THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

WCC File No. 1609593

Gena Cain-Davis, Claimant, ... Appellant,

v.

SC Department of Corrections, Employer,
and State Accident Fund, Carrier, ... Respondents.

INITIAL BRIEF OF APPELLANT

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6. As the the Appellate Panel's Decision and Order (based on Respondents' Brief) mischaracterizes and misstates the underlying facts, arguments and statements of the Hearing Commissioner and the Parties, these statements should be vacated.

STATEMENT OF THE CASE

This appeal arises from a work related accident suffered by the Appellant, Gena Cain-Davis, on July 14, 2016 at the Broad River Correctional Institute where she worked as a correctional officer for the Employer, South Carolina Department of Corrections (SCDC). The issues on appeal concern procedural aspects of withdrawal of a Form 50 and dismissal of a Form 21.

A hearing on a Form 50 filed by Appellant and a Form 21 filed by Respondents was set before Commissioner Mike Campbell on October 24, 2017. Each had already filed its Form 58 (Prehearing Brief) and Notice of APA Submissions. Appellant sought additional medical treatment. Respondents sought to ratify their suspension of temporary compensation due to allegations of refusal of medical treatment..

Appellant had moved for the Form 21 to be dismissed because Respondents were not current on temporary total disability payments and had illegally suspended compensation.

The parties appeared before Commissioner Campbell on October 24, 2017 and made arguments off the record in a pretrial conference. During the conference, Commissioner Campbell indicated he would dismiss the Form 21. Appellant also requested leave to withdraw her Form 50 to obtain additional proof of her need for medical treatment. Commissioner Campbell issued an Administrative Order on November 14, 2017 [Administrative Order].

Respondents timely filed a Form 30 (Notice of Appeal) on November 20, 2017. The Appelate Panel denied Appellant's motion to dismiss as interlocutory.Oral argument was held on February 20, 2018. The Appellate Panel issued its Decision and Order on March 5, 2019, in which it affirmed in part and reversed in part. [FC Order].

This appeal followed.

STATEMENT OF THE FACTS

Gena Cain- Davis worked at the South Carolina Department of Corrections for over 17 years as a correctional officer. On Thursday, July 14, 2016, Cain-Davis was working at the prison. She slipped and fell forward landing on her hands and knees. The accident was witnessed by numerous staff and inmates.

Respondents accepted the claim and began providing treatment to the left knee. The authorized treating physician, Dr. Gee, noted reported symptoms of right knee and back pain, but indicated he was not authorized to examine or treat these injuries. Dr. Gee took Cain-Davis out of work.

The Fund filed a Form 15 (Section I) on August 3, 2016 starting temporary total disability compensation.

Cain-Davis has a past history of developing DVT's (deep vein thrombosis) in her left leg. She did not have a DVT immediately before the accident, but developed a DVT almost immediately after. As to the DVT, Dr. Gee opined "In my opinion, this is related." Despite Dr. Gee's opinion and other evidence, Respondents have consistently denied the DVT throughout this claim. That dispute has not yet been litigated.

In late 2016, Dr. Gee retired due to health reasons. Cain-Davis was sent to Dr. Eric Byrd for follow-up on her admitted left knee injury. Due to the extensive swelling, pain and limited range of motion, Dr. Byrd was unable to diagnose the extent of the injury to her left knee. He ordered an MRI. Dr. Byrd opined Cain-Davis was not at MMI.

Cain-Davis went three times to have the MRI done. Unfortunately due to swelling and pain, the radiologist was not able to fully straighten her leg into a position where the MRI could be done.

After the first two failed attempts, Dr. Hunt gave her a note to take to the radiologist explaining: "Patient with multiple DVT episodes and filter placement continues to have swelling and pain in her left leg which prevents her from stretching the leg totally straight. Hopefully an MRI can be performed in the face of this problem." Unfortunately, the radiologist could not perform the MRI even on the third attempt on March 15, 2017.[1]

PROCEDURAL HISTORY

This case arises out of work-related injuries suffered by Claimant Gena Cain-Davis on July 14, 2016. Cain-Davis was written out of work by the authorized treating physician, Dr. Gee.

Claimant filed a Form 50 (Claim) on July 28, 2016 alleging injuries to her left knee/leg, right knee/leg; and back affecting both legs.

On August 31, 2016, the adjuster, Kori Tabor, filed and served a Form 15 (Section I) starting temporary total disability compensation.

On October 19, 2016, Claimant filed a Form 50 (Request for Hearing), seeking additional medical examination and treatment for "back affecting both legs; DVT." On November 16, 2016, Respondents filed a form 51 admitting Claimant gave notice of an injury, but denying the employee suffered an injury. The case was set for a hearing before Commissioner Scott Beck on January 31, 2017.

On January 20, 2017, Respondents filed a Motion to Leave the Record Open to take the deposition of Dr. Rajesh Bajaj (Cain-Davis's treating hematologist). Claimant consented to the continuance. Commissioner Beck's office was notified of the agreement and reset the hearing for

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[1]This Statement of the Facts is taken from Claimant's pre-hearing brief filed with the Commission. As the hearing was continued by Commissioner Campbell before going on the record, no testimony or medical records were admitted into evidence.

February 23, 2017. Dr. Bajaj was deposed on February 2, 2017.

On February 6, 2017, Claimant advised Commissioner Beck's office by email that she was withdrawing her Form 50.

On March 21, 2017, Respondents suspended temporary compensation based on an alleged refusal of medical treatment. On April 5, 2017, Respondents filed a Form 21 stating (inaccurately) that:

> Compensation payments are current as of 04/04/17 (m/d/yy) and shall continue until otherwise ordered or until Form 17 is signed by the Claimant.

Attached to the Form 21 was a Form 18 showing payment of TTD from 7/15/2016-3/27/2017. The last check received by Cain Davis paid the period of 03/14/17 - 03/20/17.

On April 11, 2017, Claimant filed a Form 22 requesting additional compensation and penalties, alleging "claimant has been compliant with all treatment. Respondents have denied causally-related treatment which would lessen the period of disability."

