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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2016-001257
W.C.C. File No.: 1414851

Michael Thompson Appellant,

v.

KMS, Inc./Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc. Respondents.

INITIAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Table of Authorities3

Statement of Issues4

Statement of the Case5

Statement of Facts6-8

Argument 8-15

I. Thompson abandoned his issues on appeal.....9

II. Substantial evidence supports the Commission finding Thompson knowingly and willfully misrepresented his physical condition 9-12

III. Substantial evidence supports the Commission finding KMS relied on the misrepresentation and the reliance was a substantial factor in the hiring and placement of Thompson 12-14

IV. Substantial evidence supports the Commission finding Thompson suffered from back problems from 2007 until 2013 “that were related to the backitself [sic].” 14

V. Substantial evidence supports finding the Commission did not err in refusing to find KMS “had time and opportunity to react to all medical issues from 2007-2013.” 14-15

Conclusion 15

TABLE OF AUTHORITIES

Cases

<i>Bennett v. Inv'rs Title Ins. Co.</i> , 370 S.C. 578, 635 S.E.2d 649 (Ct. App. 2006).....	9
<i>Brayboy v. WorkForce</i> , 383 S.C. 463, 681 S.E.2d 567 (2009).....	9-12
<i>Cooper v. McDevitt & Street Co.</i> , 260 S.C. 463, 196 S.E.2d 833 (1973).....	5, 8
<i>Cox v. Cox</i> , 290 S.C. 245, 349 S.E.2d 92, (Ct. App. 1986).....	14
<i>Fields v. Melrose Ltd. P'ship</i> , 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993)	11
<i>First Sav. Bank v. McLean</i> , 314 S.C. 361, 444 S.E.2d 513 (1994).....	9
<i>Hartzell v. Palmetto Collision, LLC</i> , 415 S.C. 617, 785 S.E.2d 194 (2016)	5-6,11,13
<i>Holmes v. Nat'l Serv. Indus., Inc.</i> , 395 S.C. 305, 717 S.E.2d 751 (2011)	6
<i>Lark v. Bi-Lo, Inc.</i> , 276 S.C. 130, 276 S.E.2d 304 (1981).....	6
<i>McCall v. Finley</i> , 294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987).....	14
<i>Mulherin-Howell v. Cobb</i> , 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005)	9
<i>Rabon v. Arrow Exterminating, Inc.</i> , 393 S.C. 510, 713 S.E.2d 347 (Ct. App. 2011)	11
<i>Shealy v. Doe</i> , 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006)	9,14
<i>Small v. Oneita Indus.</i> , 318 S.C. 553, 459 S.E.2d 306 (1995).....	13-14

Statutes and Rules

Rule 220(b)(2), SCACR.....	13
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STATEMENT OF THE ISSUES

- I. Whether Thompson abandoned all of his issues on appeal.
- II. Whether substantial evidence supports the Commission finding Thompson knowingly and willfully misrepresented his physical condition.
- III. Whether substantial evidence supports the Commission finding KMS relied on the misrepresentation and the reliance was a substantial factor in the hiring and placement of Thompson.
- IV. Whether substantial evidence supports the Commission finding Thompson suffered from back problems from 2007 until 2013 “that were related to the backitself [sic].”
- V. Whether substantial evidence supports finding the Commission did not err in refusing to find KMS “had time and opportunity to react to all medical issues from 2007-2013.”

STATEMENT OF THE CASE

In December 2014, Michael Thompson (Thompson) filed a workers' compensation claim against KMS, Inc. (KMS), alleging a work-related injury by accident to his back. (R.). Initially, KMS admitted Thompson sustained a compensable injury to his back on October 8, 2014, and provided him compensation benefits and medical treatment; however, after additional discovery, KMS asserted the claim was barred by the doctrine of fraud in the application for employment pursuant to *Cooper v. McDevitt & Street Co.*, 260 S.C. 463, 468, 196 S.E.2d 833, 835 (1973). (R.). Commissioner Avery B. Wilkerson, Jr. heard the matter and denied the claim. (R.). Specifically, Commissioner Wilkerson found Thompson committed fraud in the application for employment, vitiating the employer-employee relationship and barring him from benefits under the South Carolina Workers' Compensation Act. (R.).

