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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

Appellate Case No. 2016-000497  
W.C.C. 1112328

Samuel A. Rose, Claimant.....Respondent,

v.

JJS Trucking, LLC, Unisured Employer, and  
Chris Thompson Services, LLC, Upstream Contractor, and  
Bridgefield Casualty Ins. Co., Carrier, and South Carolina  
Uninsured Employers' Fund,.....Defendants,

*of whom* JJS Trucking, LLC, Uninsured Employer, and  
the South Carolina Uninsured Employers' Fund are.....Respondents,  
and

Chris Thompson Services, LLC, Upstream Contractor,  
and Bridgefield Casualty Ins. Co., Carrier are the.....Petitioners.

**PETITION FOR REHEARING**

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## Statement of the Case

This matter came before Workers' Compensation Commissioner Aisha Taylor for a hearing on September 23, 2013 in St. Matthews, South Carolina, pursuant to the Form 21, Stop Payment Application, filed by Chris Thompson Services and Bridgefield Casualty Insurance (hereinafter "the Respondents"), requesting permission to terminate compensation on the basis that the Claimant had been released at maximum medical improvement and no work restrictions.<sup>1</sup> A previous Commission Order found that the Claimant sustained an injury by accident on August 10, 2011 and was entitled to a medical evaluation to determine the extent of his injuries, as well as ongoing temporary total disability compensation. Only after the hearing before Hearing Commissioner Taylor, but before a decision was rendered, the Petitioners learned for the first time on November 8, 2013 that the Claimant had an ongoing third-party claim arising out of the August 10, 2011 accident pending in the Charleston County Court of Common Pleas.

Immediately thereafter, on November 12, 2013, the Petitioners filed a Motion to Introduce Newly Discovered Evidence, specifically the Claimant's pleadings in connection with the third-party claim he filed in the Charleston County Court of Common Pleas some

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<sup>1</sup> After extensive evaluation and treatment, the Claimant was ultimately diagnosed with "myofascial pain and/or fibromyalgia." According to Dr. Greg Jones, the Claimant reached maximum medical improvement by March 20, 2013 and "[i]t does not appear that any future treatment would be warranted." Dr. Jones further opined that the Claimant "is capable of working without restrictions."

eight months earlier, on February 20, 2013. The Petitioners argued that this newly discovered evidence was relevant to the determination of the issues pending before Commissioner Taylor because the Claimant did not file a Form S-2 with the Workers' Compensation Commission, the Employer, or the Carrier within thirty days after filing his third-party claim. As a result, the Petitioners argued that the Claimant is not entitled to additional benefits under the Workers' Compensation Act as a matter of law for failure to comply with the requirements of S.C. Code Ann. § 42-1-560.

The Claimant did not file a return<sup>2</sup> to the Petitioners' Motion to Introduce Newly Discovered Evidence. The Petitioners' Motion was granted by Administrative Order dated January 3, 2014 and the Claimant's third-party pleadings were admitted into evidence and made part of the record in this case. The Claimant then filed a Motion to Introduce New Evidence into the record. Hearing Commissioner Taylor denied the Claimant's Motion by Administrative Order dated January 3, 2014 on the basis that the evidence the Claimant sought to introduce was not "of the same nature and character required for granting a new trial" as required by S.C. Code Reg. 67-707(C) and S.C.R.C.P. Rules 59 and 60.<sup>3</sup>

On September 2, 2014, Commissioner Taylor issued a Decision and Order, by which she concluded that the Claimant failed to satisfy the mandatory requirements of

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<sup>2</sup> The Claimant did file a "Motion in Opposition to Introduce After Discovered Evidence." The Claimant's Motion was denied by Administrative Order dated January 3, 2014.

<sup>3</sup> The Claimant did not appeal this January 3, 2014 Administrative Order to the Court of Appeals.

S.C. Code Ann. § 42-1-560. Commissioner Taylor further granted the Petitioners' Stop Payment Application, concluding that the Petitioners were entitled to terminate temporary disability pursuant to S.C. Code Ann. § 42-9-210 and § 42-9-260. In addition, Commissioner Taylor concluded that the Claimant is not entitled to any additional medical care or treatment under S.C. Code Ann. § 42-15-60, or benefits for permanent disability or loss of use under S.C. Code Ann. § 42-9-10, § 42-9-20, or § 42-9-30.

