

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Civil Action No. 07-CP-09-0089

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S.C. Supreme Court

Stephen Brad Wise Petitioner

v

Richard Wise d/b/a Wise Services and the
South Carolina Uninsured Employers Fund Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Stephen Brad Wise, Appellant,

v.

Richard Wise d/b/a Wise
Services and the South Carolina
Uninsured Employers Fund, Respondents.

Appeal From Calhoun County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 4879
Heard November 4, 2010 – Filed August 24, 2011

AFFIRMED

Pope D. Johnson, of Columbia, for Appellant.

John G. Felder, of St. Matthews; Robert Merrell
Cook, II, of Batesburg-Leesville, for Respondents.

KONDUROS, J.: Stephen Brad Wise (Claimant) appeals the circuit court's dismissal of his workers' compensation claim that arose from the same facts as a civil action he settled against a third party and a default judgment

he obtained against his employer. He maintains the circuit court could not take judicial notice of the existence of his civil action when evidence of that claim did not appear in the appellate record. We affirm.

FACTS/PROCEDURAL HISTORY

This workers' compensation action arose out of an accident Claimant had on October 30, 2000, while working for Richard Wise d/b/a Wise Services (Employer).¹ Claimant was riding on top of a bank building that was being moved when he came into contact with a high voltage electrical line in Orangeburg, South Carolina and sustained severe burns as a result. On June 26, 2001, Claimant filed a Form 50 against Employer for medical and compensation benefits for his injuries. On July 13, 2001, Employer filed a Form 51, denying Claimant was an employee and asserting he was an independent contractor. Additionally, Employer contended it was not covered by the Workers' Compensation Act (the Act) because it does not have the requisite number of employees. Employer also maintained if Claimant was an employee, he was a casual employee and thus exempt under section 42-1-360 of the South Carolina Code. The South Carolina Uninsured Employers' Fund (the Fund) contended Claimant was not subject to the Act. It further asserted that if Claimant was a covered employee, his weekly wage should be figured at the minimum compensation of \$75 per week because he failed to file a tax return for his wages from Employer.

On May 2, 2002, the single commissioner held a hearing on the matter. On October 18, 2002, five months after the single commissioner conducted the hearing but prior to its issuing the order, Claimant filed a tort action against Employer and the City of Orangeburg (the City). On November 26, 2003, the single commissioner issued an order denying the claim, finding Employer regularly employed only three employees and thus was exempt from the Act and not required to provide workers' compensation insurance coverage. The single commissioner further found because Employer was exempt from coverage, the Fund had no responsibility to provide benefits to Claimant. Finally, the single commissioner found the Workers'

¹ We note at the outset the procedural history of this case is difficult to follow.

Compensation Commission had no jurisdiction over the claim and dismissed it.

On December 8, 2003, Claimant filed a Form 30 appealing the single commissioner's order to the Appellate Panel. On January 4, 2004, Claimant obtained a default judgment in the amount of \$900,000 in the tort action against Employer. Claimant and the City reached a settlement.

On June 22, 2004, the Fund filed a motion to dismiss the appeal or order new evidence taken before the single commissioner. The Fund contended Claimant had waived his right to appeal his claim by filing suit against Employer alleging his employment did not fall within the scope of the Act and prosecuting that action to a final judgment of \$900,000. Additionally, the Fund maintained Claimant did not notify it or the Commission of his suit against the City as a third-party tortfeasor, which section 42-1-560(b) of the South Carolina Code requires, and as a result he elected his remedy and was barred from receiving any benefits under the Act. The Fund provided an affidavit, a copy of Claimant's summons and complaint against Employer and the City, the default judgment against Employer, and the order from February 24, 2004, dismissing the action against the City with prejudice. The Appellate Panel dismissed the workers' compensation action, finding (1) Claimant, Employer, or their attorneys did not notify the Commission or the Fund of the civil suit; (2) when Claimant filed his civil action on the same issues that were before the Commission, the matter was removed from the Commission's jurisdiction, and the Claimant alleged his employment did not fall within the parameters of the Act; and (3) accordingly, the matter is res judicata.

Claimant appealed to the circuit court, which reversed the order to dismiss, finding Regulation 67-215(B)(1) of the South Carolina Code of Regulations prohibited the Appellate Panel from addressing a motion to dismiss. The circuit court remanded the action to the Full Commission for it to consider the Fund's motion to submit new evidence. The Full Commission then remanded the matter to the Appellate Panel, which granted the motion to submit additional evidence and remanded the action to the single commissioner to consider the new evidence. Claimant appealed the Appellate Panel's allowance of additional evidence to the circuit court, which

reversed the Appellate Panel, finding the Appellate Panel's order was too summary to allow a meaningful review. On remand, the Full Commission issued an order granting the Fund's motion to submit additional evidence, finding the record contains no evidence contrary or similar to the new evidence; thus, the new evidence was not cumulative or impeaching. Accordingly, the Full Commission remanded the action to the single commissioner to determine whether Claimant had elected his remedy.

