

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
South Carolina Workers' Compensation Commission

R. Michael Campbell, II, Commissioner; T. Scott Beck, Commissioner; Gene McCaskill,
Commission Chair

W.C.C. File No.: 1708722
Appellate Case No.: 2020-000718

Timothy Clayton, Employee, Appellant,

v.

South Carolina Department of Transportation, Employer; and SC State Accident Fund,
Carrier, Respondents.

INITIAL BRIEF OF APPELLANT

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 II. Whether the Full Commission erred as a matter of law in finding that the Appellant’s preexisting psychiatric and psychological conditions were not aggravated subsequent to the March 28, 2017, on the job accident despite two (2) causation opinions which met the statutory burden of proof. S.C. Code Ann. §42-1-160 (D) (4).

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STATEMENT OF ISSUES ON APPEAL

- I. The Appellate Panel erred as a matter of fact in finding that the Appellant's preexisting psychiatric and psychological conditions were not aggravated subsequent to the March 28, 2017, on the job accident despite two (2) causation opinions which met the statutory burden of proof. S.C. Code Ann. §42-1-160 (D) (4).

- II. The Appellate Panel erred as a matter of law in finding that the Appellant's preexisting psychiatric and psychological conditions were not aggravated subsequent to the March 28, 2017, on the job accident despite two (2) causation opinions which met the statutory burden of proof. S.C. Code Ann. §42-1-160 (D) (4).

STATEMENT OF THE CASE

This workers' compensation matter originated out of an admitted low back injury by accident on March 28, 2017, while Timothy Clayton ("Appellant") was acting within the course and scope of his employment with Respondent South Carolina Department of Transportation ("SCDOT"). Appellant alleged additional injuries to his right hip, right leg and aggravation of preexisting psychiatric and psychological conditions.

The Respondents' filed a March 21, 2018, Form 21 final hearing request and Appellant an April 5, 2018, Form 50 hearing request for a compensability determination whether the work injury aggravated preexisting psychiatric and psychological conditions; and payment for medical treatment July 20, 2017, necessary an injection by the authorized treating orthopedic. Appellant filed a Form 22 response and Amended Form 50 alleging permanent and total disability. The Respondents' May 4, 2018, Form 51 admitted a back injury only and denied the July 20, 2017, medical treatment subsequent to their authorized physician's injection; aggravation of the Claimant's preexisting psychological condition; and permanent and total disability. The parties conducted mandatory mediation July 13, 2018, which failed. The parties executed a consent order for additional discovery in lieu of the October 25, 2018, Forms 50/51/21 hearing.

The Single Commissioner held a March 6, 2019, hearing on all issues, issued a May 14, 2019, decision and order in favor of Appellant. Respondents appealed to the Full Commission Panel May 28, 2019. The Full Panel held oral arguments August 19, 2019; and issued a decision and order March 23, 2020, which affirmed the Single Commissioner's causation determination on Appellant July 20, 2017, seizure episode. However, the Full Panel reversed the Single Commissioner's causation determination on aggravation of preexisting psychiatric and psychological conditions.

Appellant filed an April 21, 2020, Notice of Appeal and received the Full Panel hearing transcript June 2, 2020. This Appellant's Initial Brief follows. The Appellant requests that this Court reverse the Full Panel's decision that the Appellant did not sustain an aggravation of preexisting psychiatric and psychological conditions.

STANDARD OF REVIEW

The S.C. Administrative Procedures Act (“APA”) provides the standard for judicial review of decisions by the administrative Workers’ Compensation Commission. S.C. Code Ann. §1-23-380 (“The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact.”); Pierre v. Seaside Farms, Inc., 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010); Lark v. Bi-Lo, Inc., 276 S.C. 130, 133-34, 276 S.E.2d 304, 306 (1981). The Appellant asserts that the Full Panel’s decision was “clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record”. S.C. Code Ann §1-23-380. (5)(e). “Under the Administrative Procedures Act (APA), the Court of Appeals may reverse or modify the decision of the Workers' Compensation Commission when the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” Sellers v. Tech Service, Inc., 421 S.C. 30, 803 S.E.2d 731 (Ct. App. 2017), rehearing denied; S.C. Code Ann. § 1-23-380(5) (2011).

