THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Successor Circuit Court Judge

Case No. 2013-CP-32-01272
Case No. 2014-CP-32-00399

Appellate Case No. 2015-001821

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Alexander Guice, Appellant,

v.

US Foodservice, Inc., Employer, and Ace American Insurance Company c/o Gallagher Bassett Services, Inc., Respondents.

INITIAL BRIEF OF APPELLANT

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The brief(s) in this matter are being filed by appellant in *propia persona*, wherein pleadings are to be considered without regard to technicalities. *Propria*, pleadings are not held to the same high standards of perfection and expertise as practicing lawyers. See *Haines v. Kerner*, 92 Sct 594; also See *Power* 914 F2d 1459 (11th Cir 1990); also See *Hulsey v. Ownes*, 63 F3d 354 (5th Cir 1995). In the instant appeal at bar, the undersigned appellant is proceeding in this matter self-represented or "pro se" and request this Court consider all brief(s) filed in this matter by appellant without regard to technicalities. *Id.*

STATEMENT OF ISSUES ON APPEAL

1. Did the Commission lack jurisdiction when it approved the Settlement Agreement and Release in this matter on January 05, 2006?

2. Did the Circuit Court, by way of the successor Judge, err and lack jurisdiction by issuing untimely *sua sponte* administrative orders?

3. Did the Circuit Court, by way of the successor Judge, err and lack jurisdiction when it *sua sponte* vacated the Order of former presiding Judge Gibbons within the same circuit?

4. Did the Circuit Court, by way of the successor Judge, err and lack jurisdiction when it *granted a de novo hearing to reconsider the respondent's motion to dismiss based on grounds raised by the Circuit Court sua sponte*?

5. Did the Circuit Court err and lack jurisdiction by making findings of fact exclusively reserved to the Appellate Panel of the Commission?

6. Did the Circuit Court err and lack jurisdiction when it convened the March 27, 2015 appellate hearing without affording the parties a minimum of not less than thirty days' notice?

FACTS

A *de novo* review of the record confirms the Commission lacked

jurisdiction at the time it approved the Settlement Agreement and Release on January 05, 2006 because, 1) the Commission never considered appellant's medical records, which were binding terms and conditions for approval of the settlement agreement; 2) appellant's compensable injury of "permanent lifting restrictions" was not specifically referenced as a "fact in issue" in the settlement agreement and therefore remains an "open material term"; and 3) the parties were barred from resolving WCC Case No. 0506205 via settlement agreement and release pursuant to S.C. Code Ann. § 42-1-620; S.C. Code Ann. § 42-9-260(F); and S.C. Reg. 67-506(D)&(E) of the Act, based on appellant's confirmed receipt of temporary compensation payments for approximately 213 days, including the first 150 days.

Appellant prevailed in the instant appeal(s) on September 25, 2014 when the Circuit Court, by way of the Honorable Brian M. Gibbons ("Judge Gibbons"), issued the 'Order Granting Appellant/Claimant's Motion for New Trial and Order of Recusal', wherein the Circuit Court granted "all particulars" set forth in appellant's Motion for New Trial. Respondents', by way of counsel, filed and served a 'Motion to Alter/Amend Circuit Court Order dated September 25, 2014; however, respondents' failed to raise any issues in their Motion to alter/amend to be reconsidered by the circuit court or by this Court, and subsequently has failed to preserve any issues for review.

Appellant contends all actions taken in the instant appeal subsequent the September 25, 2014 Circuit Order were effectuated out of jurisdiction. Specifically, appellant contends the Honorable William P. Keesley ("Judge Keesley"), the successor Circuit Judge, took actions out of jurisdiction, in terms of 1) issuing seven (7) untimely *sua sponte* administrative orders; 2) granting respondents' a *de novo* hearing to reconsider respondents' motion to dismiss based on *sua sponte* grounds not raised by the parties; 3) convening the March 27, 2015 appellate hearing in this matter without affording the parties at least thirty days' prior notice; 4) making impermissible findings of fact exclusively reserved for the Appellate Panel; and 5) *sua sponte* vacating the September 25, 2014 Court Order issued by Judge Gibbons while within the same circuit.

STATEMENT OF THE CASE

The facts and procedural history of the instant appeal is morass. Alexander Guice (hereafter "Injured Worker" "Claimant" or "Appellant") was hired as a Delivery Driver by US Foodservice, Inc. (hereafter "Employer" or

"Respondent"), located in Lexington, SC 29072 on October 1, 2001.

Upon employment, the parties became bound by the South Carolina Workers' Compensation Act (hereafter "Act"). On May 5, 2005 claimant was injured in an admitted work-related accident while in the performance and scope of claimant's official duties. Claimant notified employer of the work related injury on May 5, 2005. At the time of the work-related injury, the mutually agreed average weekly wage of claimant was $1,161.00 per week. Employer timely reported claimant's work-related injury to the South Carolina Workers' Compensation Commission (hereafter "Commission"), who assigned this matter Case Number 0506205. WCC Form 12. Record on Appeal.

On or around May 16, 2005 claimant retained the legal services of Robert G. Bacon, Esq. and Harry Pavilack & Associates, P.A (hereafter "Attorney Bacon"). Notice of Appearance, Attorney Bacon. Record on Appeal.

Claimant attended all required and scheduled medical appointments, and fully complied with the orders of the employer-selected authorized treating physicians, and specifically, authorized treating physician Alan Tamadon, MD("Dr. Tamadon"). On October 27, 2005 Dr. Tamadon opined that claimant reached maximum medical improvement ("MMI"). Specifically, Dr. Tamadon; (1) assigned a 5% percent impairment rating to the whole person of claimant; (2) assigned "permanent lifting restrictions" to claimant, specifically, "No lifting greater than (>) 25 pounds occasionally" and "No lifting greater than (>) 10 pounds frequently or occasionally"; and (3) reported to employer that claimant could no longer perform the duties of a delivery driver. MMI Medical Report

dated October 27, 1995. Record on Appeal.

The medical opinion of Dr. Tamadon was never challenged by the parties. When Dr. Tamadon opined MMI on October 27, 2005 claimant had received temporary compensation payments for approximately **175** consecutive days, including the first 150 days. WCC Form 18. Record on Appeal.

On or around November 2, 2005, approximately five (5) days after Dr. Tamadon opined MMI regarding claimant's accepted work-related injuries, employer verbally terminated claimant on the grounds of "permanent lifting restrictions" and "no position available".

Claimant requested a copy of the discharge notice at the time employer verbally discharged claimant; however, employer did not provide claimant with a copy of the discharge notice. Claimant immediately informed Attorney Bacon of the verbal termination; however, Attorney Bacon took no legal action on behalf of claimant. Subsequent termination of employment, the employer's representative suspended all payments of temporary total compensation to claimant. Claimant was provided no reason by the employer's representative as to why temporary compensation payments were suspended.

Claimant informed Attorney Bacon that claimant was not receiving compensation payments; however, Attorney Bacon took no legal action on behalf of claimant. On or around December 13, 2005 claimant was involuntarily separated from claimant's now ex-wife. Claimant was homeless and sleeping in claimant's personally owned vehicle.

On or around December 16, 2005 claimant received telephonic

correspondence from Attorney Bacon. Claimant informed Attorney Bacon that claimant was homeless and was not receiving compensation payments from the employer's representative. Attorney Bacon declined to respond regarding the suspension of temporary compensation payments. Attorney Bacon informed claimant that employer's representative was offering $20,000.00 to settle the workers' compensation claim. Attorney Bacon further stated to claimant that if claimant did not accept the settlement offer from the employer's representative, Attorney Bacon did not know when claimant could expect to receive another compensation payment.

Attorney Bacon never advised claimant of any legal rights under the Act specifically related to statutory provisions and procedures regarding temporary compensation payments set forth in §§ 42-9-260(F)(1996 supp.) and Reg. 67-506(D)(1997 supp.) of the Act, relative to claimant's receipt of temporary compensation payments after and including the first 150 days.

On December 22, 2005 and while still homeless and not receiving TTD benefit payments, claimant went to Attorney Bacon's office and signed the proposed Settlement Agreement and Release. Subsequent signing the Settlement Agreement and Release, claimant received an envelope via regular mail from employer's representative containing three (3) separate envelopes containing 3 compensation checks reflecting withheld compensation payments to claimant from on or around November 7, 2005 to on or around December 17, 2005. The compensation checks were paid out at a reduced average weekly wage amount of $592.56 instead of the mutually agreed upon average weekly

wage of $1,161.00. Receipts of the last three Compensation payments received by claimant **after** claimant signed the settlement agreement and release. Record on Appeal.

On or around January 5, 2006 Commissioner David W. Huffstetler approved the aforementioned Settlement Agreement and Release. Settlement Agreement and Release. Record on Appeal. Subsequent the approval of the Settlement Agreement and Release by the Commission, claimant received a check for approximately $13,333.33 from Attorney Bacon, as Attorney Bacon retained $6,666.66 or 33.3% of the settlement amount as attorney fees. Claimant has not received another compensation payment from the employer's representative to date.

No hearing, formal conference, or informal conference was ever convened before the Commission prior to, or subsequent the employer representative's suspension and termination of claimant's temporary compensation payments or the Commission's approval of the settlement agreement and release. Claimant made repeated telephonic calls to Attorney Bacon regarding claimant's employment with the employer, to include informing Attorney Bacon that claimant had not received the termination notice from the employer; however, Attorney Bacon stopped returning the claimant's phone calls.

Attorney Bacon never took any legal action on behalf of claimant in terms of the employer's discharge of claimant's employment. After ineffective assistance of counsel from Attorney Bacon, claimant made numerous phone calls directly to the employer's Human Resources Department requesting a copy of the discharge notice. Claimant received written correspondence from the

employer dated March 9, 2006. The correspondence received by employer was not the discharge notice. The aforementioned correspondence stated that claimant "**left the company in November 2005 because he could not longer perform the duties of a delivery driver**". (Emphasis added). Correspondence from employer dated March 9, 2006. Record on Appeal.

