THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

Appellant Case No. 2014-001815

Clarence Winfrey .... Appellant,

v.

Archway Services Inc, Employer, and
American Fire & Casualty Insurance Company, and
Liberty Mutual Group, Carrier, ... Respondents,

RESPONDENTS' FINAL BRIEF

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STATEMENT OF ISSUES RAISED BY APPELLANT

I. Where the respondents are the moving party under S.C. Code §42-9-260, the Commission erred as a matter of law by holding that the defendants/respondents do not have the burden of proof to prove that they conducted a good faith investigation allowing them to stop benefits without a hearing and by shifting the burden of proof to the appellant to prove that the defendants/respondents did, "not" conduct a good faith investigation.

II. The Commission erred as a matter of law by not ordering reinstatement of benefits where the Respondents failed to comply with the mandatory requirements of S.C. Code §42-9-260.

III. The Commission abused its discretion by considering the late filed pre-hearing brief and the late filed APA submissions of the Respondents.

IV. The Commission erred by excluding evidence from the Appellant after September 15, 2013 which denied him due process of law.

V. The Hearing Commissioner erred as a matter of law by holding an unrecorded pre-hearing conference, over two hours in length, during which he made substantive decisions on motions that were not properly noticed for hearing and during which the parties' stated and argued their positions on the issues before the Commissioner.

VI. The Hearing Commissioner erred as a matter of law in his ancillary order concerning motions that had been filed.

VII. The Commission erred as a matter of law by affirming Finding of Fact #2 that the Appellant suffered a myocardial infarction, "on May 28, 2013."

VIII. The Commission erred as a matter of law by making a finding of fact that is not supported by the evidence that an investigation was conducted as found in Findings of Fact #6 and #10 and by making Findings of Fact #4 through #11 which are not supported by testimony, stipulations or documentary evidence in the record.

IX. The Hearing Commissioner erred as a matter of law by delaying a decision from November 13, 2013 until December 5, 2013.

STATEMENT OF THE CASE

This claim arises out of an alleged accident on May 22, 2013. On that date, Claimant contends he was momentarily shocked by a rotisserie oven he was working on. Following the accident, Claimant continued to work for the remainder of the day and the following day. Claimant had scheduled time off after May 23, 2013. Claimant suffered a myocardial infarction on or around May 28, 2013. On May 28, 2013—six days after the accident—Claimant presented to Doctor's Care and Lexington Medical Center with severe three vessel coronary disease, an occluded coronary artery, and an acute myocardial infarction caused by a plaque rupture which caused an acute ventricular septal defect. At Doctor's Care, Claimant reported he was having no chest pressure and had started sweating that morning (on May 28th). At Lexington Medical Center, Claimant indicated he was not having chest pain but had been sweating. Following the diagnosis, Claimant underwent surgery to repair the ventricular septal defect caused by the plaque rupture and subsequent myocardial infarction. The medical records in the case revealed that Claimant has a distinct family history of coronary disease with his father passing away at a similar age from coronary disease and a myocardial infarction. Further, the medical records indicated that Claimant was a 35 year pack-a-day smoker and drank a case of beer per week. Based on all of the medical records available to Carrier, this claim was ultimately denied on September 13, 2013.

Immediately following the denial of benefits, Claimant filed a Form 15, Section III requesting a hearing as well as a Summons and Complaint in Richland County Circuit Court alleging a bad faith denial of benefits, alleging that S.C. Code Ann. § 42-9-260 is unconstitutional, seeking a temporary restraining order to stop Respondents from denying

the claim, and seeking an Order from Judge Lee finding the claim compensable and awarding benefits. The Summons and Complaint was filed on or around September 27, 2013. Judge Lee issued and then rescinded the temporary restraining order sought by Claimant on or around October 1, 2013. Judge Benjamin conducted a lengthy hearing on the merits of the Complaint but has not yet rendered a decision as to whether S.C. Code Ann. § 42-9-260 is unconstitutional. After the temporary restraining order was rescinded, the Commission set Appellant's Form 15, Section III for a hearing before Commissioner Beck. In addition, Respondents filed several motions with the Commission including a Motion to Quash the deposition of the adjuster, a Motion to Quash discovery of the adjuster's claim file, and a Motion to Postpone the Hearing.

A hearing on all of the motions and on Appellant's Form 15, Section III was set on September 30, 2013 for November 11, 2013. Prior to the hearing, Commissioner Beck conducted a standard pre-hearing conference as well as a Motions Hearing wherein Commissioner Beck ruled on all outstanding issues raised by the motions including Respondents' Motion to Postpone. Each of these motions affected the ability to conduct the Form 15 hearing and were necessary to have prior to the hearing. Specifically, Respondents' Motion to Postpone alleged the Commission did not have jurisdiction to hear the claim because Appellant had asserted the statute (42-9-260) by which the hearing was scheduled was unconstitutional and Appellant could not claim or exercise the benefits of the statute while simultaneously arguing it was unconstitutional for Respondents to also act pursuant to the statute. Commissioner Beck warned Appellant of the risk of proceeding based on the jurisdictional issues raised by Respondents. Commissioner Beck gave Appellant the opportunity to postpone the Form 15 hearing in

order to spend time preparing for each of the motions that were timely served. Appellant turned down that opportunity. At the hearing, all parties agreed that the only issue for Commissioner Beck was to determine was whether or not Respondents had conducted a good faith investigation. In order to make that determination, Commissioner Beck limited the review of evidence to only those documents produced prior to the date of denial – September 13, 2013. Following the hearing, Commissioner Beck issued a Decision and Order on December 5, 2013 finding that Respondents had conducted a good faith investigation. The Full Commission conducted a review hearing on May 19, 2014. The Full Commission issued its Decision and Order on July 25, 2014. That Decision and Order is the subject of this appeal.

By way of further background, on October 22, 2013, after the Form 15 hearing was set by the Commission but before that hearing was held, Appellant filed a Form 50 requesting a hearing on compensability for alleged injuries to his head, brain, left hand, left arm, chest, heart, and all other organs, members, and bodily parts. A hearing notice for the Form 50 hearing was sent by the Commission on December 6, 2013 with explicit instructions that the hearing would be to determine compensability of Appellant's alleged injuries to his head, brain, left hand, left arm, chest, heart, and all other organs, members, and bodily parts. The Form 50 hearing was held before the Single Commissioner on January 13, 2014. Following the hearing, the Single Commissioner issued a Decision and Order on February 27, 2014. The Full Commission conducted a review hearing on May 19, 2014. The Full Commission issued its Decision and Order on July 25, 2014. That Decision and Order is also on appeal by both parties in a companion action.

