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**Aug 24 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

The Honorable T. Scott Beck, Commissioner

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W.C.C. File No. 1112328  
Appellate Case No. 2019-001357

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Samuel Rose, Employee .....Respondent,

v.

JJS Trucking, Uninsured Employer,

and

Chris Thompson Services, Upstream Employer,  
Bridgefield Casualty Insurance Company, and  
South Carolina Uninsured Employers' Fund, Carrier,  
all of whom are .....Appellants.

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**PETITION FOR REHEARING**

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## **Statement of the Case**

Pursuant to Rule 221(a), S.C.A.C.R., the Appellants request that the Court of Appeals reconsider its unpublished opinion filed August 10, 2022. The Appellants respectfully contend that the Court overlooked and otherwise misapprehended arguments regarding obvious due process violations; the statutory mandate that awards of medical treatment be both specific and proven to be necessary to “lessen the period of disability;” and the fact that no claim under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 was preserved for review by the Commission on remand. The Appellants further contend that the Court misapprehended the applicable law in holding that the Commission was entitled to “empower” Dr. Poletti to determine the Appellant’s liability for unspecified future medical treatment and the evidence in the record regarding the Claimant’s subsequent, non-work-related re-injuries to his neck and back.

## **Arguments**

- I. **The Court of Appeals overlooked the Appellants’ argument that the Workers’ Compensation Commission’s June 24, 2019, Order violates the Appellants’ constitutional right to due process and equal protection.**

Despite clearly raising arguments regarding constitutional violations in their Brief to the Court of Appeals and despite lengthy discussion of these issues during oral arguments on June 9, 2022, the August 10, 2022, Opinion of the Court of Appeals makes absolutely no mention of due process or equal protection. Because the Court has

overlooked and otherwise failed to address these arguments, the Appellants respectfully request rehearing and reconsideration.

As previously argued by the Appellants, the Commission's June 24, 2019, Order constitutes an abuse of discretion by the Commission and otherwise violates the Appellants' right to due process and equal protection under the law, including their right to notice and opportunity to be heard on the issues addressed, *sua sponte*, and without notice, regarding the application of S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30. No issues with respect to the Claimant's entitlement to benefits under these statutes were preserved for appeal by the Claimant in his Form 30, or his 2014 Brief to the Appellate Panel, and entitlement to benefits under these statutes was not addressed by the Court of Appeals in their remand order. Therefore, the Appellants did not and could not have had an opportunity to address the merits of such claims before the Commission's Appellate Panel in the first instance (*i.e.*, by brief or oral argument in 2015), much less on remand (in 2019). Indeed, the Appellants were not given any notice that the Commission intended to address the merits of long-abandoned claims under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30, *sua motu*, in June 2019, prior to the issuance of the Appellate Panel's Orders of June 17 and June 24, 2019.

In addition, even assuming, *arguendo*, that the Appellate Panel had the authority or jurisdiction to address the Claimant's entitlement to medical or temporary disability benefits for the period after September 23, 2013 (the date of the most recent evidentiary hearing), the Commission eviscerated the Appellants' right to ever be heard on the issue of whether or to what extent the Claimant required medical treatment or was capable of earning wages after September 23, 2013, by speculating as to conditions after the

hearing and after the evidentiary record was closed, by awarding a lump sum in the absence of any request by the Claimant, and by basing a lump-sum award on impermissible speculation as to the Claimant's ability to earn wages in the six years following the hearing. See Ashley v. Ware Shoals Mfg. Co., 210 S.C. 273, 42 S.E.2d 390 (1947) (holding that the parties have "clear" and "definite rights involved" in a lump sum request and "are entitled to notice of such proceedings and an opportunity to be heard"). Despite the fact that this argument was clearly raised by the Appellants in their Brief and during oral arguments, the Court of Appeals overlooked and otherwise failed to address this issue in its unpublished Opinion of August 10, 2022.

Again, the issue of the Claimant's ability to earn wages after September 23, 2013, was not litigated at the September 23, 2013, hearing because such arguments would have been ridiculously speculative. Similarly, the Commission did not seek or obtain evidence or arguments on this issue following the remand from the Court of Appeals. However, under the terms of the Commission's June 24, 2019, Order, the Appellants will never have an opportunity to address this issue. For example, if the Appellants obtain proof that the Claimant has been working and earning wages consistently since September 23, 2013, they cannot dispute the Claimant's entitlement to benefits between September 23, 2013, and June 24, 2019, with such evidence at an actual hearing in the future because the Commission has already conclusively ruled that the Claimant is entitled to a lump sum payment of temporary total disability compensation for this period. This is plain legal error. See Rice v. Froehling & Robertson 267 S.C. 155, 226 S.E.2d 705 (1976) (reversing an award of the Commission that, by its sweeping terms, did not give the employer adequate notice or opportunity to be heard).

The Administrative Procedures Act, S.C. Code Ann. § 1-23-320(E), specifically requires that “[o]pportunity must be afforded all parties to respond and present evidence and argument on all issues involved” in an administrative hearing. Of course, the Constitution of the United States of America and the Constitution of the State of South Carolina guarantee due process and equal protection rights to all parties. *See* U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; S.C. Const. art. I, § 3 & § 22. The South Carolina Constitution provides:

“The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.” S.C. Const. art. I, § 3.

Our state Constitution additionally assures:

“No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; nor shall he be subject to the same person for both prosecution and adjudication; nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review.” S.C. Const. art. I, § 22.

The South Carolina Supreme Court has interpreted this provision to provide “persons the right to notice and an opportunity to be heard by an administrative agency.” Ross v. Med. Univ. of S.C., 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997) (citing Stono River Envtl. Prot. Ass’n v. S.C. Dep’t of Health & Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)); accord Kurschner v. City of Camden Planning Comm’n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (holding the “fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.”). At a minimum, due process requires adequate notice and adequate opportunity for a hearing. Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007) (citing In re Vora, 354 S.C. 590, 595, 582 S.E.2d 413, 416 (2003)); accord Dangerfield v. State, 376 S.C. 176, 179, 656 S.E.2d 353, 354 (2008). Importantly, an interested party must be given notice “reasonably calculated under all circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Blanton v. Stathos, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (2002) (citing Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); Murdock v. Murdock, 338 S.C. 322, 334, 526 S.E.2d 241, 248 (Ct. App. 1999)).

