

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2019-000369
WCC File Nos. 1322451, 1319203, 1420487

RECEIVED

MAY 08 2019

SC Court of Appeals

Terry Capone, Claimant.....Appellant *pro se*,

v.

City of Columbia, Employer, and
Companion Third Party Administrator, LLC, Carrier, Respondents.

MOTION TO DISMISS APPEAL

Pursuant to Rule 240, SCACR, Respondents City of Columbia, Employer, and Companion Property & Casualty, Carrier (collectively "Respondents") move to dismiss this appeal. For the reasons stated in greater detail, below, Respondents assert the Notice of Appeal filed by Appellant *pro se* Terry Capone ("Capone") is untimely, thereby depriving this Court of appellate jurisdiction to consider the merits of Capone's claims. Accordingly, Respondents are entitled to an order dismissing this appeal in its entirety and with prejudice. In addition, Respondents seek an order from this Court relieving them of any further obligation to respond to appellate filings by Appellant *pro se* related to WCC File Nos. 1322451, 1319203, and 1420487.

FACTUAL AND PROCEDURAL BACKGROUND

Capone, Claimant *pro se* below, sought workers' compensation benefits via three separate claims: (1) WCC File Number 1319203 for re-injury of his hands and wrists; (2) WCC File Number 1322451 for aggravation of a psychological injury; and (3) WCC File Number 1420487 for re-injury of his toe. *See* Forms 50, Employee's Request for Hearing, attached collectively as Exhibit A. Those claims were heard before Single Commissioner Gene McCaskill on August 21, 2015, and his Decision and Order denying benefits on these claims was filed December 2, 2015. *See* December 2, 2015 Decision and Order, attached as Exhibit B. Capone did not file a Form 30, Request for Commission Review, challenging Commissioner McCaskill's Order denying benefits¹. Instead, more than two years later, on or after February 20, 2018, Capone filed his Notice of Motion and Motion Relief to Alter, Amend, Set Aside Judgment, Order, or Proceeding under Rule 60(A) (B) [sic] and/or SC Code 1-23-380. *See* Notice of Motion and Motion, attached as Exhibit E. That motion was denied via Administrative Order filed March 27, 2018. *See* March 27, 2018 Motion Order, attached as Exhibit F.

Following the denial of his motion to alter or amend judgment, Capone filed a Form 30, Request for Commission Review, dated April 10, 2018, seeking review of the March 26, 2018 Order dismissing his claims as barred by *res judicata*. *See* Form 30, Request for Commission Review, attached as Exhibit G. Capone's Form 30, Request for Commission Review, was "Dismissed as Interlocutory" via Administrative Order dated June 18, 2018. *See* June 18, 2018 Order, attached as Exhibit H. Capone filed his Notice of Appeal on or about July 23, 2018. This

¹ Capone also filed successive Forms 50, Employee's Request for Hearing, pertaining to the same claims denied by the December 2, 2015 Decision and Order. *See* Successive Forms 50 (WCC File Nos. 130203, 1322451, and 1420487) attached collectively as Exhibit C. These Forms 50, Employee's Request for Hearing, were denied on the basis of *res judicata* via Decision and Order filed March 27, 2018. *See* March 27, 2018 Decision and Order, attached as Exhibit D.

Court dismissed Capone's appeal as interlocutory via Order filed September 20, 2018, issued the Remittitur October 9, 2018, and denied Capone's request to recall the Remittitur and reinstate his appeal via Order filed November 2, 2018. The Court also declined to consider Capone's subsequent motion to reconsider via correspondence dated November 15, 2018.

Following issuance of the Remittitur, the Appellate Panel of the South Carolina Workers' Compensation Commission issued its March 1, 2019 Decision and Order, attached as Exhibit I. In that Decision and Order, the Appellate Panel fully and unanimously affirmed the single commissioner's prior determination that Capone never appealed the December 2, 2015 Order determining he was not entitled to further benefits for the claims asserted in WCC File Nos. 1319203, 1322451, and 1420487 and that Capone presented no evidence of any mental condition that would have prevented him from filing a timely Form 30, Request for Commission Review. Further, the Full Commission noted Capone's acknowledgement that "he did not appeal the Decision and Order" of the single commissioner. (December 2, 2015 Order, p. 9, ¶ 4) In addition, the Appellate Panel ordered that further filings by Capone related to these claims shall be administratively dismissed and that Respondents "shall be relieved of any obligation to respond to further filings by [Capone] related to [WCC File Nos. 1319203, 1322451, and 1420487]." (*Id.*, p. 10)

Notwithstanding the Appellate Panel's conclusion that the unappealed single commissioner's order established the law of the case, as well as his admitted failure to seek timely review of that order, Capone now seeks review in this Court. For the reasons stated herein, Capone's appeal is untimely and should be dismissed. Additionally, Respondents request an order from this Court relieving them of any further obligation to respond to any further appellate filings related to the claims at issue.