On or around October 2012 appellant filed an appeal with the Commission. However, appellant was notified by two (2) different Commission agents that appellant's appeal was not proper because there was no order for appellant to appeal. Both correspondences from the Commission Agents advised appellant on the required procedures needed to be taken in order to re-open WCC Case No. 0506205. Correspondences from Commission Agents' Valerie D. Deller and Eugenia Hollmon. Record on Appeal.

On or around November 18, 2012 claimant duly filed a Freedom of Information Act (FOIA) Request with the Commission requesting to obtain the Commission's copy of the contents contained within WCC File No. 0506205. Claimant relieved Attorney Bacon as counsel of record. Commission Order relieving Attorney Bacon as counsel of record to claimant. Record on Appeal.

On December 7, 2012 the Commission, by way of Executive Director Gary M. Cannon (Mr. Cannon), satisfied claimant's FOIA Request and provided a complete copy of the contents contained within WCC File No. 0506205, via electronic transmission. Upon review of WCC File No. 0506205 as of December 7, 2012, claimant's medical reports were absent from the file. FOIA Request. E-Mail from Mr. Cannon. Contents of WCC Case File Number 0506205 as of

December 7, 2012. Record on Appeal.

On December 7, 2012 Claimant duly served a WCC Form 27 (Subpoena) upon Attorney Bacon, which commanded Attorney Bacon to provide claimant a full copy of the contents contained within claimant's client file regarding WCC Case No. 0506205. To date, Attorney Bacon has failed to comply with the Subpoena. WCC Form 27 Subpoena to Attorney Bacon. Record on Appeal.

On December 7, 2012 claimant served a Form 27 Subpoena upon employer's representative to provide claimant with a full copy of the claimant's employment file. On or around December 21, 2012 employer's representative provided claimant with documents contained within claimant's employment file pursuant to the subpoena, which included a copy of the employer's discharge notice dated November 2, 2005.

Claimant's initial service of the Discharge Notice was not perfected upon claimant until on or around December 21, 2012, more than seven (7) years *post facto*. Correspondence from Employer's Representative dated December 21, 2012. Employer Discharge Notice. Record on Appeal.

Claimant filed and served a WCC Form 50 and an Amended Form 50 requesting a hearing with the commission, alleging *inter alia*; (1) that employer unlawfully terminated claimant; (2) that employer's representative unlawfully terminated temporary total compensation payments; and (3) that claimant was subjected to intentional misrepresentation by Attorney Bacon. WCC Form 50. Amended WCC Form 50. Record on Appeal. Employer's Representative filed and served a WCC Form 51 and an Amended Form 51 denying that claimant's

employment and temporary total compensation payments were unlawfully terminated on the grounds that the parties entered into the Settlement Agreement and Release, and that ("...he [claimant] entered into a clincher settlement agreement to resolve his claim related to his accident of May 5, 2005"). Form 51. Amended Form 51. Record on Appeal.

The commission issued a Notice of Hearing dated January 29, 2013 regarding WCC Case No. 0506205. Hearing Notice. Record on Appeal. Appellant filed a "Motion for Transfer of Jurisdiction", seeking the Commission to transfer the Form 50 Hearing to Commission District No. 7 (RICHLAND) based on the employer's proper Lexington, SC address. Motion for Transfer of Jurisdiction (exhibits not included). Record on Appeal. Respondents filed a responsive pleading to the motion to transfer agreeing that the employer's proper address in the instant appeal was in Lexington, SC and did not object to a reset Form 50 Hearing Notice being issued. Respondents' Answer to Motion for Transfer of Jurisdiction. Record on Appeal.

On February 22, 2013 and within the jurisdiction of Commission District No. 2 (ANDERSON), Commissioner Barden issued a *sua sponte* Order cancelling claimant's previously scheduled March 28, 2013 Form 50 Hearing and dismissing all motions on the *sua sponte* grounds that "Claimant settled his claim (WCC# 0506205) through a Full and Final Settlement Agreement..." *Sua sponte* Commission Order dated 02/22/2013. Commissioner District Assignments and District Map. Record on Appeal. On Feb. 28, 2013 appellant filed a WCC Form 30 requesting a review of Commissioner Barden's February 22, 2013 *sua sponte*

Order. Form 30 Request for Review. Record on Appeal. On March 4, 2013 appellant filed and served a "Motion for Reinstatement of Employment and Release of Temporary Total Compensation Payments" ("Motion for Reinstatement"). Motion for Reinstatement. Exhibits to motion not included. Record on Appeal.

On or around March 14, 2013 respondents' filed a "Reply" to the Motion for Reinstatement. Reply to Motion for Reinstatement Exhibits to reply motion not included. Record on Appeal. On or around Mar. 17, 2013 appellant filed and served an "Answer" to the Motion for reinstatement wherein appellant asserted Rule 8(d), South Carolina Rules of Civil Procedure (SCRCP), with respect to respondents' failure to "affirm" or "deny" any averments set forth in the motion for reinstatement. Answer to Motion for Reinstatement. Record on Appeal. On or around March 18, 2013 appellant filed a proposed order granting the Motion for reinstatement with the Commission. Proposed Order on Motion for reinstatement. Record on Appeal. On or around March 25, 2013 Respondents' submitted correspondence to the Commission, and specifically, to Single Commissioner Andrea C. Roche reiterating the Settlement Agreement and Release[1]. Correspondence to Commission from Respondents. Exhibit to correspondence not included. Record on Appeal. The aforementioned motion for reinstatement filed in this contested case was never heard and determined by Commissioner Roche[2].

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1 Commissioner Roche was the District 7 jurisdictional commissioner at this time (Record on Appeal, p.), which confirms that Commissioner Barden's Feb. 22 *sua sponte* Order which she issued from District 2 (ANDERSON) was issued out of jurisdiction.

On or around March 27, 2013 Mr. Cannon issued correspondence to appellant regarding the aforementioned motion for reinstatement which served as a *de facto* decision. Specifically, Mr. Cannon returned the motion for reinstatement to appellant un-adjudicated by single Commissioner Roche on the grounds that ("...the Commission does not have subject matter jurisdiction for the issues set issues set forth in the motion."). Correspondence from Commission Executive Director Gary M. Cannon. Record on Appeal[3].

On or around April 8, 2013 appellant appealed the March 27, 2013 decision of Mr. Cannon to the Lexington County Court of Common Pleas (hereafter "Circuit Court"), which assigned the matter Appellate Case Number 2013-CP-32-01272. Complaint, Appellate Case No. 2013-CP-32-01272. Exhibits to Complaint not included. Record on Appeal. On or around April 23, 2013 appellant filed the Appellant's Brief with the commission in regards to the Form 30 Review. Appellant's Brief to Full Commission. Record on Appeal. On or around May 2, 2013 respondents' filed a Motion to Dismiss Appellate Case No.

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2 With respect to the motion for reinstatement, which was filed by appellant **after** the Form 30 Request for Review was filed but **before** the Form 30 Review was convened by the Appellate Panel, SC Reg. 67-707(C)(2)(c) (Supp. 1997)("Oral argument will not be heard on the motion. The Commission will act upon the motion and issue an order before the review hearing is held"), required Single Jurisdictional Commissioner Roche to issue an order on the Motion for reinstatement **before** the Appellate Panel convened the Form 30 Review of Commissioner Barden's Feb. 22 *sua sponte* Order. See *Triska v. Dep't of Health & Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987)(holding that an agency **must** follow its own regulations) (Emphasis added). *Id.*

3 SC Code Ann. § 42-3-80(Supp. 2008), governs the duties and powers of the Executive Director of the Commission. However, the legislature **did not** empower the Executive Director of the Commission with the authority to hear and determine contested cases brought before the Commission. Mr. Cannon lacked jurisdiction when he issued the March 27 decision. See *Triska*. "Any action taken outside of its statutory and regulatory power is null and void." *Id.*

13-01272 with the circuit court. Defendants' Motion to Dismiss. Exhibits to motion not included. Record on Appeal. On May 8, 2013 respondents filed a Respondents' Brief to the Full Commission with respect to the Form 30 Review. Respondents' Brief to the Full Commission. Record on Appeal.

On June 10, 2013 the Circuit Court issued an "Order Granting Defendants' Motion to Dismiss". Order Granting Defendants' Motion to Dismiss. Appellate Case No. 2013-CP-32-01272. Record on Appeal. On July 17, 2013 Appellate Panel issued its Final Order affirming the Feb. 22, 2013 *sua sponte* Order issued by Commissioner Barden. The Appellate Panel did not affirm the Feb. 22 *sua sponte* Order on the grounds raised and relied upon by respondents. The Appellate Panel affirmed the order on the grounds of S.C. Code Reg. § 67-801. Appellate Panel Final Order. Record on Appeal.

Appellant timely filed a motion to reconsider with the Circuit Court as to the June 10, 2013 order dismissing Appellate Case No. 13-CP-32-01272. The Circuit Court denied appellant's reconsideration motion by way of a Form 4. Form 4 denial of appellant's Motion to Reconsider. Record on Appeal. Appellant initially appealed the Appellate Panel's July 17, 2013 Final Order with the Court of Appeals, who assigned the instant appeal Appellate Case No. 2013-001804. However, pursuant to the appellant's admitted injury occurring prior to July 1, 2007, the Court of Appeals transferred the appeal to the Circuit Court by Order dated December 6, 2013. Order from Court of Appeals, Appellate Case No. 2013-001804. Record on Appeal.

Upon service of the Circuit Court's Form 4 September 6, 2013 decision denying appellant's motion for reconsideration with respect to Appellate Case

No. 13-CP-32-01272, which was not received by appellant until on or around November 22, 2013, appellant appealed the Circuit Court's denial of the reconsideration to the Court of Appeals, who assigned the appeal Appellate Case No. 2013-002491. Appellant proceeded to appeal the July 17, 2013 Appellate Panel Final Order with the Circuit Court, who assigned the appeal Appellate Case No. 2014-CP-32-00399. The respondents did not file a cross appeal of the Appellate Panel's July 21, 2013 Final Order[4].