Prior to the briefing on this appeal, the parties entered into the voluntary pilot mediation program in an attempt to resolve this matter. Due to certain issues with obtaining records and opinions, as well as scheduling issues, this mediation did not occur until May 1, 2015. Unfortunately, the parties reached an impasse and this matter is now back before this Court on the original appeals.

ARGUMENT

Appellant notified Employer he was shocked while working on a rotisserie oven on May 22, 2013. (R. p. 222). Employment records of Appellant indicate that he continued working the remainder of the day and the entire following day. (R. p. 224-25). An email from Appellant to Employer indicates that he was experiencing only neck pain on May 27, 2013 (5 days post-accident). (R. p. 223). Appellant first presented to Doctor's Care on May 28, 2013 (6 days post-accident) complaining that he woke up sweating that morning (6 days post-accident) (R. p. 215). Appellant was treated by Dr. Greenfield at Doctors' Care. Dr. Greenfield noted that Appellant had some tenderness in his shoulder and neck area. Id. Further, Dr. Greenfield noted that Appellant did not complain of any chest pressure. Id.

Dr. Greenfield testified in her deposition that the testing she conducted could not give any indication as to when Appellant suffered the myocardial infarction. Specifically, Dr. Greenfield stated that the myocardial infarction "...could have been 5 days ago..." and further admitted that the acute myocardial infarction could have occurred the evening of May 27 or the morning of May 28. (R. p. 448, line 10 – p. 449, line 8). Further, Dr. Greenfield indicated that she based portions of her opinion on articles that she read relating to electrocution from lightning strikes. When asked about these articles, Dr. Greenfield admitted the voltage involved in those articles was 10,000,000 volts—an amount that is 20,000-40,000 times higher than the voltage involved in this claim. (R. p. 464, line 19 – p. 465, line 4). Additionally, Dr. Greenfield stated that Appellant presented without any chest pain. (R. p. 452, line 5-9, p. 460, line 3-8). Dr. Greenfield also noted the pain in Appellant's arm and shoulder was not indicative of having sustained a

myocardial infarction. (R. p. 452, line 13-25). Dr. Greenfield issued a written opinion stating Appellant's heart condition was caused by the electrical shock.

Appellant was then referred to and saw Dr. Dasgupta at the South Carolina Heart Center on May 28. Dr. Dasgupta also noted sweating and noted that Appellant denied chest pain but did have minimal left shoulder pain. (R. p. 216). Dr. Dasgupta diagnosed Appellant with an acute myocardial infarction. Id. Dr. Dasgupta indicated that Appellant had a prior history of hypertension, tobacco abuse (one pack a day smoker), as well as a significant family history for heart disease (Appellant's father passed away from coronary disease and myocardial infarction). (R. p. 216-17). Dr. Dasgupta also noted that Appellant appeared to have a ventricular septal defect as a possible completion of his acute myocardial infarction. (R. p. 216). Dr. Dasgupta referred Appellant to Lexington Medical Center where Dr. Travis performed surgery to repair an acute ventricular septal defect that formed following the myocardial infarction. (R. p. 219-21).

Dr. Travis described the mechanism of Appellant's injury as being a plaque rupture that caused a myocardial infarction that caused the ventricular septal defect. (R. p. 415, line 24 – p. 416, line 2). Dr. Travis indicated that plaque ruptures can be caused by many things including getting up the wrong way from a couch, strenuous activity, stressful events in your personal life, emotional stresses, and many other things. (R. 416, line 3-11). Further, Dr. Travis was asked "...other than the timing of the heart attack...there's no way to know for certain the plaque rupture was caused by the electrical shock, is that correct?" (R. p. 416, line 12-15). Dr. Travis response was that "[i]s there a definitive way to—collate one to another absolutely not." (R. p. 416, line 16-18) (emphasis added). Dr. Travis also stated that "the [electrical shock] ***could*** of started

the whole domino effect." (R. p. 431, line 23-24) (emphasis added). Finally, Dr. Travis indicated that the neck pain Appellant experienced "could be just neck pain." (R. p. 432, line 12-16).

Dr. Travis indicated that part of his opinion formed because of the presence of a plaque on Appellant's heart. However, Dr. Travis stated that this was his first open heart surgery on a patient who had received an electrical shock. (R. p. 431, line 2-5). Further, Dr. Travis stated that he had never "read about or seen anything" related to whether or not the plaque he observed is related to electrical shock or whether or not the plaque he observed is common in electrical shock. (R p. 431, line 6-12). Following the care provided to Appellant, Dr. Travis issued a written opinion stating Appellant's heart condition was caused by the electrical shock.

After the surgery, Appellant began treating with Dr. Lide on an outpatient basis for his heart condition. In his deposition, Dr. Lide stated that no one knows what causes a plaque rupture in the heart. (R. p. 551, line 13-15). Dr. Lide agreed with the statement that "...we don't really know what causes plaque rupture." (R. p. 551, line 16-22). Dr. Lide also testified that "I don't know whether the electrical shock caused the plaque rupture... ." (R. p. 552, line 14-15). Further, Dr. Lide testified that he is not familiar with any research and he has not conducted any research on whether an electrical shock can cause a myocardial infarction or a ventricular septal defect. (R. p. 556, line 13 – p. 557, line 1). Dr. Lide also indicated that the longer in time the heart condition develops from the precipitating event (in this case an electrical shock), the less likely it is the heart condition is related to the electrical shock. (R. p. 557, line 2-6). Finally, Dr. Lide stated his overwhelming evidence that the electrical shock caused Appellant's condition was

“proximity in time.” (R. p. 557, line 20-21). Dr. Lide issued a written opinion stating Appellant’s heart condition was caused by the electrical shock.

