THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 0824526

Robert L. Harrison, Employee, ... Appellant,

v.

Owen Steel Company, Inc., Employer, and
Old Republic Insurance Company
c/o Gallagher Bassett Services, Inc., Carrier,. ..... Respondents.

RESPONDENTS' RETURN IN OPPOSITION TO PETITION FOR REHEARING

Respondents Owen Steel Company, Inc. and Old Republic Insurance Company c/o Gallagher Bassett Services, Inc. hereby oppose Appellant Robert L. Harrison's ("Claimant") Petition for Rehearing ("Petition"). As an initial matter, Claimant's Petition cites no case law or other authority for his positions. This both serves as a ground to deny his Petition, *see* In the Matter of the Care and Treatment of McCracken, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001) (a cursory and unsupported argument is deemed abandoned on appeal), and also reveals the lack of any legal support for his positions. Although Respondents disagree with this Court's resolution of the laches issue, this Court was correct in, and did not overlook or misapprehend any facts or law in confirming the Commission's denial of benefits for the 2008 claim.

I. This Court properly held that Claimant's 2008 claim is barred by the fact that he settled a 2010 injury to the same body part based on an impairment rating that was lower (15%) than the impairment ratings he obtained following his initial injury (25%).

Despite the fact that Claimant's counsel opened oral argument with the assertion that he knew why prior counsel had settled the 2010 claim before pursuing the 2008 claim, Claimant now insists that this Court improperly ruled on that basis. Claimant's counsel explained that prior counsel had purposefully orchestrated the settlement of the 2010 injury before pursuing an award for the 2008 injury in order to avoid (circumvent) a deduction under Sections 42-9-150 to 42-9-170 of the Act. It is disingenuous at best for Claimant to now argue that the Court should not have ruled on this basis when his own counsel raised it at oral argument.

Furthermore, the issue of whether Respondents should be entitled to a credit was raised before the Commission. Defense counsel argued at the August 1, 2014 hearing before Commissioner McCaskill that, at a minimum, they were entitled to a credit for the 28 percent settlement to the back (which equates to 90 weeks) paid in 2011. (R. p. 185, lines 10 – p. 186, line 7). Claimant's counsel argued that, because Claimant had settled his second injury first, Respondents were not entitled to any credit. (R. p. 178, line 23 – p. 179, line 8).

Claimant's assertion that he merely was complying with and using Sections 42-9-150 and 42-9-170 to "recover the maximum and legally proper amount due" to Claimant requires an absurd interpretation of the Act, one which runs counter to the stated policy of our workers' compensation law. Under Claimant's interpretation, despite strong policies preventing double recovery expressed throughout the Act, *see, e.g.*, Section 42-1-450 (a claimant can recover from a subcontractor or a principle contractor, but not from both);

Section 42-9-170 (as stated by Claimant, where "an employee has one or more injuries while employed with the same employer, the employer is entitled to a credit for disability compensation paid in the first claim");[1] Medlin v. Greenville County, 303 S.C. 484, 488-489, 401 S.E.2d 667, 669 (1991) (limiting the claimant to maximum compensation for total loss of use of the back despite subsequent injury to the back), a claimant could recover twice for some or all of his injury by settling his second claim prior to his first claim. Such a result produces absurd results, which could not be what the legislature intended. *See, e.g.*, Kiriakides v. UA Commc'ns, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("[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").

Claimant also attacks this Court's reliance on Dr. Sweet's Form 14-B. Contrary to Claimant's assertion that Respondents did not take the position that Dr. Sweet's rating accounted for impairment from both the 2008 and 2010 injuries, Respondents' Brief to this Court argued that there was no evidence "that Dr. Sweet's 15% whole body impairment rating did not also include some of the impairment that is reflected in Drs. Holbrook and Johnson's 25% whole body impairment ratings." (Resp. Br. p. 19).[2] Thus,

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[1] Respondents note that Claimant does not take issue with this Court's interpretation of Sections 42-9-150 to 42-9-170 and their applicability to this claim. He only argues, contrary to the position he took at oral argument, that there was no intent to circumvent those sections.

