

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

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**SC Court of Appeals**

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

Appellate Case No. 2015-001821

APPEAL FROM THE WORKERS' COMPENSATION COMMISSION

WCC Case No. 0506205

Alexander Guice, Employee, Appellant,

v.

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

**INITIAL REPLY BRIEF OF APPELLANT**

Alexander Guice  
U.S. African American Citizen  
Honorable Disabled Veteran  
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Appellant, Pro Se

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## ARGUMENT

Respondents fail to overcome any of the issues raised in Appellant's Initial Brief. In its simplest form, a *de novo* review of Workers' Compensation Claim No. 0506205 ("WCC # 0506205) can be reduced to one number: **150**, and one word: **Compliance**. One hundred and fifty days is the period of time, after notice of injury, and as set by the Legislature, an employer has to voluntarily terminate temporary compensation payments to an injured employee without triggering axiomatic obligations which both the employer and the Commission must perform under the Act. S.C. Code Ann. § 42-1-10, *et. seq.*

If the employer terminates temporary compensation payments prior to the expiration of the one-hundred-fifty-day-period after notice of injury, then it is the responsibility of the injured employee, or their representative(s), to file the appropriate documents with the Commission to seek the reinstatement of compensation payments and benefits. S.C. Code Reg. 67-504(Supp. 1997). If, however, the injured employee receives temporary compensation payments after the expiration of the one-hundred-fifty-day-period after notice of injury, then an employer, through their representative(s), **must** continue payment of temporary compensation payments until the Commission grants permission to suspend or terminate temporary compensation payments by convening an evidentiary hearing and issuing an order granting an employer permission to suspend or terminate temporary compensation payments. S.C. Code Ann. § 42-9-260(F)(Supp. 1996). S.C. Code Reg. 67-505(A)(Supp. 1997). S.C. Code Reg. 67-506(D) & (E)(Supp. 1997).

This requirement is jurisdictional, not discretionary. A review of the record as a whole, and under the "substantial evidence" rule, the Court must accept the following findings and conclusions: A) That Appellant, at the time a resident of Loris, SC, was hired by Respondent US Foodservice, Inc. ("Respondent" or "US Foods"), located in Lexington, SC, on 10/01/2001 to perform the job of Delivery Driver; on 05/05/2005 Appellant was involved in a traffic accident,

which Appellant sustained injuries from, while in the performance of Appellant's official duties; Appellant provided notice of the May 5, 2005 accident/injuries to US Foods on 05/05/05; at the time of the injury, Appellant and US Foods mutually agreed that Appellant's average weekly wage ("AWW") was approximately \$1,161.00; US Foods and Appellant are bound by the Act; and the Commission assigned Case No. 0506205 to the 05/05/05 workers' compensation injury claim (US Foods WCC Form 12 dated 05/21/05, ROA); **B)** That Respondent provided medical treatment to Appellant, wherein Appellant was treated by several authorized health care providers, and specifically, primary authorized health care provider, Alan Tamadon, MD ("Dr. Tamadon"); that on 10/27/05 via medical examination and subsequent Medical Report, Dr. Tamadon opined Appellant reached Maximum Medical Improvement respective of the 05/05/05 admitted work-related injury; assigned "permanent lifting restrictions"; assigned a five percent impairment rating to the whole person of Appellant; and reported to US Foods Appellant could no longer perform the duties of a delivery driver (Medical Report dated 10/27/05, ROA);

**C)** That on 11/02/05 US Foods terminated Appellant's employment on grounds of "Permanent Lifting Restrictions" and "No position available" (Employee Status Notice, dated 11/02/05, ROA); **D)** That on 12/01/05 US Foods filed a WCC Form 18 – Periodic Report, with the Commission, which confirmed Appellant was paid temporary compensation payments by US Foods, from 05/06/05 to 12/04/05, for approximately 212 consecutive days, including and after the expiration of the one-hundred-fifty-day-period after Appellant's notice of injury to US Foods on 05/05/2005 (US Foods WCC Form 18 dated 12/01/05, ROA); **E)** That on December 22, 2005 US Foods; its insurance Carrier; and Appellant entered into a Settlement Agreement and Release, under the apparent authorities of S.C. Code Ann. § 19-1-150 (1976); S.C. Code Ann. § 42-9-10 (1976); and S.C. Code Ann. § 42-9-20(1976); and for the stated essential factual issue regarding

the five percent permanent impairment rating assigned to Appellant respective of the May 5, 2005 work-related injury; wherein Appellant agreed to accept the sum of \$20,000.00 as final payment regarding the five percent impairment rating respective of the May 5, 2005 injury, which was approved by the Commission, and specifically, by Commissioner David W. Huffstetler on January 5, 2006 (Agreement, ROA);

F) That on March 9, 2006 US Foods, through Agent Kellen K. Pollard, issued correspondence to Appellant stating *inter alia* that Appellant was employed by US Foods from October 1, 2001 to November 2, 2005; that while employed with US Foods Appellant reported for work as scheduled and always responded to company direction in a professional manner; and Appellant “left” the company in November 2005 because Appellant “could not longer perform the duties of a delivery driver” (US Foods 03/09/2006 Correspondence, ROA); and

G) That on November 15, 2012 Appellant received electronic correspondence from Commission Agent Eugenia Hollmon which stated in part, “According to our records this case [WCC Case No. 0506205] has never had a hearing of any kind.” (Commission Correspondence dated 11/15/2012). McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996) (holding “Failure to object when the evidence is offered constitutes a waiver of the right to have the issue considered on appeal.”). Baggott v. Southern Music, Inc., 330 S.C. 1, 5, 496 S.E.2d 852, 854 (1998) (“Substantial evidence is evidence which, considering the record as a whole, would [not] allow reasonable minds to reach the conclusion that the administrative agency reached to justify its action.”). Lyles v. Quantum Chem. Co. (Emery), 315 S.C. 440, 434 S.E.2d 292 (Ct. App. 1993)(holding in reviewing a decision of Workers' Compensation Commission, Court of Appeals will not set aside its findings unless they are not supported by substantial evidence or they are controlled by error of law).