On April 13, 2017, Claimant filed a Form 50 (Request for Hearing). Also on April 13, 2017, Claimant filed a Motion to Compel Compliance with Subpoena. The subpoena had been served on January 12, 2017.

On May 12, 2017, Respondents filed a Form 51 stating "Respondents deny any and all injuries."

A hearing was set before Commissioner Campbell for July 19, 2017. On July 5, 2017, Claimant filed her prehearing brief, in which she amended her Form 50 to add Dr. Phillip Baldwin as an examining physician. Respondents responded by filing a Motion to Leave Record Open to depose Dr. Baldwin. Claimant filed a Return consenting to leave the record open for the deposition.

Dr. Baldwin was deposed on September 20, 2017.

The parties appeared before Commissioner Campbell at the reset hearing on October 24, 2017. At the pretrial conference, Claimant's counsel inquired as to whether Defense counsel was taking the position that Claimant was not entitled to additional medical treatment under Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016)("To hold an employer liable for medical expenses beyond this [10 week] time period, the Appellate Panel must decide that, based upon a heightened standard of medical evidence, additional treatment would tend to lessen the claimant's period of disability."). Defense counsel stated that was her position.[2] Claimant's counsel then expressed concern over the need to obtain a specific statement from the doctor and requested leave to withdraw the Form 50 to obtain such a medical statement. Commissioner Campbell agreed. No objection was made by Defense Counsel.

Commissioner Campbell's office sent an email to the parties requesting an order. On November 7, 2017, Claimant's counsel submitted a proposed Order via email to Defense Counsel for her review prior to submission to Commissioner Campbell. [Exhibit D]. On November 9, 2017, on her own initiative, Defense Counsel submitted her own proposed Order directly to Commissioner Campbell's office, with a copy to Claimant's counsel. The Commissioner's assistant, Barbara Cheeseboro, responded with an email stating "Please advise if all parties are in agreement for Comm. Campbell to sign this Order." Claimant's counsel responded stating "I have not seen Ms. Barr's proposed Order, as it was not sent to me first. I will review and get back to you shortly."

Later that day, Claimant's counsel submitted a revised proposed Order to Ms. Cheeseboro. In the email, he wrote:

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[2]Ms. Barr represented the employer in Hartzell.

> This matter has become more complicated than initially realized at the hearing because Ms. Barr is now seeking to dismiss the claim pursuant to Regulation 67-611. Ms. Barr has pointed out to me that I had previously withdrawn a Form 50 in this case, such that the October 24th withdrawal is, in her view, a voluntary dismissal of the claim. At the pretrial, Ms. Barr expressed her position that additional medical treatment would be contested under Hartzell (to obtain medical treatment beyond 10 weeks, the claimant must produce medical evidence stated to a reasonable degree of medical certainty that such treatment would tend to lessen the period of disability). In light of her position and over concern that there may not be sufficient proof in the record, I advised Commissioner Campbell that I was withdrawing my Form 50 to obtain additional medical evidence to meet the Hartzell standard. I believe this met the "good cause" standard in the regulation. The 50 was withdrawn to obtain proof; not "merely for the purpose of delay."
>
> As Commissioner Campbell heard the parties at the pretrial conference, he is in the best position to judge that the 50 was not withdrawn merely for the purpose of delay. For that reason, I have asked that the proposed order make it clear that each party is restored to where they were before the hearing and can move forward towards resolving the case on the merits.

In response to this email, Defense counsel wrote:

> Again, I am quite taken aback that Mr. Samuels would make such new arguments and draft an order addressing issues that were never discussed at our pre-trial conference with Commissioner Campbell. No hearing was held. No motion to withdraw the Form 50 without prejudice was made. No order for costs or reinstatement of ttd was issued by Commissioner Campbell, nor could it have been because, again, we had no hearing. None of these issues are before the Commissioner to decide today. The sole issue decided by Commissioner Campbell was a pro forma dismissal of the Form 21.
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> In addition, with all due respect, the sole purpose of the Form 50 withdrawal was delay. Both Forms 50 filed by the Claimant are identical. Apparently, the Claimant was unprepared to go forward at either scheduled hearing. This is not "good cause." More importantly, this issue is not properly before Commissioner Campbell to decide. While it is unfortunate that Mr. Samuels only now realizes the issue created by his second Form 50 withdrawal, this does not give Commissioner Campbell authority or jurisdiction to excuse this action. [Exhibit D].

On November 14, 2017, Commissioner Campbell issued an Administrative Order ruling:

> This matter was scheduled for a hearing on October 24, 2017 before the undersigned Commissioner pursuant to the Defendants's Form 21, as well as, the Claimant's

Form 50 and Defendants' Form 51. **After a pre-hearing conference, the Claimant was allowed to withdraw the Form 50 without prejudice.**

Furthermore, because temporary total disability compensation was suspended prior to the hearing and not current at the time of the hearing, pursuant to S.C. Code Ann. § 42-9-260 (F), I find that the Form 21 hearing request was not properly before the Commission. Therefore, the Form 21 was dismissed and the October 24, 2017 hearing was cancelled. No penalties were assessed. The claim is hereby returned to the Commission's general files.

[November 14, 2017 Administrative Order (emphasis added)].

After the Order was issued, the following exchange occurred between Defense Counsel and Commissioner Campbell's assistant Barbara Cheeseboro:

Ms. Barr: Respectfully, on what basis does the Commissioner allow the Claimant to withdraw the form 50 without prejudice?

Ms. Cheeseboro: Please be advised that I put your email before the Commissioner. He said that Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50 without prejudice, and with it being within his discretion to do so, allowed Mr. Samuels to do that.

Thanks,

Ms. Barr: Mr. Samuels did no such thing. This is patently false. Mr. Samuels simply withdrew the Form 50 because he did not have sufficient evidence. At no time did he ever ask that it be withdrawn without prejudice, as evinced by the fact that the Form 50 was noted as withdrawn on ecase prior to Mr. Samuels's request regarding prejudice.

I apologize, but this is simply wrong and entirely unfair to my clients -- the State of South Carolina -- and on their behalf I must express my vehement objection.

