THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No.: 2012-CP-32-02093
2012-CP-32-02111
Appellate Case No. 2016-001729

Ricky Kneece,.....Petitioner.

v.

Kneece Farms and Legion Insurance Co. in liquidation through the S.C. Property and Casualty Insurance Guaranty Association.....Respondents.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

Mark D. Cauthen
David M. Bornemann
The McKay Firm, P.A.
1303 Blanding Street
Post Office Box 7217
Columbia, South Carolina 29202-7217
Attorneys for Respondents

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QUESTIONS PRESENTED

I. Is the issue of whether petitioner suffered severe and permanent physical brain damage preserved for review?

II. Is the issue of whether application of Regulation 67-1101 to petitioner's physical brain damage was arbitrary or capricious preserved for review?

III. Is the issue of whether the petitioner suffered a total loss of earning capacity preserved for review?

IV. Whether the Court of Appeals correctly held that the Workers' Compensation Commission order was not immediately appealable?

A. The Commission's order is interlocutory and not immediately appealable to the courts.

B. Petitioner's arguments for exceptions to the APA's requirements for appealability have already been rejected by the Supreme Court.

C. Petitioner has not been deprived of an "adequate remedy" by the Court of Appeals vacating the Circuit Court order.

STATEMENT OF THE CASE

The Claimant/Petitioner, Ricky D. Kneece (hereinafter "Claimant" or "Petitioner"), sustained compensable injuries on November 22, 1999, while working for Kneece Farms, which was owned by the Claimant's uncle, including injuries to his head/brain, left lower extremity and left upper extremity. The Defendants provided medical as well as indemnity benefits for the Claimant's work injuries.

At the time of the accident at Kneece Farms, the Claimant was also employed with Delano R. Kneece & Son Farms, Inc. (hereinafter "Delano Kneece & Son"), which is a family farm that is owned and operated by Claimant and his father. The Claimant and his father farmed their own land while also working as sharecroppers on land owned by Kneece Farms. The Claimant never returned to employment with the Defendant Employer in this claim – Kneece Farms. However, he did return

to full time employment with the family farming operation, Delano Kneece & Son Farms.

The Claimant returned to limited work duties with Delano R. Kneece & Son Farms within months of his accident and admitted, per a signed Form 17, that he was able to return to full time work with Delano Kneece & Son during 2005. (R. P. 1241; Form 17 dated 6/16/2006).

The Claimant, per testimony during the hearing, has never been without his salary or wages as a result of his injuries. During the hearing, the Claimant's Wife, who is also the bookkeeper for Delano R. Kneece & Son Farms, Inc., testified that the Claimant's wages from the family farm for 2007 and 2009 were $76,600.00 and $77,600.00 respectively. (R. p. 482 lines 22-24). She also testified that these yearly amounts were over two times the amount of the Claimant's yearly salary at the time of the accident. (R. p. 483 lines 1-4).

On April 16, 2004, Claimant's treating physician for his left lower extremity, Dr. James O'Leary, released Claimant at maximum medical improvement (MMI) with a 10% impairment rating to his left lower extremity. (R. p. 998). The Claimant treated with Dr. Michael Green for his left upper extremity injury. Dr. Green released the claimant at MMI with a 17% impairment rating to his left upper extremity on September 23, 2004. (R. p. 946).

Accordingly, the Defendants filed a Form 21 Request to stop payment of temporary total disability (TTD) benefits. The hearing on Defendants' Form 21 was held on January 11, 2005, before Commissioner Childs. On April 18, 2005, Commissioner Childs issued her Decision and Order finding and concluding, in pertinent part, that: (1) Claimant sustained compensable injuries to his brain/head, face, nasal passage, sinus, left eye, left knee, left shoulder, left elbow and depression; and (2) Claimant had not yet reached MMI all of those injuries. As a result, the hearing Commissioner ordered Defendants to provide additional medical treatment for injuries to the Claimant's left knee and shoulder, as well as treatment for Claimant's closed head injury, and

depression with Dr. Randy Waid and Dr. Larry Bergmann. (R. pp. 104-107).

