IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
Appellate Panel

Appellate Case No. 2019-001017

Delinzy Grant, Claimant..Respondent,

v.

Steel Technologies, Employer, and
Zurich American Insurance Co., Carrier...Appellants.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. DID THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION ERR IN FINDING THAT, SUBJECT TO THE REQUIREMENTS OF S.C. CODE ANN. § 42-15-20(C), APPELLANT GAVE TIMELY NOTICE OF HER ALLEGED REPETITIVE TRAUMA INJURY TO HER EMPLOYER?

STATEMENT OF THE CASE

Delinzy Grant (hereinafter "Respondent") filed a Form 50, filing a claim, on September 18, 2017, alleging a repetitive trauma injury to her back and right lower extremity sustained as a result of purported repetitive activities at work. Respondent further alleged she verbally notified her employer on September 14, 2017. Respondent subsequently filed a Form 50, Request for Hearing, on February 27, 2018, and another on June 4, 2018, wherein the substantive allegations remained as claimed in the original Form 50.

Steel Technologies and Zurich America Insurance Company (hereinafter "Appellants"), in each Form 51, Employer's Answer to Request for Hearing, denied the claim challenging the sufficiency of Respondent's evidence to establish a compensable repetitive trauma injury under S.C. Code Ann. § 42-1-172. Appellants raised, as an additional defense, Respondent's failure to provide timely notice to her employer pursuant to the requirements of S.C. Code Ann. § 42-15-20(C). Appellants maintain that they, due to Respondents failure to satisfy her burden of proof, are not obligated to pay any benefits to or on behalf of Respondent.

A hearing was held before the Single Commissioner on August 14, 2018. The Single Commissioner issued an order finding Claimant satisfied her burden of proof establishing a compensable repetitive trauma injury. The Single Commissioner further found Claimant, in compliance with S.C. Code Ann. § 42-15-20(C), timely notified her employer of a repetitive trauma injury.

Appellants appealed the Single Commissioner's ruling by way of a Form 30, Request for Commission Review, challenging the findings that Respondent sustained a compensable repetitive trauma injury in accordance with S.C. Code Ann § 42-1-172 and provided Appellants with timely notice as pursuant to the requirements of S.C. Code Ann. § 42-15-20(C). The Appellate Panel review was held on March 18, 2019, following which they affirmed, without modification, the Single Commissioner's Decision and Order on May 31, 2019. Appellants thereafter filed their Notice of Appeal to this Court on June 21, 2019.

STATEMENT OF FACTS

Respondent began her employment with Appellant/Employer on March 4, 2004, in packaging. Respondent testified that her employment in the packaging department lasted approximately eight to nine years. The role of a packager included banding coils, packaging skids to be sent to finished goods, housekeeping, operation of a forklift and place finished goods in the warehouse. Respondent further testified that in working as a packager she worked primarily five (5) days per week for eight (8) hours. Physically, Respondent testified that she had to lift skids, weighing between forty (40) to fifty (50) pounds depending on size, placing them on a carousel approximately three (3) feet high.

Following her employment in packaging, Respondent transitioned to her role working as a machine helper on the slear machine. In this role Respondent was tasked with loading skids on the machine, loading coils onto the pull cart and help the steel through the machine. Additionally, Respondent was responsible for handling maintenance inside the slear machine. Respondent, in this role was again working five (5) to six (6) days per week for eight (8) hours per day. According to Respondent's testimony, she would lift "maybe 35, maybe 40" skids per day depending "on how many coils you ran per day." (R. p. 153, lines 5-6). The number of skids per coil was indicated to be ten (10) "or sometimes you might get a little less or maybe a little more." (R. p. 153, lines 7-9). However, Respondent had previously testified that the slear machine "ran about three (3) coils a day." (R. p. 152, lines 4-5). The skids for the slear machine were estimated by Respondent to weigh "anywhere from 35 pound to 45/50 pounds." (R. p. 154, lines 9-10). Finally, Respondent indicated that her role as a machine operator on the slear machine included housekeeping tasks such as sweeping the floor, cleaning up oil spills and wiping down the machinery.

