

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1116275

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AUG 17 2017

SC Court of Appeals

John McDaniel, Employee,.....Appellant,

v.

Career Employment Professional
d/b/a Snelling Staffing, Employer, and
United Wisconsin Insurance Co., Carrier, Respondents.

**REPLY TO RETURN IN OPPOSITION
TO MOTION TO STRIKE
PORTIONS OF APPELLANT'S
DESIGNATION OF MATTER**

Pursuant to Rules 209, 210 and 240, SCACR, Respondents Career Employment Professional d/b/a Snelling Staffing and United Wisconsin Insurance Co. reply to Appellant John McDaniel's Return in opposition ("Return") to their Motion to Strike Portions of Appellant's Designation of Matter ("Motion"). Respondents maintain the position that these materials were never accepted by the Commission into the record and, therefore, should not be included in the Record on Appeal for substantive purposes.

To the extent Appellant is arguing to this Court that the Commission wrongly excluded various items that he moved the Commission to accept, Respondents do not object to admission of limited materials that are necessary for this Court to make that determination. This appears to be the genesis and core of Appellant's argument regarding Section 1-23-380(5). However, to the

extent Appellant relies on non-record materials substantively, which he does, they are improper and should be excluded. In fact, in his Initial Brief, Appellant relies substantively on APA pp. 340-351 and Dr. Tavel's medical records from July 22, 2013, Motion Item Nos. 19 & 31. (*See* App. Initial Br. p. 43, Exh. A). Thus, he is not citing these items solely to argue about alleged procedural irregularities at the Commission.

In addition, Appellant overstates the scope of Section 1-23-380(4), which provides in full that, “[t]he review must be conducted by the court and must be confined to the record. In cases of alleged irregularities in procedure before the agency, *not shown in the record*, and established by proof satisfactory to the court, the case may be remanded to the agency for action as the court considers appropriate.” S.C. Code Ann. § 1-23-380(4) (emphasis added). Although Appellant has raised numerous allegations regarding the Commission's procedure, what he has not shown and cannot show is that the alleged irregularities are “not shown in the record.” Simply alleging irregularities does not give an appealing party carte blanche to designate any and all items he wished had been admitted below but which were excluded by the Commission.¹ Furthermore, Appellant has not moved this Court for inclusion of any non-record materials to be considered on appeal – he simply has designated them and substantively relied on them as if they had been admitted by the Commission.

Finally, Appellant's argument that all he had to do under Rule 210(c), SCACR, was to “present” material to the Commission, in order for it to be properly included in the Record on Appeal is nonsensical and would produce absurd results. Court rules are subject to the same rules of interpretation as statutes. *See MariChris, LLC v. Derrick*, 384 S.C. 345, 352, 682 S.E.2d 301, 305 (Ct. App. 2009). As such, “[h]owever plain the ordinary meaning of the words used in

a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention.” Kiriakides v. UA Commc’ns, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). As is the case with a statute, here, Rule 210(c) must be interpreted “so as to escape the absurdity and carry the intention into effect.” Id. Appellant’s interpretation of Rule 210(c) is plainly absurd and must be rejected.

Appellant’s position appears to be that materials presented to the Commission under cover of a motion or other pleading but that were rejected and never considered by the Commission may be added to the Record on Appeal simply by designating them because, at some point in time, they were presented to (although rejected by) the Commission. This would turn appellate review of administrative decisions on its head by requiring appellate courts to consider and decide workers’ compensation and other administrative agency decisions based on evidence the commission or agency rejected and never considered. Such an interpretation would strip the Commission of its fact finding role and, instead, and in contravention of Section 1-23-380(5), reassign that role to the appellate courts. It is well-established in South Carolina, however, that a reviewing “court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.” S.C. Code Ann. § 1-23-380(5); *see also* Lark v. Bi-Lo, Inc., 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981) (appellate courts must not engage in judicial fact finding); Walker v. City of Columbia, 247 S.C. 241, 247, 146 S.E.2d 856, 859 (1966) (“[i]t is axiomatic that in a Workmen’s Compensation case the [Commission] is the fact-finding body, and that in their review of a factual finding by the Commission the courts may not weigh the evidence, their function being limited to determination of whether or not such

¹ Respondents note that Appellant does not deny that all of the items identified in the Motion


finding is supported by [substantial] evidence”). Appellant’s proposed interpretation of Rule 210(c) would allow appellants and respondents alike to designate material that was rejected by the fact finding forum, without even moving this Court for inclusion of the additional material.