On or around January 24, 2014 appellant timely filed an Appellant's Brief with the circuit court with respect to Appellate Case No. 14-CP-32-00399. Appellant's Brief, Appellate Case No. 14-CP-32-00399. Exhibits to brief not included. Record on Appeal.

On or around February 24, 2014 respondents' filed an Answer to appellant's Appeal Brief and a Motion to Dismiss. Respondents' Answer to Appellant's Brief. Motion to Dismiss. Appellate Case No. 14-CP-32-00399. Record on Appeal. On or around March 4, 2014 appellant filed a Reply to respondents' Answer to appellant's appeal brief and an Answer to Respondents' Motion to Dismiss. Reply to Answer to Appeal Brief. Answer to Motion to Dismiss. Appellate Case No. 14-CP-32-00399. Record on Appeal. The Circuit Court issued a *sua sponte* notice to the parties setting an appellate hearing with

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4 Because the respondents' declined to cross appeal the July 17, 2013 Final Order issued by the Appellate Panel, any issues raised in the 'Respondents' Brief to the Full Commission' which was not ruled upon by the Appellate Panel in the aforementioned July 17, 2013 Final Order **were not preserved for review** by the Circuit Court sitting in its appellate capacity, or preserved for review by the Court of Appeals. 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 raised to and ruled upon by the trial judge to be preserved for appellate review."). (Emphasis added). *Id.*

oral arguments regarding Appellate Case No. 14-CP-32-399. Record on Appeal.

With respect to Appellate Case No. 2013-002491 appealed before the Court of Appeals, appellant timely filed an Initial Brief and Designation of Matter. Respondents filed a Motion to Dismiss. Appellant filed a return. On April 24, 2014 the Court of Appeals issued an Order opining the appeal was not in posture for review based on the July 21, 2013 Final Order pending review before the Circuit Court under Appellate Case No. 2014-CP-32-00399. In granting the respondents' motion to dismiss, the Court of Appeals opined, "*This case is remanded to the circuit court, which* ***shall*** *consider the merits of this appeal* ***in conjunction*** *with Appellant's appeal from the commission's final order.*" (Emphasis added). Court of Appeals Order, Appellate Case No. 2013-002491.

On or around May 20, 2014 respondents' filed a Memorandum in Support of Respondent's Position on Appeal to the Circuit Court. Respondents' Memorandum in Support of Respondent's Position on Appeal. Record on Appeal. On July 21, 2014 the Circuit Court issued an Order granting the respondents' motion to dismiss and affirming the July 17, 2013 Appellate Panel Final Order. Order, Case No. 2014-CP-32-00399. Record on Appeal.

On August 04, 2014 appellant timely filed a Motion for New Trial. Motion for New Trial. Exhibits to motion not included. Record on Appeal. On or around August 19, 2014 respondents' filed a Reply to Appellant's Motion for New Trial. Reply to Appellant's Motion for New Trial. Record on Appeal. On August 25, 2014 appellant filed an Answer to Reply to Motion for New Trial. Answer to Motion for New Trial. Exhibits not included. Record on Appeal.

On August 25, 2014 appellant submitted correspondence to the Circuit Court. Correspondence to Judge Gibbons from Appellant. Record on Appeal. On September 1, 2014 the Circuit Court, via Judge Gibbons, contacted the parties via electronic mail. The Circuit Court directed "Ms. Hantske, please provide the Court with a brief or memorandum that responds specifically to that portion of Mr. Guice's motion for new trial/reconsideration that addresses my July 21 Order not addressing what the Court of Appeals instructed the Circuit Court to do on remand." September 01, 2014 E-Mail from the Circuit Court to the parties. Record on Appeal.

On September 8, 2014 respondents' filed a Memorandum in Response to Appellant's Verified Notice to the Court and Motion for New Trial. In the respondents' memorandum, respondents' re-asserted that the Settlement Agreement and Release "was not timely appealed" and asserted the authority of S.C. Code Ann. §42-9-390[4, 5]. Additionally, respondents' averred "...Appellant's prior motion for reinstatement of employment and release of temporary total compensation benefits which was at issue in a letter from Mr. Gary Cannon **denying any additional motions** based upon Commissioner Barden's February 22, 2013 Order." (Emphasis added)[3]. Respondents' Memorandum in Response to Appellant's Verified Notice to the Court and Motion for New Trial. Exhibits not included. Record on Appeal.

On or around September 18, 2014 appellant filed a 'Reply to Respondents' Memorandum in Response to Appellant's Verified Notice to the

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5 Because respondents did not cross appeal the Appellate Panel's Final Order to raise and preserve this issue for review, the Circuit Court was required to reject this argument.

Court and Motion for New Trial'. Reply to Respondents' Memorandum in Response to Appellant's Verified Notice to the Court and Motion for New Trial. Exhibits not included. Record on Appeal. On September 18, 2014 the Circuit Court, by way of Judge Gibbons, issued a notice to the parties via electronic mail, wherein Judge Gibbons opined, "To all concerned: I have received this electronic submission from Mr. Guice and will issue a ruling within the next 10 days. No other arguments or filings will be necessary." E-Mail from the Circuit Court to the parties. Record on Appeal.

On or around September 25, 2014 the Circuit Court issued an "Order Granting Appellant/Claimant's Motion for New Trial And Order For Recusal". The Order was issued by the Circuit Court without oral arguments. The Order was prepared by the Circuit Court. *Inter alia*, the Circuit Court Order GRANTED all particulars set forth in appellant's motion for new trial; VACATED the Circuit Court's previous dismissal Order dated July 21, 2014; *sua sponte* RECUSED Judge Gibbons "in the interest of justice"; and reassigned the instant appeals to the Chief Administrative Judge of the 11th Circuit. The Circuit Order declined to rule on any of the issues raised by respondents. Order Granting Motion for New Trial and Order for Recusal. Record on Appeal.

On or around October 7, 2014 appellant served a Notice of Demand upon the respondents and a copy of the Circuit Court Order dated September 25, 2014, specifically demanding that respondents comply with the Circuit Court's grant of the motion for new trial in terms of immediately releasing all withheld temporary total compensation payments and the 25% interest penalty on

withheld compensation and reinstate appellant's employment. Notice of Demand. Record on Appeal.

On or around October 16, 2014 respondents' filed a Motion to Alter/Amend Circuit Court Order dated September 25, 2014 ("Motion to Alter/Amend"). However, the Motion to Alter/Amend failed to raise any issues to be preserved for reconsideration by either the successor Circuit Court or the Court of Appeals. Motion to Alter/Amend Circuit Court Order dated September 25, 2014. Record on Appeal.

On October 20, 2014 appellant filed a Reply to the Motion to Alter/Amend and provided a proposed order on Motion to alter/amend. Reply to Defendants' Motion to Alter/Amend and proposed Order on Motion to Alter/Amend. Record on Appeal. Respondents' did not file an answer to appellant's reply to motion to alter/amend. On or around October 20, 2014 appellant filed a Motion for Sanctions, specifically seeking the Circuit Court to impose reasonable sanctions upon the respondents for failing to comply with the September 25, 2014 Circuit Court Order. Motion for Sanctions. Exhibits to motion excluded. Record on Appeal. Respondents' declined to file a responsive pleading to the motion for sanctions.

On October 23, 2014, approximately 28 days after the issuance of the Sep. 25, 2014 Circuit Order, the Circuit Court, via successor Judge Keesley, issued 5 *sua sponte* Administrative Orders which *inter alia* raised issues not previously raised by the parties. Administrative Order. Administrative Order to Continue the Hearing Scheduled for November 10. Administrative Order To Obtain File From The South Carolina Workers Compensation Commission And

Directing That The Files Not Be Destroyed Until Final Resolution of the Appeal. Administrative Order Designating Cases As Complex Litigation. Administrative Order Consolidating the Files. Record on Appeal.

On October 31, 2014 appellant filed a Motion in Objection to Administrative Orders. Objection to Administrative Orders. Exhibits to motion excluded. Record on Appeal. Respondents declined to file a responsive pleading to the appellant's objection pleading. On or around December 03, 2014 appellant filed and served a "Motion for Judgment on the Pleadings". Exhibits to the motion not included. Record on Appeal. Respondents declined to file a responsive pleading to appellant's Motion for Judgment on the Pleadings.

On December 09, 2014 the Circuit Court, via the successor Judge, issued a *sua sponte* "Administrative Order Regarding Rule 63, SCRCP". Administrative Order Regarding Rule 63, SCRCP. Record on Appeal.

On March 3, 2015 the Circuit Court, via the successor Judge, issued a *sua sponte* "Supplemental Administrative Order Regarding Rule 63, SCRCP, And Determining to Hold A *DE NOVO* Hearing On The Pending Rule 59 Motion Of The Employer/Carrier, And Setting The Date For Hearing The Rule 59 Motion And All Pending Motions". Supplemental Administrative Order Regarding Rule 63, SCRCP, And Determining to Hold A *DE NOVO* Hearing On The Pending Rule 59 Motion Of The Employer/Carrier, And Setting The Date For Hearing The Rule 59 Motion And All Pending Motions[6]. Record on Appeal.

On or around March 7, 2015 appellant filed and served an "Appellant's

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6 The March 03 *sua sponte* Administrative Order was served upon the appellant by the Clerk on March 05, 2015 via electronic mail only.

Memorandum In Response to Supplemental Administrative Order Regarding Rule 63, SCRCP, And Determining to Hold A *DE NOVO* Hearing On The Pending Rule 59 Motion Of The Employer/Carrier, And Setting The Date For Hearing The Rule 59 Motion And All Pending Motions"; a Notice of Cancellation of Hearing; A Verified Motion to Disqualify; A Motion for Relief from Administrative Orders; and a Motion to Stay. Appellant's Memorandum In Response to Supplemental Administrative Order Regarding Rule 63, SCRCP, And Determining to Hold A *DE NOVO* Hearing On The Pending Rule 59 Motion Of The Employer/Carrier, And Setting The Date For Hearing The Rule 59 Motion And All Pending Motions. Notice of Cancellation of Hearing. Verified Motion to Disqualify. Notice of Cancellation of Hearing. Motion for Relief from Administrative Orders. Motion to Stay. Exhibits to motions not included. Record on Appeal.

