

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE WORKERS COMPENSATION COMMISSION

Aisha Taylor, Commissioner
T. Scott Beck, Commissioner
Avery B. Wilkerson, Commissioner

WCC File No. 1318602

Appellate Case No. 2017-001246

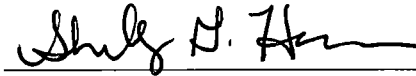
Dorothy Miller,..... Respondent,

v.

Husqvarna, Employer, and Ace American Insurance Company,Appellants.

INITIAL BRIEF OF APPELLANT

June 28, 2017



E. Ros Huff, Jr., Esquire #2767
Shelby G. Hapeshis, Esquire #74731
HUFF & HAPESHIS, LLC
Post Office Box 1935
Irmo, South Carolina 29063
(803) 252-2232 telephone
Attorneys for Husqvarna, Employer, and Ace
American Insurance Company, Appellants

Other Counsel of Record:

Richard C. Alexander
Shelly Leeke Law Firm
3614 Ashley Phosphate Road
North Charleston, SC 29418
Telephone 843-297-8485

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QUESTIONS PRESENTED

1. Did the Commission err in finding as fact that the Claimant sustained a compensable injury by accident to her shoulders, the error being that the evidence does not support the fact that the Claimant sustained an injury from the accident?
2. Did the Commission err in finding as fact that the Claimant sustained a compensable injury by accident to her shoulders, the error being that the Claimant did not meet her burden of proof that she sustained an injury from the accident?
3. Did the Commission err in concluding as a matter of law that the Claimant sustained a compensable injury by accident to her shoulders, the error being that the evidence does not support the fact that the Claimant sustained an injury from the accident?
4. Did the Commission err in concluding as a matter of law that the Claimant sustained a compensable injury by accident to her shoulders, the error being that the Claimant did not meet her burden of proof that she sustained an injury from the accident?
5. Did the Commission err in finding as fact that the Claimant is entitled to temporary total disability benefits, the error being that the evidence does not support the finding?
6. Did the Commission err in finding as fact that the Claimant is entitled to temporary total disability benefits, the error being that the Claimant did not meet his burden of proof?
7. Did the Commission err in concluding as a matter of law that the Claimant is entitled to temporary total disability benefits, the error being that the evidence does not support the finding?
8. Did the Commission err in concluding as a matter of law that the Claimant is entitled to temporary total disability benefits, the error being that the Claimant did not meet his burden of proof?
9. Did the Commission err in finding as fact that the Claimant is entitled to medical treatment, the error being that the evidence does not support the finding?
10. Did the Commission erred in finding as fact that the Claimant is entitled to medical treatment, the error being that the Claimant did not meet his burden of proof?
11. Did the Commission err in concluding as a matter of law that the Claimant is entitled to medical treatment for her arms and shoulders, the error being that the evidence does not support the finding?
12. Did the Commission err in concluding as a matter of law that the Claimant is entitled to medical treatment for her arms and shoulders, the error being that the Claimant did not meet his burden of proof?

13. Did the Commission err in appointing Dr. Nahigian as the authorized treating facility, the error being that the defendants have the right to choose the treating physician pursuant to McKinney v. Kimberly Clark Corp?
14. Did the Commission err in determining that the claimant was not at MMI for her wrist injuries and the defendants were not entitled to an overpayment, the error being that this finding is not supported by the evidence and is an error of law?
15. Did the Commission err in determining that the defendants are responsible for all previously sought medical treatment for the arms and shoulders, the error being that this finding is not supported by the evidence and is an error of law?

STATEMENT OF THE CASE

This matter was before the Single Commissioner on August 17, 2016 in Columbia, South Carolina. The hearing was to determine issues set forth in Defendants' Form 21. This is an admitted accident to the claimant's **right hand injury (wrist)** which occurred on October 8, 2013 and the defendants filed a Form 21 stating the claimant was at MMI for that body part and to pay permanency and request overpayment of temporary total disability.