“The findings of an administrative agency are presumed correct and will be set aside only if unsupported by substantial evidence. Gadson v. Mikasa Corp., 368 S.C. 214, 222, 628 S.E.2d 262, 266 (Ct. App. 2006). “The Court of Appeals must affirm the Workers' Compensation Commission's decision unless it is clearly erroneous in view of the substantial evidence on the whole record.” Nettles v. Spartanburg School District #7, 341 S.C. 580, 535 S.E.2d 146 (Ct. App. 2000).

“[G]uiding [o]ur workers’ compensation system [is] that the Act is to be liberally construed in favor of the claimant. The second is the equally compelling evidentiary principle that an award may not rest upon surmise, conjecture, or speculation.” Hutson v. S.C. State Ports Authority, 399 S.C. 381, 732 S.E.2d 500 (2012). The Commission’s decision “must be founded on evidence of sufficient substance to afford a reasonable basis for it.” Wynn v. People’s Natural Gas Co. of S. C., 238 S.C. 1, 12, 118 S.E.2d 812, 818 (1961).

“The Appellate Panel is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established.” Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct. App. 2011). “[T]he fact finder may disregard” medical evidence only if there is other competent evidence in the record to support their conclusion. Id.

The Appellant asserts that the Full Panel’s decision was “clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record”. S.C. Code Ann §1-23-380. (5)(e). The record clearly supports that the Appellant was terminated without just cause based upon the evidence presented, lack of evidence presented, witness testimony, and record as a whole. “Under the Administrative Procedures Act (APA), the Court of Appeals may reverse or modify the decision of the Workers' Compensation Commission when the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record.” Sellers v. Tech Service, Inc., 421 S.C. 30, 803 S.E.2d 731 (Ct. App. 2017), rehearing denied.

ARGUMENT

THE FULL COMMISSION APPELLATE PANEL ERRED IN FINDING THAT APPELLANT'S PSYCHIATRIC/PSYCHOLOGICAL CONDITIONS WERE NOT CAUSALLY RELATED BY AGGRAVATION SUBSEQUENT TO HIS MARCH 28, 2017, ON THE JOB ACCIDENT.

A. The Appellant satisfied the legal burden of proof.

Appellant clearly met the burden of proof required under S.C. Code Ann. §42-9-160 and prevailing caselaw that his preexisting psychiatric/psychological conditions were causally related to his March 28, 2017, on the job accident. Appellant presented his physician's statement which specifically satisfied S.C. Code Ann. §42-1-160 (D) (4).

(D) Stress, mental injuries, and mental illness alleged to have been aggravated by a work-related physical injury may not be found compensable unless the aggravation is: (4) noted in a medical record of report of the employee's physician as causally related or connected to the injury or accident.

"Claims for psychological injury are compensable only if the claimant proves by a preponderance of evidence they are caused by physical injury or by extraordinary and unusual conditions of employment." Pack v. State Dept. Of Transportation, 381 S.C. 526 (Ct. App. 2009) (citing Frame v. Resort Servs., Inc., 357 S.C. 520, 593 S.E. 2d. 491 (Ct. App. 2004)). "Mental injuries are compensable if they are induced either by physical injury or by unusual or extraordinary conditions of employment." Getsinger v. Owens-Corning Fiberglas Corp., 335 S.C. 77, 81, 515 S.E.2d 104, 106 (Ct.App.1999) (citing Kennedy v. Williamsburg County, 242 S.C. 477, 131 S.E.2d 512 (1963); and Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 250 (1991)). "Aggravation of pre-existing psychiatric problems is compensable if that aggravation is caused by a work-related physical injury." Anderson v. Baptist Medical Center and Palmetto Hospital Trust Fund, 343 S.C. 487, 493, 541 S.E.2d 526, 528 (2001). (citing Toler v. Black & Decker, 134 N.C. App. 695, 518 S.E.2d 547, 551 (1999)).

