

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CALHOUN COUNTY  
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

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Civil Action No. 07-CP-09-0089

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Stephen Brad Wise ..... Appellant

v.

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

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**FINAL BRIEF OF APPELLANT**

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## STATEMENT OF THE CASE

This workers' compensation action arises out of an accident that occurred on October 30, 2000, when Steven Brad Wise (the "Claimant") was assisting in moving a bank building. While riding on top of the building, he contacted a high voltage electrical line and sustained severe burn injuries.

On or about June 26, 2001, the Claimant served and filed his Form 50 against Richard Wise d/b/a Wise Services (the "Employer"), seeking medical and compensation benefits under the South Carolina Workers' Compensation Act (the "Act") for the burn injuries to his right upper extremity and left foot and for the amputation of the fourth and fifth toes. (R. p. 442).

On or about July 31, 2001, the Employer served a Form 51, denying that the Claimant was an employee and asserting that he was an independent contractor or a casual employee. The Employer also asserted that he did not have the required number of employees and was not covered by the Act. On or about September 26, 2001, the South Carolina Uninsured Employers Fund (the "Fund") filed a Form 51 denying the material allegations of the Form 50 and asserting that the Employer was not subject to the Act and asserting various affirmative and specific defenses. (R. p. 441).

A hearing was held on May 2, 2002 before Commissioner Lisa D. Chavis. Approximately nineteen months later, on November 26, 2003, Commissioner Chavis issued a Decision and Order denying the claim. The Commissioner found that: (1) the claimant was an employee of the Employer and had sustained severe electrical burn injuries while working for the Employer; (2) the Employer regularly employed

dismissing with prejudice the action against the City of Orangeburg. (R. pp. 405-19).

By an Order dated September 14, 2004, the Full Commission dismissed the Claimant's appeal. Without and hearing, the Full Commission granted the motion to dismiss for the following reasons:

- a) The Commission was not notified of the civil suit by the Claimant, the Employer, or their respective attorneys.
- b) The UEF defends the claim; however, it is not the Employer's attorney. In the instant matter, the Employer's attorney failed to notify the UEF of the civil suit.
- c) The Single Commissioner verbally provided all parties with her ruling in the matter at the time of the hearing. Claimant should have waited for the Order to be issued and file an appeal to the Full Commission. If the Claimant was not satisfied, then the Claimant could have appealed to the circuit court.
- d) The Claimant timely filed his Form 30; however, he filed his action in circuit court prior to the appeal being heard.
- e) When the Claimant filed his civil action on the same issues that were before the Commission, the matter was removed from the Commission's jurisdiction. The Claimant alleged his employment did not fall within the parameters of the Act.
- f) The Employer and his attorney did not file any responsive pleadings and the Claimant was granted a default judgment against the Employer for \$900,000.00. The civil action was dismissed with prejudice on February 24, 2004. It was not remanded to the Commission.
- g) At no time did the attorneys for the Claimant or the Employer notify the Commission or the UEF of the filing of the action or of the settlement.
- h) The claimant chose to pursue his claim through the civil court that precludes him from seeking benefits under the Act for the same injury.
- i) Filing an action for the same issues is comparable to appealing those issues from the Full Commission to the circuit court and removing the matter from the Commission's jurisdiction.

- j) The circuit court issued a final order in the civil action. It did not remand the matter to the Commission for further action.
- k) This matter is *res judicata*." (R. pp. 61-62).

On October 8, 2004, the Claimant filed a Notice of Appeal in the Court of Common Pleas for Calhoun County. A hearing on the appeal was held by the Honorable James C. Williams on December 3, 2004. On December 17, 2004, Judge Williams reversed the Order of the Full Commission, finding that the Commission's own regulation, Regulation 67-215(B)(1), prohibited the Commission from addressing a motion to dismiss. Judge Williams remanded the action to the Full Commission to determine the Fund's motion to submit new evidence pursuant to Regulation 67-707. (R. pp. 57-58).

On July 21, 2005, the Full Commission referred the action to an Appellate Panel to issue an order in accord with Judge Williams' order. Prior to an argument scheduled for September 26, 2005, the Appellate Panel determined the matter to be premature to be heard on the merits and issued an Order on November 17, 2005 directing the matter to be heard at the judicial conference per the Order of Judge Williams. By an Order dated January 6, 2006, the Full Commission granted, without a hearing or any explanation, the Fund's motion to submit additional evidence and remanded the action to the hearing commissioner to consider the new evidence. (R. p. 47).

The Claimant appealed the Order dated January 6, 2006 to the Court of Common Pleas for Calhoun County, the appeal again being heard by Judge Williams. (R. pp. 218-25). By an Order dated May 23, 2006, Judge Williams

reversed the Full Commission, holding:

“Upon considering the arguments of counsel and the record before the Court, I find that the Order of the Commission dated January 6, 2006 should be and hereby is reversed. The Commission's Order granted the Fund's motion, without explanation and without stating any law, facts, or basis for its ruling. A summary order of this nature precludes a meaningful review and is inconsistent with the Order of this Court dated December 17, 2004.

I find that this action should be remanded to the Full Commission to determine the Fund's motion to submit new evidence pursuant to Regulation 67-707. In doing so, the Full Commission is directed to issue an order which sets forth the laws, facts and the basis for its decision, whatever that decision turns out to be. The parties have fully briefed the issue to be decided, and the Full Commission is encouraged to review those briefs. Further, the Commission's delay in addressing this matter for over a year after this Court issued its Order dated December 17, 2004 necessitates the need for a deadline within which the Full Commission must issue its order. The Commission is to issue its order, as set forth above, within sixty (60) days of the date hereof. The Clerk of Court is instructed to immediately send a copy of this Order to the Commission's Judicial Director by way of correspondence highlighting the deadline of sixty (60) days, with a copy to opposing counsel.” (R. p. 45).

On July 25, 2006, the Full Commission issued an Order granting the Fund's motion to submit additional evidence, finding that there was no evidence in the record similar or contrary to the proposed evidence and that the proposed evidence was not cumulative or of an impeaching character. (R. pp. 37-42). The Claimant appealed this Order to the Court of Common Pleas for Calhoun County, asserting among other grounds, that the proposed evidence was not newly discovered evidence within the meaning of Regulation 67-707. (R. pp. 110-18).