Thompson appealed Commissioner Wilkerson's Decision and Order to the Appellate Panel of South Carolina Workers' Compensation Commission (the Commission). Following a hearing, the Commission unanimously affirmed the Decision and Order of Commissioner Wilkerson in its entirety. (R.). Thompson has now appealed the Decision and Order of the Commission to the South Carolina Court of Appeals.

STATEMENT OF FACTS

In June 2003, prior to his employment with KMS, Thompson was involved an automobile accident (the 2003 accident). (R.). During the hearing before Commissioner Wilkerson, Thompson initially denied any back injuries related to the 2003 accident, claiming any injury from the accident was limited to stiffness. (R.). Further, Thompson testified he was unaware he received medical treatment for lower back pain following the accident. (R.).

Medical records revealed Thompson presented to the Emergency Department at Lexington Medical Center with complaints of a headache, and neck, chest and back pain following the 2003

accident. (R.). Further, the medical records showed the physician who treated Thompson found Thompson had lumbar strain symptomatology and that he would benefit from a spine rehabilitation program to increase and regain the full motion of his neck and back. (R.). The physician also restricted Thompson from lifting more than thirty-five pounds or bending frequently. (R.). When confronted with the medical records, Thompson finally admitted he experienced a lower back injury from the 2003 accident and the injury was serious enough to warrant his employer to refer him to vocational rehabilitation. (R.). Thompson also admitted he was involved in several other motor vehicle accidents between 2003 and 2012, which resulted in injuries to his lower back. (R.).

In May 2008, Thompson visited his primary care physician, Dr. Kimberly Hicks, complaining he was “frequently having serious back trouble.” (R. ; Hicks Depo p.27). Dr. Hicks understood Thompson’s back issues were related to his prior motor vehicle accidents and weight fluctuations. (Hicks Depo). However, Thompson contended the back pain was due to his anxiety and sleep issues and was unrelated to the 2003 accident. (R.).

Thompson began working as a Press Brake Operator for KMS in September 2012. (R.). Shortly after his hire date, Thompson completed KMS’s post-hire medical questionnaire. (R.). The questionnaire included the following disclaimer: “*All statements and information provided are true to the best of my knowledge and belief. Misrepresentations, as to preexisting physical or mental conditions, may void your workers' compensation benefits.*” (R.) (emphasis added). Thompson admitted he read the disclaimer at the time he completed the questionnaire, he “understood every word of it,” and that he authenticated his signature beneath the disclaimer. (R.). Thompson also admitted that after he read the disclaimer, he answered “no” to the question inquiring if Thompson had ever sustained a back injury. (R.).

Thompson admitted he knew at the time he completed the post-hire questionnaire that he sustained a back injury in 2003, and he failed to disclose the back injury. (R.). Thomas also admitted he failed to disclose several other accidents which resulted in low back injuries. (R.). Instead, in response to the question regarding prior motor vehicle accidents, Thompson listed only one accident which occurred "twenty-years ago" and indicated there were no resulting injuries. (R.). Thompson alleged a fellow employee told him to deny prior back injuries on the questionnaire. (R.).

Dr. Hicks confirmed Thompson provided false information on the questionnaire. (R. ; Hicks Dep.). Dr. Hicks testified Thompson's responses on the questionnaire were contrary to what medical records from her office revealed. (R. ; Hicks Depo.). Additionally, Joe Canfield, Chief Executive Officer of KMS, testified regarding the purpose for administering post-hire medical questionnaires. (R.).

Following a hearing, Commissioner Wilkerson denied Thompson's claim, finding the employer-employee relationship was vitiated. Specifically, pursuant to *Cooper*, 260 S.C. at 468, 196 S.E.2d at 865, Commissioner Wilkerson found the following: (1) Thompson knowingly and willfully made a false representation as to his physical condition, (2) KMS relied upon the false representation in hiring Thompson, and (3) there was a causal connection between Thompson's false representation and his current alleged injury. (R.). Further, Commissioner Wilkerson ordered Thompson to reimburse KMS all benefits paid on behalf of Thompson under the South Carolina Workers' Compensation Act. (R.). Thompson appealed the decision to the Commission, which affirmed the Decision and Order of Commissioner Wilkerson in its entirety. (R.). This appeal followed.