Here, the Commission’s Appellate Panel wholly failed to apprise the Appellants of their intent to address arguments regarding the application of S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30, which were not preserved for appeal, and which were not even briefed<sup>1</sup> or argued before the Commission’s Appellate

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<sup>1</sup> The Claimant raised no argument with regard to regarding the application of S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his brief; however,

Panel at the initial review hearing in 2015. Therefore, the Appellants have been denied due process and the Commission's Orders of June 17 and 24, 2019 should have been reversed and vacated by the Court of Appeals. Leventis v. S.C. Dep't of Health & Env'tl. Control, 340 S.C. 118, 131-132, 530 S.E.2d 643, 650 (Ct. App. 2000) (holding that to "prove the denial of due process in an administrative proceeding, a party must show that it was substantially prejudiced by the administrative process") (quoting Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 561, 505 S.E.2d 598, 603 (Ct. App. 1998), overruled on other grounds by Brown v. S.C. Dep't of Health & Env'tl. Control, 348 S.C. 507, 560 S.E.2d 410 (2002)). The Appellants' right of equal protection has likewise been infringed by the Appellate Panel's failure to adhere to the statutory mandates of S.C. Code Ann. § 42-17-50 and to confine its inquiry and its order to those matters properly before it.

While the August 10, 2022, Opinion of the Court of Appeals does not discuss these violations of the Appellants' constitutional rights, there is a curious suggestion that "the time to sort out and litigate (if necessary) the proper procedure was before the commission ruled on the merits, not after." Respectfully, lacking the power of clairvoyance, it was not until the Appellate Panel actually issued its Orders on June 17 and June 24, 2019, that the Appellants had any reason to believe that the Appellate Panel intended to address arguments that were not before them – including arguments that were never even briefed to the Appellate Panel – or that the Appellate Panel

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the Defendants did argue to the Appellate Panel that the Hearing Commissioner's conclusions about these statutes are the law of the case.

otherwise intended to violate the Appellants' constitutional right to notice and opportunity to be heard.

Indeed, the Commission's "procedure" on remand changed repeatedly and the Appellants diligently requested information regarding this procedure and the scope of the Commission's intended review. By Order dated July 16, 2018, the Chairman of the Commission remanded the case to Hearing Commissioner Taylor. (R.p.63). Nine months later on April 10, 2019, Commissioner Taylor's office informed the parties that she was "trying to schedule this Remand hearing in Richland" for May 8, 2019. (R.p.252). On April 15, 2019, Counsel for the Appellants inquired as to whether "the Commissioner intends to have a new evidentiary hearing." (R.p.251). The next day Commissioner Taylor scheduled a hearing for May 8, 2019. (R.p.245). Having received no response to their previous inquiry, on April 23, 2019, counsel for the Appellants asked again whether "Commissioner Taylor was going to consider this claim on the existing record, or whether she expected updated briefs, APAs and additional testimony." (R.p.250). Commissioner Taylor then informed the parties that she "needs a conference call on this claim." (R. p.250). During that conference call, on April 25, 2019, counsel for the Claimant asked Commissioner Taylor to recuse herself. On April 29, 2019, Commissioner Taylor issued a "Notice of Hearing Postponement." (R. p.254). By email of the same date, Commissioner Taylor informed the parties that "a Panel will address the Remand from the Court of Appeals." The Commission issued no further information regarding how they intended to proceed and at no time informed the parties of their intention to address issues that were not preserved for appeal, including issues regarding the Claimant's earning capacity and need for medical treatment after

2013 when the evidentiary record was closed. Respectfully, it was incumbent upon the Commission to give the parties notice and opportunity to be heard. Due process does not require that litigants make pre-emptive motions to guarantee their constructional rights, and the Appellants *sub judice* at no time waived their right to notice or opportunity to be heard. Because the Court of Appeals overlooked and otherwise misapprehended the Appellant's constitutional arguments by failing to address them in the August 10, 2022, unpublished Opinion, the Petition for Rehearing should be granted.

**II. The Court of Appeals overlooked and otherwise misapprehended the Appellants' arguments with regard to the award of future medical treatment.**

The Appellate Panel's Order concludes that the "Claimant is entitled to treatment<sup>2</sup> for his neck, back, and right knee." (R.p.89) (emphasis added). The Appellants specifically argued that the Commission erred as a matter of law in making any such award because there is no competent expert medial evidence "stated to a reasonable degree of medical

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<sup>2</sup> The Court's Opinion suggests that there is no distinction between ordering an "evaluation" as opposed to medical 'treatment'." Respectfully, the Commission specifically ordered "treatment" (R.p.89), despite the fact that the legislature made a very clear distinction between "treatment" and "evaluation" by requiring that an award of future medical "treatment" under S.C. Code Ann. § 42-1-560 be supported by expert medical evidence that the specific, proposed treatment would "tend to lessen the period of disability." See Hartzell v. Palmetto Collision, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016).

certainty” addressing whether any future treatment would “lessen the period of disability.” Under S.C. Code Ann. § 42-15-60 and well-established precedent, an employee is only entitled to future medical treatment upon proof that such treatment “will tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty.” See Hartzell v. Palmetto Collision, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016) (holding that this language constitutes a “heightened standard of medical evidence,” which “limit[s] the Appellate Panel’s broad discretion” to award future medical benefits). Not only did the Commission utterly fail to note the requirements of § 42-15-60 or elucidate how they were possibly met in the instant case, but the Court of Appeals similarly overlooks the fact that there is no competent expert medical evidence “stated to a reasonable degree of medical certainty” addressing whether any proposed treatment would “lessen the period of disability” that could possibly sustain an award of future medical treatment.

**a. The Court of Appeals overlooked and otherwise misapprehended the Appellants’ arguments regarding the knee.**

According to the Appellate Panel’s June 24, 2019, Order, the Claimant is “entitled to treatment” for his right knee at the expense of the Appellants. (R. p.89 #5). The Appellate Panel failed to specify what treatment he is entitled to for his right knee, most likely because no treatment was recommended at the time the record was closed in this claim. More importantly, the Appellate Panel made no finding or conclusion that any potential right knee treatment would “tend to lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty” because there is no evidence that the Claimant requires (or in 2014 *required*) any

treatment for his right knee to any degree of medical certainty. Therefore, the Appellate Panel's award of "treatment" for the knee is supported by neither substantial evidence, nor the applicable law, and is otherwise violative of S.C. Code Ann. § 1-23-350, necessitating reversal.