CONSTITUTIONAL ESTOPPEL/JURISDICTIONAL ISSUES

At the outset, Respondents assert that the Commission lacked subject matter jurisdiction to conduct any hearing on any part of the claim underlying this appeal and this court should vacate all Decisions and Orders in this case and remand the case to the Commission with instructions to hold the case until the Circuit Court has issued a ruling on Appellant's lawsuit alleging S.C. Code Ann § 42-9-260 is unconstitutional.

Commissioner Beck ultimately denied Respondents motion related to this issue on the basis that the Act requires a hearing be set within 60 days. However, the Act states that a moving party may postpone the hearing. As Appellant has vigorously argued in his briefs, Respondents were the moving party in this matter. When a hearing is set pursuant to S.C. Code Ann. § 42-9-260, the requirement to hold the hearing within sixty days is waived pursuant to S.C. Code Ann. Reg. 67-613(B)(3). That regulation states the hearing will be postponed until the following month and if the commissioner cannot hear the case by the following month, the case will be returned to the Judicial Department for reassignment. Because of the underlying declaratory judgment action filed by Appellant, the Commission did not have jurisdiction to hear this matter and should have complied with S.C. Code Ann. Reg. 67-613(B)(3) by returning the case to the Judicial Department and indefinitely postponing the hearing until the circuit court could make a decision on Appellant's Complaint.

Appellant has alleged an injury by accident during the course and scope of his employment due to electrical shock on May 22, 2013. Respondents denied the claim on or about September 16, 2013 following a good faith investigation pursuant to S.C. Code Ann. § 42-9-260(B)(3). Appellant responded to the denial of benefits by filing a

Summons and Complaint on September 27, 2013 in the South Carolina Circuit Court alleging:

a. A bad faith denial of benefits;

b. That S.C. Code Ann. § 42-9-260 is unconstitutional and requesting a Declaratory Judgment to that effect; and

c. Moving for a temporary restraining order to force Respondents to pay benefits outside of the jurisdiction of the South Carolina Workers' Compensation Commission.

Appellant improperly sought and obtained a temporary restraining order from Judge Alison Renee Lee on October 1, 2013 ordering Respondents to pay temporary compensation benefits and provide medical care to Appellant. Respondents filed a Motion to Dismiss and a Brief in Support of the Motion to Dismiss the temporary restraining order and the underlying Summons and Complaint with Judge Lee on or about October 2, 2013. Judge Lee conducted a hearing on the temporary restraining order on October 8, 2013 and dismissed the temporary restraining order on October 9, 2013 stating "[t]he Commission has the sole authority to reinstate benefits if appropriate." However, Judge Lee did not dismiss the Declaratory Judgment action against Respondents finding that legal challenges to a statute are "...properly raised for the first time...in a declaratory judgment action before the circuit court." Respondents filed an Answer and Counterclaim with the South Carolina Circuit Court on October 21, 2013.

Appellant has specifically alleged that "...the provisions of S.C. Code Ann. § 42-9-260...(A) violated the [Appellant's] right to due process of law...(B) that the provisions of §42-9-260 are in direct conflict with provisions of the Administrative

Procedures Act concerning notice and hearing...and (C) denies the [Appellant] equal protection of the laws by creating an irrational classification..." Appellant has also stated "...pursuant to S.C. Code §42-9-260 the constitutionality of which is the basis of the Declaratory Judgment Relief requested." In addition, Appellant presented to the Circuit Court a signed Verification asserting that the allegations and issues raised in the Complaint are true, accurate, and with merit. Appellant also filed a Motion for a New Trial with the South Carolina Circuit Court asking for a "...preliminary or prima facie determination that [S.C. Code Ann. § 42-9-260] is unconstitutional..."

Appellant simultaneously requested a hearing before this Commission pursuant to S.C. Code Ann. § 42-9-260—**the very statute he seeks to invalidate as unconstitutional in the ongoing companion Circuit Court case**. It strains belief that on one hand Appellant has argued at length to the Circuit Court that S.C. Code Ann. § 42-9-260 is unconstitutional and on the other hand demands relief from the Commission under the same statute. This inapposite position must be resolved before the Commission can entertain Appellant's allegations related to the workers' compensation claim—including a hearing on the denial of benefits. Further, if the Circuit Court finds S.C. Code Ann. § 42-9-260 unconstitutional—as Appellant demands—the South Carolina Workers' Compensation Commission would have no guidance under the law to conduct a hearing for the suspension or termination of benefits[1]. Additionally, if the Circuit Court finds S.C. Code Ann. § 42-9-260 unconstitutional—as Appellant demands—the underlying purpose of the scheduled hearing before the South Carolina Workers' Compensation Commission,

[1] Incidentally, Defendants would also have no guidance under the law on how to pay, terminate, and/or suspend benefits.

specifically to rule on the denial of benefits pursuant to S.C. Code Ann. § 42-9-260, would be rendered unconstitutional.

Respondents contend that the Commission may only conduct the 42-9-260 hearing (or any other hearing) in this claim once the Circuit Court has ruled on the constitutionality of S.C. Code Ann. § 42-9-260 pursuant to Appellant's demand. Pursuant to S.C. Code Ann. Reg. 67-613(B)(1)(e), any hearing in this matter was premature pursuant to S.C. Code Ann. § 42-9-260 where the underlying constitutionality issues raised by Appellant and under consideration by the Circuit Court have not yet been adjudicated.

Constitutional Estoppel is a principle which holds that a party cannot avail himself of the provisions of a statute while also reversing his position and contending the law under which he sought to avail himself is invalid. Typically this issue arises when a party proceeds with an action, loses, and then asserts the law the party sought recovery under is unconstitutional. However, Respondents contend this principle is a two-way street, so to speak. Specifically, constitutional estoppel should prevent a party from seeking the protections and/or benefits under the same statute the party asserts is unconstitutional.

It is an elementary rule of constitutional law that **one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.'** Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947) *citing* United States v. City and County of San Francisco, 310 U.S. 16, 29, 60 S.Ct. 749, 756, 84 L.Ed. 1050 (1940). While the majority of these cases deal with regulatory authorities and federal statutes, the principles are the same—you cannot simultaneously

obtain benefits under a statute while arguing the same statute it is unconstitutional. Because the constitutionality of 42-9-260, as challenged by Appellant, is grossly material to the underlying proceedings, the Commission did not have jurisdiction, and Appellant did not have standing, to conduct a hearing before the Commission prior to an adjudication of the merits before the Circuit Court.