The claimant contends in a Form 50 filed July 2015, years after the initial accident, and a year after she last worked for the employer, that her shoulders are also injured. She further states that she is not at MMI for her wrist and wants additional treatment. Defendants denied compensability to the shoulders because the medical records show that she has had shoulder problems since 2005 and consistently complained of shoulder problems until the date of accident. She never mentions problems with her shoulders as a result of her job in any medical record until 2015. In fact, the claimant states on numerous occasions that her problems with her shoulders were the result of a whiplash injury in 2009 and she has been in pain ever since. (Def.'s APA p. 465)

The purpose of the hearing was to determine if employer/carrier is entitled to pay compensation to the Claimant, if employer/carrier is entitled to a credit for temporary total

disability benefits paid in excess of award, and if the claimant suffered compensable repetitive trauma injuries. An order was issued on November 9, 2016, which found that the claimant was not at MMI for her wrist issue and found that the shoulders were compensable because “the claimant suffered a repetitive trauma **exacerbations** to her **preexisting** bilateral shoulder conditions” including bilateral rotator cuff tears due to years of overhead work. The hearing commissioner ordered payment of all medical treatment, directed treatment through Dr. Nahigian, and payment of temporary total disability benefits. Defendants appealed. The Appellate Panel affirmed the decision of the Hearing Commissioner and the Defendants appealed to this Court.

ARGUMENTS

1. **The Commission erred in determining that the claimant has repetitive trauma exacerbations to her preexisting bilateral shoulder conditions including bilateral rotator cuff tears due to years of overhead work.**

(Questions Presented 1-4; 11, 12, & 15)

The Commission found as fact that the Claimant has alleged repetitive trauma **exacerbations** to her **preexisting** bilateral shoulder conditions including bilateral rotator cuff tears due to years of overhead work. (H.T. p. 8, l. 1-23; Defendant’s APA #5, pp. 807-11). Because this finding incorporates two separate facets of workers compensation law: 1. Aggravation of a pre-existing condition and 2. Repetitive Trauma. As such, I will address each fact separately.

The claimant did not meet the legal requirements of an aggravation of a pre-existing condition. Under S.C. Code 42-9-35, the claimant has the burden of meeting specific requirements.

(A) The employee shall establish by a preponderance of the evidence, including medical evidence, that:

- (1) The subsequent injury aggravated the preexisting condition or permanent physical impairment; or,
- (2) The preexisting condition or the permanent physical impairment aggravates the subsequent injury.

No doctor has stated that the claimant suffered an aggravation of a pre-existing condition and no medical questionnaire was offered stating the same. Therefore the finding that she had an aggravation of her pre-existing condition was erroneous. Further, even if there were an aggravation no one has determined to what extent it came if any from a work injury.

The claimant also did not meet the requirements of a repetitive trauma injury. “Repetitive trauma injuries...have a gradual onset caused by the cumulative effect of repetitive traumatic events or “mini accident” See Schurlknight v. City of North Charleston, 352 S.C. 175, 174, 574 S.E.2d 194 (S.C. 2003). The first time that the repetitive nature of the claimant’s job was ever brought into question was in the claimant’s 2015 appointment with Dr. Nahigian. She never mentioned anything about the repetitive nature of her job with regards to her shoulder in the numerous years prior to this date of injury. (Dep. of Dr. Nahigian p. 10) All shoulder complaints mentioned by the claimant are listed below:

<i>Date</i>	<i>Provider</i>	<i>Narrative</i>	<i>APA</i>
11/09/05	Dr. Singleton	Follow up after ER visit, noticed low back/right arm pain. Assessment: CT head, PT evaluation 1. headache 2. lumbar/cervical strain, right arm pain	710
11/22/05	Dr. Singleton	Follow up after MVA, still complains of low back, head, face pain. Assessment: continue meds/PT 1. Headache 2. Cervical strain 3. Lumbar strain 4. Right arm pain	711
12/22/05	Dr. Singleton	Follow up after MVA, still complains of low back pain off/on, wants another x ray of back. Assessment: Improved, d/c Motrin, Rx Lodine 1. Headache 2. Cervical strain 3. Lumbar strain 4. Right arm pain 5. Costochondritis	714
01/06/06	Dr. Singleton	Follow up after MVA-doing a lot better Assessment: Released, d/c Motrin, Rx Lodine 1. Headache 2. Cervical strain	715