The Defendants timely appealed this 2005 Decision and Order of Commissioner Childs. However, prior to the Full Commission Hearing on the matter the Claimant agreed to execute a Form 17 acknowledging that he was able to return to work at full duty as of October 4, 2005. (R. p. 1241; Form 17 dated 6/16/2006). Accordingly, TTD payments were terminated as of October 4, 2005; Defendants provided Claimant with additional medical treatment for his closed head/brain injury, as well as the injuries to Claimant's left lower extremity (knee) and left upper extremity (shoulder) pursuant to the 2005 Order and the Agreement between the parties.

The Claimant was re-evaluated by Dr. Green on March 20, 2006. During this evaluation, the Claimant informed Dr. Green that he drove his tractor for long periods of time on his farm (Kneece & Son). (R. p. 1195). The Claimant's physical examination at this appointment was normal except for a "little bit of discomfort." Dr. Green opined at that time that the claimant was able to *work full duty* as of March 20, 2006. (R. p. 1195).

The Claimant was also evaluated by Dr. Randy Waid for his closed head injury. In his report of February 8, 2007, Dr. Waid indicated that the Claimant continued to "demonstrate mild executive dysfunction both with regard to cognitive and emotional/psychological functioning." He also noted that the Claimant continued to be employed on his family farm. On February 8, 2007, Dr. Waid released the Claimant at MMI with a 22% impairment rating to the whole person for this injury. The Claimant had previously been released at MMI with regard to his left upper and left lower extremity in 2004, as stated above. (R. pp. 862-868).

On May 14, 2008, the Claimant underwent a neurological examination with Dr. Julian Adams of the South Carolina Neurological Clinic. Dr. Adams diagnosed Claimant with a "mild to moderate head injury with a contusion to his right frontal lobe" and he found the Claimant's

examination to be "absolutely normal." (R. p. 1219). Dr. Adams subsequently ordered an electroencephalogram (EEG) test to measure brain electrical activity which was also normal. Consequently, no further treatment was recommended by Dr. Adams.

Following that 2008 evaluation with Dr. Adams, neither Claimant nor his attorney ever made any demand or request for any additional medical treatment other than a request that Claimant be allowed to continue his psychological treatment with Dr. Bergmann and Dr. Deal, which the Defendants authorized. However, in March of 2010, the Claimant decided to seek additional medical treatment on his own without any notice to Defendants with Dr. Charles Shissias of Lowcountry Medical Group in Beaufort.

Following the commencement of unauthorized treatment with Dr. Shissias, Claimant filed a Form 50 on July 9, 2010, requesting additional medical treatment, as well as an award of permanent and total disability based upon a general disability/loss of earning capacity pursuant to S.C. Code Ann. § 42-9-10. (R. p. 386).

This Form 50 hearing request was Claimant's first such request since before the hearing in front Commissioner Childs in 2005. This was also the first notice to Defendants that: (1) The Claimant was alleging he was permanently and totally disabled as a result of a loss of earning capacity under S.C. Code Ann. § 42-9-10; (2) That the Claimant had been receiving treatment from Dr. Shissias; and (3) That the Claimant intended to rely upon the opinions of the unauthorized physician, Dr. Shissias, as well as Claimant's own vocational expert, William Stewart, to establish his claim for permanent and total disability. The Defendants answered Claimant's Form 50, denying he was entitled to an award of permanent and total disability under S.C. Code Ann. § 42-9-10, or any other provision of the Workers' Compensation Act. (R. p. 384).

A hearing on the Forms 50 and 51, which ultimately give rise to this appeal, was originally

scheduled before Commissioner Williams on October 4, 2010; however, the parties agreed to mediate this claim. Mediation was held on November 29, 2010, but was unsuccessful. Following mediation, Defendants sought to obtain evaluations with a neuropsychologist, a neurologist, and a vocational specialist to address the new and updated opinions of Claimant's experts, specifically with regard to any ongoing neurological issues or deficits.

On December 7, 2010, counsel for the Defendants notified Claimant's counsel of a neuropsychological evaluation appointment set for January 4, 2011, with Dr. Tora Brawley of the University of South Carolina Specialty Clinics, Department of Neuropsychiatry and Behavioral Science. (R. p. 1349). Subsequently, Defendants received correspondence from Claimant's attorney to Dr. Brawley indicating that he was refusing to allow Claimant to attend the scheduled appointment with Dr. Brawley. (R. p. 1351). The Defendants kept the appointment scheduled; however, the Claimant failed to participate or attend this evaluation.

