

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

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William P. Keesley, Successor Circuit Court Judge

FEB 21 2017

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

W.C.C. Case No. 0506205

Alexander Guice, Employee, Appellant,

v.

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

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS APPEAL FOR
WANT OF SUBJECT MATTER JURISDICTION**

Pursuant to Rule 240(c)(2), SCACR, ALEXANDER GUICE, the undersigned *pro se* Appellant, the Employee, Claimant, and Injured Worker (hereinafter, "Undersigned" or "Claimant", or "Employee" or "Injured Worker" or "Appellant"), presents this Memorandum in *propria persona* wherein pleadings filed by *pro se* litigants are to be considered without regard to technicalities. Conley v. Gibson, 355 U.S. 41 at 48 (U.S. Sup. Ct. 1957). In support of the Motion to dismiss, Appellant would allege as follows:

STATEMENT IN SUPPORT OF MOTION TO DISMISS

Appellant contends this Court lacks subject matter jurisdiction over this action, and the parties, on grounds that the S.C. Workers' Compensation Commission ("Commission") lacked subject matter jurisdiction of the above-referenced action and parties, when the parties allegedly entered into the so-called Settlement Agreement and Release ("Agreement") on 12/22/2005, and the Commission's subsequent Order and Award ("Order and Award") issued on 01/05/2006, approving the agreement, based on numerous jurisdictional grounds, as addressed below.

Further, the effect of the 12/22/2005 agreement being deemed void and unenforceable, and the subsequent 01/05/2006 Order and Award approving the so-called agreement being deemed void for lack of subject matter jurisdiction, is that the all subsequent proceedings relying upon the void 01/05/2006 Commission Order and Award, and specifically, before the Single Commissioner; the Commission Appellate Panel; and the Circuit Court, must all be regarded as invalid, which not only divests this Court of subject matter jurisdiction, the instant Workers' Compensation Claim No. 0506205 ("W.C.C. # 0506205") *must* be rendered "active" and in its previous "pre-agreement" posture as of December 21, 2005, the day before the alleged entrance into the agreement by the undersigned Appellant; US Foodservice, Inc., hereinafter "Employer" or "US Foods", Appellant's former Employer; and Mac Risk Management, Inc., d/b/a Ace American Insurance Company, (hereinafter "Carrier" or "Employer"), the Carrier for US Foods.

STATEMENT IN SUPPORT OF THE RIGHT OF A PARTY TO FILE A MOTION TO DISMISS TO CHALLENGE THIS COURT'S JURISDICTION AND STAYING PROCEEDINGS UNTIL DISMISSAL MOTION IS DECIDED

Rule 240(a), SCACR, provides in relevant part: "**(a) Applicability.** This Rule governs all motions or petitions filed in the appellate court, including but not limited to... **motions to remand or dismiss....**" (Emphasis added). *Id.* Furthermore, it is well settled that issues

involving subject matter jurisdiction may be raised at any time, including for the first time to an appellate court. Weinhauer v. State, 334 S.C. 327, 513 S.E.2d 840 (1999) (stating issues involving subject matter jurisdiction may be raised at anytime, including for the first time on appeal); State v. Brown, 351 S.C. 522, 570 S.E.2d 559 (Ct.App.2002) (stating issues related to subject matter jurisdiction can be raised at anytime, can be raised for the first time on appeal, and can be raised sua sponte by the Court).

The appropriate mechanism to challenge a court's jurisdiction is by filing a motion to dismiss. Criterion Co. v. State, 458 So. 2d. 22 (Fla.1st DCA1984) (holding "Challenge to court's jurisdiction is raised by motion to dismiss"); *also see* Ross v. Richland County, 270 S.C. 100, 103, 240 S.E.2d 649, 650 (S.C. Sup. Ct. 1978) (quoting Fox v. Board of Regents of Univ. of Mich., 134 N.W.2d 146, 148 (Mich. Sup. Ct.1965)) (holding if "a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void"). Finally, Rule 240(b), SCACR ("...A motion to dismiss an appeal...**shall**, however, automatically stay the time limits for perfecting the appeal until the motion is decided") (Emphasis added), establishes that this Court should stay all proceedings until the Motion to Dismiss has been decided. Id.

STANDARD OF REVIEW

"The question of subject matter jurisdiction is a question of law for the court." Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009); Bargesser v. Coleman Co., 230 S.C. 562, 96 S.E.2d 825 (S.C. Sup. Ct. 1957). "We are free to decide questions of law with no deference to the [circuit] court." Catawba Indian Tribe of S.C. v. State of South Carolina, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007). "Consequently, our review is not bound by the Commission's findings of fact on which jurisdiction is based." Canady v.

Charleston County Sch. Dist., 265 S.C. 21, 25, 216 S.E.2d 755, 757 (1975). A reviewing court has both the power and duty to review the entire record, find jurisdictional facts without regard to conclusions of the Commission on the issue, and decide the jurisdictional question in accord with the preponderance of evidence¹. Id. See also Kirksey v. Assurance Tire Co., 314 S.C. at 45, 443 S.E.2d at 804 (1994) (holding this court can find facts in accordance with the preponderance of evidence when determining a jurisdictional question in a Workers' Compensation case); Sanders v. Litchfield Country Club, 297 S.C. 339, 342, 377 S.E.2d 111, 113 (Ct. App. 1989) (deciding where a jurisdictional issue is raised, this court must review record and make its own determination whether the preponderance of evidence supports the Commission's factual findings bearing on that issue). Workers' compensation statutes are construed liberally in favor of coverage, and South Carolina's lucid policy is to resolve jurisdictional doubts in favor of the inclusion of employees within workers' compensation coverage. Mauldin v. Dyna-Color/Jack Rabbit, 308 S.C. 18, 416 S.E.2d 639 (1992). A decision of the Industrial Commission is only conclusive when it is acting within its jurisdiction. Voehl v. Indemnity Ins. Co., 288 U.S. 162, 53 S.Ct. 380, 77 L.E.d. 676, 87 A.L.R. 245 (U.S. Sup. Ct. 1933) (quoting Hart v. Thomasville Motors, 244 N.C. 84, 92 S.E.2d 673 (N.C. Sup. Ct. 1956)). In determining whether to dismiss based on lack of jurisdiction, the court may consider "affidavits and other evidence outside the pleadings..." without converting the motion into one for summary judgment. Baird v. Charleston

¹ Black's Law Dictionary, 2nd Ed., defines 'preponderance of evidence' as "An evidence presented that provides more convincement than the pre-existing evidence presented in court. As such, the jury makes its verdict in the favor of the party which has a preponderance of evidence". Id. Further, Wex Legal Dictionary defines 'preponderance of evidence' as "A requirement that more than 50% of the evidence points to something. This is the burden of proof in a civil trial." Id. The concept of "preponderance of the evidence" can be visualized as a scale representing the burden of proof, with the totality of evidence presented by each side resting on the respective trays on either side of the scale. If the scale tips ever so slightly to one side or the other, the weightier side will prevail. If the scale does not tip toward the side of the party bearing the burden of proof, that party cannot prevail.

County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

ARGUMENT

I. The 12/22/2005 Settlement Agreement and Release and subsequent 01/05/2006 Commission Order and Award must be deemed null and void *ab initio* and must be vacated for want of subject matter and personal jurisdiction, because the agreement and Commission order and award contravened S.C. Code Ann. § 42-9-260(B)(1) (Supp. 1996).

A. Facts of W.C.C. Case No. 9506205.

A review of the contents of the Commission's copy of W.C.C. File No. 0506205 as of 12/07/2012, and specifically, Employer's W.C.C. Form 12A (Redacted) Respondents filed with the Commission dated 05/21/2005 (and confirmed processed by the Commission on 05/24/2005) (Att. A18, A19), and Appellant's Sworn Affidavit, establishes *inter alia* that;

- 1) In October 2001 Appellant/Claimant, Alexander Guice, had a legal SC residence of 2996 Gaston Drive Loris, SC 29569;
- 2) US Foodservice, Inc. (US Foods) business address is 120 Longs Pond Road Lexington, SC 29072;
- 3) Appellant was hired by US Foods on 10/01/2001;
- 4) Appellant was hired by US Foods for the position of Delivery Driver;
- 5) On 05/05/2005 Appellant was involved in a traffic accident and sustained injuries while in the course of and in the performance of Appellant's official duties with US Foods;
- 6) Appellant reported the 05/05/2005 accident/injury to US Foods on 05/05/2005;
- 7) US Foods' Insurance Carrier was Ace (American Insurance Company);
- 8) The Trading Partner for Ace was Mac Risk Management; and
- 9) The mutually agreed upon Average Weekly Wage (AWW) at the time of the 05/05/2005 work-related accident/injury was \$1,161.00.

Att. A18, A19. Sworn Affidavit.

Further, a review of material evidence not included within the contents of the

Commission's copy of W.C.C. File No. 0506205 as of 12/07/2012, and specifically, the Medical Report dated 10/27/2005 issued by the Employer-selected treating physician, and specifically, Alan Tamadon, MD ("Dr. Tamadon") (Att. H); and the correspondence dated 10/28/2005 from Cathy Dayton, RN, the Employer-selected Case Manager for W.C.C. Claim No. 0506205 ("RN Dayton") (Att. I), establishes *inter alia* that;

- 10) On 10/27/2005 Dr. Tamadon opined that Appellant/Claimant had reached maximum medical improvement (MMI) with respect to Appellant/Claimant's sustained work-related accident/injury which occurred on 05/05/2005;
- 11) Dr. Tamadon assigned a five (5) percent (%) impairment rating to the whole person of Appellant/Claimant relative to the work-related accident/injury which occurred on 05/05/2005;
- 12) Dr. Tamadon assigned "permanent lifting restrictions" to Appellant/Claimant relative to the 05/05/2005 work-related injury, and specifically, no lifting greater than (>) twenty-five (25) pounds occasionally; and no lifting greater than (>) ten (10) pounds frequently or constantly;
- 13) Dr. Tamadon Reported to US Foods that Appellant/Claimant could no longer perform the hired duties of a delivery driver relative to the work-related accident/injury which occurred on 05/05/2005;
- 14) Dr. Tamadon agreed to continue providing Appellant with prescribed medications of "Hydrocodone" and "Flexiril" for Appellant's back pain relative to the work-related accident/injury which occurred on 05/05/2005; and
- 15) Appellant's Light duty job assignment with US Foods was set to expire on 11/06/2005 relative to the work-related accident/injury which occurred on 05/05/2005.

Att. H, I. Sworn Affidavit.

Still further, a review of material evidence included within the contents of the Commission's copy of W.C.C. File No. 0506205 as of 12/07/2012, and specifically, the Employer-filed WCC Form 18 (Periodic Report), dated 12/01/2005 (stamped received by the Commission on 12/05/2005) (Att. A13), by "*Employer Representative*" Larry Grant; material evidence not included within Commission's File No. 0506205, and in particular, true copies of

every temporary compensation payment receipt reflecting all compensatory payments Appellant received from Respondents' relative to the sustained work-related accident /injury which occurred on 05/05/2005 (Att. J); and Appellant's Sworn Affidavit, establishes *inter alia* that;

- 16) Appellant received continuous temporary compensation payments, from the Employer, from **05/06/2005**, the day after Appellant reported the 05/05/2005 work-related accident/injury to US Foods, until **12/17/2005**, for approximately **226** days, including "After the one-hundred-fifty-day period has expired" pursuant to S.C. Code Reg. 67-505(A)(Supp. 1997); S.C. Code Reg. 67-506 (D)(Supp. 1997); and S.C. Code Ann. § 42-9-260(F)(Supp. 1996);
- 17) When, on 10/27/2005, treating physician Dr. Tamadon opined MMI; assigned the 5% impairment rating to the whole person of Appellant/Claimant; assigned 'permanent lifting restrictions' to Appellant/Claimant; and reported to US Foods that Appellant/Claimant could no longer perform the duties of a delivery driver (Att. H), Appellant/Claimant had received temporary compensation payments from US Foods for approximately 175 days, including "After the one-hundred-fifty-day period has expired";
- 18) Appellant/Claimant never received any temporary compensation payments from US Foods for the entitled periods from **11/03/2005** to **11/06/2005**; and
- 19) Appellant/Claimant received temporary compensation payments from US Foods for the entitled periods from **11/07/2005** to **12/17/2005** at the **reduced** weekly rate of **\$592.56** instead of the mutually agreed upon average weekly wage (AWW) rate of **\$1,161.00** (Att. A18, A19).

Sworn Affidavit. Att. A13. Att. J.

Moreover, a review of material evidence not included within the contents of the Commission's copy of W.C.C. File No. 0506205 as of 12/07/2012, and specifically, Appellant's Sworn Affidavit; US Foods' "Employee Status Notice" dated 11/02/2005 (Att. K); and Correspondence from the Employer dated 03/09/2006 (Att. L), establishes *inter alia* that;

- 20) On 11/02/2005 US Foods fired the injured Appellant/Claimant on the grounds of 'permanent lifting restrictions' and 'no position available' ("**Termination of Employment- Released from Doctor with permanent lifting restrictions not comparable with job duties**") (Att. K);
- 21) While employed with US Foods, Appellant "**reported to work as scheduled and always responded to any company direction in a professional manner**" (Att.

L);

- 22) Prior to firing the injured Appellant/Claimant, US Foods never offered suitable employment to accommodate the injured Appellant/Claimant's work-related permanent lifting restrictions; and
- 23) US Foods fired Appellant during the period of continued disability (*i.e.* permanent lifting restrictions, Att. H, I); and Appellant never refused any offers of reemployment from US Foods.

Sworn Affidavit. Att. K & L.

Further still, a review of the contents of Commission File No. 0506205 (to include the alleged agreement) (Att. A); additional material evidence, including; E-Mail Correspondence dated 11/14/2012 from Commission Agent Eugenia Hollmon (Att. G); Appellant's Sworn Affidavit; and a true redacted copy of Appellant's Social Security Administration (SSA) Statement dated 01/20/2017 (Att. M), establishes *inter alia* that;

- 24) Respondents' never a filed a WCC Form 21 with the Commission requesting permission, from the Commission, to terminate or suspend entitled TTD/TTC payments to Appellant in accordance with Reg. 67-505(D); or Reg. 67-506(E);
- 25) Appellant was neither informed nor aware that he had a legal right to entitled TTD/TTC payments pursuant to Reg. 67-505(A); Reg. 67-506(D); or § 42-9-260(B)(1) & (F) at the time Appellant signed the alleged agreement;
- 26) Appellant never waived his entitled right to an evidentiary § 42-9-260(F) (Form 21) stop payment hearing;
- 27) The Commission never convened a § 42-9-260(F) (Form 21) stop payment hearing with the above-entitled parties;
- 28) The Commission never issued an order on the § 42-9-260(F)(Form 21) hearing granting Respondents' permission to terminate or suspend entitled TTD/TTC payments to Appellant/Claimant, at any time, and specifically, prior to the parties' alleged entrance into the so-called agreement or subsequent 01/05/2006 Commission order and award;
- 29) Respondents' withheld the last three (3) compensation payments received by Appellant from **after** the Employer fired Appellant on **11/02/2005** until **after** Appellant entered into the so-called agreement on **12/22/2005** (Att. J);

- 30) Appellant's 10/27/2005 treating physician-assigned 'permanent lifting restrictions' relative to the work-related accident/injury which occurred on 05/05/2005 (Att. H) have never resolved; and
- 31) Appellant has and remains to be unemployed and unable to return to employment to perform the duties of a delivery driver relative to the 05/05/2005 work-related injury, to date, since US Foods fired the injured Appellant/Claimant on 11/02/2005.

Att. A. Sworn Affidavit. SSA Statement dated 01/20/2017. Att. M. E-Mail Correspondence from Commission Agent Hollmon dated 11/15/2012. Att. G.

- B. The so-called 12/22/2005 agreement and 01/05/2006 Commission order and award contravened S.C. Code Ann. § 42-9-260(B)(1) & (F) (Supp. 1996); S.C. Code Reg. § 67-505(A) (Supp. 1997); and R. 67-506 (D)-(E) (Supp. 1997).

Section 42-1-120 of the South Carolina Code (1985), defines disability as the "incapacity because of injury to earn the wages which an employee was receiving at the time of the injury in the same or some other employment." *Id.* "Disability is presumed to continue until the employee returns to work." 25A S.C. Code Regs. 67-502(B)(2) (Supp. 2005); 25A S.C. Code Regs. 67-506(A) (Supp. 2005).

The 10/27/2005 Medical Report (Att. H), *which was never filed with the Commission* (Att. A), establishes that treating physician Dr. Tamadon assigned Appellant/Claimant with permanent restrictions, and specifically, "no lifting > 25 pounds occasionally" and "No lifting > 10 pounds frequently or constantly"; and reported to US Foods that Appellant could no longer perform the duties of the hired position of delivery driver. Att. H.

Consideration of Appellant's Sworn Affidavit; and the contents of the Commission's copy of WCC File No. 0506205 as of 12/07/2012, establishes that neither party ever challenged the 10/27/2005 medical findings of Dr. Tamadon; and the permanent restrictions have never resolved, wherein the permanent restrictions assigned to Appellant, by US Foods-selected

treating physician Dr. Tamadon, which are causal to the work-related accident/injury sustained by Appellant on 05/05/2005, is the “law of the case”. Att. A. Att. H. Sworn Affidavit. *See Brading v. County of Georgetown*, 327 S.C. 107, 113, 490 S.E.2d 4, 7 (1997) (holding that an unchallenged ruling, right or wrong, is the law of the case).

Section 42-9-260(B)(1) of the South Carolina Code (Supp. 1996), provides that once temporary disability payments have commenced, these benefits “may be terminated or suspended immediately at any time within the one hundred fifty days 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**” (Emphasis added). S.C. Code Ann. § 42-9-260(B)(1) (Supp. 1996).

Nowhere in section 42-9-260(B)(1) of the Act does it afford an Employer to forego its mandatory obligations to continue payment of temporary disability payments to an injured employee who “does not remain at work for a minimum of fifteen days”, by way of settlement agreement and release of the parties, and neither the Commission; the lower court, nor this Court has jurisdiction to expand or restrict the operation of section 42-9-260(B)(1) in workers’ compensation proceedings governed by same. *Id.* Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994) (holding if a statute’s terms are clear and unambiguous on their face, there is no room for statutory construction and courts must apply the statute according to its literal meaning.); *see also* Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 81 (2000) (holding if a statute’s language is plain, unambiguous, and conveys a clear meaning “the rules of statutory interpretation are not needed and the court has no right to impose another meaning.”); *also see* Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (holding the words of a statute or regulation “must be given their

plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation.”). Att. A18, H, I, K, L, M. Sworn Affidavit.

Further, Section 42-9-260(F) of the South Carolina Code (Supp. 1996), provides in its entirety:

“(F) 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.”

Id. (Emphasis added).

Nowhere in section 42-9-260(F) of the Act does it afford an Employer to forego its mandatory obligations to continue payment of temporary disability payments to an injured employee if “the circumstances identified in Section 42-9-260(B)(1) or (B)(2) are present”, by way of settlement agreement and release of the parties, and neither the Commission; the lower court, nor this Court has jurisdiction to expand or restrict the operation of section 42-9-260(F) in workers’ compensation proceedings governed by same, in light of Carolina Power & Light Co.; Hodges; and Hitachi Data Sys. Corp. Id. Att. A18, A13, H, J.

Furthermore, a review of the 10/28/2005 correspondence from Employer-selected Case Manager, Cathy Dayton, RN (Att. I); the Employer-filed Form 12A (Att. 18, 19); and Appellant’s Sworn Affidavit establishes that Appellant’s *Light Duty* period of employment with US Foods was set to expire on 11/06/2005, six months after temporary compensation payments to Appellant began. Id.

