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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

RECEIVED

DEC 28 2018

SC Court of Appeals

W.C.C. File No.: 1303989

Clarence B. Jenkins, Employee,Appellant,

v.

Amazon.Com DEDC, LLC, Employer, and
Zurich Ins. Co., Carrier, Respondents.

**MOTION TO STRIKE PORTIONS OF APPELLANT'S
INITIAL REPLY BRIEF AND FOR CLARIFICATION AND/OR
TO STRIKE DESIGNATION OF MATTER**

Pursuant to Rules 208, 209, 210 and 240, SCACR, Respondents Amazon.Com DEDC, LLC and Zurich Ins. Co. move this Court to order that portions of Appellant's [Initial] Reply Brief ("Initial Reply Brief") and certain items contained in Appellant's Designation of Matter to be Included in the Record on Appeal ("Designation"), both dated December 16, 2016, be clarified and/or stricken.

First, Appellant's Initial Reply Brief raises arguments and issues that were not raised in his Initial Brief. These include:

1. His argument that the Single Commissioner erred with instructions regarding Appellant's credibility (Initial Reply Brief pp. i, iv, 5-6);

2. His argument regarding whether the Commission erred in not accepting medical evaluations from Dr. Carol Benoit and Dr. James Way (Initial Reply Brief pp. ii, 8-9);
3. His argument regarding the Commission's legal counsel, J. Keith Roberts' "medical assessment" in J.R. Brock's report of Lexington County Sheriff Office (Initial Reply Brief pp. ii, iv, 9); and,
4. A complaint filed by Appellant with the South Carolina Human Resources Commission (Initial Reply Brief pp. 3, 8).

These arguments/issues are not preserved for appellate review because they were not raised in Appellant's Initial Brief. *See Emerson Elec. Co. v. South Carolina Dept. of Rev.*, 395 S.C. 481, 489 n.6, 719 S.E.2d 650, 654 n.6 (2011) (declining to consider argument raised for the first time in a reply brief); *Simmons v. SC Strong*, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 634 n.2 (Ct. App. 2013) (argument not preserved for appellate review where it was raised for the first time in a reply brief). As such, they should be stricken from his Initial Reply Brief.

Nos. 3 and 4 above also reference and rely on non-record materials. These materials were never presented to the Commission and are not part of the Commission record. As Respondents have noted previously, appellate review of a Commission decision is confined to the record before the Commission. S.C. Code Ann. § 1-23-380(4) (“[t]he review must be conducted by the court and must be confined to the record”); *see also Terry v. South Carolina Dept. of Health & Env'l Control*, 377 S.C. 569, 574, 660 S.E.2d 291, 294 (Ct. App. 2008) (appellate review of agency decisions “is confined to the record ...”). “This Court’s review is restricted to the evidence considered by the

appellate panel in reaching its decision,” and may not rely on evidence not considered by the Commission. Martin v. Rapid Plumbing, 369 S.C. 278, 288, 631 S.E.2d 547, 553 (Ct. App. 2006). As a result, arguments/issues Nos. 3 and 4 should be stricken for this additional reason.

In addition, Appellant’s Initial Reply Brief references and relies on non-record material in violation of this Court’s August 11, 2016 Order. In particular, Appellant’s Initial Reply Brief references and relies on alleged “medical evaluations from Dr. Carol Benoit and Dr. James Way along with United States Social Security Determination ...” (Initial Reply Brief pp. 8, 9). Respondents moved to strike these very same non-record items from Appellant’s first initial brief. (See Respondents’ Motion for Correction of and/or to Strike Items From Designation of Matter, dated June 17, 2016 and received by this Court on June 20, 2016, p. 4) (“First Motion to Strike”). On August 11, 2016, this Court granted Respondents’ motion to strike and required Appellant to file a new designation that “only designates matters that were actually presented to the lower court pursuant to Rule 210(c), SCACR ...”¹ As a result, all references to any alleged “medical evaluations from Dr. Carol Benoit and Dr. James Way along with United States Social

¹ In addition, although Appellant argues in his Initial Reply Brief that these documents should be included in the appellate Record because they “met or exceeded the requirement in Bettis v. Busbee, 283 S.C. 502, 323 S.E.2d 536, 538 (Ct. App. 1984) and In re Crawford, 205 S.C. 72, 80-81, 30 S.E.2d 841, 844 (1944)” and Martin v. Rapid Plumbing, 369 S.C. 278, 287, 631 S.E.2d 547, 552 (Ct. App. 2006), (Initial Reply Brief p. 9), this argument was not raised in his Initial Brief. Emerson, 395 S.C. at 489 n.6, 719 S.E.2d at 654 n.6; Simmons, 402 S.C. at 173 n.2, 739 S.E.2d at 634 n.2. Furthermore, Appellant’s argument fails to address the fact that “[a] conflicting doctor’s report created after a hearing does not mandate a new trial.” Martin, 369 S.C. at 287, 631 S.E.2d at 552, citing Ancrum v. Low Country Steaks, 317 S.C. 188, 193, 452 S.E.2d 609, 612 (Ct. App. 1994). As Appellant readily acknowledges, both Dr. Benoit and Dr. Way’s medical records were created after the May 21, 2015 hearing. (Initial Reply Brief pp. 8-9). As such, they do not meet the test for admissible after-acquired evidence.