**1. Whether the Court should reject all arguments advanced by Respondent in defense of the validity of the Agreement; Unlawful Termination of Temporary Compensation Payments and affirmance of the Circuit Court Order on appeal for lack of subject matter jurisdiction.**

On appeal, the Commission's findings and legal conclusions are reviewed *de novo*. Grant v. Grant Textiles, 372 S.C. 196, 200-201, 641 S.E.2d 869, 871 (2007)(Workers Compensation Commission's legal conclusions are reviewed *de novo*). Furthermore, the Commission has a statutory duty to make a finding of fact for all "essential factual issues", which would include the statutory duty of making a finding of fact regarding Appellant's payment and receipt of temporary compensation payments by US Foods; including when the temporary compensation payments began; when temporary compensation payments ended; and providing the controlling authority utilized under which said temporary compensation payments were terminated. Airco, Inc., supra. S.C. Workers' Compensation Practice Manual, § 9.03 (2000)("Some of the...issues that must be addressed by fact and law are: 1. Jurisdiction...7. Dates of temporary disability (total/partial), maximum medical healing, ability to return to work").

If the Commission fails to make statutory findings of facts regarding all essential factual issues contained within the Act, the Commission's award/order must be remanded to the Commission for further proceedings. Fox v. Newberry County Mem'l Hosp., 319 S.C. 278, 280, 461 S.E.2d 392, 394 (1995)(holding "The duty to determine facts is placed solely on the commission. The court reviewing the commission's decision has no authority to determine factual issues but must remand the matter to the commission for further proceedings."). 73A C.J.S. Public Administrative Law and Procedure §144, 104, 110, 156 S.E.2d at 648 (1983)("Where the requirements as to administrative findings are contained in statutes [§ 42-9-260(F); Reg. 67-505(A); Reg. 67-506(D) & (E)], the findings must comply therewith...awards

without such specific findings do not comply with the requirements of the [workers' compensation] act and are illegal"). Shealy v. Algernon Blair, Inc., 250 S.C. 106, 109, 156 S.E.2d 646, 648 (1967). Aristizabal v. I. J. Woodside-Division of Dan River, Inc., 268 S.C. 366, 370-71, 234 S.E.2d 21, 23 (1977)(holding "if a material fact is contested, the [Appellate Panel] must make a specific, express finding on it."); Brayboy v. Clark Heating Co., Inc., 306 S.C. 56, 58-59, 409 S.E.2d 767, 768 (1991)(holding the findings of fact of the Appellate Panel must be sufficiently detailed to enable the reviewing court to determine (1) whether the law has been properly applied to those findings and (2) whether the findings are supported by the evidence.); Heater of Seabrook, Inc., v. Public Serv. Comm'n, 332 S.C., 20, 503 S.E.2d 739 (1998)(findings of fact must be sufficiently detailed to enable reviewing court to determine whether the findings are supported by the evidence and whether the law has been properly applied to those findings); Able Communications, Inc. v. South Carolina Public Serv. Comm'n, 290 S.C. 409, 351 S.E.2d 151 (1986) (implicit findings of fact are insufficient). Id.

**I. Wrongful Termination of TTC/TTD Payments**

A review of Respondents' Brief indicates while Respondents' do not deny the validity of their own WCC Form 18 it filed with the Commission establishing that Respondents paid temporary compensation payments to Appellant for 212 consecutive days, including after the expiration of the one-hundred-fifty-day-period after Appellant's May 5, 2005 Notice to Respondents regarding the May 5, 2005 accident/injury (ROA), Respondents' rely upon McCreery v. Presbyterian Church, (Sup. Ct. 1990); Singleton (1960); Atkins v. Charleston Shipbuilding & Drydock Co., (1945); and Lloyd v. AT&T Nassau Metals Corp., (Ct. App. 1989)(Respondents' Brief, p. 22-23) for the proposition that entitled TTD/TTC compensation payments can be lawfully suspended/terminated via Settlement Agreement, even when the

circumstances and conditions set forth in § 42-9-260(F); Regs. 67-505(A) and 506(D) & (E) are present, is misplaced and categorically without merit based on several pertinent factors.

First, a review of the Agreement (ROA) and the Appellate Panel's July 17, 2013 Order (ROA) confirms that no administrative findings or conclusions were ever made as to the period that Appellant was paid temporary compensation payments by Respondent; whether temporary payments were paid after the expiration of the one-hundred-fifty-day-period; whether temporary compensation payments were lawfully suspended/terminated; the statutory authority relied upon by the Commission establishing temporary compensation payments were lawfully suspended or terminated; of whether Appellant was able to return to duty without restrictions, respective of WCC Case No. 0506205, which was required, pursuant to Respondents' WCC Form 18, dated 12/01/2005; 73A C.J.S. Public Administrative Law and Procedure; Fox; Shealy; and S.C. Workers' Compensation Practice Manual, § 9.03. Id. WCC Form 18, ROA. Appellate Panel Order, ROA. Agreement, ROA.

Second, a review of McCreery, Singleton, Atkins, and Lloyd confirms that neither this Court nor the Supreme Court made an express ruling that entitled TTC/TTD compensation payments, when the circumstances and conditions set forth in § 42-9-260(F); Regs. 67-505(A); and 67-506(D) & (E) are present, can lawfully be suspended or terminated via Settlement Agreement without the Commission's or Employer's prior compliance with the same. Id.