Respondent next transitioned to the CTL line in 2014 or 2015 as a machine helper though she later became a machine operator. This was the position Respondent held as of her last date of employment. Respondent indicated that she would, on the CTL lines, load skids which she reported varied in size noting they "could be 25, 30 pounds up towards 45, 50 pounds." (R. p. 156, lines 15-16). The skids would have to be lifted onto a carousel that was approximately knee height. Respondent testified the number of skids lifted on a day would range depending on the material they were running. On a given day, Respondent claimed, they would do up to 25, 30, 40, 45 [skids]" though noting some days less. (R. p. 157, lines 2-4). Aside from lifting the skids onto the carousel Respondent stated they would also have to inspect the first sheet of material by lifting it up to check for pitting or other damage. Once the first sheet was checked she would "go back up to the platform, watch the steel go in there, and … when it's finished … come back down … lift your … last sheet up, check for measurements, make sure there's no pitting or any damage … [then] send it down the line." (R. p. 158, line 22 – p. 159, line 6). Respondent, as CTL machine operator, was again responsible for housekeeping activities around her machine as well as operation of a forklift. Respondent acknowledged that there were months were the CTL line was slow, which would result in her working in a variety of other areas within the plant, including working as a forklift driver or filling in on other lines.

Respondent testified that she began having back pain "probably at the end of 2015." (R. p. 164, lines 2-3). Despite the problems commencing in 2015 she stated that she did not require medical treatment until September of 2016 when she sought treatment from Dr. Anderson at Southeastern Spine Institute. Respondent testified that she initially attributed the problems, as of September 2016, to weight gain and her aging. However, she later testified the issues were the result of her "doing my job that I normally did," noting "I go there, I do the job, and [I] go home

sore." (R. p. 164, lines 20-23). Respondent admitted that she never, before August 21, 2017, told a supervisor at Respondent/Employer, that she believed her work activities were the cause or potential cause of her back pain.

Cross-Examination of Respondent

Respondent, during cross-examination, provided greater clarity on the specifics of the positions she held during her tenure of employment. As a packager, Respondent testified that she was tasked with banding coils, putting skids on the line, tagging skids as they moved down the line, tagging banding coils in the floor and general housekeeping. Although having testified that the packaging line ran between 40 and 80 skids per day, she acknowledged she was not the only employee on the line and lifted maybe 15 to 20 skids. Respondent eventually moved, still in packaging, from the role of a packager to a coordinator though she could not recall when the transition occurred. As a coordinator the amount of lifting was lessened. Respondent further admitted that she did not always, in lifting skids, have to bend over to pick the skid up off the floor, as they were stacked.

Respondent testified to being supervised by David Brown in August of 2009 though she could not recall her specific position at the time. It was acknowledged that Respondent interacted with Mr. Brown about back and leg problems she was having at work in August of 2009. In fact, Respondent authored and signed a report wherein she attributed her back and leg pain to lifting ***skids***. (R. p. 176, lines 1-3) (***emphasis added***).

Respondent later transferred to the slear line, which she indicated had three or four employees when she transferred. Respondent testified that of the 25 to 40 skids per day she would, at the beginning when she was training to become an operator, would lift "probably 20." (R. p. 177, lines 20-24). When Respondent transitioned to the CTL line, she was one of two employees

to work that line on her shift. It was the responsibility of both employees on the line to lift skids and Respondent testified there would never be an occasion where someone on the line would not have to lift any skids. The skids were stacked, as was the case in packaging, near the carousel to be picked up and placed on the line.