		3. Lumbar strain 4. Right arm pain	
09/08/08	Family Health Dr. W. Deas	.....also needs something for arthritis pain in her shoulders. Exam: right shoulder pain/stiffness	778
09/23/08	Family Health J. Degen	..... pain in shoulders/low back, pressure, intermittent, aggravated by lifting	777
12/17/09	TRMC	....presents after MVA, rear-ended IMPRESSION: Shoulder sprain	45
12/29/09	Family Health Dr. Apraku	Presents after MVA, pain in neck/back, headaches, shoulders and abdominal pain. Exam: tenderness on palpation/spasms of shoulders	774
04/19/10	Family Health Dr. W. Deas	.....pain down right arm and some down left arm for approximately 3 weeks; bilateral arm pain Assessment: Inflammatory myopathy (myositis)	771
05/04/10	Family Health C. Jackson	Pain head, neck, shoulders, arms and down left leg. Complains of pain in joints with "chill feeling" for 5-6 months following MVA.	768
06/26/10	TRMC	PT: pain from base of skull down into bilateral upper trapz	196
06/29/10	TRMC	PT: pain to both shoulders and down forearms.	186
08/19/10	Family Health	Patient presents for review of MRI and follow up after MVA in December 2009, MRI showed mild disc protrusion at C5/6.	763
07/19/11	Family Health	Patient presents with continuous abdominal and neck pain-says her whiplash injury is acting up again-needs prescription	761
10/22/11	TRMC	Patient presents with severe pain in right shoulder. States right arm has been hurting "for a while". History of arthritis, left arm hurts "on and off some"...	315
02/12/12	TRMC	severe pain in bilateral shoulders, decreased ROM due to pain x 2 weeks. History of arthritis... Follow up with Dr. Marro for shoulder pain.	351
04/29/12	TRMC	...bilateral arm pain, worse with movement, toradol injection Impression: Shoulder pain, Rx Lortab	395
09/27/12	TRMC	severe pain to both shoulders. Pain to both shoulders that radiates down arms x 1 week. States "got whiplash a few years ago and has trouble with pain ever since"	465
12/19/12	Family Health	Exam reveals full ROM neck/back and bilateral frozen shoulders with pain on partial abduction. Assessment: Shoulder tendonitis	759
02/08/13	Family Health	presents with right and left arm/shoulder pain, neck pain and right/left hand stiffness/pain and pain in back (thoracic area) on inhalation... Assessment: -Muscle spasm in neck/shoulder	757
03/29/13	Family Health	Patient complains of right shoulder-joint/hand pain x 4 days. Right shoulder and left shoulder after whiplash 1 ½ years ago- ... Exam: tenderness/pain in shoulders, right shoulder- active/passive motion was abnormal. Assessment: Arthralgia of shoulder region; Shoulder tendonitis Plan: Toradol injection, consult with ortho surgery in Columbia for right shoulder pain. Rx: Hydrocodone	756

08/21/13	Family Health	Still having spasms in neck/shoulder muscles-restart Flexeril.	754
08/30/13	TRMC	presents with severe pain in bilateral arms from shoulders down,	580
11/21/13	Family Health	Still has spasms in neck and shoulder muscles-has been unable to afford pain and asthma medications. Complains of pain in right and left shoulder, neck, right and left leg, right foot pain. Exam: shoulders-muscle spasms. Discussed Trigger Point Therapy	750
02/10/15	Family Health	....complains of Neck and arm pain after whiplash injury, intermittent knee/leg pain. Also hand/finger arthritis with pain in arms	744
04/30/15	Family Health	.....spasms in right neck and shoulder muscles-restart Flexeril.	741
06/24/15	Family Health	Presents with pain in right arm from shoulder to wrist, also pain in neck and fingers are numb. Had surgery on arm-was going to PT but didn't go today... Pain in right neck/shoulder areas with numbness. Had shoulder surgery in past and also has right ulna nerve injury. Has a lot of spasms in right neck/shoulder muscles. Compliance with PT is stressed.	739
07/06/15	Family Health	Patient presents after ER visit on 07/02/15-xrays showed torn rotator cuff tear-needs referral to Ortho. Pain located in right shoulder-sharp. Exam: shoulder joints have full ROM, no instability or weakness. Right shoulder-tenderness on palpitation at cuff insertion, pain on active and external motion/rotation; Left shoulder-normal exam Assessment: -Pain in right shoulder joint(s) X ray from ER showed rotator cuff tear, sling applied, refer to Ortho	738
07/13/15	Family Health	Also had visit here on 07/06/15-rotator cuff tear-needs referral to Ortho. Will get shoulder MRI's via TRMC charity program. Exam: Pain-persistent, sharp, dull, burning, throbbing Assessment: -Chronic left rotator cuff sprain (capsule) -Left rotator cuff tendonitis -Pain in finger joints -Muscle spasms...	736
08/03/15	Family Health	Presents for routine follow up-continues bilateral shoulder pain... Pain located in right and left shoulders-throbbing/aching. MRIs showed complete tears of supraspinatus tendons-says she got injured on the job. Will refer her back to her workplace to arrange WC. Assessment: -Partial tear of right rotator cuff tendon -Left rotator cuff tendonitis	736
09/22/15	SCOI: Dr. Buckaloo	.....bilateral shoulder pain x years, presents today to evaluate recently obtained MRI confirming chronic rotator cuff tears	807