Claimant again appealed to the circuit court, asserting the evidence did not fit the meaning of newly discovered evidence under Regulation 67-707 of the South Carolina Code. The circuit court reversed, finding the evidence did not constitute newly discovered evidence under Regulation 67-707. The circuit court stated: "The evidence of facts sought to be admitted did not exist at the time of the hearing before the [s]ingle [c]ommissioner. . . . [T]he evidence sought to be admitted does not constitute after discovered evidence within the meaning of Regulation 67-707." (quoting State v. Haulcomb, 260 S.C. 260, 270, 195 S.E.2d 601, 606 (1973) ("[A]fter discovered evidence refers to facts existing at time of trial of which . . . [the] aggrieved party was excusably ignorant.")). On remand, the Appellate Panel denied the Fund's motion to admit additional evidence pursuant to Regulation 67-707 and ordered Claimant's appeal as to whether Employer was subject to the Act be set for a hearing. Following the hearing, the Appellate Panel reversed the single commissioner, finding Employer had four employees in his employment, and thus, it was subject to the Act. The Fund appealed to the circuit court, which reversed the Appellate Panel, finding the action was "barred by the election of remedies of the [C]laimant by instituting and settling his tort claims without notice to and the consent of the [E]mployer and the [Fund]." The circuit court also found in the alternative, "pursuant to the election of jurisdiction provision of [s]ection 42-5-40 the Commission was divested of jurisdiction over this claim and its order is vacated."² This appeal followed.

² The circuit court stated it had erred in its prior determination that the evidence of the existence of Claimant's tort action, default judgment, and settlement could not be admitted under Regulation 67-707.

STANDARD OF REVIEW

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions by the Appellate Panel. See Lark v. Bi-Lo, Inc., 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). This court may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may reverse when the decision is affected by an error of law. Stone v. Traylor Bros., 360 S.C. 271, 274, 600 S.E.2d 551, 552 (Ct. App. 2004).

The substantial evidence rule governs the standard of review in workers' compensation decisions. Frame v. Resort Servs. Inc., 357 S.C. 520, 527, 593 S.E.2d 491, 494 (Ct. App. 2004). The Appellate Panel's decision must be affirmed if supported by substantial evidence in the record. Shuler v. Gregory Elec., 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005). An appellate court can reverse or modify the Appellate Panel's decision only if the decision is affected by an error of law or is "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 363 S.C. 612, 619, 611 S.E.2d 297, 300 (Ct. App. 2005) (citations and internal quotation marks omitted).

LAW/ANALYSIS

Claimant argues the circuit court erred in considering the documents relating to the civil action because they were not part of the record. He further contends the circuit court erred in taking judicial notice of the civil action because the Fund never requested the Appellate Panel take notice of it or raise it as a ground on appeal. We disagree.

I. Election of Remedies/Third-Party Action

When an employee's claim arises out of and in the course of his or her employment, the Act provides the exclusive remedy. See Sabb v. S.C. State Univ., 350 S.C. 416, 422, 567 S.E.2d 231, 234 (2002). "Every employer and employee . . . shall be presumed to have accepted the provisions of this title respectively to pay and accept compensation for personal injury or death by

accident arising out of and in the course of the employment and shall be bound thereby." S.C. Code Ann. § 42-1-310 (Supp. 2010).

"When an employee and his or her employer accept the provisions of the Act, the employee's remedies under the Act exclude all other rights and remedies of the employee." Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 325-26, 523 S.E.2d 766, 772 (1999) (citing S.C. Code Ann. § 42-1-540 (1985)).

THIS SECTION IS KNOWN AS THE EXCLUSIVE REMEDY PROVISION, AND IT shrouds an employer with immunity from any actions at law instituted by the employee. Such immunity is part of the broader quid pro quo arrangement imposed upon the employer and employee by the Act. The employee "receives the right to swift and sure compensation" in exchange for giving up the right to sue in tort; the employer receives such tort immunity in exchange for complying with those provisions of the Act that insure swift and sure compensation for the employee.

Id. at 326, 523 S.E.2d at 772. "The Act achieves such 'swift and sure compensation' by requiring the employer to secure the payment of compensation under [section 42-5-10 of the South Carolina Code (1985)]." Id. at 326, 523 S.E.2d at 773. Section 42-5-10 provides: "Every employer who accepts the compensation provisions of this Title shall secure the payment of compensation to his employees in the manner provided in this chapter." An employer that fails to secure such compensation becomes liable either under the Act or in an action at law. Harrell, 337 S.C. at 327, 523 S.E.2d at 773 (citing S.C. Code Ann. § 42-5-40 (1985)). "[T]he Act prohibits an employee from recovering both workers' compensation and a tort judgment from an employer who fails to secure compensation." Id. at 329, 523 S.E.2d at 774.

A claimant has three remedies for job-related injuries:

(1) To proceed solely against the employer thereby allowing the employer-carrier the opportunity to pursue reimbursement against the third party for its obligated payments.

(2) To proceed solely against the third party tortfeasor under [section] 42-1-550 by instituting and prosecuting an action at law; and

(3) To proceed against both the employer-carrier and the third party tortfeasor by complying with [section] 42-1-560.

Callahan v. Beaufort County Sch. Dist., 375 S.C. 92, 95-96, 651 S.E.2d 311, 313 (2007).

Section 42-1-560 of the South Carolina Code (1985) provides the requirements for simultaneously pursuing a third-party action and a workers' compensation claim. It states: "Notice of the commencement of the [third-party] action shall be given within thirty days thereafter to the . . . Commission, the employer[,] and carrier upon a form prescribed by the . . . Commission." § 42-1-560(b). The statute clearly requires timely notice be given to all three entities: employer, carrier, and Commission. Callahan, 375 S.C. at 96, 651 S.E.2d at 314. "The object of [section] 42-1-560 is to effect an equitable adjustment of the rights of all the parties. It would defeat this objective to allow the employee to demand compensation from the employer after having destroyed the employer's normal right to obtain reimbursement from the third party." Fisher v. S.C. Dep't. of Mental Retardation-Coastal Ctr., 277 S.C. 573, 575-76, 291 S.E.2d 200, 201 (1982) (citation and internal quotation marks omitted). "[T]he settlement of a third party claim without notice to the employer and carrier bars a workers' compensation action." Kimmer v. Murata of Am., Inc., 372 S.C. 39, 52, 640 S.E.2d 507, 513-14 (Ct. App. 2006). In Fisher, the supreme court held that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of section 42-1-560, even though the carrier had actual knowledge of the third-party suit. Id.