The Claimant's appeal was heard by the Honorable Diane S. Goodstein. On October 27, 2006, Judge Goodstein issued an Order reversing the Full Commission's Order, finding that the proposed evidence did not constitute newly

discovered evidence within the meaning of Regulation 67-707. Judge Goodstein stated in her Order:

"The evidence of facts sought to be admitted did not exist at the time of the hearing before the Single Commissioner. "[A]fter discovered evidence refers to evidence of facts existing at time of trial of which . . . [the] aggrieved party was excusably ignorant." *State v. Haulcomb*, 260 S.C. 260, 270, 195 S.E.2d 601, 606 (1973). In this regard, as recognized by the Supreme Court in *Haulcomb*, the concept of "after-discovered evidence" does not include "evidence . . . [which] was not in existence at the time of the initial trial of the case . . . ." *Id.*

Based upon the Supreme Court's holding in *State v. Haulcomb*, 260 S.C. 260, 195 S.E.2d 601, (1973), the evidence sought to be admitted does not constitute after discovered evidence within the meaning of Regulation 67-707. It is well settled that an administrative agency must follow its own rules and regulations. *Ogburn-Matthews v. Loblolly Partners*, 332 S.C. 551, 505 S.E.2d 598 (Ct. App. 1998); *Triska v. Department of Health and Env'tl. Control*, 292 S.C. 190, 355 S.E.2d 531 (1987)." (R. p. 35).

Judge Goodstein held that the Commission must follow its own regulation and the holdings of the South Carolina Supreme Court and must deny the Fund's motion. No appeal was taken of this Order.

By an Order dated December 18, 2006, the Appellate Panel, as directed by the circuit court, denied the Fund's motion to admit additional evidence pursuant to Regulation 67-707 and ordered that the Claimant's appeal be set for a hearing. (R. pp. 27-31). No appeal was taken of this Order.

The Claimant's appeal was heard by the Appellate Panel on March 28, 2007. By an Order dated May 4, 2007, the Appellate Panel reversed the Hearing Commissioner, finding that: (1) Russ Hine was an employee; (2) based thereon, the Employer had 4 employees regularly in his employment; and (3) the Employer was subject to the Act. The Order remanded the action to the next jurisdictional

commissioner for a determination of benefits. (R. pp. 20-25).

On or about May 30, 2007, the Fund appealed the Order dated May 4, 2007 to the Court of Common Pleas for Calhoun County upon the following grounds:

- “1) That the Commission erred as a matter of law in failing to apply South Carolina Code Section 42-5-40 to find that it had no jurisdiction over this claim.
- 2) That the Commission erred as a matter of failing to rule that South Carolina Code Section 42-5-40 precluded the Claimant from prosecuting both an action at law and a workers’ compensation claim against the Defendant Wise.
- 3) That the Commission erred as a matter of law in failing to apply South Carolina Code Section 42-5-40 to find that the Claimant elected his remedy and was barred from further prosecution of this claim.
- 4) That the Commission committed an abuse of discretion and error of law in failing to address the application of South Carolina Code Section 42-5-40 to this claim.
- 5) That the Commission erred as a matter of fact and law in denying the motion of the UEF to Admit Additional Evidence by way of its interlocutory Administrative Order dated December 18, 2006, and precluding its consideration of the issue of the Claimant’s election of remedies by settling his tort suit against the Defendant Wise.
- 6) That the Commission erred in finding and concluding that the Defendant Wise regularly employed four or more employees and as a result was subject to the Workers’ Compensation Act. (Decision and Order of May 4, 2007, at Finding of Fact No. 4, No. 5, No. 6 and No. 7, and Conclusion of Law No. 2 and No. 4).
- 7) That the Commission erred in finding and concluding that Russ Hine was an employee and, based upon that finding, holding that the Defendant Wise was subject to the Act. (Decision and Order of May 4, 2007, at Finding of Fact No. 6 and No. 7, and Conclusion of Law No. 2 and No. 4).” (R. pp. 94-95).

The Fund’s appeal was heard by Judge Goodstein on July 11, 2007. By an Order dated May 18, 2008, Judge Goodstein reversed the Commission’s Order

dated May 4, 2007, holding:

“... the workers’ compensation claim of the claimant against the UEF and the employer is dismissed with prejudice as being barred by the election of remedies of the claimant by instituting and settling his tort claims without notice to and the consent of the employer and the UEF. In the alternative, the Court also finds and rules that pursuant to the section of jurisdiction provision of Section 42-5-40 the Commission was divested of jurisdiction over this claim and its order is vacated and the claimant’s claim against the employer and the UEF is dismissed with prejudice on that basis, also.” (R. pp. 18-19).

On June 9, 2008, the Claimant filed a Rule 59(e) Motion to Alter or Amend the Order dated May 18, 2008. (R. pp. 393-404). Judge Goodstein heard the Claimant’s motion on September 2, 2008. (R. pp. 443-77). By an Order dated November 4, 2008, Judge Goodstein denied the Claimant’s motion. (R. pp. 5-9). Claimant’s counsel received written notice of Judge Goodstein’s Order on November 20, 2008. This appeal was filed on November 26, 2008. (R. p. 76).

### **SCOPE OF REVIEW**

Review of a decision of the Workers’ Compensation Commission is governed by the Administrative Procedures Act (APA), S.C. Code Ann. §1-23-310 *et seq.* *Callahan v. Beaufort County School Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007). The review is limited to deciding whether the Commissions’ decision is unsupported by substantial evidence or is controlled by some error of law. *Rodriguez v. Romero*, 363 S.C. 80, 610 S.E.2d 488 (2005). By statute, review must be “confined to the record.” S.C. Code Ann. §1-23-380(4).

### **ARGUMENT**

- I. **THE CIRCUIT COURT JUDGE ERRED AS A MATTER OF LAW IN CONSIDERING AND BASING HER DECISION ON MATTERS WHICH**

## WERE NOT PART OF THE RECORD.

The Fund's appeal was pursuant to S.C. Code Ann. §1-23-380.

Section 1-23-380(4) provides as follows:

"(4) 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 or the Administrative Law Court, not shown in the record, and established by proof satisfactory to the court, the case may be remanded to the agency or the Administrative Law Court for action as the court considers appropriate." (Emphasis added).

Rather than confine her review to the records, the circuit court judge based her entire decision and order upon an alleged tort judgment and related documents. 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.

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

However, the Fund made no application to present additional evidence. 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.

The receipt of new evidence by a circuit court judge in an appeal from an administrative agency, as was done here, is clearly proscribed by §1-23-380 (4).

§1-23-380(4) provides:

“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 supplied)

A circuit court judge, hearing an appeal from the Commission, does as a not sit a super court, which can act in derogation of statutory mandates and controlling law. Since there was no application made to admit new evidence pursuant to §1-23-380(3), the circuit court judge was limited to review “confined to the record.”

Where §1-23-380 sets forth the procedure for taking additional evidence and specifically confines the review “to the record,” it is error as a matter of law for a circuit court judge to disregard the statute and take additional evidence by way of judicial notice. The circuit court judge’s order regarding election of remedies, judicial notice, re-consideration of the Order dated October 27, 2006, her reliance on the affidavit of Brooks Shealy, subject matter jurisdiction, and the applicability of Section 42-5-40 and related rulings are all based upon this fundamental flaw and error. All

such findings and rulings should therefore be reversed.