Therefore, for the foregoing reasons, this court should rule any hearing before the Commission should have been postponed until such time as the Circuit Court could rule on the constitutionality of S.C. Code Ann. § 42-9-260 pursuant to Appellant's demands. Only after the Circuit Court has ruled on the constitutionality of S.C. Code Ann. § 42-9-260—as demanded by Appellant—would any issue raised by Appellant before the Commission be ripe for a hearing before the Commission. In other words, Appellant's choice to vigorously pursue a claim that the Act is unconstitutional strips the Commission of jurisdiction over compensability until such time as the Circuit Court can rule on the matter. Therefore, this court must vacate all prior Orders and remand this matter to the Commission with instructions to hold the case until such time as the Circuit Court rules on Appellant's Declaratory Judgment.

LEGAL ARGUMENT ON APPELLANT'S ISSUES RAISED ON APPEAL

I. THE COMMISSION DID NOT SHIFT THE BURDEN OF PROOF TO APPELLANT AND DID NOT ERR AS A MATTER OF LAW BY DETERMINING APPELLANT WAS REQUIRED TO PRESENT REBUTTAL EVIDENCE PROVING RESPONDENTS DID NOT CONDUCT A GOOD FAITH INVESTIGATION AFTER THE COMMISSION DETERMINED RESPONDENTS HAD MET THE REQUIREMENTS FOR CONDUCTING A GOOD FAITH INVESTIGATION PURSUANT TO S.C. CODE ANN. § 42-9-260.

The record is clear that the Commission reviewed all of the evidence relevant to the hearing[2], including testimony and representations of counsel, and rendered a decision on whether or not Respondents conducted a good faith investigation as required by S.C. Code § 42-9-260. The record is also clear that the Commission determined by a preponderance of the evidence (i.e. more likely than not) that Respondents conducted a good faith investigation based on the medical records available by statute at the time of the denial of benefits[3], records of the Nurse Case Manager[4], the medical records provided by Appellant's counsel to Respondents' counsel on June 26, 2013[5], as well as the Form 15 filed in this case[6]. There is no dispute that the burden rests with Respondents in proving that a good faith investigation occurred by a preponderance of the evidence. Respondents clearly met that burden as set out in the Commission's Decision and Order. Nowhere in the Commission's Decision and Order does the Commission state that Appellant has the initial burden of proving Respondents did not conduct a good faith

[2] As will be discussed further in other exceptions raised by Claimant/Appellant, the relevant evidence for this hearing was limited to only the evidence dated prior to the denial of benefits as that would have been the only evidence available to Defendants to make a decision on compensability.

[3] See R. p. 31-32

[4] Id.

[5] See R. p. 28

[6] See R. p. 28, p. 30-31

investigation. Rather, the only finding by the Commission on this subject is a finding that Appellant presented no evidence to rebut Respondents' presentation that a good faith investigation occurred. This is not an error of law. The Commission did not shift or place the burden on Appellant. Rather, the Commission noted that once Respondents showed by a preponderance of the evidence that a good faith investigation occurred, Appellant presented no rebuttal evidence that showed a good faith investigation did not occur. This fact is noted by the careful sequential placement of the findings of fact and conclusions of law. All findings related to Appellant's burden of proof are located sequentially after the Commission finds Respondents conducted an investigation and had a good faith basis to terminate benefits. Further, the Commission noted that Appellant does have the burden of proving a compensable injury by accident arising out of and in the course and scope of his employment. *See* Full Commission Conclusions of Law #2(e) *citing to* S.C. Code Ann. § 42-1-60; Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E.2d 753 (S.C. App. 2009); Fowler v. Abbott Motor Co., 236 S.C. 226, 113 S.E.2d 737 (1960); S.C. Second Injury Fund v. Liberty Mut. Ins. Co., 353 S.C. 117, 576 S.E.2d 119 (S.C. App. 2003).

Therefore, because Respondents proved they conducted a good faith investigation by a preponderance of the evidence and no contrary or rebuttal evidence was presented by Appellant, the Hearing Commissioner was required by law to make a finding that Respondents conducted a good faith investigation pursuant to S.C. Code Ann. § 42-9-260. For these reasons, this court should uphold the Commission's Decision and Order in its entirety.

II. THE COMMISSION DID NOT ERR AS A MATTER OF LAW BY NOT ORDERING REINSTATEMENT OF BENEFITS BECAUSE RESPONDENTS COMPLIED WITH S.C. CODE § 42-9-260.

Appellant next argues that the Commission erred in not reinstating medical and temporary disability benefits. Out the outset it should be noted that Appellant misstates the series of event surrounding the Form 15. Respondents' fine was rescinded by the Commission on October 3, 2013 and Respondents' did not pay any fine associated with the Form 15 in this case.

Appellant likewise misstates that it is "undisputed" that Respondents did not serve Appellant with "any supporting documentation as required by Commission Regulation 67-504 setting forth the reason for termination." Respondents provided Appellant with the supporting documented reasons for the termination of benefits. This is undisputed as it appears on the face of the Form 15[7]. Appellant cannot say that he was not put on notice as to the reason for the denial nor can Appellant say that Respondents did not comply with Regulation 67-504 related to the reason for termination. There is likewise no dispute that Appellant received a copy of the Form 15 when it was filed. The Commission specifically notes this is shown by Appellant filing a Form 15, Section III (which would not have been done unless Appellant received a Form 15, Section II). Appellant's exception or complaint is that he did not receive two copies of the Form 15. The Commission determined that because Appellant was represented by counsel at the time the Form 15, Section II was served, the requirement to serve two copies was unnecessary. Case law on this issue indicates only that an employer *should* apply to the commission

[7] See R. p. 37

for permission to terminate benefits and that the employee *should* receive notice of the application[8].

Because the Form 15, Section II was determined to be properly filed and served and because Respondents complied with the "reason for denial" component of Reg. 67-504, the denial of benefits was properly enacted under the Act. The denial of benefits is not defective or otherwise inoperable because Appellant only received one copy of the Form 15, Section II. Appellant was on notice of the denial of benefits within the statutorily prescribed period and in full compliance with S.C. Code Ann. § 42-9-260 and Reg. 67-504. Therefore, for the foregoing reasons, the Commission's Decision and Order should be affirmed in its entirety.