Respondent eventually acknowledged that she never reported to anyone at her employer, starting on September 9, 2016, that her back pain was bad when she was lifting skids despite her testimony acknowledging the connection with her employment. However, she affirmed that her back pain eventually got to be bad when lifting skids at work, which she testified coincided with "when I finally made the choice -- well, made the choice to go see Dr. Anderson." Respondent affirmed that she knew in September of 2016 that when she was lifting skids she was experiencing an increase in her back pain, yet she did not report this to anyone at Appellant/Employer.

Direct Examination of David Brown

Mr. Brown began his employment with Appellant/Employer on May 30, 2000. His title, as of the date of the hearing, was first shift shift-lead, which is a role he has held since 2006. Mr. Brown is tasked with, in part; safety, quality and making sure production is getting done. He supervises all departments except for maintenance and shipping. During his time as shift-lead Mr. Brown has had supervisory responsibility over Respondent. Mr. Brown also testified specifically as to the lifting required on each of the lines Respondent has worked on. On the CTL line, where Respondent was working when she began receiving medical attention in September of 2016, Mr. Brown testified that the line would run an average of approximately 16 to 20 skids. Aside from lifting the skids Mr. Brown testified that the only other lifting a CTL line operator would be tasked with is lifting one sheet to inspect it for quality. However, Mr. Brown clearly noted that the CTL

line typically functions with two employees, an operator and helper, with the helper traditionally doing more of the lifting.

Additionally, Mr. Brown testified to an interaction he had with Respondent in August of 2009. Mr. Brown testified that Respondent reported to him that her back was hurting, which she attributed to picking up skids. (R. p. 215, lines 2-9). At no time between September of 2016 until her last day in June of 2017 did Respondent report that her back was hurting from lifting skids nor did he ever have to modify her job in any way.

STANDARD OF REVIEW

"The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the Workers' Compensation Commission." *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 288, 599 S.E.2d 604, 610 (Ct. App. 2004); (*See Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981); *Gibson v. Spartanburg Sch. Dist. No. 3,* 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000)). "A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions or decisions of that agency are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" *Id.*; (*quoting Bursey v. South Carolina Dep't of Health and Envtl. Control,* Op. No. 3813, 360 S.C. 135, 600 S.E.2d 80, (Ct. App. filed June 1, 2004) (Shearouse Adv. Sh. No. 24 at 47); S.C. Code Ann. § 1-23-380(A)(6)(e) (Supp. 2003). "Under the scope of review established in the APA, this Court may not substitute its judgment for that of the Commission as to the weight of the evidence on questions of fact but may reverse where the decision is affected by an error of law." *Id.*, 360 S.C. at 289; (*See Frame v. Resort Servs., Inc.,* 357 S.C. 520, 593 S.E.2d 491 (Ct. App. 2004); *Stephen v. Avins Constr. Co.,* 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996); S.C. Code Ann. § 1-23-380(A)(6)(d) (Supp. 2003)).

Review of decisions rendered by the South Carolina Workers' Compensation Commission is governed by the substantial evidence rule as promulgated by the APA. *Id.* Any such review by the Court of Appeals is limited to a determination of whether the decision(s) is/are unsupported by substantial evidence to or was a result of an error in the application of the law. *Id.* "In reviewing the decision of the commission, we will not set aside its findings unless they are not supported by substantial evidence or they are controlled by an error of law." *Lyles v. Quantum Chem. Co. (Emery)*, 315 S.C. 440, 445, 434 S.E.2d 292, 294 (Ct. App. 1993). A finding is supported by substantial evidence "unless there is no reasonable probability that the facts could be as related by a witness upon whose testimony the finding was based." *Id.* A finding upon which reasonable men might differ will not be set aside. *Id.*; (*quoting Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 136, 276 S.E.2d 304, 307 (1981)).

"Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." *See Supra Hargrove*, 360 S.C. at 289; (*See Etheredge v. Monsanto Co.*, 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002); *Broughton v. South of the Border,* 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999)). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Id.* at 290; (*See Sharpe v. Case Produce, Inc.*, 336 S.C. 154, 519 S.E.2d 102 (1999); *Muir,* 336 S.C. at 282, 519 S.E.2d at 591). "Where there are conflicts in the evidence over a factual issue, the findings of the Appellate Panel are conclusive." *Id.*; (*See Etheredge,* 349 S.C. at 455, 562 S.E.2d at 681).