**II. THE CIRCUIT COURT JUDGE ERRED WHEN SHE CONCLUDED THAT IT WAS APPROPRIATE TO TAKE JUDICIAL NOTICE OF A COURT JUDGMENT AGAINST THE EMPLOYER AND THE THIRD PARTY SETTLEMENT, WHEN THE ISSUE OF JUDICIAL NOTICE WAS NOT RAISED BEFORE THE COMMISSION OR IN THE NOTICE OF APPEAL.**

The Circuit Court Judge erred when she concluded that it was appropriate to take judicial notice of a court judgment against the employer and the third party settlement. Although §1-23-330(1) allows the administrative agency to take notice of “judicially cognizable facts,” the Fund never requested the Appellate Panel to take notice of “judicially cognizable facts.” The Fund did not mention or raise the issue of judicial notice in any of its grounds of appeal as required by §42-17-60. (R. pp. 92-109). The circuit court judge therefore considered a matter not raised below and not raised by the Fund on appeal, when she decided to receive evidence outside the record by way of judicial notice.

By statute, the notice of appeal must state “the grounds of the appeal or the alleged errors of law.” S.C. Code Ann. §42-17-60 (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's 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).

Furthermore, the record does not include proof of the judgment against the employer. There is an actual dispute that the Claimant obtained a tort judgment against the employer and also entered into a settlement with a third party, all without protecting the lien and the subrogation rights of the Fund and the employer (as to the third party) as required by statute. An authenticated copy of the purported tort judgment was not proffered or submitted at the hearing before the circuit court.

There is no appellate court decision that has held that it is appropriate to take judicial notice of facts during the course of an appeal from the South Carolina Workers' Compensation Commission, §1-23-380(3) and (4) provide a specific procedure for the receipt of additional evidence, and, at the same time, restrict the review to the record. Contrary to the circuit court judge's order, *Masters v. Rodgers Development Group*, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984), does not support the taking of judicial notice in this case. Furthermore, as Judge Bell wrote in *Masters*:

"Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. See *United States v. Jones*, 580 F.2d 219 (6th Cir. 1978) (applying Fed.R.Evid. 201); Turner, *Judicial Notice and Federal Rule of Evidence 201 - A Rule Ready For Change*, 45 U.Pitt.L.Rev. 181, 196 (1983). 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. Comment, *The Presently Expanding Concept of Judicial Notice*, 13 Vill.L.Rev. 528, 560 (1968); Morgan, *Judicial Notice*, 57 Harv.L.Rev. 269, 293 (144). Finally, appellate courts, limited to the 'cold' record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. Turner, *supra* at 196. 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*, 321 S.E.2d at 197.

The concerns discussed by Judge Bell are addressed by the procedure outlined in §1-23-380(4), which allows for notice and remand to the administrative agency and fact finder. The Fund did not avail itself of this procedure.

Here, had the Fund made an application to submit additional evidence pursuant to §1-23-380(3) and had the Court determined that such should be granted, the matter would have been submitted to the Commission for the receipt of the evidence and a proper record could have been made. That right has now been waived. The circuit court judge erred in taking judicial notice of matters outside the record.

**III. THE CIRCUIT COURT JUDGE ERRED IN *SUA SPONTE* RECONSIDERING HER ORDER DATED OCTOBER 27, 2006, DIRECTING THE COMMISSION TO DENY THE MOTION TO ADMIT ADDITIONAL EVIDENCE.**

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 re-consider the Order dated October 27, 2006 when the Order was issued. No appeal was taken of the Order dated October 27, 2006. The issue of re-consideration of the Order dated October 27, 2006 was not raised in the Fund's Petition For Review. §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* re-consideration 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, 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.

**IV. THE CIRCUIT COURT JUDGE ERRED WHEN SHE CONSIDERED AND GAVE WEIGHT TO THE AFFIDAVIT OF BROOKS SHEALY, ESQUIRE DATED JUNE 22, 2004 AND ACCOMPANYING DOCUMENTS AND MADE FINDINGS BASED THEREON, WHICH AFFIDAVIT WAS NOT PART OF THE RECORD.**

The circuit court judge erred when she considered and gave weight to the Affidavit of Brooks Shealy, Esquire dated June 22, 2004 and accompanying 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 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. The order of the circuit court judge giving weight to the affidavit and documents must be reversed.

**V. 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.

**VI. 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*.

**VII. 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).

**VIII. 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. *Schurlknight 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 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.

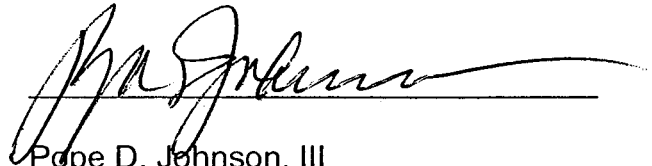
### **CONCLUSION**

This case has had as tortured a path as can be imagined. This was a relatively simple, straightforward case, arising out of a work-related injury on October 30, 2000 and presented to the single commissioner on May 2, 2002. The hearing took less than two hours. The single commissioner took some nineteen months to issue a written decision dated November 26, 2003. Thereafter and while an appeal was pending, the Fund filed its motion to dismiss or order new evidence taken before the hearing commissioner, supported by a mere affidavit with exhibits. This started the trips back and forth to the circuit court solely because the Commission failed to follow its own regulations and the established law. The Commission first granted the Fund's motion to dismiss even though its own regulation, Regulation 67-215(B)(1), prohibits the Commission from addressing such a motion. Then the Commission next failed to apply properly the applicable law relating to the receipt of evidence, which necessitated several trips to the circuit court and ultimately led to a circuit court order directing the Commission to deny the motion to admit new evidence. On December 18, 2006, some six years after the accident, the Commission finally complied and denied the Fund's motion and found that the Employer was subject to the Act and that the Fund was liable for benefits.

Although no appeal was taken of the Commission's order denying the motion and although no further motions were filed in the Commission or circuit court to admit new evidence, the circuit court judge, in complete disregard of the requirements of §1-23-380, became a finder of fact and admitted new evidence.

Since the Fund did not avail itself of §1-23-380(3) and make application for the admission of new evidence, the circuit court judge erred in admitting it and erred

in failing to confine the review "to the record." The circuit court judge, like all of us, must follow the law. The Claimant was entitled to the procedural safeguards and protections afforded him under §1-23-380. The order of the circuit court judge should be reversed, and the Order of the Appellate Panel should be affirmed.



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October 19, 2009

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CALHOUN COUNTY  
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

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Civil Action No. 07-CP-09-0089

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Stephen Brad Wise ..... Appellant

v.

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

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**FINAL BRIEF OF RESPONDENT**

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## STATEMENT OF THE ISSUES ON APPEAL

- I. IS THIS CLAIM BARRED BY THE DOCTRINE OF ELECTION OF REMEDIES BY WAY OF APPLICATION OF SOUTH CAROLINA CODE SECTIONS 42-1-560 AND 42-5-40 AS A RESULT OF THE APPELLANT RECEIVING A TORT JUDGMENT AGAINST HIS UNINSURED EMPLOYER AND SETTLING A TORT CLAIM AGAINST A THIRD PARTY AND WITHOUT PROVIDING THE REQUIRED STATUTORY NOTICE OF THE SAME?
  