While Dr. Poletti addressed the Claimant's knee after his one-time evaluation, Dr. Poletti's report only surmises, "[h]e requires evaluation by a knee specialist. I *suspect* that he *may require* additional MRI scanning of his knee and *perhaps* even knee surgery." (R. p.501) (emphasis added). Dr. Poletti did not recommend any treatment for the right knee, much less address causation or the tendency to "lessen the period of disability" required by S.C. Code Ann. § 42-15-60. Moreover, the Claimant was initially diagnosed with only a "superficial laceration" on his right knee (R. p.439), there was no evidence of any fracture or dislocation (only pre-existing Osgood-Schlatter disease) (R. pp.495-6, p.499), and not even his own personal physician, Dr. Abel, recommended any future treatment for the Claimant's right knee (R. p.465).

Without "expert medical evidence stated to a reasonable degree of medical certainty," and without persuasive authority that specific medical treatment will "lessen the period of disability," the Appellate Panel lacked the power and authority to award the Claimant medical "treatment" (R.p.89 #5) for his right knee under the express terms of S.C. Code Ann. § 42-15-60. See Hartzell v. Palmetto Collision, 419 S.C. 87, 796 S.E.2d 145 (Ct. App. 2016). Here, the burden of proving his entitlement to benefits under S.C. Code Ann. § 42-15-60 was the Claimant's alone. See Glover v. Columbia Hosp., 236 S.C.410, 114 S.E.2d 565 (1960) (holding that claimants who assert their right to compensation must establish by the preponderance of the evidence the facts that will

entitle them to an award); *see also* Herndon v. Morgan Mills, 246 S.C. 201, 143 S.E.2d 376 (1965) (stating “the difficulty in proving a fact in a compensation case does not relieve the party on whom the burden rests of proving it, and does not shift the burden to the other party) (internal citations omitted)). By addressing, *sua motu*, a claim for medical treatment long-since abandoned, and where the requisite statutory burden of proof has not been met, the Appellate Panel arbitrarily and capriciously exceeded its statutory authority and violated the Appellants’ rights, necessitating reversal by the Court of Appeals. The Court Appeals appears to have overlooked or misapprehended these arguments and; therefore, the Appellants respectfully request rehearing and reconsideration.

**b. The Court of Appeals overlooked and otherwise misapprehended the Appellants’ arguments regarding the low back.**

Much like the award for his right knee, the Appellate Panel made a vague conclusion that the Claimant is “entitled to treatment” for his back, without specifying what treatment he requires, much less what evidence has proven his entitlement. (R. p.89 #5). The Appellate Panel’s findings of fact are no more instructive, as they contain only cursory mentions that “Dr. Poletti diagnosed Claimant with ...low back pain of **indeterminate etiology**,” that “Dr. Poletti also opined Claimant needed an MRI scan of his lumbar spine” (R. p.86#13 (emphasis added)) and that; therefore, Dr. Poletti was appointed as the authorized provider for the Claimant’s “lumbar spine treatment” (R. p.87 #16). Therefore, the Appellate Panel’s findings and conclusions should have been reversed as violative of S.C. Code Ann. § 1-23-350.

In addition, neither these vague and conclusory findings, nor the actual medical records themselves, support an award under S.C. Code Ann. § 42-15-60. Again, the burden was upon the Claimant to prove that additional medical treatment for his low back was required to “lessen the period of disability as evidenced by expert medical evidence stated to a reasonable degree of medical certainty” and to prove that such “period of disability” is actually causally related to the work accident. S.C. Code Ann. § 42-15-60. However, not even the report of Dr. Poletti satisfies this burden, as Dr. Poletti did not recommend any treatment for the Claimant’s low back – he didn’t even provide a diagnosis or opine as to the cause of the Claimant’s subjective complaints of “low back pain of **indeterminate etiology**.” (R. p.502). The reports of Dr. Jones, Dr. Abel, and Dr. Wildstein similarly fail to recommend any medical treatment for the Claimant’s low back complaints, which were described as “mild degenerative changes.” (R. p.392, p. 463, p.465) Indeed, Dr. Jones stated that it “does not appear that any future treatment would be warranted to help this patient achieve higher level of functional status or lessen his disability.” (R. p.392).

There is simply no evidentiary basis upon which the Appellate Panel could have made the requisite findings regarding the need for low back treatment to “lessen the period of disability.” Considering no treatment was recommended, it is obvious that the mandatory “reasonable degree of certainty” in such recommendation is also lacking. Similarly, by admitting that the Claimant’s low back pain was “of **indeterminate etiology**,” even Dr. Poletti admits to an absence of proof of causation. As such, the Appellate Panel’s award of medical benefits for the low back under S.C. Code Ann. § 42-15-60 should have been reversed by the Court of Appeals as a matter of law and;

therefore, the Petition for Rehearing should be granted to reconsider this argument, which was apparently overlooked by the Court.

**c. The Court of Appeals overlooked and otherwise**

**misapprehended the Appellants' arguments regarding the neck.**

The Appellate Panel's June 17 and 24, 2019 Orders contains the following conclusory finding :

“With regards [sic] to the Claimant's cervical spine...we find Claimant is entitled to additional medical treatment to include the recommended cervical fusion as recommended as it has been shown by a preponderance of the evidence that it would tend to lessen his period of disability.” (R. p.74#15, p.87 #15).

The Appellate Panel failed to elucidate what “expert medical evidence stated to a reasonable degree of medical certainty” showed that any treatment would “lessen the period of disability,” likely because no such evidence exists.