Third, the controlling authorities respective of the Commission's and Employer's mandatory duty to comply with § 42-9-260(F) and Reg. 67-506(D) & (E) of the Act are Martin v. Rapid Plumbing, Opinion No. 4114 (Ct. App. 2006) (holding TTC compensation payments were wrongfully terminated and "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 Susan Davis v. UniHealth Post Acute Care, Appellate Case No. 2011-197634, Opinion No. 5098 (Filed March 13, 2013)(holding “The commission simply imposed this necessary consequence, which continues until the commission allows UniHealth to terminate compensation. *See* S.C. Code Ann. § 42-9-260(F) (Supp. 2012) (requiring the commission to adopt regulations for terminating compensation that “provide for an evidentiary hearing and commission approval prior to termination”). (Emphasis added). *Id.* WCC Form 18, ROA.

Fourth, under the rules of statutory construction and interpretation, if this Court accepts Respondents’ contentions that an injured employee’s entitled § 42-9-260(F); Regs. 67-505(A) and 506(D) rights to entitled TTC/TTD compensation payments can be lawfully suspended, terminated, resolved or waived via agreement, then § 42-9-260(F); Regs. 67-505(A) and 506(D) & (E) would no longer be harmonious, have no meaning, force, and effect under the Act. *Id.* The employer’s representative would need only to *unilaterally* suspend and/or terminate entitled TTC/TTD compensation payments; wait until the injured worker and/or his family incurred “harsh” and “incongruous” circumstances, and then “offer” to “settle” or “resolve” the workers’ compensation claim, including entitled TTC/TTD compensation payments, by way of settlement agreement, which was not the intent or purpose of the Legislature at the time it enacted § 42-9-260(F) or the Commission at the time it promulgated Regs. 67-505(A) or 67-506 (D) & (E). *Id.* Nexsen v. Ward, 96S.C. 313, 80 S.E. 599 (1914)(“[E]very word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction.”). Hitachi Data Sys., 309 S.C. at 178, 420 S.E.2d at 846 (citations omitted) (“The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose.”). Laurens Cnty. Sch. Dists. 55 & 56 v. Cox, 308 S.C. 171, 174, 417 S.E.2d 560, 561 (1992)(“The true guide to statutory construction is not the phraseology of an isolated section or

provision, but the language of the statute as a whole considered in the light of its manifest purpose. In applying the rule of strict construction the courts may not give to particular words significance clearly repugnant to the meaning of the statute as a whole, or destructive of its obvious intent.").

Fifth, under the rules of statutory construction and interpretation, this Court must reject Respondents' contentions because neither § 42-9-260(F) nor Regs. 67-505(A) and 506(D) & (E) expressly provides or allows the Commission and an Employer the authority to unilaterally depart from compliance of the above provisions, via settlement agreement, and this court lacks authority to expand or limit a statute's scope and is precluded from rewriting the statute and injecting matters into it which are not in the legislature's language where the language of the statute, § 42-9-260(F), is clear and explicit. *Id.* City of Camden v. Brassell, 326 S.C. at 561, 486 S.E.2d at 495 (Ct. App. 1997)("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). Shelley Constr. Co., 287 S.C. at 28, 29, 336 S.E.2d at 491 ("We are not at liberty, under the guise of construction, to alter the plain language of [a] statute by adding words which the Legislature saw fit not to include...Our duty is to apply the statute according to its own terms.").

Finally, while there are more factors Appellant could advance with holding authorities to support this Court's rejection of Respondents' erroneous argument that when entitled TTC/TTD compensation payments fall under the control of § 42-9-260(F) and corresponding Regs. 67-505(A) and 506 (D) & (E) that neither the Commission nor the Employer is lawfully required to comply with the same so long as the parties resolve entitled TTC/TTD compensation payments via settlement agreement, Appellant contends the above referenced arguments and settled authorities sufficiently sustains Appellant's contention that; 1) Respondents' unlawfully

terminated entitled TTC/TTD benefits in noncompliance with Regs. 67-505(A) and 506(D) & (E) of the Act; 2) the Commission failed to comply with Legislative mandate pursuant to § 42-9-260(F); and 3) Appellant could not waive, agree, give consent or resolve entitled TTC/TTD compensation payments, pursuant to the verified WCC Form 18 dated 12/01/2005 and the Medical Report dated 10/27/2005 (establishing the circumstances and provisions were present under § 42-9-260(F) and Regs. 67-505(A) and 67-506(D)) via settlement agreement. Id.

Next, Respondents' reliance upon Town of Mt. Pleasant v. Roberts, (2011) for the proposition that "Under Appellant's reasoning, the only settlement agreements that could resolve a claim completely are those entered into within the first 150 days of TTD payments" is misplaced, misguided, and patently erroneous. Respondents' Brief, p. 26. Specifically, at no time were Respondents ever precluded or restrained, by Commission Order; Court Order; or otherwise, from terminating/suspending temporary compensation payments to Appellant *prior* to the expiration of the first-one-hundred-fifty-day-period after Appellant's notice of injury to Respondents on May 5, 2005. WCC Form 12A dated 05/21/2005.

In other words, if Respondents' would have terminated temporary compensation payments to Appellant at any time **prior to October 3, 2005**, then § 42-9-260(F); Regs. 67-505(A) and 506(D) & (E) of the Act would *have never become actionable and controlling in the instant workers' compensation claim*; Respondents' would have never been required to seek permission from the Commission to suspend or terminate TTC/TTD compensation payments (Reg. 67-506(E)); Appellant would not have a *continued entitlement* to temporary total compensation payments (Reg. 67-505(A) & 506 (D)); and the Commission would not have a continuing obligation, pursuant to § 42-9-260(F), to *convene an evidentiary stop payment hearing and grant US Foods permission* to terminate temporary compensation payments. Id.

However, that did not happen. Respondents' own verified WCC Form 18 dated 12/01/2005 (ROA), which was stamped received by the Commission on 12/05/2005, confirms that Respondents paid temporary compensation to Appellant **from May 06, 2005 to December 04, 2005**, for approximately **212 consecutive days, including the first-one-hundred-fifty-day-period after Appellant's notice of injury**, wherein Respondents have no one to blame for failing to comply with Regs. 67- 505(A) and 506(D) & (E) of the Act, or the period of time Respondents *voluntarily chose* to pay temporary compensation payments to Appellant, but themselves<sup>1</sup>. Id.

