In other words, we find that the State and the Retirement System had no reasonable basis in law or in fact on which to defend the breach of an unambiguous contract with certain TERI participants. Accordingly, we hold that the State and the Retirement System were not substantially justified in pressing their claim, and therefore, the circuit judge correctly concluded that counsel for TERI plaintiffs were entitled to attorneys' fees under the state action statute.

Id. at 449, 658 S.E.2d at 328. Like in McDowell, the Supreme Court found the law and fact were clear and unambiguous; therefore, the agency was not substantially justified in pressing its claim.

Additionally, the supreme court distinguished its determination in Layman from the South Carolina Court of Appeals' decision in Video Gaming Consultants, Inc. v. South Carolina Department of Revenue, 358 S.C. 647, 595 S.E.2d 890 (Ct.App.2004), in which the court of

appeals found the Department of Revenue was substantially justified in pressing its claim under a statute that was later declared unconstitutional. Layman, 376 S.C. at 447, 658 S.E.2d at 327. Specifically, the Supreme Court cited the court of appeals' reasoning that "[a]s an administrative agency, the Department 'must follow the law as written until its constitutionality is judicially determined.'" Id. (citing Video Gaming Consultants, Inc., 358 S.C. at 652, 595 S.E.2d at 892). Therefore, if an agency presses a claim under a law that is constitutional at the time, it is substantially justified in pressing its claim even if the statute is later determined to be unconstitutional. See id.

Analysis

Here, the issue was whether the State Health Plan was subject to the diabetes mandate of 38-71-46 of the South Carolina Code, which requires "every health maintenance organization, individual and group health insurance policy, or contract issued or renewed in this State" to provide coverage for "outpatient self-management training and education for the treatment of people with diabetes mellitus . . . ." S.C. Code Ann § 38-71-46(A). The parties disagreed as to whether the State Health Plan qualified as group policy "health insurance coverage" under section 38-71-840(14) of the South Carolina Code, which defined "health insurance coverage" as:

> benefits consisting of medical care provided directly, through insurance or reimbursement, or otherwise and including items and services paid for as medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or health maintenance organization contract offered by a health insurance issuer . . . .

S.C. Code Ann. § 38-71-840(14). On the merits, Respondent argued the phrase "health insurance issuer" modified the entire statutory section. Respondent further argued that the State Health Plan clearly was not a "health insurance issuer" as defined in section 38-71-840(16) and, therefore, the State Health Plan was not subject to the diabetes mandate. Respondent also cited to its own guidance documents showing diabetes education was excluded from coverage and it cited to several statutory instances where the Legislature specifically made it clear mandates otherwise restricted to health insurers were to apply to the State Health Plan. In contrast, Appellant argued "health insurance issuer" only modified "health maintenance organization," and, without the restriction as argued by Respondent, the State Health Plan clearly fell within the definition of "health insurance coverage" and the diabetes mandate statute.

This Court agreed with the Respondent, finding "health insurance issuer" modified section 38-71-840(16) in its entirety and determining the State Health Plan did not qualify as a "health

insurance issuer." However, on appeal, the South Carolina Supreme Court agreed with Appellant. The Supreme Court held:

> We do not read "health care issuer" as modifying all preceding clauses in subsection (14). Benefits need not be provided by a "health care issuer" to qualify as "health insurance coverage" under section 38-71-840(14). Therefore, based on the plain language of section 38-71-840(14), the ALC erred in finding that the State Health Plan does not provide "health insurance coverage."

Rather, the Supreme Court found section 38-71-840(14) provided "health insurance coverage" is defined as "benefits consisting of medical care provided: (1) directly through insurance; (2) directly through reimbursement; or (3) provided otherwise" and the words "and including" expounded on the primary definition. Allen v. S. Carolina Pub. Employee Ben. Auth., 411 S.C. 611, 617, 769 S.E.2d 666, 670 (2015). Accordingly, the Supreme Court concluded "the plain language of the statute does not require health insurance coverage to be offered by a "health insurance issuer" and "[t]o conclude otherwise results in a tortured and illogical reading of the statute." Id. The Supreme Court also found that even assuming section 38-71-840(14) was ambiguous, the legislative history was not supportive of finding the mandate did not apply. Id. at 617-19, 769 S.E.2d at 670-71.