STANDARD OF REVIEW

“The South Carolina Administrative Procedures Act (APA) governs judicial review of decisions by the Commission.” *Hartzell v. Palmetto Collision, LLC*, 415 S.C. 617, 622, 785 S.E.2d 194, 197 (2016). “An appellate court's review is limited to the determination of whether or not the Commission's decision is supported by substantial evidence or is controlled by an error of law.” *Id.*

“In workers' compensation cases, the Commission is the ultimate fact finder.” *Id.* Appellate courts must affirm the Commission's factual findings if they are supported by the evidence. *Holmes v. Nat'l Serv. Indus., Inc.*, 395 S.C. 305, 308, 717 S.E.2d 751, 752 (2011). “Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached.” *Id.* “[T]he substantial evidence test ‘need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment’; and a judgment upon which reasonable men might differ will not be set aside.” *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (quoting *Dickinson-Tidewater, Inc. v. Supervisor of Assessments of Anne Arundel Cty.*, 273 Md. 245, 256, 329 A.2d 18, 25 (1974)).

ARGUMENT

Despite Thompson's arguments to the contrary, the Commission correctly determined Thompson's workers' compensation claim is barred because of the false statements he included in his post-hire questionnaire. The Commission's findings on all prongs of the *Cooper* test are supported by substantial evidence. *Cooper*, 260 S.C. at 468, 196 S.E.2d at 865.

I. Appellant abandoned all of his issues on appeal.

In the *two* pages of the argument section of Appellant's initial brief, Appellant fails to cite to at least one case, statute, or supporting rule of law. It is well settled that issues are abandoned when an appellant merely asserts conclusory arguments and statements without providing supporting case law. Accordingly, all of Appellant's issues were abandoned and should not be considered by this Court. *See Bennett v. Inv'rs Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) ("Appellants fail to cite any case law for this proposition and make only conclusory arguments in support thereof. Thus, Appellants abandoned this issue on appeal."); *Shealy v. Doe*, 370 S.C. 194, 205-06, 634 S.E.2d 45, 51 (Ct. App. 2006) (declining to address an issue, finding the issue abandoned when the appellant failed to cite to any case law for the proposition and made only conclusory arguments in support of the proposition); *Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (noting when an appellant fails to cite any supporting authority for his position and makes conclusory arguments, the appellant abandons the issue on appeal "and it need not be addressed by this court"); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) ("Appellant fails to provide arguments or supporting authority for his assertion. Thus, he is deemed to have abandoned this issue.").

II. Substantial evidence supports the Commission finding Thompson knowingly and willfully misrepresented his physical condition.

Should the Court determine Thompson did not abandon this issue, KMS submits the Commission did not err in finding Thompson knowingly and willfully misrepresented his physical condition. The facts of this case are similar to the facts outlined in *Brayboy v. WorkForce*, 383 S.C. 463, 464, 681 S.E.2d 567, 567 (2009). In *Brayboy*, Brayboy sustained a back injury in 2003, which required lumbar fusion surgery. *Id.* Brayboy's employment application included

disclaimers similar to those outlined in Thompson's post-hire questionnaire. *Id.* at 464-65, 681 S.E.2d at 567-68. "Notably, Brayboy signed his name under these cautionary statements. Despite these warnings, Brayboy responded in the negative to all questions inquiring if Brayboy had prior back injuries, physical defects, medical conditions, or previous workers' compensation claims." *Id.* at 465, 681 S.E.2d at 568. "Brayboy testified he did not report any of his prior injuries to WorkForce as he did not feel the injuries were relevant to a construction job. Also, Brayboy stated he did not include the cave-in injury as it had 'cleared up very quickly.'" *Id.* at 466, 681 S.E.2d at 568. Our supreme court held it was "firmly convinced" the employer established all three factors of *Cooper*. *Id.* at 467, 681 S.E.2d at 569. The court noted Brayboy failed to report a host of prior back problems and admitted he provided false information on the employment application. *Id.*

Here, similarly to *Bradboy*, Thompson failed to report a host of prior back problems during the application process with KMS. Thompson knowingly failed to disclose the 2003 accident and resulting prior back injury or his restrictions to KMS. The severity of the back injury from the 2003 accident caused Thompson's treating physician to restrict Thompson from lifting more than thirty-five pounds and from frequent bending.