This court has previously explained the reasoning behind a settlement serving as a bar to a workers' compensation action:

As a result of the failure to notify of a third party claim, the employer-carrier loses a voice in the litigation and is clearly prejudiced. That voice encompasses the right to select one's own counsel, conduct one's own investigation, and direct the litigation. Notice makes it possible for the employer-carrier to offer the employee meaningful assistance in prosecuting the third party claim. With timely knowledge the employer-carrier gains the opportunity to lend support to an effort that could lead to the carrier's recovery of some or all of the compensation it might later be required to pay the injured employee under the Workers' Compensation Act. The statute's underlying purpose serves to protect the carrier's subrogation interests and prevents an employee's double recovery.

Kimmer, 372 S.C. at 51, 640 S.E.2d at 513 (citations omitted).

Case law makes clear that an employee cannot recover against an employer under both a workers' compensation action and a civil action. Here, Claimant recovered \$900,000 from Employer in the form of a default judgment. Further, because Claimant did not strictly comply with the notice provisions in filing suit against a third party, he is barred from recovering under the Act. However, we must determine if the evidence of the civil suit could be admitted as new evidence or the circuit court could take judicial notice of it.

II. Judicial Notice

"Notice may be taken of judicially cognizable facts" in administrative cases. S.C. Code Ann. § 1-23-330(4) (2005).

Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Finally, appellate courts, limited to the "cold" record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.

Masters v. Rodgers Dev., 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) (citations omitted). "A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." Freeman v. McBee, 280 S.C. 490, 313 S.E.2d 325 (Ct. App. 1984). "It is not error for a judge to take judicial notice of what was stated in [a] former opinion in [a] prior action of the same case." Id.

Claimant's argument as to judicial notice revolves around the fact that the Fund did not request the Appellate Panel take judicial notice of the suit or raise judicial notice in its grounds on appeal to the circuit court. As Claimant's own case law states, an appellate court can take judicial notice of something that was not before the trial court if it is indisputable. The summons and complaint and default judgment show that Claimant did file an action and recover against Employer thus making that his exclusive remedy. Additionally, he filed suit and entered a settlement against a third party without providing any notice to the Fund or the Commission as required by statute, thus barring the workers' compensation action.

III. Additional Evidence

Additionally, the evidence of the civil claim could be admitted as new evidence under Regulation 67-707 of the South Carolina Code of Regulations (Supp. 2010), which provides the requirements for the admission of

additional evidence in workers' compensation cases. Regulation 67-707 states:

A. When additional evidence is necessary for the completion of the record in a case on review the Commission may, in its discretion, order such evidence taken before a Commissioner.

B. When a party seeks to introduce new evidence into the record on a case on review, the party shall file a motion and affidavit with the Commission's Judicial Department.

C. The moving party must establish the new evidence is of the same nature and character required for granting a new trial and show:

(1) The evidence sought to be introduced is not evidence of a cumulative or impeaching character but would likely have produced a different result had the evidence been procurable at the first hearing; and

(2) The evidence was not known to the moving party at the time of the first hearing, by reasonable diligence the new evidence could not have been secured, and the discovery of the new evidence is being brought to the attention of the Commission immediately upon its discovery.

Claimant argues because the circuit court originally found it was not newly discovered evidence and the Fund did not appeal, it was the law of the case. However, an appeal of that ruling would have been interlocutory. See Leviner v. Sonoco Prods. Co., 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000) (holding an order by the circuit court remanding the matter to the single commissioner for further proceedings was not directly appealable).

Therefore, the circuit court's original decision to not allow the evidence as newly discovered was not the law of the case.

The evidence of the civil claim meets the criteria in the Regulation for the admission of new evidence: (1) it is not cumulative or impeaching character and would have produced a different result if produced at the first hearing and (2) was not known and could not have been discovered at the time of the first hearing and was brought to the attention of the Commission immediately upon its discovery. Nothing requires that the facts be in existence at the time of the first hearing by the single commissioner.³ Accordingly, the circuit court's decision is

AFFIRMED.

HUFF and LOCKEMY, JJ., concur.

³ Claimant also argues the circuit court erred in failing to affirm the Appellate Panel's finding that Employer had four employees and thus was subject to the Act. We need not address this issue. See Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

RECEIVED

Diane Schafer Goodstein, Circuit Court Judge Sep 07 2011

SC Court of Appeals

Civil Action No. 07-CP-09-0089

Stephen Brad Wise Appellant

v

Richard Wise d/b/a Wise Services and the
South Carolina Uninsured Employers Fund Respondents

**MOTION FOR REHEARING
PURSUANT TO RULE 221, SCACR**

The Appellant hereby moves for rehearing pursuant to Rule 221, SCACR upon the grounds that the following points were overlooked or misapprehended by the Court:

- I. The Court overlooked its obligation to follow the law, specifically S.C. Code §1-23-380(4).
- II. The Court overlooked its obligation to follow the law, specifically S.C. Code Ann. §42-17-60 (1976) by considering an issue that was not raised or ruled upon by the administrative agency.
- III. The Court overlooked its obligation to follow the law, specifically §1-23-380(3), in affirming the circuit judge's consideration of matter

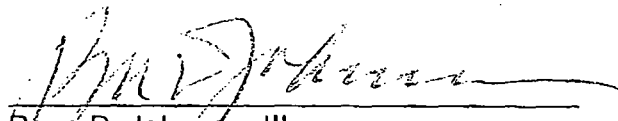
outside the record.

