

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Casey L. Manning

Case No: 2015-CP-40-07178

RECEIVED
OCT 28 2016
SC Court of Appeals

Clarence B. Jenkins, Jr., Appellant,.....Appellant,

v.

South Carolina Workers' Compensation Commission,.....Respondent.

**MOTION TO STRIKE AND/OR
FOR CORRECTION
OF DESIGNATION OF MATTER
AND INITIAL BRIEF AND
FOR EXTENSION OF TIME**

Pursuant to Rules 208, 209, 210 and 240, SCACR, Respondent the South Carolina Workers' Compensation Commission moves this Court to order that Appellant's Designation of Matter to be Included in the Record on Appeal ("Designation") and the Initial Brief of the Appellant ("Appellant's Brief") be corrected and/or that items be stricken as described below.

First, Appellant has designated several items that were not part of the Record before the Circuit Court; these non-record items may not be included in the Record before this Court.

An appellate court cannot decide issues that were not raised before the trial court. Wilson v. Builders Transport, Inc., 330 S.C. 287, 294, 498 S.E.2d 674, 678 (Ct. App. 1998). Further, Rule 209(b), SCACR, establishes that the Designation “may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials properly included in the Record on Appeal [See Rule 210(c)].” Rule 210(c), SCACR, states that the Record “shall not, however, include matter which was not presented to the lower court or tribunal.” Therefore, matters which were not presented to the lower court cannot be included in the Designation because they would be improper to include in the Record on Appeal. *See* Argabright v. Argabright, 398 S.C. 176, 179, 727 S.E.2d 748, 750 (Ct. App. 2012)(establishing that the appellant court is “bound to the record at trial . . . ”); *see also* State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007)(statements not presented to the lower court “cannot be properly included in the Record on Appeal”).

As the issue before the Circuit Court was the Respondent’s Motion to Dismiss, the only matters on the Record were the pleadings, the Respondent’s Motion to Dismiss, and the transcript of the hearing. Consequently, the following non-record items were listed in the Appellant’s Designation:

- #2. “Decision and Order of February 26, 2016”;
- #3. “Decision and Order of August 14, 2015”;
- #8. “Transcript of Proceedings of South Carolina Worker’s[sic]

- Compensation Commission Full Board Hearing December 14, 2015”;
- #9. “Transcript of May 21, 2015 South Carolina Worker’s[sic]
Compensation Commission Hearing pp.1-20”;
- #10. “Motion to Include Dr. Mahmoud Abu-Ata Medical Records”;
- #11. “Motion to Include Medical Reports by Dr. Carol Benoit and Dr.
James Way and Disability Determination by Social Security
Administration”;
- #12. “Notice of deposition of Mahmoud Abu-Ata, M.D.”;
- #13. “Form 50 filed by pro se claimant dated February 25, 2015”;
- #14. “A police report filed by J.R. Brock of Lexington, South Carolina”;
- #15. “South Carolina Worker’s[sic] Compensation Commission
Regulatory Advisory of Form14B[sic]”;
- #17. “An email letter from Attorney Russell J. Goudeock dated April 24,
2014”;
- #18. “A letter from Nurse Kelly Wells of Disability case[sic] Management
Professionals dated June 9, 2014”;
- #19. “An email letter from Michelle Doyle of Amazon.Com,DEDC,
LLC[sic] Human Resource Office on February 19, 2014”;
- #20. “South Carolina Worker’s[sic] Compensation Commission
Educational Publication Board of Directors”;
- #23. “S.C. Code Ann. 15-79-105(C).”

The items discussed immediately above were never admitted into the Record before the Circuit Court and must be removed from Appellant's Designation, as they are not proper for the Record on Appeal. Rule 209(a), SCACR; Rule 210(c), SCACR; Argabright, 398 S.C. at 176; Wilson, 330 S.C. at 294. Therefore, the Respondent moves that these items be stricken from the Appellant's Designation.