III. THE COMMISSION DID NOT ABUSE ITS DISCRETION BY CONSIDERING RESPONDENTS' PRE-HEARING BRIEF AND APA SUBMISSIONS.

Appellant next argues that the Commission erred by allowing Respondents' pre-hearing brief and APA submissions into the record. This is based on two factors: (1) pursuant to Reg. 67-612(B)[9], Respondents are the moving party and, therefore, were required to serve their APA submission fifteen days prior to the hearing; and (2) Reg. 67-611 requires all parties file a Form 58 ten days before the hearing. Each of these will be addressed in turn.

First, Appellant is patently incorrect that Reg. 67-612(B) makes Respondents the moving party insofar as it subjects Respondents to filing APA submissions fifteen days before a hearing. **Reg. 67-612 is limited in scope to the admission of expert reports as**

[8] *See e.g.* Halks v. Rust Engineering Co., 208 S.C. 39, 36 S.E.2d 852 (1946).
[9] Claimant repeatedly refers to Reg. 67-613 in his Brief. Defendants presume this to be an error and presume Claimant is referring to Reg. 67-612.

evidence. Respondents did not submit any expert reports into the record that were considered by the Commission for the purpose of the hearing[10] (e.g. determining if a good faith investigation occurred prior to denial of benefits). Therefore, Reg. 67-612(B) simply does not apply to the hearing before the Commission. In addition, it should be noted that Appellant submitted his pre-hearing brief and APA submissions fifteen days prior the hearing[11]. This is evidence that Appellant, in fact, believed he was the moving party under the Act and did not believe Respondents were the moving party under the Act.

Second, Appellant is correct that Reg. 67-611 requires a Form 58 be filed ten days before a hearing. However, Respondents are unsure what Appellant's basis for this exception is. In this case, this 10 day requirement was met by Respondents. Ten days prior to the November 13, 2013 hearing was November 3, 2013. November 3, 2013 was a Sunday. The Commission is not open on Sundays and cannot accept service of documents on that day. Likewise, Appellant's attorney's office is not open on Sundays and cannot accept service of documents on that day. Because all entities available for service were closed and unable to accept service on November 3, 2013, Respondents Form 58 was filed on Monday, November 4, 2013. South Carolina Rule of Civil Procedure 6 states "[i]n computing any period of time prescribed or allowed by these rules, by order of the court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, **unless it is a Saturday, Sunday, or**

[10] Defendants did submit the report of Dr. Barry Feldman but the Hearing Commissioner excluded it from evidence.
[11] Claimant filed his brief on October 30, 2013 for the November 13, 2013 hearing.

a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday." Monday, November 4, 2013 was the first day available to file and serve Respondents' Form 58 and readily complies with the Act and the South Carolina Rules of Civil Procedure.

Therefore, for the foregoing reasons, the Commission did not abuse any discretion in allowing Respondents' Pre-Hearing Brief and APA Submissions because the Commission did not have any discretion to exercise. Reg. 67-612 is inapplicable to the underlying hearing as it relates only to expert reports as evidence and Reg. 67-611 is not in issue as Respondents filed their pre-hearing brief 10 days prior to the hearing. Appellant functionally argues he was prejudiced by a timely and properly filed pre-hearing brief—that argument fails outright. Therefore, the Commission's Decision and Order should be upheld in its entirety.

IV. THE COMMISSION DID NOT ERR BY EXCLUDING EVIDENCE DATED AFTER SEPTEMBER 13, 2013.

Respondent must first point out to the court that this limitation and/or exclusion of records was a stipulation as noted by Commissioner Beck in his December 5, 2013 Order. Appellant appealed the actual application of that date but has not at any time formally appealed the actual stipulation to the Full Commission or this court. Respondents would submit Appellant is bound by his unappealed stipulation regardless of whether or not he agrees with the application of the date in the context of the case.

Appellant next argues that the Commission erred by limiting the evidence in the record to any evidence created prior to the verbal denial of benefits on September 13,

2013[12]. The basis for this ruling is that Respondents could not have had access on or before September 13, 2013 to any documents or records created after September 13, 2013. When the Commission was asked to determine if Respondents conducted a good faith investigation, the only relevant documents to review were the documents available to Respondents at the time the decision to deny benefits was made. To permit or consider documents produced or created after September 13, 2013 would circumvent and undermine the stated purpose of the hearing on the Notice of Hearing.

Appellant argues that by excluding evidence after September 13, 2013, the Commission excluded written opinions from medical doctors related to causation. Again, that was the purpose of the decision by the Commission. The records and written opinions created after September 13, 2013 were not available to Respondents prior to September 13, 2013 and therefore cannot be weighed against the evidence used to deny benefits to Appellant. The only evidence relevant to the Commission's inquiry was the evidence available prior to September 13, 2013. Therefore, for the foregoing reasons, the Commission's Decision and Order should be upheld in its entirety.

[12] Appellant mistakenly uses the date "September 15, 2013" in his brief. A review of the Stipulations in the Single Commissioner Decision and Order dated December 5, 2013 clearly states "No documentary evidence dated after September 13, 2013 would be considered by the undersigned in the adjudication of the dispute."

V. THE HEARING COMMISSIONER DID NOT ERR AS A MATTER OF LAW BY CONDUCTING A ONE HOUR PRE-HEARING CONFERENCE AND RULING ON OUTSTANDING PROCEDURAL OR SUBSTANTIVE MOTIONS.

Appellant next argues that the Hearing Commissioner erred as a matter of law by conducting an un-recorded pre-hearing conference and ruling on outstanding motions. Interestingly, in his brief before this court, Appellant asserts there was an "over two hour" pre-hearing conference. In his appeal and brief to the Full Commission, Appellant asserted the pre-hearing conference was "over an hour." For purposes of this brief, Respondents proceed as if the hearing is as originally alleged—over an hour—and not as newly alleged—over two hours.