- IV. The Court misapprehended the law in finding that §42-5-40 prohibits the employer from recovering both workers' compensation and a tort judgment from an employer who fails to secure compensation.
- V. The Court misapprehended that facts regarding the claim against the negligent third party, elevating form over substance.
- VI. The Court overlooked the fact that there is no appellate decision that has held that is appropriate to take judicial notice of facts during the course of an appeal of the South Carolina Workers' Compensation Commission when the appeal is taken pursuant to §1-23-380 which provides the specific procedure for receipt of additional evidence and at the same time restricts the review to the record.
- VII. The Court failed to address whether the circuit court judge erred in *sua sponte* reconsideration of Order dated October 27, 2006.
- VIII. This Court overlooked its obligation to follow the law in holding that the evidence of the civil claim could be admitted as new evidence under Regulation 67-707.
- IX. This Court overlooked its obligation and its scope of review and that of the circuit court in becoming a fact finder.
- X. This Court overlooked and failed to rule on whether the circuit court judge erred when she considered and gave weight to the Affidavit of Brooks Shealy, Esquire dated June 22, 2004 and accompanying unauthenticated documents and made findings based thereon, which Affidavit was not part of the record and was hearsay.
- XI. This Court overlooked and failed to rule on whether the circuit court judge erred when she held that the evidence provided by the Fund showed beyond any doubt that the claimant was seeking to do something the law does not permit him to do and that the claimant was attempting to use Regulation 67-707 in a fashion that would be contrary to the doctrine of election of remedies and in the face of the express statutory prohibition in §42-5-40.
- XII. This Court overlooked and failed to rule on whether the circuit court judge erred when she relied upon *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999) and applied § 42-5-40.
- XIII. This Court overlooked and failed to rule on whether the circuit court

judge erred when she found that the Commission lacked jurisdiction and that there was a right to raise the jurisdiction during the appeal process based upon the alleged tort judgment.

- XIV. This Court overlooked and failed to rule on whether the circuit court judge erred in failing to affirm the Commission's finding that Russ Hine was an employee and that the employer was subject to the Act.

A Memorandum with citation authorities is submitted in support of this Motion.



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THE STATE OF SOUTH CAROLINA
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Stephen Brad Wise Appellant

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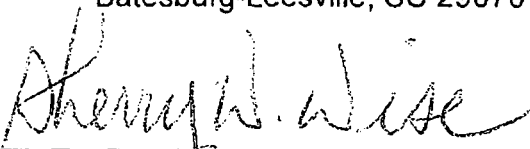
Richard Wise d/b/a Wise Services and the
South Carolina Uninsured Employers Fund Respondents

PROOF OF SERVICE

I, Sherry W. Wise, of Johnson & Barnette, LLP, hereby certify that I have served the **MOTION FOR REHEARING PURSUANT TO RULE 221, SCACR** on the Respondents Richard Wise d/b/a Wise Services and South Carolina Uninsured Employers Fund and their attorneys, by having a copy mailed to them on the 7th day of September, 2011, properly addressed to as follows:

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Sherry W. Wise

THE STATE OF SOUTH CAROLINA
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Stephen Brad Wise Appellant

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Richard Wise d/b/a Wise Services and the
South Carolina Uninsured Employers Fund Respondents

**MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING
PURSUANT TO RULE 221, SCACR**

The Appellant submits this Memorandum in support of this Motion For Rehearing.

- I. **The Court overlooked its obligation to follow the law, specifically S.C. Code §1-23-380(4).**

The Fund's appeal was pursuant to S.C. Code Ann. §1-23-380. Section 1-23-380(4) provides as follows:

"The review must be conducted by the court and must be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, and established by proof satisfactory to the court, the case may be remanded to the agency for

action as the court considers appropriate.” (Emphasis added).

Rather than confine her review to the record, the circuit court judge based her entire decision and order upon an alleged tort judgment and related documents. The circuit court judge became a fact finder, in complete disregard for the law which makes the Appellate Panel the ultimate fact finder. *Houston v. Deloach & Deloach*, 378 S.C. 543, 663 S.E.2d 85 (2008). However, the alleged tort judgment and related documents were not part of the record in the case. They had been excluded by the Commission’s Order dated December 18, 2006, from which there was no timely appeal. Therefore, there was no basis in the record for considering the Fund’s arguments related to §42-5-40, election of remedies and subject matter jurisdiction. This Court made the same error. The statute which represents the will of the people, trumps any authority of the trial court or this court to go outside of the record. This Court overlooked and failed to address the question of whether the circuit court and the appellate court must follow §1-23-380(4) with review being confined to the record.

II. The Court overlooked its obligation to follow the law, specifically S.C. Code Ann. §42-17-60 (1976) by considering an issue that was not raised or ruled upon by the administrative agency.

The Fund never asked the Single Commissioner to take notice of “judicially cognizable facts” pursuant to §1-23-330(4). The Fund did not mention or raise the issue of judicial notice in any of its grounds of appeal to the Appellate Panel as required by §42-17-50. The Fund never asserted that the Single Commissioner and/or the Appellate Panel erred in failing to take notice of “judicially cognizable facts”. (R. pp. 2-109). The Fund did not mention or raise the issue of judicial notice in any of its grounds of appeal to the circuit court judge, as required by §42-17-60. By statute, the appeal to the circuit court must state

"the grounds of appeal or the alleged errors of law". Section 42-17-60.