ARGUMENT

Capone's motion to alter or amend judgment was filed February 20, 2018 – more than two years after the filing of the single commissioner's order denying benefits. When his motion to alter or amend was denied, Capone then filed a Form 30, Request for Commission Review, challenging the dismissal of his claims originally rejected in the unappealed order of the single commissioner in December 2015. As explained below, motions to alter or amend are not proper before the Workers' Compensation Commission, and, even if such motions were proper in workers' compensation proceedings, Capone's motion was filed well beyond the one-year deadline established by Rule 60, SCRCP. In light of his failure to file a timely Form 30, Request for Commission Review, Capone's Notice of Appeal is untimely. As a result, this appeal should be dismissed with prejudice.

I. Motions to Alter or Amend Pursuant to Rule 60 of the South Carolina Rules of Civil Procedure Are Not Proper Before the South Carolina Workers' Compensation, and Appellant's Rule 60 Motion Was Not Timely.

Capone's sole remedy for any alleged error on the part of the single commissioner was to file a timely Form 30, Request for Commission Review, followed by an appeal to this Court. As this Court has explained, the workers' compensation statutory scheme does not contemplate a motion to reconsider or to alter or amend before the Commission pursuant to either Rule 59 or Rule 60 of the South Carolina Rules of Civil Procedure. *Nettles v. Spartanburg School District # 7*, 341 S.C. 580, 588, 535 S.E.2d 146, 150 n. 4 (Ct. App. 2000) (quoting *Lloyd v. AT&T Nassau Metals Corp.*, 299 S.C. 207, 209, 383 S.E.2d 257, 259 (Ct. App. 1989) (“[T]he proper remedy [to address an alleged error in the single commissioner's order] is a timely appeal to the full Commission and then to the courts.”)). For this reason, Capone's motion to alter or amend was improper, and the Commission lacked jurisdiction to consider it.

Even if Rule 60 provided an additional mechanism by which Capone could seek alteration or amendment of the single commissioner's order denying benefits, his motion was untimely. Capone's motion, filed more than two years later seeking commission review, was based on alleged errors of law, violation of his constitutional rights, and fraud upon the tribunal. Rule 60 contemplates relief based upon the grounds alleged (but not substantiated) in Capone's motion; however, the Rule also provides that "[t]he motion shall be made within a reasonable time, and for reasons (1), (2), and (3)² **not more than one year after the judgment, order or proceeding was entered or taken.**" See Rule 60(b), SCRCPP (emphasis added). As noted, the initial order denying benefits was filed December 2, 2015. Thus, any motion to alter or amend, assuming such motions offer a viable avenue for relief in workers' compensation proceedings, would have been due on or before December 2, 2016. Assuming for the sake of argument that the Commission could consider a motion pursuant to Rule 60, SCRCPP, Capone's was not filed within one year of judgment and was not timely according to the plain text of the Rule.

Capone's delay in seeking relief, combined with his failure to follow established procedural requirements, deprived the Commission and this Court of appellate jurisdiction to consider any alleged error on the part of the single commissioner in denying his claims. The Appellate Panel recognized this required outcome when it unanimously and fully affirmed the March 27, 2018 Order of the single commissioner. This Court should dismiss Capone's appeal on this basis.

² Rule 60(b)(1)-(3) provide relief for the following reasons: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); [and] (3) fraud, misrepresentation, or other misconduct of an adverse party. . . ." The remaining grounds for relief provided for in Rule 60(b) are not at issue in these proceedings.