Second, Appellant's Initial Brief references non-record items. Rule 208(b)(4), SCACR, states that the brief "shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal . . . to support the salient facts alleged." As the above-listed items are not proper for the Record on Appeal, they cannot properly support the facts alleged in the Appellant's Initial Brief. Specifically:

- On page 4 of the Initial Brief, Appellant references the police report filed by Officer J.R. Brock, listed above in Appellant's Designation as item number 14;
- On page 4 of the Initial Brief, Appellant additionally references "expert's evaluations" by Dr. Carol Benoit and Dr. James Way. These evaluations are not listed by Appellant in his Designation. Further, the only mention of these evaluations in the Designation is listed above as item number 11, a motion to include Dr. Benoit and Dr. Way's reports;

- On page 5 of the Initial Brief, Appellant references “S.C. Code Ann. § 15-79-105(C).” This statute does not exist.

As such, the Respondent moves that Appellant’s Initial Brief is stricken and the Appellant submit an amended Initial Brief that contains references only to documents that were on the Record before the Circuit Court.


Finally, Respondent requests that the briefing schedule, including the deadline for filing their Initial Brief and Designation of Matter, be stayed until the Court decides this Motion.

CONCLUSION

For the reasons stated herein, Respondent moves this Court to strike all non-record material from Appellant’s Designation, strike the Appellant’s Initial Brief, and require Appellant to file an amended Initial Brief based on material properly included in the Record.

Finally, Respondent respectfully requests that the briefing schedule be stayed while the Court considers this Motion.

October 28, 2016



J. Keith Roberts, S.C. Bar No.: 100735
1333 Main Street, Suite 500,
P.O. Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5701

*Attorney for Respondent South Carolina
Workers’ Compensation Commission*

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Casey L. Manning, Circuit Court Judge

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PROOF OF SERVICE

I, the undersigned counsel for Respondents, hereby certify that I have served a copy of the MOTION STRIKE AND/OR FOR CORRECTION OF DESIGNATION OF MATTER AND INITIAL BRIEF AND FOR EXTENSION OF TIME by causing a copy of the same to be deposited in the United States mail, first class postage, prepaid, address to the *pro se* Appellant on this the 28th day of October, 2016:

Clarence B. Jenkins, Jr.
945 Wire Road
Neeses, SC 29107

10/28/, 2016


J Keith Roberts
1333 Main Street, Suite 500,
P.O. Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5701

*Attorneys for Respondent South
Carolina Workers' Compensation
Commission*

State of South Carolina

J. Keith Roberts
General Counsel
1333 Main Street, 5th Floor
P.O. Box 1715
Columbia, S.C. 29202-1715



TEL: (803) 737-5701
FAX: (803) 737-5764
KeRoberts@wcc.sc.gov

Workers' Compensation Commission

October 28th, 2016

South Carolina Court of Appeals
The Hon. Jenny Abbott Kitchings, Clerk of Court
1220 Senate St.
P.O. Box 11629
Columbia, SC 29211

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SC Court of Appeals

Re: Clarence B. Jenkins, Jr., Appellant v. S.C. Workers' Compensation Commission,
Respondent.
Appellate Case No.: 2016-001382

Dear Ms. Kitchings:

Enclosed please find the original and six (6) copies of Respondent the South Carolina Workers' Compensation Commission's Motion for Correction of and/or to Strike Items from Appellant's Designation of Matter and Initial Brief, which I would appreciate your filing with the court. Respondent understands that, as an agency of the State of South Carolina, it is exempt from paying a filing fee pursuant to Rule 240(d), SCACR. If a filing fee is required for this motion, please notify my office immediately and it will be promptly remitted.

By copy of this letter to the last known address for Mr. Clarence B. Jenkins, Jr., Claimant *pro se*, I am hereby serving him with a copy of our Motion. Please see the attached Certificate of Service.

If there is anything further the court requires from the Respondent at this time, please do not hesitate to ask.

With warmest regards,

Sincerely,

A handwritten signature in cursive script that reads "J. Keith Roberts".

J. Keith Roberts, Esquire
S.C. Workers' Compensation Commission

Enclosure

Cc: Mr. Clarence B. Jenkins, Jr.
945 Wire Rd.
Neeses, SC 29107

South Carolina Workers' Compensation Commission

1333 MAIN STREET, SUITE 500
P.O. Box 1715
COLUMBIA, SOUTH CAROLINA 29202-1715

RETURN SERVICE REQUESTED

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SC Court of Appeals

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The Hon. Jenny Abbott Kitchings, Clerk of Court
1220 Senate St.
P.O. Box 11629
Columbia, SC 29211

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~~OCT 19 2016~~

~~SC Court of Appeals~~

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