Thereafter, the Claimant filed a Form 30 requesting the Commission's Appellate Panel review Commissioner Taylor's September 2, 2014 Order; however, the only exceptions raised related to "newly discovered evidence" and the application of S.C. Code Ann. § 42-1-560. The Claimant raised no exception to the remainder of the Hearing Commissioner's Conclusions of Law. Similarly, the Claimant raised no argument with regard to Commissioner Taylor's denial of benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 in his brief to the Appellate Panel. In fact, the Claimant did not even mention these statutes in his Form 30 or in his brief to the Appellate Panel. Therefore, the Petitioners argued that the Commissioner's conclusions of law with regard to the Claimant's entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30 are the law of the case and is not subject to review by the Appellate Panel or the Courts.<sup>4</sup>

After oral arguments in Columbia on April 21, 2015, the Appellate Panel issued the Commission's final Decision and Order dated February 8, 2016, affirming the Decision and Order of Commissioner Taylor in its entirety. The Claimant timely filed

the present appeal to the South Carolina Court of Appeals. In his brief to the Court of Appeals, the Claimant again failed to raise any argument with respect to (or even mention) the Commission's conclusion of law pursuant to S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, or 42-9-30.

The Court of Appeals decided this case, without oral arguments, by unpublished decision dated April 18, 2018. Chris Thompson Services and Bridgefield Casualty now petition for rehearing pursuant to Rule 221, S.C.A.C.R. for the reasons set forth below.

### **Arguments**

**I. The unpublished decision of the Court of Appeals overlooks the fact that the Workers' Compensation Commission's conclusions of law with respect to the Claimant's entitlement to additional medical and compensation benefits are the law of the case irrespective of his procedural arguments.**

According to the final Decision and Order of the Workers' Compensation Commission,

"The Claimant did not appeal conclusions of law numbers 4, 5, 6, 7, or 8 of the Hearing Commissioner's Decision and Order in his Form 30, nor did he raise any exception to these conclusions in his brief to the Appellate Panel. Similarly, the Claimant raised no argument with respect to these conclusions of law in his brief to the Court of Appeals. These conclusions deal with the Claimant's entitlement to benefits under S.C. Code Ann. §§ 42-9-210, 42-9-260, 42-15-60, 42-9-10, 42-9-20, and 42-9-30, yet none of these statutes are ever mentioned in the Claimant's Form 30 his brief to

the Appellate Panel, or his brief to the Court of Appeals. Quite simply, the Claimant makes no argument with regard to the proper application of these statutes and; therefore, **the following conclusions are the law of the case:** [emphasis added]

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- *Pursuant to S.C. Code Ann. Sec. 42-9-260, the Defendants are entitled to terminate temporary disability compensation effective the date of the hearing, September 23, 2013.*
- *Pursuant to S.C. Code Ann. Sec. 42-15-60, the Defendants shall have no liability for any additional medical care or treatment under the workers' Compensation Act.*
- *Pursuant to S.C. Code Ann. Sec. 42-9-10, Sec. 42-9-20, and Sec. 42-9-30, the Claimant is not entitled to, and the Defendants shall have no liability for, any benefits for permanent disability or loss of use under the Workers' Compensation Act.*

As noted by the Commission, S.C. Code Ann. § 42-17-50 provides the procedure for appealing a Hearing Commissioner's Order; however, "only issues within the application are preserved for the full Commission." Creech v. Ducane Co., 320 S.C. 559, 476 S.E.2d 114, *reh'g denied, cert. denied* (Ct. App. 1995). Furthermore, all findings of fact and law by the Hearing Commissioner "become and are the law of the case, except only those within the scope of the exception." Ham v. Mullins Lumber Co., 193 S.C. 66, 7 S.E.2s 712 (1940). In the case *sub judice*, the Claimant did not raise any exception to

the above-reference conclusions of law and the Commission's Appellate Panel properly concluded that it lacked the authority or jurisdiction to extend the fourteen days permitted for the perfecting of an appeal so as to allow the Claimant to argue these issues. Allison v. W.L. Gore & Assoc., 394 S.C. 185, 714 S.E.2d 547 (2011).<sup>3</sup>

Therefore, the Commission properly concluded that, regardless of any argument the Claimant makes under S.C. Code Ann. § 42-1-560, the issue is moot because the Claimant is not entitled to any additional medical or compensation benefits under the South Carolina Workers' Compensation Act as a matter of law based upon the well-established principle that "an unappealed ruling, right or wrong, is the law of the case." Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) (*citing* Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 160-61, 177 S.E.2d 544 (1970)).