On December 14, 2010, Counsel for the Defendants requested, via written correspondence to Claimant's attorney, dates that Claimant was available to meet with Defendants' vocational expert, Cynthia P. Grimley; however, Claimant's Counsel subsequently advised that he would not agree to make the Claimant available for a vocational evaluation with the Defendants' expert. (R. p. 1354).

Finally, on January 21, 2011, counsel for the Defendants notified the Claimant's counsel of a neurological examination scheduled for the Claimant with Dr. Ben Bashinski of Neurological Associates of Augusta, Georgia, for February 4, 2011. (R. p. 1359). However, Claimant's counsel responded by letter dated January 24, 2011, that the Claimant would not submit to the neurological evaluation with Dr. Bashinski. (R. p. 1360).

On January 26, 2011, the Defendants moved for an Order compelling the Claimant to attend and cooperate with the examinations to be conducted by the Defendants' neurologist,

neuropsychologist and vocational rehabilitation expert as set forth above. (R. p. 361, See Motion to Compel dated January 26, 2011). The Defendants also requested an Order suspending Claimant's right to further benefits and cancelling the hearing that had been scheduled for February 14, 2011, due to the Claimant's noncompliance with S.C. Code Ann. § 42-15-80 permitting an independent medical evaluation by the Defendants. On February 2, 2011, the Defendants' Motion to Compel the medical and vocational evaluations and to postpone the hearing was denied by a Form Order of the Commission without explanation. (R. p. 93). However, prior to the hearing, the Claimant complied with the neuropsychological evaluation with Dr. Brawley and this was performed on January 29, 2011. In her report, Dr. Brawley was essentially in agreement with Dr. Waid that the Claimant had experienced a "mild residual brain dysfunction as a result of his accident." (R. pp. 1237-1239, Dr. Tora Brawley, dated February 11, 2011).

At the Single Commissioner Hearing on February 14, 2011, the Claimant asserted that he was entitled to permanent and total disability benefits as a result of a physical brain injury pursuant to S.C. Code Ann. § 42-9-10. It was the position of the Defendants that the Claimant had not sustained a loss of earning capacity and that Claimant was not permanently and totally disabled. However, both parties agreed the Claimant was at maximum medical improvement for all injuries.

On April 28, 2011, Commissioner Derrick L. Williams issued his Decision and Order finding the Appellants responsible for lifetime compensation and medical benefits.

From this Decision and Order issued by Commissioner Williams, the Defendants timely filed a Form 30 Request for Review to the Appellate Panel of the South Carolina Workers' Compensation Commission, raising 39 Grounds for Review. (R. p. 349). The Defendants' appeal was heard by the Full Commission on September 20, 2011.

Pursuant to S.C. Code Ann. § 42-17-50 (1985), the Appellate Panel reviewed the Award and

weighed the evidence as presented at the initial hearing, finding good grounds to reverse and remand the prior Order on grounds that Claimant was not permanently and totally disabled with accompanying physical brain damage. The Appellate Panel also remanded the claim to the jurisdictional Commissioner to determine the extent of Claimant's permanent disability per Regulation 67-1101. (R. p. 47-57, SCWCC Appellate Panel Order dated April 19, 2012).

Subsequently, both parties timely appealed the Order of the Full Commission for the reasons outlined below and in their respective Petitions for Review to the Circuit Court of Lexington County. (R. p. 214; 225, Notice of Intent to Appeal dated May 18, 2012; Petition for Judicial Review dated May 21, 2012). Judge Knox McMahon reversed the holdings and conclusions of the Appellate Panel of the full Commission, reinstating the holdings of the single Commissioner, and finding that the Claimant was permanently totally disabled with a physical brain injury, and therefore entitled to lifetime medical and indemnity benefits associated with this claim. (R. pp. 21-46). The Defendants filed a Rule 59(e) motion for rehearing based on the incorrect application of the substantial evidence standard, which was denied on April 24, 2014.

Subsequently, Employer/Carrier appealed the Circuit Court ruling to the Court of Appeals. The Court of Appeals vacated and remanded the Circuit Court decision for further findings of the Workers' Compensation Commission. The Court of Appeals held that the prior Commission order was not directly appealable to the Circuit Court. The Claimant filed a Motion for Rehearing on April 22, 2016, which was denied on July 22, 2016.