While the Appellate Panel cites the opinions of Dr. Wildstein and Dr. Poletti, their opinions do not satisfy the requisite burden of proof under S.C. Code Ann. § 42-9-260. According to Dr. Wildstein's report dated December 14, 2011, the Claimant “*could potentially benefit* from a one level C5-6 ACDF.” (R. p.496) (emphasis added). However, Dr. Wildstein does not even relate the need for surgery to the August 10, 2011, accident, much less address the seminal issues lessening the “period of disability” to *any* degree of “certainty.” Similarly, Dr. Poletti, who evaluated the Claimant once on July 16, 2013, for

the purpose of litigation, merely posited that the Claimant “has a *potential* surgical lesion in his neck” and admitted that “surgery *may not be* a magic wand answer.” (R. p.502) (emphasis added). While Dr. Poletti’s report contains a catch-all “reasonable degree of medical certainty” reference, the fact remains that that he was only reasonably certain that the Claimant had even a “potential” need for surgery, but Dr. Poletti otherwise made no mention of this potential surgery’s impact on lessening the Claimant’s disability.

Therefore, the Appellants respectfully contend that an award of a cervical fusion mentioned as mere potentiality nine years ago is legally insufficient. However, the Court of Appeals does not address this argument in its unpublished Opinion of August 10, 2022. As such, the Respondents respectfully request that the Court grant the Petition for Rehearing and reverse the Appellate Panel’s award of a cervical fusion and future treatment for the neck as a matter of law.

**III. The Court of Appeals overlooked and otherwise misapprehended the Appellants’ arguments regarding the Commission’s “blanket award” of future medical treatment.**

According to the Court of Appeals, the Appellate Panel’s “order is not vague;” however, it suggests that if a dispute “over whether a particular treatment is appropriate ... arises in this case, the parties are free to litigate that issue.”<sup>3</sup> Respectfully, not only is

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<sup>3</sup> The Court of Appeals appears to suggest that should the Appellant’s disagree with some future recommendation made by Dr. Poletti, they should attempt a collateral attack of the Commission’s July 2019 award of any future medical treatment recommended by Dr. Poletti, noting that “[w]orkers’ compensation cases frequently

the Appellate Panel's award of future medical treatment impermissibly vague, but the parties have already litigated the Claimant's entitlement to future medical treatment under S.C. Code Ann. § 42-15-60 and are entitled to a specific, definitive ruling on this issue at this juncture. Indeed, the fact that litigation over whether "a particular treatment is appropriate" may be necessary in the future only serves to underscore the fact that the Commission's award of "future medical treatment with Dr. Poletti or any referral made by Dr. Poletti for Claimant's neck and back injuries" -- without limitation or qualification -- is impermissibly vague and otherwise violates the requirements of S.C. Code Ann. § 42-15-60(B)(2) and the guarantees of due process. (R. p.89 #5). How could a reviewing court possibly determine whether the future medical treatment Dr. Poletti is "empowered" to provide meets the requirements of S.C. Code Ann. § 42-1-560 without even knowing the precise nature of such treatment? It cannot. Therefore, the award is impermissibly vague as a matter of law. See Frame v. Resort Servs. Inc., 357 S.C. 520, 593 S.E.2d. 491 (Ct. App. 2004) (holding that findings of fact must be

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involve disputes over whether a particular treatment is appropriate." Respectfully, once treatment has been awarded and affirmed on appeal, there is no legal remedy for any future "dispute" given the doctrine of collateral estoppel. As previously explained by this Court,

"[t]he doctrine of collateral estoppel was conjured up some years ago by judges as a way of avoiding the perils inherent in having to decide the same thing twice – not the least of which is the embarrassment of deciding something one way on the first occasion and another on the second." Garret v. Snedigar, 293 S.C. 176, 188 n.4, 359 S.E.2d. 283, 288 n.4 (Ct. App. 1987) (citing Farmer v. Miller, 39 S.C. L. (5 Rich.) 480 (1852)).

sufficiently detailed to enable the appellate court to determine whether the evidence supports the findings and whether the law was properly applied to those findings, otherwise remand is required).

Furthermore, this vague, “blanket award” by the Appellate Panel (coupled with the finding that the Claimant is entitled to “direct his own medical care” (R. p.87 #16)) appears to make the Appellants automatically liable for any treatment Dr. Poletti recommends at any time in the future, regardless of whether it is causally-related to the August 10, 2011 accident, regardless of whether it would “tend to lessen the period of disability,” and regardless of any degree of certainty in these recommendations. In addition, the Claimant may seek penalties and contempt citations if the Appellants do not unquestionably agree to all treatment recommended by Dr. Poletti in the future, despite factual or legal arguments that should render such treatment non-compensable under the law. This is because the Commission and the Court of Appeals have not only excused the Claimant’s current burden of proof under S.C. Code Ann. § 42-15-60 but also have excused his burden of proving entitlement to any treatment in the future, without reserving any opportunity for the Appellants to defend against such demands (save, apparently, a future collateral attack), as is their right under S.C. Code Ann. § 42-15-60. However, neither S.C. Code Ann. § 42-15-60, nor any other provision of the Workers’ Compensation Act, authorizes the Commission to make such a broad, blanket award, nor does the Act in any way authorize the Commission or the Courts to “empower” Dr. Poletti to determine the Appellant’s liability for future medical treatment as the Court’s August 10, 2022, Opinion boldly suggests.

In fact, in affirming this award and in “empowering” Dr. Poletti to provide any future treatment he desires, the Court of Appeals misapprehends the Supreme Court’s ruling in Rice v. Froehling & Robertson 267 S.C. 155, 226 S.E.2d 705 (1976), the purpose of which was to prohibit such blanket awards. In Rice, the employee had been a patient at the Durham Rehabilitation Center for a number of years and the Commission awarded him future medical benefits in the form of

“such medical costs as will hereafter be incurred by claimant for medical services rendered by the Durham Rehabilitation Center.” 267 S.C. 155, 162, 226 S.E.2d 705, 708.

The Supreme Court noted that Rice’s “future medical treatment could be far ranging” and held that the Commission’s vague award did not give his employer adequate notice of their future liability or even enable an appellate court to review the award; nor did it limit the services to those tending to limit the period of disability, as required by law. 267 S.C. 155, 163, 226 S.E.2d 705, 708. The facts and impermissibly vague language at issue in Rice are virtually identical to this claim and Rose’s award of

“future medical treatment with Dr. Poletti or any referral made by Dr. Poletti for Claimant’s neck and back injuries.” (R. p.89).

