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STATE OF SOUTH CAROLINA  
In the Court of Appeal

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APR 04 2022

SC Court of Appeals

APPEAL FROM THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

SCWCC File No. 1508995

Appellate Case No. 2018-001964

Samuel Paulino, Claimant.....Respondent

v.

Diversified Coatings, Inc., Employer, and AmGuard Ins. Co., Carrier.....Appellants.

**MOTION TO STRIKE AND FOR EXTENSION OF TIME**

Pursuant to SCACR 240 and other applicable law, Appellants in the above-referenced case hereby move to strike certain portions of Respondent's Memorandum in support of his Petition for Rehearing. Appellants also move for an Extension of Time for filing their Return to the Petition for Rehearing, which has specifically been requested by the Court pursuant to SCACR 240(e), pending a ruling on their Motion to Strike. Such Motions are based on the following grounds:

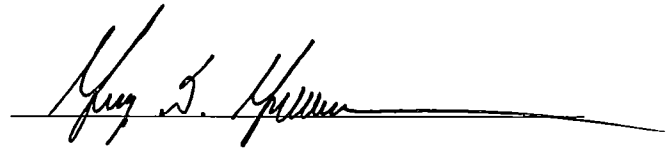
- 1) SCACR 210 (h) provides that the "appellate court will not consider any fact which does not appear in the Record on Appeal." (emphasis added).
- 2) Respondent's Memorandum asks the Court to take "judicial notice" of the terms "success and/or failure" as it pertains to his surgical outcome in this case. (See p. 14). Respondent further cites

scholarly articles and medical journals/treatises purportedly sourced from the U.S. National Library of Medicine's website and other repositories to generally support his proposition. (pp. 14-15).

- 3) By smuggling these articles into his Memorandum Respondent is clearly attempting to rehabilitate the Commission's patently erroneous finding that he obtained a "poor" surgical result, which this Court in its Opinion correctly found was unsupported by "medical evidence." *See Burnette v. City of Greenville*, 410 S.C. 417, 737 S.E.2d 200 (Ct. App. 2012) (Court rejected a Commission finding regarding the significance of an MRI scan when there was no evidence indicating the opinion originated from a medical provider).
- 4) It is undisputed that the Record on Appeal does not contain the articles and treatises cited by Respondent in his Petition. Moreover, it is undisputed that there is no "medical evidence" or opinion testimony in the Record that otherwise references and/or explains the relevance, if any, of these general articles and treatises to the specific facts of the instant case.
- 5) Although Appellants could certainly respond to the merits of Respondents arguments in their Return to the Petition, Appellants submit they should not be forced into the untenable position of perpetuating arguments beyond the Record on Appeal in violation of SCACR 210. Moreover, the Court should not even be put in the position of being tempted by Respondent's inappropriate arguments and references.
- 6) It is elementary that objections to impertinent matters raised in a pleading can be properly raised by a party in a Motion to Strike. *See Hackworth v. Greywood at Hammett*, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009). Respondent's Petition for Rehearing is akin to a "pleading" to the extent that it sets forth entitlement to remedies and relief based on underlying factual allegations and legal arguments. As such, Respondents submit that their Motion to Strike is an appropriate remedy for enforcing the requirements of SCACR 210 (h).
- 7) Appellants finally submit that they cannot adequately respond to the Petition for Rehearing per the Court's request pending a disposition of their Motion to Strike.

**WHEREFORE** Appellants pray for an Order from the Court striking Respondent's arguments based on, and references/citations to, medical treatises/articles and other facts and/or evidence not contained in the Record on Appeal. Appellants specifically submit that pages 14 and 15 of the Memorandum in support of the Petition, as well as the purported articles/treatises themselves attached as exhibits to the Petition (designated and paginated as pp. A1 to C5), be stricken and no consideration be given to same as contrary to SCACR 210 (h). Appellants finally request an extension for filing their Return to the Petition until a reasonable time following the Court's ruling on their Motion to Strike.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "George D. Gallagher", is written over a horizontal line.

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April    /   , 2022  
Columbia, SC

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v.

Diversified Coatings, Inc., Employer, and Amguard Ins. Co., Carrier, Appellants

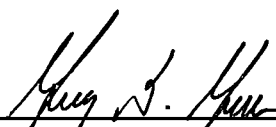
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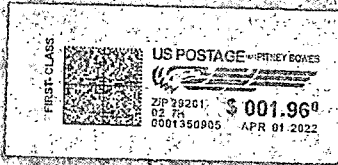
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I certify that I have served the **Motion to Strike and for Extension of Time** on Samuel Paulino, by depositing a copy of it in the United States Mail on **April 1, 2022**, with postage prepaid and with the envelope addressed to his attorney, Stephen N. Garcia (604 Pettigru Street, Greenville, SC 29601).

April 1, 2022

  
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1700-0502  
The Honorable Jenny Abbot Kitchings  
Clerk of Court for the SC Court of Appeals  
Post Office Box 11629  
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