- II. IS THE UNINSURED EMPLOYER SUBJECT TO THE WORKERS' COMPENSATION ACT?

## STATEMENT OF THE CASE AND FACTS

The facts relevant to this appeal can probably best be understood in the context of the procedural history of this matter and, as such, will be recited within this statement of the case.

This workers' compensation appeal arises from an injury to the Appellant on October 30, 2000. (R.p.442) (Form 50). The Respondent South Carolina Uninsured Employers' Fund (UEF) asserted that the claim was not compensable because the Appellant was not an employee covered by the Act and also because the uninsured employer did not regularly employ four or more employees. (R.p.440) (Forms 51 and 58 of the UEF) (Form 51 of the UEF apparently missing from Record on Appeal). After a hearing on the merits, this claim was denied by the Single Commissioner for the reasons asserted by the UEF. (R.pp.64-75) (Single Commissioner order). The actual written order denying this claim was not executed until well more than a year after the hearing. (Id.). During the period of time between the hearing and the execution of the order the Appellant filed suit against the uninsured employer and a third party and later obtained a tort judgment of \$900,000.00 against the uninsured employer and settled his tort claim

against another party, all without provided notice to the uninsured employer (and UEF) as required by Section 42-1-560. (R.pp.411-415, 417-420, and 421-422) (Complaint, Judgment, Dismissal, and Affidavit of Brooks Shealy). After the unexpectedly lengthy delay in issuance of the order, the Appellant then appealed that decision of the Single Commissioner. (R.pp.435-439) (Form 30). It was only after this appeal was filed by the Appellant that the UEF became aware of the tort judgment against the uninsured employer and third party settlement obtained by the Appellant. (R.p.421-422) (Affidavit of Brooks Shealy). Once it learned of these events, the UEF filed a motion to bar this claim as a result of this election of remedies. (R.pp.405-406) (Motion of UEF).

Upon receipt of that motion, the Appellant's appeal of the underlying order denying his claim was then dismissed on the basis of his election of remedies by pursuing a tort claim from the same incident to a conclusion without protecting the subrogation or lien interests of the employer and the Uninsured Employers' Fund (UEF). (R.pp.59-63) (Full Commission order dismissing claim). Subsequent to that dismissal by the Full Commission there have been several appeals to the Circuit Court and remands back to the Full Commission regarding the evidence used in support of that dismissal. Eventually, the Circuit Court issued an order directing the Commission to deny the motion of the UEF and to set the claim for a hearing on the underlying appeal. (R.pp.32-36) (Circuit Court order of October 27, 2006).

The Full Commission then denied the motion of the UEF and set this matter for a hearing on the underlying appeal of the denial of the claim. (R.pp.27-31) (Interlocutory Administrative order dated December 18, 2006). The Full Commission then reversed, by a 2-1 vote, the ruling of the Single Commissioner that the uninsured employer was not

subject to the Act, primarily based upon its determination that both the Appellant and Russ Hine were employees. (R.pp.20-26) (Full Commission order dated May 4, 2007). The UEF then appealed that order and the earlier interlocutory administrative order resulting in the order of the Circuit Court dismissing this claim due to the election of remedies and also on the basis of the application of Section 42-5-40 to this claim. (R.pp.10-19) (May 18, 2008, order of the Circuit Court). The Appellant's motion to alter or amend that order was denied by the trial judge, resulting in the present appeal.

### STANDARD OF REVIEW

This workers' compensation appeal is subject to the standard of review known as the "substantial evidence rule." That standard of review mandates reversal of the Full Commission (as the Circuit Court below did) when the decision of the Full Commission is based upon an error of law or when the facts relied upon in support of its decision are clearly erroneous. Application of the "substantial evidence rule" has been comprehensively analyzed previously by this Court in the following fashion:

The South Carolina Administrative Procedures Act (APA) establishes the standard for judicial review of decisions of the workers' compensation commission. A reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." Under the scope of review established in the APA, this Court may not substitute its judgment for that of the commission as to the weight of the evidence on questions of fact, but may reverse where the decision is affected by an error of law.

Liberty Mutual Ins. Co. v. South Carolina Second Injury Fund, 363 S.C. 612, 611 S.E.2d 297 (Ct. App. 2005) (internal citations omitted). Under this standard of review the order of the Full Commission was properly reversed by the Circuit Court because it was based upon an error of law regarding the proper application of the doctrine of election of

remedies (and Section 42-5-40) or, stated another way, the ultimate factual conclusions and findings of the Full Commission regarding the evidence submitted in support of the UEF's motion to dismiss are not supported by substantial evidence. As discussed in more detail in Section II below, the issue of whether or not the employer was subject to the Act is a jurisdictional question for which a de novo review of the whole record is mandated with no deference given to the factual findings of the Full Commission that the Appellant was a covered employee and the uninsured employer was subject to the Act. Harding v. Plumley, 329 S.C. 580, 496 S.E.2d 29 (Ct. App. 1998).

### ARGUMENT

#### **I. THE CIRCUIT COURT CORRECTLY DISMISSED THIS CLAIM AS A RESULT OF THE APPELLANT OBTAINING A TORT JUDGMENT AGAINST THE UNINSURED EMPLOYER.**

##### A. THE CIRCUIT COURT PROPERLY APPLIED THE DOCTRINE OF ELECTION OF REMEDIES.

The whole basis of this appeal rests upon the Appellant's assertion that the Circuit Court committed reversible legal error in dismissing his claim because the tort judgment against the uninsured employer was not in evidence.<sup>1</sup> The Appellant really does not even argue that the dismissal of his claim would have been in error assuming the tort judgment was properly in evidence. Thus, the Appellant seems to impliedly concede the appropriateness of the legal rationale (as opposed to the evidentiary basis) of the Circuit Court's order.

The Appellant has never contended that he did not obtain a tort judgment against the uninsured employer or that he did not enter into a settlement with a third party, all

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<sup>1</sup> For the sake of convenience the various documents related to the tort judgment in issue, including the Complaint and the settlement with the third party, will be collectively referred to as "the tort judgment."

without proper notice to and protection of the lien rights of the UEF or the employer (as to the third party) as required by South Carolina Code Section 42-1-560. The Full Commission has previously held that the Appellant was awarded a default judgment in the amount of \$900,000.00 against the uninsured employer and that the Appellant subsequently dismissed with prejudice his third-party action against the Orangeburg Department of Public Utilities as a result of a settlement with that entity. (R.p.21) (Full Commission order of May 4, 2007, at page 2). The Appellant does not deny the fact of the judgment and settlement (nor has he ever offered any proof that these events did not occur), but rather he asserts that evidence of the judgment and settlement cannot be considered.