By statute, the notice of appeal from the Single Commissioner must show "good grounds" for reversal. S.C. Code Ann. §42-17-50 (1976). The notice of appeal must direct the Court's attention to the abuses allegedly committed below through a distinct and specific statement of the rulings complained of and it must include all that is necessary to enable the Court to decide whether the ruling complained of was erroneous. See *Smith v. South Carolina Department of Social Services*, 284 S.C. 469, 327 S.E.2d 348 (1985). When an issue is not raised or ruled upon by the administrative agency, it is error for the circuit court to consider it. *TNS Mills, Inc. v. S.C. Dept. Of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998). See generally *Robbins v. Walgreens & Broadspire Services, Inc.*, 375 S.C. 259, 652 S.E.2d 90 (Ct. App. 2007). Only issues raised and ruled upon by the Commission are cognizable on appeal. *Smith v. NCCI, Inc.*, 369 S.C. 236, 631 S.E.2d 268 (Ct. App. 2006) It is well settled that in an appeal pursuant to the Administrative Procedures Act, the circuit court judge is limited to deciding whether the Appellate Panel's decision is unsupported by substantial evidence or is controlled by some error of law, based upon the facts in the record. See *Hall v. United Rentals, Inc.*, 371 S.C. 69, 636 S.E.2d 876 (Ct. App. 2006).

The circuit court judge erred by considering a matter not raised below before the Single Commissioner and not raised by the Fund on appeal to the Appellate Panel or circuit court, when she decided to receive evidence outside the record by way of judicial notice. This court has now made the same error.

- III. **The Court overlooked its obligation to follow the law, specifically §1-23-380(3), in affirming the circuit judge's consideration of matter outside the record.**

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JMA

The circuit court judge's consideration of matter outside the record violated §1-23-380(3). Section 1-23-380(3) provides the only procedure for the admission of additional evidence when an order of the administrative agency is on appeal. Section 1-23-380(3) provides:

"If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file the evidence and modifications, new findings, or decisions with the reviewing court."

The Fund made no application to present additional evidence. This is undisputed. Had such an application been made and granted, it would have required that the evidence be taken before the agency, not taken by the circuit court. If additional evidence was taken before the Commission, the Claimant would have been able to offer evidence on the new matters and be heard. This statute, which represents the will of the people, trumps any authority of the trial court or this court to consider additional evidence.

IV. The Court misapprehended the law in finding that §42-5-40 prohibits the employer from recovering both workers' compensation and a tort judgment from an employer who fails to secure compensation.

This Court has stated:

"Section 42-5-10 provides: 'Every employer who accepts the compensation provisions of this Title shall secure the payment of compensation to his employees in the manner provided in this chapter.' An employer that fails to secure such compensation becomes liable either under the Act or in an action at law. *Harrell*, 337 S.C. at 327, 523 S.E.2d at 773 (citing S.C. Code Ann. §42-5-40 (1985)). '[T]he Act prohibits an employee from recovering both workers' compensation and a tort judgment from an employer who fails to secure compensation. *Id.* At 329, 523 S.E.2d at 774.

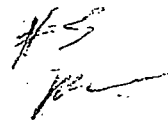
Actually, the statute, §42-5-40, contains no such prohibition. What the statute actually

says is:

"Any employer required to secure the payment of compensation under this title who refuses or neglects to secure such compensation shall be punished by a fine of one dollar for each employee at the time of the insurance becoming due, but not less than ten dollars nor more than one hundred dollars for each day of such refusal or neglect, and until the same ceases, and he shall be liable during continuance of such refusal or neglect to an employee either for compensation under this title or at law in an action instituted by the employee or his personal representative against such employer to recover damages for personal injury or death by accident and in any such action such employer shall not be permitted to defend upon any of the grounds mentioned in Section 42-1-510. The fine provided in this section may be assessed by the commission in an open hearing with the right of review and appeal as in other cases. All fines collected pursuant to this section must be submitted to the general fund."

What the statute actually does is impose a fine or penalty for failure to secure compensation. Although the statute goes further and says the employer shall be liable while the employer refuses or neglects to obtain security for the payment of compensation for compensation under the Act or at law and cannot defend on the grounds mentioned in §42-1-510, this portion of the statute no longer carries any force. Section 42-1-510 was repealed effective June 18, 1996. Prior to its repeal, §42-1-510 stripped the employer of the defenses of employee negligence, assumption of the risk, and negligence of a fellow employee. The statute, prior to the repeal of §42-1-510, imposed strict liability under the Act or at law. With the repeal of §42-1-510, there is no longer strict liability.

Section 42-5-40 does not state that the employer would only be liable under the Act or at law. While it was in force, it only provided for strict liability under the Act or at law for an employer who failed to secure its obligation to provide workers' compensation coverage. In fact, recovery under the Act is the exclusive means of settling personal injury claims which came under the Act. *Doe v. S.C. State Hospital*, 285 S.C. 183, 328 S.E.2d 652 (Ct. App. 1985).



Moreover, there are claims which arise from the same conduct that give rise to claims under the Act and at law. There is no cause of action at law for personal injury or death which came under the Act. *Dawkins v. Ingles Markets, Inc.*, 306 S.C. 287, 411 S.E.2d 437 (1991) (slander actions are not barred by the Act's exclusivity provision since the gravamen of a slander action is injury to one's reputation, although damages for emotional injuries are recoverable under the Act.)

