

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
COURT OF COMMON PLEAS

Honorable Thomas A. Russo

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Case No. ~~2013-002491~~

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**RECEIVED**

JUL 21 2014

**S.C. Supreme Court**

Alexander Guice, ..... Petitioner,

v.

US Food Service, Inc. and  
ACE American Insurance Company  
c/o Gallagher Bassett Services, Inc., ..... Respondents.

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**RESPONDENTS' RETURN  
IN OPPOSITION TO  
PETITIONER'S PETITION FOR  
WRIT OF CERTIORARI**

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## STATEMENT OF ISSUES ON APPEAL

- I. DID THE COURT OF APPEALS PROPERLY DISMISS PETITIONER'S APPEAL ON THE BASIS THAT IT INVOLVES A NON-FINAL ORDER?
  
- II. AT A MINIMUM, ARE ISSUES 1 AND 3 NOT PRESERVED FOR THIS COURT'S REVIEW BECAUSE THEY WERE NOT RAISED IN PETITIONER'S PETITION FOR REHEARING TO THE COURT OF APPEALS?

Pursuant to Rule 242(f), SCACR, Respondents US Food Service, Inc. and ACE American Insurance Company c/o Gallagher Bassett Services, Inc. hereby oppose Petitioner Alexander Guice's Petition for Writ of Certiorari ("Petition").

### **STATEMENT OF THE CASE**

Petitioner was employed by US Food Service, Inc. ("Employer") when he was injured in the course of his employment on May 5, 2005. Employer provided medical treatment and temporary compensation payments. Petitioner's claim before the Commission was assigned Commission File No. 0506205. After Petitioner reached Maximum Medical Improvement, Petitioner and Employer entered into a Settlement Agreement and Release ("Settlement"),<sup>1</sup> "in full and final satisfaction of all claims whatsoever as a result of the alleged accident." (Appx 50-58).

Under the Settlement, which was dated December 22, 2005, the Employer paid \$20,000 (which was divided between Petitioner and his counsel \$13,333.34/\$6,666.66 respectively).<sup>2</sup> In return, Petitioner released Employer and its workers' compensation carrier from "any and all claims, demands, actions or causes of action under the South Carolina Worker's [sic] Compensation Act, on account of any and all injuries, disability, disfigurement, specific loss, death, operations, medical, hospital or like expense, continuances, recurrences, aggravations, changes of condition, ailments, illnesses, and diseases or other damages, consequences or results, past, present or future in any way

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<sup>1</sup> At the time of the Settlement, Employer's carrier was MAC Risk Management, Inc., which is now ACE American Insurance Company c/o Gallagher Bassett Services, Inc.

<sup>2</sup> Respondents dispute Petitioner's assertion that Respondents "reduced his average weekly wage from \$1,161.00 to \$592.56." (Petition, p. 2). Both the July 17, 2013 Commission Decision (Appx p. 287), and the Settlement signed by Petitioner and approved by the Commission indicates Petitioner's average weekly wage was \$1,154.00 with a corresponding compensation rate of \$592.56. (Appx p. 51). By statute, compensation under the Workers' Compensation Act is set at "sixty-six and two-thirds percent of [a claimant's] average weekly wages" during the

connected with, or arising from the alleged injury sustained by the Claimant on or about May 5, 2004..." The Settlement was "full, final and complete regardless of whether the Claimant is able to keep any employment whatsoever, or is able to earn any wages at any time in the future..."<sup>3</sup> Petitioner signed this Settlement, which was filed with and, on January 5, 2006, approved by the Commission, pursuant to S.C. Code Ann. § 42-9-390. (Appx pp. 50-58). The Commission's approval of the Settlement was not timely appealed.

Nearly seven years later, on November 11, 2012, Petitioner filed a Form 30, Request for Commission Review appealing the Settlement. Petitioner alleged numerous issues on appeal, including that the approval of the Settlement violated the Workers' Compensation Act, the Settlement was the result of an illegal settlement offer submitted by the Employer/Carrier, criminal conspiracy on the part of the Employer/Carrier, and a request that the Commission vacate the settlement agreement. (Appx pp. 59-79).