Despite the unquestionable similarity between the award in Rice and the award *sub judice*, Court’s August 10, 2022, Opinion makes no attempt to distinguish them, it

merely “rejects” the argument wholesale.<sup>4</sup> The Court fails to elucidate why holding of Rice is not applicable to the “far ranging” award in the present claim. Respectfully, the Court of Appeals should have applied the Supreme Court’s holding in Rice, to the effect that the Appellants are

“entitled to a more definitive order. Otherwise, they do not have an opportunity to argue that a specific medical care is unnecessary or that the proposed medical care will not tend to reduce the period of disability.”

Id. As such, the Appellants respectfully request that the Court of Appeals reconsider the Appellants’ arguments and the Supreme Court’s decision in Rice, as proper application of that decision to the case *sub judice* necessitates reversal.

**IV. The Court of Appeals overlooked the fact that no argument under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 was preserved for review and; therefore, the Commission erred as a matter of law in addressing these statutes on remand.**

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<sup>4</sup> The Opinion states that the Appellate Panel’s award here “designated the surgeon as Rose’s authorized treating physician for Rose’s neck and back, empowered the surgeon to treat those injuries, empowered the surgeon to refer Rose to other providers if necessary.” Similarly, the Commission “empowered” the Durham Rehabilitation Center to treat Rice and by doing so, the Supreme Court held that it had committed an error of law and violated the rights of the defendants. Rice v. Froehling & Robertson 267 S.C. 155, 226 S.E.2d 705 (1976).

By Order dated September 2, 2014, Commissioner Taylor concluded that the Claimant failed to satisfy the requirements of S.C. Code Ann. § 42-1-560. (R. p.40 #3). In addition, Commissioner Taylor specifically ruled that the Appellants were entitled to terminate temporary disability pursuant to S.C. Code Ann. § 42-9-260 and § 42-9-210; that the Claimant is not entitled to any additional medical treatment under S.C. Code Ann. § 42-15-60; and that the Claimant is not entitled any benefits under S.C. Code Ann. §§ 42-9-10, 42-9-20, and 42-9-30. (R. p.40). The Claimant appealed Hearing Commissioner Taylor's conclusion regarding the application of S.C. Code Ann. § 42-1-560 to the Commission's Appellate Panel. (R. pp.118—119). However, the Claimant's Form 30 dated September 14, 2014, raised no argument with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 and elucidated no question as to the Hearing Commissioner's application of these statutes. (R. pp.118—120). Therefore, the Claimant did not comply with the requirements of S.C. Code Ann. § 42-17-50 or S.C. Code Reg. 67-701 and, as such, no argument under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 was preserved for review by the Appellate Panel. *See* S.C. Code Reg. 67-701(A)(3)(a) (requiring that "[t]he grounds for appeal must be set out in detail on the Form 30 in the form of questions presented...Each question presented must be concise and concern one finding of fact, conclusion of law, or other proposition the appellant believes is in error."); S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-302, 641 S.E.2d 903, 907 (2007) (holding that to preserve an issue for appeal, it must be raised by the appellant in a timely manner and with sufficient specificity (citing Jean Hofer Toal *et al.*, Appellate Practice in South Carolina 57 (2d ed. 2002)); Jones v. Anderson Cotton Mills, 205 S.C. 247, 31 S.E.2d 447

(1944) (holding that general exceptions, such as “the commission erred in making an award,” are too ambiguous to fulfill the notice requirements of due process and do not preserve an issue for review).

Furthermore, the Claimant did not make any argument with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his November 14, 2014, Brief to the Appellate Panel<sup>5</sup>. (R. pp.121–135). Of course, mere "conclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review." State v. Crocker, 366 S.C. 394, 621 S.E.2d 890 (Ct. App. 2005) (citing Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 285 (Ct. App. 1993 (holding that failure to provide argument or supporting authority for an issue renders it abandoned))). Therefore, even if the Claimant had properly raised any argument regarding S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his Form 30, he clearly abandoned those issues in his November 14, 2014, Brief, such that the Appellate Panel had no jurisdiction or authority to disturb the Hearing Commissioner's conclusions regarding these statutes on remand.

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<sup>5</sup> The Claimant's November 14, 2014, Brief to the Appellate Panel raises only 2 arguments, both of which deal solely with the application of S.C. Code Ann. § 42-1-560. (R. pp.129–130). In addition, according to the “Conclusion” of the Claimant's November 14, 2014, brief, relief sought by the Claimant did not involve the application of S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30. (R. p.135). The Claimant's Brief simply does not argue the merits of, or evidentiary support for, any claim for medical or compensation benefits and does not request that the Appellate Panel award benefits under these statutes.

Of course, the Appellate Panel, in reviewing the Hearing Commissioner's September 2, 2014, Decision and Order in the first instance, could have made its own findings and conclusions regarding S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 had they actually been preserved for appeal and argued to the Appellate Panel. Green v. Raybestos-Manhattan, Inc., 250 S.C. 58, 156 S.E.2d 318 (1967); S.C. Code Ann. § 42-17-50. However, the Claimant did not make any argument with regarding S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his Form 30 or his Brief to the Appellate Panel; therefore, arguments regarding the application of these statutes could not be properly raised at any time in the future. See Patterson v. Reid, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) (holding that a party cannot raise that issue for the first time in a post-trial motion if the issue could have been initially presented to the trier of fact (citing generally C.A.H. v. L.H., 315 S.C. 389, 434 S.E.2d 268 (1993); Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990)). Indeed, the right to argue the propriety of the Hearing Commissioner's conclusions regarding S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 was forever relinquished in 2014 with the filing of a Form 30 and a Brief to the Appellate Panel that was silent on these issues. Wall v. CY Thomason Co., 232 S.C. 153, 101 S.E.2d 286 (1957) (holding that an award unappealed from is conclusive not only of the issues actually decided, but also of those that might have been raised before the Commission). Because the "adjudications and awards of compensation boards or commissions...in proceedings for the recovery of compensation, are generally held to be conclusive upon the parties and their privies, as to the matters involved or justiciable therein, so as to preclude, under the doctrine of *res judicata*, the

relitigation thereof in subsequent proceedings," the Appellate Panel erred as a matter of law in addressing any issue with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 on remand. *Id.* (citing 58 Am. Jur., Workmen's Compensation, Section 493, p. 886; Trigg v. Industrial Commission, 1936, 364 Ill. 581, 5 N.E. (2d) 394, 108 A.L.R. 153; and 122 A.L.R. at pp. 550 *et seq.*).