Even if the Act prohibited recovery from the employer under both the Act and at law, there is no evidence that has occurred here. There is absolutely no evidence that any amount has been recovered on the judgment against the employer. The employer defaulted in the civil action. The employer/Fund failed to avail itself of its rights under §1-23-380(3) and §1-23-330(4). The issue of the Act prohibiting recovery under the Act and at law has never been properly raised and was never raised until the final appeal to the circuit court. By law, that was too late.

V. The Court misapprehended that facts regarding the claim against the negligent third party, elevating form over substance.

Section 42-1-560 provides for the carrier's lien.

"In such case the carrier shall have a lien on the proceeds of any recovery from the third party whether by judgment, settlement or otherwise, to the extent of the total amount of compensation, including medical and other expenses, paid, or to be paid by such carrier, less the reasonable and necessary expenses, including attorney fees, incurred in effecting the recovery, and to the extent the recovery shall be deemed to be for the benefit of the carrier."

However, there was no lien here. No amount was paid in the compensation case. The employer, through the Fund, asserted that the Commission lacked subject matter jurisdiction of the claim. Clearly the employer had notice of the action against the third party. The employer was joined in the same action with the third party. The employer was

served with the Summons and Complaint and defaulted, rather than have a voice in the litigation. It stands logic and reason on their heads to say that this employer lacked notice of the suit against the negligent third party. It stands logic and reason on their heads to say the employer was prejudiced by not getting its lien protected when in fact it had no lien since nothing had been paid.

VI. The Court overlooked the fact that there is no appellate decision that has held that is appropriate to take judicial notice of facts during the course of an appeal of the South Carolina Workers' Compensation Commission when the appeal is taken pursuant to §1-23-380 which provides the specific procedure for receipt of additional evidence and at the same time restricts the review to the record.

Although the claimant agreed in its brief that there was case law that stated that an appellate court could take judicial notice of something that was not before the trial court if it was undisputable, the claimant never conceded that it applied or authorized judicial notice in this case. In fact, the claimant asserted that the holding in *Masters v. Rodgers Development Group*, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984) did not apply. Here, the appeal was taken pursuant to §1-23-380. Section 1-23-380 provides the specific procedure for receipt of additional evidence and at the same time restricts the review to the record. Furthermore, the appellant never conceded that the facts were undisputable or controlled the outcome.

VII. The Court failed to address whether the circuit court judge erred in *sua sponte* reconsideration of Order dated October 27, 2006.

The circuit court judge erred in *sua sponte* reconsidering her Order dated October 27, 2006, which directed the Commission to deny the motion to admit additional evidence and to set a review hearing on the merits of the underlying appeal. No motion was made to reconsider the Order dated October 27, 2006 when the Order was issued. No appeal was

taken of the Order dated October 27, 2006. The issue or reconsideration of the Order dated October 27, 2006 was not raised in the Fund's Petition For Review. Section 42-17-60 mandates that the notice of appeal state the grounds of the appeal or the alleged errors of law and no such alleged error was stated. The effect of the circuit court judge's *ex mero motu* or *sua sponte* reconsideration was to admit new evidence and in effect granted a new trial based thereon. However, this was error as a matter of law. See *Southern Railway Co. v. Coltex, Inc.*, 285 S.C. 213, 214, 329 S.E.2d 736 (1985) ("The sole issue is whether a trial judge *ex mero motu* can grant a new trial on a ground not raised by a party. We hold he cannot.") The order of the circuit court judge, reconsidering her Order dated October 27, 2006, must be reversed. This court, in affirming the circuit court judge, has now made the same error.

VIII. This Court overlooked its obligation to follow the law in holding that the evidence of the civil claim could be admitted as new evidence under Regulation 67-707.

The Supreme Court, in *State v. Haulcomb*, 260 S.C. 260, 270, 195 S.E.2d 601, 606 (1973) held that "[A]fter discovered evidence refers to evidence of facts existing at time of trial of which . . . [the] aggrieved party was excusably ignorant." This Court is obligated to follow the law as determined by the South Carolina Supreme Court. This Court failed to address the holding in *State v. Haulcomb* and obviously and erroneously overlooked it in holding that the evidence was admissible under Regulation 67-707.

IX. This Court overlooked its obligation and its scope of review and that of the circuit court in becoming a fact finder.

The scope of appellate review of the circuit court judge and this Court is clear, well-settled and controlled by statute. See *Lack v. Bi-Lo, Inc.*, 276 S.C. 130, 134-35, 276 S.E.2d 304, 306 (1981). The Appellate panel is the ultimate fact finder in workers'

compensation cases. *Houston v. Deloach and Deloach*, 378 S.C. 543, 663 S.E.2d 85 (Ct. App. 2008). The scope of appellate review does not allow the circuit court judge or this Court to become a fact finder, particularly where the alleged facts are hearsay and unauthenticated. This Court should reconsider its decision and decline to rule outside of its statutorily limited scope of review.

- X. This Court overlooked and failed to rule on whether the circuit court judge erred when she considered and gave weight to the Affidavit of Brooks Shealy, Esquire dated June 22, 2004 and accompanying unauthenticated documents and made findings based thereon, which Affidavit was not part of the record and was hearsay.**

The circuit court judge erred when she considered and gave weight to the Affidavit of Brooks Shealy, Esquire dated June 22, 2004 and accompanying unauthenticated documents and made findings based thereon, when the Affidavit and documents were not part of the record.

By statute, review is to be confined to the record. §1-23-380(4). As the Appellate Panel stated and as the Fund's counsel conceded at the hearing on March 28, 2007, the affidavit and accompanying documents were not part of the record. (R. p. 492, line 2-p. 494, line 25).