On or around March 20, 2015 respondents filed a 'Respondent's Reply to Appellant's Pre-Trial Motions and Submissions'. Respondent's Reply to Appellant's Pre-Trial Motions and Submissions. Record on Appeal. On or around March 22, 2015 appellant filed an "Answer to Reply to Motion for Relief from Administrative Orders". Answer to Reply to Motion for Relief from Administrative Orders. Record on Appeal.

On or around March 27, 2015 the Circuit Court, via the successor Judge, convened the appellate hearing in this matter. Appellant was not present at the appellate hearing. Transcript, March 27, 2015 Hearing in regards to Case No. 14-CP-32-00399 & 13-CP-32-01272. Record on Appeal. On or around April 9,

2015 appellant submitted correspondence to the Circuit Court, and in particular, the successor Judge. Correspondence from appellant to Successor Judge Keesley. Record on appeal. On or around April 10, 2015 respondents' counsel submitted correspondence to appellant which was courtesy copied to the successor Judge. Correspondence from respondents' counsel to appellant. Record on Appeal.

On or around April 27, 2015 the Circuit Court, by way of the successor Judge, submitted a Memorandum to the parties in response to appellant's April 9, 2015 correspondence. Memorandum from Circuit Court to the parties. Record on Appeal. On or around May 28, 2015 appellant submitted follow-up correspondence to the Circuit Court, by way of the successor Judge. Correspondence to Circuit Court from appellant. Record on appeal.

On or around June 1, 2015 the Circuit Court, by way of the successor Judge, issued a Memorandum wherein the Court "asked" the respondents' counsel to provide the proposed Order from the **March 27, 2015** appellate hearing by **July 2, 2015**. Memorandum from the Circuit Court to the parties. Record on Appeal. On or around June 17, 2015 the respondents' counsel provided a copy of the proposed Order to the appellant via electronic mail. The proposed Order as prepared by the respondents' counsel was approximately thirteen (13) pages in length. Proposed Order. Record on Appeal.

On or around June 23, 2015 appellant provided a Memorandum of comments and exceptions regarding the proposed Order on appeal. Appellant's Memorandum of comments and exceptions. Record on Appeal. On or around

June 27, 2015 respondents' counsel submitted a revised proposed Order on appeal, via electronic mail, wherein the amount of attorney fees sought by respondents was increased. Revised proposed Order on appeal. Record on Appeal.

On or around July 17, 2015 the Circuit Court, by way of the successor Judge, verified the Circuit Court Order on appeal subsequent the March 27, 2015 appellate hearing. The Order verified by the Circuit Court, through the successor Judge, was substantially modified, to include an additional fifteen (15) pages of narrative, which was not provided to appellant for review and consideration prior to verification by the Circuit Court. Order, Case No. 14-CP-32-00399/13-CP-32-01272. Record on Appeal. This appeal follows.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the workers' compensation commission. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981); *Bass v. Isochem*, 365 S.C. 454, 617 S.E.2d 369 (Ct. App. 2005); *Hargrove v. Titan Textile Co.*, 360 S.C. 276, 599 S.E.2d 604 (Ct. App. 2004). A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." *Bursey v. South Carolina Dep't of Health & Envtl. Control*, 360 S.C. 135, 141, 600 S.E.2d 80, 84 (Ct. App. 2004); S.C. Code Ann. § 1-23-380(5)(e) (2005).

"In an appeal from the appellate panel, neither this court nor the circuit court may substitute its judgment for that of the appellate panel as to the weight

of the evidence on questions of fact but may reverse when the decision is affected by an error of law". *Corbin v. Kohler Co.*, 351 S.C. 613, 617, 571 S.E.2d 92, 95 (Ct. App. 2002). *Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund*, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005); S.C. Code Ann. § 1-23-380(5)(d) (2005). Workers Compensation Commission's legal conclusions are reviewed *de novo*. *Grant v. Grant Textiles*, 372 S.C. 196, 200-201, 641 S.E.2d 869, 871 (2007). The Commission's factual findings are reviewed for "substantial evidence." Review is limited to whether reasonable minds could reach the conclusion that the agency reached: "Substantial evidence is not a mere scintilla of evidence, but evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the agency reached." *Holmes v. Nat'l Serv. Ind., Inc.*, 395 S.C. 305, 308-309, 717 S.E.2d 751, 752 (2011).

"Regulations authorized by the legislature have the force of law." *Goodman v. City of Columbia*, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (1995). An administrative agency can only exercise the powers which have been conferred upon it by the South Carolina General Assembly and must follow its own regulations and the provisions of the APA. *Triska v. Dep't of Health & Envtl. Control*, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions. See, *e.g., Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 553 S.E.2d 110 (2001).

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. The issue of

subject matter jurisdiction may be raised at any time including when raised for the first time to an appellate court." *Linda Mc Co. v. Shore*, 390 S.C. 543, 557, 703 S.E.2d 499, 506 (2010) (citation and internal quotation marks omitted). "A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question." *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). *Turner v. Malone*, 24 S.C. 398 (1886). "A judgment or order entered without jurisdiction is void *ab initio*". *Id.*

ARGUMENT

1. Because the Commission never considered the medical reports; appellant's compensable injury of 'permanent lifting restrictions' remains an open material term; and appellant received temporary compensation payments for approximately 213 consecutive days, the Commission lacked jurisdiction when it approved the Settlement Agreement and Release in this matter on January 5, 2006.

Upon *de novo* review, appellant contends the Commission lacked jurisdiction when it considered and approved the Settlement Agreement and Release issued in this matter on or around January 5, 2006.

I. Open Material Terms in the Settlement Agreement and Release

A. Medical Reports not filed with Commission by Respondents

A review of the Settlement Agreement and Release entered into by the parties on December 22, 2005 reflects that the parties agreed that "full and complete medical reports are on file with the South Carolina Workers' Compensation Commission and these are duly considered by it in approving this Settlement Agreement and Release". Record on Appeal. However, a review of the Commission's copy of the contents of WCC Case File No. 0506205 as of December 7, 2012 confirms that the medical reports were absent from the

Commission's file. Commission Copy of contents contained within WCC Case File No. 0506205 as of December 07, 2012. Record on Appeal.

Further, S.C. Reg. 67-1301(B)(2005), **Medical Reports**, provides: "The employer's representative **shall** submit to the Commission a report indicating the claimant's final rating of permanent impairment." (Emphasis added). *Id.* "Under the rules of statutory interpretation, use of words such as "shall" or "must" indicates the legislature's intent to enact a mandatory requirement. See *e.g., In re Matthews*, 345 S.C. 638, 550 S.E.2d 311 (2001); *South Carolina Police Officers Retirement Sys. v. Spartanburg*, 301 S.C. 188, 391 S.E.2d 239 (1990); *Starnes v. South Carolina Dept. of Public Safety*, 342 S.C. 216, 535 S.E.2d 665 (Ct. App. 2000); *Montgomery v. Keziah*, 277 S.C. 84, 282 S.E.2d 853 (1981).

Here, a review of the record, and specifically, the correspondence submitted to the Commission by the employer's representative dated December 30, 2005 confirms that while the proposed settlement agreement and release was filed with the commission, the employer's representative did not file the medical reports with Commission, in violation of S.C. Reg. 67-1301(B)(2005), and the terms and conditions of the proposed settlement agreement and release. *Id.* December 30, 2005 correspondence to Commission from Employer's Representative. Record on Appeal.

Appellant contends the respondents' counsel has never filed the medical reports with the Commission. Because the respondents' never filed the medical reports with the Commission, the Commission never duly considered the medical reports prior to approving the agreement, and therefore lacked jurisdiction at the

time it approved the agreement.

B. Open Compensable Injury of "Permanent Lifting Restrictions"

A review of the record, and specifically, the medical reports, confirms that appellant's injury of "permanent lifting restrictions" arose out of and in the course and scope of the performance of appellant's official duties and as a proximate cause of the admitted work-related injury which occurred on May 5, 2005. Medical Reports. Record on Appeal. See *Howell v. Pac. Columbia Mills*, 291 S.C. 469, 471, 354 S.E.2d 384, 385 (1987); also see S.C. Code Ann. § 42-1-160 (Supp. 2005); also see *Oliver v. South Carolina Dep't of Hwys. & Pub. Transp.*, 309 S.C. 313, 422 S.E.2d 128 (1992); also see *Gibson v. Spartanburg Sch. Dist. #3*, 338 S.C. 510, 518, 526 S.E.2d 725, 729 (Ct. App. 2000). *Id.*

However, a review of the Settlement Agreement and Release makes no reference of the compensable injury of "permanent lifting restrictions" as a fact in issue which was to be resolved in the aforementioned agreement. Settlement Agreement and Release. Record on Appeal. As it relates to the requirement of the compensable injury of permanent lifting restrictions to be specifically referenced in the settlement agreement and release, S.C. Reg. 67-803(A)(2)(2005), **Settlement by Agreement and Final Release**, provides: "If the parties agree to the terms of a settlement by entering into an Agreement and Final Release, the document **shall** include the following: (2) A statement of the facts at issue..." (Emphasis added). *Id.*

Further, appellant never discussed the issue of permanent lifting restrictions with Attorney Bacon or the respondents, as the employer terminated

the appellant on the erroneous grounds of "permanent lifting restrictions" (Termination Notice, Record on Appeal), and as such, there was never a "meeting of the minds" regarding the compensable injury of permanent lifting restrictions.