## **II. Lack of Subject Matter Jurisdiction**

The subject matter jurisdiction of a court is fundamental. Subject matter jurisdiction is a question of law for decision by the court and includes findings of fact which relate to jurisdiction. Lake v. Reeder Constr. Co., 330 S.C. 242, 247, 498 S.E.2d 650, 653 (Ct. App. 1998). Appellant raised several issues attacking the Commission's jurisdiction at the time it approved the Agreement. Appellant's Initial Brief.

With regards to Appellant's receipt of temporary compensation payments after the expiration of the one-hundred-fifty-period (as provided in detail above) after Appellant's notice of injury and the circumstances and conditions in the instant workers' compensation claim as set forth in § 42-9-260(F); Regs. 67-505(A) and 506 (D) & (E), being present (WCC Form 12A; WCC Form 18; 10/27/2005 Medical Report; ROA), Appellant lacks the requisite authority or power to waive, agree, or give consent to the Commission to depart from its Legislatively-

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<sup>1</sup> While Respondents do not deny the validity of the WCC Form 18 (ROA), Appellant previously provided both Respondents and the Commission, true copies of every compensation payment receipt between May 2005 and Dec. 2005 confirming the accuracy of the WCC Form 18, which on request, can be provided for review by this Court.

mandated obligation to conduct an evidentiary stop payment hearing and issue an order granting Respondents permission to suspend/terminate temporary compensation payments pursuant to § 42-9-260(F); and Appellant lacks the requisite authority or power to waive, agree, or give consent to the Respondents' to depart from performing their mandatory obligations to continue paying temporary compensation until Respondents' file a WCC Form 21 with the Commission (and Appellant) seeking and obtaining permission from the Commission to terminate or suspend temporary compensation payments to Appellant in accordance with Regs. 67-505(A) and 506(D) & (E), **prior** to the parties' entrance into and subsequent Commission approval of the Agreement. Id. Agreement, ROA. Carter v. Associated Petroleum Carriers, 235 S.C. 80, 110 S.E. (2d) 8 (1959)(Industrial Commission cannot acquire jurisdiction by estoppel, **agreement**, **waiver**, or conduct)(Emphasis added). State v. Funderburk, 259 S.C. 256, 261, 191 S.E.2d 520, 522 (1972)(holding the action of a court, regarding a matter as to which it has no jurisdiction, is void). Wigfall v. Tideland Util., Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003)(holding because workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, we must strictly construe such statutes, leaving it the legislature to amend and define any ambiguities). Brown v. State, 343 S.C. 342, 346, 540 S.E.2d 846, 84849 (2001)(holding consent does not confer jurisdiction).

As it specifically relates to Appellant's contention that the Commission lacked jurisdiction at the time it approved the Agreement (ROA) because the Respondents' and Commission failed to comply with the terms of the Agreement, and in particular, failed to file with the Commission "full and complete medical reports" with the Commission and the Commission's prerequisite failure to "duly consider" the medical reports prior to approval of the agreement, as well as Respondents failure to comply with S.C. Code Reg. 67-1301(B) in terms

of failing to file with the Commission Appellant's final permanent impairment rating, Respondents' reliance upon *repealed* S.C. Code Ann. § 42-3-230(2006) and cited authorities advanced is misplaced and should be rejected by the Court based on several pertinent factors.

As an initial matter, contrary to Respondents proposition that "In reality, Appellant cannot "prove" what was in the Commission file as of January 2006 and/or that Respondents failed to submit any necessary medical reports to the Commission" (Respondents' Brief, p. 20), Appellant has sufficiently established what was contained within the Commission's file as of 12/07/2012 pursuant to the Commission's compliance with Appellant's Freedom of Information Act (FOIA) Request, wherein the Commission provided the full contents of Commission Case File No. 0506205 as of 12/07/2012 (ROA), which included all contents in the file as of January 2006 at the time the Commission approved the agreement. Specifically, when the Commission, via Executive Director Gary M. Canon, satisfied Appellant's FOIA Request electronically, he stated,

*Attached the documents your requested. Two Form 27's and a document containing copies of the documents in your case file. Please advise if you would like us to mail you copies via the US postal Service. Please contact our office if we may be of further assistance.*

Id. Contents of Commission Case File No. 0506205 as of 12/07/2012. ROA. Commission Agent Director Canon never advised that documents from Case File No. 0506205 were lost or destroyed. Id.

Further, Respondents failed to cite any substantial evidentiary support, either from their own Commission-stamped file copies or from the Commission, advising the parties that documents contained in Commission File No. 0506205 have been lost, damaged or destroyed or providing Commission-stamped copies establishing that the Medical Reports were on file at any time prior to January 5, 2006. Respondents' Brief. ROA. Moreover, a review of the Electronic

Correspondence from Commission Agent Eugenia Hollmon makes no reference or mention that records contained by the Commission respective of Case No. 0506205 had been lost, damaged, or destroyed. Correspondence from Commission Agent Hollmon dated 11/15/2012 ("According to our records this case has never had a hearing of any kind."), ROA.

Finally, although the undersigned Appellant is not an attorney, the undersigned is informed and aware that in order to ensure verification of documents filed with an agency, tribunal, court, etc., that it is generally known to retain personal stamped copies of all documents filed with the same to have the ability to verify compliance if required to do so. In this instance, Respondents' fail to advance a single piece of evidence to demonstrate Respondents' compliance with the terms and conditions of the Act and the Agreement the parties entered into prior to Commission approval of the same on January 5, 2006. Respondents' Brief. Commission Copy of Case File No. 0506205 as of 12/07/2005. Agreement. Correspondence from Commission Agent Hollmon. ROA.