[Exhibit E]

Respondents filed a Form 30 (Notice of Appeal) appealing Commissioner Campbell's order on November 20, 2017. Prior to the filing of the Form 30, Claimant filed a Form 15 (Section III) seeking a hearing to address the illegal termination of her weekly benefits. [Form 15]. A hearing was

scheduled for December 18, 2017 before a single commissioner on the Form 15. The commission postponed that hearing indefinitely due to the filing of the Form 30. [Notice].

Oral argument was held before the Appellate Panel on February 20, 2018. The Appellate Panel issued a Decision and Order on March 5, 2019, wherein it REVERSED IN PART and AFFIRMED IN PART. [FC Order].

The Appellate Panel affirmed the dismissal of the Form 21, but reversed the Hearing Commissioner's ruling that the Form 50 was withdrawn without prejudice. The Appellate Panel reasoned: "The hearing was cancelled by the Hearing Commissioner on Otober [sic] 24, 2017 prior to going on the record, after which time the Hearing Commissioner's authority and jurisdiction to adjudicate this claim ended." [FC order, Finding of Fact 7, page 14]. The Appellate Panel also made additional findings of fact and conclusions of law addressing the withdrawal of the Form 50 and the suspension of temporary compensation.

This Appeal followed.

STANDARD OF REVIEW

An appellate court has the power upon review to reverse or modify a decision of an administrative agency if the findings and conclusions of the agency are (1) affected by an error of law, (2) clearly erroneous in view of the reliable and substantial evidence on the whole record, or (3) arbitrary or capricious or characterized by abuse of discretion or a clearly unwarranted exercise of discretion. James v. Anne's Inc., 390 S.C. 188, 701 S.E.2d 730 (2010).

The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible. Strother v. Lexington County Recreation Comm'n, 332 S.C. 54, 62, 504 S.E.2d 117, 121 (1998). If a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers. TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998). It is well-settled that statutes dealing with the same subject matter are in pari materia and must be construed together, if possible, to produce a single, harmonious result. Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (2000).

> Compensation laws constitute a form of social legislation and were enacted primarily for the benefit, protection and welfare of working men and their dependents, to relieve them of the uncertainties of a trial in a suit for damages, to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents, and to prevent the burden of injured employees and their dependents becoming charges on society. Their right to sue and obtain compensation is taken away, and such laws should be construed liberally in favor of the employees and their dependents, in furtherance of the beneficent purposes for which they were enacted, and to avoid any incongruous or harsh results. Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (1941).

ARGUMENT

The entire thrust of Respondents' argument to the Appellate Panel – indeed their entire defense of this case – has been reliance on technicalities, rather then dealing directly with the merits of their obligation to care for their injured employees. Two essential principles overshadow the issues raised in this appeal. The first is that it is not the place of the courts (nor litigants) "to play a 'gotcha' game with attorneys by showcasing their alleged mistakes, at the expense of their clients." Atlantic Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012)(Toal, C.J., dissenting)("This practice ignores the fact that behind every party name on a caption is a life-blood litigant or criminal defendant that depends on the court system to protect their economic and liberty interests."); see, also In re Nov. 4, 2008 Bluffton Election, 686 S.E.2d 683, 385 S.C. 632 (2009)("we are guided by the principle that courts should not interpret procedural rules to create a trap for unwary lawyers."); In re Nov. 4, 2008 Bluffton Election, 686 S.E.2d 683, 385 S.C. 632 (2009) ("A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice . . .").

The second is that our State has a strong preference for deciding cases on the merits, rather than on procedural technicalities. Lewis v. Congress of Racial Equality and/or C. O. R. E., Inc., 274 S.E.2d 287, 275 S.C. 556 (1981). Cf. Capital City Ins. Co. v. Bp Staff, Inc., 674 S.E.2d 524, 382 S.C. 92 (Ct. App. 2009)(considering whether "circuit court abused its discretion in ordering dismissal of the case over some less drastic remedy, such as a continuance or stay . . ."). These sentiments are particularly relevant where, as here, the technicalities are not real and cause no impediment to this claim's viability.

In this case, the Respondents successfully appealed an Administrative Order from a hearing

commissioner who granted Appellant's request to withdraw a Form 50 without prejudice so as to obtain additional proof. Every party has the right to rely on the pronouncements of a hearing commissioner or trial judge as to whether a continuance will be granted. It is improper and prejudicial for *any* appellate body – whether this Court or the Appellate Panel – to disregard the hearing commissioner's inherent authority to manage his docket. See Trotter v. Trane Coil Facility, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011)("The granting or refusal of a request for a continuance rests in the sound discretion of the hearing commissioner, whose ruling will not be disturbed unless a clear abuse of discretion is shown.").

1. An administrative order granting a continuance or dismissing a pleading without prejudice is not directly appealable as a matter of law.

An administrative order allowing a claimant to withdraw a Form 50 without prejudice is not directly appealable. This Court addressed a similar situation in Walker v. Springs Industries, Inc., 379 S.E.2d 729, 298 S.C. 249 (Ct. App. 1989). In Walker, the employee requested that her Form 50 be dismissed without prejudice. Unlike the instant case – where employer's counsel remained silent – the employer "objected to the dismissal of the Form 50 and attendant hearing unless employee's underlying claim was also dismissed.[3] . . . The single commissioner held that an employee, as a matter of right, and over the employer's objection, may dismiss a Form 50 Request for Hearing without thereby dismissing the underlying claim. The commissioner ordered the case returned to the files of the Commission until a hearing was requested by one of the parties or set by the Commission." Id.