South Carolina jurisprudence indicates, "To read additional specific terms into the agreement, without evidence such terms were contemplated by the parties, seems to reach beyond our judicial purview. It is possible no actual meeting of the minds occurred in this case." See *Patricia Grand Hotel*, 372 S.C. at 638-39, 643 S.E.2d at 694-95 (discussing *Ozyagcilar v. Davis*, 701 F.3d 306 (4th Cir. 1989) wherein the appellate court reversed the district court's enforcement of a settlement agreement upon a party's request when there was no meeting of the minds as to the specifics of the settlement agreement)); see also *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."). *Id.*

Because the compensable injury of "permanent lifting restrictions" were not specifically referenced as a "fact in issue" in addition to the five (5) percent impairment rating in the agreement, and because no meeting of the minds ever occurred regarding the permanent lifting restrictions, the aforementioned compensable injury remains an open material term, wherein the Commission lacked jurisdiction to approve the agreement. See *Aperm Of South Carolina v. Alvin R. Roof*, 290 S.C.442 351 S.E.2d 171 (Ct. App. 1986)("regardless of intent, an agreement which leaves open material terms is unenforceable."). *Id.*

II. Unlawful Suspension/Termination of TTD Benefits

A review of WCC Form 18 dated December 01, 2005 and filed by the employer/carrier's representative with the Commission in this matter confirms that appellant received temporary compensation payments for approximately 213 consecutive days, including the first 150 days, beginning from May 06, 2005 (the day after the May 05, 2005 admitted work-related injury), until December 04, 2005 when the employer's representative terminated TTD Benefits. WCC Form 18. Record on appeal.

Further, WCC Form 15 filed by Respondents' with the Commission on December 06, 2005 alleges that respondents' initiated TTD benefits on November 07, 2005 with the first payment issued to appellant on **November 15, 2005**; that appellant's average weekly wage is listed at $1,161.00 but fails to state what the appellant's "current weekly wage" was; listed TTD benefits at the REDUCED weekly rate of $592.56 and fails to state "why" appellant has no weekly wage, or whether the employer offered suitable employment to accommodate appellant's incapacity; and sections "**II**" and "**III**" are left blank. WCC Form 15. Record on Appeal.

However, appellant contends the information submitted on the aforementioned Form 15 was inaccurate. Specifically, a review of the last three compensation check receipts received from respondents' confirms that the checks were <u>not created</u> until December 01 & 02, 2005, sixteen (16) days <u>after</u> the compensation payment allegedly was issued to appellant. Receipts of last 3 Compensation Checks. Record on Appeal. Additionally, appellant has asserted

on "numerous" occasions, without objection, that respondents' unlawfully withheld entitled TTD payments from appellant until AFTER appellant entered into the aforementioned agreement on December 22, 2005. Motion for Reinstatement. Record on Appeal. Motion for New Trial. Record on Appeal.

Based on the 213 consecutive days appellant received temporary compensation, suspension, reduction, or termination of TTD benefits were exclusively controlled by §42-9-260(F)(supp. 1996), which provides:

> *After the one-hundred-fifty-day period has expired, the commission **shall** provide by regulation the method and procedure by which benefits may be suspended or terminated for any cause, but the regulation **must** provide for an evidentiary hearing and commission approval **prior** to termination or suspension unless such prior hearing is expressly waived in writing by the recipient or the circumstances identified in Section 42-9-260(B)(1) or (B)(2) are present. Further, the commission may not entertain any application to terminate or suspend benefits unless and until the employer or carrier is current with all payments due.* (Emphasis added). *Id.*

AND S.C. Reg. 67-506(D)&(E)(Supp.1997), which provides:

> *D. After the one hundred fifty day period, when the claimant is receiving temporary compensation and the authorized health care provider assigns an impairment rating and reports the claimant is unable to return to work at the same or other suitable job, the employer's representative **must** continue payment of temporary compensation until the Commission finds the employer's representative may terminate temporary compensation.*
>
> *E. To request a hearing for permission to terminate temporary compensation, the employer's representative **shall** file a Form 21 with the Judicial Department.*
>
> *(1) The employer's representative **shall** serve a copy of the Form 21 on the claimant according to R.67-211.*
>
> *(2) The employer's representative **shall** certify temporary compensation is current or no hearing will be set.* (Emphasis added). *Id.*

A review of the unchallenged MMI Report dated October 27, 2005 from Dr. Tamadon confirms the statutory procedures set forth in R. 67-506(D)&(E),

controlled the manner and procedure by which entitled TTD benefits was required to be reduced, suspended, or terminated. MMI Report dated October 27, 2005. *Id.* Record on Appeal. Still further, this Court has provided guidance and jurisprudence as it relates to the requirement of the employer's representative to comply with the procedures required to terminate TTD benefits. Specifically, in *Martin v. Rapid Plumbing*, Opinion No. 4114 (Ct. App. 2006), this Court opined,

> *The reason given on the Form 15 for the termination was because "Claimant has returned to work without restrictions and employment has been offered." However,* ***the statute is explicit that even under a Form 15, an employer can only terminate or suspend temporary compensation if one of the specified conditions is met****. The applicable condition in this case allows termination or suspension if "the employee has returned to work; however, if the employee does not remain at work for a minimum of fifteen days, temporary disability payments* ***must*** *be resumed immediately[.]" S.C. Code Ann. § 42-9-260(B)(1) (Supp. 2005). Because Martin did not remain at work for fifteen days, Rapid Plumbing was required to resume payments immediately after he left work on August 13, 2002...*
>
> *...Even if Rapid Plumbing could have stopped temporary total disability benefits,* ***it failed to follow the proper procedure for doing so as outlined by section 42-9-260 and regulation 67-504****. Rapid Plumbing terminated the compensation on August 10, 2002, but failed to file and serve the Form 15 until at least August 28, 2002, and* ***failed to attach the supporting documentation as required by section 42-9-260. These deficiencies are not mere technicalities, but are substantial deviations from the statutory procedure****. The circuit court was correct in finding Rapid Plumbing wrongfully terminated temporary benefits.* (Emphasis added). *Id.*

Finally, appellant contends the Commission is bound to strictly construe worker's compensation statutes in derogation of the common law. See *Gilfillin v. Gilfillin*, 344 S.C. 407, 544 S.E.2d 829 (2001); also see *Caughman v. Columbia YMCA*, 212 S.C. 337, 47 S.E.2d 788 (1948). To put it in another way, in order for

the Commission to have had proper jurisdiction to consider approving a settlement agreement and release in this matter, the employer's representative would have been required to terminate compensation payments to appellant prior to the expiration of the first 150 days, or prior to **October 02, 2005**; however, this did not happen. WCC Form 18. Record on Appeal.

III. Summary and Conclusion

"Settlement agreements are reviewed by the circuit court in much the same way as contracts." *Patricia Grand Hotel, LLC v. MacGuire Enters.*, 372 S.C. 634, 640, 643 S.E.2d 692, 695 (Ct. App. 2007). Upon *de novo* review, because the employer's representative paid temporary compensation payments to appellant for approximately 213 consecutive days, including the first 150 days, appellant was prohibited from waiving his entitled right to TTD compensation and the parties were **prohibited** from entering into an agreement to resolve entitled TTD benefit payments (See §§ 42-1-620(1962) ("No agreement by an employee to waive his rights to compensation under this title shall be valid")), and the respondents "substantially deviated from the statutory procedure", by failing to file a Form 21 with the Commission and failing to make continued TTD benefit payments to appellant until an evidentiary stop payment hearing was convened before the commission, and an order on the evidentiary stop payment hearing was issued by the commission granting permission to terminate TTD benefits. See section 42-9-260(F)(supp. 2005), and Reg. 67-506(D)&(E). *Id.*

Appellant contends the employer's representative misled the Commission in terms of the erroneous information contained in the invalid and unverified Form

15 it filed with the Commission. The employer's representative failed to comply with Reg. 67-1301(B)(2005), of the Act in terms of failing to transmit the medical reports to the Commission. *Id.*

The settlement agreement failed to specifically reference the open compensable injury of "permanent lifting restrictions", as no meeting of the minds between the parties ever took place on the issue. Appellant never expressly waived his right to an evidentiary stop payment hearing, particularly wherein appellant was neither advised nor aware, from Attorney Bacon, regarding appellant's protected right to continued TTD Benefit payments, wherein appellant was homeless and enduring coerced incongruous and harsh circumstances at the time appellant entered into the agreement on December 22, 2005.

The Commission never considered the medical reports prior to approving the agreement, which were binding terms and conditions for approval of the settlement agreement. The Commission lacked jurisdiction at the time it approved the settlement agreement and release, and specifically failed to ensure efficiency and integrity in the judicial process. See *Ecclesiastes Prod. Ministries v. Outparcel Assocs.*, 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App. 2007) (quoting *Poston by Poston v. Barnes*, 294 S.C. 261, 263-64, 363 S.E.2d 888, 889-90 (1987)) ("...settlement agreements **must** be carefully scrutinized in order to determine their efficiency and impact upon the integrity of the judicial process.") (Emphasis added). *Id.*

Accordingly, because the Commission lacked jurisdiction at the time it approved the settlement agreement and release, this Court should consider

deeming the aforementioned settlement agreement and release "invalid", "unenforceable" and null and void *ab initio* upon *de novo* review of the instant appeal at bar, and as a matter of law (See *Triska*, "Any action taken outside of its statutory and regulatory power is null and void."; Also see *Turner,* "A judgment or order entered without jurisdiction is void *ab initio*"), to include setting aside all subsequent orders and judgments rendered in this matter.

2. Because the successor Judge issued all seven (7) *sua sponte* administrative orders after the expiration of ten (10) days from the entry of judgment of the September 25, 2014 Court Order, all *sua sponte* administrative orders issued by the successor Judge were issued untimely and without jurisdiction.

Appellant contends the circuit court erred and lacked jurisdiction by issuing untimely *sua sponte* administrative orders in violation of Rule 59(d), SCRCP, and well-established law.