[2] In addition, one of the Commissioners on the Appellate Panel (Commissioner Beck) raised this very question at the May 18, 2015 review hearing. To the extent this Court grants Claimant's request to supplement the Record, which Respondents oppose, Respondents request that that transcript also be entered into the Record. Respondents note that the May 18, 2015 transcript also contains Claimant's counsel explanation of the

this issue was raised properly on appeal. *E.g.*, Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 904 (2010) (a "respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court'").

Claimant argues that this Court should allow him to supplement the Record with the transcript of the 2011 settlement hearing. Claimant could have but did not designate the transcript of the 2011 settlement hearing for inclusion in the Record. There is no good reason to allow him to supplement the Record at this late date, *see* Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 339, 611 S.E.2d 485, 487-88 (2005) (the appellant bears "the burden of providing a sufficient record" for appellate review), and Respondents oppose any such request.

In any event, regardless of what Claimant may or may not have believed he was settling in 2011, the Act dictates what he is and is not entitled to in terms of benefits. Furthermore, it is not the 2011 settlement that this Court focused on but, instead, Dr. Sweet's impairment rating following the 2010 injury: "Harrison is entitled to only the compensation he received for his second injury because the 15% impairment represents the totality of his impairment resulting from his 2008 and 2010 injuries." This Court reached that result by following the AMA Guides' procedure for apportionment: "[T]he most recent permanent impairment rating is calculated, and then the prior impairment rating is calculated and deducted." The specifics of what Claimant believed he was settling in 2011 do not enter into or affect this analysis.

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strategy behind settling the second injury prior to prosecuting the first injury, which was to prevent Respondents from obtaining any credit for the second injury.

Despite Claimant's argument to the contrary, it is not at all clear that Dr. Sweet's Form 14-B was limited to the 2010 accident. Claimant cites to no statutory, regulatory or case law authority to support his novel argument – that, where there are two injuries to the same body part, a Form 14-B rendered after the second injury reflects only the degree of additional impairment caused by the second injury – for the simple reason that there is none. There is no verbiage on the form itself that so limits an impairment rating. Instead, the Form 14-B captures a claimant's impairment at the time it is rendered.

There is absolutely no indication in either Dr. Sweet's medical notes or his Form 14-B that suggests he was even attempting to separate out the impairment of Claimant's spine caused by the 2010 accident from that caused by the 2008 accident. (R. pp. 141-146). Claimant could have but did not depose Dr. Sweet or even offer into evidence a questionnaire indicating any such attempt at a division or allocation of impairment.

Instead, without any indication that he was separating out symptoms or impairment between Claimant's 2008 and 2010 accidents, Dr. Sweet provided conservative treatment only and, on November 18, 2010, released Claimant after just two appointments. On November 2, 2010, Dr. Sweet noted that Claimant's pain was "averaging 7, sharp, throbbing, constant. He feels he is getting worse." By November 18, 2010, however, Claimant's pain had "settled down" and he was "having only some achy neck pain without arm pain." (R. pp. 141-146).

Thus, despite Claimant's criticism that Dr. Sweet's impairment rating does not make sense in light of the change in lifting restrictions, Dr. Sweet's treatment notes indicate a clear improvement. There simply is no indication whatsoever in this Record that Dr. Sweet was limiting his impairment rating to the effects of the 2010 injury, as

separated or apportioned out from the 2008 injury. Claimant bears the burden of proving by a preponderance of the evidence that he is entitled to benefits. *E.g.*, Crisp v. SouthCo, Inc., 401 S.C. 627, 645, 738 S.E.2d 835, 844 (2013).