The Full Commission, circuit court and Court of Appeals affirmed. The Court of Appeals

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[3]As noted later in this brief, counsel for Respondents made no such objection to a withdrawal without prejudice at the hearing.

noted this situation did not meet any of the four basic situations from which a party could appeal. The Court dismissed the employer's appeal and held: "Moreover, the appealed order effected an indefinite continuance of this case. Orders granting continuances are not directly appealable." Id., *citing* Temples v. Ramsey, 285 S.C. 600, 330 S.E.2d, 558 (Ct. App.1985)("it is well-established that orders granting or denying motions for a continuance or a mistrial are not directly appealable."). See, also, Allison v. W.L. Gore & Associates, 394 S.C. 185, 714 S.E.2d 547 (2011)("Employer argues, and we agree, that it could not immediately appeal the order denying the motion to dismiss."); Bone v. U.S. Food Serv., 404 S.C. 67, 73, 744 S.E.2d 552, 556 (2013)("An agency decision that does not decide the merits of a contested case is not a final agency decision subject to judicial review.").

As the Administrative Order was not directly appealable, the Court should vacate the Decision and Order of the Appellate Panel and reinstate the Administrative Order of the Hearing Commissioner.

2. The Hearing Commissioner retained Jurisdiction over the case at the time he issued the Administrative Order.

The Appellate Panel held: "The hearing was cancelled by the Hearing Commissioner on Otober [sic] 24, 2017 prior to going on the record, after which time the Hearing Commissioner's authority and jurisdiction to adjudicate this claim ended." [FC order, Finding of Fact 7, page 14]. This was error, for if a Hearing Commissioner, like a trial judge, "has jurisdiction to hear a matter and the matter having been heard before him, he entertains jurisdiction until his decision is rendered." First Carolinas Joint Stock Land Bank of Columbia v. Knotts, 191 S.C. 384, 410, 1 S.E.2d 797, 808 (1939). Cf. First Union Nat'l Bank of S.C. v. Hitman, Inc., 308 S.C. 421, 422, 418

S.E.2d 545, 545 (1992) ("[A] judge is not bound by [a] prior oral ruling and may issue a written order which is in conflict with the oral ruling.").

This rule is further confirmed by the language in the regulation stating whether withdrawal of a Form 50 voluntarily dismisses the claim is to be determined if "in the *opinion of the Commissioner*, the form is withdrawn merely for the purpose of delay." S.C. Code Ann. Regs. 67-609 (2017). The reference to "the Commissioner" in the singular shows this decision is to be made by the Hearing commissioner; not the Appellate Panel. Cf. Spruill v. Richland County School Dist. 2, 363 S.C. 61, 609 S.E.2d 524 (2005)(affirming authority of hearing commissioner to retain jurisdiction to deny request to withdraw Form 50 "after the hearing had been held and a decision rendered" but before the actual signed Order had been written and filed).

It is axiomatic that a trial court retains jurisdiction over a pending matter unless and until it is divested of jurisdiction by operation of law, such as removal to another tribunal or a timely appeal to a higher body (which could be an appellate court or the Appellate Panel). This rule applies to the Workers' Compensation Commission with equal force as it does to circuit court. The rule specifically applies to withdrawal of a Form 50, as "when a Form 50 or Form 52 is withdrawn, a notice removing the case from the docket will be filed in the Commission's record and *a copy sent electronically or mailed to the parties* . . ." S.C. Code Ann. Reg. 67-609 (A)(2) (2010)(emphasis added). The regulation requires the jurisdictional commissioner to send a copy of the notice – which, in this case, was the Administrative Order.[4]

Our Supreme Court exhaustively detailed the concepts underlying jurisdiction in Limehouse

[4]The regulation further states: "The notice is without prejudice to the claimant's right to proceed with his or her claim." S.C. Code Ann. Reg. 67-609(B) (2010)

v. Hulsey, 404 S.C. 93, 744 S.E.2d 566 (2013). The court explained:

> Jurisdiction is generally defined as "the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause." Specifically, "[j]urisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the particular judgment requested." Id., 744 S.E.2d at 572 (internal citations omitted).

The Workers' Compensation Commission has exclusive subject matter jurisdiction over claims for workplace injuries filed by employees against their employers. See S.C. Code Ann. 42-3-180 (2007).

It is not entirely clear what underlies the Appellate Panel's reasoning in concluding that Commissioner Campbell's "authority and jurisdiction to adjudicate this claim ended." [FC Order, page 14, Finding of Fact 7, Conclusion of Law 6]. The Appellate Panel seems to have believed that once the Hearing Commissioner "cancelled" the Form 21 hearing and allowed the Form 50 to be withdrawn, he no longer retained jurisdiction. This begs the question of who did have jurisdiction, if not Commissioner Campbell?

There is no way to answer this question. The Commission consists of seven commissioners – all of whom are essentially equivalent to trial judges. The commissioners rotate among seven geographical districts every two months, holding hearings in various locations around the state. The assigned jurisdictional commissioner deals with all issues that are assigned to them – including hearings, motions, clincher conferences, informal conferences, approving attorney fee petitions and any of the myriad administrative issues which may arise. Once a case is assigned to a commissioner, the commissioner retains jurisdiction until a final order is issued disposing of the matters raised in

the pleadings – or, in some situations, administratively returned to the general files.[5] Indeed, when a case is ordered to be mediated, "A Commissioner must retain jurisdiction of the claim solely for those issues being mediated." S.C. Code Ann. Reg. 67-1802 B(1)(2015).

The Appellate Panel simply got it wrong in concluding the Hearing Commissioner had been divested of jurisdiction when he issued the Administrative Order addressing the issues before him on the pleadings. The Decision and Order of the Appellate Panel should be reversed and the Administrative Order reinstated.

3. As the Hearing Commissioner exercised his discretion in permitting withdrawal of the Form 50 without prejudice, there is no legal basis on which to reverse the administrative order.

According to the regulation governing withdrawal of a Form 50:

> Withdrawing a Form 50 or Form 52 the second time without good cause may operate as a voluntary dismissal of the claim when the form is withdrawn by a claimant who has once withdrawn a Form 50 or Form 52 based on the same set of facts, and, *in the opinion of the Commissioner*, the form is withdrawn merely for the purpose of delay.

S.C. Code Ann. Reg. 67-609 (2017) (emphasis added).