		<p>w/retraction and atrophy of associated muscle. Reports she believes that her 30 years of work at Husqvarna was partially responsible for her rotator cuff condition. Reports that she does not present today for Workmen's Comp.</p> <p>RIGHT SHOULDER MRI Comparison Plain film dated 07/02/15. Clinical Hx: Shoulder pain for years w/limited ROM, evaluate for rotator cuff tear.</p> <p>IMPRESSION:</p> <ol style="list-style-type: none"> 1. Full-thickness full width tearing of the supraspinatus tendon with approximately 3 cm of tendinous retraction. Atrophy of the supraspinatus muscle. 2. Tendinopathy of the infraspinatus tendon with some muscle atrophy. Tearing of the anterior fibers should be considered. 3. Degeneration and probable tearing of the superior labrum. 4. Soft tissue fullness of the rotator cuff interval w/mild associated edema, query symptoms of frozen shoulder. 5. Tendinopathy of the subscapularis tendon. <p>LEFT SHOULDER MRI: IMPRESSION:</p> <ol style="list-style-type: none"> 1. Complete tear of the supraspinatus tendon, retracted to the level of acromioclavicular joint. Atrophy of the supraspinatus muscle belly noted. 2. Acromioclavicular hypertrophy. 3. Tendinopathy of the infraspinatus tendon w/muscular atrophy. 4. Small nondisplaced degenerative tear of the superior labrum. <p>Pt reports she is currently not pursuing surgical options, is having pain and difficulty w/overhead activities for which she reports is a chronic condition. ... Rotator cuff images by MRI are consistent with chronic retracted supraspinatus tendon injuries. The age of injury is unknown but certainly chronic given the atrophy of the associated supraspinatus muscle belly of the shoulder.</p>	
11/11/15	Dr. Nahigian	<p>Patient is seen for initial evaluation of right shoulder injury from using air guns on assembly line for 30 years, onset 2013. Assessment: Complete tear of right rotator cuff, AC joint arthrosis Treatment: exhausted conservative management. Proceed with shoulder arthroscopy, repair, resection and decompression. Patient has a very significant only retracted tear and understands it may not be repairable.</p>	1909
06/13/16	SCOI: Dr. Buckaloo	<p>Questionnaire: 1. Based upon review of med records, can state to a reasonable</p>	1819

	<p>degree of medical certainty that CL suffered from bilateral shoulder pain, arthritis/artralgias, muscle spasms, "frozen" shoulder symptoms and was diagnosed w/bilateral shoulder tendonitis prior to the 10/08/13 incident.</p> <p>2. Based upon treatment/evaluation he provided and upon review of CL's med records, can state to a reasonable degree of medical certainty that the most probable cause of CL's bilateral complaints stem from pre-existing conditions, predating the accident of 10/08/13.</p>	
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While Dr. Nahigian states that the claimant suffered from a repetitive injury with regards to her shoulder, he admitted that he did not know: the duration of overhead work before returning to neutral position; has no idea what type of air gun was used; no idea as to the weight of the air gun; no idea as to the level of the air gun, the force needed to use the air gun; or the frequency of air gun use in an 8 hour date. He testified that he “cannot state to reasonable degree of medical certainty how long the tear was present in the rotator cuff.” (HT p. 43 lines 20-23) He discussed in length the fact that the claimant had pre-existing arthritis and degenerative issues. (HT p. 43) He further testified that her job can be contributory, but no way can he say it’s the only reason why this occurred and that the problems pre-existed her date of injury (HT p. 51 lines 8-13)

Under § 42-1-172 (A): "Repetitive trauma injury" means an **injury which is gradual in onset and caused by the cumulative effects** of repetitive traumatic events.