The law on election of remedies in the workers' compensation context is absolutely clear and there is no real issue that the actions of the Appellant resulted in an election of remedies. See South Carolina Code Section 42-1-560 and Fisher v. S.C. Dept of Mental Retardation, 277 S.C. 573, 291 S.E.2d 200 (1982). In Fisher the claimant settled her tort claim against a third-party without the consent of the employer/carrier. Our Supreme Court, in ruling that this resulted in an election of remedies, noted that "the legislature did not intend for a claimant to settle his third party case without regard to the employer's rights for subrogation under Section 42-1-550 and still maintain a workmen's compensation claim." 277 S.C. at 575. In Callahan v. Beaufort County School District, 375 S.C. 92, 651 S.E.2d 311 (2007), the Supreme Court ruled that the required notice provisions of Section 42-1-560 must be strictly construed and that dismissal of a workers' compensation claim was mandated when a claimant did not strictly follow the notice requirements. A similar result was reached in Kimmer v. Murata of America, Inc., 372

S.C. 39, 640 S.E.2d 507 (Ct. App. 2006), cert. denied, (2007), in which the claimant instituted his third-party action without notice to the employer/carrier and settled the same without the consent of the employer/carrier. Thus, by failing to provide notice to the uninsured employer and UEF of the institution of his tort action and by not getting the consent of the uninsured employer and UEF to his settlement, the Appellant elected his remedy under Section 42-1-560 and the Circuit Court correctly ruled he is barred from further prosecution of his workers' compensation claim.

In this particular case the election of remedies is even more apparent, involving as it does an attempt to continue a workers' compensation claim against an uninsured employer after first obtaining a tort judgment against the same uninsured employer. The laws of this state specifically do not permit a claimant to receive a tort judgment against an uninsured employer and also prosecute a workers' compensation action against that same uninsured employer. South Carolina Code Section 42-5-40 provides:

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 ten cents for each employee at the time of the insurance becoming due, but not less than one dollar nor more than fifty dollars for each day of such refusal or neglect, and until the same ceases, he shall be liable during the 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.... (Emphasis added).

The language of the statute could not be more emphatic in prohibiting the Appellant from pursuing both a tort claim and a workers' compensation claim against his uninsured employer.

In Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 532 S.E.2d 766 (1999), in analyzing Section 42-5-40, the Supreme Court held that "the Act prohibits an employee

from recovering both workers' compensation and a tort judgment from an employer who fails to secure compensation", 337 S.C. at 329. This part of the majority opinion acknowledges that the dissent was correct in its analysis that Section 42-5-40 precludes a claimant from seeking both a tort judgment and a workers' compensation claim against an uninsured employer. The language within the dissent is even more direct: "As Section 42-5-40 specifically provides, however, an employer who fails to secure compensation becomes liable to an employee 'either for compensation under this title or at law. Thus, in a situation where an employer is uninsured, a claimant may pursue a workers' compensation or, in the alternative recovery in tort. Nothing in the Act entitles the claimant to recover both workers' compensation and a tort judgment". (Emphasis in the original). *Id.* at 331.

It cannot legitimately be disputed that the Appellant received a tort judgment of \$900,000.00 against the uninsured employer. It is equally clear that Section 42-5-40 and the Harrell decision require that when a claim is made against an uninsured employer, which is the case in the matter at bar, a claimant cannot proceed with both a tort judgment and a workers' compensation claim. Accordingly, the Circuit Court properly dismissed this action under the Respondent's alternative theory of an election of remedies under Section 42-5-40.

By instituting his tort action against the uninsured employer (and receiving a judgment) the Appellant made a binding choice under Section 42-5-40 as to the jurisdiction under which his claim against the uninsured employer was to be determined. The Full Commission simply did not have jurisdiction to adjudicate this claim once it was shown that the Appellant had prosecuted and received a tort judgment against his

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uninsured employer. This matter goes directly to the subject matter jurisdiction of the Commission, which is a creature of statute and may only hear those matters specifically provided for by statute. Bazzle v. Huff, 319 S.C. 443, 462 S.E.2d 273 (1995) (holding that the Commission lacks jurisdiction to act when there is no express statutory authority). The issue of subject matter jurisdiction may be raised at any time, even during the appeal process. GNOC Corp. v. Estate of Rhyne, 312 S.C. 86, 439 S.E.2d 274 (1994). Under the provisions of Section 42-5-40 it was legal error for the Commission to fail to dismiss this claim because the Appellant's tort judgment against that uninsured employer divested the Commission of any jurisdiction over the workers' compensation claim brought against that same uninsured employer. The Circuit Court correctly ruled the Commission was without jurisdiction and should be affirmed on this issue.

This section (I.A) of the Respondent's brief responds to those issues raised in sections V, VI, and VII, of the Appellant's brief which baldly asserts that the Circuit Court committed reversible legal error in its application of the doctrine of election of remedies under Sections 42-1-560 and 42-5-40. For the reasons discussed above, the contentions of the Appellant are without merit and the order of the Circuit Court should be affirmed.

B. THE TORT JUDGMENT AGAINST THE UNINSURED EMPLOYER WAS PROPERLY IN EVIDENCE.

Sections I, II and IV of the Appellant's brief generally assert that the Circuit Court had no evidentiary support for its ruling that this claim was barred. Essentially, the Appellant contends that the tort judgment obtained by the claimant against the uninsured employer was not in evidence and could not be considered. In Section III of

his brief, the Appellant makes a different, but related, argument that the Circuit Court allegedly and improperly reconsidered its earlier order directing the Full Commission to deny the UEF's motion (per Regulation 67-707) to submit additional evidence. For the reasons discussed below, these arguments are without merit and should be rejected by this Court.

**1. The tort judgment against the uninsured employer was properly in evidence in connection with the election of remedies motion by the UEF.**

It is significant that this issue related to the admission of evidence arises out of a motion based upon the Appellant's election of remedies and that an election of remedies can be raised at any point during the proceedings. Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999). Thus, the relevant question is whether or not the evidence relied upon by the UEF with regard to its election of remedies motion was properly submitted.

The regulations of the Commission do not provide for any particular form for a motion pertaining to an election of remedies, but only require generally that a motion be supported by an affidavit evidencing the facts relied upon within the motion. See South Carolina Regulation 67-215(D)(1). The UEF satisfied the requirements of Regulation 67-215(D) by means of the affidavit of Brooks Shealy, Esquire, which was filed in support of the motion and had attached to it as exhibits the following documents: (1) the pleadings in the tort action by the Appellant against the uninsured employer and the City of Orangeburg, (2) the order awarding the Appellant a \$900,000.00 tort judgment against the uninsured employer, and (3) the consent order of dismissal of the suit against the City of Orangeburg as a result of the claim against that third party being resolved.