Furthermore, Thompson admitted that in 2008 he reported to Dr. Hicks, his primary care physician, that he was "frequently having serious back trouble." (R.). Dr. Hicks confirmed Thompson reported his back problems to her in 2008 and she believed the back problems were related to Thompson's motor vehicle accidents and weight fluctuations. Thompson further admitted he suffered from "serious" back pain from 2007 until at least 2013. (R.).

Importantly, Thompson admitted he knew at the time he completed the post-hire questionnaire in 2012 that he sustained prior back injuries and he failed to disclose the injuries on the questionnaire. (R.). Thomas also admitted he failed to disclose several other accidents which

resulted in a low back injury. (R.). Instead, in response to the question regarding prior motor vehicle accidents, Thompson listed only one accident which occurred "twenty-years ago" and indicated there were no resulting injuries. (R.). Moreover, Dr. Hicks confirmed Thompson provided false information on the questionnaire. (R. ; Hicks Dep.). She testified Thompson's responses on the questionnaire were contrary to what medical records from her office revealed. (R. ; Hicks Depo.). *Id.* at 467-68, 681 S.E.2d at 569.

Thompson's suggestion that he could make material misrepresentations on the application because a fellow employee told him to deny prior back injuries is a baseless position. (R.). *See Brayboy*, 383 S.C. at 467, 681 S.E.2d at 569 ("The suggestion that Brayboy could make material misrepresentations on his employment application because he believed he was fit for construction work is a specious position."). Consequently, substantial evidence supports the Commission finding Thompson knowingly and willfully misrepresented his physical condition in the employment application. *Hartzell, LLC*, 415 S.C. at 622, 785 S.E.2d at 197; *cf. Rabon v. Arrow Exterminating, Inc.*, 393 S.C. 510, 516, 713 S.E.2d 347, 350 (Ct. App. 2011) ("Therefore, because Arrow never asked Rabon if he had any current or prior injuries, and regardless of his injuries, Rabon was physically able to do all the jobs Arrow hired him to do, we find Rabon did not knowingly and willfully make a false representation as to his physical condition.").

III. Substantial evidence in the record supports the Commission finding KMS relied on the misrepresentation and the reliance was a substantial factor in the hiring and placement of Thompson.

Thompson's second "argument" merely states "with no limitations and at 100% recovery from a minor injury, you have no reliance on placement, and Respondent testified it was not a factor." (Appellant Initial Br. 2). This conclusory statement is insufficient to preserve this issue for appellant review. *See Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106, 439 S.E.2d 283, 285

(Ct. App. 1993) (“[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.”).

Moreover, even if the argument was preserved, evidence demonstrated KMS relied upon this information in the hiring and placement process. The court in *Brayboy* held the employer presented credible evidence it relied on the employment application. 383 S.C. at 467-68, 681 S.E.2d at 569. The court stated, “the employment application is important in the hiring and placement decisions. Clearly, the questionnaire portion of the application protects the employer and employee. Had Brayboy given truthful information, WorkForce would have been able to give him suitable job assignments, which would not have included heavy lifting.” *Id.* Despite Thompson’s statement that KMS testified the post-hire questionnaire “was not a factor,” here, as in *Brayboy*, the employer testified it relied on the questionnaire for placement purposes and had Thompson provided accurate information on the questionnaire, KMS could have given Thompson suitable job assignments not to include the heavy lifting that caused the back injury. *Id.*

Canfield, Chief Executive Officer of KMS, testified regarding the purpose for administering post-hire medical questionnaires. (R.). He stated KMS sought to learn of any injuries or conditions an employee may have in order for KMS to determine whether reasonable accommodations needed to be made to hopefully prevent the employee from further injuring themselves or another person. (R.). Further, he testified that because of the physical nature of many jobs at KMS—including Thompson’s job—it was important for KMS to be aware of any prior back injuries or problems an employee may have in order for KMS to make informed decisions regarding job placement. (R.).

