THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

W.C.C. File No. 1116275

John McDaniel, Employee, ... Appellant,

v.

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

RESPONDENTS' RETURN IN OPPOSITION TO PETITION FOR REHEARING

Respondents Career Employment Professional d/b/a Snelling Staffing and United Wisconsin Insurance Co. hereby oppose Appellant John McDaniel's ("Claimant") Petition for Rehearing ("Petition"). Claimant has presented no genuine issues that this Court either overlooked or misapprehended and, as a result, his Petition should be denied.

I. This Court properly upheld the Commission's determination that Claimant's Amended Form 30 was not properly before the Appellate Panel. (Issue 6)

Claimant appears to allege that the Commission and this Court committed an error of law in determining his Amended Form 30 was not properly before it. Claimant is incorrect. First, Claimant's recitation of case law setting forth the tenants of statutory interpretation is simply that, a recitation. While it is true that statutes must be read as a

whole, giving each word and provision meaning, "in a manner consonant and in harmony with its purpose," *e.g.*, CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011), Claimant has not and cannot show that the Commission failed to interpret its regulations in a manner that reads them as a whole and gives each provision its proper effect. Instead, Claimant continues to advocate for an interpretation that cannot fairly be read into the provisions and which would produce absurd results.

Claimant's arguments with regard to the application of S.C. Code Reg. §§ 67-708, 67-610 and 67-613 would produce absurd results. According to Claimant's interpretation, any time a party desired to change the nature of the claim or relief requested, even while on appeal to the Full Commission, all it would need to do is to file an "amended" form 30 which, according to Claimant, would allow it to submit additional evidence at that point. Such an interpretation would render the requirements that "[e]ach party shall arrange and present all evidence at the hearing," S.C. Code Reg. § 67-613(A), and that additional evidence sought to be introduced at the Full Commission level must comport with S.C. Code Reg. § 67-707, "Additional and Newly Discovered Evidence," meaningless and superfluous. This runs counter to the very statutory interpretation argument raised by Claimant. *See, e.g.*, State v. Sweat, 379 S.C. 367, 3477665 S.E.2d 645, 651 (Ct. App. 2008) ("[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous ...").

Furthermore, while Claimant argues that S.C. Code Reg. § 67-708 "incorporates by reference § R.67-613B(4)," (App. Br. p. 17), his argument is legally unsound. R.67-708(A) states that a "review hearing may be postponed for the *reasons* in R.67-613." S.C. Code Reg. § 67-708 (emphasis added). That is, while Reg. 67-708 specifically

incorporates by reference the reasons for postponement set forth in Reg. 67-613(B)(1),[1] it does not incorporate any of the other procedures in that regulation.

In addition, as was explained in Respondents' Brief, Claimant's reliance on Reg. 67-613(B)(4) is misplaced. The quoted portion specifically states that "if the nature of the claim or the relief requested changes, file a new *hearing* request according to Reg. 67-207 unless Reg. 67-610 applies." S.C. Code Reg. § 67-613(B)(4) (emphasis added). Reg. 67-207 specifically refers to hearing requests via Forms 15, 50 or 52, and does not refer to or implicate Form 30 or appeals to the Full Commission in any way. Claimant's arguments attempt to confuse and blur the lines between the Commission's regulations governing the initial contested case procedure, which apply to requesting a hearing through determination by the hearing commissioner, and those governing Commission review of a hearing commissioner's decision. Claimant's arguments are akin to applying the pleading rules of the South Carolina Rules of Civil Procedure to the appellate process before this court. In both cases, the results would be absurd and Claimant's proposed interpretation of the Commission's regulations should be rejected.

And, while Claimant asserts he did not rely only on Reg. 67-701 but also on Reg. 67-708, that does not mean he is not bound by both Reg. 67-701 and, for that matter, Reg. 67-702. Reg. 67-701 sets the jurisdictional time for filing a notice of appeal, while Reg. 67-702 provides that an appellant is required "to attach to the Form 30 the filing fee required by the Act." S.C. Code Reg. §§ 67-701 & 67-702. Section 42-17-50 of the Act provides, in pertinent part, that an application for review must be filed with the Commission "within fourteen days from the date when notice of the award shall have

[1] Respondents note that R.67-613 was amended in 2018.

been given," and that "[*e*]*ach application* for commission review must be accompanied by a fee equal to that charged in circuit court for filing a summons and complaint in order to defray the costs of the review." S.C. Code Ann. § 42-17-50 (emphasis added). The requirements of Section 42-17-50 delineate the Commission's appellate jurisdiction, and the Commission cannot expand its authority. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 188-189, 714 S.E.2d 547, 549-550 (2011) (the fourteen-day window for appeals is jurisdictional and cannot be extended). This Court did not "violate" the tenants of statutory interpretation and did not overlook or misapprehend any points raised by Claimant.