ARGUMENT

I. The Appellate Panel erred in finding that Respondent satisfied the requirements of S.C. Code Ann. § 42-15-20(C) and provided her employer timely notice of a repetitive trauma claim.

a. The substantial evidence does not support a finding of fact that Dr. Anderson's completed questionnaire on February 21, 2018, was the date Respondent first discovered her condition as compensable.

Appellants contend the Appellate Panel erred in finding the claim compensable despite the substantial evidence reflecting Respondent had knowledge the injuries were a result of her employment upon her seeking treatment in September of 2016. Respondent failed to timely notify Respondents of an alleged repetitive trauma injury as required by the provisions of S.C. Code Ann. § 42-15-20(C). The foregoing statute states that when an employee suffers a repetitive trauma injury:

> [N]otice must be given by the employee within ninety days of the date the employee discovered, or could have discovered by exercising reasonable diligence, that his condition is compensable, unless reasonable excuse is made to the satisfaction of the [Workers' Compensation C]ommission for not giving timely notice, and the commission is satisfied that the employer has not been unduly prejudiced thereby.

S.C. Code Ann. § 42-15-20(C) (Supp. 2010). The notice requirement in repetitive trauma claims is an area of great dispute and litigation. However, in 2011 the Court of Appeals took up this issue in *King v. International Knife and Saw-Florence*. In *King*, the employer argued that its employee, who acknowledge long-term arm ache, which he attributed to swinging hammers to hammer saw blades, failed to notify them timely. The employer took the position that the employee could have discovered he had a compensable condition "a couple of years" prior to when he made his claim. 395 S.C. 437, 718 S.E.2d 227 (Ct. App. 2011). It was determined in *King*, the employee's duty to notify his employer does not commence until it is discovered or could be discovered that the condition is compensable. 395 S.C. at 444-45. A workers' compensation claim does not become

compensable, as established in *King*, "until the injured employee discovers or should discover he qualifies to receive benefits for medical care, treatment, or disability due to his condition." 395 S.C. at 444.

Respondent maintains that she satisfied the notice requirement by virtue of her providing Appellant/Employer notice of her repetitive trauma injury within ninety (90) days of the date Dr. Thomas Anderson completed his questionnaire. This assertion is a fallacy. First and foremost, the Decision and Order of the Appellate Panel is devoid of two required findings. First, there is no finding of fact setting forth the date Respondent discovered her condition was compensable. Second, there is no finding of fact setting forth the date Respondent provided notice to her employer. Without either of the foregoing findings it is impossible for the Decision and Order to be affirmed as reflecting compliance with the requirements of S.C. Code Ann. § 42-15-20(C).

It is inarguable that Dr. Anderson provided an opinion that Claimant's injury was a result of repetitive activities performed by Respondent, such that she could certainly contend this was a date she discovered her condition as compensable. However, the substantial evidence in the case establishes that Respondent discovered the condition was related to the activities of her employer far before the questionnaire of February 21, 2018. Respondents would have this Court conclude that notice is timely given provided it occurs within ninety (90) days of the date a doctor opines, within a reasonable degree of medical certainty, "there is a direct causal relationship between the condition under which the work is performed and the injury." S.C. Code Ann. § 42-1-172(D). It is certainly true that one may satisfy the notice requirement by providing notice within ninety (90) days of their being informed of the relation between the injury and employment by a doctor. However, the conclusion by a physician is not the only means by which an employee can discover a condition as compensable. Moreover, the notice requirement clearly does not state the ninety

(90) day clock begins to run ***only*** after a physician establishes the causal connection between the injury and the employment. The Appellate Panel's ruling would establish that an employee cannot discover a condition as compensable until the date a doctor provides an opinion sufficient to satisfy the foregoing requirements of S.C. Code Ann. § 42-1-172(D). If this were the proper application of the law it would be implausible to understand the Appellate Panel's conclusion that notice was timely given by virtue of the filing of a Form 50, Request for Hearing five (5) months prior to Respondent having secured such an opinion. The requirement is that an employee provide notice within ninety (90) days of the date compensability was discovered rather than the time beginning from the date a doctor opines on causation.