On December 7, 2012, Petitioner filed a Form 50 Request for Hearing and then an Amended Form 50 dated January 5, 2013,<sup>4</sup> alleging entitlement to additional medical examination and treatment, temporary total disability benefits, and permanent disability as a result of injuries sustained arising out of his May 5, 2005, work-related accident, as well as attacking the validity of the Settlement and raising issues of unlawful termination

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appropriate period of time. *See* S.C. Code Ann. §§ 42-9-10, 42-9-20 & 42-9-30.

<sup>3</sup> For the record, Respondents dispute that they unlawfully terminated his employment and/or that they unlawfully stopped payment of benefits at any time. Respondents dispute numerous other factual assertions made by Petitioner; however, they are not addressed specifically herein as none of them are required for a resolution of Petitioner's Petition. Similarly, Petitioner's current dispute with the attorney who represented him at the Commission is not relevant to either the claims he has asserted against Respondents or to the resolution of whether the Court of Appeals properly dismissed his appeal as premature.

<sup>4</sup> All of Petitioner's recent filings with the Commission have been under the prior W.C.C. File No.: 0506205.

of employment, unlawful reduction in his average weekly wage calculation, unlawful termination of temporary total compensation payments, inadequate legal representation, and seeking penalties. (Appx pp. 81-88). Petitioner also filed two separate motions with the Commission. The first motion sought to transfer jurisdiction within the Commission from Charleston County to Richland County, and the second was to conduct the hearing via telephone as he currently resides in Tampa, Florida. (Appx pp. 89-94).

Petitioner's Form 50's were set for hearing on March 28, 2013. However, on February 22, 2013, Commissioner Susan S. Barden issued an Order ("February 22 Order"), holding that, as Petitioner had "settled on a Full and Final basis on or about January 6, 2006, [Petitioner's] hearing request is hereby denied." Commissioner Barden cancelled the hearing and dismissed "any and all motions filed pertaining to WCC# 0506205." (Appx pp. 95-96).

At this point, Petitioner began pursuing two separate avenues to have his claims heard. First, on February 28, 2013, he filed a Form 30 Request for Commission Review of Commissioner Barden's February 22 Order. In his notice of appeal to the Full Commission, he alleged seven different points of appeal, including whether Commissioner Barden had jurisdiction to decide his claim, whether the February 22 Order violated certain rules of civil procedure, and whether Petitioner had been subjected to a conspiracy. (Appx 97-102). Claimant's appeal to the Commission proceeded to a Full Commission hearing and Decision, dated July 17, 2013, (Appx pp. 149-156), which Petitioner subsequently and erroneously appealed to the Court of Appeals. (Appx pp. 157-159). It was transferred to the Circuit Court pursuant to Rule 204, SCACR. (Appx 301).

Second, on March 4, 2013, before any action had been taken by the Commission on his Form 30 appeal of the February 22 Order, Petitioner mailed a Motion for Reinstatement of Employment and Release of Temporary Total Compensation Payments (“Motion for Reinstatement”) to the Commission. (Appx pp. 103-114). Styled as a circuit court complaint, Petitioner’s Motion for Reinstatement raised many of the same issues he raised in his Form 50’s, including but not limited to: unlawful termination of his employment; unlawful reduction in his average weekly wage/compensation rate; unlawful termination of temporary total compensation payments; challenges to the Settlement; complaints about his former legal counsel; and a request for penalties. Respondents opposed Petitioner’s Motion for Reinstatement. On March 18, 2013, Petitioner mailed a proposed order granting his Motion for Reinstatement to the Commission. (Appx pp. 263-265).<sup>5</sup> On March 27, 2013, Mr. Gary Cannon, Executive Director of the Commission, returned Petitioner’s Motion for Reinstatement, along with the filing fee submitted by Petitioner. That letter stated that Mr. Cannon was “returning the Motion and the filing fee because the Commission does not have subject matter jurisdiction for the issues set forth in the Motion.” (Appx pp. 115-122).