Appellant's work and psychiatric treatment timeline is beyond important. Despite all previous psychiatric treatment, 2010 death of Appellant's military Son, or medication changes, the Appellant worked for Respondent Employer 2009 until July 17, 2017. Appellant consulted with his long-time treating psychiatrist, James R. Kirkland, M.D., immediately prior to the March 28, 2017, accident—on March 21, 2017. Dr. Kirkland noted "Pt has functioned well since his last appointment. He has some situational stresses at times but has not come anywhere close to a panic attack. He has adjusted well to the new policies that were implemented at work some time ago. He continues to focus well on Vyvanse³⁰. Mood-good. Affect-bright. No attention defi** noted."

Appellant returned to Dr. Kirkland after a July 20, 2017, authorized orthopedic appointment in which he suffered a seizure following injection administration. Both of Dr. Kirkland's August 7, 2017, and August 17, 2017, reports specifically recorded: "Seen prior to scheduled appointment." Subsequently, Dr. Kirkland opined December 5, 2017:

ALL OPINIONS ARE TO A REASONABLE DEGREE OF MEDICAL CERTAINTY:
Timothy Neal Clayton's increased anxiety, panic attacks, and depression were most probably (more likely than not i.e. greater than 50% likelihood) aggravated by his low back/right leg/right hip pain; and July 20, 2017, seizure originating when Mr. Clayton lifted hydraulic pumps to saddles on March 28, 2017, while at work.

Dr. Kirkland reiterated that it was still his opinion by correspondence dated May 15, 2018:

[T]hat Timothy Neal Clayton's increased anxiety, panic attacks, and depression were most probably (more likely than not i.e. greater than 50% likelihood) aggravated by his low back/right leg/right hip pain; and July 20, 2017, seizure originating when Mr. Clayton lifted hydraulic pumps to saddles on March 28, 2017, while at work.

Both statements conclusively satisfied 42-1-160 (D) (4). It is worth noting that Dr. Kirkland's causal determinations were unchallenged.¹

"Although medical evidence "is entitled to great respect," the Commission is not bound by the opinions of medical experts and may disregard medical evidence in favor of other

¹ Compliance with S.C. Code Ann. §42-9-35 as well.

competent evidence in the record.” Burnette v. City of Greenville, 401 S.C 417, 737 S.E.2d 200 (Ct. App. 2012) (citing Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 23, 716 S.E.2d 123, 126 (Ct.App.2011)). As the Potter court explored, the Appellate Panel can certainly disregard medical evidence if other evidence supports an alternate conclusion. First, the medical evidence presented was uncontested. Second, the Respondents presented no compelling medical or other evidence to counter Appellant’s 42-1-160 (D) (4) submission. Respondents competing psychiatric opinion by Dyana Lowndes-Rosen, M.D. stated as follows:

Pursuant to request in letter of Ms. Benson of December 15, 2017:

1. Primary psychiatric diagnosis is of Panic Disorder with Agoraphobia and second diagnosis is ADHD, Inattentive Type, diagnosed by Dr. Kirkland and believed by Mr. Clayton. I do not have an opinion whether this is an accurate diagnosis.

2. Psychological background and diagnoses addressed in report.

3. I cannot determine causation of Mr. Clayton's cognitive dysfunction. On possible etiology is psychomotor retardation due to his depression, not related to W/C injury. Another possibility is overuse of tranquilizer medication in combination with his other medications, for example, tranquilizer such as Valium and Xanax in excess dosage.

4. His reports of chronic anxiety with depression preexisting W/C injury did not render him unable to be employed at his job description.

My professional opinions are stated within a reasonable degree of medical certainty. If further information becomes available, such additional information may or may not change my opinion rendered in the evaluation.²

Dr. Rosen stated both “*I do not have an opinion whether this is an accurate diagnosis*” and “*I cannot determine causation of Mr. Clayton's cognitive dysfunction*” which does not answer the necessary questions, disprove Dr. Kirkland’s two (2) causation statements, or neutralize their impact.

²Dr. Rosen’s IME report: A. Acknowledged Midlands Orthopedics reports: “This was said to not be caused by but aggravated by his work injury.” B. Stated: “I do not have any notes relevant to early treatment.” C. Referenced: Midlands Orthopaedics notes, but not 08-24-2017 which thoroughly addressed work concerns. D. Omitted: Carolina Occupational Healthcare records; Palmetto USC Orthopedic 01-04-2018 IME report; 12-07-2017 FCE report; Prior family physician reports.