Thus, Appellant contends the Court should agree with Appellant and reject Respondents' reliance upon *repealed* § 42-3-230(2006) and Respondents' conclusory contention that Appellant failed to establish that Respondents' and Commission failed to comply with the terms of the Agreement, or Reg. 67-1301(B), by failing to file full and complete copies of Appellant's medical reports and the Medical report containing the final impairment rating with the Commission and for the Commission's required review and consideration prior to approving the agreement, as unsubstantiated. *Id.* 100A C.J.S. Workers' Compensation, § 1029 (2013) ("Because a fact must be proved with substantial evidence in a workers' compensation proceeding, a rebuttable presumption must be met with substantial evidence."). Wigfall v. Tideland Util., Inc.

Next, Respondents' reliance upon Skinner v. Westinghouse Elec. Corp.; Reese v. CCI Constr. Co.; Gallagher v. Evert; Conner v. City of Forest Acres; and Mears v. Mears for the proposition that even if Respondents' failed to comply with the terms and conditions of the Agreement and Reg. 1301(B) (which Respondents' does not deny, but does not concede), Appellant's time period to "appeal" these issues has expired (Respondents' Brief, p. 19-20), is misplaced.

Specifically, Appellant is not *appealing* the Agreement; Appellant has alleged that the Commission lacked jurisdiction at the time it approved the agreement because the Commission failed to perform its mandatory obligation pursuant to the terms of the agreement, of reviewing and considering Appellant's medical reports prior to approval of the agreement, and Respondents' failure to comply with the terms of the agreement, by failing to file with the Commission, Appellant's medical reports with the Commission as required pursuant to the terms of the Agreement. Appellant's Initial Brief. Agreement. ROA.

Appellant has the legal right to challenge the jurisdiction of the Commission, or lack thereof, at the time it approved the Agreement, after the agreement was approved and executed, and in the first instance before an appellate court. Carter v. Associated Petroleum Carriers, 235 S.C. 80, 110 S.E. (2d) 8 (1959) (Industrial Commission cannot acquire jurisdiction by estoppel, agreement, waiver, or **conduct**). Hart v. Thomasville Motors, 244 N.C. 84, 92 S.E.2d 673 (1956)(holding "a decision of the Industrial Commission is only conclusive when it is acting within its jurisdiction... This proceeding is remanded to the Superior Court so that it can remand it to the Industrial Commission with direction to enter an order setting aside its approval of the agreements and its award for the payment of compensation and medical benefits and dismissing the proceeding on the ground of lack of jurisdiction."). Spoone v. Newsome Chevrolet-Buick,

309 S.C. 432, 434, 424 S.E.2d 489, 490 (1992)(“Because South Carolina adopted large portions of the North Carolina Workers’ Compensation legislation, we rely on North Carolina precedent in Workers’ Compensation cases.”).

In this instance, while the Commission certainly has jurisdiction to consider and approve settlement agreements entered into by an employer and employee, the controlling authority regarding Appellant’s substantiated issue is Carter. Specifically, there are two material terms respective of the agreement which remains **open: I)** Neither party ensured that “full and complete medical reports” were on file with the South Carolina Workers’ Compensation Commission”<sup>2</sup>; and **II)** the Commission never “duly considered” Appellant’s medical reports *prior* to approving the Settlement Agreement. Agreement, ROA. Case File No. 0506205 as of 12/07/2012, ROA.

Here, the Commission’s **conduct** is at issue, as it had a *prerequisite obligation*, pursuant to the plain language of the Agreement entered into by the parties, to review Appellant’s medical reports **prior** to approving the agreement, which the Commission failed to perform. Agreement, ROA. Copy of Commission’s Case File as of 12/07/2012, ROA. Because the record confirms that Appellant’s medical reports were never filed with the Commission at any time prior to January 5, 2006, the Commission acted in excess of its jurisdiction at the time it approved the agreement without prior review and consideration of Appellant’s medical reports, wherein the Agreement must be deemed void. Carter, supra (Industrial Commission cannot acquire jurisdiction by estoppel, agreement, waiver, or **conduct**)(Emphasis added). State v. Funderburk, 259 S.C. 256, 261, 191 S.E.2d 520, 522 (1972)(holding the action of a court, regarding a matter

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<sup>2</sup> Because the agreement did not state with specificity *which party* was required to ensure that Appellant’s compensation medical reports were filed with the Commission, the failure to satisfy this material term was by both parties.

as to which it has no jurisdiction, is void).

To put it in another way, there was no mandatory requirement that the Agreement entered into by the parties contain language requiring that Appellant's medical reports be filed with the Commission and that the Commission duly considers said medical reports prior to approval of the agreement. § 42-9-10, 20. Furthermore, nothing precluded the Commission from issuing a notice to the parties requesting that Appellant's medical reports be *immediately* filed with the Commission for *mandatory* review by the Commission. However, because those material terms are expressly stated within the agreement, the failure of the medical reports to be filed with the Commission, and specifically, the failure of the Commission to review the medical reports prior to approving the agreement is *fatal* and a *deathblow* to the continued enforceability of the agreement. Carter. State v. Funderburk. Agreement. File No. 0506205 as of 12/07/2012. ROA.

With regards to Appellant's contention that the Commission lacked jurisdiction at the time it approved the agreement because the agreement fail to resolve the issue of Appellant's 'permanent lifting restrictions' assigned by Dr. Tamadon which Appellant contends are compensable and causally related to Appellant's back injury sustained in the May 5, 2005 accident/injury (Medical Report, ROA), Respondents' proposition that "a lifting restriction does not constitute an "injury" as contemplated the Act is proper; however, the record, and specifically, the October 27, 2005 medical report confirms that Appellant sustained injuries to his back causally related to the May 5, 2005 admitted work-related accident/injury and the "permanent lifting restrictions" should have been expressly stated in the agreement pursuant to 73A C.J.S. Public Administrative Law and Procedure; Fox; Shealy; and S.C. Workers' Compensation Practice Manual, § 9.03. Id. WCC Form 12A. Medical Report. Agreement. ROA.