Accordingly, all these documents were properly in evidence in support of the election of remedies motion and it was never necessary for the Commission (or Circuit Court in its previous orders) to rule on compliance with Regulation 67-707 regarding introduction of new evidence during an appeal since the original motion of the UEF was properly supported under Regulation 67-215(D)(1).

The motion of the UEF was not explicitly styled a motion regarding an election of remedies, although the substance of that motion makes it clear enough that it was based upon an election of remedies. Regardless of the styling of its motion the UEF asked the Full Commission to rule that the Appellant elected his remedy by pursuing his tort claim without notice and to a conclusion in derogation of the statutory lien and subrogation rights of the UEF (and the uninsured employer). The courts of this state have never required strict construction of the pleadings in workers' compensation claims and the general rule in all cases is to interpret pleadings liberally and in the interests of justice. See e.g., Harbin v. Owens-Corning Fiberglass, 316 S.C. 423, 450 S.E.2d 112 (Ct. App. 1994) (holding that strict and formalistic interpretation of pleadings is not appropriate in workers' compensation cases). The motion of the UEF can only fairly be described as a motion to bar the claimant from further prosecution of his claim as a result of his election of remedies and, as such, would only require supporting documentation per the provisions of Regulation 67-215(D)(1), as discussed immediately above.

The Appellant at page 9 of his initial brief argues that the Circuit Court could not consider evidence of the tort judgment in light of the order of the Full Commission denying introduction of the same per Regulation 67-707 as directed by the Circuit Court. (R.pp.27-31) (December 18, 2006, interlocutory administrative order of the

67-707 would undermine the doctrine of election of remedies (and Section 42-5-40) when the events related to an election of remedies occurred during the appeal process. R.pp.14-15) (Order of May 18, 2008, at pages 5 and 6). Regulation 67-707 more or less mandates that the evidence to be introduced during the appeal satisfy the “after discovered evidence rule,” that requires the evidence to have been in existence at the time of the original hearing.

Application of that regulation under these facts would totally preclude an election of remedies dismissal when the tort judgment and/or settlement occurred subsequent to the initial workers’ compensation hearing. The Circuit Court wisely surmised that a claimant could knowingly and intentionally undermine the requirements of Sections 42-1-560 and 42-5-40 simply by waiting until after his or her workers’ compensation hearing to prosecute a tort action and then subsequently move to bar consideration of the tort action as failing to meet the standard of “after discovered evidence” under Regulation 67-707.

In light of this, the Circuit Court correctly ruled that the Commission could not apply its own regulations in a manner that would frustrate and undermine the statutory scheme provided in Sections 42-1-560 and 42-5-40 regarding election of remedies. See Goodman v. City of Columbia, 318 S.C. 488, 458 S.E.2d 531 (1995) (regulations of the Commission cannot be applied so as to contravene statutory requirements established by the legislature by adding additional requirements in excess of the statutory provisions). This recognition by the Circuit Court of the incompatibility of that regulation with the statutory scheme regarding election of remedies did not amount to an improper reconsideration of her prior order as briefly contended by the Appellant (at Section IH of

his brief), particularly in light of the Court's ruling that the motion of the UEF was properly supported under Regulation 67-215. (R.p.13) (Circuit Court order at page 4).

**2. The Circuit Court properly took judicial notice of the tort judgment against the uninsured employer.**

Without regard to the regulations of the Commission (or the provisions of the Administrative Procedures Act), all of the documentation necessary to support the elections of remedies motion was properly before the Full Commission (and the Circuit Court) by virtue of judicial notice. The doctrine of judicial notice allows a court to accept certain types of facts as proven without further evidence. Rule 201, SCRE, provides that judicial notice must be taken when requested by a party and that party supplies the necessary information to take judicial notice of the fact requested. That rule further provides that judicial notice may be taken of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The Commission may also take judicial notice of facts. Eadie v. H.A. Sack Co., 322 S.C. 164, 470 S.E.2d 397 (Ct. App. 1996) (accepting contention that Commission may take judicial notice of facts, but ruling it was not proper in that particular case). Further, it should be noted that contrary to the assertion of the Appellant at pages 11 and 12 of his brief there is nothing in Rule 201, SCRE, that requires a specific written pleading in order for a court to take judicial notice of a fact and, in any case, the rules of evidence do not apply in the context of workers' compensation proceedings per Section 1-23-330(1).

The actual written judgment against the uninsured employer and the third party settlement documents had previously been provided to the Court as part of the pleadings and briefs of the parties in connection with earlier appeals in this matter. The courts of this state have held that it is appropriate to take judicial notice of a court judgment. See

Griffin v. Van Norman, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990). Our courts have also held that it is appropriate to take judicial notice of facts during the course of an appeal. Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2003); Cf. Masters v. Rodgers Development Group, 283 S.C. 251, 321 S.E.2d 194 (Ct. App. 1984) (discussing nature of information necessary to permit judicial notice of fact during appeal). Accordingly, it seems reasonable to conclude, and the Circuit Court so held, that it was proper to take judicial notice of the tort judgment against the uninsured employer (and that the Full Commission should have done so when it was brought to their attention by the Respondent's counsel). (R.p.489) (See Transcript of hearing before the Full Commission at page 12). Further, the Administrative Procedures Act specifically provides for a reviewing court to take notice of judicially cognizable facts. Section 1-23-330(4).

On page 12 of his brief (in Section II) the Appellant further asserts that consideration of the tort judgment was improper, purportedly because no authenticated copy of the judgment was submitted. This contention is without merit because, as discussed above, the Administrative Procedures Act explicitly states that the rules of evidence do not apply in workers' compensation proceedings (Section 1-23-330(1)) and, as discussed immediately below, the Appellant himself had previously submitted copies of the tort judgment to the Circuit Court in connection with his prior appellate pleadings. Accordingly, this contention is without merit. Additionally, the Administrative Procedures Act specifically provides for the introduction of copies of documents without any mandated requirement of authentication by certification. Section 1-23-330(2).

Regardless of its manner of submission (affidavit per Regulation 67-215 versus judicial notice), the evidence provided by the UEF shows beyond any doubt that the Appellant is seeking to do something the law does not permit him to do; that is, receive a third-party settlement and a tort judgment against the uninsured employer while also seeking workers' compensation benefits from that same uninsured employer. To permit the Appellant to use Regulation 67-707 as a bar to consideration of the tort judgment would be contrary to the doctrine of election of remedies and in the face of the express statutory prohibition in Section 42-5-40 against pursuing such multiple remedies against an uninsured employer.