Dr. Kirkland incorporated both Dr. Rosen's March 6, 2018, evaluation report, and psychologist William Haxton's, Ph.D., reports into his second causation statement which remained the same.³ The Respondents issued no evidentiary rebuttal compliant with the prevailing legal standard.

Thus, the Hearing Commissioner opined: "[A]fter a careful consideration and study of all the evidence as well as a personal observation of the Claimant's demeanor, there is substantial and reliable probative evidence to support the [F]indings of Fact." He findings included:

3. *The testimony of Claimant, Timothy M. Clayton, was clear and honest. Mr. Clayton possesses a ninth (9th) grade education. [Hrg. Tr. Pg. 51, ln. 25-pg. 52, ln. 2]. His preexisting psychological issue dates to his childhood. Mr. Clayton cutoff all contact with father. [Hrg. Tr. Pg.127, ln. 24-pg. 128, ln. 9]. In the past, the Claimant experienced increased work to larger vehicles and increased pressure from job, but continued to work until July 17, 2017, with the Employer even during his treatment with James R. Kirkland, M.D., which were generally three (3) months apart, but sometimes sooner, especially after the March 28, 2017, on the job accident . [Hrg. Tr. Pg.53, ll. 5-15; Pg. 85, ll.1-9; Pg. 86, ll.6-18; Pg. 94, ll. 2-6, 19-21; CL APA#1, pgs. 1-5; DEF APA#1, pgs. 1-10]. Since receiving psychological counseling pursuant to Dr. Kirkland's recommendation, the Claimant did not think his psychological condition was any better or worse; everything is about the same; treatment does not seem to be working. [Hrg. Tr. Pg. 98, ln. 20- pg. 100, ln.2]. The Claimant's medications were increased. [C-1].*
5. *Dr. Kirkland provided two (2) causation statements December 5, 2017 and May 15, 2018, that opined to a reasonable degree of medical certainty that the Claimant's increase anxiety, panic attacks, and depression were most probably aggravated by his low back/right leg/right hip pain. [Cl. APA #1, Pgs. 9-10; 15-16]. The Defendants submitted Dana-Lowndes Rosen's, M.D. March 16, 2018, independent psychiatric evaluation. [DEF. APA#2]. In this report, Dr. Rosen references Mr. Crocker and Mr. Lang. [DEF. APA#2, Pg. 27].*
6. *The Claimant's preexisting psychiatric and psychological conditions were aggravated subsequent to his March 28, 2017, on the job accident.*
7. *The Claimant is not at maximum medical improvement for the psychological overlay and is entitled to additional treatment.*
8. *A full psychological evaluation needs to be done by a certified psychiatrist*
13. *None of the doctors used in the treatment submitted in the parties' APAs are to be used by either party as treating doctors. I do not find either James. R. Kirkland, M.D., Scott Psychiatric Institute or Dyana-Lowndes Rosen, M.D., one-time IME, convincing based on the overall evidence. Mr. Clayton found Dr. Kirkland by internet referral. (DEF APA #1, Pg. 1).*

³ Ivan E. LaMotta, M.D., noted 08-24-2017 that Appellant developed anxiety and agoraphobia after the 07-20-2017 appointment.

16. *The Claimant met his burden of proof as he submitted two (2) causation statements by treating physician James R. Kirkland, M.D. (CL. APA#1, Pgs.9-10, 15-16).*

In Anderson, the Claimant's treating psychiatrist provided a letter that her September 1, 1995, fall "aggravated her pre-existing psychiatric diagnosis." Anderson, 493, 529 (2001). The Court noted: "These contentions are, if not supported, at least not contradicted by the notes of Dr. Robert Peele, the carrier-approved treating physician." Id. Further, "Although Anderson was receiving treatment for depression prior to this accident, the only substantial evidence in the record clearly shows her condition was aggravated by the work-related fall." Anderson, 494, 529 (2001). Similarly, based on the preponderance of the evidence as a whole including Appellant's testimony, Dr. Kirkland's unrefuted causation statements, and authorized treating physician, Ivan E. LaMotta, M.D., August 24, 2017, note, the Appellant's psychiatric/psychological worsening was directly tied to the original March 28, 2017, on the job accident. Therefore, Dr. Kirkland's two (2) causation statements remain the sole statutory compliant medical evidence presented.