Still further, the "reason" Appellant's 'permanent lifting restrictions' were not addressed

in the Agreement was because US Foods terminated Appellant's employment on grounds of 'permanent lifting restrictions' which Appellant contends was not only retaliatory in nature, no "meeting of the minds" ever took place between the parties regarding the permanent lifting restrictions. Employee Status Notice. ROA.

Furthermore, Respondents' rebuttal fails to provide or cite a single independent intervening incident involving Appellant either prior to or subsequent the May 5, 2005 accident/injury which would rationally explain *how* Appellant sustained the 'permanent lifting restrictions' if not causally related to the May 5, 2005 admitted work-related injury. Respondents' Brief. Therefore, the permanent lifting restrictions assigned to Appellant by US Foods'-selected-authorized-health-care-provider-Dr. Tamadon, *which Respondents' never challenged Dr. Tamadon's medical findings*, must be deemed by the Court as 'compensable' and causally related to the May 5, 2005 admitted work-related injury. Mullinax v. Winn-Dixie Stores, Inc., 318 S.C. 431, 458 S.E.2d 76 (Ct.App.1995)(holding "Our courts have clearly held the natural consequences flowing from a compensable injury, absent an independent intervening cause, are compensable."). Whitfield v. Daniel Constr. Co., 226 S.C. 37, 83 S.E.2d 460 (1954).

Still further, as it directly relates to Appellant's assigned permanent lifting restrictions by Dr. Tamadon, it is well settled that "While an impairment rating may not rest on "surmise, speculation or conjecture . . . it is not necessary that the percentage of disability or loss of use be shown with mathematical exactness." Roper v. Kimbrell's of Greenville, 231 S.C. 453, 461, 99 S.E.2d 52, 57 (1957). Because Appellant's permanent lifting restrictions are compensable as it is causally related to the May 5, 2005 accident/injury and was not resolved in the agreement, as there was never a 'meeting of the minds' between the parties, the Commission lacked jurisdiction at the time it approved the agreement and said agreement should be deemed null and

void. Carter. State v. Funderburk. Medical Report. Agreement. ROA.

Finally, because Appellant was terminated by US Foods, for cause, and specifically, for ‘permanent lifting restrictions’, on November 2, 2005 (ROA), and because Appellant has never recovered from the compensable permanent lifting restrictions, not only did the Commission lack jurisdiction at the time it approved the agreement because US Foods terminated the prerequisite “employment relationship” which divested the Commission of jurisdiction of the claim or the parties at the time it approved the agreement more than two (2) months later on January 5, 2006; US Foods has never established that Appellant was able to return to duty without restrictions, which is *fatal* and a *deathblow* to the continued enforceability of the agreement. Carter. State v. Funderburk. Agreement. Employee Status Notice. Medical Report. ROA. Glass v. Dow Chem. Co., 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997)(“The existence of an employment relationship is a jurisdictional issue for purposes of workers' compensation benefits reviewable under the preponderance of the evidence standard of review”). (Emphasis added). Vines v. Champion Bldg. Prods., 315 S.C. 13, 16, 431 S.E.2d 585, 586 (1993). Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 454 S.E.2d 320 (1996)(holding because Employee Grayson was released from the treating physician with work restrictions, there was in reality *no* evidence that Grayson's period of temporary total disability ever ended prior to his firing...because Grayson's benefits *were never properly terminated in accordance with Regulation 67-504* Grayson was entitled to have his temporary benefits reinstated).

Appellant has met his burden in terms of establishing that the Commission lacked subject matter jurisdiction at the time it approved the agreement, based on several holding grounds, wherein said agreement should be deemed null and void by the Court. State v. Funderburk.

Pursuant to section 1-23-380(5) (Supp. 2013) of the APA, the findings of facts and

conclusions of law as advanced by the Appellate Panel (ROA) and the Circuit Court (ROA), in terms of finding and concluding that the Agreement (ROA) was approved pursuant to Reg. 67-801 and § 42-9-390 when neither Reg. 67-801 nor § 42-9-390 were ever referenced or cited in the Agreement (ROA); the Appellate Panel failing to expressly make factual findings that Appellant received temporary compensation payments for 212 days, including the first 150 days; to include the Commission failing to convene the mandatory evidentiary stop payment hearing and issuing a proper order on the evidentiary hearing granting Respondent permission to suspend or terminate temporary compensation payments in this matter, in violation of § 42-9-260(F), as required, pursuant to the Supreme Court's holding in Caughman v. Columbia YMCA, 212 S.C. 337, 47 S.E.2d 788 (1948), upon a review of the record as whole, and specifically, reviewing Respondents' WCC Form 18 dated 12/01/2005 (ROA); Case File No. 0506205 as of 12/07/2012 (ROA); Commission Agent Hollmon Correspondence (ROA); and the Medical Report (ROA), constitutes an "error of law" and an "abuse of discretion", which renders both the Appellate Panel's Order (ROA) the Circuit Court's Order (ROA), and the Agreement (ROA) "clearly erroneous". 73A C.J.S. Public Administrative Law and Procedure; Shealy, supra. Corbin v. Kohler Co., 351 S.C. 613, 617, 571 S.E.2d 92, 94-95 (Ct. App. 2002) (citing Gibson v. Spartanburg Sch. Dist. No. 3, 338 S.C. 510, 526 S.E.2d 725 (Ct. App. 2000); Hamilton v. Bob Bennett Ford, 336 S.C. 72, 518 S.E.2d 599 (Ct. App. 1999)).