However, on 11/02/2005, US Foods fired Appellant on the grounds of “Permanent lifting restrictions” and “No position available”, which constitutes *termination of employment during*

period of disability, on grounds that; **a**) the grounds utilized to terminate Appellant by US Foods are not the mandatory affirmative defenses set forth in section 41-1-80 (Supp. 2005) (“...willful or habitual tardiness or absence from work; being disorderly or intoxicated while at work; destruction of any of the employer’s property; failure to meet established employer work standards; malingering; embezzlement or larceny of the employer’s property; violating specific written company policy for which the action is a stated remedy of the violation”) (Att. K);

b) the “permanent lifting restrictions” are in fact and law causally related to the admitted work-related traffic accident/injury which occurred on 05/05/2005 (Att. A18-A19, H, I, K, Sworn Affidavit); **c**) the Employer characterized Appellant’s conduct while employed as being “always...professional” (Att. L); **d**) US Foods has never provided an explanation, and specifically, an ‘independent intervening cause’ as to how Appellant incurred the permanent lifting restrictions, if not causal to the injuries sustained in the admitted and compensable work-related accident/injury which occurred on 05/05/2005 (Att. K);

e) US Foods has never challenged or contested Dr. Tamadon’s 10/27/2005 assignment of permanent lifting restrictions to Appellant; and **f**) US Foods voluntarily continued payment of workers’ compensation benefits to Appellant after US *fired* Appellant (Att. A13, J), wherein Appellant's termination and resulting incapacity to earn wages was due to his work-related injury and not a violation of company policy. *Id.* See Whitfield v. Daniel Constr. Co., 226 S.C. 37, 83 S.E.2d 460 (S.C. Sup. Ct. 1954) (holding “Our courts have clearly held the natural consequences flowing from a compensable injury, absent an independent intervening cause, are compensable.”).

Moreover, a review of Appellant’s Sworn Affidavit and SSA Statement (Att. M), confirms Appellant has and remains unemployed and unable to obtain gainful employment since

US Foods fired Appellant on 11/02/2005. Id.

It is well settled South Carolina, federal and other states' jurisprudence that parties in workers' compensation proceedings are free to devise a settlement agreement in any manner that **does not** contravene public policy or the law, and a contract or agreement that is devised in a manner which contravenes public policy or the law is void. Poston by Poston v. Barnes, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987) (quoting Hudson v. Lancaster Convalescent Center, Appellate Case No. 2011-194189, Opinion No. 27348 (Sup. Ct. 2014) (holding "that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law."); *also see* 73 Corpus Juris Secundum (C.J.S.), Public Administrative Bodies and Procedure, § 59 (2005) ("They [officers or agencies] **are without power to act contrary to the provisions of the law** or the clear legislative intendment, or to exceed the authority conferred on them by statute.") (Emphasis added); *see also* Harvey v. Care Initiatives, Inc., 634 N.W.2d 681, 684, n.4 (IA. Sup. Ct. 2001) ("a contract in violation [contravention] of public policy is void"); *see also* Valley v. Northern Fire & Marine Ins. Co., 254 U.S. 348, 41 S.Ct. 116 (U.S. Sup. Ct. 1920) (quoting Elliott v. Lessee of Piersol, 26 U.S. 328 (U.S. Sup. Ct. 1828) ("Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, **and certainly in contravention of it**, their judgments and orders are **regarded as nullities.**) (Emphasis added); *also see* Hart and Voehl ("A decision by the Industrial Commission is only conclusive when it is acting within its jurisdiction").

Moreover, it is well settled law that regulations approved by the General Assembly have the force of law. Goodman v. City of Columbia, 318 S.C. 488, 490, 458 S.E.2d 531, 532 (S.C. Sup. Ct. 1995) (citing Faile v. S.C. Employment Security Commission, 267 S.C. 536, 230, S.E.2d 219 (S.C. Sup. Ct. 1976) (holding "Regulations authorized by the legislature have the

force of law.”)).

The Commission, a State Administrative Agency, must comply with and enforce its own regulations. Triska, 292 S.C. at 194, 355 S.E.2d at 533 (holding that an agency must follow its own regulations); *also see* City of Myrtle Beach v. Tourism Expenditure Review Comm., 407 S.C. 298, 304, 755 S.E.2d 425, 428 (2014) (“The wisdom or folly of the Act is not for us to judge; we **must** enforce the Act as written.”) (Emphasis added); *see also* Wigfall v. Tideland Utilities, Inc., Op. No. 25628 (S.C. Sup. Ct. 2003) (Shearouse Adv. Sh. No. 14 at pg.10) (because Act provides compensatory system in derogation of common law rights, Court **must** strictly construe the statute and leave it to the General Assembly to amend and define any ambiguities) (Emphasis added).

Here, the alleged agreement signed by Appellant *only* on 12/22/2005 (Att. B), and subsequent approval, by way of Order and Award, by the Commission on 01/05/2006, with the consent of “Employer Representative” Walter H. Barefoot, Esq. (“Attorney Barefoot”), also on 01/05/2006 (Att. A4), contravened the law, and specifically, section 42-9-260(B)(1) & (F), and corresponding Commission-promulgated regulations 67-505(A) and R. 67-506 (D)-(E), based on several pertinent factors.

First, section 42-9-260(B)(1) governs the manner with which US Foods lawfully can terminate temporary total disability payments to Appellant, **not an agreement**, based on the facts of W.C.C. Case No. 0506205 (*supra*), wherein Appellant has been assigned permanent restrictions by Dr. Tamadon prohibiting Appellant’s ability to perform the hired duties of a delivery driver (Att. H); the permanent lifting restrictions have never resolved, wherein the period of Appellant’s disability remains current (Sworn Affidavit; Att. H); US Foods fired Appellant on grounds of the expiration of the light duty job assignment period and the

compensable permanent lifting restrictions (I, K, L, M); US Foods have never offered re-employment to Appellant (Sworn Affidavit); and to date, Appellant has been unable to obtain gainful employment (Sworn Affidavit; Att. M), wherein W.C.C. Case No. 0506205 **has never** been in jurisdictional posture for settlement agreement pursuant to the operation and control of section 42-9-260(B)(1) pursuant to Wigfall and City of Myrtle Beach. Id.

Second, because Appellant received temporary compensation payments for approximately **226 days**, and specifically, **after expiration of the one-hundred-fifty-day-period** (Att. A13, J) after Appellant's notice of the admitted work-related accident/injury to US Foods, on 05/05/2005, as well as the 10/27/2005 medical report (Att. H), where Dr. Tamadon assigned permanent restrictions and reported to US Foods Appellant could no longer perform the duties of delivery driver, Respondents were **bound** by, and termination or suspension of entitled TTD payments to Appellant in W.C.C. Case No. 0506205 were **governed** by, section 42-9-260(F), and corresponding R.67-505(A) and R. 67-506(D)-(E) of the Act; however, Respondents' never filed the requisite Form 21 with the Commission which was required by law (Att. A), pursuant to Wigfall and City of Myrtle Beach. Id.

Third, even if Respondents would have filed a Form 21 with the Commission seeking permission to terminate or suspend entitled TTD benefit payments to Appellant in accordance with section 42-9-260(F) and corresponding R. 67-506(E), which they have never filed (Att. A), in light of the circumstances and conditions set forth in section 42-9-260(B)(1) being present in W.C.C. Case No. 0506205 (*Supra*), the Commission would have been bound, pursuant to section 42-9-260(B)(1); Reg. 67-506(D); and Triska, to **deny** Respondents' Form 21 stop payment request *without a hearing ever being convened*. Id.

Fourth, when determining the intent of the General Assembly in terms of interpreting

and construing the plain unambiguous language contained within section 42-9-260(B)(1) & (F), it would lead to an “absurd result” to conclude that the Legislature intended to allow and afford an Employer the ability to forego their bound unambiguous duties to pay TTD benefits to an injured employee unable to return to duty due to permanent work-related impairments, by way of settlement agreement, when particularly, as here; **1**) Appellant remains unemployed and unable to obtain gainful employment (Sworn Affidavit, Att. M); and **2**) there is no citation to specific code of authority (*i.e.* § 42-17-10) on the *face* of the alleged agreement *vesting* proper subject matter jurisdiction upon the Commission to even consider approving a settlement agreement and release between the parties *in the first instance*. *Id.* Att. B. Att. A4. Lancaster Cnty. Bar Ass’n v. S.C. Comm’n on Indigent Defense, 380 S.C. 219, 222, 670 S.E.2d 371, 373 (2008) (“In construing a statute, this Court will reject an interpretation when such an interpretation leads to an absurd result that could not have been intended by the legislature.”).

Fifth, neither Appellant nor Respondents, by way of their conduct in the alleged agreement (Att. B), could waive, consent, agree or confer subject matter jurisdiction upon the Commission to consider approving a settlement agreement and release, when section 42-9-260(B)(1) & (F) governs instant W.C.C. Case No. 0506205 (*Supra*); and the Commission could not acquire jurisdiction to consider and approve the alleged agreement, because the parties lack the requisite power to invest subject matter upon the Commission over that which the Legislature’s enactment of section 42-9-260(B)(1) & (F) **has not** provided the parties or the Commission with such **authority** to control, pursuant to 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); California v. LaRue, 409 U.S. 109 (U.S. Sup. Ct. 1972) (holding consent of the parties regarding subject matter jurisdiction is ‘irrelevant’); Hart,

supra (“...it is a universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel.”); and State v. Langford, 223 S.C. 20, 26, 73 S.E.2d 854, 857 (S.C. Sup. Ct. 1953) (quoting City of Florence v. Berry, 61 S.C. 237, 240, 39 S.E. 389, 390 (S.C. Sup. Ct. 1901) (holding “[T]he question of [subject matter] jurisdiction cannot be waived by **any act or admission of the parties**, for the **very obvious reason** that **the parties have no power** to invest **any** tribunal with jurisdiction of a subject over which the law has not conferred jurisdiction upon such a tribunal. Hence the common expression, ‘Consent cannot confer jurisdiction.’”) (Emphasis added).

Sixth, the alleged agreement, as drafted by the “Employer’s Representative” (Att. B, Att. A4), is factually inaccurate, ambiguous, and omits relevant facts of W.C.C. Case No. 0506205. Specifically, the alleged agreement makes no reference to, and is *facially* ambiguous to the fact(s) that; **a)** Appellant was assigned permanent restrictions by treating physician Dr. Tamadon in addition to the five percent impairment rating (Att. H); **b)** the Employer fired Appellant for permanent lifting restrictions and no position available on 11/02/2005 (Att. K, L, Sworn Affidavit); **c)** Appellant had received temporary compensation payments after the expiration of the one-hundred-fifty-day-period after Appellant’s notice of injury (Att. A13, J); **d)** Appellant was unemployed at the time Appellant signed the alleged agreement (Sworn Affidavit); **e)** the permanent restrictions had not resolved (Sworn Affidavit, Att. H, I); and **f)** section 42-9-260(B)(1) & (F) governed the manner with which Respondents’ could terminate, suspend or reduce entitled TTD/TTC payments to Appellant, wherein this Court should construe the language of the alleged agreement in Appellant’s favor as being *invalid* and *ambiguous*, as Respondents are responsible for the ambiguities and inaccuracies contained within the

agreement. *Id. Supra. See Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981) (quoting 17A C.J.S. Contracts § 324) (“Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage.”).

Accordingly, the alleged agreement entered into by the parties, and in fact, signed by Appellant and Appellant’s then counsel **only** on 12/22/2005 (Att. B) (which Appellant addresses in more detail below), must be deemed *null* and *void* for contravening section 42-9-260(B)(1) & (F) of the Act, as well as Commission promulgated R. 67-505(A) and R. 67-506 (D)-(E), in light of Poston, 294 S.C. at 263-64, 363 S.E.2d at 889-90 (“We are cognizant that litigants are free to devise a settlement agreement in any manner that does not contravene public policy or the law. In fact, this Court encourages such compromise agreements because they avoid costly litigation and delay to an injured party. However, these settlement agreements must be carefully scrutinized in order to determine their efficiency and impact upon the **integrity of the judicial process**”) (Emphasis added); Harvey; and Ecclesiastes Prod. Ministries v. Outparcel Assocs., 374 S.C. 483, 493, 649 S.E.2d 494, 499 (Ct. App. 2007). *Id. Supra.*

Finally, because the alleged agreement contravened section 42-9-260(B)(1) & (F), *et al*, as well as Appellant’s legal rights to workers’ compensation benefits secured under the Act, based on the factual evidence presented herein (*Supra*), the Commission’s 01/05/2006 Order and Award approving the alleged agreement (Att. A4) must deemed null and void *ab initio*, for want of subject matter jurisdiction, and, in fact and law, constituting an excess of the Commission’s jurisdiction in approving the alleged agreement, pursuant to Hart; Voehl; Valley; Elliot; Triska;

and by operation of law, as a matter of law. Id.

C. Conclusion (As to Argument I).

Thus, based on the *preponderance of evidence* as submitted herein (*Supra*), which tips the scale of the trier of fact in favor of Appellant that the alleged agreement and Commission Order and Award must be deemed nullities (Att. A4, B), this Court lacks subject matter jurisdiction over the parties and W.C.C. Case No. 0506205, and should grant Appellant's motion to dismiss and remand this matter to the Commission, with a directive to vacate its 01/05/2006 Order and Award approving the null and void agreement, even prior to reaching merits or reversal, for want of subject matter jurisdiction, pursuant to Ross; Hart; and Voehl, by operation of law, as a matter of law. Id. Supra. See Ex parte Hart, 186 S.C. 125, 133, 195 S.E. 253, 256 (S.C. Sup. Ct. 1938) ("It is a universal principle as old as the law, that the proceedings of a Court without jurisdiction are a nullity, and its judgment without effect, either on the person or property.")

II. Appellant contends the alleged "Settlement Agreement and Release" signed by Appellant on 12/22/2005 and subsequent 01/05/2006 Commission Order and Award approving the agreement must be vacated and deemed void for lack of subject matter jurisdiction because the agreement and Commission Order and Award violated Appellant's constitutional rights under the Due Process Clause and the Equal Protection Clause of the United States and South Carolina Constitutions.

It is well settled South Carolina and Federal jurisprudence that "The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." Ogburn-Matthews, 332 S.C. at 562, 505 S.E.2d at 603; *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (U.S. Sup. Ct. 1950); *also see* S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard..."); *see also* U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

Furthermore, with respect to equal protection of law, in Village of Willowbrook v. Olech, the U.S. Sup. Ct. opined: “Our cases have recognized successful equal protection claims brought by a ‘class of one,’ where the [Appellant] alleges that [he] has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” Id. at 528 U.S. 562, 564 (U.S. Sup. Ct. 2000). The USSC’s holding in Olech echoed our Supreme Court’s prior holding in Grant v. S.C. Coastal Council, where it opined: “The sine qua non of an equal protection claim is a showing that similarly situated persons received disparate treatment.” Id. at 319 S.C. 348, 354, 461 S.E.2d 388, 391 (S.C. Sup. Ct. 1995). U.S. Const. amend. XIV, § 1.

Furthermore, this Court, like every other Court in the United States, has a legal obligation to guard and enforce every right secured by Appellant, a U.S. Citizen, pursuant to the U.S. Constitution, as well as the South Carolina Constitution. Mooney v. Holohan, 294 U.S. 103-115, 79 L.Ed. 791 (U.S. Sup. Ct. 1935) (holding “State courts, equally with Federal courts, are under an obligation to guard and enforce every right secured by the Federal Constitution.”). S.C. Const. art. I, § 22. U.S. Const. amend. XIV, § 1. Sworn Affidavit. Redacted Copy of DD Form 214 of Alexander Guice. Att. E. Copy of Birth Certificate of Appellant Alexander Guice (Redacted) (Establishing Appellant is a U.S. Citizen). Att. F.

Moreover, it is well settled law that entitlement to workers’ compensation benefits

constitutes a property interest. Orszula v. Orszula, 292 S.C. 264, 356 S.E. (2d) 114 (S.C. Sup. Ct. 1987) (quoting Last v. MSI Construction Co., Inc., 305 S.C. 349, 409 S.E.2d 334 (S.C. Sup. Ct. 1991)).

Further, waiver is a voluntary and intentional relinquishment or abandonment of a **known** right. Eason v. Eason, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009). To waive a right, the party must have known of the right and known that the right was being abandoned. Id. The determination of whether one's actions constitute waiver is a question of fact. Laser Supply & Servs., Inc. v. Orchard Park Assocs., 382 S.C. 326, 337, 676 S.E.2d 139, 145 (Ct. App. 2009). "Waivers of Constitutional Rights, not only must they be voluntary, they must be knowingly intelligent acts done with sufficient awareness." Brady v. U.S., 397 U.S. 742, 748 (U.S. Sup. Ct. 1970).

A. Establishing violation(s) of Appellant's constitutional rights under the Due Process Clause.

Appellant's constitutional rights under the prongs of "reasonable notice" and the "opportunity to be heard", under the South Carolina and United States Constitutions', respectively, before the Commission and prior to Respondents' termination of Appellant's entitled TTC/TTD workers' compensation benefit payments, were violated, based on several pertinent factors.

First, a review of the record, and specifically, the contents of Commission Case File No. 0506205 as of 12/07/2012 (Att. A), establishes that Respondents **never** filed the requisite Form 21 with the Commission seeking permission to reduce, suspend or terminate Appellant's entitled TTC/TTD benefits, which was required, pursuant to section 42-9-260(F); corresponding Commission Regulation 67-506(E); and the posture of W.C.C. Claim No. 0506205, wherein the circumstances and conditions as set forth in section 42-9-260(B)(1) & (F) and R. 67-506(D) was

present. Id. Att. A13, A18, H, I, J, K, L. Sworn Affidavit.

Second, a review of Appellant's Sworn Affidavit, and the contents of Commission File No. 0506205 (Att. A), establishes that the parties **were not** afforded "notice" that the Commission would be considering suspending or terminating Appellant's entitled TTD/TTC compensation benefits, property secured by Appellant pursuant to section 42-9-260(B)(1) & (F), and circumstances and conditions present in W.C.C. Case. No. 0506205. Id. Sworn Affidavit. Att. A13, A18, H, I, J, K, L. Orszula.

Third, Appellant *never* waived his constitutional and statutory right to an evidentiary TTD/TTC compensation benefit stop payment hearing before the Commission, by way of settlement agreement and release between the parties. Specifically, for Appellant to have "unequivocally" or "expressly" waived his constitutional and section 42-9-260(F) statutory rights to the evidentiary stop payment hearing via settlement agreement, Appellant was required to have *previously* "known"; (i) THAT Appellant had a legal right, pursuant to section 42-9-260(B)(1) & (F), to continued payments of TTD benefits from Respondents', as of 12/22/2005, the date Appellant signed the alleged agreement (Att. B), in the amount of \$1,161.00 per week; (ii) THAT by entering into the agreement, Appellant was waiving his right to an evidentiary hearing before the Commission **as to Appellant's entitled section 42-9-260(B)(1) & (F) property rights to continued TTC/TTD compensatory payments and benefits from Respondents'** in addition to a release of liability as to the five percent impairment rating; and (iii) THAT in entering into the agreement, Appellant agreed to except the sum of \$20,000.00 (of which, Appellant received \$13,333.34 as Attorney Bacon received \$6,666.66 as Attorney's Fees) as **final payment** for the five percent impairment rating to the whole person of Appellant **and final payment of entitled TTC/TTD payments secured by Appellant pursuant to section 42-**

9-260(B)(1) & (F) of the Act; however that **was not** the case here. *Id.* Att. B. Laser Supply & Servs., Inc. Brady.

Specifically, a *facial* examination and inspection of the agreement signed by Appellant (Att. A4, B), confirms that there is **no** language or reference to either Appellant's continued legal right to entitled TTC/TTD compensation payments by the Employer and Carrier; **no** reference or mention to *controlling* section 42-9-260(B)(1) & (F) regarding the authority under which Respondents' are bound to continue making TTC/TTD payments to Appellant; or that Appellant **agreed** to release Respondents' from their obligation to pay entitled TTC/TTD to Appellant for the sum of \$20,000.00. *Id.* Att. A4, B.