The Claimant's Petition for Writ of Certiorari now comes before the Supreme Court from the denial of his Motion for Rehearing to the Court of Appeals.

ARGUMENTS

I. THE ISSUE OF WHETHER THE PETITIONER SUFFERED SEVERE AND

PERMANENT PHYSICAL BRAIN DAMAGE IS NOT PRESERVED FOR REVIEW

The Respondents assert that this issue, as proposed in the Petitioner's Petition for Writ of Certiorari, is not preserved for review because it was not raised in the Petition for Rehearing to the Court of Appeals.

The South Carolina Appellate Court Rules provides, "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 242(d)(2), SCACR.

Questions not raised in the petition for rehearing to the Court of Appeals are not preserved for review. Mazloom v. Mazloom, 392 S.C. 403, 403–04, 709 S.E.2d 661 (2011). The Court in Mazloom emphasized the importance that the issues must be included in the petition for rehearing and not just in prior filings to the Court of Appeals ("Only those questions raised in the Court of Appeals *and in the petition for rehearing* shall be included in the petition for writ of certiorari....") (emphasis supplied in the original opinion) Id. *See also* Camp v. Springs Mortgage Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the Court of Appeals and not raised in petition for rehearing); Holly Hill Lumber Co. v. McCoy, 210 S.C. 440, 442, 43 S.E.2d 143, 144 (1947) (holding issue not raised in petition for rehearing is the law of the case).

The Respondent's petition for rehearing to the Court of Appeals raised only one ground for rehearing, namely whether "The Workers' Compensation Commission order was immediately appealable." The issue raised by the Petitioner of whether he sustained severe and permanent physical brain damage was not addressed by the Court of Appeals ruling, was not raised as an issue in the Petition for Rehearing, and cannot be reasonably interpreted to be a subsidiary question to the

issue the Petitioner did raise.

Based on the above, the Court should deny the petition for Writ of Certiorari as to this issue because it is not preserved for appellate review.

II. THE ISSUE OF WHETHER THE APPLICATION OF REGULATION 67-1101 TO PETITIONER'S PHYSICAL BRAIN DAMAGE WAS ARBITRARY OR CAPRICIOUS IS NOT PRESERVED FOR REVIEW

The Respondents assert that this issue, as proposed in the Petition for Writ of Certiorari, is not preserved for review because it was not raised in the Petition for Rehearing to the Court of Appeals.

The South Carolina Appellate Court Rules provides, "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 242(d)(2), SCACR

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The Petition for Rehearing to the Court of Appeals raised only one ground for rehearing, namely whether "The Workers' Compensation Commission order was immediately appealable." The issue raised by the Petitioner as to the application of Regulation 67-1101 was not addressed by the Court of Appeals ruling, was not raised as an issue in the Petition for Rehearing, and cannot be reasonably interpreted to be a subsidiary question to the issue the Petitioner did raise.

Based on the above, the Court should deny the Petition for Writ of Certiorari as to this issue because it is not preserved for appellate review.

III. THE ISSUE OF WHETHER THE PETITIONER SUFFERED A TOTAL LOSS OF EARNING CAPACITY IS NOT PRESERVED FOR REVIEW

The Respondents assert that this issue, as proposed in the Petition for Certiorari, is not preserved for review because it was not raised in the Petition for Rehearing to the Court of Appeals.

The South Carolina Appellate Court Rules provides, "Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein." Rule 242(d)(2), SCACR.

Questions not raised in the petition for rehearing to the Court of Appeals are not preserved for review. Mazloom v. Mazloom, 392 S.C. 403, 403–04, 709 S.E.2d 661 (2011). The Court in Mazloom emphasized the importance that the issues must be included in petition for rehearing and not just in prior filings to the Court of Appeals ("Only those questions raised in the Court of Appeals *and in the petition for rehearing* shall be included in the petition for writ of certiorari....") (emphasis supplied in the original opinion) Id. *See also* Camp v. Springs Mortgage Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (declining to address issue not addressed by the Court of Appeals and

not raised in petition for rehearing); Holly Hill Lumber Co. v. McCoy, 210 S.C. 440, 442, 43 S.E.2d 143, 144 (1947) (holding issue not raised in petition for rehearing is the law of the case).