The regulation provides that the decision to allow a 50 to be withdrawn without prejudice is solely within the opinion of Hearing Commissioner. As such, even if the administrative order is appealable, the Hearing Commissioner's decision is reviewed under the most deferential standard. "The granting or refusal of a request for a continuance rests in the sound discretion of the hearing commissioner, whose ruling will not be disturbed unless a clear abuse of discretion is shown." Trotter v. Trane Coil Facility, 393 S.C. 637, 645, 714 S.E.2d 289, 293 (2011). Our Supreme Court

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[5]The statute states: "The commission or any of its members shall hear the parties at issue and their representatives and witnesses and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue, must be filed with the record of the proceedings and a copy of the award must immediately be sent to the parties in dispute." S.C. Code § 42-17-40 (A) (2007).

explains the "exercise of a sound judicial discretion must and should be performed in every case with a conscientious regard for what is just and proper under the circumstances." State v. Scates, 212 S.C. 150, 46 S.E.2d 693 (1948). Unless Commissioner Campbell had exercised his discretion "arbitrarily, or for reasons clearly untenable or unreasonable," his decision below could not be reversed on appeal by the Appellate Panel.

In this case, after the Administrative Order was issued, the following exchange occurred between Defense Counsel and Commissioner Campbell's assistant Barbara Cheeseboro:

Ms. Barr:	Respectfully, on what basis does the Commissioner allow the Claimant to withdraw the form 50 without prejudice?
Ms. Cheeseboro:	Please be advised that I put your email before the Commissioner. **He said that Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50 without prejudice, and with it being within his discretion to do so, allowed Mr. Samuels to do that.** Thanks,
Ms. Barr:	Mr. Samuels did no such thing. This is patently false. Mr. Samuels simply withdrew the Form 50 because he did not have sufficient evidence. At no time did he ever ask that it be withdrawn without prejudice, as evinced by the fact that the Form 50 was noted as withdrawn on ecase prior to Mr. Samuels's request regarding prejudice. I apologize, but this is simply wrong and entirely unfair to my clients -- the State of South Carolina -- and on their behalf I must express my vehement objection. [Exhibit E].

This exchange demonstrates that the Hearing Commissioner did exercise appropriate discretion. He appropriately considered Claimant's counsel's expressed concern that additional medical evidence could be needed to meet the requirements of Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016)(The 2007 amendment to § 42-15-60, "while retaining the employer's

ten-week liability period, the General Assembly added a requirement for expert medical evidence to support an award of additional treatment and limited the Appellate Panel's broad discretion to order such treatment in a case or controversy between the employer and the employee.").[6] This is entirely appropriate as [w]hen the claimant notifies the Commissioner and her employer of her request for an adjournment to provide additional proof of disability . . . an adjournment causes no prejudice to the employer. The Commissioner should have permitted adjournment in the interest of justice." Morgan v. JPS Automotives, 321 S.C. 2012, 467 S.E.2d 457 (Ct. App. 1996)(reversing commissions' denial of claimant's motion for adjournment to submit additional evidence of disability) Cf. Brown v. La France Ind., 286 S.C. 319, 333 S.E.2d 348 (Ct. App. 1985)(when the claimant in a workers' compensation case inadvertently omits proof of causation, the case should be reopened and an opportunity should be afforded the claimant to supply such proof in the interest of justice).

At no time did Defense counsel object to Commissioner Campbell's action, point out that a Form 50 had previously been withdrawn or otherwise put Claimant on notice that she would seek to have the case dismissed. She had the ability to object and request that Appellant try her case on the existing evidence, yet chose to remain silent with the obvious intent of profiting later when Claimant filed a new Form 50. "If one remains silent where in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent." Smith v. Williams, 141 S.C. 265, 282, 139 S.E. 625, 630 (1927). "It is a general rule of law, as well as of good morals and fair dealing, that if a party is silent when he should speak, or supine when he should act, he will not afterwards be permitted to either speak when he should be silent, or to act when he failed to do so

[6]Defense counsel represented the employer in Hartzell.

at the first proper and opportune moment. 'Silence always implies consent,' says another cardinal maxim of the law." King v. Ligon, 180 S.C. 224, 185 S.E. 305 (1936). Respondents' counsel's attempt to gain a strategic advantage was properly denied by the Hearing Commissioner.

As a precise recounting of the pretrial conference is not possible because it was off the record, the parties and the Full Commission must rely on the Hearing Commissioner's recounting of the pretrial conference. Commissioner Campbell's assistant explained: "Please be advised that I put your email before the Commissioner. **He said that Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50 without prejudice, and with it being within his discretion to do so, allowed Mr. Samuels to do that.** " [Exhibit E (emphasis added)].

The Appellate Panel entirely disregards Commissioner Campbell's explanation of his reasoning. Instead, the Appellate Panel found:

> Claimant's counsel admits in oral argument before the undersigned Commissioners that there was no discussion about whether the Form 50 withdrawal was with or without prejudice. [FC Order, page 13, Finding of Fact 5].

For members of the workers' compensation bar, it is disconcerting that the Appellate Panel would take a candid statement from counsel so completely out of context (and contrary to that of the Hearing Commissioner) and use the resulting finding to effectively dismiss a meritorious claim.

The transcript shows the following exchange:

Mr. Samuels:	I understand I withdrew the 50 on that day.
Commissioner Taylor:	Okay.
Mr. Samuels:	Without prejudice. And the Commissioner memorialized that - - -
Ms. Barr:	Objection.
Commissioner Barden:	Was there a discussion - - -
Mr. Samuels:	- - - in an Order.
Commissioner Barden:	- - - with Ms. Barr and Commissioner Campbell about whether it was with or without prejudice?

Commissioner Taylor: On the day.

Mr. Samuels: There was a discussion as to the reasons why the Form 50 was being withdrawn.

Commissioner Barden: Right, because you wanted some more medical evidence.

Mr. Samuels: I was concerned – you know, normally, what most lawyers will do and say, if a Claimant is not at MMI we want to provide medical treatment because we want to get that person to MMI. Ms. Barr was the attorney in our case and she took the unusual position of insisting on that relatively new case and language of that specific language – specific language to a reasonable degree of medical certainty, ten months comparative disability [*sic*].