Similarly, the Claimant did not raise any issue with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his 2016 Brief to the Court of Appeals. (R. p.165). Indeed, the Claimant did not present any argument to the Court of Appeals as to how or why the Hearing Commission erred in specifically denying him benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30. (R. pp.162–182). Therefore, the propriety of the Commission's unappealed conclusions with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 were not before the Court of Appeals in 2016, nor were they addressed in any way by the Court's Order of Remand dated April 18, 2018. (R. pp.58–60).

Therefore, the Appellants respectfully contend that the Hearing Commissioner's rulings regarding S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, and 42-9-30 are the law of the case and neither the Court of Appeals, nor the Commission's Appellate Panel, had any authority to address these statutes on appeal or on remand. (See S.C. Code Ann. § 42-17-50; Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (holding that "an unappealed ruling, right or wrong, is the law of the case" and citing Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544 (1970); Creech v. Ducane Co., 320 S.C. 559, 476 S.E.2d 114, *reh'g denied, cert. denied* (Ct. App. 1995) (holding that S.C. Code Ann. § 42-17-50 provides

the procedure for appealing a Hearing Commissioner's Order; however, "only issues within the application are preserved for the full Commission"); Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2s 712 (1940) (holding that all findings of fact and law by the Hearing Commissioner "become and are the law of the case, except only those within the scope of the exception"). In addition, because the Hearing Commissioner's rulings regarding S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 are the law of the case, neither the appellate courts, nor the Appellate Panel have jurisdiction to address any issue with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E.2d 547 (2011) (holding that the question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction the Commission lacks the authority or jurisdiction to extend the fourteen days permitted for the perfecting of an appeal). Considering the fact that the Appellate Panel had no authority and no jurisdiction to address any issue with respect to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30, the Appellants respectfully contend that, on remand, the Appellate Panel acted arbitrarily and erred as a matter of law in awarding benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30, or in otherwise disturbing the Hearing Commissioner's unappealed conclusions with regard to these statutes in its June 17, 2019 Order, necessitating reversal by the Court of Appeals.

While the Appellate Panel's June 17, 2019, Order vaguely suggests that it has jurisdiction by virtue of the remand instructions from the Court of Appeals, the April 18, 2018, Order of the Court of Appeals does not, and cannot, extend the Commission's jurisdiction to address any unappealed rulings under S.C. Code Ann. §§ 42-9-210, 42-9-

260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30. Allison v. W.L. Gore & Assoc., *supra*; see also Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (holding that "an unappealed ruling, right or wrong, is the law of the case" and citing Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544 (1970)); see also Bailey v. Covil Corp., 291 S.C. 417, 354 S.E.2d 35 (1987) (holding that the Supreme Court could not address issues that were not argued before the lower appellate tribunal). In fact, the April 18, 2018, Order from the Court of Appeals says nothing of awarding the Claimant medical or compensation benefits and does not purport to expand the Appellate Panel's jurisdiction vested by virtue of S.C. Code Ann. § 42-17-50 and the Claimant's Form 30, but merely states, "[w]e reverse the Appellate Panel's order and remand for further proceedings consistent with this opinion." (R. p.46). Of course, that opinion dealt solely with the application of S.C. Code Ann. § 42-1-560, as the Claimant made no argument with regard to his entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 to the Court of Appeals.

Therefore, because the Court of Appeals had no authority or jurisdiction to disturb the Hearing Commissioner's conclusions with regard to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30, the Appellate Panel erred in assuming that the Court of Appeals remanded any issue with regard to these statutes to the Appellate Panel. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal," but must have been first raised and ruled upon by the lower appellate tribunal); Talley v. S.C. Higher Education, 28 S.C. 483, 487 (1986) (citing American Hardware Supply Co., Inc. v.

Whitmire, 278 S.C. 607, 300 S.E.2d 289 (1983) for the proposition that it “is an axiomatic rule of law that issues may not be raised for the first time on appeal” to a higher appellate court, when not raised by the lower reviewing court). As such, the Appellants respectfully contend that the remand and Remittitur from the Court of Appeals merely returned the claim to the Commission to address the issues actually raised in the Claimant’s November 14, 2014, Brief to the Appellate Panel, consistent with the Court’s analysis of S.C. Code Ann. § 42-1-560, and consistent with the Appellate Panel’s jurisdiction under S.C. Code Ann. § 42-17-50.

Unfortunately, the Court of Appeals appears to have overlooked these arguments when issuing its unpublished Opinion on August 10, 2022. Therefore, the Appellants respectfully request that the Court of Appeals grant the Petition for Rehearing and reverse the Appellate Panel’s June 17 and June 24, 2019, Orders.

V. **The Court of Appeals overlooked and otherwise misapprehended the Appellant’s arguments regarding appointment of Dr. Poletti**

According to its August 10, 2022, Opinion, the Court of Appeals stated that “[i]t would at least be odd – and maybe even silly – for the commission to order that Rose was entitled to back [sic] surgery but designate as Rose’s doctor a physician who believe Rose did not need surgery.” Respectfully, this statement belies a misapprehension of the law, pursuant to which the *employer* chooses the authorized treating physician. See S.C. Code Ann. § 42-9-260; S.C. Code Reg. 67-509 (stating that the “employer’s representative chooses an authorized health care provider”); see also McKinney v. Kimberly Clark Corp., 376 S.C. 636, 658 S.E.2d 112 (Ct. App. 2008).

This is especially true here, where the Claimant did not even request that the Commission appoint a treating physician at the hearing on September 23, 2013, or at any time thereafter.<sup>6</sup> The issue of terminating the Appellants' rights under S.C. Code Ann. § 42-9-260 and S.C. Code Reg. 67-509 was not raised before the Hearing Commissioner, the Appellate Panel, or the Court of Appeals. Instead, the Appellate Panel unilaterally raised the issue, *sua motu*, on remand, without ever affording the Appellants notice or the opportunity to be heard regarding the revocation of their rights under S.C. Code Ann. § 42-15-60. The Appellants respectfully contend that this constitutes plain legal error, requiring reversal. *See* S.C. Code Ann. § 1-23-320(I) (stating that “[f]indings of fact must be based exclusively on the evidence and on matters officially noticed”).