While Claimant argued in his Brief that he was "under the impression" that his Amended Form 30 had been accepted, (App. Br. p. 15), he did not argue that the Commission actually ruled on it and accepted it, as he now appears to argue. (Pet. pp. 2-3). First, this argument is not preserved for appellate review. Herron v. Century BMW, 395 S.C. 461, 468, 719 S.E.2d 640, 644 (2011) (a party cannot raise an issue or argument for the first time in a petition for rehearing), *citing* Kennedy v. South Carolina Ret. Sys., 349 S.C. 531, 532, 564 S.E.2d 322 (2001). Second, Claimant is incorrect that the Commission was "required to rule at the hearing." He presents no case law or other authority for such a proposition. Instead, the Commission often holds its ruling on a motion in abeyance pending final review of the file and hearing argument from the parties. Third, the Commission did not rule that Claimant's Amended Form 30 had been accepted – which is made clear in its 2017 Decision. (R. p. 47). Finally, Claimant is incorrect that the result of this Court's and the Commission's ruling is that, where a remand is made to the hearing commissioner for consideration of additional evidence, =

"no issues arising in that (single Commissioner) remand hearing can then be heard when the Appellate Panel hearing is held." (Pet. p. 3). Instead, in this case, because Commissioner James issued a second decision addressing the effect, if any, of the additional material that had been admitted into the record, the same appellate procedure applied to that decision as applied to her prior January 4, 2013 Decision. (R. pp. 1-14). In other words, Claimant had 14 days from the date Commissioner James filed her September 30, 2013 remand Decision to file a Form 30 along with the statutorily-required filing fee in order for the issues arising out of the remand order to be heard. He did not do so and any loss of an "appellate right" falls on his own shoulders.

II. This Court properly held that Claimant's arguments with regard to S.C. Code §§ 42-9-90 & 42-9-260 were not preserved for appellate review. (Issues 11 & 12)[2]

Claimant attempts to convert unpreserved issues into viable issues by alleging that his prior counsel simply was inarticulate, whereas he is being much more articulate. (Pet. pp. 3-6). Claimant's problem is that his current Issues 11 and 12 were never raised properly to the Commission.[3] It is true that Claimant's Form 30 asserted, as his sixth issue on appeal, that "[t]he Hearing Commissioner erred in failing to find as a fact and

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[2] Respondents address Issues 11 & 12 jointly, as Claimant's arguments on each appear to merge at points. For example, under ¶14 of Claimant's Petition, in the argument addressing whether penalties should have been applied pursuant to Section 42-9-90, Claimant also asserts that any penalty due under Section 42-9-260 was mandatory. (Pet. pp. 3-4).

[3] It is helpful to clarify what Claimant argued under Sections 11 & 12 of his Brief to this Court. In Section 11, Claimant asserted that Section 42-9-90 "statutorily mandated" the Commission to order penalties against Respondents because: 1) they did not provide "all treatment and did not [provide] all treatment in a timely manner," and 2) "Respondent's [sic] failed to make timely payments [of TTD] on multiple occasions." (App. Br. pp. 25-27). Section 12 alleges that there were instances of late payment of TTD, and that, as a result, "[t]he application for the stop payment of benefits was made at the time that mandatory penalties were due to the Appellant" pursuant to Section 42-9-260(F). (App. Br. pp. 27-28).

ruling as a matter of law that the Defendants should be subject to fines and penalties for the late payments of temporary total disability benefits because those payments were made 14 days after they were due and Defendants failed to make timely payment on multiple occasions." (R. p. 77). However, in his Brief to the Full Commission, Claimant reduced his six issues on appeal to three: 1) the proper calculation of his average weekly wage, 2) whether he was entitled to a higher disability award, and 3) whether Respondents should not have been awarded a credit for payments made after the date of maximum medical improvement ("MMI") because no "Stop-Pay Application" had been filed and Claimant had not been provided or been able to find a job on his own. Claimant's appellate brief did not argue, as Claimant does now, that a credit was improper because alleged penalties for late payment of TTD were "due," or raise or discuss the application of Section 42-9-90 in any way. (R. pp. 218-227).[4] And, although he did not raise either Issue 11 or 12 properly in his lengthy Reply Brief, even if he had, an appellant cannot raise an issue for the first time in a reply brief. Instead, issues raised on appeal and not addressed in the opening brief are deemed abandoned on appeal. *See, e.g.*, Emerson Elec. Co. v. South Carolina Dept. of Rev., 395 S.C. 481, 489 n.6, 719 S.E.2d 650, 654 n.6 (2011) (declining to consider argument raised for the first time in a reply brief); Simmons v. SC Strong, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 634 n.2 (Ct.