II. Appellant's Notice of Appeal Is Untimely And Should Be Dismissed.

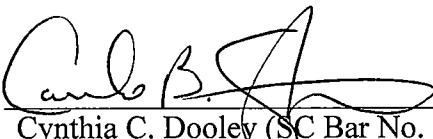
It is black letter law that this Court lacks appellate jurisdiction in a workers' compensation appeal where the appellant failed to file a timely Form 30, Request for Commission Review. As the Supreme Court has observed, the South Carolina Workers' Compensation Commission "lacks the authority to extend the fourteen days permitted for the filing of an appeal from the decision of a single commissioner." *Allison v. W.L. Gore & Associates*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011) (vacating full commission order and circuit court's reversal of full commission order where claimant filed untimely Form 30, Request for Commission Review) (citing *Goodman v. City of Columbia*, 318 S.C. 488, 458 S.E.2d 531 (1995)). By extension, "an appellate body may not extend the time to appeal." *Id.*, 318 S.C. at 188, 714 S.E.2d at 550 (citations omitted).

In this case, Capone failed to file a Form 30, Request for Commission Review, challenging the dismissal of his claims via Order filed December 2, 2015, until February 20, 2018. He never requested, and the Full Commission lacked authority to grant, any extension of the fourteen-day deadline, opting instead to file an impermissible motion to alter or amend well-beyond the time permitted. These procedural missteps compel this Court to dismiss Capone's Notice of Appeal with prejudice. Further, given the repeated and voluminous filings by Capone in reference to his time-barred claims, Respondents respectfully request entry of an order relieving them of any further obligation to respond to filings submitted to this Court related to the workers' compensation claims at issue.

CONCLUSION

For all of the reasons addressed herein, Appellant Terry Capone's Notice of Appeal is not timely and should be dismissed, and Respondents so move. Respondents further request this Court issue an order relieving them from any obligation to respond to further appellate filings in this matter.

May 8, 2018

By:  _____
Cynthia C. Dooley (SC Bar No. 13623)
Carmelo B. Sammataro (SC Bar No. 69746)
TURNER PADGET GRAHAM & LANEY P.A.
Post Office Box 1473
Columbia, SC 29202
CDooley@TurnerPadget.com
SSammataro@TurnerPadget.com
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR RESPONDENTS

EXHIBIT A

Ukate New Claim NR

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



WCC File #: _____
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: 57-6000229

Claimant's Name: Terry H Capone SSN: _____ Employer's Name: City of Columbia
Address: _____ Address: P.O. Box 147
City: Columbia State: SC Zip: 29203 City: Columbia State: SC Zip: 29217
Home Phone: _____ Work Phone: () - _____ Insurance Carrier: Companion TPA Services, LLC (800) 922 1282
Preparer's Name: SELF Law Firm: N/A Preparer's Phone #: (803) 622 - 6578

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: Nov 07, 2013

Injury Illness Repetitive Trauma

1a. The claimant sustained an injury to Head(Mind/Brain), Body (Part(s) of Body Injured) on 11/7/2013 (Month/Day/Year) in Richland county, state of SC

1b. Body part(s) affected are: See Above Injuries

Briefly describe how the accident occurred. SEE SUPPLEMENTAL ATTACHMENT ENCLOSED

2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.

3. The relationship of employer and employee existed at the time of injury.

4. At the time of the injury the claimant was performing services arising out of and in the course of employment.

5. Notice of the accidental injury was given to the Employer on 11/11/2013 (Month/Day/Year) in the following manner:

OSHA 301 Sent to Health & Safety Officer Owusu @City of Columbia Fire Department via Email attachment

6. Due to injury, the claimant is in need of (check one):

(a) medical examination and treatment for: Post Traumatic Stress Disorder, Depression, Anxiety, Migraine Headaches

(b) additional medical examination and treatment for: _____

7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: 11/7/2013-Present Day

8. Due to the injury, the claimant has permanent disability of the following nature and extent (check one):

(1) General Disability:

Total

(2) Specific Disability:

Total

(3) Wage Loss

Partial

Partial

9. Due to the injury, the claimant has a serious bodily disfigurement consisting of: _____

10a. At the time of the injury, the claimant was paid weekly wages of \$ 701.08, and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident:

City of Columbia /City of Columbia Fire Department 1800 Laurel st Columbia SC 29202

11a. Further grounds or unusual aspects of claim:

SEE SUPPLEMENTAL ATTACHMENT ENCLOSED

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident:

Dr. Tiona Pnylow Emission Wellness Medical Group, 2601 Road 51 Suite 1-7 Columbia SC 29204 fax 800 854-3497 tele 803 258-0101

11c. To the best of your knowledge, did you have any prior permanent disability? Yes

If yes, describe: 5% Right Elbow (2003) 1 was catapulted 18 feet to the ground on my back from 24 foot fire ladder fracturing arm missing being impelled by rebar

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

13a. I am filing a claim. I am not requesting a hearing at this time.

