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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

W.C.C. File No. 1408826

Gennette Sowell,

Employee,
Respondent,

v.

Piggly Wiggly,

Employer,

and

Auto Owners Insurance Inc.,

Carrier,
Appellants.

RECEIVED
MAY 22 2018
SC Court of Appeals

**MOTION TO STRIKE AND
TO EXTEND TIME**

Kenya C. Miller, Esquire SC Bar #72634
Kristian C. Bell, Esquire SC Bar #76578
Dickie, McCamey & Chilcote, P.C.
Post Office Box 2046
Lancaster, South Carolina 29721
(803) 285-0004
Attorney for Appellants

The Respondent, Gennette Sowell, has designated two items to be included in the Record on Appeal. The Respondent has also discussed and referenced these items in the Statement of the Case in Respondent's Initial Brief.

These items were never submitted to the lower tribunal as exhibits and are not part of the record in this case. Accordingly, the Appellants, Piggly Wiggly and Auto Owners Insurance, Inc., respectfully move pursuant to Rules 210(c) and 263(b), SCACR, (1) to strike these items from the Respondent's Designation of Matter to be included in the Record on Appeal; (2) to strike any references to these items and any arguments based on these items in their Initial Brief; and (3) to extend the time limits for filing the Record on Appeal until the Court rules on this motion.

RELEVANT FACTS

This appeal involves a dispute over whether the Appellate Panel of the Worker's Compensation Commission erred in (1) evaluating Claimant's occupational asthma under S.C. Code Ann. Section 42-1-172; (2) finding claimant met her burden of proof under Section 42-11-10, et al; (3) finding Claimant permanent and totally disabled under S.C. Code Ann. Section 42-9-10; and (4) broadly awarding Claimant future medical treatment.

The Appellants filed their Initial Brief and Designation of Matter to be included in the Record on Appeal on February 6, 2018. The Respondent filed the Initial Brief and Designation of Matter to be included in the Record on Appeal on April 19, 2018.

The Respondent's Designation of Matter states as follows:

Appellant [sic] proposes the following be included in the Record on Appeal:

...

9. Letter to Commissioner dated 3/11/16;

...

12. My letter to Commission dated 4/27/16;

[See Designation of Matter, attached as Exhibit A.]

These items are referenced in the Respondent's Statement of the Case; however, the letters have no relevance to the issues presently being argued on appeal before this Court. Moreover, the letters are not a part of the evidentiary record of the lower tribunal. Appellants requested an agreement of the parties to remove the items as irrelevant to the appeal; however, no response was received before the filing of this Motion. [See Emails between the parties, attached as Exhibit B.]

DISCUSSION

Rule 210(c) of the South Carolina Appellate Court Rules provides that "[t]he Record on [Appeal] shall not . . . include matter which was not presented to the lower court or tribunal." See also Norris v. Ferre, 315 S.C. 179, 183, 432 S.E.2d 491, 493 (Ct. App. 1993)(Court of Appeals denied motion to supplement the Record on Appeal with deposition testimony where it was not presented to the Trial Court); Clements v. Young, 310 S.C. 73, 75, 425 S.E.2d 63, 64 n.1 (Ct. App. 1992)(stating that "[t]he South Carolina Appellate Court Rules require that '[t]he Record shall not [] include matter which was not presented to the lower court or tribunal.'").

Although a party may move to supplement the Record with the written consent of all parties under Rule 212(b), SCACR, this Rule must be read in conjunction with Rule 210(c), which prohibits matter which was not presented to the Trial Court. Jean Hoefler Toal et al., Appellate Practice in South Carolina 261 (2nd ed. 2002)(“Rule 212(b), SCACR, must, of course, be read in conjunction with Rule 210(c), SCACR, which declares that the record cannot include matter that was not presented to the lower court or tribunal.”).

Because Items 9 and 12, were not submitted to the Commission for consideration, they are outside the scope of matter properly included in the Record on Appeal. Therefore, the Respondent should be precluded from presenting these items to this Court for consideration or discussing these items in the Statement of the Case, Argument III, or anywhere else in their Brief.