[4] This is not a failure "to use the exact name of a legal doctrine," as Claimant suggests excuses his failure to make these arguments to the Commission. This is a matter of Claimant presenting different arguments on appeal than he raised to the Commission. An argument raised on appeal that is based on different grounds from the argument presented to the trial court is not preserved for appeal. Creighton v. Coligny Plaza Ltd. P'ship, 334 S.C. 96, 108, 512 S.E.2d 510, 516 (Ct. App. 1998) (issue not preserved "because the trial judge never ruled on the grounds the [plaintiffs] raise on appeal").

App. 2013) (argument not preserved for appellate review where it was raised for the first time in a reply brief).

The mere fact that the Commission Decision recites the issues stated on Claimant's Form 30 in the procedural Statement of the Case portion of the Decision, (R. pp. 44-45), does not cure Claimant's preservation issue either. This is so, particularly in light of his failure to address this issue meaningfully in his Brief to the Commission. (R. pp. 218-227).

Claimant also argues that these issues are preserved because he raised them at the Full Commission hearing when he referenced his brief and the Appellate Panel Commissioners confirmed they had read it. (R. p. 493). Such a vague reference to an unsubstantiated allegation is woefully insufficient to preserve an issue for appeal. *Cf.* Clark v. Aiken County, 366 S.C. 102, 108, 620 S.E.2d 99, 102 (Ct. App. 2005) ("[g]eneral exceptions that fail to specifically assign the grounds for error are insufficient to preserve an issue").

In addition, Issues 11 & 12 are not preserved because the Commission did not rule on either of them. "Only issues raised and ruled upon by the commission are cognizable on appeal." Stone v. Roadway Express, 367 S.C. 575, 582, 627 S.E.2d 695, 698 (2006); *see also* Transportation Ins. Co. v. South Carolina Second Injury Fund, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) (issues and arguments are only preserved for appeal when they are both raised to and ruled on by the lower tribunal). Claimant mistakenly relies on the former version of Rule 40 of the Administrative Law Court ("ALC") rules. While Rule 40 of the ALC rules provided that "[i]ssues raised on appeal but not addressed in the [final] order are deemed denied," Sierra Club v. South Carolina

Dept. of Health & Envt'l Control, 387 S.C. 424, 433, 693 S.E.2d 13, 17 (Ct. App. 2010), those rules do not apply to this case. Instead, the ALC appellate rules, including Rule 40, apply to "matters heard on appeal from final decisions of certain agencies." The Workers' Compensation Commission is not one of those agencies, as Section 42-15-60 provides for appeals directly to this Court. S.C. Code Ann. § 42-15-60.

Finally, even if either of these issues were preserved for appellate review, which they are not, Claimant's arguments are meritless. Regardless of Claimant's discussion of the mandatory nature of Sections 42-9-90 and 42-9-260, he has never proven that Respondents wrongfully withheld any of his temporary compensation payments or failed to provide medical treatment as ordered by the Commission. As is explained in more detail in Respondents' Brief at pp. 35-37, Claimant's unproven allegations are not proof and are insufficient to trigger the operation of either Section 42-9-90 or Section 42-9-260.

III. This Court properly affirmed the Commission's determination that Respondents are entitled to a credit for weekly benefits paid after the date Claimant reached MMI. (Issue 13)

Claimant continues to suggest that the Hearing Commissioner committed an error of law by concluding that she had no discretion as to whether to award Respondents a credit for overpayment of TTD after Claimant reached MMI. Claimant's entire argument is based on his erroneous assumption that both Commissioner James and the Full Commission ruled that they had no option but to award Respondents a credit. This incorrect assumption is based on an exchange between Commissioner James and Claimant's counsel at the November 28, 2012 hearing. After reciting the general positions of the parties, and noting that Respondents were seeking a credit, Claimant's counsel stated that they objected to a credit because Claimant was waiting for and willing