The Petitioner's Petition for Rehearing to the Court of Appeals raised only one ground for rehearing, namely whether "The Workers' Compensation Commission order was immediately appealable." The issue raised by the Petitioner of whether he sustained a total loss of earning capacity was not addressed by the Court of Appeals ruling, was not raised as an issue in the Petition for Rehearing, and cannot be reasonably interpreted to be a subsidiary question to the issue the Respondent did raise.

Based on the above, the Court should deny the Petition for Writ of Certiorari as to this issue because it is not preserved for appellate review.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE WORKERS' COMPENSATION COMMISSION ORDER WAS NOT IMMEDIATELY APPEALABLE

Respondents contend that the Petition should be denied and the Court of Appeals' Order dated April 7, 2016 vacating the Circuit Court Order and remanding this matter back to the Commission for further proceedings be upheld. Respondents submit that the Court properly found that the Commission's Order from which appeal to the Circuit Court was made was not a "final decision" within the meaning of S.C. Code Ann. § 1-23-380 *et seq* and therefore not immediately appealable to the courts under the Administrative Procedures Act ("APA"). The Court also properly found that Petitioner would not be deprived of an "adequate remedy" by immediate judicial review of the Commission's interlocutory Order.

A. THE COMMISSION'S ORDER IS INTERLOCUTORY AND NOT IMMEDIATELY APPEALABLE TO THE COURTS

It is now well-settled black letter law that an administrative order not resolving **all** issues

and/or disposing of the **entire** action and leaving only execution of judgement is not a "final agency decision" subject to judicial review under the APA. Bone v. U.S. Food Services, 404 S.C. 67, 744 S.E.2d 552 (2013); *See also* Charlotte-Mecklenburg Hospital Authority v. S.C. Dept. of Health & Environmental Control , 387 S.C. 265, 692 S.E.2d 894 SC (2010). It is also elementary that appeals from the Commission are governed by the APA. Lark v. Bi-Lo, 276 S.C 130, 276 S.E.2d 304 (1981). In this case, the Commission reversed the Hearing Commissioner's finding that Respondent was entitled to lifetime compensation benefits for total disability with physical brain damage, and remanded the case back to a Hearing Commissioner for a determination of his entitlement to permanent partial disability benefits. Because the issue of Respondents entitlement to permanent disability benefits remains to be determined, the Commission's remand Order is not a "final decision" appealable to the Circuit Court. *See also* Price v. Peachtree Electrical Services, Inc., 405 S.C. 455, 748 S.E.2d 455 (2013).

B. PETITIONERS ARGUMENTS FOR EXCEPTIONS TO THE APA'S REQUIREMENTS FOR APPEALABILITY HAVE ALREADY BEEN REJECTED BY THE SUPREME COURT

Petitioner's citation to Canteen v. McLeod Reginal Medical Center, 384 S.C. 617, 682 S.E.2d 504 (Ct. App. 2009) as authority for the proposition that general appealability concepts and principles still nevertheless apply to the APA's appellate scheme is improper because that case was specifically overruled by Charlotte-Mecklenburg *supra.* To the extent Canteen v. McLeod Reg'l Med. Ctr., 384 S.C. 617, 682 S.E.2d 504 (Ct.App.2009). and Oakwood Landfill, Inc. v. S.C. Dep't of Health and Envtl. Control, 381 S.C. 120, 671 S.E.2d 646 (Ct.App.2009), rely on § 14-3-330 to permit the appeal of interlocutory orders of the ALC or an administrative agency, those cases are overruled." Charlotte-Mecklenburg Hosp. Auth. v. S. Carolina Dep't of Health & Envtl. Control, 387 S.C. 265, 266, 692 S.E.2d 894 (2010)

Petitioner's attempts to distinguish the precedential value of Charlotte-Mecklenburg, *supra*, from the present case are simply invalid. Simply put- the APA governs appeal from the Workers Compensation Commission, not the general appealability statute, and the only exception to the finality requirement is when review of the final agency decision would not provide an adequate remedy. *See* Bone *supra*.