Canfield stated he was not aware Thompson had been in the 2003 accident which resulted in a low-back injury. (R.). Canfield testified Thompson's failure to disclose his prior back issues

prevented KMS from addressing this potential issue. (R.). He stated Thompson's failure to include the prior back injuries was material to Thompson's employment because his job included heavy manual labor and required the ability to lift forty to fifty pounds and bend for extended periods of time. (R.). Canfield stated that because Thompson concealed his prior back problems, KMS was not afforded the opportunity to investigate the injury and consider accommodations which may have prevented Thompson's injury. (R.). Accordingly, substantial evidence in the record supports finding KMS relied on Thompson's fraudulent application. *Id.*; *Hartzell*, 415 S.C. at 622, 785 S.E.2d at 197 ("An appellate court's review is limited to the determination of whether or not the Commission's decision is supported by substantial evidence or is controlled by an error of law."); *see also Small v. Oneita Indus.*, 318 S.C. 553, 554 n.1, 459 S.E.2d 306, 306 n.1 (1995) (noting the employer testified the appellant's prior injury would affect job placement decisions, not hiring decisions, and affirming the denial of workers' compensation benefits due to a false representation on an employment application).

IV. Substantial evidence in record supports the Commission finding Thompson suffered back problems from 2007 until 2013 "that were related to the backitself [sic]."

To the extent this argument is preserved, the argument is wholly without merit as Thompson admitted he suffered from "serious" back pain from 2007 until at least 2013. (R.). Moreover, even if the Commission erred, Thompson cannot show prejudice as a result of the ruling. As previously stated, Thompson admitted he provided false information regarding his prior back problems on his post-hire questionnaire and an KMS employee testified KMS relied on the fraudulent information. *See McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("Appellate courts recognize—or at least they should recognize—an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter."); *see also Cox v.*

Cox, 290 S.C. 245, 249, 349 S.E.2d 92, 94 (Ct. App. 1986) (holding the appellant must show prejudice resulting from an erroneous ruling and affirming when the appellant failed to show reversible error); Rule 220(b)(2), SCACR (“The Court of Appeals need not address a point which is manifestly without merit.”).

V. Substantial evidence in record supports finding the Commission did not err in refusing to find KMS “had time and opportunity to react to all medical issues from 2007-2013.”

As with his previous arguments, KMS submits Thompson’s final argument is not preserved for review as Thompson merely makes conclusory statements without providing any supporting authority. *See Shealy*, 370 S.C. at 205-06, 634 S.E.2d at 51 (declining to address an issue, finding the issue abandoned when the appellant failed to cite to any case law for the proposition and made only conclusory arguments in support of the proposition).

To the extent the argument is preserved, the argument is meritless. Although Thompson worked for KMS previously, left, and was rehired, KMS did not require a questionnaire as part of the application process when Thompson began working at KMS the first time. It was only after Thompson was rehired and provided false information on the questionnaire that KMS learned of the prior back injuries.

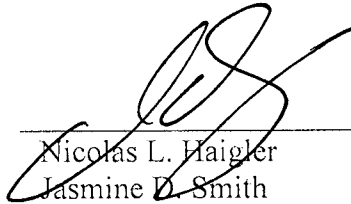
Furthermore, whether KMS chose not to terminate Thompson following an injury has no bearing on KMS’s reliance on Thompson’s misrepresentation. *See Small*, 318 S.C. at 555, 459 S.E.2d at 307 (“We find no authority to hold that the failure to terminate an employee upon discovery of a misrepresentation subsequent to an injury vitiates the employer's reliance. To so hold would be to require an employer who learns of a misrepresentation subsequent to an injury to elect either termination, in which case it may be subject to a wrongful discharge suit, or retention

of the employee, in which case it is liable for worker's compensation. We decline to put the employers of this state on the horns of such a dilemma.”).

CONCLUSION

KMS submits Thompson abandoned all of his issues on appeal as he only makes short, conclusory statements in his brief without providing supporting case law. Alternatively, should the Court find the arguments are preserved, substantial evidence in the records supports the findings of the Commission; therefore, this Court must affirm.