Petitioner appealed the March 27 letter to the Circuit Court, (Appx pp. 123-133), which Respondents moved to dismiss. (Appx pp. 134-139). The Circuit Court conducted a hearing on June 3, 2013. Although Petitioner was notified of the hearing, he failed either to attend or to arrange to have counsel present. The Circuit Court granted Respondents’ motion to dismiss on the basis that the court lacked jurisdiction to hear the appeal, as Petitioner had failed to exhaust all of his administrative remedies. The Circuit

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<sup>5</sup> Contrary to Petitioner’s assertion, (Petition p. 18), correspondence concerning Petitioner’s Motion for Reinstatement was not addressed to Commissioner Roche but, rather, to Virginia

Court issued its Order on June 13, 2013. (Appx 140-145). Petitioner moved for reconsideration of that Order, which was denied in a Form 4 Order filed on September 6, 2013. (Appx pp. 146-148). Petitioner timely appealed to the Court of Appeals.

Respondents moved to dismiss Petitioner's appeal to the Court of Appeals, (Appx 40-48), which the Court granted on April 24, 2014 on the ground that the order appealed from was not final for purposes of review. (Appx pp. 2-3). Petitioner's Petition for Reinstatement, (Appx 333-339), which the Court of Appeals treated as a petition for rehearing ("Petition for Rehearing"), was filed with the Court on May 5, 2014. (Appx 334). The Court of Appeals denied rehearing in an order issued June 5, 2014. (Appx p. 1).

**I. The Court of Appeals properly dismissed Petitioner's appeal on the basis that it involves a non-final order.**

The Court of Appeals properly dismissed Petitioner's appeal of a non-final order. As the Court of Appeals noted, the Circuit Court's June 14, 2013 dismissal specifically recognized that, "[u]pon exhaustion of all administrative remedies, [Petitioner] may have an appeal to the Circuit Court once [the Commission] has reached a final decision." (Appx 145). As the Court of Appeals observed, the South Carolina Workers' Compensation Commission issued a final order on July 17, 2013, which Petitioner appealed to the Circuit Court under the same workers' compensation file number that is the subject of this appeal, W.C.C. No. 0506205. In fact, the Court of Appeals' dismissal is appropriate for two reasons, because: 1) Petitioner failed to exhaust his administrative remedies before filing his appeal with the Circuit Court and, 2) neither the March 27 letter nor the Circuit Court Order is a final order for purposes of appeal.

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Crocker, the Commission's Judicial Director. (Appx pp. 104, 263, 266).

The Administrative Procedures Act controls appeals from the Commission. Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Section 1-23-280 provides, in pertinent part, that “[a] party who has **exhausted all administrative remedies** available within the agency **and** who is aggrieved by a **final decision** in a contested case is entitled to judicial review ...” S.C. Code Ann. § 1-23-280 (emphasis added). Section 1-23-290 limits further appellate review to “final judgments.” S.C. Code Ann. § 1-23-290; Bone v. U.S. Food Serv., 399 S.C. 566, 576-77, 733 S.E.2d 200, 205 (2012) (the APA “governs appeals from the circuit court in Commission cases, *section 1-23-390*, [and] limits appeals to those from final judgments”). Thus, appeals are proper only where a party has exhausted all of his or her administrative remedies, and where the forum below has rendered a final judgment. Neither prong is satisfied in the instant appeal, which should be dismissed.

Petitioner initiated the instant appeal of the March 27 letter after he had already filed a Form 30 appeal of Commissioner Barden’s dismissal of his claims to the Full Commission. That process was not final but, in fact, was pending at the time he appealed the March 27 letter to the Circuit Court. Commissioner Barden’s February 22 Order considered and dismissed the issues Petitioner raised in his Form 50’s, all of which center on the same issues raised in his Motion for Reinstatement. (Appx pp. 80-88, 95-96 & 103-114). Where inter-connected issues are pending before a commission, a separate appeal of those issues is inappropriate because the claimant has not exhausted his or her administrative remedies. Nucor Steel v. South Carolina Pub. Serv. Comm’n, 312 S.C. 79, 84-85, 439 S.E.2d 270, 273 (1994).

In addition, despite Petitioner's attempts to characterize Mr. Cannon's March 27 letter as a Commission Decision, it is not a final decision of the Commission for purposes of appeal. The letter is no more than correspondence from the Commission to Petitioner, returning his Motion for Reinstatement wherein Mr. Cannon attempted to explain to Petitioner that the Commission lacked subject matter jurisdiction to consider his Motion for Reinstatement. Petitioner's assertion that there is no process at the Commission to appeal the March 27 letter does not transform the letter into a final order or mean that Petitioner had exhausted his administrative remedies. Instead, Petitioner's proper course of action was to appeal the February 22 Order dismissing all of his claims and motions to the Full Commission.