Appellant contends reversal or modification is warranted in this matter because the undersigned was substantially prejudiced by the above-referenced errors of law and discretionary abuses by the Commission and the Circuit Court, because if the Commission would have made the required findings of fact that Appellant received temporary compensation payments for more than the first 150 days after notice of injury; Respondents' never complied with Regs. 67-505(A)

and 506(D) & (E); as well as the fact that the Commission never granted Respondents permission to terminate temporary total compensation payments in accordance with Legislative mandate per § 42-9-260(F), then the Commission would have had no choice but to reverse the single commissioner's Order (ROA); deem the Agreement (ROA) void; and Order Respondents to reinstate and immediately release unlawfully withheld TTC/TTD compensation payments to Appellant. Stephen v. Avins Constr. Co., 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996)(To warrant reversal, an appealing party must demonstrate not only error in the court's ruling, but also resulting prejudice.).

**2. Whether Respondents' contentions the Circuit Court acted properly should be rejected for lack of subject matter jurisdiction.**

Respondents' contentions in defense that the Circuit Court had proper jurisdiction when it issued the seven sua sponte administrative orders in excess of ten (10) days after issuance of the September 25, 2014 order issued by the former presiding circuit judge; that the Circuit Court had proper jurisdiction to sua sponte vacate the September 25, 2014 order of the former presiding circuit judge; that the Circuit Court had jurisdiction to make findings of facts on appeal from the Commission; and the Circuit had jurisdiction at the time it convened the appellate hearing without affording the parties a minimum of thirty days prior notice are without merit and must be rejected by the court.

**I. Section 1-23-320(A)(Supp. 2008) Compliance**

A review of Respondent Brief as to defending the Circuit's departure from compliance with § 1-23-320(A) of APA (Respondents' Brief, p. 37) in terms of convening the appellate on less than the mandated 30 day notice after the circuit court sua sponte set the hearing is not convincing and should be rejected by the Court as meritless. This action, currently before this Court and previously before the circuit court, is an appeal from the Appellate Panel of the

Commission, wherein the APA governs 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).

Further, Respondents' attempt to separate the March 27, 2015 hearing convened as being a hearing before the Circuit Court and not being an "administrative hearing" relying upon Al-Shabazz, 338 S.C. at 374, 527, S.E.2d at 752 is misplaced. There is no stated exception wherein an appellate court considering a decision from the workers' compensation commission, may deviate from the APA. Lark. In fact, when the APA is in dispute with the Act it is well settled that the APA controls and the Act becomes silent. Pringle v. Builders Transp., 298 S.C. 494, 496, 381 S.E.2d 731, 732 (1989). Williams v. S.C. Dept. of Wildlife, 295 S.C. 98, 367 S.E.2d 418 (1987). Further, Respondents' allege the controlling authority the Circuit Court utilized when sua sponte scheduling the hearing was Rule 6(d) and Rule 40(h), SCRCP, while relying upon Plyler v. Burns; however this must be rejected by the Court. Plyler was not an appeal from a decision by the Appellate Panel, and therefore inapposite to the instant appeal. Plyler.

Further, a review of the March 5 sua sponte Administrative Order setting the *Administrative* hearing confirms the Circuit Court failed to cite *any* authority to support setting the hearing. March 5 Order, ROA. If there is a conflict regarding the provisions of the Act and the APA, the APA controls, which would include affording the parties a minimum of not less than 30 days prior notice as established in the APA. § 1-23-320(A). Lark. Pringle.

Finally, Appellant contends a clear constitutional procedural due process claim is present based on the failure of the Circuit Court to comply with § 1-23-320(A) in terms of failing to afford the parties 30 days prior notice, wherein the "notice" and "right to be heard" prongs under the Due Process Clause of the Fifth and/or Fourteenth Amendment of the U.S. Constitution and Article I, § 22 of the S.C. Constitution were violated, wherein Appellant has been "substantially

prejudiced” where the Circuit Court, sitting as an appellate court, deprived Appellant of reasonable notice (less than 30 days as mandated by the General Assembly under § 1-23-320(A)) and the opportunity to be heard in a meaningful way at the March 27, 2015 Hearing. *Id.* Transcript, ROA. Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). S.C. Dep't of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002) (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)). Ross v. Med. Univ. of South Carolina, 328 S.C. 51, 492 S.E.2d 62 (1993).

## II. Fact Finding in Workers' Compensation Appeals by Appellate Court

Respondents' Brief specifically alleging the Circuits Court's finding “**that the Commission approved the settlement agreement pursuant to Section 42-9-390**” was never disputed below by Appellant (Respondents' Brief, p. 35) is patently erroneous. A review of the Appellate Panel's Decision and Order dated July 17, 2013 confirms that the Appellate Panel made Conclusions of Law citing “S.C. Reg. 67-801” and “S.C. Code Reg. 67-801(E)”. Appellate Panel Order, ROA. The Appellate Panel *never* made an express conclusion that the Agreement approved by the Commission was approved under § 42-9-390. *Id.*

Furthermore, the Appellate Panel's “Conclusion of Law” relying upon Reg. 67-801; and the Circuit Court's improper factual finding that the Agreement was approved under § 42-9-390 are both “clearly erroneous” and ‘errors of law’ and constitutes an “abuse of discretion”, by both the Appellate Panel and the Circuit Court, because both findings and conclusions of law reached by the Appellate Panel and the Circuit Court “was without reasonable factual support”, upon review of the Agreement, which makes no reference, mention, or citation to either § 42-9-390 or Reg. 67-801 as the controlling jurisdictional grounds the Agreement was filed under by the parties or approved by the Commission. *Id.* Agreement. Appellate Panel Order. Circuit Court

Order. ROA. Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citation omitted)("An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law."). S.C. Code Ann § 1-23-380(A)(6) (Supp. 2013).