This tear which became evident in 2015, did not show up until a year after the claimant stopped working for Husqvarna. However, the surgery was already contemplated for the claimant’s shoulder in 2013. Moreover, the job duties were not the cause as the claimant herself stated in numerous medical records that her shoulder began and continued hurting after her 2009 whiplash incident. The claimant herself states in a medical record of 2015 that the shoulder problems were the result of a whiplash injury. She has complained of shoulder pain since 2005. The

record also shows that she has had shoulder pain since 2008 in the form of arthritis and was treated with Dr. Apraku for the pain. She treated for a whiplash injury in 2009 and has visited the doctor consistently for shoulder problems since that date. In September of 2012, she again complains that her shoulder problems are from her whiplash injury and she has not been the same since. On August 30, 2013, less than two months before her alleged date of accident with the employer, she presented with severe shoulder pain to TRMC and mentions nothing about her work. (Def.'s APA p. 580) At her visit in February 2015 at Family Health Centers, she mentions her neck pain cause was the motor vehicle accident and states nothing about a work injury. (Def.'s APA p. 744) As stated above she had extensive treatment for her shoulder and there was no mention of any work injury to her shoulder.

Dr. Buckaloo, who treated the claimant numerous times for her wrist problems specifically stated that the claimant had pre-existing shoulder issues and the issues were degenerative and not work related in his treatment note of 2013. Moreover, the claimant returned to Dr. Buckaloo on September 22, 2015 and he opined that while the bilateral shoulder injuries were age-indeterminate, they were certainly chronic given the atrophy of the associated supraspinatus muscle belly of the shoulder. He never stated that the claimant sustained an aggravation to her shoulders as a result of the work injury. (Defendants' APA #5, p. 811) He again reiterated that the claimant's problems with her shoulders were not work related in his questionnaire of 2016. He specifically stated that that the bilateral shoulder complaints stem from preexisting conditions predating her October 8, 2013 right wrist injury. (Defendants' APA #21, pp. 1819-20).

The Hearing Commissioner and the Appellate Panel gave more weight to Dr. Nahigian's opinion rather than Dr. Buckaloo's because Dr. Nahigian did her shoulder surgery and Dr. Buckaloo only saw the claimant one time. This statement is untrue. Dr. Buckaloo treated the claimant for

years for her work injuries as well as for a neck problem she was having in 2010 in which she had radicular pain. He knew of her medical history and was present at the onset of the claim. He stated to a reasonable degree of medical certainty that the injury was not work related. Moreover, Dr. Buckaloo's medical records correspond with this questionnaire.

Dr. Nahigian's opinion changed three times as to whether the shoulder problems were work related. In fact, Dr. Nahigian had no knowledge of the claimant having prior shoulder problems before the 2013 date of injury. Dr. Nahigian himself admitted at his deposition that he had virtually no knowledge of the claimant's job duties. As such, the claimant did not meet her burden of proving a repetitive trauma accident.

2. The Commission erred in determining that the claimant was entitled to temporary total disability benefits and medical benefits.

(Questions Presented 5-12, 14, and 15)

The claimant received extensive medical treatment for her wrist, which is the only accepted body part in this claim. The claimant was found at MMI and released by numerous doctors for her only accepted body parts. Therefore, the claimant is not entitled to TTD and medical benefits with regard to her wrists. Maximum Medical Improvement is an appropriate point to terminate temporary benefits. Smith v. South Carolina Department of Mental Health, 335 S.C. 396, 517 S.E.2d 694 (1999). Moreover, the claimant cannot show an inability to earn wages as she testified that she has worked since the date of MMI sitting with the elderly and was pursuing further work doing the same. To be entitled to temporary total disability benefits, one must have a total incapacity to work. S.C. Code Ann. Section 42-9-10 (Supp. 2002); 67 S.C. Code Ann. Regs 502(F) (Supp. 2008). It is clear that the claimant is not entitled to further benefits and the defendants should receive credit for the TTD paid after the last date of MMI.