to work "as work is available through Snelling." Commissioner James did not state that a "credit MUST be granted," (Pet. p. 7), or that she had no discretion as to whether to award Respondents a credit but simply and accurately stated the law, which was that her "understanding of the decision of Curiel is that at the date of maximum medical improvement, whatever that date is, ... that that is the date that the temporary total and/or temporary partial has to stop." (R. pp. 260-261). That is a correct statement of the law. Once a claimant reaches MMI, it is "appropriate to terminate TTD benefits in favor of either permanent partial or permanent total disability benefits." Hendricks v. Pickens County, 335 S.C. 405, 414, 517 S.E.2d 698, 703 (Ct. App. 1999). "Essentially, workers' compensation benefits accrue along a time continuum: TTD benefits are available from the date of the injury through the date of MMI and post-MMI benefits may be awarded either as a permanent total or partial disability, or as a percentage of impairment to a scheduled member. *Smith v. NCCI, Inc., 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006).* Accordingly, the date of maximum medical improvement signals the end of entitlement to temporary total benefits." Curiel v. Environmental Management Services, 376 S.C. 23, 29, 655 S.E.2d 482, 485 (2007).

Furthermore, even if Commissioner James had stated at the hearing that she *had no discretion* but to award Respondents a credit, which she did not, such statement would not be binding. Instead, where a judge rules from the bench, that ruling is not final until a written order is issued and the written order controls. *See, e.g.*, Woodson v. DLI Props. LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 433 (2014) (explaining that "what the circuit court 'might' have stated during the hearing on the motion for summary judgment is irrelevant, as a written order constitutes a final order and final judgment of the lower

court"); Cole Vision Corp. v. Hobbs, 394 S.C. 144, 150, 714 S.E.2d 537, 540 (2011) ("[i]t is well settled that when there is a discrepancy between an oral ruling of the court and its written order, the written order controls"). Here, both Commissioner James and the Full Commission properly held that Respondents "will receive a credit for all weekly benefits paid after the date of maximum medical improvement (August 13, 2012) pursuant to *Curiel.*" (R. pp. 12, 52). Thus, the Commission properly exercised its discretion and, since substantial evidence supports the finding that Claimant reached MMI as of August 13, 2012, this Court properly held that substantial evidence supports the Commission Decision with regard to awarding Respondents a credit from that date.

IV. This Court properly upheld the Commission's determination of Claimant's average weekly wage. (Issue 15)

Claimant continues to argue, incorrectly, that regardless of the alternative chosen under S.C. Code Ann. § 42-1-40 to determine his average weekly wage, the Commission was required to follow the first alternative method. Claimant misunderstands the nature of the four alternative approaches outlined in Section 42-1-40. Where the primary method is inapplicable, which is the case here since Claimant worked fewer than 52 weeks for Snelling Staffing, the Commission then looks to the alternative methods.

The first alternative contains the language on which Claimant is fixated, and provides that, "[w]hen the employment, prior to the injury, extended over a period of less than fifty-two weeks, the method of dividing the earnings during that period by the number of weeks *and parts thereof* during which the employee earned wages shall be followed, *as long as results fair and just to both parties* will be obtained." S.C. Code Ann. § 42-1-40 (emphasis added). Clearly, the Commission did not chose this approach. Frankly, had it applied the first alternative, Claimant's average weekly wage would have

been lower than $537.91 ($9,856.96 gross pay ÷ 20 weeks worked = $492.84; even accepting Claimant's unproven allegation that he really only worked 19 weeks, the first alternative would have yielded only $518.79 ($9,856.96 gross pay ÷ 20 weeks worked = $518.79)).

Instead, the Commission properly determined exceptional reasons exist and exercised its flexibility to determine the proper average weekly wage under the third alternative: "[w]hen for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury." S.C. Code Ann. § 42-1-40; Brunson v. Wal-Mart Stores, Inc., 344 S.C. 107, 112, 542 S.E.2d 732, 734-735 (Ct. App. 2001) (applying second paragraph of Section 42-1-40 where other alternatives would be unfair to employer). In calculating AWW under this last alternative, the Commission exercises flexibility, always keeping in mind that the "[t]he specific goal of *section 42-1-40* is for the commission to calculate an average weekly wage that is "fair to the employee and to the employer." Bennett v. Gary Smith Builders, 271 S.C. 94, 99, 245 S.E.2d 129, 131 (1978). Here, Commissioner James found that exceptional reasons exist that made calculating Claimant's average weekly wage under the first paragraph of Section 42-1-40 unfair. (R. p. 25). Contrary to Claimant's assertions otherwise, the Commission is not bound to any specific approach or calculation under the third alternative, so long as the result is a fair approximation of his future earnings if not for the injury.

Indeed, the statute provides the Commission "[a]n elasticity or flexibility ... with a view toward always achieving the ultimate objective of reflecting fairly a claimant's

probable future earning loss," in order to reach "a result fair to the employee and to the employer." Bennett, 271 S.C. at 98-99, 245 S.E.2d at 131. Claimant's attempts to re-write or mischaracterize the statute to his benefit lack legal support and do not provide any reason for this Court to grant rehearing.