Commissioner Taylor: And so you felt like maybe you may not get there.

Mr. Samuels: I was – correct.

Commissioner Taylor: I understand. And so, when you advised Commissioner Campbell that you were going to withdraw your Form 50, was there a discussion between either you and Commissioner or and Ms. Barr and Commissioner Campbell about whether it was with or without prejudice?

Mr. Samuels: There was not, Your Honor.

Commissioner Taylor: Okay.

Mr. Samuels: And I think that is an important point. Becuase I think you've got to consider what's going on. Is it my intention to withdraw the Form 50 to obtain additional evidence as we had discussed, or am I intentionally dismissing my case so I woulc walk outside to may client and tell her I just voluntarily dismissed your case? So, you can sue me for legal malpractice. Because that would be absurd if I were to do that. Ms. Barr didn't raise the issue of a dismissal until a Proposed Order was submitted to her. She then responded with that email and copied it to Commissioner Campbell's administrative assistant - - -

Commissioner Taylor: Okay.

[FC Tr. Page 17, line 10 - 19, line 14].

The argument then moves to a discussion over the Form 21 dismissal before returning to the issue over the Form 50. [FC Tr. Page 20, line 24 - 22, line 18]. In that argument, Appellant's counsel reiterates that "No, Your Honor, I wasn't silent. Because I said I – I am withdrawing the Form 50 to obtain additional evidence [to get more medical treatment]... to obtain additional proof,

which clearly is not an intent to dismiss."

As is readily apparent from the contemporaneous email exchanges, the reason for the request to withdraw the Form 50 was explained to the Hearing Commissioner and Respondents' counsel. The Hearing Commissioner is not a fool. He easily understood that even if there was no literal discussion about "with or without prejudice" in those precise terms, the request to withdraw the Form 50 to procure additional proof is unquestionably a withdrawal without prejudice. It beggars belief to suggest than any attorney present at trial with his witnesses and hundreds of pages of written evidence would simply throw in the towel and voluntarily dismiss the case.[7] Cf. Trowell v. S.C. Dept. of Public Safety, 681 S.E.2d 893, 384 S.C. 232 (Ct. App. 2009)("The agency's decision here arbitrarily created a trap for the unwary petitioner."). Had Commissioner Campbell denied the request (or Respondents' counsel raised an objection or forced the issue), then the only alternative for Appellant would have been to proceed with the evidence at hand.

As Commissioner Campbell exercised his discretion appropriately, the Administrative Order should be affirmed.

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[7]In the Discussion portion of the Appellate Panel's Decision and Order, it states the regulation allowing withdrawal of a second Form 50 for good cause "is modeled on the common law doctrine of retraxit, which holds that once a case has been voluntarily dismissed, it if brought to court again a dismissal in this second case will mean the case can never be brought back to court." [FC Order, page 11]. This discussion seems to indicate that the Commission's Decision and Order is a final one, preventing Appellant from never moving forward. However, as *retraxit* is not discussed in the Findings of Fact and Conclusions of Law, it appears not to be part of the actual holding.

To the extent *retraxit* is relevant, the regulation does not follow the doctrine of *retraxit*, for it provides a case can only be dismissed if the hearing commissioner explicitly finds the second withdrawal is "merely for the purpose of delay." S.C. Code Ann. Reg. 67-609 (2017) The federal court rule contains no such proviso. Rule 41, FRCP.

4. If the Appellate Panel found the Administrative Order to be "impermissibly vague," it should have remanded the case to the Hearing Commissioner to make "detailed findings of fact and rulings of law."

In the Discussion portion of the Appellate Panel's Decision and Order, the commissioners state: "The Appellate Panel agrees that the Hearing Commissioner's Order is impermissibly vague, as it lacks detailed findings of fact and rulings of law." [FC Order, page 10]. If this is the case, then the case should have been remanded back to the Hearing Commissioner with instructions to make such findings. Indeed, it is illogical and inconsistent that the Appellate Panel reversed the Hearing Commissioner's Administrative Order for this reason, yet in the same breath concludes the "issues of prejudice and 'good cause'" were not before the Hearing Commissioner. What makes this so disturbing is that the Hearing Commissioner plainly (and properly) believed the issues were before him as shown by the Administrative Order itself One and his explanatory email to Respondents' counsel.

One also has to ask how could it not be before him? The request to withdraw the Form 50 was made in open court, at the same time the parties argued whether the Form 21 could be heard without Respondents reinstating Cain-Davis's temporary total disability compensation. While it would have been preferable for these arguments to have been on the record, the fact the arguments were made in an off record pretrial conference does not change the reality that the Hearing Commissioner had to make decisions on the arguments and memorialize them in a written order. S.C. Code § 42-17-40 (2007).

In short, *good cause* was before the Hearing Commissioner. It seems a bit much to require him to make specific findings of good cause and "not merely for the purpose of delay" in a case where Respondents' counsel made no objection until an order was drafted; but if he must, then he

must be given the opportunity to do so on a remand.

Therefore, any conclusions from the Appellate Panel that the Administrative Order is vague or that good cause was not before the Hearing Commissioner should be reversed. If specific and detailed findings are needed, the case should be remanded directly to Commissioner Campbell to make findings as to how he appropriately used his discretion in granting the withdrawal of the Form 50 without prejudice.

5. As the Form 21 hearing was set based on Respondents misrepresentation that temporary total disability was currently being paid, the Hearing Commissioner properly dismissed the Form 21, although the Appellate Panel should have ordered reinstatement of compensation with a penalty.

Although the Appellate Panel affirmed Commissioner Campbell's Administrative Order dismissing the Form 21, it made several contradictory and legally incorrect findings. If the Appellate Panel's interpretation is correct, then its regulations impermissibly contradict the governing statute.