The motions Appellant refers to are motions that directly affected whether or not the Form 15 hearing could even proceed[13]. At least one of the motions was actually made and raised by Appellant[14]. In addition, it is undisputed that Respondents motions were timely filed and served on Appellant. Because of the nature of the motions, the Hearing Commissioner was required to conduct a hearing on these motions before a Form 15 hearing could occur. Further, Appellant was given the opportunity during the pre-hearing conference with the Hearing Commissioner to adjourn and postpone the Form 15 hearing for additional time to prepare responses to various motions filed in the claim. Appellant refused that opportunity and chose to proceed with the hearing. Therefore, the Hearing

[13] The motions included (1) Respondents' Motion to Quash Deposition of Terri Hughes, (2) Respondents' Motion to Quash the September 18, 2013 Subpoena for the Adjuster's Claim File, (3) Appellant's Motion for Rule to Show Cause related to Respondent's Motion to Quash Deposition of Terri Hughes, (4) Respondents' Motion to Compel Deposition of Plaintiff, and (5) Respondent's Motion for Continuance/Postponement due to Appellant's Declaratory Judgment Action alleging the unconstitutionality of S.C. Code Ann. § 42-9-260.

Commissioner did not err in conducting an un-recorded pre-hearing conference nor did the Hearing Commissioner err in ruling on motions that directly affected whether or not the Form 15 hearing could be held. Further, Appellant cannot argue he was prejudiced by having to argue the motions when voluntarily rejected the Hearing Commissioner's offer of a continuance.

Appellant also argues, again, that the Hearing Commissioner erred by shifting the burden of proof to Appellant. Again, there is nothing in the Hearing Commissioner's Decision and Order that shifts the burden to Appellant. Therefore, the Hearing Commissioner did not err in issuing his Decision and Order because he did not shift the burden to Appellant.

For the foregoing reasons, the Hearing Commissioner's Decision and Order should be affirmed in its entirety.

VI. THE HEARING COMMISSIONER DID NOT ERR AS A MATTER OF LAW IN ANY OF HIS ORDERS RELATED TO THE OUTSTANDING MOTIONS.

Appellant next argues that the Hearing Commissioner erred as a matter of law related to specific findings and decisions in the Motions Hearing conducted prior to the Form 15 hearing. Respondents would respond to each sub part of the exception as follows:

[14] Therefore, Claimant cannot argue he was prejudiced by having to argue all of the motions.

(a) Appellant first argues that the Hearing Commissioner denied his right to take the deposition of the adjuster "as a managing agent" of Carrier. Appellant also asserts error in that the Hearing Commissioner did not make a finding of fact that Respondents failed to obtain an Order prior to the adjuster refusing to appear for the deposition. First, Appellant's request to depose the adjuster failed for several reasons. However, the chief reason is that the adjuster is not a managing agent of Carrier and, therefore, is not subject to subpoena for a deposition *as a managing agent*. Simply naming the adjuster as a managing agent does not magically make it so. Appellant sought to depose the wrong person with Carrier and the Hearing Commissioner properly denied his request. Second, the Hearing Commissioner properly refused to make a finding that Respondents failed to obtain an Order prior to the adjuster refusing the deposition. Interestingly, Appellant refused to appear for his own properly noticed deposition without filing a Motion to Quash and without obtaining an Order to postpone the deposition and took the position that no Order was needed to choose not to appear his own deposition. Therefore, the Hearing Commissioner did not err in regards to this sub-part of the exception.

(b) Next, Appellant argues the Hearing Commissioner erred by not holding a hearing on the Motion to Quash the subpoena of the adjuster's file prior to the Form 15 hearing. Appellant never requested an alternate date for the motion to quash and never asked that it be expedited. Therefore, Appellant has waived any objection to its expediency. Further, Appellant's position stated herein was that the motions should not have been heard at all at the Form 15 hearing (rather, they should have

been done later). If Appellant was successful on that issue, it would be at odds with this position stated herein. Therefore, the Hearing Commissioner did not err in regards to this sub-part of the exception.

(c)

VII. THE COMMISSION DID NOT ERR AS A MATTER OF LAW BY AFFIRMING FINDING OF FACT #2 THAT THE APPELLANT SUFFERED A MYOCARDIAL INFARCTION, "ON MAY 28, 2013" BECAUSE THE COMMISSION DID NOT AFFIRM FINDING OF FACT #2 THAT APPELLANT SUFFERED A MYOCARDIAL INFARCTION "ON MAY 28, 2013."

The Commission did not issue a finding of fact that Appellant suffered a myocardial infarction on May 28, 2013. Therefore, they cannot have erred as a matter of law by issuing a finding of fact that Appellant suffered a myocardial infarction on May 28, 2013

VIII. THE COMMISSION DID NOT ERR AS A MATTER OF LAW BY MAKING FINDINGS OF FACT #4 THROUGH #11 BECAUSE EACH FINDING IS SUPPORTED BY TESTIMONY, STIPULATIONS OR DOCUMENTARY EVIDENCE IN THE RECORD.

Appellant next argues that the Hearing Commissioner erred as a matter of law related to Findings of Fact #4 through #11[15]. Respondents would respond to each individual Finding of Fact of the exception as follows:

a. Finding of Fact #4

This finding of the Full Commission states "Defendants began providing Claimant with temporary total disability benefits beginning on June 1st, 2013 and continuing through September 14, 2013. This is based on the Form 19 Status Report and Compensation Receipt filed by Defendants on September 12, 2013." This evidence for

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[15] See R. p. 27-29

this finding is a matter of record with the Commission. It is undisputed that Respondents *did* pay temporary total disability benefits from June 1, 2013 through September 14, 2013 and Respondents *did* file a Form 19 with the Commission on September 12, 2013. Respondents are not aware of any ground or basis under which Appellant asserts this finding of fact is an error of law (or fact).

b. Finding of Fact #5

This finding of the Full Commission states "Defendants also provided Claimant with medical treatment between the alleged date of injury and September 12, 2013. This is based on the Form 19 Status Report and Compensation Receipt filed by Defendants on September 12, 2013." This evidence for this finding is a matter of record with the Commission. It is undisputed that Respondents *did* provide medical care to Appellant through September 12, 2013 and Respondents *did* file a Form 19 with the Commission on September 12, 2013. Respondents are not aware of any ground or basis under which Appellant asserts this finding of fact is an error of law (or fact).

c. Finding of Fact #6

This finding of the Full Commission states "Defendants terminated Claimant's workers' compensation benefits 114 days after employer could have had notice of his alleged injury, on September 12, 2013. The termination was based on a denial of the claim following an investigation. This is based on the Form 15, Section II dated September 12, 2013." This evidence for this finding is a matter of record with the Commission. It is undisputed that Respondents *did* terminate benefits on September 12, 2013 and that Respondents terminated those benefits by filing a Form 15, Section II dated September 12, 2013.