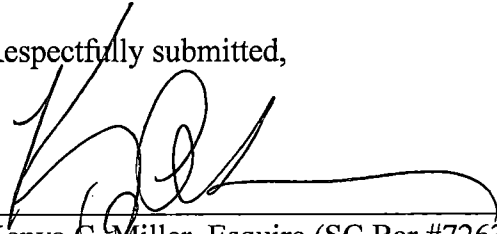
CONCLUSION

For the foregoing reasons, the Appellants respectfully request:

1. That Items 9 and 12 listed in the Respondent’s Designation be stricken;
2. That discussion of and references to this material in the Initial Respondent’s Brief be stricken; and
3. That the time limits for filing the Record on Appeal be held in abeyance until the Court rules on this motion.

[Signature page follows.]

Respectfully submitted,



Kenya C. Miller, Esquire (SC Bar #72634)
Kristian C. Bell, Esquire (SC Bar #76578)
Dickie, McCamey & Chilcote, P.C.
Post Office Box 2046
Lancaster, South Carolina 29721
(803) 285-0004
Attorney for Appellants

May 18, 2018.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

W.C.C. File No. 1408826

Gennette Sowell,

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CERTIFICATE OF SERVICE

The undersigned certifies that she is an employee Dickie, McCamey & Chilcote, P.C. and that she has served, on the date set forth below, a copy of the document described below, in the above entitled action to the following persons, pursuant to Section 15-9-930 and Section 15-9-940 of the Code of Laws of South Carolina, 1976, as well as Rule 203 and Rule 262 of the SCACR, by depositing a copy of same in the United States Mail, postage prepaid, addressed to:

TO: **VIA FAX (803) 734-1839 & U.S. MAIL**
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

VIA FAX (803) 252-0709 & U.S. MAIL
Preston F. McDaniel, Esquire
McDaniel Law Firm
1315 Elmwood Ave
Columbia, SC 29201

VIA FAX (843) 332-4646 & U.S. MAIL

Gerald Malloy, Esquire
Malloy Law Firm
108 Cargill Way
Hartsville, SC 29551

DOCUMENT: MOTION TO STRIKE AND TO EXTEND TIME

DATE OF
MAILING: May 18, 2018



Tamra Carver-McMillan
Paralegal to Kenya C. Miller, Esquire and Kristian
C. Bell, Esquire

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 23 2018

SC Court of Appeals

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Appellate Case No.: 2017-002396
WCC File No.: 1408826

Gennette Sowell, Employee,Respondent,

v.

Piggly Wiggly, Employer, and
Auto Owners Insurance, Inc., Carrier,Appellants.


DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record
on Appeal:

1. Form 50 Claim filed 7/17/14;
2. Form 50 Hearing filed 9/26/14;
3. Amended Form 50 Hearing filed 11/11/14;
4. Form 51 filed 12/18/14;
5. Hearing Notice for 12/18/14;
6. Form 70 filed 4/6/15 with handwritten amendments;
7. Form 70 filed 2/5/16;
8. Hearing Notice for 2/11/16;
9. Letter to Commissioner dated 3/11/16;
10. Hearing Notice for 3/15/16;
11. Letter to Commissioner James 4/15/16 with Amended PHB
and APAs and including PHB and APAs filed 3/8/16;

12. My letter to Commission dated 4/27/16;
13. Form 70 filed 6/9/16;
14. Hearing Notice for 4/22/16 dated 4/27/16;
15. Hearing Notice for 7/21/16 dated 6/22/16;
16. Defendants' PHB/APAs filed 4/15/16; Supplemental PHB/APAs filed 6/13/16 and Revised 6/21/16;
17. Hearing Transcript for 6/22/16;
18. Hearing Transcript for 7/21/16;
19. Email Tamara 10/20/16;
20. Award of Commissioner James dated 5/16/17;
21. Full Commission Award dated 10/17/17;
22. Deposition of Dr. Gordon Early;
23. Deposition of Dr. Menendez.