According to the Form 21 filed by Respondents, "Compensation payments are current as of 04/04/17 (m/d/yy) and shall continue until otherwise ordered or until Form 17 is signed by the Claimant." [Form 21]. This statement was false, as compensation had been unilaterally terminated on March 28, 2017. As the accident occurred on July 14, 2016, the termination was well past 150 days. The Form 21 states the basis for terminating compensation is "Claimant's refusal of authorized medical treatment."[8] Given this scenario, the Hearing Commissioner properly refused to hold a stop pay hearing and properly dismissed Respondents' Form 21 as violative of the statute. "[T]he commission may not entertain any application to terminate or suspend benefits unless and until the employer or carrier is current with all payments due." S.C. Code Ann. § 42-9-260(F)(2007). The

[8]Appellant denies this allegation, as she has attended all authorized medical visits.

Appellate Panel correctly affirmed the dismissal of the Form 21. However, this does not end the analysis, for the Respondents were also required to reinstate temporary compensation and pay a 25% penalty. S.C. Code Ann. § 42-9-260(G)(2007).

Payment, suspension and termination of temporary compensation is governed by § 42-9-260. The statute allows the employer to unilaterally suspend or terminate temporary compensation at any time *within the first 150 days* if certain enumerated conditions are met. One of these conditions is if "the employee refuses medical treatment, as provided in Section 42-15-60, or refuses an examination or evaluation, as provided in Section 42-15-80, and the termination or suspension of benefits continues until the refusal ceases or the commission determines the refusal is justified pursuant to either Section 42-15-60 or 42-15-80." S.C. Code Ann. § 42-9-260 (B)(6) (2007).

Here, as compensation was terminated *after 150 days*, the employer could not legally suspend or terminate compensation for alleged refusal of medical treatment without an order from the Commission after an evidentiary hearing. The employer can suspend or terminate compensation without a hearing if the employee has returned to work or signs a Form 17. The statute states:

> After the one-hundred-fifty-day period has expired, the commission shall provide by regulation the method and procedure by which benefits may be suspended or terminated for any cause, but **the regulation must provide for an evidentiary hearing and commission approval prior to termination or suspension** unless such prior hearing is expressly waived in writing by the recipient or the circumstances identified in Section 42-9-260(B)(1) or (B)(2) are present. Further, the commission may not entertain any application to terminate or suspend benefits unless and until the employer or carrier is current with all payments due.

S.C. Code Ann. § 42-9-260 (F) (2007)(emphasis added).

In their brief to the Appellate Panel, Respondents completely ignore § 42-9-260, relying instead on § 42-15-60 and regulation 67-505(F). The code section relied on by Respondents states:

> The refusal of an employee to accept any medical, hospital, surgical, or other

> treatment or evaluation when provided by the employer or ordered by the commission bars the employee from further compensation until the refusal ceases and compensation is not paid for the period of refusal unless in the opinion of the commission the circumstances justified the refusal, in which case the commission may order a change in the medical or hospital service.

S.C. Code Ann. § 42-15-60 (A) (2007)

Respondents also rely on regulation 67-505 contending it implicitly allows suspension of compensation for refusal of medical treatment after 150 days. The regulation states:

> When the employer's representative suspends temporary compensation for refusal of medical treatment according to Section 42-15-60 or Section 42-15-80, the employer's representative shall file a Form 21 according to R.67-506.

S.C. Code Ann. Reg. 67-505 (F)(1997).

In its Decision and Order, the Appellate Panel concluded that "The Defendants suspended temporary disability compensation on April 15, 2017 in accordance with S.C. Code Reg. 67-505(F) and S.C. Code Ann. § 42-15-80(A)." [FC Order, page 14, Conclusion of Law 2]. The error here is that while Respondents alleged they suspended compensation in accordance with the regulation, they had no legal right to do so. After 150 days, the statute specifically requires temporary compensation to continue until the Commission holds an evidentiary hearing and issues an order permitting compensation to be stopped. S.C. Code Ann. § 42-9-260 (F) (2007); Last v. MSI Const. Co., Inc., 409 S.E.2d 334, 305 S.C. 349 (1991)(affirming decision by hearing commissioner that carrier had "erroneously stopped payment before a hearing was held and ordered Carrier to pay all temporary total benefits due to the date of the hearing."). Last demonstrates that the right to a hearing before payments can be stopped prevents a carrier from unilaterally stopping compensation.

The real bottom line here is that the requirement for an evidentiary hearing before suspension or termination trumps the statute barring an employee from further compensation when unjustifiably refusing medical treatment. The role of the Court is to harmonize the two statutes. This is not

difficult. If the employer believes an injured worker is refusing treatment outside the 150 day period, it simply continues weekly compensation payments and files a form 21 seeking permission from the commission to terminate temporary compensation. If the commissioner finds the employee refused treatment without justification, payments are stopped until the refusal ceases and the employer takes a credit for payments made in the interim. See S.C. Code Ann. § 42-9-210 (2007)("Any payments made by an employer to an injured employee during the period of his disability, or to his dependents, which by the terms of this title were not due and payable when made may, subject to the approval of the commission, be deducted from the amount to be paid as compensation; provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid and not by reducing the amount of the weekly payment.").

If this were not the case, then it would create an absurd result. The statute requires the employer to file a form 21 to obtain leave to suspend compensation for refusal of medical treatment. Yet, it simultaneously requires compensation payments to be current before the Form 21 could be heard. If one follows the reasoning of respondents and the Appellate Panel, an employer could illegally suspend compensation payments and perpetually avoid a hearing by not making the required payments.

The Hearing commissioner acted appropriately in dismissing Respondents' Form 21, as the hearing was set based on the misrepresentation that compensation was and would remain current. The error from both the Hearing Commissioner and the Appellate panel was in failing to require Respondents to pay compensation with a mandatory 25% penalty for illegal termination of compensation. Martin v. Rapid Plumbing, 369 S.C. 278, 631 S.E.2d 547 (Ct.App.2006)(assessment of 25% penalty for illegal suspension of temporary compensation is mandatory).

6. The Appellate Panel's Decision and Order (based on Respondents' Brief) mischaracterizes and misstates the underlying facts, arguments and statements of the Hearing Commissioner and the Parties.

The Appellate Panel included multiple erroneous statements in the Statement of the Case and Discussion portions of its Decision and Order. This errors contributed to the erroneous legal conclusions reached by the Panel.