Appellant cannot dispute a finding or conclusion made by the Appellate Panel that does not exist. Moreover, Respondents fail to cite a single authority wherein an appellate court reviewing the decision of a the Appellate Panel may make findings of fact without 'reversing' the decision of the Appellate Panel on errors of law, wherein there are "numerous" well settled authorities holding that neither this Court nor the Circuit Court may make findings of facts regarding workers' compensation claims; and that the Appellate Panel of the Commission, not even the single commissioner, is the ultimate fact finder in workers' compensation claims. Stone v. Traylor Bros., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004); also see Frame v. Resort Servs. Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004); see also City of Greer v. Humble, 402 S.C. 609, 618, 742 S.E.2d 15, 20 (Ct. App. 2013) (quoting Rogers v. State, 358 S.C. 266, 270, 594 S.E.2d 278, 280 (Ct. App. 2004))("the circuit court, sitting in its appellate capacity, may not engage in fact finding.").

Finally, the abuse of discretion by the Appellate Panel and Circuit Court substantially prejudiced the rights afforded to Appellant, because the Appellate Panel and/or the Circuit should have *vacated* the Agreement for lack of subject matter jurisdiction based on the substantial evidentiary grounds cited and relied upon above and contained within Appellant's Initial Brief which warrants reversal in the instant appeal. Id. Stephen.

**III. Compliance with directives from this Court and September 25, 2014 Order by Successor Circuit Court.**

Respondents' Brief alleging that the successor Circuit Court complied with the April 24, 2014 Remand Order of this Court (ROA) and September 25, 2014 Order issued by the former presiding Circuit Judge when it sua sponte ordered a de novo hearing to reconsider Respondents' original Motion to Dismiss filed in Appellate Case No. 2013-CP-32-0127, is patently erroneous and without merit. As an initial matter, neither the April 24, 2014 Remand Order nor the Sept. 25, 2014 Circuit Order directed or ordered the successor Circuit Court to convene a de novo hearing regarding Respondents' *original Motion to Dismiss*. Remand Order. Sept. 25 Order. ROA. S.C. Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 250, 551 S.E.2d 274, 279 (Ct. App. 2001)("[A] trial court has no authority to exceed the mandate of the appellate court on remand."). Prince v. Beaufort Mem'l Hosp., 392 S.C. 599, 605, 709 S.E.2d 122, 125 (Ct. App. 2011) (citation omitted)("The mandate of the appellate court is jurisdictional. The trial court has a duty to follow the appellate court's directions.").

Second, Respondents' contention that the Circuit Court heard and determined Appellant's contentions is inaccurate. Specifically, a review of the March 5 sua sponte scheduling Order expressly stated that if Appellant did not appear at the March 27 hearing that the Circuit Court would deem Appellant's claims abandoned and denied. Mar. 5 Order, ROA. Further, a review of the both the Transcript from the March 27 proceeding as well as the Circuit Court Order on appeal confirms the Circuit Court denied all Appellant's claims and contentions as abandoned because Appellant did not appear at the hearing. Transcript. Circuit Court Order. ROA.

Finally, where the successor Circuit Court failed to comply with the directives of this Court and the Sept. 25, 2014 Order in terms of sua sponte ordering a de novo hearing to reconsider Respondents motion to dismiss, on March 5, 2015, more than five months after issuance of the Sept. 25, 2014 Order, the successor Circuit Court's Mar 5 Order violated (1) Rule

59(d), SCRCF; and (2) the directives of both this Court's April 24, 2014 Remand Order and the Sept. 25, 2014 Order of the former presiding Circuit Judge in noncompliance with settled law set forth in S.C. Dep't of Soc. Servs. v. Basnight and Prince v. Beaufort Mem'l Hosp., wherein the successor Circuit Court abused its discretion and the July 17, 2015 Order on appeal is "clearly erroneous". Id. Appellant's substantial rights was prejudiced because the Circuit Court failed to comply with the Directives of both this Court and the former presiding Circuit Judge's Order because Respondents' *original* (13-CP-32-01272) Motion to Dismiss should have never been reconsidered *sua sponte* by the successor Circuit Court, and applicable to both Appellate cases, wherein remand to the Circuit Court based on the substantial evidentiary grounds relied upon by Appellant wherein remand or reversal is the proper course of action. Stephen, *supra*.

#### CONCLUSION

Based on the foregoing<sup>3</sup>, Respondents' contentions and defenses should be rejected and the Court should grant the relief as stated in Appellant's Initial Brief as a matter of law.

Respectfully submitted,

By: 

Alexander Guice  
U.S. African American Citizen  
Honorable Disabled Veteran  
Post Office Box 13281  
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(813) 562-0547  
Appellant, pro se

November 14, 2016

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<sup>3</sup> Pursuant to the Supreme Court Order dated January 28, 2016 (Appellate Case No. 2015-002219) amending Rule 11(a), SCRCF, this brief is not required to be verified or accompanied by affidavit.

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  
WCC Case No. 0506205

Alexander Guice, Employee, Appellant,

v.

US Food Service, 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; an Initial Reply Brief; and a proof of service, by depositing the same in the US Postal Service, via Certified Mail, and addressed to: **Erin L. Hantske, Esq., P.O. Box 650007 Mt. Pleasant, SC 29465** on this 14<sup>th</sup> day of November, 2016.



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November 14, 2016

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SC Court of Appeals

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November 14, 2016

Via Certified Mail

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

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**SC Court of Appeals**

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

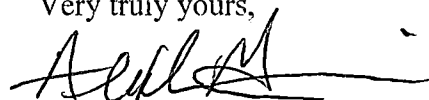
Dear Ms. Kitchings:

Please find enclosed with this cover letter an original and a copy of an Initial Reply Brief and a Proof of Service in regards to the above referenced matter. 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 certified 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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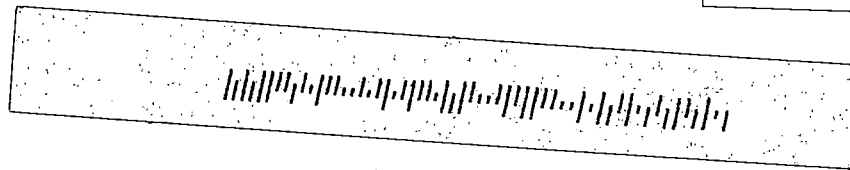
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