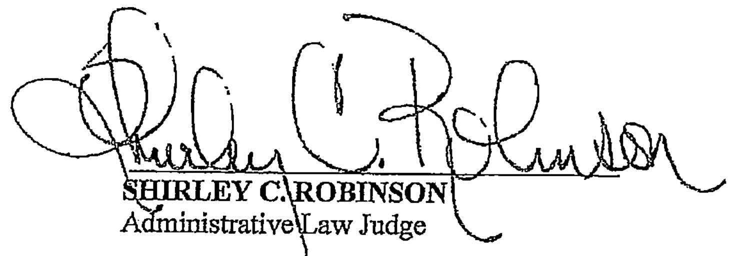
Applying the law to the facts, I first note this is not a situation in which the agency was enforcing a law that was later determined to be unconstitutional. See Video Gaming Consultants, Inc., 358 S.C. at 652, 595 S.E.2d at 892. Rather, the issue is whether Respondent was justified in pressing its claim "to a degree that could satisfy a reasonable person" and the agency's argument has a "basis in law and fact." McDowell, 304 S.C. at 542, 405 S.E.2d at 832. Moreover, in McDowell, Layman, and Heath, the critical determination can be summarized as whether the law relied on by the agency was clear and unambiguously against the agency's position. Further, the outcome of the case must also be considered. Layman, 376 S.C. at 445, 658 S.E.2d at 326.

I find this case to be distinguishable from McDowell, Layman, and Heath because I do not find section 38-71-840(14) and the related statutes analyzed in the case to be clear and unambiguous. Here, I find section 38-71-840(14) was ambiguous to an extent that justified Respondent in pressing the claim, particularly in light of its complicated grammatical structure, the longstanding agency practice denying similar claims without contest, the unique nature of the State Health Plan, and the legislative treatment of the State Health Plan in the citations provided by Respondent. While the supreme court ultimately found its interpretation of section 38-71-840(14) to be controlling, I find it was reasonable for Respondent to take these additional factors

into consideration when dealing with an ambiguous statute, and it was not unreasonable to come to the conclusion that the mandate did not apply to the State Health Plan. See McDowell, 304 S.C. at 542, 405 S.E.2d at 832. Moreover, this was a case of first impression, which the Fourth Circuit Court of Appeals has generally held to be justified. See Cody v. Caterisano, 631 F.3d 136, 142 (4th Cir. 2011) (noting "litigating cases of first impression is generally justifiable"). Accordingly, I find Respondent's position had a basis in law and fact and it was substantially justified in pressing its claim. See id.; S.C. Code Ann. § 15-77-300. Because I find Respondent's position was substantially justified, it is not necessary to address whether "there are no special circumstances that would make the award of attorney's fees unjust." S.C. Code Ann. § 15-77-300.

IT IS THEREFORE ORDERED that Appellant's Motion for Attorney's Fees is **DENIED.**

AND IT IS SO ORDERED.



SHIRLEY C. ROBINSON
Administrative Law Judge

June 17, 2015
Columbia, South Carolina

CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).
This 17 day of June 2015
By: [signature]
Judicial Law Clerk

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 10-ALJ-30-0710-AP

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees or retirees, ... Appellant,

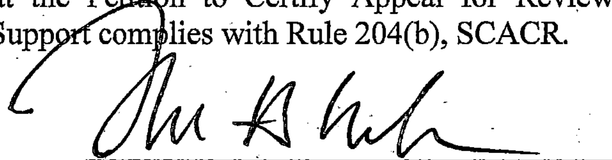
v.

South Carolina Budget and Control Board, Employee Insurance Program .... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Petition to Certify Appeal for Review by Supreme Court and Memorandum in Support complies with Rule 204(b), SCACR.

July 21, 2015



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
JUL 23 2015
SC Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 10-ALJ-30-0710-AP

Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees or retirees, ... Appellant,

v.