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



Preston F. McDaniel, Esquire
SC Bar No. 3770
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

And

Gerald Malloy, Esquire
SC Bar No. 12033
Malloy Law Firm
108 Cargill Way
Hartsville, SC 29551
(843) 339-3000
Attorneys for Movant/Respondent
To the Appeal for the Injured
Worker, Ms. Gennette Sowell

April 19, 2018

EXHIBIT B

Bell, Kristian

From: Bell, Kristian
Sent: Thursday, May 17, 2018 12:28 PM
To: 'Sabrina Kelley'; preston@pfmcdlaw.com
Cc: Miller, Kenya; 'Gerald Malloy'; Carver, Tamra; 'Denise'
Subject: RE: Genette Sowell Record on Appeal

Preston

Pursuant to my conversation with Sabrina yesterday, I understand you are in oral arguments at the Court of Appeals today. We need to discuss two items included in your Designation of Matter. As you know, the Record on Appeal is due Monday, May 21, 2018.

There are two letters (March 11, 2016 and April 27, 2016) that we do not believe are material to the appeal, and are therefore, improper to include in the Record on Appeal. Since we are tasked per the rules to make a certification that everything included in the ROA is material and relevant to the appeal, we cannot include those items. As such, please let us know if you agree that we can leave them out. Alternatively, if you want them included, please complete the certification yourself and we will attach that to the ROA. If neither option is agreeable to you or we do not have your response by tomorrow at noon, we will request an extension to the file the ROA so we have time to discuss with each other further.

Please let us know once you get a free moment.

Thanks,

Kristian

Kristian C. Bell, Esquire

Of Counsel

803-285-0004 Office

803-285-0042 Fax

kbell@dmclaw.com

Kenya C. Miller
Attorney at Law
Admitted in SC

803-285-0034
Fax: 888-811-7144
kmiller@dmclaw.com

May 18, 2018

VIA FAX (803) 734-1839 & REGULAR MAIL

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

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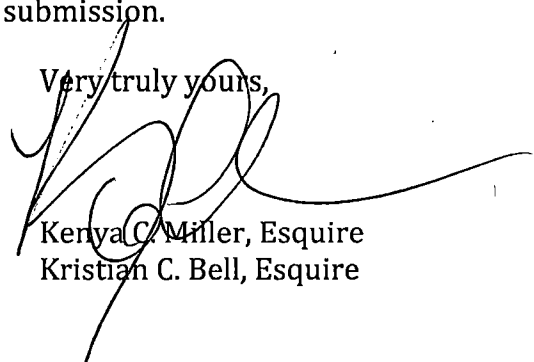
RE: Genette Sowell v. Piggly Wiggly
Appellate Case No. 2017-002396
Date of Accident: 1/6/2014
WCC File No.: 1408826
Our File No.: 0056461.0349337
Claim No.: 36-1835-2014

Dear Ms. Kitchings:

Enclosed for filing please find one (1) original and six (6) copies of a Motion to Strike and Extend Time in the above-referenced matter along with the applicable filing fee. Please clock the copies and return them to us in the enclosed self-addressed stamped envelope.

By copy of this letter, we are serving the Motion via regular U.S. mail to Respondent's attorneys, Preston McDaniel, Esquire and Gerald Malloy, Esquire. Enclosed please find a certificate of service verifying same. Please feel free to contact me should you have any questions or concerns regarding this submission.

Very truly yours,



Kenya C. Miller, Esquire
Kristian C. Bell, Esquire

KCB:KCM:snw

cc: Preston McDaniel, Esquire (via regular mail)
Gerald Malloy, Esquire (via regular mail)



Dickie McCamey

DICKIE, McCAMEY & CHILCOTE, P.C.
P.O. BOX 2046 | LANCASTER, SOUTH CAROLINA 29721

NEOPOST PRIORITY MAIL
05/18/2018
US POSTAGE \$007.25⁰



ZIP 29720
041L10402370

FIRST CLASS MAIL

Dickie McCamey

DICKIE, McCAMEY & CHILCOTE, P.C.
P.O. BOX 2046 | LANCASTER, SOUTH CAROLINA 29721

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