13b. I am requesting a hearing. A \$25 fee is required.

14. Estimated time needed for hearing: _____

I verify the contents of this form are accurate and true to the best of my knowledge.

T H Capone
Preparer's Signature

Ret-Fire Battalion Chief
Title

tcapone@liberty.edu
Email

03/03/2015
Date

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

WCC Form # 50
Revised 9/07

50

Employee's Notice of Claim and/or
Request for Hearing

New Claim / Date change to Diagnosis 11/7/2013

SCWCC

MAR 10 2015

INSURANCE &
MEDICAL SERVICES

WCC File #: 1322451
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: 67-6000229

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



Claimant's Name: Tarry H Capone SSN: _____ Employer's Name: City of Columbia
Address: _____ Address: P.O. Box 147
City: Columbia State: SC Zip: 29203 City: Columbia State: SC Zip: 29217
Home Phone: _____ x Phone: () - _____ Insurance Carrier: Companion TPA Services, LLC (800) 922 1282
Preparer's Name: SELF Law Firm: N/A Preparer's Phone #: (803) 822 - 6578

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds: Injury Illness Repetitive Trauma Date of Injury or Illness: Nov 07, 2013

- 1a. The claimant sustained an injury to Head(Mind/Brain), Body (Part(s) of Body Injured) on 11/7/2013 (Month/Day/Year) in Richland county, state of SC.
- 1b. Body part(s) affected are: See Above Injuries
Briefly describe how the accident occurred. SEE SUPPLEMENTAL ATTACHMENT ENCLOSED
- 2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
- 3. The relationship of employer and employee existed at the time of injury.
- 4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
- 5. Notice of the accidental injury was given to the Employer on 11/11/2013 (Month/Day/Year) in the following manner: OSHA 301 Sent to Health & Safety Officer Ownsu @City of Columbia Fire Department via Email attachment
- 6. Due to injury, the claimant is in need of (check one):
 (a) medical examination and treatment for: Post Traumatic Stress Disorder, Depression, Anxiety, Migraine Headaches
 (b) additional medical examination and treatment for: _____
- 7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: 11/7/2013-Present Day
- 8. Due to the injury, the claimant has permanent disability of the following nature and extent (check one):
 (1) General Disability: Total (2) Specific Disability: Total
 (3) Wage Loss Partial Partial
- 9. Due to the injury, the claimant has a serious bodily disfigurement consisting of: _____
- 10a. At the time of the injury, the claimant was paid weekly wages of \$ 701.08, and demands accounting of days worked and wages earned as provided by law.
- 10b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident: City of Columbia /City of Columbia Fire Department 1800 Laurel st Columbia SC 29202
- 11a. Further grounds or unusual aspects of claim: SEE SUPPLEMENTAL ATTACHMENT ENCLOSED
- 11b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident: Dr. Tiona Phaylow Envision Wellness Medical Group, 2801 Reed St Suite 1-7 Columbia SC 29204 fax 800 854-3487 tele 803 256-0101
- 11c. To the best of your knowledge, did you have any prior permanent disability? Yes
If yes, describe: 5% Right Elbow (2003) I was catapulted 18 Feet to the ground on my back from 24 foot Fire ladder fracturing arm missing being impaled by rebar
- 12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- 13a. I am filing a claim. I am not requesting a hearing at this time.
- 13b. I am requesting a hearing. A \$25 fee is required.
- 14. Estimated time needed for hearing: _____

SCWCC
APR 21 2015
JUDICIAL

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature: _____ Title: Ret-Fire Battalion Chief Email: tcapone@liberty.edu Date: 04/15/2015

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

WCC Form # 50
Revised 9/07

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723
www.wcc.sc.gov



WCC File #: 1319203
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: 57-6000229

Claimant's Name: Terry H Capone SSN: _____ Employer's Name: City of Columbia
Address: _____ Address: P.O. Box 147
City: Columbia State: SC Zip: 29203 City: Columbia State: SC Zip: 29217
Home Phone: _____ Work Phone: () - _____ Insurance Carrier: Companion TPA Services, LLC (800) 922 1282
Preparer's Name: SELF Law Firm: N/A Preparer's Phone #: (803) 622 - 6578

Complete each information blank. To request a hearing, check Box 13b, indicate the kinds of benefits claimed by checking the box(es) at Lines 6, 7, 8, and 9, and file this form in duplicate.