Under the AMA Guides, if a physician is asked to apportion impairment between two sequential injuries to the same body part "the analysis must consider the nature of the impairment and its relationship to each alleged causative factor, providing an explanation of the medical basis for all conclusions and opinions." AMA Guides, p. 21. Clearly, Dr. Sweet's Form 14-B does not contain any such analysis. In addition, in the example provided in the AMA Guides "apportioning a spine impairment, first the current spine impairment rating is calculated, and then an impairment rating from any preexisting spine problem is calculated. The value for the preexisting impairment rating can be subtracted from the present impairment rating to account for the effects of the intervening injury or disease." Id. There is no indication or evidence in this Record that Dr. Sweet performed such an analysis to arrive at his 15% impairment rating.

Claimant's argument that a Form 14-B that indicated a claimant's overall condition at the time it was rendered would be "totally useless," fails to acknowledge the AMA Guides process for dealing with exactly that situation. In fact, the scenario described by Claimant – where a claimant has a pre-existing non-work-related impairment of his spine of 15% and then suffers a work-related injury, following which a physician assigns him a 20% impairment rating – is precisely what the AMA Guides instructions address. In the scenario described by Claimant, the Commission would deduct the first impairment from the second, with a resulting 5% impairment caused by the second, work-related injury. Thus, the Form 14-B would not be "useless" but,

instead, would provide the Commission with the claimant's latest impairment rating so that the additional impairment caused by work-related injury, if any, could be determined.

Claimant apparently misunderstands or intentionally misconstrues this Court's explanation of the AMA Guides' direction on apportioning loss of use or impairment between subsequent injuries to the same body part. First, the AMA Guides indicate that "[i]n some instances, the physician may be asked to apportion or distribute a permanent impairment rating between the impact of the current injury and the prior impairment rating." AMA Guides p. 11. As noted above, there is no indication Dr. Sweet was asked to or intended to provide an apportioned rating. If he had, in order to arrive at a 15% impairment rating from just the 2010 injury, Dr. Sweet would have had to have found that Claimant's total impairment at the time of his release from treatment was 40%, which he did not.[3] There simply is no evidence that Dr. Sweet assigned Claimant a 40% overall impairment rating that, after the prior ratings were subtracted out, would have resulted in an apportioned rating of 15% for the 2010 injury.

Further, this Court did not rule that Claimant was not entitled to additional benefits simply because he "concluded the settlement of the second accident prior to the conclusion of the first accident." Instead, this Court candidly acknowledged that, "the order in which an employee settles two compensable injuries would not matter so long as the injuries are distinguishable." However, this Court ruled that Claimant "is entitled to only the compensation he received for his second injury because the 15% impairment represents the totality of his impairment resulting from his 2008 and 2010 workplace

[3] As this Court noted, "the most recent permanent impairment rating is calculated, and then the prior impairment rating is calculated and deducted." AMA Guides p. 12.

injuries" to the same body part. In other words, because Claimant settled his second injury first, and his impairment rating after the second claim was lower than the impairment ratings he had obtained in 2010, he is not entitled to any additional compensation, since subtracting the first impairment rating from the second results in a negative number or, at best, zero. In addition, this Court held that a claimant cannot circumvent Sections 42-9-150 to 42-9-170 the Act and "our courts' express proscription against double recovery" by settling a later claim first. That is not to say a claimant cannot settle a later claim first, but he cannot do so in order to circumvent the Act and obtain a double recovery.

Finally, Claimant fails to address this Court's authority to decide this case on a basis not raised by either party. *See* Bartles v. Livingston, 282 S.C. 448, 465, 319 S.E.2d 707, 717 (Ct. App. 1984) ("[w]hile this Court is generally confined to the issues raised by the exceptions, it is not limited to the reasoning of the parties or the trial court in addressing those issues"); Rule 220(c), SCACR (an appellate court can rule on any basis appearing in the record). While Respondents do not concede that the basis for this Court's affirmation is the only basis on which the Commission should be upheld, it is clearly permissible and serves as another reason to uphold the Commission's denial of additional disability compensation to Claimant.