Further, a review of Appellant's Sworn Affidavit confirms that;

(1) Appellant stopped receiving entitled TTC/TTD payments from Respondents **after** US Foods fired Appellant on 11/02/2005; (2) Appellant informed Attorney Bacon that Appellant was not receiving any compensation payments from US Foods after US Foods fired Appellant on 11/02/2005; (3) Attorney Bacon took no action on behalf of Appellant to seek the reinstatement of TTC/TTD payments to Appellant; (4) Appellant was neither informed nor aware that Appellant had a continuing legal right to TTC/TTD benefit payments after US Foods fired Appellant on 11/02/2005;

(5) On 12/16/2005 in a telephonic conference between Appellant and Attorney Bacon, Attorney Bacon advised Appellant that Respondents' were offering to settle W.C.C. Claim No. 0506205, and after Appellant advised Attorney Bacon that Appellant was still not receiving any compensation payments from US Foods, Attorney Bacon advised Appellant that if Appellant did not accept the \$20,000.00 settlement offer by Respondents', that Attorney Bacon did not know when Appellant could expect to receive another compensation payment from Respondents' of

any kind; and

(6) on 12/22/2005 when Appellant went to Attorney Bacon's office and signed the agreement, Attorney Bacon never explicitly or implicitly advised Appellant that he had a right to continued TTC/TTD payments by the Employer; that by entering into the agreement that Appellant was waiving his right to an evidentiary stop payment hearing before the Commission; or that by signing the agreement, Appellant was accepting the sum of \$20,000.00 as final payment for the five percent impairment rating to Appellant's whole person AND final payment of entitled TTC/TTD compensatory payments from US Foods. Sworn Affidavit.

Thus, Appellant's entrance into the alleged agreement (Att. B) **did not** constitute an intelligent, intentional and voluntarily known waiver to Appellant's statutory and constitutional right to an evidentiary stop payment hearing before the Commission, pursuant to section 42-9-260(F), for suspension or termination of Appellant's entitled property rights to TTC/TTD benefit payments, from Respondents', via settlement agreement and release between the parties, in light of the evidence proffered above (*supra*); Laser Supply & Servs., Inc.; and Brady. Id.

Fourth, a review of the contents of Commission Case File No. 0506205 (Att. A); Correspondence received by Appellant from Commission Agent Eugenia Hollmon dated 11/15/2012 (Att. G); and Appellant's Sworn Affidavit, confirms that the Commission never convened an evidentiary stop payment hearing between the parties prior to Respondents' termination of entitled section 42-9-260(B)(1) & (F) TTC/TTD benefit payments to Appellant. Id. Att. A. Att. G. Sworn Affidavit.

Fifth, there is no expressed language contained within the *face* of the alleged agreement (Att. A4, B) indicating that the alleged agreement served as **final payment** for Appellant's entitled TTC/TTD disability payments. Id. In fact, the plain language holds otherwise. Id.

Specifically, on page “3” of the agreement (Att. B), which was approved verbatim by way of Order and Award of the Commission (Att. A4), it states:

WHEREAS, without in any way affecting the overall terms of this settlement insofar as the Defendants are concerned, and with the Claimant and the Claimant’s attorney acknowledging that the Defendants make no representations as to the **effect such allocation may have on the Claimant’s receipt of other benefits**, the Claimant and his attorney hereby request this Commission to approve the allocation of the proposed settlement sum of \$20,000.00”

Id. (Emphasis added).

Here, the “**other benefits**” as plainly stated within the alleged agreement (Att. A4, B), certainly refers to Appellant’s entitled TTC/TTD benefit payments, as there is **no language** contained within the agreement wherein the sum of \$20,000.00 served as final payment for entitled section 42-9-260(B)(1) & (F) TTC/TTD benefit payments AND the five percent impairment rating assigned to the whole person of Appellant, wherein this Court should liberally construe the language in the agreement as such that the agreement **did not** serve as final payment for entitled TTC/TTD benefits Respondents’ were required and obligated to pay to Appellant under the Act, because Respondents’ drafted the agreement, and therefore is responsible for the verbiage contained within same, in light of Willoughby and 17A C.J.S. Contracts § 324. Id.

Finally, based on the foregoing, and specifically; **a)** because Respondents’ never filed a Form 21 seeking permission to suspend or terminate Appellant’s entitled TTC/TTD benefit payments (Att. A); **b)** Appellant never waived his constitutional and statutory rights to an evidentiary section 42-9-260(B)(1) & (F) stop payment hearing before the Commission (Sworn Affidavit, Att. A); **c)** the Commission never issued any notice to the parties advising that the Commission was convening an evidentiary stop payment hearing (Att. A);

d) no hearing was ever convened between the parties before the Commission as to the termination or suspension of Appellant’s entitled section 42-9-260(B)(1) & (F) property rights to

TTC/TTD benefit payments prior to the Commission's issuance of its 01/05/2006 Order and Award (Att. A, G, Sworn Affidavit); e) the plain language on the face of the Agreement makes no reference that the agreement served as final payment as to Appellant's entitled section 42-9-260(B)(1) & (F) property rights to TTD/TTC benefit payments; and

f) the plain language of the agreement creates a clear "ambiguity" that the sum of \$20,000.00 served *only* as final payment for the five percent impairment rating AND NOT as final payment for Appellant's entitled section 42-9-260(B)(1) & (F) TTC/TTD payments payable by Respondents, Appellant's fundamental constitutional rights to 'reasonable notice' and the 'opportunity to be heard', prior to termination of Appellant's entitled property, and specifically, Appellant's entitled TTC/TTD benefit payments secured under section 42-9-260(B)(1) & (F) of the Act, pursuant to the Due Process Clause to both the South Carolina and United States Constitutions', respectively, **have been violated**, and even if the agreement and Commission Order and Award does not expressly reflect that the agreement served as final payment for Appellant's entitled TTC/TTD benefit payments, which it does not, due to Respondents' reliance upon the same, this Court must treat both the agreement and the Commission Order and Award as a nullity, pursuant to Webster v. Clanton, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (S.C. Sup. Ct. 1972), and should grant Appellant's motion to dismiss and remand this matter to the Commission, with a directive to vacate its 01/05/2006 Order and Award approving the agreement, even prior to reaching merits or reversal, for want of subject matter jurisdiction and due process violations, pursuant to Ross; Hart; and Voehl, and other holding authorities, by operation of law, as a matter of law. Id. Supra. See Webster (holding "It is a fundamental doctrine of the law that a party whose personal rights are to be affected by a personal judgment **must** have a day in court, or opportunity to be heard, and that without due notice and opportunity

to be heard **a court has no jurisdiction to adjudicate such personal rights**. A judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and **must** be so treated by the courts whenever and for whatever purpose it is presented and relied on”) (Emphasis added); *see also Earle v. McVeigh*, 91 US 503, 23 L Ed 398 (U.S. Sup. Ct. 1875) (“Every person is entitled to an opportunity to be heard in a court of law upon **every question involving his rights or interests, before he is affected by any judicial decision on the question.**”) (Emphasis added); *see also Renaud v. Abbott*, 116 U.S. 277, 29 L.Ed. 629, 6 S.Ct. 1194 (U.S. Sup. Ct. 1886) (“It is a fundamental doctrine of law that a party to be affected by a personal judgment must have his day in court, and an opportunity to be heard.”).

B. Establishing violation of Appellant’s constitutional rights to equal protection of laws under the Equal Protection Clause.

Here, in approving the so-called 12/22/2005 agreement entered into by Appellant *only* by way Commission 01/05/2006 Order and Award (Att. A4), the Commission violated Appellant’s constitutional rights under the Equal Protection Clause pursuant to the 14th Amendment of the U.S. Constitution and the holding authorities of Village of Willowbrook and Grant, in light of Susan Davis v. UniHealth Post Acute Care, 402 S.C. 541, 741, S.E.2d 770 (Ct. App. 2013); Grayson v. Carter Rhoad Furniture, 317 S.C. 306, 310, 454 S.E.2d 320, 322 (1995); and Cranford v. Hutchinson Constr., 399 S.C. 65, 76, 731 S.E.2d 303, 309 (Ct. App. 2012), among other similarly-situated cases. Id.

Specifically, in the above-cited cases, Davis, Grayson and Cranford are all analogous to instant workers’ compensation claim no. 0506205 (Att. A, H, I, J, K), in that; **a)** they (Davis, Grayson and Cranford) were injured in the course and scope of their employment with their respective employers; **b)** their respective employers terminated their employment *during* their periods of disability; **c)** their respective employer representatives’ terminated their temporary

total compensation /disability payments during the period of disability without offering or providing suitable employment to accommodate their incapacities **or** requesting and obtaining permission from the Commission to terminate or suspend entitled TTC/TTD benefit payments; and **d**) in ordering the respective employers' to reinstate and release entitled TTD/TTC benefits to Davis, Grayson and Cranford, the respective Court's relied upon either section 42-9-260 (B)(1), or section 42-9-260(F). Id.

Furthermore, even if the so-called agreement was valid and enforceable, which it is not, Appellant's entrance into the so-called agreement on 12/22/2005 to accept the sum of \$20,000.00 "regardless of whether the Claimant [Appellant] is able to keep any employment whatsoever, or is able to earn any wages any time in the future" (Att. A4, B), where US Foods had *previously* fired Appellant on 11/02/2005 for his permanent restrictions **compensable** disability (Att. H, I, K, L), **contravened** section 42-9-260(B)(1) & (F), and therefore must be deemed null and void. Id. Supra. Poston. Triska. Hart. Voehl.

Thus; **a**) in issuing the Order and Award approving the so-called Agreement on 01/05/2006 (Att. A4), wherein the sum of \$20,000.00 *apparently* served as Appellant's final payment of entitled section 42-9-260(B)(1) & (F) TTD/TTC benefit payments; **b**) while Appellant was **fired** by US Foods for expiration of the light duty period (Att. K, L, Sworn Affidavit, A13);

c) during the period of disability (Att. H, I, Sworn Affidavit); **d**) without the "Employer's Representative" ever seeking proper permission to terminate entitled TTD/TTC payments from the Commission by filing the requisite Form 21 (Att. A); **e**) because the circumstances and conditions set forth in section 42-9-260(B)(1) & (F) were present in W.C.C. Case No. 0506205

(Att. A18, A13, H, I, Sworn Affidavit); **f**) without the Commission ever convening an evidentiary stop payment hearing (Att. A, G, Sworn Affidavit); and

g) without the Commission ever issuing an Order on a stop payment hearing granting Respondents' permission to terminate Appellant's entitled TTC/TTD benefit payments, the Commission subjected Appellant to "disparate" treatment, and, for "no rational basis for the difference in treatment", in comparison to similarly-situated injured employees Davis; Grayson; and Cranford, and in doing so, the Commission violated Appellant's constitutional rights to equal protection of laws under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, wherein said agreement and subsequent 01/05/2006 Commission Order and Award must be vacated and deemed null and void *ab initio*, for lack of subject matter and personal jurisdiction, wherein this Court must dismiss this matter and remand to the Commission, with a directive to vacate the 01/05/2006 order and award, and prior to reaching the merits or reversal, pursuant to Webster; Ross; Ex parte Hart; Triska; Voehl; Hart; Poston; Valley; Elliot; and other holding state and federal authorities, by operation of law, as a matter of law. Id.

III. Appellant contends the alleged "Settlement Agreement and Release" signed by Appellant on 12/22/2005 and subsequent 01/05/2006 Commission Order and Award approving the agreement must be vacated and deemed void for lack of subject matter jurisdiction because the Agreement fails to cite the requisite authority by which the parties vested subject matter jurisdiction upon the Commission to consider and approve the agreement in the first instance.

While the document signed by Appellant and his then attorney of record (Att. B), Attorney Robert G. Bacon, is captioned as a "Settlement Agreement and Release", and in fact, the Commission issued an Order and Award approving the alleged agreement 01/05/2006 (Att. A4), there is no cited or referenced authority, on the *face* of the alleged agreement, vesting subject matter jurisdiction upon the Commission to consider or approved the alleged agreement in the first instance, rendering the agreement a nullity and the Commission's Order and Award

approving the agreement a void judgment *ab initio*. Att. A4, B.

Specifically, while page “3” of the alleged agreement (Att. A4, B) *facially* cites or references “Section 19-1-150” and “Section 42-9-10 and 42-9-20”, none of the aforementioned codes govern or control settlement agreements and releases entered into by parties, and more importantly, **do not** vest the Commission with authority to approve a settlement agreement and release in the first instance. *Id.* Furthermore, the citation to “Utica Mohak Mills v. Orr, 277 S.C. 226, 87 SE 2d 593” on page “3” of the alleged agreement, in reality, is a 1955 case before the South Carolina Supreme Court reviewing an “unappealed Award” issued by the Commission, not a settlement agreement and release. *Id.*

Still further, citations to “Sciarotta v. Bowen”; “Lemire v. Secretary of Health and Human Services”; and “Hatch v. Heckler”, are all federal cases which do not address settlement agreements and releases between parties, and more importantly, do not vest the Commission with subject matter jurisdiction to consider and approve a settlement agreement and release. *Id.* Att. A4, B.

Moreover, it is well settled that neither Appellant nor Respondents, by way of their conduct in the alleged agreement (Att. A4, B), could waive, consent, agree to confer subject matter jurisdiction upon the Commission to consider approving a settlement agreement and release, when the parties never cited or relied upon the proper code to vest the requisite jurisdiction upon the Commission with authority to act in the first instance, in light of Carter; LaRue; Hart; Langford; and Berry. *Id.*

Finally, the Commission lacked authority to “fix the bounds of its own jurisdiction, according to its own discretion”, in terms of approving the alleged agreement, when the proper citation to specific authority **was not** provided on the *face* of the agreement (Att. A4, B), on

grounds that the basic issue in the settlement agreement and release was the Commission's jurisdiction to act, and the Commission was required to have *that* authority in the first instance, contained on the face of the alleged agreement, which it did not. Att. A4, B. See Maxfield v. Levy, 4 U.S. 330 (U.S. Sup. Ct. 1797) (holding "The Court is not to fix the bounds of its own jurisdiction, according to its own discretion."); *also see* Rescue Army v. Municipal Court of Los Angeles, 331 US 549, 91 L. ed. 1666, 67 S.Ct. 1409 (U.S. Sup. Ct. 1947) ("A court has no jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and a court must have the authority to decide that question in the first instance.").

Thus, where the alleged agreement (Att. B) facially lacks the requisite citation to authority vesting subject matter jurisdiction upon the Commission to consider and approve the agreement in the first instance, the agreement contravened the law and therefore must be deemed a nullity, pursuant to Hart; Langford; and Poston; and, in approving the alleged agreement, without citation to proper authority, by the parties, vesting the Commission with jurisdiction to act in the first instance (Att. A4), the Commission exceeded its jurisdictional authority, wherein this Court must dismiss this matter, and remand to the Commission, with a directive to vacate the 01/05/2006 order and award, and prior to reaching the merits or reversal, pursuant to Webster; Ross; Ex parte Hart; Triska; Voehl; Hart; Valley; Elliot; and other holding state and federal authorities, by operation of law, as a matter of law. *Id.* See Hagans v. Lavine, 415 U.S. 533 (U.S. Sup. Ct. 1974) ("The law requires **proof of jurisdiction** to appear on the record of the administrative agency and **all administrative proceedings.**") (Emphasis added).

IV. Appellant contends the alleged "Settlement Agreement and Release" signed by Appellant on 12/22/2005 and subsequent 01/05/2006 Commission Order and Award approving the agreement must be vacated and deemed void for lack of subject matter jurisdiction because there was no "meeting of minds between the parties" as to the fundamental requirements of a contractual agreement in contravention of Player v. Chandler, et al; and Respondents' alleged Counsel did not sign the alleged

Agreement prior to submission to the Commission, in contravention of S.C. Code Reg. § 67-803(B)(2) (Supp. 2005).

Commission-promulgated Regulation 67-803 (Supp. 2005), establishes the form prescribed by the Commission in terms of the requirements parties must perform prior to consideration and approval of a settlement agreement and release by the Commission. *Id.* The pertinent regulation specific to W.C.C. Case No. 0506205, where the undersigned Appellant /Claimant was represented by counsel, and in particular, S.C. Code Reg. § 67-803(B)(2) provides in part:

“(2) If the claimant is represented by an attorney, **the claimant, his or her attorney, and the attorney for the employer’s representative sign the Agreement and Final Release.** The Agreement and Final Release may then be approved by the Commissioner assigned the claim without an appearance before a Commissioner...”

Id. (Emphasis added).

Further, the requirement for parties to sign the Agreement prior to submission of the proposed agreement to the Commission for consideration and approval is mandatory, based on the plain language contained within R. 67-803(B)(2), where it states that after the parties sign the Agreement “**then**” the Agreement may be approved by the Commission, in addition to well settled law, which fundamentally requires mutual consent between the parties, and at the same time, regarding all essential material issues, in order to form a binding contractual agreement. *Id.* See Benya v. Gamble, 282 S.C. 624, 628, 321 S.E.2d 57, 60 (Ct. App. 1984) (“A contract exists where there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act.”)(Emphasis added); see also Patricia Grand Hotel, LLC v. MacGuire Enters, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007) (holding “A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement”); also see 17A Am. Jur. 2d – Contracts, § 29

(2005) (“There **must be mutual assent** or a meeting of the minds at the same time, on all the essential elements or terms to form a binding contract.”) (Emphasis added); *also see* Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (S.C. Sup. Ct. 1989) (“South Carolina common law requires that, in order to have a valid and enforceable contract, there **must be a meeting of the minds between the parties** with regard to *all* essential and material terms of the agreement.”) (Emphasis added).

Additionally, the Commission has a binding obligation to comply with and enforce its own regulations approved by the General Assembly, in light of Triska. *Id.*

Here, a review of the face of the agreement establishes that the parties never entered into any agreement of any kind respective to W.C.C. Case No. 0506205, and the Commission exceeded its jurisdiction at the time it issued its Order and Award approving the alleged agreement based on relevant factors.

First, a *facial* review of the plain language of the agreement (Att. A4, B), establishes that while Appellant /Claimant and Appellant’s then counsel, Attorney Bacon, signed the alleged Agreement on 12/22/2005 in accordance with R. 67-803(B)(2), Respondents are not identified as a party to the alleged agreement. *Id.*

Specifically, the alleged “agreement” states, “WHEREAS, the undersigned, Alexander Guice, hereinafter referred to as Claimant...the undersigned further acknowledges that the consideration herein expressly recited is the sole and only consideration for the execution thereof, and that no promise, agreement or suggestions of any other additional consideration has been made to, or received by, me”, which confirms that Appellant was *not only* expressly identified as a party to the alleged Agreement, Appellant appears in the alleged agreement in the *first person* (“me”). Agreement (Emphasis added). Att. Att. A4, B.

However, Respondents', by way of Respondents' *presumed* former Employer Representative, namely, Attorney Barefoot, *are not* expressly identified as being an *actual* party to the agreement; rather, Respondents' are identified as Appellant's Employer and the Employer's Insurance Carrier, respectively, and then *erroneously* referred to as 'parties' within and throughout the five (5) page agreement. *See Id.* at 1 ("...by accident arising out of and in the course of his employment with US Food Service, Inc., hereinafter referred to as Employer... WHEREAS, Mac Risk Management, Inc., hereinafter referred to as Carrier, is the Insurance Carrier for the Employer... WHEREAS, **all parties...**"). (Emphasis added).

Put in another way, in order for the agreement to have actually been a valid and enforceable contractual settlement agreement, the alleged 'agreement' was required to provide inclusive language in terms of: "WHEREAS, US Food Service, Inc., hereinafter referred to as the Employer, and Mac Risk Management, Inc. [Ace American Insurance Co.], hereinafter referred to as Carrier, **are a party to and represented in this Settlement Agreement and Release, by their Representative, Walter H. Barefoot, Esq., hereinafter referred to as Attorney for Employer and Carrier,** with the alleged agreement to have included a signature block on page "5" of the Agreement, for Attorney Barefoot's signature, on behalf of and for the Employer and Carrier, so the Employer and Carrier could have *actually been a party to, and entered into*, the alleged Agreement; however, that did not happen. Att. A4, B. *See Benya, supra* ("A contract exists where there is an agreement **between two or more persons**") (Emphasis added).