A claim for workers' compensation benefits is made based on the following grounds:

Date of Injury or Illness: 10/12/2013

Injury Illness Repetitive Trauma

- 1a. The claimant sustained an injury to Hands, Wrist, Arms, Elbows, lower back and brain (Part(s) of Body Injured) on 10/12/13 (Month/Day/Year) in Richland county, state of SC.
- 1b. Body part(s) affected are: Hands, Wrist, Arms, Elbows and Lower back and Brain
Briefly describe how the accident occurred. Trying to open door of vehicle of a head on collision to get a elderly bleeding patient out of the car
2. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
3. The relationship of employer and employee existed at the time of injury.
4. At the time of the injury the claimant was performing services arising out of and in the course of employment.
5. Notice of the accidental injury was given to the Employer on 10/28/2013 and 12/12/2013 (Month/Day/Year) in the following manner:
OSHA 301 Sent to Health & Safety Officer Owusu @City of Columbia Fire Department via Email attachment

6. Due to injury, the claimant is in need of (check one):
 (a) medical examination and treatment for: Insomnia, Sleep Apnea
 (b) additional medical examination and treatment for: Bi-lateral Median Nerve Entrapment or Carpal Tunnel Syndrome/ Bilateral Lesion of Ulnar Nerve/Neck and lower back

7. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
01/11/2014 - Present

8. Due to the injury, the claimant has permanent disability of the following nature and extent (check one):
 (1) General Disability: Total (2) Specific Disability: Total Partial
 (3) Wage Loss Partial

9. Due to the injury, the claimant has a serious bodily disfigurement consisting of:

10a. At the time of the injury, the claimant was paid weekly wages of \$701.06, and demands accounting of days missed and wages provided by law.

10b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident:
City of Columbia /City of Columbia Fire Department 1800 Laurel st Columbia SC 29202

11a. Further grounds or unusual aspects of claim:
Claimant was being treated and released 1/14/2014 despite still suffering and symptoms have worsened and continue to affect me daily and my quality of life.

11b. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident:
Columbia Neurology Associates PA -Dr Frank O Pusary, Moore Center for Orthopedics-Dr David Fulton, RCS Electrodiagnostic and Rehabilitation Dr.W. Randal Westerman, Midlands Orthopedics PA-Dr. Michael S. Green (see enclosure)

11c. To the best of your knowledge, did you have any prior permanent disability? Yes
If yes, describe: 5% Right Elbow (2003) I was catapulted 16 Feet to the ground on my back from 24 foot Fire ladder fracturing arm missing being impaled by rebar

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

13a. I am filing a claim. I am not requesting a hearing at this time.

13b. I am requesting a hearing. A \$25 fee is required.

14. Estimated time needed for hearing: _____

I verify the contents of this form are accurate and true to the best of my knowledge.

Preparer's Signature: [Signature] Title: Ret-Fire Battalion Chief Email: tcapone@liberty.edu

Refer to R.67-204 through R.67-210 and R.67-601 through R.67-615. Questions about the use of this form may be directed to the Commission's Claims Department.

WCC Form # 50
Revised 9/07

50 # 283730

Employee's Notice of Claim and/or Request for Hearing

RECEIVED
MAY 14 2015

FRONT DESK
SC Workers' Comp.com

SCWCC

MAY 15 2015

JUDICIAL
Date



WCC File #: 1319203
 Carrier File #: _____
 Carrier Code #: _____
 Employer FEIN #: _____

Claimant's Name: Terry Capone SSN: _____
 Address: _____
 City: Columbia State: SC Zip: 29203
 Home Phone: _____ Work Phone: _____
 Preparer's Name: Self Law Firm: _____
 Employer's Name: City of Columbia Fire Department
 Address: 1800 Laurel St
 City: Columbia State: SC Zip: 29201
 Insurance Carrier: Companion
 Preparer's Phone #: _____