II. Laches also bar Claimant's claim in this case.

Despite Claimant's arguments to the contrary, the issue of laches was properly before and properly decided by the Commission. As explained more fully in Respondents' Brief at pp. 14-17, Claimant's counsel acknowledged at the February 18, 2014 oral argument before the Appellate Panel that, "**[l]aches was pled as a defense**, and

it's my understanding that the order ruled against [Respondents' counsel] because it did not find for it in the Commissioner's order." (R. p. 332, lines 19-22) (emphasis added). In addition, laches was clearly pled on Respondents' 2014 Form 58, (Resp. 2014 Form 58, R. p. 118), with the result that Claimant had a full and fair opportunity to respond. Thus, the issue of laches was properly before and decided by the Commission. *See* King v. Wesner, 198 S.C. 49, 62, 16 S.E.2d 289, 295 (1941) (the "niceties of pleadings and process in the law Courts" are not required in workers' compensation proceedings); *cf.* Staubes v. City of Folly Beach, 339 S.C. 406, 413-414, 529 S.E.2d 543, 546-547 (2000) (finding negligence cause of action properly before the court and preserved for appeal where, although not pled in the complaint, both parties treated the negligence claim as having been raised, and where the defendant both argued the issue at oral argument below and had ample opportunity to respond to the claim).

This Court dismissed the Commission's finding that laches bars Claimant's recovery for his 2008 injury because "Dr. Holbrook and Dr. Johnson examined Harrison before any of his successive injuries and determined he had suffered a 25% whole-person impairment as a result of his September 2008 injury." (Opinion n.2). Respectfully, had Claimant pursued his 2008 claim in a timely manner and prior to the subsequent injuries to his back, this Court's reasoning would be fully applicable.

However, it is Claimant's condition at the time of the hearing, in this case 2014, that is determinative of any permanent disability award based on his 2008 injury. "The Commission is concerned with conditions existing prior to and **at the time of the hearing**." Keeter v. Clifton Mfg. Co., 225 S.C. 389, 394, 82 S.E.2d 520, 523 (1954) (emphasis added); *see also* Burnette v. City of Greenville, 401 S.C. 417, 424 & 429, 737

S.E.2d 200, 204 & 206-207 (Ct. App. 2012) (holding that the claimant's testimony as to her condition "at the time of the hearing" is relevant to the determination of her impairment rating); Fishburne v. ATI Sys. Int'l, 384 S.C. 76, 681 S.E.2d 595 (Ct. App. 2009) (Commission properly based its disability rating on medical evidence and testimony at the hearing). Questions put forth by Claimant's counsel at the August 1, 2014 hearing recognize this underlying principle. For example, Claimant was asked, "[d]o you have any injuries or physical problems **now** that you relate to this accident of September 17th of 2008?" (R. p. 192, lines 18-20) (emphasis added).

And, because a disability rating is more art than science, involving consideration of medical opinions but also opinions of vocational experts, as well as testimony by the claimant and other lay witnesses, Burnette, 401 S.C. at 429, 737 S.E.2d at 206-207; *see also* Lyles v. Quantum Chem. Co., 315 S.C. 440, 443-445, 434 S.E.2d 292, 294-295 (Ct. App. 1993) ("[t]he commission may find a degree of disability different from that suggested by expert testimony"), reliance on outdated and stale impairment ratings is insufficient to establish entitlement to an award. Furthermore, as explained in more detail in Respondents' Brief, pp. 17-19, where the medical evidence is stale or outdated, as is the case here, the Commission understandably and necessarily must rely on other evidence and testimony. *See* Smith v. South Carolina Dept. of Mental Health, 329 S.C. 485, 499, 494 S.E.2d 630, 637 (Ct. App. 1997) (expressing concern over relying on medical evidence that was "more than two years old at the time of the hearing," and remanding so that full testimony could be elicited regarding "the impact of [the claimant's] injuries and the extent of his physical capabilities"). As this Court properly concluded, Dr. Sweet's 2010 impairment rating indicates Claimant's condition had

improved by November of 2010. Thus, to base a permanent award in 2014 on stale and superseded impairment ratings unquestionably would be prejudicial to Respondents.