The Circuit Court clearly held that, once Petitioner exhausted his administrative remedies, he could then appeal the Commission's decision, if necessary, to that court. (Appx p. 145). Therefore, the Circuit Court's order was not a final judgment for purposes of appellate review. Bone, 399 S.C. at 575, 733 S.E.2d at 204-05 (defining a final judgment as an order that disposes of "the whole subject matter of the action or terminate[s] the action, leaving nothing to be done but to enforce what has already been determined"); Charlotte-Mecklenburg Hosp. Auth. v. South Carolina Dept. of Health & Env't'l Control, 387 S.C. 265, 267, 692 S.E.2d 894, 894-95 (2010) (same, and noting that "[a] judgment which determines the applicable law, but leaves open questions of fact, is not a final judgment"). At the time Petitioner filed his appeal of the March 27 letter to the Circuit Court, the Commission was in the process of considering his Form 30 appeal of the February 22 Order. Allowing this appeal to have gone forward while Petitioner was adjudicating his claim before the Commission would have resulted in duplicative,

potentially inconsistent and piecemeal resolution of this matter which, in turn, adversely affects judicial economy. Bone, 399 S.C. at 575-76, 733 S.E.2d at 205.

**II. At a minimum, Issues 1 and 3 are not preserved for this Court's review because they were not raised in Petitioner's Petition for Rehearing to the Court of Appeals.**

At a minimum, two of the issues Petitioner argues in his Petition, Issues 1 and 3, are not preserved for review because they were not raised in his Petition for Rehearing. See Mazloom v. Mazloom, 392 S.C. 403, 709 S.E. 2d 661 (2011) (holding issue not preserved "because it was not raised in the petition for rehearing to the court of appeals," and noting that Rule 242(d)(2), SCACR provides that only those questions raised to the Court of Appeals "*and in the petition for rehearing shall be included in the petition for writ of certiorari ...*") (emphasis in original); Camp v. Springs Mtg. Corp., 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (refusing to address issue not raised in petition for rehearing).

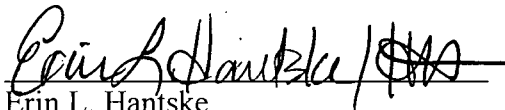
First, Petitioner alleges in Issue 1 that the Court of Appeals' Order violated his constitutional right to be heard, particularly Section 22 of Article 1 of the South Carolina Constitution. S.C. Const. art I, § 22. However, his Petition for Rehearing did not raise this issue. (Appx 334-339). Second, Petitioner asserts in Issue 3 that the Court of Appeals deviated from the "Standard of Review" scope of the Appellate Court's authority pursuant to the South Carolina Administrative Procedures Act." In short, Petitioner alleges that the Court of Appeals could only affirm, reverse, or remand or modify the lower tribunal's decision. In addition to being incorrect, Bone, 399 S.C. 575, 733 S.E.2d at 204-05 (appeal dismissed for lack of finality); Charlotte-Mecklenburg, 387 S.C. at 267, 692 S.E.2d at 894-95 (same), this issue was not raised in Petition for

Rehearing. (Appx 334-339). As a result, these issues are not properly preserved for appellate review by this Court, even if the Petition were otherwise appropriate, which it is not.

**CONCLUSION**

For all the reasons stated herein, this Court should deny Petitioner's Petition for Writ of Certiorari and should not act *sua sponte* to grant review of this matter at this time.

Respectfully submitted,



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July 17, 2014

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM LEXINGTON COUNTY  
COURT OF COMMON PLEAS

S.C. Supreme Court

Honorable Thomas A. Russo

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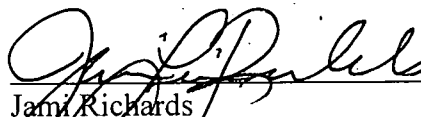
v.

US Food Service, Inc. and  
ACE American Insurance Company  
c/o Gallagher Bassett Services, Inc., ..... Respondents.

**PROOF OF SERVICE**

I certify that I have served the **Respondents' Return in Opposition to Petitioner's Petition for Writ of Certiorari** on Alexander Guice, pro se, by depositing a copy of it in the United States Mail, postage prepaid, on July 17, 2014, addressed as follows:

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