Security Determination,” (Initial Reply Brief pp. ii, 8, 9), should be stricken from Appellant’s Initial Reply Brief.

Appellant’s Initial Reply Brief also references and relies on non-record material in violation of this Court’s October 25, 2016 Order. In particular, Appellant’s Initial Reply Brief references and relies on alleged “disability payments from Liberty Mutual and Aetna Insurance ...” (Initial Reply Brief pp. 4, 6, 7-8). This Court’s October 25, 2016 Order specifically struck those items from Appellant’s Designation of Matter and ordered him to exclude “all references to the items stricken by this order.” As a result, all references to any alleged “disability payments from Liberty Mutual and Aetna Insurance ...” (Initial Reply Brief pp. 4, 6, 7-8), should be stricken from Appellant’s Initial Reply Brief.

Finally, the Designation of Matter filed with Appellant’s Initial Reply Brief potentially designates non-record material. Appellant’s designation of “Email Communications from Appellant to Respondents” is both vague, in that it does not identify specific emails, content or dates, and most likely includes many non-record items which cannot be included in the Record on Appeal. Respondents have no objection to Appellant’s designation of his Form 30, dated August 25, 2015, so long as that designation does not include the voluminous attachments that were rejected by the Commission. (Appellate Panel Decision and Order of the South Carolina Workers’ Compensation Commission, filed Feb. 26, 2016, pp. 3-5) (Att. D to First Motion to Strike). To the extent Appellant intends to designate his Form 30 Attachments, Respondents move to strike them, as they are not part of the Commission Record. S.C. Code Ann. § 1-23-380(4); Terry, 377 S.C. at 574, 660 S.E.2d at 294; Martin, 369 S.C. at

288, 631 S.E.2d at 553. Appellant should be ordered to clarify which emails he intends to designate and whether he is attempting to designate the rejected attachments to his Form 30 and, subsequently, any non-record material should be stricken.

CONCLUSION

For the reasons stated herein, Respondents move this Court to strike arguments/issues raised in Appellant's Initial Reply Brief that were not raised in his Initial Brief. In addition, Respondents move this Court to strike references to and designations of all non-record material from Appellant's Initial Reply Brief and Designation, and to clarify certain designations as requested herein.

December 21, 2016

McANGUS GOUDELOCK & COURIE, LLC



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*Attorneys for Respondents Amazon.Com DEDC,
LLC and Zurich Ins. Co.*

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In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

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Clarence B. Jenkins, Employee,Appellant,

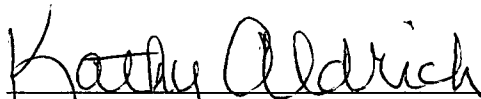
v.

Amazon.Com DEDC, LLC, Employer, and
Zurich Ins. Co., Carrier, Respondents.

PROOF OF SERVICE

I certify that on the 21st day of December 2016, I served the Respondents' **Motion to Strike Portions of Appellant's Initial Reply Brief and for Clarification and/or to Strike Designation of Matter** on Clarence B. Jenkins, *pro se*, by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

Clarence B. Jenkins
945 Wire Road
Neeses, South Carolina 29107



Kathy Aldrich
Legal Assistant to Helen F. Hiser
McAngus, Goudelock & Courie LLC
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P.O. Box 650007
Mount Pleasant, South Carolina 29465
(843) 576-2900

*Attorneys for Respondents Amazon.Com DEDC,
LLC and Zurich Ins. Co.*

mgc

Reply To

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Direct Dial: (843) 576-2930
helen.hiser@mgclaw.com

December 21, 2016

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DEC 28 2016

SC Court of Appeals

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Clarence B. Jenkins v. Amazon.com and Insurance Company of the State
of Pennsylvania c/o Sedgwick Claims Management Services, Inc.
Date of Accident: February 10, 2013
WCC File No.: 1303989
Our File No.: 20194.13164
Claim No.: 30130262998
Appeal No.: 2016-000598

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents' Motion to Strike Portions of Appellant's Initial Reply Brief and for Clarification and/or to Strike Designation of Matter, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the self-addressed, stamped envelope.

Also enclosed is our firm's check in the amount of \$25 for filing the motion.

If you have any questions, please do not hesitate to contact me.

Yours truly,

McAngus Goudelock & Courie, LLC


Helen F. Hiser

Enclosures

cc: Clarence B. Jenkins, *pro se*

J