Furthermore, an award of permanency made six years after an injury, with intervening work-related and non-work-related injuries to the same body part necessarily requires speculation. It is nonsensical to ask the Commission or this Court to determine "permanency" as of a point in time years before and in isolation of all that has occurred, including both work and non-work-related injuries to the same body part.

The 2010 impairment ratings provided by Drs. Holbrook and Johnson were complicated and overtaken by events that occurred between when they were rendered and the date of the hearing. As a result, and as the Commission properly found, it would require speculation to determine in 2014 what Claimant's "permanent" disability was from the 2008 accident, particularly when he had been compensated for some or all of that alleged disability in 2011 and had suffered other non-compensable injuries to the same body part. It would be absurd to make an award for "permanent partial disability" in 2014 based on medical records and opinions rendered in 2010 that had been superseded by later injuries and treatment to the same body part. Just as an award of permanent partial disability cannot be awarded for conditions that might develop in the future, Keeter, 225 S.C. at 394, 82 S.E.2d at 523, it cannot be awarded for a point in time years prior to the hearing, particularly when subsequent injuries have occurred to the same body part. Claimant sat on his rights and attempted to "game" the Act by settling his 2010 injury first, which inevitably included compensation for disability caused by the 2008 accident, and then attempted to double-recover by prosecuting the instant claim.

Interestingly, Claimant agreed at the August 8, 2013 hearing that his "current neck pain" was the result of all three events (the September 2008 work injury, the 2010 work injury and the 2012 incident with his daughter). (R. p. 323-A, lines 1-18). Furthermore, the problems he was experiencing in 2013 from the 2008 accident were the same as the problems he was experiencing in 2013 from the 2010 accident. (R. p. 326, lines 12-23). As a result, and setting aside the proper apportionment pursuant to the AMA Guides, it is impossible at this point in time to determine how much, if any, of Claimant's impairment is caused by his 2008 accident, as opposed to his 2010 work-related accident and other non-work-related injuries to the same body part.

Finally, as this Court held, in order for a claimant "to be entitled to additional permanent partial disability compensation for a second injury, when the claimant has already received permanent partial disability compensation for a previous injury to the same body part, the evidence must show the degree of disability attributable only to the second injury in order to avoid double compensation." This express intent to avoid double recovery for the same injury is the key to the prejudice that Respondents would suffer if this claim were allowed to go forward. Thus, despite Drs. Holbrook and Johnson providing a 25% impairment rating to the whole body in 2010, Claimant failed to pursue his claim at that time and, in fact, purposefully settled a subsequent injury to the same body part in order to circumvent the operation of Sections 42-9-150 to 42-9-170. This attempt to double-recover is clear evidence of prejudice and fully supports Respondents' laches argument.

As a result, Claimant's current claim is also barred by laches, which was properly before and properly decided by the Commission.

CONCLUSION

For all the reasons stated herein, this Court should deny Claimant's Petition. This Court also should rule that, alternatively, his claim is barred by laches.

Respectfully submitted,

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February 1, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No.: 0824526

Robert L. Harrison, Employee, ... Appellant,

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Owen Steel Company, Inc., Employer, and
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c/o Gallagher Bassett Services, Inc., Carrier,. ..... Respondents.

PROOF OF SERVICE

I certify that on the 2nd day of February 2018, I served the **Respondents' Return in Opposition to Petition for Rehearing** on Robert L. Harrison by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record:

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February 2, 2018

Via U.S. Mail
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Robert L. Harrison v. Owen Steel Co., Inc. and Old Republic Insurance Company c/o Gallagher Bassett Services, Inc.
Date of Accident: September 17, 2008
WCC File No.: 0824526
Our File No.: 2098.12057
Claim No.: 002979-007796-WC-01
Appeal No.: 2015-002093

Dear Ms. Kitchings:

Enclosed for filing please find the original and six (6) copies of the Respondents' Return in Opposition to Petition for Rehearing in the above-referenced matter. Also, enclosed please find the original and one copy of the Proof of Service. Please file these documents and return a clocked in copy in the enclosed, self-addressed envelope.