This affidavit and the documents were excluded from evidence by the unappealed Order dated December 18, 2006. Furthermore, an affidavit, which is hearsay, is not admissible evidence to prove or disprove a fact in a contested administrative hearing. Although §1-23-330(1) provides that when certain requirements are met any part of the evidence may be received in written form, no finding was made by the Commission that the requirements were met to allow admission of the affidavit and accompanying documents. Further, under §1-23-330(3), a party may conduct cross-examination, and the

Claimant here was never afforded an opportunity to conduct cross-examination of the affidavit and documents. This Court is obligated to rule on every point that is distinctly stated which is necessary to the decision. Rule 220(b), SCACR. The order of the circuit court judge giving weight to the affidavit and documents must be reversed. This Court should address this issue and reconsider its decision.

- XI. This Court overlooked and failed to rule on whether the circuit court judge erred when she held that the evidence provided by the Fund showed beyond any doubt that the claimant was seeking to do something the law does not permit him to do and that the claimant was attempting to use Regulation 67-707 in a fashion that would be contrary to the doctrine of election of remedies and in the face of the express statutory prohibition in §42-5-40.**

The Circuit Court Judge erred when she held that the evidence provided by the Fund showed beyond any doubt that the Claimant was seeking to do something the law does not permit him to do and that the Claimant was attempting to use Regulation 67-707 in a fashion that would be contrary to the doctrine of election of remedies and in the face of the express statutory prohibition in §42-5-40.

The circuit court judge erroneously concluded that a claimant could “knowingly and intentionally undermine the requirements of Section 42-1-560 and 42-5-40 by purposefully waiting until after the workers’ compensation hearing to prosecute a tort action and subsequently move to bar consideration of the tort action as failing to meet the standard of ‘after discovered evidence’ under Regulation 67.707.” However, this is simply wrong. §1-23-380(3) clearly and unambiguously provides the means and procedure by which such evidence could be admitted. §1-23-380 is the vehicle by which such evidence can be admitted. The Fund did simply not avail itself of §1-23-380(3). As a result, it was error for the circuit court judge to consider evidence outside of the record.

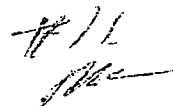
The Claimant had the right to object to the admission of evidence that was allegedly newly discovered evidence under Regulation 67-707. The Fund had the right to make an application to the court for leave to present additional evidence pursuant to §1-23-380(4) but made no such application. The Claimant was well within his rights to object to evidence and matters deemed inadmissible or inappropriate and then insist based upon §1-23-380(4) that the case be determined based upon the record that was properly made. This Court is obligated to rule on every point that is distinctly stated which is necessary to the decision. Rule 220(b), SCACR. This Court should address this issue and reconsider its decision.

XII. This Court overlooked and failed to rule on whether the circuit court judge erred when she relied upon *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999) and applied § 42-5-40.

The circuit court judge erred when she relied upon *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 523 S.E.2d 766 (1999) and applied §42-5-40 to find that since the Claimant had received a tort judgment, he could not recover under the Act. There was no evidence in the record of the tort judgment to support the application of the holdings in *Harrell* and the review must be confined to the record pursuant to §1-23-380(4). There is no evidence in the record to support the application of any holding in *Harrell*. This Court is obligated to rule on every point that is distinctly stated which is necessary to the decision. Rule 220(b), SCACR. This Court should address this issue and reconsider its decision.

XIII. This Court overlooked and failed to rule on whether the circuit court judge erred when she found that the Commission lacked jurisdiction and that there was a right to raise the jurisdiction during the appeal process based upon the alleged tort judgment.

The circuit court judge erred when she found that the Commission lacked jurisdiction since the Claimant had obtained a tort judgment and that there was a right to raise the



jurisdiction during the appeal process based upon the alleged tort judgment. By statute, the review must be confined to the record. §1-23-380(4). Subject matter jurisdiction cannot be raised based upon evidence not in the record. Therefore, the Court erred in making a determination regarding subject matter jurisdiction by considering matters outside of the record and in violation of §1-23-380(4). This Court is obligated to rule on every point that is distinctly stated which is necessary to the decision. Rule 220(b), SCACR. This Court should address this issue and reconsider its decision.

XIV. This Court overlooked and failed to rule on whether the circuit court judge erred in failing to affirm the Commission's finding that Russ Hine was an employee and that the employer was subject to the Act.

The circuit court judge erred in failing to affirm the Commission's finding that: (1) Russ Hine was an employee; (2) that the employer therefore had four employees; and (3) the employer was subject to the Act.

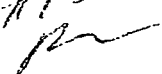
It is South Carolina's policy to liberally construe the Workers' Compensation Act in favor of coverage. *Schurknight v. City of North Charleston*, 352 S.C. 175, 574 S.E.2d 194 (2002). It is also South Carolina's policy to resolve jurisdictional doubt in favor of inclusion of employers and employees under the Workers' Compensation Act. *Dawkins v. Jordan*, 341 S.C. 434, 534 S.E.2d 700 (2000), overruled as to analytical framework by *Wilkinson ex rel. v. Palmetto State Transportation Company*, 382 S.C. 295, 676 S.E.2d 700 (2009).

The general test to determine whether a worker is an employee or an independent contractor is that of control by the Employer. It is not the actual control then exercised, but whether there exists the right or authority to control and direct the particular workers undertaking as to the manner or means of its accomplishment. *Young v. Warr*, 252 S.C. 179, 189, 165 S.E.2d 797, 802 (1969).