**3. The Appellant himself submitted the tort judgment into the appellate record on several occasions.**

Significantly, the Appellant placed the tort judgment into the record on at least two occasions during the various appeals between the Full Commission and the Circuit Court. (R.pp.256-257 and 149-150) (See Petition for Circuit Court Review dated January 13, 2006, Exhibit C, and Petition for Circuit Court Review dated August 8, 2006, Exhibit C). - Thus, the Appellant should not now be permitted to argue that the tort judgment was not part of the appellate record and, as such, properly used by the Circuit Court in reaching its decision. See Rule 10(c), SCRCP, ("A copy of any plat, photograph, diagram, document or other paper which is an exhibit to a pleading is a part thereof **for all purposes** if copy is attached to such pleading.") (emphasis added). At a minimum, the Appellant's prior use of the tort judgment as exhibits in his own pleadings seriously undermines his current contention, as discussed above, that the decision of the

Circuit Court was somehow flawed because no certified copy of the tort judgment was used.

**II. THE UNINSURED EMPLOYER WAS NOT SUBJECT TO THE WORKERS' COMPENSATION ACT.**

The Appellant argues in Section VIII (at pages 17-18) of his initial brief that the Circuit Court erred in not affirming the 2-1 decision of the Full Commission that the uninsured employer was subject to the Act. The decision as to whether an employer is subject to the Act is jurisdictional and is subject to a de novo review by the appellate court. Harding v. Plumley, 329 S.C. 580, 496 S.E.2d 29 (Ct. App. 1998) (stating this standard of review and ruling that employer was not subject to the Act because he did not regularly employ four or more employees).

The Circuit Court did not directly rule on this issue in light of its holding that this claim was otherwise barred. Review of the 2-1 decision of the Full Commission in this regard revolves primarily about whether or not Russ Hine and Brandon Robinson were employees as defined by the Act. The order of the Full Commission finds that the uninsured employer regularly employed Carla Amaker, Brandon Robinson, the Appellant, and Russ Hine. (R.p.24) (Full Commission Order at Finding of Fact No. 4, 5 and 6). Thus, if either Russ Hine or Brandon Robinson is not an employee, the uninsured employer is not subject to the Act because Section 42-1-360 exempts those employers that do not regularly employ four or more employees.

The record during the original hearing on this matter is replete with evidence that Russ Hine was an independent contractor, and not an employee. He was paid the same amount of money whether he worked or not. (R.p.518) (Transcript of Single

Commissioner Hearing at page 16). Russ Hine considered himself to be self-employed. (R.p.520) (Id. at page 18). He had his own business cards and took care of paying his own taxes. (R.p.528) (Id. at page 26). Significantly, he was not paid for working on the job during which the claimant was injured. (R.pp.529-530) (Id. at pages 27-28).

Additionally, the finding that Brandon Robinson was regularly employed is contrary to the evidence. He was a 16-year-old student and was enrolled in school at the time the claimant was injured on October 30, 2000. R.p.535) (Id. at page 33). To count an irregularly working student who is 16 years old as a regular employee stretches credulity. This Court is free to take its own view of the preponderance of the evidence and find that either or both Russ Hine and Brandon Robinson were not regular employees of the employer as that term is used in the Act. Harding, supra. If either of these individuals is found not to be an employee as defined within the Act, then the employer is not subject to the Act and this claim must be denied on that basis.

There are other defects with regard to the Commission's 2-1 decision finding the uninsured employer subject to the Act. There is precious little, if any, support for finding of fact number three that the uninsured employer was regularly engaged in a business of moving buildings. In any event, there was no finding that he was regularly engaged in that business or that he regularly employed any specific number of employees with regard to that business. This is significant because it was during the moving of a building that the Appellant was injured. Further, by reference to finding of fact number four, it seems clear that neither Carla Amaker or Brandon Robinson were regularly employed with regard to the alleged building moving business of the uninsured employer. All of this, taken together as part of this Court's de novo review of this jurisdictional issue,

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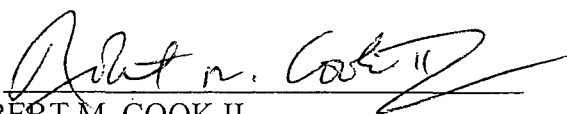

should result in a finding that the employer was not subject to the Act because he did not regularly employ four or more employees. Harding, supra.

**CONCLUSION**

For the reasons discussed above, or as appear in the record on appeal per Rule 220(c), SCACR, or as may be made at oral argument, the Respondent requests that this Court affirm the order of the Circuit Court holding that this claim was barred by the doctrine of election of remedies under South Carolina Code Sections 42-1-560 and 42-5-40, or in the alternative, rule that the uninsured employer was not subject to the Act.

Respectfully submitted,

KENNEDY LAW FIRM, LLC

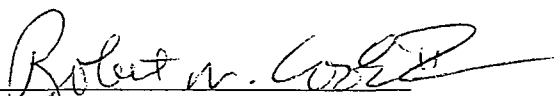
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**CERTIFICATE**

Counsel for the Respondent hereby certifies that the Respondent's Final Brief complies with Rule 211(b), SCACR.

  
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ATTORNEY FOR RESPONDENT

October 20, 2009

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CALHOUN COUNTY  
Court of Common Pleas

Diane Schafer Goodstein, Circuit Court Judge

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Civil Action No. 07-CP-09-0089

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Stephen Brad Wise

Appellant

v.

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

Respondents

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**FINAL REPLY BRIEF OF APPELLANT**

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## ARGUMENT

I

### **The Fund has failed to address the key statutory provisions which control the appeal.**

Although the Fund has made much argument that a claimant who has obtained a tort judgment should not be permitted to pursue a workers' compensation based upon election of remedies, the Fund's brief is notable as to what is unaddressed. The Fund has failed to address the following:

1. S.C. Code Ann. §1-23-380(4) mandates that the court's review "must be confined to the record." *Id.* The Circuit Court Judge failed to follow this mandate. S.C. Code Ann. §1-23-380(3) provides for admission of additional evidence "if a timely application is made" and for the taking of the additional evidence before "the agency." *Id.* Even though no application was made, the Circuit Court Judge considered additional evidence. The Circuit Court Judge then compounded her error by deciding the appeal based upon the additional evidence, rather than remand the matter to the Commission for the additional evidence to be taken. The Circuit Court Judge ignored the procedure and mandate as set forth in §1-23-380(3). The Fund has failed to address or provide any basis for the Circuit Court Judge's disregard of the statutory mandates set forth in §1-23-380.

2. The Circuit Court Judge took judicial notice of the tort judgment. However, the Fund did not ask the Appellate Panel to take notice of "judicially cognizable facts" or mention the need for judicial notice in its grounds of appeal to the Circuit Court. The law is settled that 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, 625, 503 S.E.2d 471, 479 (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, 246-48, 631 S.E.2d 268, 273-75 (Ct. App. 2006). The Fund failed to address how or why this well-settled rule of law should be disregarded here.