Furthermore, in examining the language contained within the alleged agreement, which does not expressly identify Respondents' or Respondents' counsel as being a party to the alleged agreement (Att. A4, B), this Court should construe the alleged agreement's failure to identify

Respondents' as a party to the agreement, in favor of Appellant, that the alleged agreement is in fact and law, no agreement at all and unenforceable, because neither Appellant nor Appellant's counsel wrote or prepared the agreement, in light of Myrtle Beach Lumber Co., Inc. and 17A C.J.S. Contracts § 324. Id.

Because the alleged agreement (Att. A4, B) *facially* fails to identify Respondents', or Respondents' counsel, as being an *actual party to the agreement*, the agreement contravened the fundamental requisite of contract doctrine, as set forth in Patricia Grand; Benya; Player; and 17A Am. Jur. 2d – Contracts, § 29, wherein the alleged agreement must be deemed null and void pursuant to Poston and Harvey. Id.

Second, even if the Employer and Carrier had been properly identified as a party on the *face* of the alleged agreement, which they were not, Attorney Barefoot **never signed** the alleged agreement, which contravened R. 67-803(B)(2).

In particular, R. 67-803(B)(2) expressly requires that the “the claimant, his or her attorney, and the attorney for the employer’s representative **sign** the Agreement and Final Release. The Agreement and Final Release **may then** be approved by the Commissioner”, which clearly establishes that all parties must sign the agreement prior to submission to the Commission; however, while Appellant and Appellant’s Counsel signed the alleged agreement on 12/22/2005 (Att. A4, B), Attorney Barefoot failed to sign the alleged agreement prior to submission to the Commission on or around 12/30/2005 (Att. A6), which, according to the contents of the Commission’s copy of Case File No. 0506205, was when the proposed agreement was filed by Attorney Barefoot for Commission consideration and approval of same. Id.

Instead, Attorney Barefoot signed the Commission’s Order and Award approving the Agreement, on 01/05/2006, the same day the Commission issued its Order and Award, which

contravened R. 67-803(B)(2), and again, renders the alleged agreement *null* and *void* pursuant to Poston and Harvey. Id. Att. A4, B.

Third, the Commission, in; 1) approving a non-agreement, which in fact and law, did not exist, because neither Respondents' nor Respondents' presumed Counsel, Attorney Barefoot, were expressly identified as a party to the agreement; and 2) approving the agreement, where Respondents' alleged Counsel, Attorney Barefoot **had not signed the Agreement** on 12/22/2005 or any time prior to 01/05/2006, violated and failed to enforce its own regulation, and specifically, R. 67-803(B)(2), and in doing so, exceeded its jurisdiction, rendering the alleged 01/05/2006 Commission Order and Award (Att. A4) approving the alleged agreement null and void *ab initio*, pursuant to Hart; Voehl; Ex Parte Hart; Triska; and Hagans. Id.

Finally, the parties' conduct, in terms of Appellant and Appellant's Counsel being the only signees to the alleged agreement; no "meeting of the minds between the parties" and mutual consent at the same time, ever taking place, in terms of neither Respondents nor Respondents' counsel being *facially* identified as a party to the alleged agreement; and Respondents' counsel's failure to sign the alleged agreement, could not and did not waive, confer, consent or agree to vest jurisdiction upon the Commission to approve the alleged agreement, because the parties lack the requisite power to invest the Commission with jurisdiction of a subject over which the law, and specifically, R. 67-803(B)(2), Patricia Grand; Benya; Player; and 17A Am. Jur. 2d – Contracts, § 29, **has not** conferred jurisdiction upon the Commission to control, pursuant to Carter; LaRue; Hart; Langford and Berry. Id. Att. A4, B.

Thus, based on the foregoing, and under the preponderance of evidence standard, this Court must dismiss this matter, and remand to the Commission, with a directive to vacate the 01/05/2006 order and award, and prior to reaching the merits or reversal, pursuant to Webster;

Ross; Ex parte Hart; Triska; Voehl; Hart; Valley; Elliot; and other holding state and federal authorities, by operation of law, as a matter of law. Id. Att. A4, B.

V. **Appellant contends the alleged “Settlement Agreement and Release” signed by Appellant on 12/22/2005 and subsequent 01/05/2006 Commission Order and Award approving the agreement must be vacated and deemed void for lack of subject matter jurisdiction because Walter H. Barefoot, Esquire, alleged Employer Representative, engaged in the Unauthorized Practice of Law, in contravention of Rule 5.5(a), RPC, Rule 407, SCACR; S.C. Code Reg. § 67-1202(A) (Supp. 2005); S.C. Code Ann. § 40-5-310(Supp. 2005); and S.C. Code Reg. § 67-803(B)(2) (Supp. 2005).**

A. “Definition” of the Unauthorized Practice of Law (UPL).

“The generally understood definition of the practice of law ‘embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts.’” State v. Despain, 319 S.C. 317, 319, 460 S.E.2d 576, 577 (1995) (quoting In re: Duncan, 83 S.C. 186, 189, 65 S.E. 210, 211 (1909)). The practice of law, however, “is not confined to litigation, but extends to activities in other fields which entail specialized legal knowledge and ability.” State v. Buyers Service Co., Inc., 292 S.C. 426, 430, 357 S.E.2d 15, 17 (1987). For this reason, Courts have consistently refrained from adopting a specific rule to define the practice of law. In re: Unauthorized Practice of Law Rules, 309 S.C. at 305, 422 S.E.2d at 124 (stating “it is neither practicable nor wise” to formulate a comprehensive definition of what the practice of law is). Instead, the definition of what constitutes the practice of law turns on the facts of each specific case. Id.

It is well settled that corporations in proceedings before the Court (except the magistrate court), must be represented by counsel. Renaissance Enterprises, Inc. v. Summit Teleservices, Inc., 515 S.E.2d 257 (S.C. 1999) (holding a corporation must be represented by a licensed attorney in circuit and appellate courts); *also see* State ex rel. Daniel v. Wells, 5 S.E.2d 181 (S.C.

1939) (“[i]f a corporation could appear in court through a layman upon the theory that it was appearing for itself; it could employ any person, not learned in the law, to present it in any or all judicial proceedings.”); *also see* S.C. Code Ann. § 40-5-10, *et. seq.*

This principle also applies to employers and their insurance carriers in proceedings before the Commission. In particular, S.C. Code Reg. § 67-1202(A) (Supp. 2005), **Attorney’s Letter of Representation**, provides: “When an attorney is employed to represent a party before the Commission, the attorney **must** notify the Commission by writing the Commission’s Judicial Department.” *Id.* (Emphasis added). *See South Carolina Police Officers Retirement Sys. v. Spartanburg*, 301 S.C. 188, 391 S.E.2d 239 (1990) (“Under the rules of statutory interpretation, use of words such as “shall” or “must” indicates the legislature’s intent to enact a mandatory requirement.”).

Attorneys in proceedings before the Commission, on behalf of the employer and carrier, are referred to as the “Employers Representative”. *See* S.C. Code Reg. § 67-202(A)(7)(a) (Supp. 2005) (defining Employers Representative as “...counsel of record for the employer and its insurance carrier.”).

Furthermore, as it specifically relates to UPL, S.C. Code Ann. § 40-5-320(A)(1-4) (Supp. 2005), provides:

- “(A) It is unlawful for a corporation or voluntary association to: (1) **practice or appear as an attorney at law for a person other than itself** in a court in this State or before a **judicial body**;
- (2) **make it a business to practice as an attorney at law for a person other than itself in a court or judicial body**;
- (3) hold itself out to the public as being entitled to practice law, render or furnish legal services, advise or to furnish attorneys or counsel, **or render legal services in actions** or proceedings;
- (4) assume to be entitled to practice law or to assume, use, or advertise the title of lawyer...attorney, attorney at law, **or equivalent terms in any language as to convey the impression that it is entitled to practice law or to furnish legal advice, services, or counsel...**”

Id. (Emphasis added).

Moreover, Rule 5.5(a), Rules of Professional Conduct (RPC), Rule 407, SCACR, provides in part: “(a) A lawyer **shall not** practice law in a jurisdiction in violation of the regulation of the legal profession in **that** jurisdiction or **assist another in doing so.**” Id. (Emphasis added). Finally, S.C. Code Ann. § 40-5-310 (Supp. 2005), provides: “No person may practice or solicit the cause of another person in a court of this State unless he has been **admitted** and sworn as an attorney.” Id. (Emphasis added).

B. Establishing UPL by Attorney Barefoot.

A *facial* review of the contents of the Commission’s copy of W.C.C. # 0506205 as of 12/07/2012 (Att. A), establishes that Robert Glenn Bacon, Esquire (“Attorney Bacon”), the former counsel of record for the undersigned, filed and served with the Commission’s Judicial Department, a Letter of Representation, on or around 05/23/2005, which was stamped received by the Commission on 05/27/2005 (Att. A17), and courtesy copied to “Larry Grant”, Claims Administrator for the Employer and Carrier (Att. A9), wherein Attorney Bacon properly identified himself to the Commission Judicial Department and the Employer and Carrier as the counsel of record for Appellant, in compliance with R. 67-1202(A). Id. Further, the record also establishes that on 12/22/2005, Attorney Bacon also filed an “Attorney’s Certificate”, again identifying himself as the Appellant’s attorney of record in W.C.C. Case No. 0506205. Att. A4.

However, a *facial* review of the entire contents of the Commission’s copy of W.C.C. # 0506205 as of 12/07/2012, all of thirty-five pages, which includes Appellant’s FOIA Request, confirms that Walter H. Barefoot, Esq. (“Attorney Barefoot”), the *presumed* former attorney of record for the above-referenced Employer and Carrier, never filed a “Letter of Representation” with the Commission, which was required, pursuant to R. 67-1202(A). Id. Att. A.

Additionally, Attorney Barefoot never filed an “Attorney’s Certificate” on or around 12/22/2005, expressly identifying himself as the attorney of record, or “Employer’s Representative”, for the Employer and Carrier, respective to W.C.C. Case No. 0506205, and specifically, as having requisite power of attorney to take any actions on behalf of the Employer and Carrier, which certainly would include having the requisite authority to consent to the Commission’s Order and Award approving the alleged settlement agreement between the parties on 01/05/2006. Att. A4. Att. B.

Further still, a *facial* review of the four corners of both the alleged agreement (Att. B), and the Commission’s 01/05/2006 Order and Award approving the alleged agreement (Att. A4), confirms that there is no reference, mention or expressed identification of Attorney Barefoot lawfully appearing or participating in W.C.C. Case No. 0506205, and specifically, **within** the proposed settlement agreement on behalf of the Employer and Carrier. Id.

Moreover, a review of the Form 19 initially filed with the Commission in this matter by Attorney Barefoot on or around 01/11/2006 (Att. A3), indicates that **Larry Grant**, who is not an attorney, and in fact, the Claims Administrator for the Carrier (Att. A9, 10, 11, 12, 14, A19), actually prepared, identified himself and signed the Form 19 as the “**Employer Representative**”; however, on or around 04/11/2006 (A2), Attorney Barefoot filed a so-called Revised Form 19 with the Commission, wherein Attorney Barefoot placed his signature and the term “for” over the signature of Larry Grant in the “Employer Representative” signature block, *but failed to remove Mr. Grant’s printed name as the “Preparer’s Name”*. Id. See S.C. Code Reg. 67-414(A) (Supp. 2005) (“A. After payment of all compensation the employer’s representative shall file with the Commission's Claims Department a Form 19, Status Report and Compensation Receipt”) (Emphasis added).

Still further, Larry Grant, who in fact and law is not an attorney admitted to practice with the S.C. Bar, **prepared and signed the Form 18**, the “Periodic Report” Mr. Grant filed with the Commission in W.C.C. Case No. 0506205 (Att. A13); however, to date, Attorney Barefoot has never file a so-called “Revised” Form 18 correcting this fatal defect in this matter, and in fact, the information contained within the Form 18 signed and prepared by Larry Grant, and filed with the Commission on 12/01/2005 (received by the Commission on 12/05/2005), was facially **inaccurate and fraudulent**, on grounds that; (1) as of this date, Appellant **has not** received entitled TTD compensation payments for the entitled periods from **11/03/2005 to 11/06/2005**, upon facial review of Appellant’s TTD compensation payment receipts, attached hereto as Attachment “J” although the Form 18 alleges to the Commission that Appellant was paid “TPD” from “06/20/05” to “11/6/05”; and (2) on 12/01/2005, Appellant **was not and had not** been paid entitled TTD benefit payments from the Employer and Carrier, and in fact, Appellant did not receive entitled TTD benefit payments thru **12/04/2005** until **AFTER** Appellant signed the agreement, on or around 12/27/2005, in consideration of Appellant’s Sworn Affidavit. Id. Att. A. *See* S.C. Code Reg. 67-413(A) (Supp. 2005) (“A. The **employer’s representative shall** file a Form 18, Periodic Report”) (Emphasis added). Att. J. Sworn Affidavit.

These are not mere technicalities; they are serious deviations and repeated violations of Commission Regulations approved by the Legislature, which have the effect of law (Goodman, supra); a disturbing pattern within the Commission, of failing to enforce and ensure compliance with the Act and its own regulations, as it particularly relates to employers and insurance carriers (Triska, supra); and repeated violations of sections 40-5-310 & 320, regulating the practice of law in South Carolina. Id. Att. A.

In fact and law, because Attorney Barefoot never filed the requisite ‘Letter of Representation’ with the Commission, pursuant to R. 67-1202(A) expressly identifying himself and being admitted to practice law within the jurisdiction of the Commission, and, in W.C.C. Case No. 0506205, and on behalf of the Employer and Carrier (Att. A, A4, B); Attorney

Barefoot's failure to be expressly identified within the four corners of the alleged agreement or the Commission's 01/05/2006 Order and Award as the Employer Representative for Respondents'; and Attorney's Barefoot's improper assistance with Larry Grant's improper preparation and filing, and false representations as the "Employer's Representative", Attorney Barefoot **and** Larry Grant engaged in the unauthorized practice of law (UPL), in W.C.C. Case No. 0506205, in violation(s) of Rule 5.5(a), RPC, Rule 407, SCACR; Section 40-5-310 (Supp. 2005); R. 67-1202(A); and Section 40-5-320, respectively, rendering the alleged agreement and the Commission's Order and Award approving the agreement, *null* and *void*, as Attorney Barefoot lacked the requisite *power of attorney* to enter into, or consent to, the agreement, on behalf of the Employer and Carrier, in light of Poston and Harvey. Id.

Moreover, this Court must consider that if it does not take appropriate corrective action in terms of deeming the alleged agreement and subsequent Commission Order and Award null and void for Attorney Barefoot's (and Larry Grant's) alleged UPL (Att. A, A4, B), in W.C.C. Case No. 0506205, any Claims Administrator for an Employer and Carrier in proceedings before the Commission would be allowed to perform legal services reserved solely to that of attorneys in workers' compensation proceedings, to include filing patently fraudulent information with the Commission, and **any attorney** could take action on behalf of an employer and carrier, in a similarly erroneous, unlawful and unethical manner, as demonstrated by Attorney Barefoot, in terms of simply applying their signature on the **last page** of an alleged binding agreement, and without ever being properly identified in the workers' compensation proceedings or admitted to practice within the jurisdiction or particular case before the Commission. *Supra.*

Still further, this Court must guard against the unauthorized practice of law to protect the public from the potentially severe economic and emotional consequences that may flow from

erroneous preparation of legal documents and to protect the public from improper or unethical conduct by attorneys, wherein Appellant has sustained severe economic consequences from the falsely filed information with the Commission by Larry Grant, in terms of the Form 18 (A 13), wherein Mr. Grant knowingly and willfully misled the Commission as when Appellant was paid entitled workers' compensation benefits. State v. Buyers Serv. Co., 292 S.C. 426, 357 S.E.2d 15 (1987) (holding Courts must guard against the unauthorized practice of law to protect the public from the potentially severe economic and emotional consequences that may flow from erroneous preparation of legal documents and to protect the public from improper or unethical conduct by attorneys).

Finally, because the Commission failed to enforce and comply with its own Regulations, and specifically, R. 67-413(A); R. 67-414(A); R. 67-1202(A) and R. 67-803(B)(2), in terms of ensuring that the Employer and Carrier was properly represented by counsel in W.C.C. Case No. 0506205, and, that all legal documents filed in this matter from the Employer and Carrier were *properly* filed by an admitted attorney, and not by the Employer and Carrier's Claim Administrator *purporting* to be the "Employer's Representative", the Commission lacked and exceeded its subject matter jurisdiction at the time it issued its Order and Award approving the alleged agreement, wherein said Order and Award must be deemed null and void *ab initio*, in light of Hart; Voehl; and Triska. Id. Att. A, A4, B.

Thus, based on the foregoing (*supra*), and under the preponderance of evidence standard, this Court must dismiss this matter, and remand to the Commission, with a directive to vacate the 01/05/2006 order and award, and prior to reaching the merits or reversal, pursuant to Webster; Ross; Ex parte Hart; Triska; Voehl; Hart; Valley; Elliot; and other holding state and federal authorities, by operation of law, as a matter of law. Id. See Turner v. Malone, 24 S.C. 398 (S.C.

Sup. Ct. 1886) (holding “a judgment or order entered without jurisdiction is void *ab initio*”); *see also* McDonald v. Mabee, 243 U.S. 90, 37 Sct 343, 61 L.E.D 608 (U.S. Sup. Ct. 1917) (holding order that exceeds the jurisdiction of the court is void); also see 73 C.J.S. Public Administrative Bodies and Procedure § 59 (2005) (“They [officers or agencies] are without power to act contrary to the provisions of the law or the clear legislative intentment, or **to exceed the authority conferred on them by statute.**”) (Emphasis added).

VI. Appellant contends the 01/05/2006 Commission Order and Award must be vacated and deemed null and void *ab initio* for want of subject matter jurisdiction, because Appellant’s Medical Reports were neither filed with nor considered by the Commission prior to its issuance of the 01/05/2006 Order and Award approving the so-called agreement.

A review of page “4” of the so-called agreement states, “WHEREAS, 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”. (Emphasis added). Att. A4 at 4. Att. B at 4. However, a review of the record, and specifically, the 35 page contents of Commission Case File No. 0506205, as of 12/07/2012, establishes that *not a single Medical Report* is present in the file. Att. A.

Further, in addition to none of the medical reports being on file with the Commission prior to its issuance of the 01/05/2006 Order and Award, the 10/27/2005 Medical Report from treating physician Dr. Tamadon (Att. H), expressly identifying that Appellant had reached MMI and was *assigned permanent restrictions* as well as the five percent impairment rating, was required to be filed with the Commission by the *Employer’s Representative*, pursuant to S.C. Code Reg. § 67-1301(B) (Supp. 2005) (“The **employer’s representative shall** submit to the Commission a report indicating the claimant’s final rating of permanent impairment”) (Emphasis added), was also **not filed** with the Commission. *Id.*

Furthermore, a review of page “7” of the “Order and Award” section approving the so-called agreement, establishes that the Commission makes no reference to the ‘medical reports’ being on file with the Commission or whether the Commission “considered” the medical reports prior to issuing its Order and Award approving the so-called agreement. Att. A4 at 7.

Still further, a review of the contents contained within Commission Case File No. 0506205, establishes that the last correspondence(s) filed with the Commission by either parties prior to the Commission’s issuance of the 01/05/2006 Order and Award approving the so-called agreement, were correspondences submitted on 12/30/2005 (Att. A6), and 12/28/2005 (Att. A7), respectively, by apparent Paralegal Kara Motegi, on behalf of the Employer and Carrier; and by *presumptive* Employer’s Representative Attorney Barefoot. Id. However, while both aforementioned correspondences indicates filings of the 12/22/2005 so-called Settlement Agreement with the Commission (Att. A6, A7), neither of the correspondences indicate filings of the medical reports being perfected with the Commission. Id.