A claim for workers' compensation benefits is made based on the following grounds:
 Injury Illness Repetitive Trauma Occupational Disease Physical Brain Injury Concurrent Jurisdiction
 Date of Injury or Illness: 11-7-2013
 1. The claimant sustained an injury to both arms, PTSD, Depression, Sleep disturbance and Alleged reaction (Part(s) of Body Injured) on 11-7-2013 (Month/Day/Year) in South Carolina county, state of _____ Body part(s) affected are: (see above)

2. Briefly describe how the accident occurred: Pushing/pulling on door to get out accident victim 10/12/13
 3. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
 4. The relationship of employer and employee existed at the time of injury.
 5. At the time of the injury the claimant was performing services arising out of and in the course of employment.
 6. Notice of the accidental injury was given to the Employer on 10/25-11/11/2013 (Month/Day/Year) in the following manner: WESA McAlister
Notified HSO Albert Curcio, Division Chief Mark Wright, Companion Drill Change/McCubbing

7. Due to injury, the claimant is in need of (check one):
 (a) medical examination and treatment for: above injuries
 (b) additional medical examination and treatment for: _____

8. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of:
10/21/13 - the present day

9. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
 (1) General Disability: Total Partial (2) Specific Disability: Total Partial (3) Wage Loss

10a. A determination of permanent disability is premature at this time.
 10. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:
Request Calculation

10a. At the time of the injury, the Claimant was paid weekly wages of \$ 6 and demands accounting of days worked and wages earned as provided by law.

10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
none

11. Further grounds or unusual aspects of claim:
 11a. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
Dr Tonia Paylow (Envision Wellness) Dr Fulton (Imove Clinic) Dr Williams (Self) (Sleep Med)

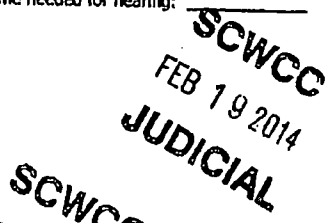
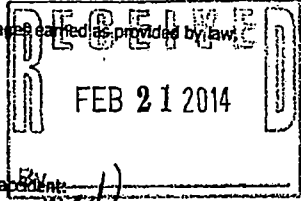
11b. To the best of your knowledge, did you have any prior permanent disability?
 If yes, describe: 5% Right Elbow (2003)

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
 13a. I am filing a claim. I am not requesting a hearing at this time.
 13b. I am requesting a hearing. A \$25 fee is required.

14. Estimated time needed for hearing: _____
 Mediation
 a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
 b. Mediation is required pursuant to Reg. 67-1802.
 c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
 d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
 Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to the address _____ on the _____ day of _____ 20____ by first class postage certified mail personal service.

I verify the contents of this form are accurate and true to the best of my knowledge.
 Preparer's Signature: [Signature] Title: Fire Battalion Chief Email: tcapone@cityofcolumbia.com Date: 2/14/2014



001 0-24-14

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723 www.wcc.sc.gov



WCC File #: 1420487
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: 57-6000229

Claimant's Name: Terry h Capone SSN: _____ Employer's Name: City of Columbia
Address: _____ Address: _____
City: Columbia State: SC Zip: 292038 City: _____ State: _____ Zip: _____
Home Phone: _____ Work Phone: _____ Insurance Carrier: COMPANION THIRD PARTY GROUP
Preparer's Name: SELF Law Firm: _____ Preparer's Phone #: SELF

A claim for workers' compensation benefits is made based on the following grounds: Date of Injury or Illness: 6/24/2013