Appellant's contentions related to Finding of Fact #6 appear to center around the portion of the finding related to the language "following an investigation." Specifically, throughout his brief, Appellant challenges any finding that indicates an investigation was conducted because Respondents did not present live testimony from Employer or Carrier related to an investigation. While Appellant is correct that Respondents did not present live testimonial evidence, Respondents did present documentary evidence in the form of medical records and form filings with the Commission. The Act does not require live testimonial evidence to support a denial of benefits pursuant to S.C. Code Ann. § 42-9-260. The evidence presented by Respondents and the forms filed with the Commission make it clear that an investigation was performed and a conclusion that the claim was not compensable was reached based on a review of the medical records produced to Respondents prior to September 13, 2013.

Because the record is clear that Respondents denied compensation benefits because Appellant failed to meet his burden of proving a compensable claim, the Commission did not err in relying on those form filings and submitted medical records to support a conclusion that Respondents conducted an investigation in this claim. Therefore, the Commission's Decision and Order should be affirmed in its entirety.

c. Finding of Fact #7

This finding of the Full Commission states "We find that the communications by and through the Claimant's attorney and the Defendants' representatives are sufficient to prove that the medical records were provided to the Defendants prior to September 13, 2013, and provide a basis for the Defendants knowledge and good faith denial."

Appellant's challenge to this finding of fact should raise serious concerns to this court. Specifically, on page 41 of his brief, Appellant states:

> "[t]here is absolutely no evidence...as to when the Respondents received any of the belated medical records that they were allowed to put into evidence...and there was simply no testimonial or documentary evidence submitted into the Record that would establish whether or not those records were received by the Respondents before September 13, 2013..."

This same contention was made in Appellant's prior brief to the Full Commission. The undersigned brought it to Appellant's attention at that time, and before the Full Commission, that this statement/allegation is patently false. **Appellant's counsel provided Appellant's medical records to Respondents via e-mail on June 26, 2013.** This email has been previously provided to both the Full Commission and Appellant's counsel[16]. Appellant's counsel has not denied sending this e-mail. This specific issue was not raised with the Hearing Commissioner because Respondents never imagined or contemplated Appellant's counsel would later deny providing Respondents with the medical records he previously provided via e-mail. Nevertheless, that is the situation this case finds itself in. Appellant's counsel has been notified by Respondents' counsel of this incorrect and inaccurate allegation on several occasions prior to filing the present brief with this court and Appellant's counsel apparently still insists on pursuing it with this court. At best Appellant's position is disingenuous. At worst it is a position which Appellant's counsel knows to be false and misleading.

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[16] Due to it being evidence presented after the Single Commissioner hearing, it was not accepted into the file as a piece of evidence by the Full Commission. However, the existence of Finding of Fact #7 reflects the Commission's belief that Appellant's counsel did, in fact, submit the records to Respondents prior to September 13, 2013.

Respondents received the records Appellant on June 26, 2013. The receipt of these records is a sufficient basis for the Commission to determine Respondents conducted an investigation before denying the case over six weeks later.

d. **Finding of Fact #8**

This finding of the Full Commission states: "We find that a heart attack and its relationship to a work related injury is a medically complex case."

Claimant argues that the Commission erred by determining and stating this claim is medically complex. Claimant, on his Form 50 and Form 58 indicates that he is seeking medical benefits for his heart, left hand, left arm, left shoulder, neck, head, brain, chest, and all organs, members, and body parts. Alleging the entire body, including brain injury, necessarily makes this a medically complex claim. Therefore, the Commission did not err by stating this claim is "medically complex."

e. Finding of Fact #9

This finding of the Full Commission states: "The Form 15, Section II was received by the Commission no later than September 18th, 2013. This is based on the records in the Commission's file and the Form 15, Section III filed by the Claimant." This evidence for this finding is a matter of record with the Commission. It is undisputed that Commission *did* receive the Form 15, Section II no later than September 18, 2013 and that Appellant *did* file a Form 15, Section III. . Respondents are not aware of any ground or basis under which Appellant asserts this finding of fact is an error of law (or fact).

f. Finding of Fact #10

This finding of the Full Commission states: "The Form 15, Section II documented that the reason for termination was that the employee fails to meet the burden of a compensable injury under the S.C. Workers' Compensation Act. This is based on the Form 15, Section II dated September 12th, 2013."

Appellant argues that the Commission erred in Finding of Fact #10 for two reasons: (1) the finding is in error because the Commission found Appellant was not prejudiced by receiving only one copy of the Form 15 when there is no evidence of lack of prejudice to Appellant; and (2) the finding is in error because Appellant was prejudiced when Respondents did not attach a separate attachment setting forth the grounds for denial. Each of these will be addressed in turn.

First, Finding of Fact #10 is not an error of law because there was no evidence of prejudice. If Appellant was prejudiced by receiving only one copy of the Form 15, Appellant was required to present evidence of prejudice to rebut the Commission's finding. Appellant failed to present any evidence that he was prejudiced by receiving only one copy of the Form 15. Therefore, the Commission properly determined that Appellant was not prejudiced by receiving only one copy of the Form 15.

Second, Finding of Fact #10 is not an error of law because Respondents *did* attach the grounds for denial of benefits. Appellant reasserts issues raised previously in his brief that Respondents Form 15, Section II was deficient because it did not include the reasons for denial. In fact, the Form 15, Section II clearly includes the information required by the Act. Respondents Form 15, Section II states that Appellant's claim is being denied because "Claimant fails to meet the burden of a compensable injury under the SC

Workers' Compensation Act." Therefore, Appellant cannot say he was prejudiced by receiving the very notice the Act requires.