Notice is, inarguably, timely provided if it is given to an employer within ninety (90) days of a doctor concluding the injury is directly related to the conditions under which an employee's work is performed; however, this is not the only way an employee can discover an injury is compensable. An employee can certainly discover compensability before a doctor's opinion, which is what is at issue in the case at bar. The substantial evidence in the instant case leads only to the conclusion that Respondent had knowledge of the connection between her employment and injuries well before February 21, 2018, and even prior to September 20, 2017. Appellants do not dispute that Respondent filed a Form 50, Request for Hearing within ninety (90) days of the completion of Dr. Anderson's questionnaire. However, Appellants submit the substantial evidence in the record clearly refutes any assertion that Dr. Anderson's questionnaire was the date Respondent discovered the condition was compensable.

The record has established that Respondent began seeking medical treatment on or about September 9, 2016. Regardless of the timing of Dr. Anderson's questionnaire, Respondent's claim fails to satisfy the requirements of S.C. Code Ann. § 42-15-20(C) as the substantial evidence leads

only to the conclusion that Respondent had knowledge that the condition was compensable when she commenced treatment with Dr. Anderson. First and foremost, it was established in the record that Respondent had a previous instance where she experienced the same issues during her employment in August of 2009. The record shows Respondent, in August of 2009, believed the issues were related to "lifting skids." Respondent, despite contending the 2009 issue as a solitary occurrence, clearly related her back and leg issues to lifting activities, as she now asserts again. Respondent was able to reach the conclusion of compensability for an identical issue in 2009 within a matter of a day at work. However, Respondent now contends that she was unable to determine the cause of the same symptoms, until Dr. Anderson's questionnaire completed seventeen (17) months after she began treatment. Furthermore, and most egregious, Respondent admitted on multiple occasions during her testimony that she knew her back pain got worse because she was lifting skids, to the point she required medical treatment as a result, despite admitting she did not notify her employer. The following is merely one example of an admission by Respondent that must result in a reversal of the Appellate Panel's Decision and Order:

Q: But you never reported to anyone at Steel Technologies, starting on September 9th of 2016, that when you were lifting skids your back pain was bad.

A: No.

Q: Was your back pain bad when you would lift skids at work?

A: It got to be eventually, yes.

Q: And -- and when was the eventually that it got to be?

A: When I finally made the choice -- well, made the choice to go see Dr. Anderson.

. . .

Q: So you knew in September of 2016 that when you were lifting skids, your back pain was hurting you?

A. Yes.

. . .

Q. And you never said to anyone at Steel Technologies, hey when I'm lifting these skids, my back pain is getting worse. Is that correct?

A. No.

(R. p. 190, lines 5-16 and 23-25; R. p. 191, lines 1 and 24-25; R. p. 192, lines 1-3). The substantial evidence leads to the only conclusion being the ninety (90) day clock for reporting the injury to her employer began in September 9, 2016. Assuming the Appellate Panel's reference to the September 20, 2017, Form 50 filing is intended as their finding of the date notice was given, Respondent's notice was untimely by two hundred eighty-seven (287) days.

b. Respondent failed to exercise reasonable diligence, as required by S.C. Code Ann. § 42-15-20(C), to determine her condition was compensable.