## II

**Contrary to the Fund's argument, the Appellant did not make the judgment a part of the record by attaching it to its Petition for Circuit Court Review.**

The Fund has argued that the Appellant placed the tort judgment into the evidence by attaching it to its Petition for Circuit Court Review, relying upon Rule 10(3), SCRCP, that a document attached to a pleading is a part thereof "for all purposes." However, an appeal of a Workers' Compensation Commission Order to the Circuit Court is not a civil action to which the Rules of Civil Procedure apply. There is no discovery pursuant to the Rules of Civil Procedure at the Circuit Court level in an appeal from the Workers' Compensation Commission. There is no amendment of pleadings, joinder of parties or claims or any trial at the Circuit Court level in an appeal from the Workers' Compensation Commission. There are no post trial motions pursuant to the Rules of Civil Procedure at the Circuit Court level in an appeal from the Workers' Compensation Commission. An appeal from the Workers' Compensation Commission is controlled by the Administrative Procedures

Act (APA). S.C. Code Ann. §1-23-310 et seq. The Rules of Civil Procedure have nothing to do with an appeal from the Workers' Compensation Commission. The Court should not be led down this primrose path by the Fund. Here, the Fund failed to avail itself of the means provided by §1-23-380(3) to admit additional evidence. The additional evidence and the tort judgment were not admitted. The Circuit Court Judge erred in considering and ruling upon it.

### III

#### **The doctrine of election of evidence cannot be applied in the absence of evidence to support its application.**

The Fund has argued that election of remedies can be raised at any point in the proceedings citing *Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999). However, *Cowart* involved a civil action, not an appeal from the Commission pursuant to the Administrative Procedures (APA). S.C. Code Ann. §1-23-310 et seq. The APA and the rules of law governing appellate review limit the scope of review by the Circuit Court. It is not proper for the Circuit Court Judge to become a fact finder and decide an appeal based thereon. *Fox v. Newberry County Memorial Hospital*, 319 S.C. 278, 461 S.E.2d 392 (1995). (The duty to determine facts is placed solely on the Commission and the court reviewing the decision of the Commission has no authority to determine factual issues but must remand the matter to the Commission for further proceedings). However, even if the Circuit Court could consider the application of election of remedies, there would still have to be evidence in the record to support an election of remedies before the doctrine could be considered. Contrary to the Fund's argument, attaching an affidavit to a

motion does not admit the affidavit into evidence in a contested hearing. Such an affidavit merely provides the support for the motion. Furthermore, this Court should remember that the Fund's motion was to dismiss or remand the case to the Single Commissioner to receive additional evidence. Since Regulation 67-215(A) provides that the Commission cannot consider a motion to dismiss, the only motion that could be addressed was the motion to remand the case to the Single Commissioner to receive additional evidence. However, that was never done because the information in the affidavit was not additional and newly discovered evidence within the meaning of Regulation 67-707. Even if information in the affidavit had been admissible, the evidence could only have been admitted upon remand to the Single Commissioner. Regulation 67-707(C)(2)(d). This did not occur. Since the affidavit and tort judgment were not admitted into evidence upon a remand to the Single Commissioner and since no application pursuant to §1-23-380(3) was made to the Circuit Court Judge to admit the additional evidence, there was no evidence in the record upon which the doctrine of election of remedies could be applied. The Circuit Court Judge erred in applying the doctrine and her order should be reversed.

#### IV

**The Fund's reliance on *Goodman v. City of Columbia*,  
318 S.C. 488, 458 S.E.2d 531 (1995) is misplaced.**

The Fund has argued that the Commission may not apply its own regulations in a manner that would frustrate and undermine the statutory scheme of Section 42-1-560 and 42-5-40, relying on *Goodman v. City of Columbia*, 318 S.C. 488, 458

S.E.2d 531 (1995). However, the Fund's reliance on *Goodman* is misplaced. The *Goodman* court simply held that a regulation may not alter or add to a statute. In *Goodman*, the issue was whether the claimant, in order to perfect his appeal, had to file his appeal on a Form 30 as required by regulation when use of a Form 30 was not required by statute. The Supreme Court held that the notice of appeal, not on a Form 30, was timely, since the use of Form 30 was not required by statute. *Id.* at 491-92. Here the regulations in question do not alter or add to any statute. Importantly, the Fund had a means of having the tort judgment admitted. All the Fund had to do was make an application to the Circuit Court Judge pursuant to §1-23-380(3) and seek a remand to the Commission. Again, the Fund failed to avail itself of §1-23-380(3). The Circuit Court Judge erred in considering the tort judgment and her order should be reversed.

#### V.

**The Commission's finding that the Employer regularly employed four or more employees is well supported by the facts and should be affirmed by this Court.**

The Commission laid out the specific facts upon which it based its conclusion that the Employer regularly employed in service four or more employees such that the Employer was not exempted from the S.C. Workers' Compensation Act pursuant to §42-1-360(2). 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

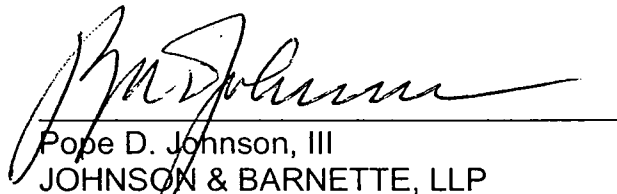
under the Workers' Compensation Act. *Dawkins v. Jordan*, 341 S.C. 434, 534 S.E.2d 700 (2000), overruled as to analytical framework by *Wilkinson ex rel. v. Palmetto State Transportation Company*, 382 S.C. 295, 676 S.E.2d 700 (2009).

If these statements of public policy of the State of South Carolina have real meaning, then this Court should and must resolve the jurisdictional question here in favor of coverage. In this case, the Employer paid his employees in cash. The Employer provided no W-2 or Form 1099's to his employees. The Employer did none of the required employee withholdings. The Employer paid no unemployment taxes. The Employer did not carry workers' compensation insurance to protect his employees who worked in jobs where serious injuries could occur. The Employer falsely claimed that he had no employees. The Claimant suffered a serious injury and incurred substantial medical expenses. A finding of coverage, which is well supported under facts, protects the injured worker, discourages the type of misconduct that the Employer engaged in, and would be consistent with the public policy of this State. The Commission's finding of coverage should be affirmed.

### **CONCLUSION**

If a party fails to make a timely objection to the admission of evidence and the evidence is admitted, the appellate court will not come to the party's aid on appeal. The objection cannot be raised for the first time. The objection is deemed to be waived. *Altman v. Griffith*, 372 S.C. 388, 642 S.E.2d 619 (Ct. App. 2007). The same should be true here where the Fund failed to avail itself of its rights under §1-23-380(3). Statutes and rules of law should not be twisted, stretched or

disregarded, as the Fund seeks to do, to afford the Fund relief from its own failure to seek the admission of evidence under §1-23-380(3). The tort judgment was not admitted into evidence. The Circuit Court Judge erred in considering it anyway and then ruling upon it, rather than remanding the action to the Commission. The law should and must be followed. The Circuit Court's Order should be reversed and action should be remanded to the Commission for disposition.



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