THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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S.C. SUPREME COURT

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 MOTION TO SUPPLEMENT THE RECORD ON APPEAL/APPENDIX

Respondents Owen Steel Company, Inc. and Old Republic Insurance Company c/o Gallagher Bassett Services, Inc. hereby oppose Petitioner Robert L. Harrison's ("Petitioner") Motion to Supplement the Record on Appeal/Appendix ("Motion"). Petitioner's Motion seeks to add the transcript of the July 25, 2011 settlement hearing for his 2010 claim to the appellate record. For the reasons set forth below, Respondents oppose the Motion.

Petitioner argues that the transcript of the 2011 settlement hearing was not submitted into the appellate record because the Court of Appeals decided this matter on grounds not addressed by either of the parties in their briefs to the Court of Appeals.

Petitioner is incorrect. Respondents first argued that it did not matter what Petitioner "may or may not have understood he was settling with regard to his 2010 injury, he agreed that the problems he experiences from the two workplace accidents are 'similar.'" (Appx., Respondents' Br., p. 8). Respondents also asserted that, "[a]lthough Claimant argued below that the settlement of his 2010 workplace injury in no way impacted this case, it is undisputed that Claimant injured the exact same body part – his cervical spine – in 2010 that is the subject of this case. It is also undisputed that he settled his claim for the 2010 injury for $42,193.63, which represented 28% loss of use of his back, or 84 weeks PPD." (Appx., Respondents' Br., pp.18-19). Finally, Respondents argued that, "[h]ere, the medical evidence Claimant asserts should bind the Commission – Dr. Holbrook's July 21, 2010 MMI rating and Dr. Johnson's September 29, 2010 IME – was over four years old at the time of the August 1, 2014 hearing before Commissioner McCaskill and did not account for Claimant's subsequent injuries to his neck or the settlement of his 2010 work place injury to the same body part." (Appx., Respondents' Br., p. 22).

Petitioner could have, but chose not to file a reply brief and a supplemental designation of matter with the Court of Appeals. He had a clear and full opportunity to respond to these points in a reply brief and to designate additional items to appellate record but, for whatever reason, chose to hold his cards. He should not be allowed at this point to supplement the Record, which he belatedly and inexcusably deems inadequate. *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); Normandy Corp. v. South Carolina DOT, 386 S.C. 393, 407, 688 S.E.2d 136,

144 (Ct. App. 2009) (deciding issue against the Department because, as the appellant, "the Department failed to meet its burden of providing this Court with a sufficient record upon which to make its decision"); Bryson v. Bryson, 378 S.C. 502, 510, 662 S.E.2d 611, 614 (Ct. App. 2008) (affirming lower court decision where the appellant failed to present "a sufficient record for review").

Petitioner's request is even more disingenuous in light of the fact that his counsel raised this very issue at the beginning of oral argument at the Court of Appeals. (*See* Appx. pp. 6 n.3, 22). By asserting that he knew why prior counsel on this case had settled the 2010 injury before seeking a hearing on the 2008 injury, *i.e.*, to avoid the operation of Sections 42-9-150 to 42-9-170 of the Act, Petitioner intentionally inserted an issue for which he knowingly had not included documentation in the Record.

Indeed, the relationship and/or impact of Petitioner having settled his 2010 claim prior to proceeding forward with his 2008 claim has been an on-going theme in these proceedings, both at the Commission and at the Court of Appeals. Petitioner's counsel argued at the August 1, 2014 hearing before Commissioner Gene McCaskill, with regard to the APA submissions, that the Single Commissioner should "consider the transcript of the hearing for the accident of October of 2010 which we submitted last time at the last hearing which clearly shows that the settlement agreement was solely for the October accident, October 2010 accident ..." (APA 175-176). Later in that same hearing, Petitioner's counsel raised the very issue on which the Court of Appeals decided this case: "Now, some mention was made earlier about – about credit for prior impairments or prior payment of impairments. The law is clear that if you have – if you have an injury and you get paid for it, then you have a subsequent injury, they're entitled to credit. It's

got to be the same employer. But if you have an injury and then you have a subsequent injury and you pay for the subsequent injury, you don't go back and get credit for the first one. It just doesn't work that way." (APA 178-179). In response, counsel for Respondents argued that they were entitled to a credit because they had "settled a case with Mr. Harrison and paid him 28 percent to the back. So they have already paid him the equivalent of close to 90 weeks of compensation. They've also paid a period of temporary total to him for this particular accident. And so they have to be entitled to a credit ... And so this notion that we somehow don't get a credit for what we already paid to him even though the accident occurred subsequent to this one is not a position that's supported by the statute or by the case law." (APA 185-186). Having raised this issue – the propriety and the impact of Petitioner settling his 2010 claim prior to proceeding forward with his 2008 claim – both at Commission and the Court of Appeals, Petitioner cannot plausibly argue at this point that he had no idea this issue might be relevant to the appeal. Again, as the Appellant, it was his duty to supply an adequate Record on Appeal. *See* Helms Realty, 363 S.C. at 339, 611 S.E.2d at 487-88; Normandy Corp., 386 S.C. at 407, 688 S.E.2d at 144; Bryson, 378 S.C. at 510, 662 S.E.2d at 614. That Petitioner thought he would win on appeal on the laches argument alone does not change the fact that this was an issue, raised and disputed by both sides, and Petitioner simply failed to designate the 2011 transcript, despite having had ample opportunity to do so.

Furthermore, the transcript of the 2011 settlement hearing will not shed any light on the issue this Court has agreed to hear. What Petitioner may have stated or believed he was or was not settling in the July 25, 2011 hearing is not relevant to the Court of Appeals' ruling in this case, which is based on the statutory mandate that a claimant

cannot recover more than once for the same injury. The Court of Appeals did not focus on the 2011 settlement but, instead, on 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." (Appx. p. 9). The Court of Appeals 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." (Appx. p. 7). The Court of Appeals also focused on the stated intent of the Act to not provide double recovery/compensation for an injury. (Appx. pp. 6, 9). The specifics of what Claimant may or may not have believed he was settling in 2011 do not enter into or affect this analysis.

Finally, at the May 18, 2015 review hearing before an Appellate Panel of the Full Commission, one of the Commissioners on the Appellate Panel (Commissioner Beck) raised the question of whether Dr. Sweet's 15% whole body impairment rating included some of the impairment that is reflected in Drs. Holbrook and Johnson's 25% whole body impairment ratings. To the extent this Court grants Petitioner's request to supplement the Record, which Respondents oppose, Respondents request that the May 18, 2015 transcript also be entered into the Record. *See* Rule 212(b), SCACR. Respondents note that the May 18, 2015 transcript also contains Petitioner's counsel's explanation of the strategy behind settling the second injury prior to prosecuting the first injury, which was to "game" the Act in order to prevent Respondents from obtaining any credit for the second injury.

CONCLUSION

For all the reasons stated herein, this Court should deny Petitioner's Motion to Supplement the Record on Appeal/Appendix. In the event, however, this Court should grant Petitioner's Motion, Respondents request that the transcript of the May 18, 2015 review hearing also be included in any supplemental Record on Appeal/Appendix.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

Court of Appeals Opinion No. 5528
(Filed January 10, 2018)

Robert L. Harrison, Employee, ... Petitioner,

v.

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

PROOF OF SERVICE

I certify that on the 24th day of August 2018, I served the **Respondents' Return in Opposition to Motion to Supplement the Record on Appeal/Appendix** 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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