CONCLUSION

For the reasons stated herein and in their Motion, Respondents move this Court to strike all non-record material from Appellant’s Designation. Respondents also request that the briefing schedule be stayed while the Court considers this Motion

McANGUS GOUDELOCK & COURIE, LLC

August 15, 2017



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were rejected by the Commission and not part of the Commission record.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM THE SC WORKERS COMPENSATION COMMISSION

Full Commission Order Dated April 28, 2017 Affirming Commissioner Melody L. James
orders dated January 04, 2013 And September 30, 2013

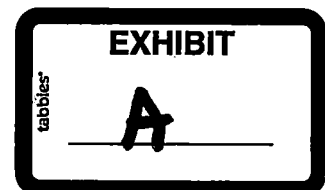
Case No: 2017-0001217

John McDaniel, Employee, Appellant

v.

Career Employment Professional D/B/A Snelling Staffing, Employer and United Wisconsin
Insurance Co., Carrier, Respondents

INITIAL BRIEF OF APPELLANT



Appellant should receive general disability under permanent total disability or maximum partial disability under §42-9-10 or §42-9-20 and/or a finding of total and permanent disability under §42-9-30.

19) DID THE COMMISSION ERR IN FINDING THAT MAXIMUM MEDICAL IMPROVEMENT AS OF AUGUST 13, 2012 WAS SUPPORTED BY SUBSTANTIAL EVIDENCE?

A) Statement of Facts

The Appellant reached maximum medical improvement according to Dr. Ohlson “from an orthopedic standpoint” on Aug. 13, 2012 but stated appellant would need further treatment (ROA _____ APA p.21-55), Dr. Tavel found Appellant to be at MMI on July 22, 2013 (ROA _____ APA p.340-351), Dr. Brilliant opined that Appellant could still be up to a year away from MMI (ROA _____ APA p.59-60), Dr. Tavel found MMI on July 22, 2013 , and Dr. Gudas judged MMI to be premature (ROA _____ APA p.56-58).

B) Discussion and Citations of Authority

The term "maximum medical improvement" means a person has reached such a plateau that, in the physician's opinion, no further medical care or treatment will lessen the period of impairment. Hall v. United Rentals, Inc., 371 S.C. 69, 89, 636 S.E.2d 876, 887 (Ct.App.2006)

Dukes v. Daniel Const. Co. 262 SC 98 (SC 1974,) where the commission found that further medical care was necessary and should be furnished, implicit in such award is the finding that additional medical treatment will tend to lessen the period of disability, for on no other grounds could liability for additional treatment be based under §42-15-60.

Dr. Ohlson was clear in two aspects of finding MMI on August 13, 2013; 1) further treatment would be necessary 2) his opinion was limited in scope to his specialty and did not account for any further impairments or treatments. To only take into consideration one out of four medical opinions fails to reach the threshold of substantial evidence.

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John McDaniel, Employee,.....Appellant,

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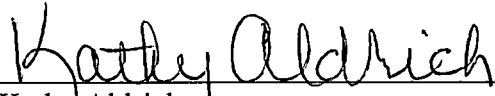
PROOF OF SERVICE

I certify that on the 15th day of August, 2017, I served the Respondents' **Reply to Return in Opposition to Motion to Strike Portions of Appellant's Designation of Matter** on John McDaniel by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

RECEIVED

John C. McDaniel, *Pro Se*
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Wyoming, MI 49519

AUG 17 2017
SC Court of Appeals


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Wisconsin Insurance Co.*



Reply To

HELEN F. HISER
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August 15, 2017

Via U.S. Mail

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

RE: John McDaniel v. Career Employment Professionals d/b/a Snelling Staffing
Services and United Wisconsin Insurance Company c/o United Heartland
Date of Accident: November 21, 2011
WCC File No.: 1116275
Our File No.: 20638.12027
Claim No.: 041100021048
Appellate Tracking No.: 2017-001217

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SC Court of Appeals

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondents' Reply to Return in Opposition to Motion to Strike Portions of Appellant's 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.

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

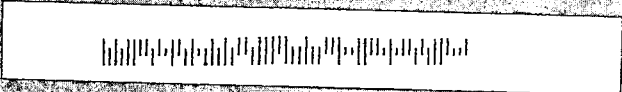
Yours truly,
McAngus Goudelock & Courie, LLC



Helen F. Hiser

Enclosures

cc: John C. McDaniel, *pro se*



mgc | INSURANCE
DEFENSE

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SC Court of Appeals

20638.12027/ HFH/kea
The Honorable Jenny Abbott Kitchings
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