In the statement of the case, the Appellate Panel's Order states:

> During a prehearing conference, the Claimant announced that she was withdrawing her Form 50 because she did not have any medical evidence to support her claim. [FC Order, page 1].

This is not accurate. First off, as Commissioner Campbell explained in an email to the parties from his assistant, "Please be advised that I put your email before the Commissioner. He said that Mr. Samuels asked in the pre-hearing conference to be allowed to withdraw his Form 50 without prejudice, and with it being within his discretion to do so, allowed Mr. Samuels to do that." [Exhibit E]. The Appellate Panel (and this Court) must rely on the truth of Commissioner Campbell's statement. Appellant obviously relied on it, as it beggars belief to suggest that she knowingly and intentionally dismissed her case with prejudice.

Secondly, the Order states the Form 50 was withdrawn "because [Appellant] *did not have **any** medical evidence* to support her claim." [FC Order, page 1 (emphasis added)]. The implication here is that Appellant was both wholly unprepared to try her case and lacked any medical evidence on which she could prevail. In fact, Appellant identified 97 pages of medical records (on top of the 150 identified by Respondents), along with the 118 page de bene deposition of Dr. Baldwin. Appellant had a great deal of medical evidence to support her claim.

Appellant was concerned that despite the volume of medical evidence, she may have lacked

a medical record using the specific *magic words* stating additional medical treatment "will tend to lessen the period of disability . . . stated to a reasonable degree of medical certainty." See Hartzell v. Palmetto Collision, LLC, 419 S.C. 87, 796 S.E.2d 145 (Ct. App.2016), *citing* S.C. Code Ann. § 42-15-60(A) (2015). As Respondents' counsel – who represented the prevailing party in Hartzell – indicated she was contesting future treatment on a strict interpretation of Hartzell, it was prudent for Appellant to ensure she had this specific medical opinion in this specific language before proceeding further. See Brown v. LaFrance Indus., 286 S.C. 319, 333 S.E.2d 348 (Ct.App.1985) (when the claimant in a workers' compensation case inadvertently omits proof of causation, the case should be reopened and an opportunity should be afforded the claimant to supply such proof in the interest of justice). Respondents certainly had the ability to argue to the Hearing Commissioner what they argued to the Appellate Panel – that Appellant must either have gone forward on the existing evidence or accept a dismissal with prejudice.

The Appellate Panel further stated:

> The Claimant also argued that the Defendants' Form 21, which had been filed in accordance with S.C. Code Reg. 67-505(F) was not properly before the Commission. The Hearing Commissioner ruled that the Form 21 was not proper and cancelled the hearing. [FC Order, page 1].

This portion of the Order also misstates Appellant's position. In her Pre-Hearing Brief, Appellant argued:

> Defendants illegally suspended temporary compensation on April 17, 2017. Defendants are required to pay accrued TTD and must be assessed a 25% penalty payable to Claimant. Cain-Davis should be paid be placed on a running award of TTD until further order of the Commission. [Claimant's Form 58, page 6].

Appellant's argument was not merely that the Form 21 was "not properly before the Commission." Appellant argued that Respondents were required to reinstate TTD and be current on weekly

payments before the Form 21 hearing could be heard. The Appellate Panel completely ignores this point of law – even though they affirmed the dismissal of the Form 21.

The Decision and Order also misstates the events surrounding the withdrawal of the Form 50. The Decision and Order states: "The Claimant admitted that the issues had not been raised or ruled upon at the pre-hearing conference on October 24, 2017, but persisted nonetheless." [FC Order, page 2]. The Order references *Defendants' Exhibit "C"*, which is an email exchange discussing the proposed orders. Appellant's counsel wrote:

> In light of [Ms. Barr's position on additional medical treatment] and over concern that there may not be sufficient proof in the record, I advised Commissioner Campbell that I was withdrawing my Form 50 to obtain additional medical evidence to meet the Hartzell standard. [Defendants' Exhibit C].

In no wise, can this statement be construed as an admission that the issue had not been raised or rule upon at the pre-hearing conference by Appellant. Appellant's reference to obtaining additional evidence to meet the Hartzell standard is plainly a request to withdraw the Form 50 without prejudice – something Commissioner Campbell understood. To the extent the dismissal with prejudice issue was not discussed before Commissioner Campbell, it was not raised because Respondents' counsel failed to object to the withdrawal or to otherwise state her position, presumably seeking to profit from her silence. See King v. Ligon, 180 S.C. 224, 185 S.E. 305 (1936)("'Silence always implies consent,' says another cardinal maxim of the law.").

The misstatements in the Decision and Order should be vacated.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Appellate Panel should be reversed in part as to the Form 50, and affirmed as modified (requiring Respondents to resume payment of temporary compensation with the statutory penalty).

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July 5, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SOUTH CAROLINA
Workers' Compensation Commission

Appellate Case No.: 2019-000560

Gena Cain Davis, Claimant, ... Appellant,

v.

S.C. Department of Corrections, Employer,
and State Accident Fund, Carrier, ... Respondents.

PROOF OF SERVICE

I certify that I, Katherine R. Carter, paralegal for the Samuels Law Firm, LLC, have served the **Initial Brief of Appellant and Designation of Matter** upon counsel for the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on July 5, 2019, addressed as follows:

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July 5, 2019

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ATTORNEYS AT LAW

July 5, 2019

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Gena Cain-Davis v. SC Dept. Of Corrections and SAF
Appellate Case No.: 2019-000560

Dear Ms. Kitchings:

Enclosed for filing are the original and two (2) copies of the **Initial Brief of Appellant and Designation of Matter** and **Proof of Service,** in the above case.

Please have your staff file the Initial Brief of Appellant, Designation of Matter and Proof of Service and return the extra clocked copy in the enclosed self-addressed stamped envelope.

With kindest regards, I am

Respectfully,

Katherine R. Carter
Paralegal for Stephen B. Samuels

/krc
Enclosure(s) as stated

cc: Kirsten Barr, Esquire

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