Appellants do not refute that Dr. Anderson's opinion on causation was rendered until February 21, 2018; however, the statute does not allow an employee to passively await a doctor's conclusion before the notice requirement commences. The statute requires an injured worker to exercise reasonable diligence in attempting to determine if the condition is compensable. Respondent, as evidenced by the absence of any corresponding finding of fact in the Decision and Order, failed to present evidence that she exercised reasonable diligence despite the notice requirement being a primary defense raised by Appellants. In fact, Respondent offered, in response to Appellants' argument, no evidence of any reasonable diligence exercised by her in an effort to determine compensability. Appellants directly argued to the Appellate Panel that Respondent failed to exercise reasonable diligence as required by the statute and she failed to present any

evidence to the contrary. Therefore, based solely on the failure to exercise reasonable diligence Respondent should have been found to have not complied with S.C. Code Ann. § 42-15-20(C) resulting in a denial of her claim.

Respondent was under the care and treatment of Dr. Anderson for nine (9) months before her surgery, twelve (12) months before her initial Form 50 was filed, and an absurd seventeen (17) months before his opinion was sought on causation. The lack of reasonable diligence is further exemplified by the fact that Dr. Anderson's questionnaire appears to be exclusively predicated on his review of the physical requirements section of Respondent's job description. However, Dr. Anderson had been in possession of Respondent's job description since, as early as May 11, 2017, which is one hundred thirty-three (133) days before the Form 50 was filed and two hundred eighty-seven (287) days before the questionnaire was completed. It is clear, as evidenced by the language of the questionnaire, that Respondent merely had to ask Dr. Anderson, at any point during her treatment, the same questions she waited five hundred and thirty-four (534) days to ask about the cause of her injuries. Respondent had been under Dr. Anderson's care for nearly a year and a half but yet had never once inquired about the cause of her injuries. This dilatory conduct by Respondent is as inapposite of the exercise of reasonable diligence as one could exhibit. Respondent has been, by the Appellate Panel, allowed to sidestep the duties imposed upon her by the Act to exercise reasonable diligence and claim timely notice of her condition was provided to her employment. As noted in *King*, an employee is required "to be diligent not prescient." *King supra* 395 S.C. at 445. Appellants are not demanding Respondent be prescient but merely contending that she exercised no diligence in contravention of her duty.

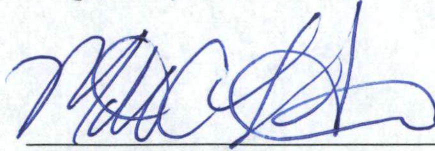
If the Appellate Panel's decision is affirmed it would have the effect of rewriting clear and unambiguous legislation as it would eliminate the requirement that, to be found to have provided

timely notice, an employee exercise reasonable diligence in attempting to discover whether a condition is compensable. The responsibility of this Court, as well as any lower tribunal, is to give the applicable statute its plain and ordinary meaning. Appellant's concede S.C. Code Ann. § 42-15-20 "should be liberally construed in favor of claimants." *Murphy v. Owens Corning*, 393 S.C. 77, 82, 710 S.E.2d 454, 457 (Ct. App. 2011); (*see also Etheredge v. Monsanto Co.*, 349 S.C. 451, 458, 562 S.E.2d 679, 683 (Ct. App. 2002); *Rogers v. Spartanburg Reg'l Med. Ctr.*, 328 S.C. 415, 418, 491 S.E.2d 708, 710 (Ct. App. 1997)). However, "[t]he cardinal rule of statutory construction is to ascertain and effectuate the intent of legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2 578, 581 (2000); (*see also Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). "Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Id.*; (*see also In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted)). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the court has no right to impose another meaning." *Id.*; (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). This Court; therefore, has an obligation to reverse on account of the absence of evidence of the exercise of due diligence as required by the clear and unambiguous language of S.C. Code Ann. § 42-15-20(C). A failure to reverse would have the effect of changing the meaning of a clear and unambiguous statute, which is in direct violation of the plain meaning rule.

CONCLUSION

For the foregoing reasons, the decision of the Appellate Panel should be reversed, and Respondent's claim barred due to her failure to provide timely notice pursuant to the requirements of S.C. Code Ann. § 42-15-20(C).

Respectfully submitted,



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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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