The Hearing Commissioner's Finding #13 to select a different physician moving forward is not evidence, but instruction on how to fulfill the clear causally related aggravation. The Hearing Commissioner merely directed that the parties select a different evaluating psychiatrist which neither negated unequivocal expert medical proof nor modified any underlying finding.

B. The Appellate Panel's reversal of Hearing Commissioner's causation finding was not an independent determination.

"The Appellate Panel is the ultimate fact finder in Workers' Compensation cases and is not bound by the Hearing Commissioner's findings of fact." *Hargrove v. Titan Textile Co.*, 360 S.C. 276 599 S.E.2d 604 (Ct. App. 2004) (citing *Gibson*, 338 S.C. at 517, 526 S.E.2d at 729; *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583 (Ct. App. 1999)). The final weight accorded evidence falls to the Appellate Panel. Id. In the case at bar, the Appellate Panel Order stated:

In an appellate review, the Appellate Panel shall, pursuant to S.C. Code Ann. §42-17-50 (1976, as amended), review the award, weigh the evidence as presented at the initial hearing and, if good grounds be shown therefor, make its own Findings of Fact and reach its own Conclusions of Law consistent with or inconsistent with those of the Hearing Commissioner.

The Order recognized Appellant's strong, candid testimony as well as submitted causation evidence in findings numbers 3 and 5:

3. *The testimony of Claimant, Timothy M. Clayton, was clear and honest. Mr. Clayton possesses a ninth (9th) grade education. [Hrg. Tr. Pg. 51, ln. 25-pg. 52, ln. 2]. His preexisting psychological issue dates to his childhood. Mr. Clayton cutoff all contact with father. [Hrg. Tr. Pg.127, ln. 24-pg. 128, ln. 9]. In the past, the Claimant experienced increased work to larger vehicles and increased pressure from job, but continued to work until July 17, 2017, with the Employer even during his treatment with James R. Kirkland, M.D., which were generally three (3) months apart, but sometimes sooner, especially after the March 28, 2017, on the job accident. [Hrg. Tr. Pg.53, ll. 5-15; Pg. 85, ll.1-9; Pg. 86, ll.6-18; Pg. 94, ll. 2-6, 19-21; CL APA#1, pgs. 1-5; DEF APA#1, pgs. 1-10]. Since receiving psychological counseling pursuant to Dr. Kirkland's recommendation, the Claimant did not think his psychological condition was any better or worse; everything is about the same; treatment does not seem to be working. [Hrg. Tr. Pg. 98, ln. 20- pg. 100, ln.2]. The Claimant's medications were increased. [C-1].*
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However, the decision reversed one Hearing Commissioner finding solely based upon language in a separate Hearing Commission finding, but not independent analysis. Again, the record as a whole must be considered to make such a finding against the clear evidence rather than Hearing Commissioner's wording in his order- which is not actual evidence. The Appellate Panel's decision and order stated:

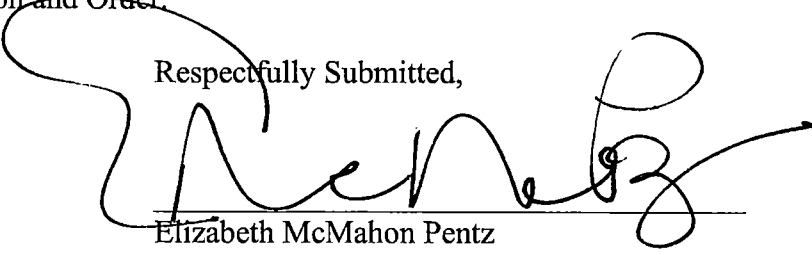
However, the Appellate Panel reverses the Single Commissioner findings that Claimant sustained an aggravation of his preexisting psychiatric and psychological condition. Such findings were based solely on medical evidence that the Single Commissioner found to be unconvincing. The finding that this evidence was unconvincing was not appealed. Therefore, the finding of compensability of Claimant's psychiatric and psychological condition is wholly inconsistent with the finding that the evidence in support of compensability is unconvincing.