The requirement of the medical reports to have been filed with and duly considered by the Commission prior to approval of the so-called agreement was jurisdictional and an “essential” material condition of the so-called agreement, and the failure of medical reports being on file with the Commission constitutes a “breach” of the agreement, rendering the agreement void, in light of Player; Benya and 17A Am. Jur. 2d – Contracts, § 29. Id. Att. A.

Because the medical reports were never filed with or duly considered by the Commission prior to issuing its 01/05/2006 Order and Award, and specifically, because the Commission failed to ensure compliance and enforcement of its own regulations, and in particular, R. 67-1301(B), the Commission lacked and exceeded its jurisdiction at the time it approved the alleged agreement, rendering the alleged Order and Award null and void pursuant to Triska; Hart;

Hagan; Ex Parte Hart; and Voehl, among other holding state and federal authorities. Id. Att. A. Att. A4, B.

Thus, based on the foregoing (*supra*), and under the preponderance of evidence standard, this Court must dismiss this matter, and remand to the Commission, with a directive to vacate the 01/05/2006 order and award, and prior to reaching the merits or reversal, pursuant to Ross; Ex parte Hart; Triska; Voehl; Hart; Valley; Elliot; Turner; McDonald; and 73 C.J.S. Public Administrative Bodies and Procedure § 59 (2005), by operation of law, as a matter of law. Id.

VII. Appellant contends the 01/05/2006 Commission Order and Award must be vacated and deemed null and void *ab initio* for want of subject matter jurisdiction, because the Commission never convened the mandatory Hearing prior to issuing its Award in this matter in contravention of S.C. Code Ann. § 42-17-40(A) (Supp. 1999).

Section 42-17-10, which generally governs settlement agreements and releases between parties in proceedings before the Commission, neither expressly requires nor references the Commission's obligation to approve a settlement agreement by way of issuance of an *Order* and *Award*, and the rules of statutory construction and interpretation prohibits the limiting or expanding of the obligation, effect or operation of section 42-17-10. § 42-17-10. Carolina Power & Light Co. v. City of Bennettsville, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994) (holding if a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and courts must apply the statute according to its literal meaning.); *see also* Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 81 (2000) (holding if a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning."); *also see* Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (holding the words of a statute or regulation "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation.").

In other words, at the point the Commission issued an *Order and Award* approving the so-called 12/22/2005 agreement, and did not simply approve the so-called memorandum agreement on page 5 of the same (Att. B), the agreement **ceased** being a settlement agreement between the parties, per the plain language of § 42-17-10; R. 67-803; and even Section 42-9-390 (Supp. 2005); and on 01/05/2006, the so-called agreement **became** an *award* issued by the Commission. Id. Agreement. Att. B. Order and Award approving the agreement. Att. A4.

There are several jurisdictional requisites the Commission must perform prior to issuing an Award. One such jurisdictional requisite is convening a hearing. The Act, and specifically, S.C. Code Ann. § 42-17-40(A) (Supp. 1999), **Conduct of hearing; award**, provides in part:

“The commission or any of its members **shall hear the parties** at issue and their representatives and witnesses and **shall** determine the dispute in a summary manner...The parties may be **heard** by a deputy, in which event he **shall** swear or cause the witnesses to be sworn and **shall** transmit all **testimony** to the commission for its **determination and award**.”

Id. (Emphasis added). See South Carolina Police Officers Retirement Sys. v. Spartanburg, 301 S.C. 188, 391 S.E.2d 239 (1990) (“Under the rules of statutory interpretation, use of words such as “shall” or “must” indicates the legislature’s intent to enact a mandatory requirement.”).

Here, a facial review of the record, and specifically, the contents of the Commission’s copy of Case File No. 0506205 (Att. A); an examination of the Commission’s Order and Award; the 11/15/2012 E-Mail Correspondence from Commission Agent Eugenia Hollmon (Att. G); and Appellant’s Sworn Affidavit, establishes that the Order and Award issued by the Commission on 01/05/2006 is and must be deemed invalid, null and void, by operation of law, based on several axiomatic factors. Id.

First, there was **no hearing** convened before the Commission prior to the Commission’s issuance of the 01/05/2006 Order the Award, which was required prior to issuance of any awards

by the Commission, pursuant to section 42-17-40(A). Id. Sworn Affidavit. Att. G. Att. A.

Second, without convening the mandatory hearing, or the submission of any depositions, admissions, or testimony from the parties' (Att. A), the Commission lacked the requisite evidence upon which to base its findings of facts and conclusions of law to establish jurisdiction and determine if an award was proper, respective to W.C.C. Case No. 0506205. Id. See Higgins v. Med. Univ. of South Carolina, 326 S.C. 592, 486 S.E.2d 269 (Ct. App. 1997) (cautioning against reliance on factual statements in memoranda submitted by counsel); *also see* McManus v. Bank of Greenwood, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (appellate courts repeatedly have held "that statements of fact appearing only in arguments of counsel will not be considered"); S.C. Dept. of Transp. v. Thompson, 357 S.C. 101, 105, 590 S.E.2d 511, 513 (Ct. App. 2003) ("[a]rguments made by counsel are not evidence"); *see also* United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (U.S. Sup. Ct. 1977) ("Manifestly, [such statements] cannot be properly considered by us in the disposition of a case."); *see also* Gonzales v. Buist, 224 U.S. 126, 56 L.Ed. 693, 32 S.Ct. 463 (U.S. Sup. Ct. 1912) ("Under no possible view, however, of the findings we are considering can they be held to constitute a compliance with the statute, since they merely embody **conflicting statements of counsel** concerning the facts **as they suppose them to be** and their appreciation of the law which **they deem applicable**, there being, therefore, no attempt whatever to state the ultimate facts by a consideration of which we would be able to conclude whether or not the judgment was warranted.") (Emphasis added).

Third, the Commission Order and Award (Att. A4) contains no findings of facts or conclusions of law establishing its jurisdiction to issue the award in the first instance, which was required, pursuant to § 42-17-40(A) ("...The **award**, together with a statement of the **findings of fact, rulings of law...**") (Emphasis added); S.C. Code Ann. § 1-23-350 (2005) ("A final decision

shall include **findings of fact** and **conclusions of law**, separately stated.”) (Emphasis added); Janhrette v. Union Camp Paper Corp., 293 S.C. 59, 60, 358 S.E.2d 704, 705 (1987) (quoting Levi v. Northern Anderson County EMS, et al, Appellate Case No. 2012-212631, Opinion No. 5243 (Ct. App. 2014) (holding “The *award*, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue, must be filed with the record of the proceedings and a copy of the award must immediately be sent to the parties in dispute.”)); 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”) (Emphasis added); 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); S.C. Workers’ Compensation Practice Manual, § 9.03 (2000) (“Some of the...issues that **must** be addressed by **fact and law** are: 1. **Jurisdiction...**”) (Emphasis added); Shealy v. Algernon Blair, Inc., 250 S.C. 106, 109, 156 S.E.2d 646, 648 (S.C. Sup. Ct. 1967) (“We have held that **awards without such specific findings** do not comply with the **requirements of the act** and are **illegal.**”) (Emphasis added); 73A C.J.S. Public Administrative Law and Procedure, § 144 (1983) (“Where the requirements as to administrative findings are contained in statutes, the findings **must** comply therewith.”) (Emphasis added); and 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. Att. A. Att. A4.

Fourth, in issuing an Order and Award, without convening the mandatory hearing, the Commission violated Appellant’s constitutional rights to “reasonable notice” and the “opportunity to heard” pursuant to both the U.S. and South Carolina Constitutions, respectively,

which reflected a judgment affecting Appellant's personal property rights to his entitled workers' compensation benefits. Att. A. Att. A4, B, G. Sworn Affidavit. *See Ogburn-Matthews; also see Mullane; see also Orszula.* S.C. Const. art. I, § 22. U.S. Const. amend. XIV, § 1.

Fifth, the parties' conduct could not serve to waive, consent or confer subject matter jurisdiction upon the Commission to issue an Order and Award (Att. A4), in W.C.C. Case No. 0506205, without convening the mandatory hearing, because the parties lack the requisite power to invest the Commission with jurisdiction, over issuing awards without convening a hearing, where the Legislature's enactment of section 42-17-40(A) **has not** provided the parties or the Commission with such **authority** to control, pursuant to Carter; LaRue; Hart; Voehl; Berry and Langford. *Id.*

Finally, this Court has an obligation to protect Appellant's constitutional rights, and Appellant's entitled property rights to workers compensation benefits, secured under both the U.S. and South Carolina Constitutions, respectively, and under Section 42-9-260(B)(1) & (F) of the Act, pursuant to Orszula and Mooney **which have been unlawfully seized and taken by Respondents.** *Id.* Att. A. Att. A4, G. Sworn Affidavit.

Thus, based on the foregoing (*supra*), and under the preponderance of evidence standard, this Court must dismiss this matter, and remand to the Commission, with a directive to vacate the 01/05/2006 order and award, and prior to reaching the merits or reversal, pursuant to Webster; Ross; Ex parte Hart; Triska; Voehl; Hart; Valley; Elliot; Turner; McDonald; Mooney; Orszula and 73 C.J.S. Public Administrative Bodies and Procedure § 59 (2005), by operation of law, as a matter of law. *Id.*

VIII. Appellant contends the so-called 12/22/2005 Agreement and subsequent 01/05/2006 Commission Order and Award must be vacated and deemed "null and void" for lack of subject matter and personal jurisdiction because of "Extrinsic Fraud Upon

the Court” committed by Commissioner David W. Huffstetler; Walter H. Barefoot, Esquire; and Robert G. Bacon, Esquire.

A. Fraud upon the court defined.

As an initial matter, “Fraud upon the court is a narrow and invidious species of fraud that “subvert[s] the integrity of the Court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.”” Chewning v. Ford Motor Co., 354 S.C. 72, 78, 579 S.E.2d 605, 608 (Sup.Ct. 2003). “A verdict may be set aside for fraud on the court if an attorney and a witness have conspired to present perjured testimony.” Cleveland Demolition Co. v. Azcon Scrap Corp., 827 F.2d 984, 986 (4th Cir. 1987)(quoting Chewning). “Involvement of an attorney, as an officer of the court, in a scheme to suborn perjury would certainly be considered fraud on the court.” Great Coastal Express, Inc. v. Int’l Bhd. of Teamsters, 675 F.2d 1349, 1357 (4th Cir. 1982) (quoting Chewning).

B. Extrinsic fraud upon the court defined.

Extrinsic fraud is “**fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.** Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the **subject matter of the action.**” Hilton Head Ctr. of South Carolina v. Public Serv. Comm’n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987) (Emphasis added). Like all other types of fraud, proving fraud upon the court requires showing that the perpetrator(s) acted with the intent to defraud, for there is no such thing as accidental fraud. *See* Chewning, 354 S.C. at 78, 579 S.E.2d at 608 (““Fraud upon the court,” whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court.”). Because fraud upon the court is an affront to the administration of justice, a litigant who has been

defrauded need not establish prejudice. Chewning, supra.

C. Establishing extrinsic fraud upon the Court committed by Commissioner Huffstetler; Attorney Barefoot; and Attorney Bacon.

(i) Commissioner David W. Huffstetler

Commissioner David W. Huffstetler (“Commissioner Huffstetler”), who issued the Order and Award on 01/05/2006 approving the so-called Settlement Agreement and Release (Att. B) respective to W.C.C. Claim No. 0506205 (Att. A4), was appointed to the S.C. Workers’ Compensation Commission by Governor Mark Sanford (with consent and approval of the Senate); was a Public Official, as defined by section 8-13-100 of the Code of South Carolina Law (Supp. 2005); is bound by the Code of Judicial Conduct set forth in Rule 501, South Carolina Appellate Court Rules, and is therefore deemed an officer of the Court. Id. S.C. Code Ann. § 42-3-250 (Supp. 2005). Chewning.

As it specifically relates to allegations of *extrinsic fraud upon the court* committed by Commissioner Huffstetler, Appellant would allege that:

- a. **On 01/05/2006, Commissioner Huffstetler, while acting in his official capacity for the Commission, intentionally issued an unlawful Order and Award approving a non-existent, invalid and patently unenforceable so-called contractual agreement between the above-referenced parties, which was entered into and signed only by the injured Appellant/Claimant on 12/22/2005, which was outside the purview of valid and enforceable settlement agreements approved by the Commission, and in intentional noncompliance with S.C. Code Reg. 67-803(B)(2), and S.C. Code Reg. 67-803(C)(Supp. 2005) (“The Commission will not approve an Agreement and Final Release that is not fairly made and in accordance with the Act.”)) (Att. B; Att. A4) (*supra*);**
- b. **On 01/05/2006, Commissioner Huffstetler, while acting in his official capacity for the Commission, intentionally issued an unlawful Order and Award approving a non-existent, invalid and patently unenforceable so-called contractual agreement between the parties, without performing the mandatory function of considering and reviewing Appellant’s Medical Reports respective to the admitted work-related accident/injury which occurred on 05/05/2005, wherein said Medical Reports were never filed with**

the Commission, in intentional noncompliance with the plain language contained within the so-called 12/22/2005 agreement and section 42-17-10 of the Code of law of South Carolina (Supp. 2005) (*supra*) (Att. A);

- c. On 01/05/2006, Commissioner Huffstetler, while acting in his official capacity for the Commission, intentionally issued an unlawful Order and Award of the Commission in W.C.C. Case No. 0506205, without performing the mandatory function of convening a hearing between the parties, in intentional violation of section 42-17-40(A) of the Code of law of South Carolina (Supp. 2005) (*supra*) (Att. A);
- d. On 01/05/2006, Commissioner Huffstetler, while acting in his official capacity for the Commission, intentionally issued an unlawful Order and Award of the Commission in W.C.C. Case No. 0506205, without ensuring that Attorney Barefoot had met the requirements to practice law within the jurisdiction of the Commission and respective of W.C.C. Case No. 0506205, in intentional violation of Reg. 67-1202(A);
- e. On 01/05/2006, Commission Huffstetler, while acting in his official capacity for the Commission, intentionally issued and unlawful Order and Award of the Commission in W.C.C. Case No. 0506205, although Commission Huffstetler was informed and aware the face of the alleged agreement failed to cite the proper authority to vest subject matter jurisdiction upon the Commission to consider or approve the alleged agreement in the first instance (Att. A4, B); and
- f. On 01/05/2006, Commissioner Huffstetler, while acting in his official capacity for the Commission, intentionally issued an unlawful Order and Award approving a non-existent, invalid and patently unenforceable so-called contractual agreement between the above-referenced parties, although said agreement should have been rejected upon consideration of the Form 18 (Att. A13) filed with the Commission by Respondents on 12/01/2005 (stamped received by the Commission on 12/05/2005), confirming Appellant had received temporary compensation payments for approximately 214 days, including after the one-hundred-fifty-day period after Appellant's notice of injury, wherein said Order and Award issued by Commissioner Huffstetler intentionally violated section 42-9-260(F) of the Code of law of South Carolina (Supp. 2005); and Respondents' mandatory obligations as set forth in Commission-promulgated S.C. Code Reg. 67-506(D)-(E) (Supp. 2005) (*supra*).

Additionally, the Court should consider that Commissioner Huffstetler resigned as Commissioner for the S.C. Workers' Compensation Commission, and prior to the expiration of his term in office in November 2011, and later, Commission Huffstetler was charged with, and

found to have violated, the Code of Judicial Conduct, Rule 501, SCACR, on six (6) separate counts, before the S.C. Ethics Commission, In The Matter Of Cofield, et al v. Huffstetler, Order No. C2012-027 dated 03/02/2012. Id.

Commission Huffstetler's intentional acts, as alleged above, and while performing his official duties for the Commission, "subvert[ed] the integrity" of the Commission itself so that the Commission's quasi-judicial machinery could not perform in the usual manner its impartial task of adjudging W.C.C. Claim No. 0506205 which was presented for adjudication, and prevented injured Appellant/Claimant from fully exhibiting and trying his case, and in fact, there has *never* been a real contest before the Commission on the subject matter of the action, wherein Commissioner Huffstetler's alleged intentional actions constitutes *extrinsic fraud upon the Court*, pursuant to Chewing and Hilton Head Ctr. of South Carolina. Id. Att. A. *Supra*. See Williamson v. U.S. Department of Agriculture, 815 F.2d. 369 (5th Cir. 1987) ("It is the duty of **all officials** whether legislative, **judicial**, executive, **administrative**, or ministerial to so perform **every official act as not to violate constitutional provisions.**")(Emphasis added).

(ii) Walter H. Barefoot, Esquire

Walter Hilton Barefoot, Esquire, S.C. Bar No. 64261, currently of McAngus Goudelock & Courie, LLC, and formerly of Turner Padgett Graham & Laney, LLC ("Attorney Barefoot), was the presumed attorney of record for above-referenced Employer and Carrier, respective to W.C.C. Claim No. 0506205, and in fact is an officer of the Court. Chewing.

As it specifically relates to allegations of extrinsic fraud upon the court committed by Attorney Barefoot, Appellant would allege that:

- a. **Attorney Barefoot engaged in the unauthorized practice of law (UPL), by representing himself as the "Employer's Representative" and attorney of record for the Employer and Carrier in W.C.C. Case No. 0506205 and before the Commission, when in fact, Attorney Barefoot intentionally failed to file**

the requisite “Letter of Representation” with the Commission in this matter pursuant to Reg. 67-1202(A); was not identified on the face of the alleged agreement or the Commission’s Order and Award as the Employer’s Representative for the Employer and Carrier; and failed to correct the fraudulent and inaccurate Forms improperly prepared and filed with the Commission by Larry Grant, the Claims Administrator for the Employer and Carrier (Att. A);

- b. Attorney Barefoot, as the alleged Employer Representative for the Employer and Carrier, knowingly and unlawfully withheld entitled TTC/TTD disability payments from Appellant from on or around 11/02/2005 after US Foods fired Appellant for ‘permanent lifting restrictions’ and ‘no position available’ (Att. K, L, Sworn Affidavit), until Appellant signed the so-called agreement on 12/22/2005, although Attorney Barefoot knew Appellant had an entitlement to TTC/TTD payments, in violation of section 42-9-260(B)(1) and section 42-9-260(F) (Att. A13, J), (*supra*);
- c. Attorney Barefoot, as the alleged Employer’s Representative for the Employer and Carrier, knew the so-called agreement signed by Appellant and Appellant’s Attorney only on 12/22/2005 was not a valid and enforceable contractual agreement between the parties because neither the Employer and Carrier nor Attorney Barefoot was expressly identified as a party to the agreement *and* Attorney Barefoot never signed the so-called agreement on behalf of the Employer and Carrier on or around 12/22/2005, and prior to the alleged agreement being submitted to the Commission for approval (Att. A4, B, Player, et al, R. 67-803(B)(2));
- d. Attorney Barefoot, as the alleged Employer’s Representative for the Employer and Carrier, made a false representation to the Commission, and specifically, that entitled TTC/TTD disability payments made to Appellant were current as of 12/01/2005 thru 12/04/2005, on the Form 18, when in fact, Attorney Barefoot had not made a TTD payment to Appellant since 11/02/2005 at the time the Form 18 was filed (Sworn Affidavit);
- e. Attorney Barefoot concealed from the Commission the fact that Appellant had been fired by the Employer on 11/02/2005 for the expiration of the light duty job assignment period, for permanent lifting restrictions and no position available, and “during the period of disability” (Att. A, H, K, L);
- f. Attorney Barefoot concealed from the Commission the fact that Appellant was assigned ‘permanent lifting restrictions’ casual to the 05/05/2005 work-related accident and Appellant was no longer able to perform the duties of a delivery driver (Att. A, H, I, K, L);
- g. Attorney Barefoot made a false representation to the Commission, and specifically, that entitled TTC/TTD disability payments made to Appellant were current as of 12/01/2005 thru 12/04/2005, on the Form 18, when in fact,

Attorney Barefoot made no payment to Appellant for the entitled period from 11/03/2005 to 11/06/2005, and the payments made to Appellant from 11/07/2005 to 12/17/2005 were unlawfully paid at the rate of \$592.56 instead of the mutually agreed upon average weekly wage of \$1,161.00 (Att. A13, J);

- h. Attorney Barefoot knowingly and willfully failed to file Appellant's Medical Reports with the Commission, and specifically, the 10/27/2005 Medical Report pursuant to section 42-17-10; and S.C. Code Reg. 67-1301(B) (Supp. 2005) (Att. A);
- i. Attorney Barefoot knowingly and willfully failed to seek permission from the Commission to suspend or terminate entitled TTC/TTD disability payments to Appellant, by intentionally failing to file the mandatory Form 21 and certifying all payments to Appellant was current, in violation of section 42-9-260(F); and S.C. Reg. 67-506 (E) (Att. A, A13, J);
- j. Attorney Barefoot knowingly and willfully consented, by signature, to the invalid "Order and Award" issued by Commissioner Huffstetler approving the so-called agreement, on 01/05/2006, and on behalf of the Employer and Carrier, although Attorney Barefoot knew that the so-called agreement contravened the law, and specifically, § 42-9-260(B)(1) and § 42-9-260(F) (Att. A18, H, I, K, L, Sworn Affidavit);
- k. Attorney Barefoot knowingly and willfully consented, by signature, to the invalid "Order and Award" issued by Commissioner Huffstetler approving the so-called agreement, on 01/05/2006, and on behalf of the Employer and Carrier, although Attorney Barefoot knew the Commission's Award was invalid because no hearing was convened prior to the Commission's issuance of an award in violation of § 42-17-40(A) (Att. A, G, Sworn Affidavit); and
- l. Attorney Barefoot knowingly and willfully re-filed a so-called (*nunc pro tunc*) "Revised" Form 19 with the Commission on or around 04/11/2006, to replace the improperly filed Form 19 previously filed with the Commission by *de facto* employer representative Larry Grant, wherein Attorney Barefoot signed with the term "For" over Larry Grant's signature, when in fact, Attorney Barefoot never contacted or obtained Appellant's requisite consent to re-file the 'revised' Form 19 bearing Appellant's previous signature from the same Form 19 signed by Appellant on 12/22/2005. Att. A.