Rule 59(d), SCRCP, provides:

> ***On Initiative of Court. Not later than 10 days after entry of judgment,*** *the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.* (Emphasis added). *Id.*

Further, South Carolina jurisprudence indicates that "...a family court [or circuit court] judge does not have the authority to alter or amend a judgment, *sua sponte*, once the judgment is more than 10-days-old". *Heins v. Heins*, 344 S.C. 146, 543 S.E.2d 224 (Ct. App. 2001). *Id.*

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the trial court." *Coleman v. Dunlap*, 306 S.C. 491, 494, 413 S.E.2d

15, 17 (1992). "Therefore, our standard of review is limited to determining whether there was an abuse of discretion." *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004). "An abuse of discretion arises when the order was controlled by an error of law or when the order is based on factual conclusions that are without evidentiary support." *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

Here, a review of the record, and specifically, the 7 *sua sponte* administrative orders issued in this matter by successor Judge Keesley, reflects the *sua sponte* orders were issued after the expiration of 10 days from the issuance of the September 25, 2014 Order from former presiding Judge Gibbons, in violation of Rule 59(d), and well settled common law. *Id.* September 25, 2014 Circuit Court Order. Record on Appeal. All 7 *sua sponte* Administrative Orders issued by Judge Keesley. Record on Appeal. Moreover, the *sua sponte* grounds relied upon by successor Judge Keesley in support of the issuance of the *sua sponte* administrative orders, specifically, that Rule 63, SCRCP, governed the process of the instant appeals, is without merit and constitutes a misapplication of the rule.

Specifically, the controlling and most persuasive ruling regarding this specific issue as to when the application of Rule 63 SCRCP, is appropriate is found in *Christy v. Christy*, Opinion No. 25643 (Sup. Ct. 2003). In *Christy*, our Supreme Court held that while it was appropriate for the family court to grant a new trial, the Supreme Court's decision was based on the fact that no order had been issued prior to the family court judge's disabling incapacity. *Id.* Here,

former presiding Judge Gibbons was not incapacitated or disabled; Judge Gibbons recused himself as the convening reviewing Circuit Judge "in the interest of justice". September 25, 2014 Order. Record on Appeal.

Additionally, Judge Gibbons issued an Order which provided clear findings and rulings. Based on the fact Judge Gibbons was not recused due to disability, as well as the fact Judge Gibbons issued an Order in the instant appeal, the *sua sponte* application of Rule 63 SCRCP, by successor Judge Keesley, to justify the issuance of the untimely *sua sponte* administrative orders was without merit.

Finally, respondents' assertion in support of the issuance of the untimely *sua sponte* administrative orders by the successor circuit court, and specifically, "...as it relates to Appellant's Motion for Relief from Administrative Orders and Appellant's Memorandum, Respondents assert this court possess full authority to issue the administrative orders in response to Respondents' Rule 59(e), Motion to Alter/Amend...", was short, conclusory, not supported by authority, and therefore should be deemed abandoned. See *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting an issue is deemed abandoned when a party fails to provide arguments or supporting authority for his assertion); also see *Citizens & S. Nat'l Bank of South Carolina v. Easton*, 310 S.C. 458, 460, 427 S.E.2d 640, 641 (1993) (holding "trial court was without authority to order a new trial beyond 10 days after entry of judgment, regardless of the pendency of the Rule 50(b) motion"). *Id.* Respondents' Reply to Appellant's Pre-Trial Motions and Submissions. Record on Appeal.

Appellant contends the issuance of the untimely *sua sponte* administrative

orders by successor Judge Keesley violated Rule 59(d), SCRCP, well-established common law, and constitutes an error of law. Judge Keesley lacked jurisdiction to issue the untimely *sua sponte* administrative orders. Because Judge Keesley lacked jurisdiction at the time the untimely *sua sponte* administrative orders was issued, appellant contends successor Judge Keesley abused his discretion in denying appellant's Rule 60(b) Relief application, and the Court should consider REVERSING the circuit court's denial of the same and deeming all aforesaid untimely *sua sponte* administrative orders null and void *ab initio*, to include vacating all actions which derived from the untimely *sua sponte* administrative orders, to include vacating the March 27, 2015 appellate hearing and the July 17, 2015 Circuit Court Order on Appeal, as a matter of law. (See *Triska*, "Any action taken outside of its statutory and regulatory power is null and void."); Also see *Turner.* ("A judgment or order entered without jurisdiction is void *ab initio*"). *Id.*

3. Because the instant appeal(s) were convened within the same circuit, successor Circuit Judge Keesley erred and lacked jurisdiction when he *sua sponte* vacated the September 25, 2014 Order of former presiding Judge Gibbons within the same circuit.

Appellant contends successor Judge Keesley lacked jurisdiction when he *sua sponte* vacated the September 25, 2014 Order issued by former presiding Judge Gibbons within the same circuit.

Appellant contends it is necessary for the Court to first consider the effect of the September 25, 2014 Circuit Court Order. *Black's Law Dictionary, 6th Ed.* defines the term "particulars" as: "The details of a claim, or the separate items of an account. When these are stated in an orderly form, for the information of a

defendant, the statement is called a "bill of particulars," (q. v.)". *Id.* Further, *Black's Law Dictionary* defines the term "all" as:

> All. Means the whole of-used with a singular noun or pronoun, and referring to amount, quantity, extent, duration, quality, or degree. The whole number or sum of-used collectively, with a plural noun or pronoun expressing an aggregate. Every member of individual component of; each one of-used with a plural noun. In this sense, all is used generically and distributively. "All" refers rather to the aggregate under which the individuals are subsumed than to the individuals themselves. *State v. Hallenberg-Wagner Motor Co.*, 341 Mo. 771, 108 S.W.2d 398, 401." *Id.*

In considering the Sept. 25, 2014 Order issued by Circuit Judge Gibbons in specific relation to the first finding, "The Appellant/Claimant's motion for new trial or hearing is GRANTED as to all particulars set forth in his motion...", it would be clearly erroneous to interpret or construe Judge Gibbons' intent in any manner other than the Circuit Court granting all issues raised and set forth in appellant's motion for new trial[7]. Sept. 25, 2014 Court Order. Record on Appeal.

Appellant contends in granting all particulars set forth in appellant's motion for new trial, the Circuit Court accepted and granted appellant's claim that employer's discharge of appellant was wrongful. Appellant relied upon S.C. Code Ann. §41-1-80 in support of the claim. Specifically, appellant asserted that the employer wrongfully terminated appellant on or around November 2, 2005 on grounds of "permanent lifting restrictions" and "no position available" which were not proper affirmative defenses as set forth in §§41-1-80. *Id.* Further, appellant asserted that the wrongful termination took place approximately five (5) days

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7 Appellant points out that in Commissioner Barden's Feb. 22, 2013 *sua sponte* order it states, "Further, any and **all** motions filed pertaining to WCC# 0506205 are hereby dismissed as well" (Emphasis added). Neither appellant nor respondents mis-interpreted Commissioner Barden's intent, effect or the meaning of the finding.

after appellant reached MMI on October 27, 2005 and after Dr. Tamadon reported that appellant could no longer perform the duties of a delivery driver with regards to WCC Case No. 0506205. Motion for New Trial. Record on Appeal.

Still further, appellant asserted that grounds relied upon by the employer in support of the termination were prohibited and addressed in the Act, specifically, under S.C. Code Ann. § 42-9-260 and S.C. Reg. 67-506. *Id.* Finally, the Circuit Court accepted appellant's argument and reliance upon *e.g. Case v. Hermitage Cotton Mills*, 236 S.C. 285, 113 S.E.3d 794 (1960), specifically, that the one year statute of limitations to present this claim was waived because the employer "misled" and "deceived" appellant in support of the unlawful discharge by 1) failing to provide appellant with a copy of the discharge notice; and 2) the employer submitted misleading correspondence to appellant dated March 9, 2006 alleging that appellant "left the company" when in fact, appellant was terminated by employer. *Id.* Motion for New Trial. Record on Appeal.

Appellant contends that in granting appellant's claim for wrongful termination, the Circuit Court's grant was similar to this Court's decision regarding "retaliatory discharge" as set forth in *Crosby v. Prysmian Communications*, Opinion No. 4876 (Ct. App. 2012)[8]. In *Crosby*, this Court, by way of Chief Justice John Cannon Few, opined,

> *In order to recover for retaliatory discharge under section 41-1-80, a plaintiff must establish three elements: "1) institution of workers' compensation proceedings, 2) discharge or demotion, and 3) a causal connection between the first two elements."* Hinton v. Designer Ensembles, Inc., 343 S.C. 236, 242, 540 S.E.2d 94, 97 (2000) (citing Hines v. United Parcel Serv., Inc., 736 F. Supp. 675, 677 (D.S.C. 1990)). *Id.*

Here, appellant successfully established the three elements required to recover for "retaliatory discharge", wherein 1) workers' compensation proceedings were instituted in this matter on or around May 2005 under WCC Case No. 0506205; 2) appellant was discharged by employer on or around November 02, 2005; and 3) the causal connection between the first two elements were established, in terms of; a) employer discharging appellant five days after Dr. Tamadon opined MMI and reported to employer appellant could no longer perform the duties of a delivery driver per the compensable injury of "permanent lifting restrictions" via WCC Case No. 0506205; b) that the "permanent lifting restrictions", as utilized by the employer as an affirmative defense for discharge, 'arose out of and in the course and scope' of the performance of appellant's official duties and was a proximate cause of the admitted work-related injury occurring on May 05, 2005; c) that employer never offered or afforded suitable employment to accommodate appellant's work-related impairments prior to the discharge; and d) wherein the employer was prohibited from discharging appellant for "no position available" pursuant to S.C. Reg. 67-506(D)(Supp.1997), of the Act. *Id.*

Appellant contends in granting all particulars set forth in appellant's motion for new trial, Circuit Judge Gibbons also granted appellant's claim that respondents unlawfully terminated entitled TTD benefits, in violation of §§ 42-9-260(F) and Reg. 67-506(D)&(E) of the Act. *Id.* Motion for New Trial. Record on Appeal.

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8 See *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001). "A party need not use the exact name of a legal doctrine in order to preserve it, but it must be clear that the argument has been presented on that ground." *Id.*

Appellant contends in granting all particulars set forth in appellant's motion for new trial, Circuit Judge Gibbons also granted appellant's arithmetic calculation in terms that as of August 04, 2014 respondents' owe appellant approximately $654,078.38 in unlawfully withheld TTD benefits, which included the 25% interest penalty assessed on the unlawfully withheld TTD benefits. Motion for New Trial. Record on Appeal.

Appellant further contends in granting all particulars set forth in appellant's motion for new trial, Circuit Judge Gibbons granted appellant's claim that appellant was subjected to ineffective assistance of counsel and intentional misrepresentation by appellant's former counsel or record, Attorney Bacon, from on or around May 2005 to on or around December 2012. Motion for New Trial. Record on Appeal.