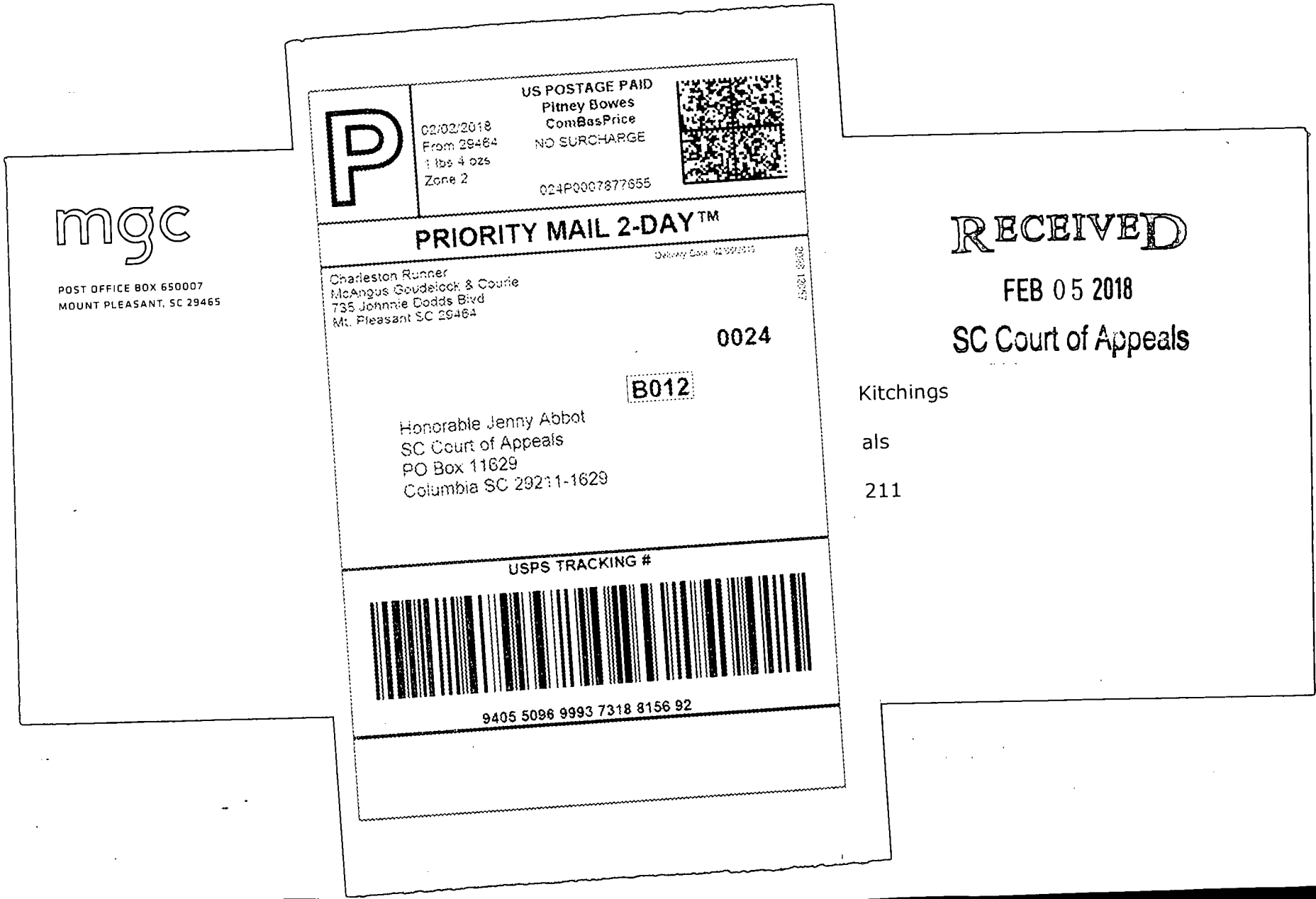
Yours truly,

McAngus Goudelock & Courie, LLC

Helen F. Hiser

Enclosures

cc: Frank A. Barton, Esq.



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Kitchings

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