Attorney Barefoot's intentional acts, as alleged above, and while performing his official duties as the *presumptive* employer representative for Respondents, "subvert[ed] the integrity" of the Commission itself so that its quasi-judicial machinery could not perform in the usual manner its impartial task of adjudging W.C.C. Claim No. 0506205 which was presented for adjudication,

and prevented injured Appellant/Claimant from fully exhibiting and trying his case, and in fact, there has *never* been a real contest before the Commission on the subject matter of the action, wherein Attorney Barefoot's alleged intentional actions constitutes *extrinsic fraud upon the Court* pursuant to Chewning and Hilton Head Ctr. of South Carolina. Id. Att. A. *Supra*.

(iii) Robert G. Bacon, Esquire

Robert Glenn Bacon, Esquire, S.C. Bar No. 12515, currently not practicing law, formerly of Harry Pavilack and Associates, LLC, and The Bacon Law Firm, LLC ("Attorney Bacon"), was the former attorney of record for Appellant, respective to W.C.C. Claim No. 0506205, and in fact is an officer of the Court. Chewning.

As it specifically relates to allegations of extrinsic fraud upon the court committed by Attorney Bacon, Appellant would allege that:

- a. **Attorney Bacon knowingly and willfully concealed from the Commission the fact that Appellant was fired by US Foods on 11/02/2005 for 'permanent lifting restrictions' and 'no position available' relative to the injuries Appellant sustained in the admitted work-related accident which occurred on 05/05/2006 and due to the expiration of the light duty job period relative to W.C.C. Claim No. 0506205 (Att. A, I, Sworn Affidavit);**
- b. **Attorney Bacon intentionally concealed from the Commission that Respondents' employer representative was not paying Appellant entitled TTC/TTD payments after US Foods terminated Appellant on 11/02/2005 (Att. A, Sworn Affidavit);**
- c. **Attorney Bacon intentionally concealed from Appellant that Appellant had a legal right to continued receipt of entitled TTD disability payments after US Foods fired Appellant on 11/02/2005 pursuant to section 42-9-260(B)(1) and section 42-9-260(F) (Sworn Affidavit);**
- d. **Attorney Bacon intentionally advised Appellant to enter into the so-called Agreement on 12/22/2005 although Attorney Bacon was informed and aware that the so-called agreement was in fact and law no contractual binding agreement at all because Respondents' were not expressly identified in the so-called agreement as party to the agreement and no representative for Respondents' ever signed the agreement on behalf of Respondents' (Att. A4, B);**

- e. **Attorney Bacon intentionally advised Appellant that if Appellant did not enter into the so-called agreement on 12/22/2005 that Attorney Bacon did not know when Appellant could expect to receive another compensation payment although Attorney Bacon was informed and aware that Appellant had entitlements to TTC/TTD payments pursuant to § 42-9-260(B)(1) and § 42-9-260(F) based on the facts of W.C.C. Case No. 0506205 (Att. A13, A18, H, I, J, Sworn Affidavit);**
- f. **Attorney Bacon never advised Appellant about the S.C. Workers' Compensation Act; the S.C. Workers' Compensation Commission; or any protected rights Appellant had under the Act as an injured worker of an admitted work-related injury (Sworn Affidavit);**
- g. **Attorney Bacon never advised Appellant of any of Appellant's protected constitutional rights to Due Process or Equal Protection set forth in the U.S. and South Carolina Constitutions', respectively (Sworn Affidavit);**
- h. **Attorney Bacon failed to ensure that Appellant's Medical Reports were on file with and duly considered by the Commission prior to the Commission's issuance of the Order and Award approving the so-called agreement on 01/05/2006 (Att. A);**
- i. **Attorney Bacon intentionally concealed from the Commission the fact that Respondents' terminated entitled TTC/TTD disability payments to Appellant without seeking permission from the Commission in terms of Respondents' failure to file the mandatory documents pursuant to S.C. Code Reg. 67-506(E) (Att. A, A13, J);**
- j. **Attorney Bacon intentionally advised Appellant to enter into the so-called Agreement on 12/22/2005 although Attorney Bacon was informed and aware that the so-called agreement in fact and law contravened § 42-9-260(B)(1) and § 42-9-260(F) (Att. A13, A18, H, I, J, K, L, Sworn Affidavit); and**
- k. **Attorney Bacon intentionally concealed from Appellant that the Order and Award issued by the Commission approving the so-called agreement violated Appellant's due process rights to a hearing in violation § 42-17-40(A) and § 42-9-260(F) (Sworn Affidavit). Id.**

Furthermore, the Court should consider that Attorney Bacon was administratively suspended from the practice of law in South Carolina for apparently failing to comply with MCLE requirements, effective 05/05/2016, pursuant to S.C. Supreme Court Order No. 2016-05-05-01 dated 05/05/2016, wherein to date, Attorney Bacon **has not** sought re-admission to the S.C. Bar to return to practicing law in South Carolina. Id.

Attorney Bacon's intentional acts, as alleged above, and while performing his official duties as the injured Appellant's counsel of record, "subvert[ed] the integrity" of the Commission so that the quasi-judicial machinery could not perform in the usual manner its impartial task of adjudging W.C.C. Claim No. 0506205 which was presented for adjudication, and prevented injured Appellant/Claimant from fully exhibiting and trying his case, and in fact, there has *never* been a real contest before the Commission on the subject matter of the action, wherein Attorney Bacon's alleged intentional actions constitutes *extrinsic fraud upon the Court* pursuant to Chewning and Hilton Head Ctr. of South Carolina. *Id.* Att. A. *Supra*.

Further still, the extrinsic fraud upon the court, as alleged to have been committed by Commissioner Huffstetler; Attorney Barefoot; and Attorney Bacon (*supra*), has served to **vitiating** all proceedings in W.C.C. Claim No. 0506205. Att. A. *See* 70 Am. Jur. § 50, Civil Liability (2005) ("**Fraud destroys the validity of everything into which it enters**") (Emphasis added); *see also* Nudd v. Burrows, 91 U.S. 426 (U.S. Sup. Ct. 1875) ("Fraud vitiates everything"); *also see* Boyce's Executors v. Grundy, 28 U.S. 3 Pet. 210 (U.S. Sup. Ct. 1830) ("**Fraud vitiates the most solemn contracts, documents and even judgments.**") (Emphasis added).

Finally, as officers of the Court, Commissioner Huffstetler; Attorney Barefoot; and Attorney Bacon "are deemed to know the law", and as such, ignorance of the law is an insufficient justification to defend against the alleged extrinsic fraud upon the court. Scheuer v. Rhodes, 416 U.S. 232, (U.S. Sup. Ct. 1974) (quoting Owen v. independence, 100 S.Ct. 1398, 445 US 622 (U.S. Sup. Ct. 1980) ("Officers of the court...are deemed to know the law.")).

D. Conclusion (as to Argument No. VIII).

Appellant never had an opportunity to present his to claim to the Commission due to the extrinsic fraud upon the court committed by Attorney Bacon; Attorney Barefoot; and

Commissioner Huffstetler. Thus, this Court should grant relief, by dismissing this matter for lack subject matter and personal jurisdiction and remand this matter to the Commission to set aside its 01/05/2006 Commission Order and Award due to extrinsic fraud upon the court, and lack of jurisdiction, pursuant to Chewning; Webster; Hilton Head Ctr. of South Carolina; and Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238 (U.S. Sup. Ct. 1944), by operation of law, as a matter of law. *Id. Supra.*

IX. Appellant contends under the Doctrine of Specific Performance, this Court must deem the 12/22/2005 so-called agreement and subsequent 01/05/2006 Commission Order and Award approving the so-called agreement null and void.

“The rule is well settled that the granting of specific performance is not a matter of absolute right, but rests in the sound or judicial discretion of the Court, guided by established principles, and exercised on a consideration of all the circumstances of each particular case.” Bishop v. Tolbert, 249 S.C. 289, 298, 153 S.E.2d 912, 917 (S.C. Sup. Ct. 1967). Equity will not decree specific performance unless the contract is fair, just, and equitable. Anthony v. Eve, 109 S.C. 255, 263, 95 S.E. 513, 515 (S.C. Sup. Ct. 1918); *see also* Amick v. Hagler, 286 S.C. 481, 484, 334 S.E.2d 525, 527 (Ct. App. 1985). “In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement...” Ingram v. Kasey’s Assocs., 340 S.C. 98, 105,106, 531 S.E.2d 287, 291 (2000).

“When the accompanying incidents are inequitable and show bad faith, such as concealment, misrepresentations, undue advantage, oppression on the part of the one who obtains the benefit, or ignorance, weakness of mind, sickness, old age, incapacity, pecuniary necessities, and the like, on the part of the other,--these circumstances, combined with inadequacy of price, may easily induce a court to grant relief, defensive or affirmative.” Holly Hill Lumber Co. v. McCoy, 201 S.C. 427, 442, 23 S.E.2d 372, 378 (S.C. Sup. Ct. 1942). When a

grossly inadequate consideration is combined with weakness of mind on the part of the seller, a denial of specific performance is warranted. Craven v. Williams, 302 F. Supp. 885, 893-94 (D.S.C. 1969); 81 C.J.S. Specific Performance, § 47 (1977) (stating that inadequacy of price combined with mental weakness tend to make a decree of specific performance inequitable). The inadequacy of price is determined at the date the contract was entered. Adams v. Willis, 225 S.C. 518, 527, 83 S.E.2d 171, 175 (1954); Holly Hill Lumber Co., 201 S.C. at 445, 23 S.E.2d at 380; Shannon v. Freeman, 117 S.C. 480, 489, 109 S.E. 406, 409 (1921); 81 C.J.S. Specific Performance § 47 (1977).

Here, in applying the doctrine of specific performance to the instant settlement agreement and release (Att. A4, B) in W.C.C. Case No. 0506205, the agreement must be deemed invalid based on the following factors:

(1) No clear evidence of a valid agreement.

Respondents', through counsel, were neither identified as a party to the agreement nor entered into the agreement on 12/22/2005 (Att. B), wherein no valid agreement exist (as established above)(*supra*); the agreement contravened the Act, and in particular, § 42-9-260(B)(1) and § 42-9-260(F), among other laws, as established above (*supra*); and thus, specific performance fails pursuant to Ingram. Id. Supra.

(2) Oppression by Respondents in terms of withholding entitled TTD payments from Appellant to support obtaining benefit of release.

While Appellant concedes and agrees that the definition of the term 'oppression' is best left to the construction by this Court on a case-by-case analysis (Kiriakides v. Atlas Food Systems & Services, Inc., 343 S.C. 587, 541 S.E.2d 257 (2001) (articulating that the definition of oppression is best left to judicial construction based on a case-by-case analysis of the fact-specific circumstances in each case)), oppression is defined in Webster's Third International

Dictionary (1993), as the “unjust or cruel exercise of authority or power esp. by the imposition of burdens”. Id.

Here, Appellant was ‘oppressed’ by Respondents, when, after US Foods fired Appellant on 11/02/2005 (Att. K), Respondents’, through their *employer representative*, unlawfully withheld entitled TTD payments from Appellant, and continued unlawfully withholding entitled TTD payments from Appellant until after Appellant entered into the so-called agreement on 12/22/2005 (Sworn Affidavit), which was a relevant factor for Appellant’s entrance into the so-called agreement in the first instance, wherein specific performance is not warranted pursuant to McCoy. Id.

(3) *Misrepresentation & concealment by Respondents’ counsel.*

Respondents’ intentionally misrepresented to Appellant, in the so-called agreement they drafted (Att. A4, B), that Respondents’ had complied with all obligations under the Act, when in fact, on 12/22/2005, the date Appellant entered into the so-called agreement, Appellant had not received any compensation payments subsequent being fired by US Foods on 11/02/2005 (Att. K, Sworn Affidavit), wherein Respondents’ concealed its obligation to pay TTD benefits to Appellant; and Respondents’ intentionally misrepresented that they were a party to the so-called agreement, when in fact, Respondents’ were neither expressly identified as a party to the agreement and never entered into the agreement (Att. A4, B), as *presumptive* Employer Representative Attorney Barefoot improperly ‘consented’ to the Commission’s Order and Award approving the so-called agreement on 01/05/2006 *only*, in violation of well settled authorities (Player, *et al*), and R. 67-803(B)(2), wherein specific performance is not warranted pursuant to McCoy; Anthony and Amick. Id. *Supra.*

(4) *Concealment by Respondents’ to the Commission regarding Appellant’s compensable permanent lifting restrictions and prior termination of*

Appellant's employment for permanent lifting restrictions.

A review of the Commission's copy of the contents contained in W.C.C. File No. 0506205 confirms that at no time prior to 12/22/2005, the date Appellant signed the so-called agreement, did Respondents' ever advise the Commission that US Foods had terminated Appellant's employment on 11/02/2005 for 'permanent lifting restrictions' (Att. A), or did Respondents' file the mandatory 10/27/2005 Medical Report with the Commission (Att. A, H), which would have advised the Commission that Appellant was assigned 'permanent lifting restrictions' by the treating physician, which constituted termination of the light duty job assignment "during the period of disability" (§ 42-9-260(B)(1)), wherein Respondents' concealment of the same precludes a finding of specific performance pursuant to McCoy; Anthony and Amick. Id. Supra.

(5) Limited education and intelligence of Appellant.

A review of Appellant's Sworn Affidavit and the Case Management Report dated 09/23/2005 by employer-selected Case Manager RN Dayton (Att. Q), establishes Appellant's education level consisted of completion of the 10th grade and a General Equivalency Diploma (G.E.D.), wherein Appellant lacked the requisite education or legal intelligence and therefore was 'mentally weak' to have understood the terms and conditions of the alleged agreement, wherein specific performance should be precluded in light of McCoy; Anthony and Amick, even if the agreement were valid. Id. Att. B. Sworn Affidavit.

(6) Appellant's mental incapacity.

A review of the Case Management Report dated 09/23/2005 (Att. Q); Correspondence from RN Dayton dated 10/28/2005 (Att. I); and Appellant's Sworn Affidavit, establishes that subsequent the injuries Appellant sustained in the admitted work-related accident which occurred

on 05/05/2005 (Att. A18-A19), Appellant was provided prescribed medications of Hydrocodone and Flexeril, to treat the pain and spasms associated with Appellant's work-related injuries. Id.

The side effects of the prescribed medications of Hydrocodone and Flexeril, which Appellant was taking at the time Appellant signed the so-called agreement on 12/22/2005, rendered Appellant in an almost constant mental state of "drowsiness"; "dizziness"; "light-headedness", with "blurred vision", wherein Appellant was mentally incapacitated, due to the effects of the prescribed medications, at the time Appellant signed the so-called agreement, and under the doctrine of Specific Performance, the alleged misrepresentation by Respondents' counsel *combined* with Appellant's mental incapacity, should render the agreement (Att. B) "unjust" and "inequitable" pursuant to McCoy; Anthony and Amick, even if the agreement were valid, which it is not. Id. Sworn Affidavit. *See Mayo Clinic Article, Hydrocodone And Acetaminophen (Oral Route)*, dated 2017 (establishing side effects of Hydrocodone, including 'Dizziness' and 'lightheadedness') (less than complete article). Att. R. *Also see Drugs.com Article, Flexeril Side Effects*, (no date) (establishing side effects of Flexeril, including 'Blurred vision'; 'dizziness, drowsiness, or lightheadedness'). Att. S.

(7) *Duress of Appellant at the time Appellant entered into the agreement.*

"Duress is a condition of mind produced by improper external pressure or influence that practically destroys the free agency of a party and causes him **to do an act or form a contract not of his own volition.**" Willms Truck Co. v. JW Constr. Co., 314 S.C. 170, 178, 442 S.E.2d 197, 202 (Ct. App. 1994) (Emphasis added). On 12/22/2005 when Appellant signed the so-called agreement (Att. B), Appellant was under "duress" based on the following factors:

a) Appellant had not received any entitled TTD payments from Respondents' employer representative subsequent US Foods' decision to terminate Appellant on 11/02/2005 (Att. K;

Sworn Affidavit), although *de facto* employer representative Larry Grant had filed the Form 18 with the Commission on **12/01/2005** alleging that all TTD payments had been paid to Appellant through 12/04/2005 (Att. A13); **b)** On 12/13/2005 Appellant was involuntarily forced from the marital home by Appellant's now estranged ex-wife, wherein Appellant was homeless and had been sleeping in Appellant's personally owned vehicle for approximately ten (10) days at the time Appellant signed the so-called agreement (Sworn Affidavit); and

c) Attorney Bacon, who was informed and aware as of 12/16/2005 that Appellant was not receiving entitled TTD payments from the employer; that the employer had fired Appellant on 11/02/2005; and that Appellant was homeless since 12/13/2005, advised Appellant that if Appellant did not enter into the so-called agreement, that Attorney Bacon did not know when Appellant could expect to receive another compensation payment of any kind from Respondents.

Id. Sworn Affidavit.

Appellant's entrance into the so-called agreement on 12/22/2005 was based in large part on the "improper external pressure" by Respondents' unlawful withholding of entitled TTD payments from Appellant, for more than six (6) weeks (Att. A13, J, Sworn Affidavit), *and* the unlawful "influence", by Appellant's former attorney of record, Attorney Bacon, advising Appellant to enter into the so-called agreement, although Attorney Bacon knew the agreement was patently invalid; that the employer representative was unlawfully withholding entitled TTD payments from Appellant; and that Appellant was homeless and sleeping in his POV, and accordingly, under the doctrine of Specific Performance, and in particular, due to the established 'duress' Appellant was under at the time Appellant signed the so-called agreement on 12/22/2005 (*supra*), this Court should deemed said agreement 'unjust' and 'inequitable', pursuant to McCoy; Anthony and Amick, *et al*, because Appellant's entrance into the so-called

agreement **was not** of Appellant's own volition. Id.

(8) Inadequacy of price.

The face value of the so-called agreement, on 12/22/2005 (McCoy, et al), was the approximate sum of twenty thousand dollars (\$20,000.00), wherein the sum of \$20,000.00 served as settlement for the five percent (5%) impairment rating to the whole person of Appellant *and apparently as final payment of entitled TTD/TTC workers' compensation benefit payments.* Att. B. Att. A4. However, this amount was wholly inadequate and unfair, based on several pertinent factors.