Appellant further contends in granting all particulars set forth in appellant's motion for new trial, Circuit Judge Gibbons also granted appellant's claim that the Appellate Panel's finding of S.C. Reg. 67-801 in support of affirming Commissioner Barden's Feb. 22, 2013 *sua sponte* Order was controlled by S.C. Code Ann. §42-1-620(1962), and the Settlement Agreement and Release should be deemed invalid. Motion for New Trial. Record on Appeal.

Appellant further contends In granting all particulars set forth in appellant's motion for new trial, the remaining issues regarding Appellate Case No. 2013-CP-32-01272 with respect as to whether Mr. Cannon lacked jurisdiction when he issued the March 27, 2013 Decision summarily denying appellant's Motion for Reinstatement became a dispositive issue. See *State v. Jolly*, 304 S.C. 34, 39,

402 S.E.2d 895, 898 (Ct. App. 1991) (noting "[a]ppellate courts recognize an overriding rule which says: 'whatever doesn't make any difference, doesn't matter'") (quoting *McCall v. Finley*, 294 S.C.1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987)); also see *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues when resolution of another issue disposes of the appeal). *Id.*

Appellant further contends in granting all particulars set forth in appellant's motion for new trial, the Circuit Court implicitly granted the relief sought by appellant. Specifically, it strains the limits of credulity and reason that the Circuit Court would grant appellant's claim that employer wrongfully discharged appellant and employer's representative unlawfully terminated entitled TTD benefits and not require respondents to immediately take remedial actions to comply with the law. See *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) ("The law of the case applies both to those issues explicitly decided and to those issues [that] were necessarily decided in the former [appeal]."); also see *In re Grossinger's Assocs.*, 184 B.R. at 434 ("The doctrine applies to all issues decided expressly or by **necessary implication**."). (Emphasis added). *Id.*

Appellant contends South Carolina jurisprudence indicates it is well settled that one judge may not overrule another judge within the same court or circuit. *Charleston County Dep't of Social Services v. Father, Stepmother, and Mother*, 317 S.C. 283, 288, 454 S.E.2d 307, 310 (1995); see also *Tisdale v. American Life Ins. Co.*, 216 S.C. 10, 13, 56 S.E.2d 580, 581 (1949) (holding that it is

"axiomatic" that a Circuit Judge does not have the power to reverse the ruling of another Circuit Judge); *Dinkins v. Robbins*, 203 S.C. 199, 202, 26 S.E.2d 689, 690 (1943) ("The rule is well settled that the prior order of one Circuit Judge may not be modified by the subsequent order of another Circuit Judge"); see also *Dinkins*, 203 S.C. at 203, 26 S.E.2d at 690 (reversing order of Circuit Judge because it substantially altered a previous order of another Circuit Judge despite finding that the order would have otherwise been "fully warranted"); see also *Medlock v. Love Shop, Ltd.*, 286 S.C. 486, 487, 334 S.E.2d 528, 529 (Ct. App. 1985) (holding that one circuit judge does not have the power to review, modify, affirm, or reverse findings of another circuit court judge). *Id.*

Here, a review of the record reflects that former presiding Circuit Judge Gibbons issued an Order in this matter on September 25, 2014 wherein the Circuit Court vacated its previous July 21, 2014 Order dismissing Appellate Case No. 2014-CP-32-00399 and granted all particulars set forth in appellant's motion for new trial. Sept. 25, 2014 Order. Record on Appeal. Subsequent the September 25, 2014 Order, neither party filed a Rule 60, SCRCP, application seeking to set aside or vacate the Sept. 25 Order. On July 17, 2015 the Circuit Court, via successor Judge Keesley, issued an Order wherein it opined, "*Judge Gibbons' order was vacated at the Appellant's request. The Respondents agree that any motion concerning Judge Gibbons' order is moot as that order was subsequently vacated*". Circuit Court Order dated July 17, 2015. Record on Appeal.

Further, at the March 27 appellate hearing, successor Judge Keesley

states, "*There is one phrase in the* [September 25, 2014] *order that is very broad, but Judge Gibbons' order has now been vacated....There is no basis for a determination that what Judge Gibbons did was what Mr. Guice interpreted in that regard...The order has been vacated now...*" Transcript from March 27, 2015 appellate hearing. Record on Appeal. Appellant contends successor Circuit Judge Keesley lacked jurisdiction to review or vacate the September 25, 2014 Order of Circuit Judge Gibbons within the same Circuit. See *Medlock*; also see *Tisdale. Id.*

Because successor Circuit Judge Keesley lacked jurisdiction to review, modify or vacate the September 25, 2014 Order issued by former presiding Circuit Judge Gibbons within the same circuit, appellant contends the Court should consider deeming the July 17, 2015 Circuit Court Order on appeal null and void *ab initio*. See *Turner,* "A judgment or order entered without jurisdiction is void *ab initio*"). *Id.*

4. Because the respondents did not file a Rule 59(e) Motion seeking to have their Motion to Dismiss reconsidered on the grounds that the Court failed to obtain a copy of the record from the Commission, the Circuit Court erred and lacked jurisdiction when it *granted a de novo hearing to reconsider the respondent's motion to dismiss based on the aforementioned grounds raised by the Circuit Court sua sponte.*

Appellant contends the successor Circuit Court lacked jurisdiction and erred when it granted a *de novo* hearing to reconsider the respondents' motion to dismiss regarding Appellate Case No. 2013-CP-32-01272 based on grounds raised by the successor circuit court *sua sponte*.

A review of the record reflects on October 23, 2014 the successor Circuit Court issued a *sua sponte* Administrative Order to obtain WCC File No. 0506205

from the Workers' Compensation Commission. Administrative Order To Obtain File From The South Carolina Workers Compensation Commission And Directing That The Files Not Be Destroyed Until Final Resolution of The Appeal. Record on Appeal. Further, on March 03, 2015 the successor Circuit Court issued a *sua sponte* Order wherein a *de novo* hearing was granted to reconsider respondents' motion to dismiss on the *sua sponte* grounds that the Clerk failed to obtain WCC Case File No. 0506205 from the Commission prior to Judge Gibbons' issuance of the September 25, 2014 Order vacating the July 21, 2014 Order granting respondents' motion to dismiss. Specifically, the successor Circuit Court opined,

> *If Judge Gibbons did not have the record from the Workers Compensation Commission before him at the time he heard the employer's/carrier's motion to dismiss, and if he only had one of the two files that have been generated in circuit court, he has dealt with any issue of not having necessary files by vacating his order dismissing the case...* March 03, 2015 *sua sponte* Administrative Order. Record on Appeal.

Appellant contends a review of the respondents' 'Motion to Alter/Amend Circuit Court Order dated September 25, 2014' filed by respondents on October 16, 2014 did not raise the issue of the failure of the Circuit Court's error to obtain the transmittal of Case File No. 0506205 from the Commission or seek relief to have their motion to dismiss regarding Appellate Case No. 2013-CP-32-01272 or Case No. 2014-CP-32-00399 reconsidered. Respondents' Motion to Alter/Amend. Record on Appeal.

Appellant contends the successor Circuit Court lacked jurisdiction to grant a *de novo* hearing to reconsider the respondents' motion to dismiss based on grounds raised *sua sponte*. Specifically, South Carolina jurisprudence indicates that a moving party must raise the objectionable issue at the appropriate time

during trial; thus, unobjected to trial error cannot be advanced as grounds for a new trial. See *State v. Dicapua*, 383 S.C. 394, 398–99, 680 S.E.2d 292, 294 (2009) (finding a trial court cannot *sua sponte* grant a new trial on a ground not raised by a party and reversing the trial court's grant of a new trial based on the admission of an unobjected to videotape); also see *S. Railway Co. v. Coltex, Inc.*, 285 S.C. 213, 216, 329 S.E.2d 736, 737–38 (1985) (finding party waived its right to claim an omitted jury charge was error by not objecting to its omission at the trial level and reversing the trial court's grant of a new trial on that ground). *Id.*

Because successor Circuit Judge Keesley lacked jurisdiction at the time he granted a *de novo* hearing to reconsider the respondents' motion to dismiss on *sua sponte* grounds, the Court should consider REVERSING the successor circuit court's March 03, 2015 administrative order granting of the same (See *State v. Dicapua*), to include vacating all actions which derived from the improper March 03, 2015 *sua sponte* administrative order, to include vacating the March 27, 2015 appellate hearing and the July 17, 2015 Circuit Court Order on Appeal, *ab initio*, as a matter of law. See *Triska*, "Any action taken outside of its statutory and regulatory power is null and void." *Id.* Also see *Turner,* "A judgment or order entered without jurisdiction is void *ab initio*"). *Id.*

5. Because the Circuit Court, while sitting in its appellate capacity, lacked jurisdiction when it made findings of fact reserved for the Appellate Panel that the Settlement Agreement and Release was approved by the Commission pursuant to S.C. Code Ann. § 42-9-390; that the Settlement Agreement and Release was an Order from the Commission; and appellant failed to timely appeal the Settlement Agreement and Release, the Circuit Court Order on appeal should be vacated *ab initio*.

Appellant contends the Circuit Court erred and lacked jurisdiction when it

made findings of fact exclusively reserved for the Appellate Panel.

Specifically, a review of page "2" of the Circuit Court Order on appeal finds, "*Appellant signed this settlement, which was approved by the Commission pursuant to S.C. Code Ann. §42-9-390, and the Commission's order was filed on January 5, 2006...The Commission's approval of the settlement was not timely appealed.*" Circuit Court Order on Appeal. Record on Appeal.