While **medical** testimony is entitled to great respect, the fact finder may disregard it if there is other competent evidence in the record.” Tiller v. National Health Care Center of Sumter, 334 S.C. 333, 513 S.E.2d 843 (1999) (citing *Ballenger v. Southern Worsted Corp.*, 209 S.C. 463, 40 S.E.2d 681 (1946)). The Panel merely meshed two findings into one based upon the Hearing Commissioner’s ruling, but seemingly without independent reevaluation. Legal compliance is ignored without insight whether the Panel weighed all evidence to determine Dr. Kirkland unconvincing.

CONCLUSION

Based upon the foregoing arguments, evidence in the record, case law, and statutes cited herein, the Appellant requests that the Court reverse the Full Panel’s March 23, 2020, Decision and Order Finding and Conclusion that the Appellant did not meet his burden of proof and reinstate the Hearing Commissioner’s original May 14, 2019, Decision and Order Finding that the Appellant did meet his burden of proof, is not at maximum medical improvement, and the Respondents must provide a psychiatric evaluation. Thus, the Respondent respectfully requests this Court affirm the Full Commission Panel’s Decision and Order.

Respectfully Submitted,



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PROOF OF SERVICE

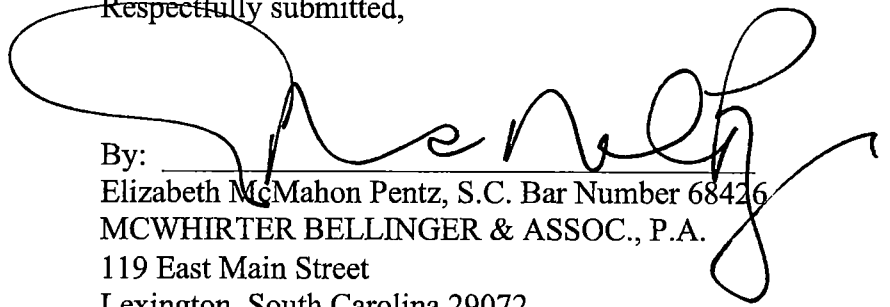
Counsel for the **Appellant** certifies that she served the **Appellant's Initial Brief and Designation of Matter to be included in the Record on Appeal** on the Respondents, South Carolina Department of Transportation, Employer; and SC State Accident Fund, Carrier, by depositing a copy of the same into the United States Postal Service with proper postage affixed on August 31, 2020, and addressed as follows:

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[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



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**PROOF OF SERVICE APPELLANT'S
INITIAL BRIEF AND DESIGNATION OF
MATTER TO BE INCLUDED IN THE
RECORD ON APPEAL**

Lexington, South Carolina
August 31, 2020

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August 31, 2020

VIA UNITED STATES POSTAL SERVICE:

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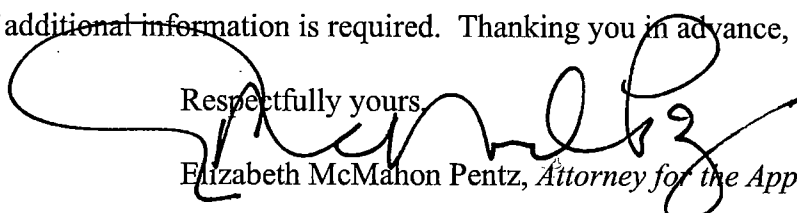
RE: Timothy Clayton, Employee, Appellant v. South Carolina Department of
Transportation, Employer; and S.C. State Accident Fund, Carrier, Respondents.
APPELLATE CASE NO.: 2020-000718
SCWCC FILE NO.: 1708722

Dear Ms. Kitchings:

Please find enclosed for filing the original and one (1) copy of the **Appellant's Initial Brief and Designation of Matter** which we are filing on behalf of the Appellant, Timothy Clayton. Also enclosed is a **Certificate of Counsel (Designation of Matter)** and **Proof of Service** on counsel and administrative tribunal. Please return the additional three (3) filed copies to via enclosed envelope.

Please advise if additional information is required. Thanking you in advance, I am

Respectfully yours,


Elizabeth McMahon Pentz, *Attorney for the Appellant*

Enclosures

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