Respectfully,



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APPEAL FROM SOUTH CAROLINA
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WCC File No. 1414851

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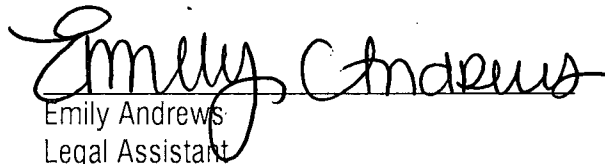
Michael ThompsonAppellant,

v.

KMS, Inc./Bridgefield Casualty Insurance Company c/o Summit Holdings, Inc.Respondents.

PROOF OF SERVICE

I certify that I have served a copy of the Respondents' Initial Brief, on the following: Michael Thompson, Pro Se, 116 School Bus Road, West Columbia, SC 29172 (via Certified Mail and U.S. Mail), Honorable Jenny Abbott Kitchings, Judicial Director, South Carolina Court of Appeals, 1015 Sumter Street, Columbia, SC 29201 (via hand-delivery), on December 28, 2016.



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**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Respondents propose the following be included in the Record on Appeal:

1. May 6, 2016 Decision and Order of the Appellate Panel of the South Carolina Workers' Commission
2. September 15, 2015 Hearing Transcript
3. Medical Records from Dr. Devin Troyer, Physical Medicine and Rehabilitation, Dates of Service July 07, 2003 to October 01, 2003
4. Medical Records from Lexington Family Practice, Dates of Service May 02, 2008 to July 25, 2014
5. July 31, 2003 Medical Records from Lexington Medical Center
6. Deposition Testimony of Dr. Kimberly Hicks
7. Deposition Testimony of Joe Canfield
8. Respondents' Exhibit A—Post-Hire Medical Questionnaire

I certify that this designation contains no matter which is irrelevant to this appeal.

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Dated: 12-28-16

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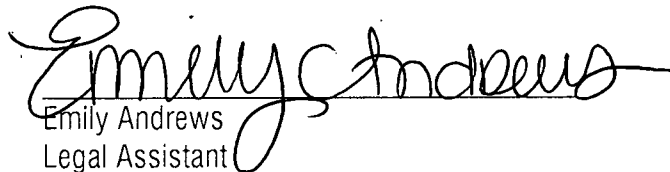
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PROOF OF SERVICE

I certify that I have served a copy of the Designation of Matter to be included in the Record on Appeal, on the following: Michael Thompson, Pro Se, 116 School Bus Road, West Columbia, SC 29172 (via Certified Mail and U.S. Mail), Honorable Jenny Abbott Kitchings, Judicial Director, South Carolina Court of Appeals, 1015 Sumter Street, Columbia, SC 29201 (via hand-delivery), on December 28, 2016.



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December 28, 2016

VIA HAND DELIVERY

The Honorable Jenny Abbott-Kitchings
Clerk, South Carolina Court of Appeals
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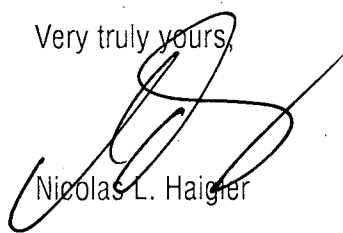
RE: Michael S. Thompson v. KMS, Inc.
WCC File No.: 1414851
Date of Accident: 10/08/14
Appeal No.: 2016-001257
Our File No.: 6288/8124

Dear Ms. Kitchings:

Please find enclosed herewith the original and one (1) copy of the Respondents' Initial Brief and an original and one (1) copy of the Respondents' Designation of Matter to be Included in the Record on Appeal in the above-referenced matter. We would appreciate your filing the original Brief and Designation of Matter and returning a clocked-in copy of the same to us via our courier.

By copy of this letter and aforementioned documents to the Appellant, we are serving him with a copy of the Respondents' Initial Brief and Designation of Matter.

Very truly yours,



Nicolas L. Haigler

NLH:esa

Enclosures

cc: Mr. Michael S. Thompson, Pro Se (via Certified Mail and U.S. Mail)
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