Appellant contends the Final Order issued by the Appellate Panel did not make findings that the Settlement Agreement and Release was an Order; that the Settlement Agreement and Release was confirmed pursuant to S.C. Code Ann. §42-9-390; or that Appellant failed to timely appeal the Settlement Agreement and Release. Specifically, the Appellate Panel Final Order finds,

> *Pursuant to S.C. Reg. 67-801, Claimant settled his claim (WCC No. 0506205) through a Full and Final Settlement Agreement which was approved by the South Carolina Workers Compensation Commission on January 5, 2006...Pursuant to S.C. Code Reg. 67-801(E), the Employer and the Insurance Carrier are relieved from any further responsibility for payment of compensation or medical expenses...*" Final Order of Appellate Panel. Record on Appeal.

Furthermore, appellant contends the aforementioned impermissible findings as contained within the Circuit Court Order on appeal are not preserved for review or consideration either by the successor Circuit Court or by the Court of Appeals, based on the fact respondents' raised these issues before the Appellate Panel, who declined to rule on the issues; the respondents' raised these issues again before the Circuit Court, wherein the Circuit Court Order dated September 25, 2014 declined to rule on the aforementioned issues; and wherein respondents' failed to specifically raise the aforementioned issues in

their Oct. 16, 2014 Motion to alter/amend to be preserved for review. Respondents' Brief to the Full Commission. Memorandum in Response to Appellant's Verified Notice to the Court and Motion for New Trial. Motion to Alter/Amend Circuit Court Order dated September 25, 2014. Record on Appeal.

Specifically, in *State v. Bray*, 342 S.C. 23, 535 S.E.2d 636 (2000), our Supreme Court opined "it is error for an appellate court to consider issues not raised to it."; also see *Al-Shabbaz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000); also See *Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991). *Id.* Further, in *Hendrix v. Eastern Distribution, Inc.*, 320 S.C. 218, 464 S.E.2d 112 (1995), our Supreme Court opined, "An issue that was not preserved for review should not be addressed by the Court of Appeals, and the court's opinion should be vacated to the extent it addressed an issue that was not preserved". *Id.*

As it specifically relates to appellant's contention that the Circuit Court engaged in impermissible fact finding, South Carolina jurisprudence indicates that neither the circuit court, sitting in its appellate capacity, nor the Court of Appeals, may engage in fact finding in Workers' Compensation Commission cases. See *Sigmon v. Dayco Corp.*, 316 S.C. 260, 262-63, 449 S.E.2d 497, 498-99 (Ct. App. 1994) (vacating circuit court's order and remanding to Full Commission where Full Commission did not make findings of fact and circuit court improperly made its own findings of fact with regard to claimant's injury); also see *Baldwin v. James River Corp.*, 304 S.C. at 487, 405 S.E.2d at 423 (Ct. App. 1991) (vacating circuit court's order and remanding case to Full Commission to make definite and detailed findings of fact on present record

where Full Commission's findings of fact were conclusory as to claimant's award). *Id.*

Here, appellant contends a review of the record reflects the successor circuit court, while sitting in its appellate capacity, made impermissible findings of fact without jurisdiction (i.e. *finding the Settlement Agreement and Release being approved by the commission pursuant to S.C. Code Ann. §42-9-390; the Settlement Agreement and Release being an "Order"; and the appellant failed to timely appeal the Settlement Agreement and Release*), which constitutes an error of law. See *Nettles v. Spartanburg Sch. Dist. #7*, 341 S.C. 580, 590-91, 535 S.E.2d 146, 151 (Ct. App. 2000) (Circuit Court Order on Appeal. Record on Appeal.). *Id.* Because the successor circuit court lacked jurisdiction when it made impermissible findings of fact, appellant contends the Court should consider vacating the Circuit Court Order on appeal *ab initio* as a matter of law. See *Sigmom*; also see *Baldwin*; also see *Turner. Id.*

6. Because the Circuit Court did not afford the parties the mandatory thirty (30) days' prior notice before convening the March 27, 2015 appellate hearing as required pursuant to §§ 1-23-320(A)(Supp. 2008), the Circuit Court lacked jurisdiction at the time it convened the March 27, 2015 appellate hearing and the Circuit Court Order on appeal should be vacated *ab initio*.

Appellant contends the circuit court erred and lacked jurisdiction when it convened the March 27, 2015 appellate hearing because the parties were not afforded a minimum of not less than 30 days' prior notice pursuant to S.C. Code Ann. § 1-23-320(A)(Supp. 2008).

A review of the record, and specifically, the March 03, 2015 *sua sponte* Administrative Order issued by successor Circuit Court reflects that a hearing

was scheduled for March 27, 2015 in the instant appeal. March 03, 2015 Administrative Order. Record on Appeal. Appellant was not previously informed or contacted by the Circuit Court to confirm if the appellant was available to appear at the date and time scheduled. Appellant was provided a copy of the aforementioned March 03, 2015 *sua sponte* Administrative Order scheduling the appellate hearing from the Clerk via E-Mail only on March 05, 2015.

Appellant contends the circuit court is sitting in its appellate capacity. See *Al-Shabbaz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000) ("In reviewing the final decision of an administrative agency, the circuit court sits as an appellate court."). *Id.*

S.C. Code Ann. § 1-23-320(A)(Supp. 2008), provides in part: "In a contested case, all parties **must** be afforded an opportunity for hearing after notice of not less than thirty days..." (Emphasis added). *Id.* Appellant contends the requirement to afford parties at least thirty days' notice prior to convening an appellate hearing in a contested case is mandatory. "Under the rules of statutory interpretation, use of words such as "shall" or "must" indicates the legislature's intent to enact a mandatory requirement. See *e.g., In re Matthews*, 345 S.C. 638, 550 S.E.2d 311 (2001). *Id.*

Here, the successor circuit court scheduled the March 27, 2015 appellate hearing on March 03, 2015 *sua sponte*, which afforded the parties approximately twenty-four (24) days' prior notice of the appellate hearing, which was less than the mandatory thirty (30) days' prior notice pursuant to section 1-23-320. *Id.* Because the circuit court did not afford the parties the mandatory 30 days' prior

notice, appellant contends the circuit court lacked jurisdiction at the time it convened the March 27, 2015 appellate hearing in this matter. Because the circuit court lacked jurisdiction when it convened the March 27, 2015 appellate hearing, appellant contends the Court should consider deeming the March 27, 2015 appellate hearing convened in this matter "null" and "void", to include vacating all actions and orders which derived from the March 27 appellate hearing, to include vacating the July 17, 2015 Circuit Court Order on appeal. See *Triska*; also see *Turner. Id.*

Further, appellant contends that if the Court accepts this argument, that appellant's un-opposed and *sua sponte* denied Motion for Sanctions and the respondents' un-adjudicated Motion to alter/amend be remanded to the circuit court with the directive to deem the respondents' motion to alter/amend "abandoned" and to impose reasonable sanctions upon the respondents. See *Turner.* ("A judgment or order entered without jurisdiction is void *ab initio*"). *Id.*

CONCLUSION

Accordingly, based on the foregoing, appellant moves the Court for an appropriate Opinion, 1) that the Circuit Court Order on appeal be VACATED; 2) that all *sua sponte* Administrative Orders issued by the successor Circuit Judge be VACATED; 3) that the September 25, 2014 Circuit Court Order be reinstated with its full weighted force and effect; 4) that appellant's uncontested and previously *sua sponte* denied Motion for Sanctions be REVERSED and REMANDED to the Circuit Court with the directive that the Circuit Court impose reasonable sanctions upon respondents; 5) that respondents' un-adjudicated

Motion to Alter/Amend be REMANDED to the Circuit Court, with the directive to deem the motion abandoned; and 6) that this Court provide explicit language compelling respondents' to comply with the September 25, 2014 Circuit Court Order in terms of the immediate release of unlawfully withheld TTD benefits, to include the 25% interest penalty and immediate reinstatement of employment.

VERIFICATION

I, **Alexander Guice**, the named and undersigned self-represented appellant in this matter, do hereby swear, under penalty of perjury, that I prepared, read and reviewed the information contained herein and believe it to be true and correct to the best of my knowledge and ability.

Respectfully submitted,

By: _____

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Appellant, Pro Se

Sworn to before me this
14 day of September, 2015

_____
Notary Public of Florida
My commission expires 10-14-2016

AYOCAH GRANT
NOTARY PUBLIC
STATE OF FLORIDA
Comm# EE843251
Expires 10/14/2016

September 14, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Successor Circuit Court Judge

Case No. 2013-CP-32-01272
Case No. 2014-CP-32-00399

Appellate Case No. 2015-001821

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

Alexander Guice, Appellant,

v.

US Foodservice, Inc., Employer, and Ace American Insurance Company c/o Gallagher Bassett Services, Inc., Respondents.

PROOF OF SERVICE

I hereby certify that the Respondents, through counsel, were provided a true copy of a cover letter to the Clerk; the Initial Brief; and Designation of matter, by depositing the same in the US Postal Service, via Priority Mail, and addressed to: **Erin L. Hantske, Esq., P.O. Box 650007 Mt. Pleasant, SC 29465** on this **14th** day of September, 2015.

By: _____

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September 14, 2015

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September 14, 2015

Via Priority Mail

The Honorable Jenny A. Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: Alexander Guice v. U.S. Foodservice, Inc., et al
Appellate Case No. 2015-001821

Dear Ms. Kitchings:

Please find enclosed an original and a true copy of an Appellant's Initial Brief; a Designation of matter; and a proof of service in regards to the above referenced appeal. Please forward to the appropriate personnel for processing, and please return clocked copies of the same to the undersigned in the pre-paid self-addressed envelope enclosed for your convenience.

By copy of this correspondence, Erin L. Hantske, Esq., the respondents' counsel of record, has been provided a copy of the same via priority mail with enclosures.

Should you have any questions, please do not hesitate to contact me. Thank you for your assistance in this matter.

Very truly yours,

Alexander Guice
Appellant, pro se

/ag

Enclosures: As stated

cc: Erin L. Hantske, Esquire

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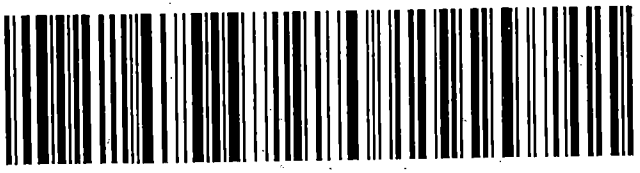

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