CONCLUSION

For all the reasons stated herein, this Court should deny Claimant's Petition.

Respectfully submitted,

McANGUS GOUDELOCK & COURIE, LLC

May 7, 2019

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THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that on the 7th day of May, 2019, I served the **Respondents' Return in Opposition to Petition for Rehearing** on John McDaniel by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

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May 7, 2019

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

Dear Ms. Kitchings:

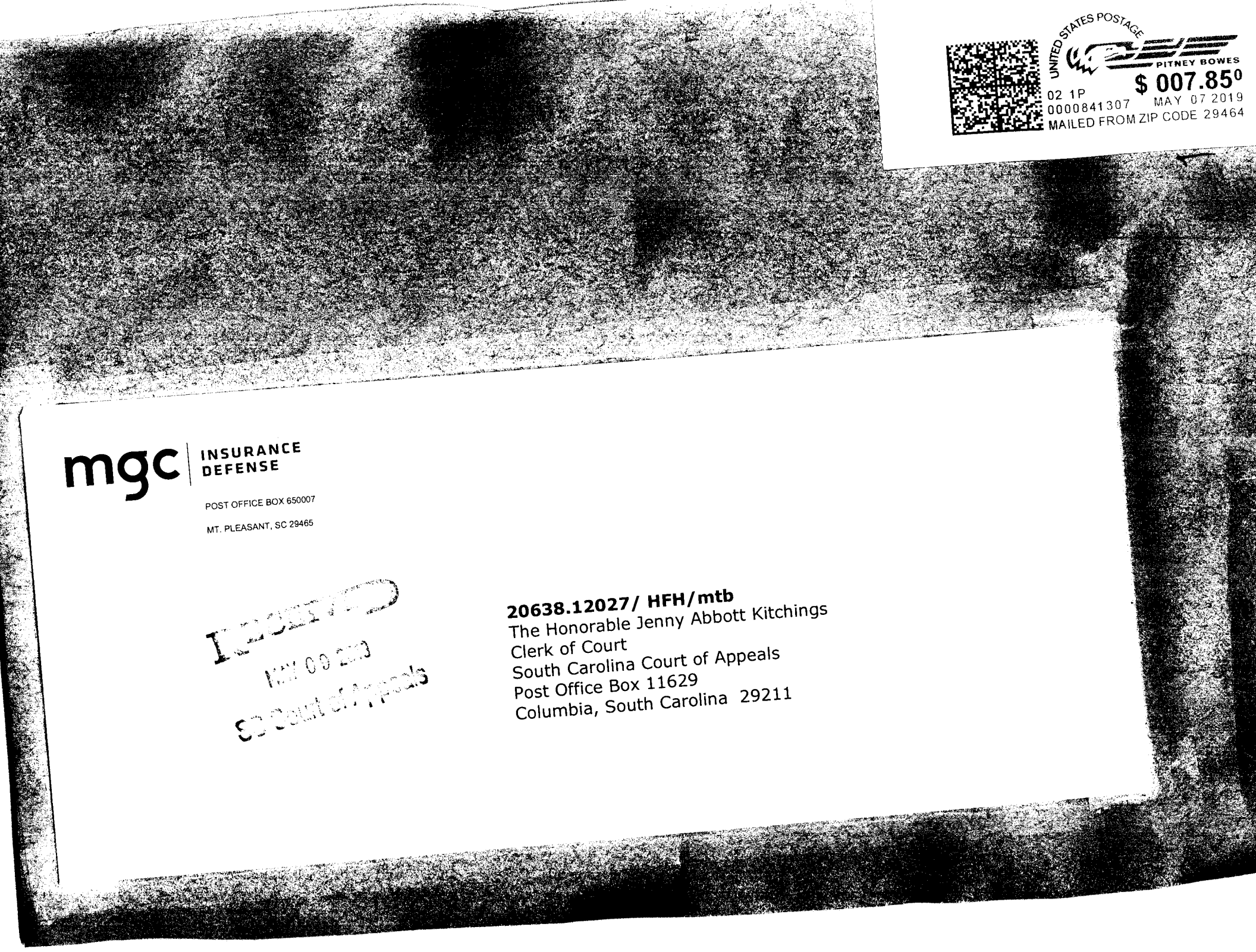
Enclosed please find the original and seven (7) copies of Return in Opposition to Petition for Rehearing, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the self-addressed, stamped envelope.

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* (via U.S. Mail and Certified Mail)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