The claimant did not meet her burden of proving a compensable aggravation caused by repetitive trauma to her shoulder entitling her to medical benefits and TTD as discussed above. Also, there is no evidence that any shoulder problems are keeping her from work as she has worked since the date of accident, is pursuing other jobs, and in vocational rehabilitee. The Commissioner's finding of TTD and medical benefits was in error.

3. The Commission erred in determining that Dr. Nahigian is the authorized treating physician.

(Question Presented #13)

The Commission erred in determining that Dr. Nahigian should provide medical treatment. There was no basis for this appointment and this was error because this is not a situation under 42-15-60(a), that calls for the Commission to appoint a treating physician because the shoulder is a denied body part and treatment has been authorized for the wrist:

(A) The employer shall provide medical, surgical, hospital, and other treatment, including medical and surgical supplies as reasonably may be required, for a period not exceeding ten weeks from the date of an injury, to effect a cure or give relief and for an additional time as in the judgment of the commission will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty. In addition to it, the original artificial members as reasonably may be necessary must be provided by the employer. During any period of disability resulting from the injury, the employer, at his own option, may continue to furnish or cause to be furnished, free of charge to the employee, and the employee shall accept, an attending physician and any medical care or treatment that is considered necessary by the attending physician, unless otherwise ordered by the commission for good cause shown. The refusal of an employee to accept any medical, hospital, surgical, or other treatment or evaluation when provided by the employer or ordered by the commission bars the employee from further compensation until the refusal ceases and compensation is not paid for the period of refusal unless in the opinion of the commission the circumstances justified the refusal, in which

case the commission may order a change in the medical or hospital service. **If in an emergency, on account of the employer's failure to provide the medical care as specified in this section, a physician other than provided by the employer is called to treat the employee, the reasonable cost of the service must be paid by the employer, if ordered by the commission.**

The Employer did not fail to provide medical care as specified in this section because they were not obligated to do so under the statute with regard to the shoulders/arm. Further, they already provided extensive treatment to the claimant's wrists. Therefore, there is no reason for the commission to order the direction of treatment by a specific physician. Pursuant to McKinney v. Kimberly Clark Corp, 658 S.E.2d 112 (App. 2008), the defendants have the right to choose the physician.

CONCLUSION

For the reasons set forth above, the defendants respectfully request that the Order of the Single Commissioner be reversed in its entirety; that the claimant be found at MMI for her accepted body part; and defendants be reimbursed for overpayment of benefits.

Respectfully Submitted,

June 28, 2017



E. Ros Huff, Jr., Esquire #2767
Shelby G. Hapeshis, Esquire #74731
HUFF & HAPESHIS, LLC
Post Office Box 1935
Irmo, South Carolina 29063
(803) 252-2232 telephone
Attorneys for Husqvarna, Employer, and Ace American
Insurance Company, Appellants

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PROOF OF SERVICE

The undersigned hereby certifies that on June 28, 2017 she served counsel for the Respondent with a copy of the *INITIAL BRIEF OF APPELLANT* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

**Richard C. Alexander
Shelly Leeke Law Firm
3614 Ashley Phosphate Road
North Charleston, SC 29418**



Emily Askew
HUFF & HAPESHIS, LLC



E. Ros Huff, Jr.
roshuff@huffandhapeshis.com

HUFF & HAPESHIS^{LLC}
ATTORNEYS AT LAW

Shelby G. Hapeshis
shapeshis@huffandhapeshis.com

June 28, 2017

Jenny Kitchings
Clerk of Court
SC Court of Appeals
Post Office Box 11629
Columbia, S.C. 29211

RECEIVED
JUN 28 2017
SC Court of Appeals

Re: Dorothy Miller, Employee, Claimant, Respondent v. Husqvarna and ACE American Insurance Company, Appellants
WC No. 1318602

Dear Honorable Kitchings:

Enclosed for filing is the Initial Brief of the appellants in the above case. Also enclosed is Proof of service on the respondent.

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

Sincerely,

Emily Askew
Paralegal to Shelby G. Hapeshis
HUFF & HAPESHIS, LLC

/eoa

Enclosure

cc: Richard C. Alexander, Esquire

1900.0490