Because Appellant presented no evidence of prejudice by only receiving one copy of the Form 15, Section II and because Respondents complied with the Act in stating the reasons for denial, the Commission's Decision and Order should be affirmed in its entirety.

g. Finding of Fact #11

This finding of the Full Commission states:

> "Claimant received the Form 15, Section II in a timely manner and was able to exercise his rights under § 42-9-260(C) and R.67-504(C). This is based on the Form 15, Section III filed by the Claimant. Claimant alleged that the Form 15, Section II was not served on him properly pursuant to R.67-504(A) because he was only served with one copy of the Form 15, Section II and the documented reason for termination was printed on the Form 15 under Section II, rather than on an attached document. However, Claimant was in no way prejudiced from exercising his rights under the Act by the manner of service of this is evident by the fact that Claimant filed a Form 15, Section III asserting his rights shortly after receiving the Form 15, Section II. Claimant had the benefit of counsel at the time he was served with the Form 15, Section II, rendering the requirement to provide him with two copies unnecessary. Therefore, Defendants alleged failure to provide Claimant with a second copy of the Form 15, Section II, and including the reasons for denial on the form itself rather than on a separate attachment are not grounds to find the termination of benefits was improper."

Appellant argues that the Commission erred in Finding of Fact #11 for two reasons: (1) the finding is in error because the Commission found Appellant was not prejudiced by receiving only one copy of the Form 15 when there is no evidence of lack of prejudice to Appellant; and (2) the finding is in error because Appellant was

prejudiced when Respondents did not attach a separate attachment setting forth the grounds for denial. Each of these will be addressed in turn.

First, Finding of Fact #11 is not an error of law because there was no evidence of prejudice. If Appellant was prejudiced by receiving only one copy of the Form 15, Appellant was required to present evidence of prejudice to rebut the Commission's finding. Appellant failed to present any evidence that he was prejudiced by receiving only one copy of the Form 15. Therefore, the Commission properly determined that Appellant was not prejudiced by receiving only one copy of the Form 15.

Second, Finding of Fact #11 is not an error of law because Respondents *did* attach the grounds for denial of benefits. Appellant reasserts issues raised previously in his brief that Respondents Form 15, Section II was deficient because it did not include the reasons for denial. In fact, the Form 15, Section II clearly includes the information required by the Act. Respondents Form 15, Section II states that Appellant's claim is being denied because "Claimant fails to meet the burden of a compensable injury under the SC Workers' Compensation Act." Therefore, Appellant cannot say he was prejudiced by receiving the very notice the Act requires.

Because Appellant presented no evidence of prejudice by only receiving one copy of the Form 15, Section II and because Respondents complied with the Act in stating the reasons for denial, the Commission's Decision and Order should be affirmed in its entirety.

IX. THE HEARING COMMISSIONER DID NOT ERR AS A MATTER OF LAW BY ISSUING HIS DECISION AND ORDER ON DECEMBER 5, 2013.

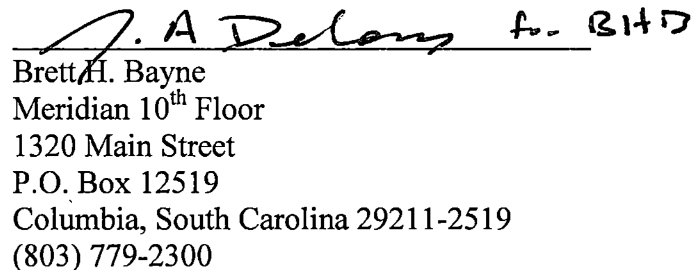
Claimant finally argues the Hearing Commissioner erred as a matter of law because the Hearing Commissioner took 14 business days to issue his Decision and Order. This is not an error of law.

CONCLUSION

This court should undertake an examination of the jurisdictional issues raised herein and rule the Commission had no jurisdiction to hear any portion of this claim. Once the jurisdictional issue is resolved, both Decision and Orders at issue should be vacated in their entirety and the atter remanded to the Single Commissioner with instructions to hold the matter in abeyance until the Circuit Court has ruled on Appellant's Declaratory Judgment seeking to invalidate S.C. Code Ann. 42-9-260. If this court determines jurisdiction was proper with the Commission, for all the foregoing reasons the exceptions raised by Appellant should be denied and the Decision and Order related to these exceptions should be AFFIRMED.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, L.L.C.



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October _____, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS COMPENSATION COMMISSION

Appellant Case No. 2014-001815

Clarence Winfrey, ... Appellant,

v.

Archway Services Inc, ... Employer,

and

American Fire & Casualty Insurance Company c/o
Liberty Mutual Group, ... Respondents.

CERTIFICATE OF COUNSEL

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

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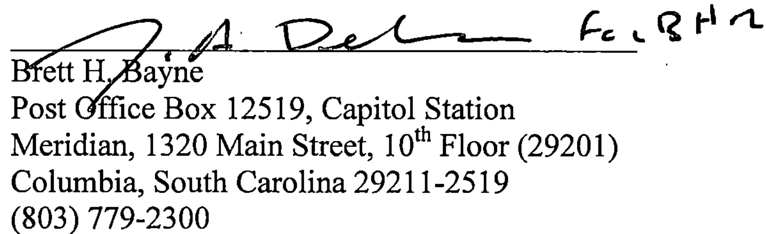

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PROOF OF SERVICE

I certify that I have served the Final Brief on the attorney of record for Clarence Winfrey, by depositing a copy of it in the United States Mail, postage prepaid, on the 29th day of October, 2015 addressed to his attorney of record, Preston F. McDaniel, Esquire, The McDaniel Law Firm, 1315 Elmwood Avenue, Columbia, South Carolina 29201 and at preston@pfmcdlaw.com.

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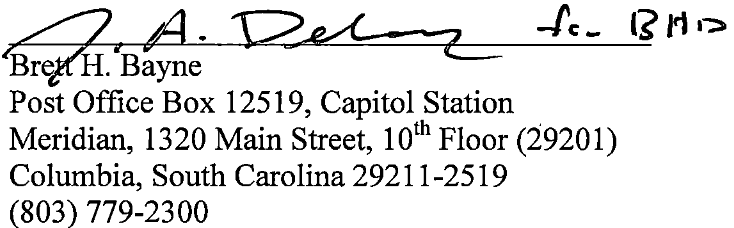

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