It would appear that by remanding the claim to the Workers' Compensation Commission, that the Court of Appeals has overlooked the Commission's final, binding, and unappealed conclusions regarding the Claimant's failure to preserve any argument regarding his entitlement to medical or compensation benefits. The unpublished decision of the Court of Appeals fails to even mention the Commission's conclusions in this regard and otherwise elucidates no basis for their reversal. As explained by the Commission, irrespective of the propriety of the Claimant's procedural arguments, his claim for benefits has been finally determined and the denial of these benefits is the law of the case and a remand for further proceedings would be moot.

**II. The Court of Appeals improperly based its unpublished decision upon facts not in evidence and misapprehended the fact that the**

**Claimant's argument regarding the admissibility of this evidence is not properly before the Court of Appeals.**

The Claimant sought to introduce newly-manufactured evidence by motion filed with the Commission dated December 20, 2014. This motion was denied by Order dated January 3, 2014. Importantly, the Claimant did not appeal the Commission's January 3, 2014 Order. In addition, the Claimant's March 8, 2016 Notice of Appeal filed with the Court of Appeals makes no mention of the Commission's January 3, 2014 Order and that Order was not otherwise attached to the Notice, as specifically required by Rule 203(d)(2)(B)ii and Rule 203(e)(2)(C), S.C.A.C.R.. The Court of Appeals necessarily misapprehended this fact in not only accepting this "evidence" on appeal, but in making its own findings of fact regarding the import of this excluded evidence.

Furthermore, the Court of Appeals lacks appellate jurisdiction to consider arguments regarding the admissibility of additional evidence because the Claimant did not comply with Rule 203, S.C.A.C.R.. See State v. Brown, 358 S.C. 382, 596 S.E.2e 39 (2004) (holding that an appellant's failure to comply with the procedural rules for appeal deprives the court of appellate jurisdiction.). The Court of Appeals also lacks subject matter jurisdiction over the Claimant's evidentiary arguments because S.C. Code Ann. § 42-17-60 and S.C. Code Ann. 1-23-380(A)(1) make the unappealed Order of January 3, 2014 conclusive and binding. Therefore, the Petitioners respectfully contend that it is improper for the Court of Appeals to admit new evidence on appeal, especially considering the issue was not even properly before the Court, an issue which the Court's unpublished decision fails to address.

**III. The Court of Appeals misapprehended the mandatory requirements of S.C. Code Ann. § 42-1-560 in reversing the final Decision and Order of the Workers' Compensation Commission.**

The Claimant commenced a civil action against a third-party as a result of the same August 10, 2011 accident for which he seeks workers' compensation benefits by filing a counterclaim against Robbie Clark in the Charleston County Court of Common Pleas on February 20, 2013. (See Exhibits "A" and "B" to the Defendants' Motion to Introduce Newly Discovered Evidence). The Claimant did not file or serve a Form S2 on the Employer, Carrier, or the Commission within thirty days after commencing the third-party action on February 20, 2013 and did not otherwise notify the Employer, Carrier or the commission that this third-party action had been commenced. As a result, the Commission concluded that the Claimant had failed to comply with the mandatory requirements of S.C. Code Ann. § 42-1-560. The Petitioners respectfully contend that the plain meaning of this statute was misapprehended by the Court of Appeals.

S.C. Code Ann. § 42-1-560 sets forth the requirements for simultaneously pursuing a third-party civil action and a workers' compensation claim. The statute provides that:

"Notice of the commencement of the [third-party] action shall<sup>5</sup> be given within thirty days thereafter to the [Commission], the employer and carrier upon a form prescribed by the [Commission]." (emphasis added)

In fact, the only way a claimant may proceed against both an employer/carrier and against a third-party tortfeasor is by complying with the requirements of S.C. Code Ann. § 42-1-560. Fisher v. S.C. Dept. of Mental Retardation, 277 S.C. 5763, 575, 291 S.E.2d 200, 201 (1982); Hudson v. Townsend Saw Chain Co., 296 S.C. 17, 20, 370 S.E.2d 104, 106 (Ct. App. 1988) (holding that § 42-1-560(b) "plainly requires an employee, when he or she brings a third-party action, to give notice to the Commission, the employer, and the employer's carrier of the commencement of the third-party action within 30 days of its commencement."). Because the Claimant did not file or serve a Form S-2 (the notice form prescribed by the Commission) or otherwise provide any notice of the commencement of the third-party action to the Commission, the Employer, or the Carrier within thirty days, the Claimant failed to satisfy the mandatory requirements of S.C. Code Ann. Sec. 42-1-560.

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<sup>5</sup> "The use of the term 'shall' in a statute means that the action is mandatory." Johnston v. S.C. Dept. of Labor, Licensing, and Reg., 365 S.C. 293, 296-97, 617 S.E.2d 363, 364 (2005) (citing Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 111, 580 S.E.2d 100, 105 (2003)).