First, the agreement makes no reference or mention to the fact(s) that in addition to the 5% impairment rating to the whole person of Appellant, on 10/27/2005 Dr. Tamadon *also* assigned to Appellant *compensable* permanent lifting restrictions (*i.e.* no lifting greater than twenty-five (25) pounds occasionally; no lifting greater than ten (10) pounds frequently or constantly) (Att. H, I); or that US Foods had previously *fired* Appellant on 11/02/2005 for 'permanent lifting restrictions' which were causal to the 05/05/2005 admitted work-related injury (and in fact, an **aggravation** to the admitted-but-not-employer-reported **05/27/2004** work-related accident), wherein the Agreement failed to address all relevant & mitigating factors associated with the instant W.C.C. Claim No. 0506205. Id. Sworn Affidavit. Att. A4, B, K, L, P.

Second, \$20,000.00 was a minute fraction of the instant workers' compensation claim's true value. Specifically, where Appellant's actual mutually agreed upon average weekly wage of **\$1,161.00**, as advanced to the Commission by US Foods, not once, but twice (Att. A18-A19), multiplied by 52 weeks (the number of weeks in a calendar year), establishes the **annual** value of W.C.C. Claim No. 0506205 at approximately **\$60,372.00**. Id.

Further, where US Foods has never offered Appellant suitable employment to

accommodate Appellant's permanent restrictions since firing Appellant on 11/02/2005; Appellant has never refused any offers of employment from US Foods; Appellant *has* and *remains* to be unemployed and unable to perform the duties of a delivery driver to date because the disability remains *unresolved*; and, as stated in the so-called agreement, on 12/22/2005 Appellant had a life expectancy of approximately "39.51" years, the true value of W.C.C. Claim No. 0506205, on 12/22/2005, was approximately \$2,385,297.72, or 39.51 years of Appellant's life expectancy multiplied by Appellant's annual AWW of \$60,372.00 (39.51 x \$60,372.00).

Thus, \$20,000.00 (notwithstanding the fact that Appellant only received approximately \$13,333.34 of the settlement agreement amount of \$20,000.00, due to Attorney Bacon receiving approximately \$6,666.66 in attorney fees (Form 61, Att. A5)), as the amount to "settle" W.C.C. Claim No. 0506205, which had an actual face value of \$2,385,297.72, reflects that Appellant received approximately eight hundred thirty-eight thousandths (0.00838%) of one percent (1%) of the actual value of W.C.C. Claim No. 0506205, or the settlement amount of \$20,000.00 divided by the actual value of W.C.C. Claim No. 0506205 of \$2,385,297.72 ($\$20,000 / \$2,385,297.72$), per the terms of the so-called agreement, which clearly is an "inadequate price" pursuant to McCoy, et al. Id. Supra.

(9) Unconscionability of Agreement.

Unconscionability is the "absence of meaningful choice on part of one party due to one-sided contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them". Fanning v. Fritz's Pontiac-Cadillac-Buick, Inc., 322 S.C. 399, 402, 472 S.E.2d 242, 245 (S.C. Sup. Ct. 1996) (stating unconscionability is the "absence of meaningful choice on part of one party due to one-sided

contract provisions, together with terms which are so oppressive that no reasonable person would make them and no fair and honest person would accept them”).

Here, the so-called agreement alleged to have been entered into by the parties, is unconscionable based on several factors.

First, there was no “meaningful choice” on the part of Appellant, as the agreement was one-sided and heavily favorable to Respondents’. Agreement. Att. B (“in consideration of sum of...(\$20,000.00), the undersigned, Alexander Guice, does hereby release and forever discharge US Food Service, Inc. and MAC Risk Management, Inc. from any and all claims, demands, actions or causes of action under the South Carolina Workers’ Compensation Act, on account of any and all injuries, disability, disfigurement, **specific** loss, death, operations, medical, hospital or like expenses, continuances, recurrences, aggravations, changes of condition, ailments, illnesses, and diseases or other damages, consequences or results, past, present, or future in any way connected with, or arising from the alleged injury sustained by the Claimant on or about May 5, 2005, and does hereby acknowledge that US Food Service, Inc. and MAC Risk Management, Inc., have fully, finally, and completely paid and discharged each and every of their obligations, liabilities and responsibilities under the South Carolina Workers’ Compensation Act and that the sum set forth above is being paid to and received by, the undersigned, Alexander Guice, in full and final satisfaction of all claims whatsoever as a result of the alleged accident described above and that US Food Service, Inc. and/or MAC Risk Management, Inc. shall not henceforth be liable for the payment of any amount whatsoever...”). (Emphasis added). Fanning. Anthony.

Put in another way, there was no language contained within the so-called agreement establishing that if Appellant **did not** enter into the so-called contractual agreement, what, if any,

entitlements or rights, guaranteed under the Act, Appellant would be privileged to (*i.e.* TTD payments, employment by US Foods with reasonable accommodations, *etc.*), or what, if any, liabilities Respondents' would be obligated to perform under the Act. Id.

Further, because Appellant had in fact received temporary compensation payments after expiration of the first-one-hundred-fifty-day-period after notice of the 05/05/2005 work-related injury to US Foods (Att. A13, A18; Att. J); Respondents' **had not** filed the requisite Form 21 with the Commission seeking permission to terminate TTD payments per R. 67-506(E) (Att. A); and the Commission **had not** scheduled a Form 21 stop payment hearing in this matter **prior** to Appellant signing the so-called agreement (contents of Commission File No. 0506205, Att. A; Correspondence from Commission Agent Hollmon, Att. G), Respondents', in fact and law, **had not** "fully, finally, and completely paid and discharged each and every of their obligations, liabilities and responsibilities under the South Carolina Workers' Compensation Act", as **falsely** stated within the so-called Agreement and **erroneously approved via Order and Award by the Commission.** Id.

Second, Respondents' were unreasonable. In particular, no "reasonable" person, who would include corporations represented by counsel, would seek settlement agreement of a workers' compensation claim, by offering \$20,000.00 or **0.00838%** of the value of a claim, worth an estimated \$2,385,297.72 and retain **99.99162%** or \$2,365,297.72 and consider the agreement to be fair, reasonable and conscionable. Agreement. Fanning. Anthony. Supra.

Third, Appellant's former counsel, Attorney Bacon, who professedly was acting in the interests of Appellant, was not "honest" or "fair" in terms of advising the undersigned injured and mentally-incapacitated Appellant to accept the terms of the so-called agreement.

In particular, Attorney Bacon, who is deemed to know the law (Owen, supra), and who

possessed intimate knowledge and awareness of the facts of W.C.C. Claim No. 0506205 as well as the injured Appellant's incapacities, and specifically, that; (i) treating physician Dr. Tamadon assigned permanent restrictions to Appellant, prohibiting Appellant from the ability to perform the US Foods'-hired duties of a delivery driver, which were causal to the 05/05/2005 work-related accident/injury, on 10/27/2005 (Att. H. Sworn Affidavit);

(ii) US Foods fired Appellant on 11/02/2005 for the same compensable permanent restrictions, after or near the expiration of the light duty period, and 'during the period of disability' (Att. H, I, K, L; Sworn Affidavit); (iii) Appellant had guaranteed rights, pursuant to § 42-9-260(B)(1) and § 42-9-260(F) of the Act, to continued receipt of TTD payments (*supra*); (iv) Appellant was not receiving entitled TTD payments from the Employer and Carrier subsequent US Foods firing Appellant on 11/02/2005 (Sworn Affidavit);

(v) Appellant was unemployed and homeless as of 12/13/2005 (Sworn Affidavit); (vi) Appellant possessed limited education and intelligence regarding his rights under the Act and his due process rights under the federal and state constitutions (Case Management Report, (courtesy copied to Attorney Bacon), Att. Q)); (vii) Appellant was under the prescribed medications of Hydrocodone and Flexeril, and experiencing side effects of drowsiness, dizziness, lightheadedness, and blurred vision (Sworn Affidavit; Att. Q); (viii) Respondents' had not complied with their obligations pursuant to R. 67-506(D)-(E); § 42-9-260(B)(1); and § 42-9-260(F) of the Act, as of 12/22/2005 (Sworn Affidavit); and

(ix) on 12/16/2005, Attorney Bacon informed Appellant that if Appellant did not enter into the so-called agreement, that Attorney Bacon did not know when Appellant could expect to receive another compensation payment of any kind from US Foods, clearly demonstrated dishonest, unfair, unreasonable and unconscionable conduct, by Attorney Bacon, advising

Appellant to “accept” Respondents’ settlement offer and enter into the so-called agreement on 12/22/2005, to include Attorney Bacon signing the Agreement as a witness, and advancing the “Attorney’s Certificate” acknowledging and confirming his advisement of the same. Id. Agreement and Attorney’s Certificate. Att. A4. Fanning. Anthony. *Supra*.

Thus, under the doctrine of Specific Performance, and because the agreement is facially unconscionable, specific performance, or continued execution of the so-called agreement, is not warranted pursuant to Anthony, *et al*, and Fanning by operation of law. Id. *Supra*.

A. Conclusion (As to Argument IX).

Finally, it would not be unreasonable to find and conclude that Respondents have never paid so much as *one cent* to secure a release from W.C.C. Claim No. 0506205, given the fact that \$20,000.00 reflects a little more than **four (4) months and one week** of entitled TTD payments Respondents are already **obligated** to pay Appellant **pursuant to section 42-9-260(B)(1), et al**, wherein \$1,161.00 (AWW) multiplied by seventeen (17) weeks of entitled TTD payments (\$1,161.00 x 17), equals \$19,737.00, wherein at a minimum, Respondents’ continue to be “unjustly enriched” due to the patently erroneous and so-called approved agreement, where Respondents’ have retained \$2,365,297.72 or **99.99162%** of the total actual value of W.C.C. Claim No. 0506205. Att. A4, A18, A19, B. *See Ellis v. Smith Grading and Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988) (holding a party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another).

Based on the foregoing reasons, under the preponderance of evidence standard, and in particular, pursuant to the doctrine of Specific Performance, this Court should exercise its sound discretion and deem the so-called agreement (Att. B) “unjust”, “inequitable”; and unenforceable, *axiomatically* rendering the 01/05/2006 Commission Order and Award a void judgment, and thus

divesting the Commission; the Circuit Court and this Court of subject matter jurisdiction over W.C.C. Case No. 0506205 and the parties, in accordance with Bishop; McCoy; Anthony; Amick and other holding authorities, by operation of law, as a matter of law. Id.

X. Appellant contends all subsequent proceedings before the Commission and the Circuit relying upon the aforementioned alleged Agreement and 01/05/2006 Commission Order and Award must be regarded as invalid.

As an initial matter, the 02/22/2013 *sua sponte* Order issued by the Single Commissioner; the 07/17/2013 Order issued by the Commission Appellate Panel; and the 07/17/2015 Order issued by the Circuit Court all rely upon the aforementioned and alleged Settlement Agreement and Release signed by Appellant and his counsel *only* on 12/22/2005 and the subsequent Commission's 01/05/2006 Order and Award approving the alleged agreement, to support their respective decisions. Agreement. Att. B. Agreement and Commission Order and Award. Att. A4. 02/22/2013 Single Commissioner Order. Att. C. 07/17/2013 Commission Appellate Panel Order. Att. D. 07/17/2015 Circuit Court Order. Previously filed.

As such, the validity of the 12/22/2005 alleged Agreement, and specifically, *whether an agreement actually existed between the parties on 12/22/2005, and whether the Commission had proper subject matter jurisdiction at the time it issued the 01/05/2006 Order and Award approving the agreement, inter alia* may be raised at this time, pursuant to Weinhauer; Brown; Voehl and Hart. Id. Att. A4, B.

A. Lack of subject matter jurisdiction cannot be corrected via an order or *de facto* order *nunc pro tunc*.

If the face of a decree, judgment or order fails to establish, by relevant facts and citation to sufficient authority, that the tribunal or court in question had proper jurisdiction of the subject matter of the action or of the parties at the time it considered and issued a judgment, jurisdiction cannot be corrected by order, or *de facto* order, at a later date for the previous jurisdictional

defective order, *nunc pro tunc* (“now for then”), because the *nunc pro tunc* order would improperly rewrite history and exceed a court’s jurisdiction. Transamerica Ins. Co. v. South, 975 F.2d 321, 325-26 (7th Cir. 1992) (“Lack of jurisdiction cannot be corrected by an order *nunc pro tunc*. The only proper office of a *nunc pro tunc* order is to correct a mistake in the records; it cannot be used to rewrite history.”).

Analogous to the Seventh Circuit’s holding in Transamerica Ins. Co. regarding the improper use of *nunc pro tunc* orders, in Ex Parte: J. P. Strom, Jr. v. Columbia, Opinion No. 25213 (S.C. Sup. Ct. 2000), our Supreme Court held:

“...the trial court's order removing Strom as counsel of record **should not** have been granted *nunc pro tunc*. *Nunc pro tunc* is a phrase applied to acts allowed to be done after the time when they should have been done, with a retroactive effect. Black's Law Dictionary 737 (7th ed. 1991). *Nunc pro tunc* orders can only be used to **place in the record** evidence of judicial action that has actually taken place. A prerequisite for a *nunc pro tunc* order . . . is some previous action by the court that is not adequately reflected in its record [Citations omitted]...The error could not be corrected by *nunc pro tunc* order because such an order can be used only for the purpose of placing in the record evidence of judicial action that has actually been taken, not to correct an error or supply an omission of judicial action...20 Am. Jur. *Courts* § 29 (1995) (the order cannot supply the record with action that the court failed to take)”.

Id. (Emphasis added).

B. The Appellate Panel and the Circuit Court lacked jurisdiction to determine the jurisdictional authorities the Parties relied upon to enter into and file the so-called agreement.

Although a facial examination of the agreement (Att. A4, B) established that there was not a specific reference to the code or regulation consented to by the parties to vest the Commission with subject matter jurisdiction to consider or approve the so-called agreement, in the Commission Appellate Panel’s 07/17/2013 Decision and Order, the Appellate Panel made a *Conclusion of Law* that the agreement was considered and approved by the Commission under the jurisdiction of “S.C. Reg. 67-801”. Att. D. Further, in the 07/17/2015 Circuit Court Order, the Circuit Court found that the so-called agreement was approved by the Commission under the

jurisdictional authority of “S.C. Code Ann. §42-9-390”. 07/17/2015 Circuit Court Order, p. 2. Previously filed.

Because both the Appellate Panel’s 07/17/2013 Order and the Circuit Court’s 07/17/2015 Order, respectively, constitute *de facto nunc pro tunc* orders, and in fact, rewrote history, and placed into the record, and specifically, the so-called agreement (Att. B) and subsequent Order and Award (Att. A4), jurisdictional authorities (*i.e.* Reg. 67-801 and § 42-9-390), which **were not** specifically referenced to in **either** the 12/22/2005 alleged agreement **or** within the subsequent 01/05/2005 Commission order and award approving the agreement, they must *both* be vacated for jurisdictional excesses *inter alia* pursuant to Transamerica Ins. Co.; Columbia; Voehl; Ross; and Hart. Id. Att. A4, B, D. Previously filed 07/17/2015 Circuit Court Order. *See Old Wayne Mut. L. Assoc. v. McDonough*, 204 U.S. 8, 27 S.Ct. 236 (U.S. Sup. Ct. 1907) (“A court cannot confer jurisdiction where none existed and **cannot make a void proceeding valid**. It is clear and well established law that a void order can be challenged in any court”) (Emphasis added); *see also* 49 C.J.S. Judgments, § 19 (“A court cannot render a valid Judgment unless it has jurisdiction over the subject matter of the litigation or cause of action.”).

Finally, it is well settled law that all subsequent proceedings founded on a void judgment are regarded as invalid. *See* 30A Am. Jur. Judgments § 44, 45 (holding all proceedings founded on the void judgment are themselves regarded as invalid). Thus, all subsequent proceedings before the Commission and the Circuit Court relying and founded upon the alleged agreement and 01/05/2006 Order and Award must be regarded as invalid, by operation of law, as a matter of law. Id. Att. C, D. 07/17/2015 Circuit Court Order, previously filed. Old Wayne Mut. L. Assoc.

XI. Appellant contends Respondents, not this Court, must prove that jurisdiction exists.

Jurisdiction, once challenged, is to be proven, not by the court, but by the party

attempting to assert jurisdiction. The burden of proof of jurisdiction lies with the asserter; the court is only to rule on the sufficiency of the proof tendered. McNutt v. GMAC, 298, U.S. 178 (U.S. Sup. Ct. 1936) (holding "...[T]herefore it became necessary for the court to determine the question of jurisdiction upon the facts presented, and, when brought directly here, it is the duty of this Court to review the decision upon the testimony as one presenting a jurisdictional question."); *also see* Maxfield v. Levy, 4 U.S. 330 (U.S. Sup. Ct. 1797) (holding "The Court is not to fix the bounds of its own jurisdiction, according to its own discretion."); *see also* Rescue Army v. Municipal Court of Los Angeles, 331 US 549, 91 L. ed. 1666, 67 S.Ct. 1409 (U.S. Sup. Ct. 1947) ("A court has no jurisdiction to determine its own jurisdiction, for a basic issue in any case before a tribunal is its power to act, and a court must have the authority to decide that question in the first instance."); *also see* Canady; Kirksey; and Sanders.

Thus, this Court cannot legally fix the bounds of its own jurisdiction in this proceeding, or fix the bounds of the previous jurisdictions of the Circuit Court; the Commission Appellate Panel; the Single Commissioner; or Commissioner Huffstetler's 01/05/2006 Order and Award approving the so-called agreement, according to this Court's own discretion (*i.e.* improper *nunc pro tunc* order), wherein Respondents', through counsel, must present evidence establishing jurisdiction at the time the parties allegedly entered into the so-called agreement on 12/22/2005 (Att. B); when the Commission issued the 01/05/2006 Order and Award approving the alleged agreement (Att. A4); and the other jurisdictional issues raised herein (*supra*), pursuant to McNutt; Maxfield; Rescue Army; and Kirksey, *et al*, as a matter of law. Id.

XII. Appellant contends Respondents' Counsel has a binding obligation, in the interest of the administration of justice, to acknowledge that the agreement and Commission order and award must be vacated and deemed void for lack of subject matter jurisdiction.

While attorneys generally owe their clients certain obligations, to include representing

their client's best interests in all legal proceedings, an attorney's first obligation, even before duties owed to that of the client, is to the public; the Court; and the interest of the administration of justice, in accordance with 7 C.J.S., Attorney & Client, § 4 (2005), which provides in part:

“His first duty is to the courts and the public, **not to the client**, and wherever the duties to his client conflict with those he owes as an officer of the court in the administration of justice, **the former must yield to the latter**. The **office of attorney is indispensable to the administration of justice** and is intimate and peculiar in its relation to, and vital to the well being of, the court. An attorney has a duty to aid the court in seeing that actions and proceedings in which he is engaged as counsel are conducted in a dignified and orderly manner, free from passion and personal animosities, and that all causes brought to an issue are tried and decided on their merits only.” *Id.* (Emphasis added).

Further, the “Lawyer’s Oath”, as set forth in Rule 402(h)(3), SCACR, recited and solemnly sworn or affirmed to by **every** lawyer prior to becoming a member of the South Carolina Bar, provides in relevant part:

“...To **opposing parties** and their counsel, I pledge **fairness, integrity**, and civility, not only in court, but also in **all written and oral communications**; I will not pursue or maintain any suit or proceeding which appears to me to be **unjust** nor maintain any defenses except those I believe to be honestly debatable under the law of the land...I will employ for the purpose of maintaining the causes confided to me only such means as are consistent **with trust and honor and the principles of professionalism**, and **will never seek to mislead an opposing party, the judge, or jury by a false statement of fact or law**...I will maintain the dignity of the legal system and **advance no fact prejudicial to the honor or reputation of a party** or witness, unless required by the justice of the cause with which I am charged...**I will assist the defenseless or oppressed** by ensuring that **justice is available to all citizens** and **will not delay any person's cause for profit or malice**...” *Id.* (Emphasis added).