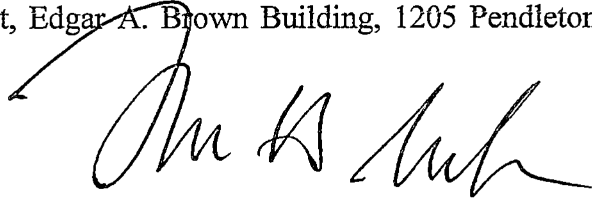
South Carolina Budget and Control Board,
Employee Insurance Program.. Respondent.

PROOF OF SERVICE

I certify that I have served the Petition to Certify Appeal for Review by Supreme Court and Memorandum in Support on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on July 21, 2015 addressed to its attorneys of record, Theodore D. Willard, Jr., Montgomery Willard, LLC, P.O. Box 11886, Columbia, SC, 29211 and Stephen Raymond Van Camp, Esquire, 202 Arbor Lake Drive, Columbia, SC 29223.

I certify that I have served the Notice of Appeal on the Administrative Law Court by depositing a copy of it in the United States Mail, postage prepaid, on July 21, 2015, addressed to The Honorable Shirley C. Robinson, Administrative Law Judge, South Carolina Administrative Law Court, Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, SC 29201.

July 21, 2015



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Shirley C. Robinson, Administrative Law Judge

Docket No. 10-ALJ-30-0710-AP

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....Appellant,

v.

South Carolina Budget and Control Board,
Employee Insurance Program...Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on July 16, 2015 addressed to its attorneys of record, Theodore D. Willard, Jr., Montgomery Willard, LLC, P.O. Box 11886, Columbia, SC, 29211 and Stephen Raymond Van Camp, Esquire, 202 Arbor Lake Drive, Columbia, SC 29223.

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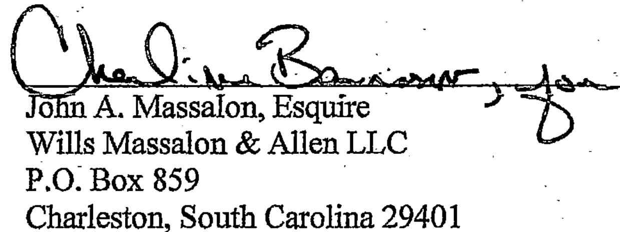
July 16, 2015



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July 21, 2015

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RECEIVED
JUL 23 2015
SC Court of Appeals

The Honorable Daniel E. Shearouse
Clerk of Court Supreme Court
Supreme Court of SC
P.O. Box 11330
Columbia, SC 29211

RE: Jeffrey D. Allen, individually, as guardian for Jane Doe, a minor, and as representative of other similarly situated State of South Carolina employees or retirees v. South Carolina Budget and Control Board, Employee Insurance Program
Docket No. 10-ALJ-30-0710-AP
File No. 595-1

Dear Mr. Shearouse:

In regard to the above-referenced matter, please find enclosed an original and seven (7) copies of the following:

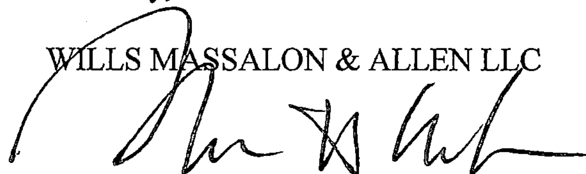
1. Petition to Certify Appeal for Review by Supreme Court and Memorandum in Support;
2. Certificate of Counsel; and
3. Proof of Service.

In addition, please find Wills Massalon & Allen LLC's check in the amount of $25.00 representing the filing fee. Please file the original, and return a file-stamped copy to me in the self-addressed, stamped envelope provided. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

WILLS MASSALON & ALLEN LLC



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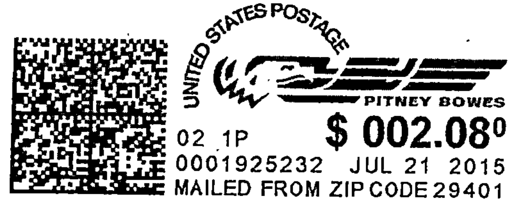
jmassalon@wmalawfirm.net

JAM/cb
Enclosures
cc: The Honorable Jenny A. Kitchings
The Honorable Shirley C. Robinson
Theodore D. Willard, Jr., Esquire
Stephen Raymond Van Camp, Esquire
Terry E. Richardson, Jr., Esquire



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