Furthermore, the Workers' Compensation Act is in derogation of common law rights, and; therefore, the terms and requirements of S.C. Code Ann. Sec 42-1-560 must be strictly construed. Callahan v. Beaufort Co. Sch. Dist., 375 S.C. 92, 651 S.E.2d 311 (2007). Even though Petitioners are entitled to maintain their lien on the proceeds of any recovery from the third-party whether by judgment, settlement, or otherwise and despite the fact that the Petitioners have "not lost [their] right of subrogation against the responsible third-party, the statutory provision mandates notice to the employer, carrier, and the Commission within thirty days of filing the third-party suit." Callahan, supra. According to the South Carolina Supreme Court, "42-1-560(b) must be strictly followed in order for a claimant to preserve [the] right to proceed against both an employer and a third-party." Callahan, supra. Because the Claimant has not followed the mandatory requirements of S.C. Code Ann. Sec. 42-1-560, but has ignored them entirely, the Claimant has failed to preserve his right to proceed against the employer for additional benefits under the Workers' Compensation Act after the date he commenced the third-party action, February 20, 2013.

The Claimant would argue that his admitted failure to comply with S.C. Code Ann. § 421-560 could somehow be "cured" by voluntarily dismissing this third-party lawsuit and then simply re-filing. The Petitioners respectfully contend that the Claimant should not be permitted to grossly circumvent the clear statutory requirements in this manner. To date, there is no case law on this issue and the Supreme Court has previously declined to address the "efficacy" of a re-filing. See Callahan, supra, at footnote #1. Should the Claimant voluntarily dismiss his third-party suit and then re-file, then the third-party suit filed on February 20, 2013 could no longer be considered

a "nullity" and to suggest that the Commission should pretend that the February 20, 2013 suit was never filed under such circumstances would entail a grossly prejudicial legal fiction. Therefore, the Petitioners respectfully contend that that the Workers' Compensation Commission's final Decision and Order should not be reversed based on facts not in evidence, hypothetical scenarios, or newly-manufactured events.

**Conclusion**

Therefore, based upon the arguments set forth above, the Petitioners respectfully request that the Court of Appeals grant a Rehearing and affirm the Decision and Order of the South Carolina Workers' Compensation Commission in its entirety.

Respectfully submitted,

*Kirsten L. Barr*

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA WORKERS' COMPENSATION  
COMMISSION

The Honorable R. Michael Campbell, II, Commissioner

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Appellate Case No. 2016-000497  
W.C.C. 1112328

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Samuel Rose, Claimant.....Appellant,

v.

JJS Trucking, LLC, Uninsured Employer, and Chris Thompson  
Services, Upstream Employer, and Bridgefield Casualty Ins. Co.,  
Carrier for Chris Thompson Services, and The State Accident  
Fund,.....Respondents.

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**PROOF OF SERVICE**

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The undersigned hereby certifies that the Petition for Rehearing of the Respondents was served on Samuel A. Rose and the South Carolina Uninsured Employers Fund by depositing a copy of the same in the United States Mail, first class postage prepaid, on May 3, 2018 addressed to their attorneys of record as follows:

Stephen Benjamin Samuels, Esq.  
1320 Richland Street  
Columbia, SC 29201

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MAY 03 2018  
SC Court of Appeals

Amy V. Cofield, Esq.  
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May 3, 2018

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TRASK  
HOWELL  
WORKERS' COMPENSATION DEFENSE

*Reply to*  
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May 3, 2017

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Re: Samuel A. Rose v. JJS Trucking, LLC/SCUEF and Chris Thompson  
Services, LLC/Bridgefield Casualty Insurance Company  
W.C.C. File No.: 1112328  
**Appellate Case No.: 2016-000497**  
Carrier File No.: 0196-943450  
Date of Accident: August 10, 2011

Dear Ms. Kitchings:

Enclosed herewith for filing, please find the original and six (6) copies of our Petition for Rehearing and original Proof of Service of the same in the above-named matter. By a copy of this correspondence, I am serving the other counsel of record with a copy of our Petition. Also enclosed, please find our check in the amount of \$25.00 for the filing of this Petition.

Yours very truly,

*Kirsten L. Barr*

Kirsten L. Barr

KLB/lmc/les

Enc.

cc: Kiema Lewis, Summit Holdings, (w/enc.)  
Chris Thompson, Chris Thompson Services, LLC (w/enc.)  
Amy V. Cofield, Esq. (w/enc.)  
Stephen Benjamin Samuels, Esq. (w/enc.)

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