Finally, the Rules of Professional Conduct, Rule 407, SCACR, provides *mandatory* actions all attorneys **must** perform with respect to truthfulness in all communications to unrepresented parties; all tribunals; and their responsibilities to the administration of justice. Rule 407, SCACR.

Thus, if Respondents’ ‘elect’ to direct their Counsel(s) of record, namely, Erin Leigh Hantske, Esquire and McAngus Goudelock & Courie, LLC (“Attorney Hantske”), to file a

Return to Appellant's Motion to Dismiss, as this would be a voluntary action, in doing so, **Attorney Hantske** would have a moral, ethical, professional, legal and **binding** obligation, to the *pro se* Appellant; this Court; and in the interest of the administration of justice, to *not only* acknowledge in fact and law, that: **a)** the so-called agreement signed by Appellant **only** on 12/22/2005 (Att. B) is no agreement at all; **b)** the Commission's 01/05/2006 Order and Award approving the so-called agreement must be deemed null and void *ab initio* (Att. A4); and **c)** neither the Commission; the Circuit Court; nor this Court has subject matter **or** personal jurisdiction over the parties or W.C.C. Claim No. 0506205 based on the well pled arguments evidentiary submissions above (*supra*), Attorney Hantske would *also* have an obligation to correct ALL briefs filed in this Court; the Circuit Court; and the Commission, to include any and all written communications to the undersigned *pro se* Appellant, where Attorney Hantske has previously alleged the validity of the so-called agreement and aforesaid 01/05/2006 Commission Order and Award, pursuant to Attorney Hantske being "bound", by oath, to Rule 402(h)(3), SCACR; the Rules of Professional Conduct; 7 C.J.S., Attorney & Client, § 4 (2005); and our Supreme Court's holdings in Riddle v. Ozmint, 369 S.C. 39, 47–48, 631 S.E.2d 70, 75 (2006), and Washington v. State, 324 S.C. 232, 235, 478 S.E.2d 833, 834, 835 (1996), by operation of law, as a matter of law. *Id.* See Riddle, *supra* ("The failure to correct false evidence is as **reprehensible as its presentation.**") (Emphasis added).

XIII. Appellant contends this Court must take notice to the allegations challenging subject matter jurisdiction of this Court; the Circuit Court; and the Commission.

It is well settled law that judges, which includes judges assigned to this Court, are deemed to know the law, as officers of the court, pursuant to Scheuer and Owen. *Id.* Furthermore, it is well settled that once jurisdiction is challenged, a court cannot proceed when it clearly appears that the court lacks jurisdiction, wherein the court has no authority to reach

merits, but, rather, should dismiss the action. Melo v. U.S., 505 F.2d 1026 (8th Cir. 1974); *see also* Maine v. Thiboutot, 100 S. Ct. 250 (U.S. Sup. Ct. 1980) ("Jurisdiction, once challenged, cannot be assumed and must be decided."); *see also* Ross.

Moreover, this Court is precluded from exercising its own discretion in terms of ignoring Appellant's arguments challenging this Court's and the Commission's subject matter jurisdiction, over the instant appeal and W.C.C. Claim No. 0506205, respectively. *Supra.* John J. Joyce v. United States of America, 474 F.2d 215, 219 (3rd Cir. 1973) (holding "Where there is no jurisdiction over the subject matter, there is, as well, no discretion to ignore that lack of jurisdiction."); *also see* Regions Bank v. Wingard Props., Inc., 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011) (holding a court may not ignore statutes, rules, and other precedent when providing an equitable remedy).

Still further, it is well settled that when a judge acts where he or she does not have jurisdiction to act, the judge is engaged in an act or acts of treason and lawless violence, under the settled theory that a judge cannot war against the Constitution without violating his or her oath to support it. U.S. v. Will, 449 U.S. 200, 216, 101 S. Ct., 471, 66 L.Ed.2d 392, 406 (U.S. Sup. Ct. 1980) (citing Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404, 5 L.Ed 257 (U.S. Sup. Ct. 1821)) (holding "When a judge acts where he or she does not have jurisdiction to act, the judge is engaged in an act or acts of treason."); *see also* Ableman v. Booth, 62 U.S. (21 How.) 506, 16 L.Ed. 169 (U.S. Sup. Ct. 1859) ("No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."); *see also* Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401 (U.S. Sup. Ct. 1958) ("No state legislator or executive or judicial officer can war against the Constitution without violating his

undertaking to support it.”)².

As such, pursuant to Scheuer; Owen; Melo; Maine; Joyce; Regions Bank; Will; Cohens; Ableman; and Cooper, *et al*, this Court must take notice to Appellant’s jurisdictional arguments challenging this Court’s subject matter jurisdiction, to include this Court’s obligation, if proper, to relinquish jurisdiction of this matter, by granting Appellant’s Motion to dismiss and remanding this action to the Commission to take appropriate action(s), by operation of law, as a matter of law. *Id. Supra. See Louisville R.R. v. Motley*, 211 U.S. 149, 29 S. Ct. 42 (U.S. Sup. Ct. 1908) (“If any tribunal finds absence of proof of jurisdiction over person and subject matter, the case **must** be dismissed.”) (Emphasis added); *also see Rhode Island v. Massachusetts*, 37 U.S. 657, 718, 9L.Ed. 1233 (U.S. Sup. Ct. 1838) (“However late this objection has been made, or may be made in **any** cause, in an inferior or appellate court of the United States, it **must** be

2 Appellant takes this opportunity to humbly apologize to this Court, and specifically, to **Chief Justice Honorable James Edward Lockemy**; **Appellate Associate Justice Honorable H. Bruce Williams**; **Appellate Associate Justice Honorable John D. Geathers**; and **Appellate Associate Justice Honorable Stephanie P. McDonald**, for any inconvenience Appellant may have caused in these proceedings (as well as the patently erroneous proceedings Appellant filed in the Supreme Court), as Chief Judge Lockemy, *et al*, certainly **did not** act improperly in terms of denying Appellant’s “Motion for Summary Judgement”; Appellant’s “Motion to Strike Respondents’ Initial Brief”; Appellant’s “Motion for Sanctions”; or any and all other motions filed by Appellant, in light of our Supreme Court’s holding in Ross, *supra*, and other state and federal authorities, wherein any action taken by a court without jurisdiction, other than dismissing the action, would have been ‘absolutely void’, which the undersigned *pro se* Appellant recently discovered. *Id. Stanard v. Olesen*, 74 S.Ct. 768, 98 L.Ed. 1151 (U.S. Sup. Ct. 1954) (“No sanction can be imposed absent proof of jurisdiction”).

Accordingly, this Court must, and has, remained fair and impartial throughout this matter, even if that meant denying an impoverished, oppressed and injured *pro se* litigant’s motions which were *procedurally defective* while they potentially advanced compelling jurisdictional arguments. While this Court certainly *could have* either applied a “liberal construction” to Appellant’s previous motions as a motion to dismiss; or exercised its inherent and vested *ex mero moto* and/or *sua sponte* powers, by acting on this Court’s own motion and directing the parties to brief this Court regarding the jurisdictional issue(s) raised in Appellant’s previous motions, and in fact, in Appellant’s Initial Brief, this was neither a mandatory obligation nor requirement of this Court to perform. U.S. v. Prestenbach, 230 F.3d 780 (5th Cir. 2000) (“Court **may** always raise question of subject matter jurisdiction on appeal and in courts below.”) (Emphasis added). Kennedy v. South Carolina Ret. Sys., 345 S.C. 339, 352-53, 549 S.E.2d 243, 250 (S.C. Sup. Ct. 2001) (The “use of the word ‘may’ signifies permission and generally means that the action spoken of is optional or discretionary”).

considered and decided, **before any court** can move **one further step** in the cause; as **any movement is necessarily the exercise of jurisdiction.**”) (Emphasis added).

XIV. Appellant contends he has a legal right, by operation of law, to reinstatement and release of entitled TTD payments and receipt of the twenty five percent penalty on the withheld TTC/TTD payments pursuant to section 42-9-260 of the Act.

A review of the instant memorandum sub judice; the evidentiary attachments; and Appellant’s Sworn Affidavit (*supra*), clearly establishes, under the “preponderance of the evidence” standard, *inter alia* that: **a)** the parties never entered into any agreement on 12/22/2005; **b)** the Commission lacked subject matter and personal jurisdiction at the time it issued the 01/05/2006 Order and Award approving the so-called agreement, rendering said Commission Order and Award a void judgment; and **c)** all subsequent proceedings founded upon the so-called agreement and the Commission’s 01/05/2006 Order and Award must be deemed invalid. *Supra*.

Thus, once this Court take appropriate action(s), in terms of deeming the aforementioned agreement (Att. B) and subsequent 01/05/2006 Commission Order and Award (Att. A4) null and void *ab initio* (Turner, supra, et al), to include dismissing this matter for lack of subject matter jurisdiction and, by operation of law, remanding this matter to the Commission with directives to vacate its 01/05/2006 Order and Award approving the so-called agreement and deeming the so-called agreement signed by Appellant and his counsel **only** on 12/22/2005 unenforceable and invalid, W.C.C. Claim No. 0506205 would *axiomatically* revert to its alleged-pre-agreement and *active* posture as of 12/21/2005, wherein Respondents’, who have always relied solely upon the so-called agreement and subsequent Commission Order and Award as the legal grounds for withholding TTD payments from the injured Appellant, would have a continuing legal obligation, *and be bound*, pursuant to section 42-9-260(B)(1), *et al*, of the Act, to immediately reinstate and release all unlawfully withheld TTD benefits to Appellant. *Id. Supra*.

Furthermore, Respondents' should not be afforded any **credit** for alleged TTD payments made to Appellant subsequent US Foods' termination of Appellant's employment on 11/02/2005, and, in fact, said TTD payments after 11/02/2005 should be deemed "invalid", by operation of law, due to the fact that: **i)** Respondents' knowingly and willfully paid TTD payments to Appellant from **11/07/2005 to 12/17/2005**, without ever paying entitled TTD payments to Appellant from **11/03/2005 to 11/06/2005**, at the *unlawfully reduced weekly rate* of **\$592.56**, instead of the mutually agreed upon AWW of **\$1,161.00**, wherein Respondents' *defrauded* Appellant out of entitled TTD disability payments (in that instance) (Att. A13, A18-A19; Att. J); and **ii)** it is well settled that "fraud destroys the validity of everything into which it enters", pursuant to Nudd; Grundy; Hazel; Chewning; and 70 Am. Jur. Civil Liability § 50 (2005). Id.

A. Estimated fraudulently withheld TTD payments due to Appellant to date pursuant to section 42-9-260(B)(1) of the Act.

Appellant estimates, as of 02/17/2017, Respondents' owe, and have *defrauded Appellant* out of, **\$683,492.31** in unlawfully withheld TTD payments, where: **a)** from **11/03/2005**, the day after US Foods fired Appellant after or near the expiration of the light duty job assignment (Att. A18, H, I, K, L), to **02/17/2017**, reflects **588.71** weeks of Appellant's entitlement to TTD benefits; **b)** Appellant's mutually agreed upon average weekly wage, as identified on both of Respondents' previously filed Form 12A's with the Commission (Att. A18, A19) is **\$1,161.00**; and **c)** 588.71 weeks of entitled TTD benefits, multiplied (x) by the AWW of \$1,161.00 (588.71 x \$1,161.00) equates to **\$683,492.31**. Id. Supra.

B. Entitlement of twenty-five percent penalty on unlawfully withheld TTD payments to Appellant pursuant to section 42-9-260(G) of the Act.

Section 42-9-260 of the South Carolina Code (Supp. 2005), requires employers to pay

temporary total disability to an employee who has “been out of work due to a reported work related injury” for eight days. *Id.* The penalty language of section 42-9-260 provides:

“(G) Failure to comply with this section **shall** result in a **twenty-five percent penalty imposed upon the carrier or employer computed on the amount of benefits withheld in violation of this section**, and the amount of the penalty **must be paid to the employee in addition to the amount of benefits withheld**. However, the penalty does not apply if the employer or carrier has terminated or suspended benefits when the employee has returned to any employment at the same or similar wage.” *Id.* (Emphasis added).

The language of section 42-9-260(G) is mandatory. *Id.* That statute sets the time of the penalty as beginning with the failure to comply with section 42-9-260, and in instant workers’ compensation claim no. 0506205, the applicable law being section 42-9-260(B)(1), and the date the Carrier failed to comply with payment of entitled TTD payments beginning on 11/03/2005, and continuing for as long as the benefits are wrongfully withheld. *Id. Supra. See Martin v. Rapid Plumbing*, 369 S.C. 278, 631 S.E.2d 547, 553 (Ct. App. 2006) (holding Employer Rapid Plumbing was required to pay the 25 percent penalty on unlawfully withheld compensation payments to Martin in accordance with section 42-9-260(G), and that an employer’s section 42-9-260(G) requirement to pay the 25 percent penalty on unlawfully withheld TTD payments is mandatory).

Further, Appellant’s Sworn Affidavit and Appellant’s SSA Income Statement dated 01/20/2017 (Att. M), establishes that to date, Appellant has not been employed since US Foods fired Appellant on 11/02/2005, wherein Appellant’s entitlement to the 25 percent penalty on all unlawfully withheld benefits is set from 11/03/2005 to date. *Id. Supra.* § 42-9-260(G).

As identified in above, Appellant estimates that Respondents’ owe and have defrauded Appellant out of \$683,492.31 in entitled TTD payments from 11/03/2005 to 02/17/2017. *Id.* Applying the § 42-9-260(G) twenty five percent penalty to the unlawfully withheld TTD

payments, reflects a payable **penalty** amount of **\$170,873.08**, where \$683,492.31 (entitled & due TTD payments) multiplied (x) by twenty-five percent (.25) equals \$170,873.08. *Id.*

C. Total amount of Compensation due to Appellant to date by operation of law.

Appellant is entitled to a total amount of compensation, which includes all unlawfully withheld TTD payments from 11/03/2005 to 02/17/2017 of \$683,492.31, per section 42-9-260(B)(1), plus the twenty-five percent penalty imposed on the unlawfully withheld TTD payments, per section 42-9-260(G), in the amount of \$170,873.08, for a **combined** TTD payment and twenty five percent penalty payment **total** amount of **\$854,365.39** (\$683,492.31 + \$170,873.08 = \$854,365.39). *Id. Supra.*

Finally, although Respondents', through counsel, are not required to wait for a ruling from this Court on Appellant's Motion to Dismiss to immediately release entitled and unlawfully withheld TTD payments and the 25 percent penalty payments to Appellant, based on the fact that Respondents', through their counsel, who is deemed to know the law (Scheuer and Owen), could voluntarily release entitled TTD and penalty payments to Appellant to come back into compliance with the Act, Appellant respectfully has no confidence that Respondents' would *voluntarily* comply with the law, and specifically, section 42-9-260(B)(1), (F) & (G), without an Order from this Court expressly directing Respondents' to comply with the same, by operation of law. *Id.* Sworn Affidavit.

D. Conclusion (as to Argument XIV).

As such, Appellant is entitled to TTD payments, and the twenty five percent penalty on the withheld TTD payments, where; **a)** the facts of W.C.C. Claim No. 0506205 establishes a clear entitlement to TTD payments and the penalty; **b)** proper application of section 42-9-260 of the Act and other holding authorities to W.C.C. Claim No. 0506205; **c)** the fact that the parties

did not enter into any agreement on 12/22/2005;

d) the fact that even if the parties had entered into a valid agreement, the agreement contravened the law, and specifically, § 42-9-260, *et al*, requiring said agreement to be deemed unenforceable, null and void; and e) the patently null and invalid 01/05/2006 Commission Order and Award approving the so-called agreement, must be deemed void *ab initio*, for lack of subject matter jurisdiction, by operation of law, as a matter of law. *Id. Supra*.

XV. Appellant contends he has a legal right to swift justice and immediate access to entitled workers' compensation benefits secured under the Act.

Workers' compensation laws were and remain intended by the General Assembly to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault. Peay v. U.S. Silica Co., 313 S.C. 91, 94, 437 S.E.2d 64, 65 (S.C. Sup. Ct. 1993) (quoting Ex parte: South Carolina Property and Casualty Insurance Guaranty Association v. South Carolina Uninsured Employers' Fund, Case No. 2013-000575 (Opinion No. 5290) (Ct. App. 2015) (holding "Workers' compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, *swift recovery* for workplace injuries regardless of fault.)) (Emphasis added); *also see* Cokeley v. Robert Lee, Inc., 197 S.C. 157, 14 S.E.2d 889 (S.C. Sup. Ct. 1941).

Further, other well settled authorities support this Court's and our Supreme Court's holdings in Peay and South Carolina Property and Casualty regarding injured claimant's swift recovery from work-related accidents or injuries. 99 C.J.S. Workers' Compensation, § 16 (2013) (stating "considerations leading to the enactment of the compensation legislation [include] a desire to provide a remedy or form of relief to...injured workers or their dependents that is prompt and speedy" (footnote omitted); *see also* 82 Am. Jur. 2d Workers' Compensation, § 12 (2013) ("A state's workers' compensation act...provid[es] injured employees with an efficient

system of rights, remedies, and procedures with the goal of giving them prompt relief. Among the purposes of [the] act [is]...providing prompt justice for injured workers and preventing the delays that might arise from protracted litigation.”).

Here, Appellant **has not** been provided “sure, swift recovery” or “prompt justice” of entitled compensation benefits guaranteed and secured to Appellant under the Act, and specifically, entitled TTD payments related to the 05/05/2005 admitted work-related accident/injury, where; **a)** US Foods terminated Appellant on 11/02/2005 for expiration of the six month light duty job period *during* Appellant’s period of disability; **b)** the compensable permanent lifting restrictions remains unresolved (*i.e.* ‘period of disability’); **c)** US Foods and their Insurance Carrier has refused to pay entitled TTD benefits;

d) Appellant signed a patently unenforceable, non-binding and so-called agreement on 12/22/2005 which **did not release** Respondents’ from their obligations under the Act; **e)** the Commission issued a categorically **invalid** Order and Award approving the so-called agreement; and **f)** Appellant remains unemployed and unable to obtain gainful employment since US Foods fired Appellant following the expiration of the light duty job period on **11/02/2005**, wherein Appellant has been deprived of entitled TTD payments, now for more than **eleven (11) years**, in clear noncompliance with our Legislature’s intended purpose of the Act; Peay; South Carolina Property and Casualty; Cokeley; and other holding authorities. *Id. Supra.*

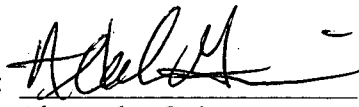
Thus, Appellant is entitled to expedited consideration and adjudication of the instant Motion to Dismiss, for “swift recovery” and “prompt justice” of unlawfully withheld TTD payments, and other entitled benefits, secured by the Act, pursuant to Peay, et al, by operation of law, as a matter of law. *Id. Supra.*

CONCLUSION

Based on all the foregoing reasons, and under the “preponderance of the evidence”

standard, this Court; the Circuit Court; and the Commission lack subject matter and personal jurisdiction over the parties and W.C.C. Claim No. 0506205. As such, this Court should grant Appellant's Motion to Dismiss, to include granting the relief, as stated, within the Motion to dismiss, by operation of law, as a matter of law. Further, in accordance with Rule 240(b), SCACR, Appellant request that the Court stay the time limits for perfecting this appeal until the Motion to dismiss is decided³.

Respectfully submitted,

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February 18, 2017

³ Appellant regrets the length of this memorandum; however, Appellant is not an attorney and tried to address all jurisdictional and related issues in as concise of a manner as Appellant could do to the best of his ability. *See Picking v. Pennsylvania Railway*, 151 F.2d. 240 (3rd Cir.1946) (where *pro se* plaintiff's pleading was 150 pages and described by a federal judge as "inept", the Court held "Where a plaintiff pleads pro se...the Court should endeavor to construe Plaintiff's Pleadings without regard to technicalities").