Not only does such a ruling exceed the Commission's appellate jurisdiction, not only such a ruling violates the Appellants' right to due process, but because such a ruling is also clearly contrary to the Commission's statutory authority and; therefore, constitutes an abuse of discretion. *See Cox v. BellSouth Telecommunications*, 356 S.C. 468, 472, 589 S.E.2d 766, 768 (Ct. App. 2003) (holding that the Workers' Compensation Act provides an exclusive compensatory system in derogation of common law rights, which must be strictly construed). Section 42-9-260 provides that the

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<sup>6</sup> Neither the Claimant's Form 58, Pre-Hearing Brief, dated August 5, 2013 (R. p.100), nor his arguments at the September 23, 2013, Hearing (*see* R. pp.337–338), makes even the slightest suggestion that the Appellants should be deprived of their statutory rights under S.C. Code Ann. § 42-15-60.

“refusal of an employee to accept any medical ... treatment when provided by the employer ... shall bar such employee from further compensation until such refusal ceases ...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.”

This is the only circumstance in which the Commission can override an employers’ right to choose an employee’s authorized treating physician and is wholly inapplicable to the case at bar. Refusal has not been raised, nor has a justification been proffered.

Therefore, the Appellate Panel’s ruling is clearly affected by an error of law and should have been reversed. Respectfully, the Court of Appeals appears to have overlooked or otherwise misapprehended this argument by failing to address the law governing the appointment of a treating physician and by suggesting that the issue was even properly before the Appellate Panel for determination. As such, the Appellants request that the Petition for Rehearing be granted, and that the appointment of Dr. Poletti be reversed.

**VI. The Court of Appeals overlooked and otherwise misapprehended the Appellants’ argument that the Commission’s award under S.C. Code Ann. § 42-9-10 and § 42-9-260 is not supported by substantial evidence or the applicable law.**

The Appellate Panel’s June 17, 2019, Order contains no legal conclusions whatsoever. (R. pp.70—75). By its Order dated June 24, 2019, the Appellate Panel made

several vague conclusions regarding disability;<sup>7</sup> however, the Panel failed mention S.C. Code Ann. § 42-1-120, or S.C. Code Ann. § 42-9-10, or S.C. Code Ann. § 42-9-260, or even their requirements, despite awarding the Claimant

“temporary total disability benefits from August 11, 2011 through the present and continuing until he is placed at maximum medical improvement.

Claimant is entitled to a lump-sum payment of any back-owed TTD accrued during litigation.” (R. p.89 #6).

Of course, the record in this claim was closed on January 3, 2014, so the Commission has no evidence whatsoever pertaining to the Claimant’s ability to earn wages after that date. (R. p.23). Additionally, neither the Claimant’s Form 30 (R. pp.117–120), nor his November 14, 2014, Brief to the Appellate Panel (R. pp.121–136), makes any argument with respect to temporary total disability compensation or a lump sum payment; therefore, the Appellate Panel had no authority or jurisdiction to address these issues on remand. *See Creech v. Ducane Co., supra*, and *Green v. City of Columbia*, 427 S.E.2d 685 (1993). Furthermore, by addressing this issue, *sua motu*, despite the binding legal conclusions of the Hearing Commissioner, and without giving the Appellants notice or opportunity to make any arguments regarding the Claimant’s entitlement to disability benefits on appeal or on remand, the Commission violated the Appellants’ statutory and

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<sup>7</sup> “Disability” is a term of art under the Workers’ Compensation Act and is defined by S.C. Code Ann. § 42-1-120 as “incapacity because of injury to earn the wages which the employee was receiving at the time of the injury.”

constitutional rights to due process and equal protection. Ross v. Med. Univ. of S.C., 328 S.C. 51, 68, 492 S.E.2d 62, 71 (1997). In addition, the Appellate Panel had no authority or jurisdiction to disturb the unappealed legal conclusion that, pursuant to “S.C. Code Ann. Sec. 42-9-260, the [Appellants] are entitled to terminate temporary disability compensation effective...September 23, 2013.” This conclusion, which was originally entered by the Hearing Commissioner and thereafter unappealed to either the Appellate Panel or the Court of Appeals, is the law of the case. See Atl. Coast Builders & Contractors, LLC v. Lewis, *supra*. Finally, the Appellate Panel has no authority or jurisdiction to speculate as to the Claimant’s current ability to earn wages, or his ability to do so at any time since September 2013. See Sola v. Sunny Slope Farms, 244 S.C. 6, 10 (1964) (holding that claimants who assert their right to compensation must establish by the preponderance of the evidence the facts that will entitle them to an award under the Workmen's Compensation Act and such award must not be based on surmise, conjecture or speculation).

In concluding that Claimant is entitled to temporary total disability compensation from August 11, 2011 “to the present and continuing” and further awarding him “a lump-sum award of any back payment of temporary disability benefits due,” not only did the Commission err as a matter of law in failing to make any predicate finding of any actual, current, causally-related loss of wage-earning capacity, but there is no evidence in the record to support a finding that the Claimant is disabled at “present and continuing” because the record in this case was closed by January 2014. See Airco, Inc. v. Hollington, 269 S.C. 152, 160, 236 S.E.2d 804, 808 (1977) (finding that the commission has a statutory duty to make a finding of fact for all "essential factual issues."); *see also*

S.C. Code Ann. § 1-23-320(I) (stating that “[f]indings of fact must be based exclusively on the evidence and on matters officially noticed”); S.C. Code Ann. § 1-23-350 (requiring the Commission’s decisions “include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings.”).

Perhaps more importantly, the Commission’s award of temporary total disability compensation “to the present and continuing,” is not supported by substantial evidence or the applicable law and should be reversed, as it is based on pure, impermissible speculation. As our Supreme Court has explained,

“awards of the...Commission may not rest upon surmise, conjecture or speculation but must be founded on substantial evidence...if the findings of the Commission are based on surmise, speculation or conjecture, then the issue becomes one of law for the court.”

Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1987) Therefore, the Commission’s award, based on pure speculation, should have been reversed by the Court of Appeals as a matter of law. See Lizee v. S.C. Dep’t of Mental Health, 367 S.C. 122, 126, 623 S.E.2d 860, 863 (Ct. App. 2005) (“where the Commission’s decision is controlled by an error of law, this court’s review is plenary”).

Furthermore, pursuant to S.C. Code Ann. § 42-9-10, an employee is only entitled to temporary total disability compensation where “the incapacity for work resulting from an injury is total.” The Supreme Court has explained that an employee must make

“reasonable efforts to secure employment” in order to satisfy his burden of proof under S.C. Code Ann. § 42-9-210. Coleman v. Quality Concrete Products, Inc., 244 S.C. 625, 142 S.E.2d 43 (1965) (citing, *with approval*, Larson’s Workmen’s Compensation Law, Vol II, Section 56-66). Here, the Commission specifically stated that the “Claimant admitted that he has not applied for any jobs or even looked for work anywhere.” (R. p.81 ¶4). Therefore, the Appellate Panel tacitly acknowledges that the Claimant did meet his burden of proving total disability as a matter of law.

The August 10, 2022, Opinion of the Court of Appeals speaks only as to the evidence of the Claimant’s alleged disability in 2013 and overlooks the fact that there is no evidence regarding the Claimant’s ability to earn wages for the period thereafter. Respectfully, by overlooking this fact, and by otherwise misapprehending the Appellants’ arguments in this regard, the Court has affirmed an award of benefits that is supported by neither substantial evidence nor the applicable law. This error is only compounded by the fact that the Court has also chosen to foreclose any opportunity for the Appellants to present evidence that the Claimant was not, in fact, disabled after 2013, or to claim credit for the temporary disability benefits in the future, in violation of the Appellants’ right to due process.

**VII. The Court of Appeals overlooked and otherwise misapprehended evidence that intervening accidents aggravated and “re-injured” the Claimant’s neck and low back.**

The Opinion of the Court of Appeals states that the “Appellants offered no evidence other than conjecture supporting the view that these falls were intervening events that

caused Rose's ailments." Respectfully, the Court appears to have wholly overlooked the fact that even the June 24, 2019, Appellate Panel Order acknowledges

"the Claimant testified that he fell down a flight of stairs at his mother's house in November 2011 and again in January of 2012 and re-injured his back and neck on both occasions." (R. p.81 ¶2; (R. p.362, ll.2-7)."

Therefore, based upon the Claimant's own admission, the proximate cause of his neck and low back problems is not work-related, but instead his problems are due to falls down a flight of stairs at home in November 2011 and again in January of 2012. *See Tiller v. National Healthcare*, 334 S.C. 333, 339-340, 513 S.E.2d 843 (1999) (holding that "the Commission is given discretion to weigh and consider all the evidence, both lay and expert, when deciding whether causation has been established").

The Commission's Conclusion of Law #3 acknowledges that an "intervening cause" can break the chain of causation but fails to apply this law to the facts of the case, making the conclusion improper, and impermissibly vague. *See S.C. Code Ann. § 1-23-350; see also Geathers v. 3V*, 371 S.C. 570, 641 S.E.2d 29 (2007) (holding that an employer is not liable for additional benefits as a matter of law after an employee sustains a subsequent, intervening accident). Because the Court of Appeals appears to have overlooked these facts and otherwise appears to have also misapprehended the applicable law governing causation in fact, which can be proven with lay testimony alone, the Appellants respectfully request that the Petition for Rehearing be granted, and the decision of the Appellate Panel be reversed.

**Conclusion**

The Appellants, Chris Thompson Services and Bridgefield Casualty, respectfully request that the Court of Appeals grant the Petition for Rehearing; withdraw the August 10, 2022, Opinion; and conclude that the June 17 and June 24, 2019, Orders of the Workers' Compensation Commission should be REVERSED for the reasons set forth herein above.

Respectfully submitted,  
TRASK & HOWELL, L.L.C.  
Attorney for the Defendants

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August 24, 2022

118\133\Petition for Rehearing

**RECEIVED**  
**Aug 24 2022**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

The Honorable T. Scott Beck, Commissioner

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W.C.C. File No. 1112328  
Appellate Case No. 2019-001357

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Samuel Rose, Employee .....Respondent,

v.

JJS Trucking, Uninsured Employer,

and

Chris Thompson Services, Upstream Employer,  
Bridgefield Casualty Insurance Company, and  
South Carolina Uninsured Employers' Fund, Carrier,  
all of whom are .....Appellants.

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**PROOF OF SERVICE**

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The undersigned hereby certifies that a copy of the Petition for Rehearing of the Appellants, Chris Thompson Services and Bridgefield Casualty Insurance Company, was served on Samuel Rose, the South Carolina Uninsured Employers Fund, and JJS Trucking, Inc., by email and depositing a copy of the same in the United States Mail, first

class postage prepaid, on the 24th day of August 2022 addressed to the parties of record  
as follows:

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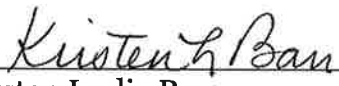
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August 24, 2022

  
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August 24, 2022

**Via Email-ctappfilings@sccourts.org and Regular Mail**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
P. O. Box 11629  
Columbia, SC 29211

**RECEIVED**  
**Aug 24 2022**  
**SC Court of Appeals**

Re: Samuel A. Rose v. JJS Trucking, LLC/SCUEF and Chris Thompson Services,  
LLC/Bridgefield Casualty Insurance Company  
W.C.C. File No.: 1112328  
**Appellate No.: 2019-001357**  
Carrier File No.: 0196-943450  
Date of Accident: August 10, 2011

Dear Ms. Kitchings:

Enclosed herewith for filing, please find our Petition for Rehearing and Proof of Service of the same in the above-referenced matter.

By a copy of this correspondence, I am serving the other counsel of record with a copy of our Petition. Also enclosed, please find our check in the amount of \$50.00 for the filing fee.

Yours very truly,



Kirsten L. Barr

KLB/mbm/les

Enc.

cc: Tracy Hayes, Summit Holdings (w/enc.) (email only-claim faxes)  
Chris Thompson, Chris Thompson Services, LLC (w/enc.)  
Stephen B. Samuels, Esq. (w/enc.) (email/mail)  
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