There are four elements which determine the right of control: (a) direct evidence of the right of control or exercise of control; (b) furnishing of equipment; (c) the right to fire; and (d) method of payment. *Tharpe v. G.E. Moore Co.*, 254 S.C. 196, 174 S.E.2d 397 (1970). These factors go only to the right of control.

The testimony of Russ Hine and the other evidence in the case establishes, by the preponderance of evidence, that Mr. Hine was an employee of the Employer. The following evidence establishes the employment relationship:

- a) Hine worked primarily as an auto mechanic in the Employer's shop, averaging 40 hours per week. (R. p. 522, lines 11-13; p. 523, lines 9-14).
- b) Customers paid the Employer for Hine's work. Parts that were purchased and ordered in the Employer's name, not in Hine's name. (R. p. 522, line 14-p. 523, line 4).
- c) All shop equipment/tools were provided by the Employer (R. p. 571, line 7-p. 572, line 6).
- d) The Employer controlled the work at the shop. He testified "I own my shop, so I would provide everything." (R. p. 571, line 16).
- e) Hine drove the wrecker and helped move the building involved in the accident. (R. p. 523, line 5-p. 524, line 24).
- f) Hine's payment for helping to move the building was part of his regular salary. (R. p. 529, line 23-p. 530, line 6).
- g) The Employer called him to help move the building. (R. p. 563, lines 17-22).
- h) The Employer was in charge of and directed the moving of the building. The Employer coordinated with the utility personnel. The moving crew included Hine. (R. p. 563, lines 4- p. 564, line 10).
- i) The Employer had the contract to move the building. (R. p. 562, line 23-p. 563, line 3).
- j) The Employer provided all personnel and equipment to move the building and obtained the permit for the work. The Employer called in

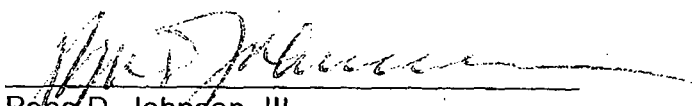
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the personnel, including Hine, to do the work. (R. p. 563, line 4-p. 564, line 10; p. 570, line 17-p. 571, line 6).

The uncontradicted evidence is that the Employer furnished the equipment, both at the shop and for moving the building. The Employer's direct exercise of control in calling Hine to help move the building and directing the crew is sufficient to establish the employment relationship. The other evidence regarding Hine and the Employer, as set forth above, establishes and supports the finding of the employment relationship. The Commission correctly concluded that Hine was an employee. Russ Hine was an employee of the Employer. As a result, the Employer had four persons regularly in service, and the Commission had subject matter jurisdiction of the claim. The Commission's order should be affirmed. This Court is obligated to rule on every point that is distinctly stated which is necessary to the decision. Rule 220(b), SCACR. This Court should address this issue and reconsider its decision.

CONCLUSION

The claimant respectfully requests that this Court address all issues set forth above and reconsider its decision and reinstate the Order of the Appellate Panel.


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Attorneys for the Appellant

Columbia, South Carolina
September 7, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CALHOUN COUNTY
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

Civil Action No. 07-CP-09-0089

Stephen Brad Wise Appellant

v

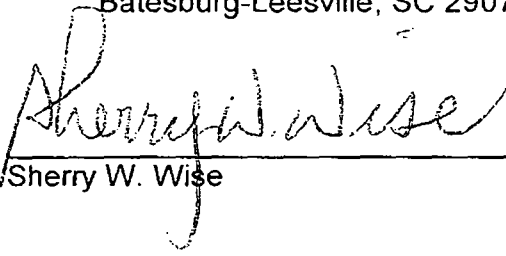
Richard Wise d/b/a Wise Services and the
South Carolina Uninsured Employers Fund Respondents

PROOF OF SERVICE

I, Sherry W. Wise, of Johnson & Barnette, LLP, hereby certify that I have served the **MEMORANDUM IN SUPPORT OF MOTION FOR REHEARING PURSUANT TO RULE 221, SCACR** on the Respondents Richard Wise d/b/a Wise Services and South Carolina Uninsured Employers Fund and their attorneys, by having a copy mailed to them on the 7th day of September, 2011, properly addressed to as follows:

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Sherry W. Wise

The South Carolina Court of Appeals

Stephen Brad Wise,

Appellant,

v.

Richard Wise d/b/a Wise Services and
the South Carolina Uninsured
Employers Fund,

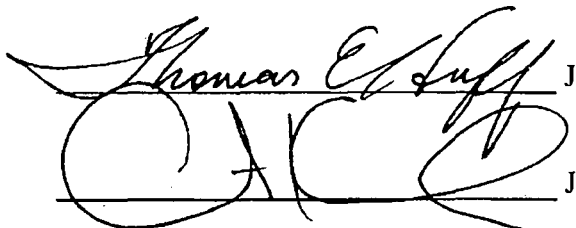
Respondents.

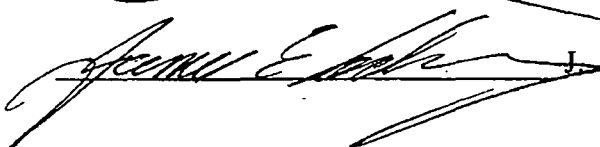
The Honorable Diane Schafer Goodstein
Calhoun County
Trial Court Case No. 2007-CP-09-00089

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

 J.

 J.

Columbia, South Carolina

cc: Pope D. Johnson, III, Esquire
John G. Felder, Esquire
Robert Merrell Cook, II, Esquire

FILED

September 22, 2011