C. PETITIONER HAS NOT BEEN DEPRIVED OF AN "ADEQUATE REMEDY" BY THIS COURT VACATING THE CIRCUIT COURT ORDER

Petitioner argues that, even if the Commission's Order was interlocutory, the Court of Appeals' decision not to review the Circuit Court Order reversing it deprives him of an "adequate remedy" because additional litigation before the Commission on remand resulting therefrom will cause him hardship in the form of delaying payment for lost compensation and provision of medical benefits. Petitioner urges this Court to proceed with review on the merits of the Circuit Court's Order. [For example Petitioner argues that "vacating he Circuit Court order has the effect of terminating benefits for his permanent and severe physical brain damage." However, the only finding suggesting a "severe" brain injury was in the Circuit Court order, which has been vacated.] Petitioner again conflates review of the Commission Order with review of the Circuit Court Order. Specifically, S.C. Code Ann. § 1-23-380 provides, in pertinent part, "[a] preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy." (emphasis added). Clearly, S.C. Code Ann. § 1-23-380 only applies to judicial review of final agency orders, including those from the Commission, except in cases where waiting for a final decision fails to provide an "adequate remedy."

Here, Petitioner is not being deprived of an adequate remedy. He is instead asking this Court to create a remedy that does not exist- circumventing application of § 1-23-380 and proceeding

straight to review of the Circuit Court Order pursuant to § 1-23-390, which governs the appeal of administrative/agency matters from the Circuit Court to the appellate courts. This is untenable because, for reasons expounded upon earlier, the Circuit Court lacked jurisdiction to address the Commission's Order in the first place. That Order should be considered void *ab initio* with no legal validity or effect and therefore not subject to review. Respondent still has an adequate remedy to the Commission's denial of his lifetime compensation benefits claim via another appeal to the Circuit Court after the Commission enters a final order on his entitlement to permanent partial disability benefits.

Petitioner next suggests that alleged hardships resulting from this Court's remand to the Commission are tantamount to depriving him of an "adequate remedy." These arguments are similar to considerations thoroughly rejected by the Supreme Court in Bone *supra.* When confronted with the inequitable dilemma of an Employer/Carrier having to pay compensation and medical benefits during the pendency on an appeal to the courts where compensability is disputed, the Court stated, "[c]laimants and employers are treated the same depending on who prevails before the Commission." Id. Any unintended consequences of delaying review of a final decision from the Commission in this case do not deprive Petitioner of an adequate remedy.

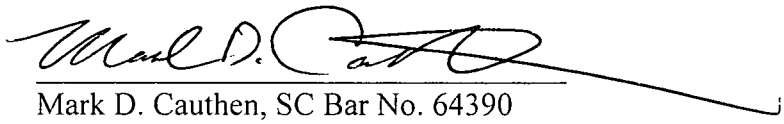
For these reasons, no exceptions to the APA regarding appealability of the Commission's interlocutory Order apply to this case.

CONCLUSION

For all the aforementioned reasons, Respondents submit the Court of Appelas properly found that the Circuit Court had no jurisdiction to review the Commission's Order. Furthermore, Respondents submit that the Petitioner did not properly preserve the remaining issues for consideration by the Supreme Court. As such, Respondents pray that Petitioners Petition for Writ of

Certiorari be DENIED and the Court of Appeals Order remanding this case back to the Commission be enforced forthwith.

Respectfully submitted,



Mark D. Cauthen, SC Bar No. 64390
David M. Bornemann, SC Bar No. 73765
The McKay Frim, P.A.
1303 Blanding Street
Post Office Box 7217
Columbia, South Carolina 29202-7217
Attorneys for Respondents

Columbia, South Carolina
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PROOF OF SERVICE

I certify that I have served a copy of the **Respondents' Return to Petition for Writ of Certiorari** on the attorney of record for **Ricky Kneece** by U.S. Mail, postage prepaid,on **September 21, 2016**, addressed as follows:

Scott Elliott, Esquire
Elliott & Elliott
1508 Lady Street
Columbia, SC 29201
Attorney for the Respondent

September 21, 2016

Mark D. Cauthen, Esq.
David M. Bornemann, Esq.
The McKay Frim, P.A.
Post Office Box 7217
Columbia, South Carolina 29202
(803) 256-4645
Attorney for Respondents