- Injury Illness Repetitive Trauma Occupational Disease Physical Brain Injury Concurrent Jurisdiction
- 1. The claimant sustained an injury to Toe nail (Part(s) of Body Injured) on 6/24/2013 (Month/Day/Year) in Richland county, state of SC. Body part(s) affected are: Toe nails
- 2. Briefly describe how the accident occurred. Because of Foot wear issued and occupation, Toe nail Fungus developed
- 3. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
- 4. The relationship of employer and employee existed at the time of injury.
- 5. At the time of the injury the claimant was performing services arising out of and in the course of employment.
- 6. Notice of the accidental injury was given to the Employer on 1/5/2015 (Month/Day/Year) in the following manner: Via Email to Health & safety Officer Owusu
- 7. Due to injury, the claimant is in need of (check one):
 - (a) medical examination and treatment for: _____
 - (b) additional medical examination and treatment for: Toe nail Fungus
- 8. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: _____
- 9. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
 - (1) General Disability: Total Partial (2) Specific Disability: Total Partial (3) Wage Loss
- 9a. A determination of permanent disability is premature at this time.
- 10. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:
Disfigured nail and continued treatment for Nail fungus
- 10a. At the time of the injury, the Claimant was paid weekly wages of \$ _____ and demands accounting of days worked and wages earned as provided by law.
- 10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
City of Columbia (City of Columbia Fire Department 1800 Laurel st Columbia SC 29202
- 11. Further grounds or unusual aspects of claim:
Claimant originally broke his toe in 2006 on the job, nail fungus developed but was treated and resolved in 2007. 6/2013 Diagnosed & treatment begin
- 11a. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
Dr. Daniel Mathuselah "Columbia Podiatry" suite 102 1 wellness Blvd Irmo, SC 29063/ Dr and Sarah Frassica City of Columbia Employee Health Clinic
- 11b. To the best of your knowledge, did you have any prior permanent disability?
If yes, describe: 5% Right Elbow (2003) 1 was catapulted 18 Feet to the ground from 24 foot Fire ladder fracturing Right arm
- 12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

RECEIVED

MAY 14 2015

(FRONT DESK)

SC Workers' Comp Comm

- 13a. I am filing a claim. I am not requesting a hearing at this time.
- 13b. I am requesting a hearing. A \$25 fee is required.
- 14. Estimated time needed for hearing: UNKNOWN
- Mediation
 - a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
 - b. Mediation is required pursuant to Reg. 67-1802.
 - c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
 - d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.

#253728

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to SC Workers' Compensation Commission - Suite 500
address 1333 Main St Columbia, SC 29202 on the 14 day of MAY 20 15 by first class postage certified mail personal service.

I verify the contents of this form are accurate and true to the best of my knowledge.
Preparer's Signature: [Signature] Title: Fire Battalion Chief-Retired Email: icapone@liberty.edu Date: May 14, 2015

Questions about the use of this form should be directed to the Claims Department at 803.737.5723. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615 as well as Reg. 67-1801.

EXHIBIT B

DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NOS.: 1319203, 1322451, 1420487

TERRY CAPONE, CLAIMANT

v.

CITY OF COLUMBIA, EMPLOYER
AND
COMPANION PROPERTY & CASUALTY, THIRD PARTY ADMINISTRATOR

HEARING: Held in Columbia, South Carolina on August 21,
2015.

APPEARANCES: Claimant appeared Pro Se

Defendants represented by Dana M. Thye, Deputy
City Attorney for the City of Columbia, South
Carolina

PURPOSE OF HEARING: To determine issues as set forth on Form 50 and
Form 51.

DECISION AND ORDER: By Commissioner Gene McCaskill.

FILED: December 2, 2015

STIPULATIONS

At the call of the case, the parties stipulated that the South Carolina Workers' Compensation Commission had jurisdiction in this case and that venue was proper in Richland County. The purpose of the hearing was to decide issues raised in Claimant's Form 50s and Defendants' Form 51s.

Claimant brought three separate claims and all were heard on this date. Notice was timely and properly served upon all parties of interest.

Claimant appeared without counsel and was properly advised of his right to counsel.¹ Claimant knowingly and voluntarily waived his right to counsel and proceeded Pro Se.

Both parties stipulated that the Claimant's applicable average weekly wage is \$1,023.51, and the corresponding compensation rate is \$682.68.

The Claimant seeks benefits under the South Carolina Workers' Compensation Act based upon alleged accidental injuries occurring on June 24, 2013, wherein he injured his toe (WCC File No. 1420487), on October 12, 2013, in which he re-injured his bilateral hands/wrists (WCC File No. 1319203), and on November 7, 2013 (WCC File No. 1322451), where he alleges an aggravation of a psychological injury, all while in the employ of the Employer/Defendants. Therefore, the South Carolina Workers' Compensation Commission has jurisdiction of these cases. Without objection, and with the exception of any self-serving statements or unstipulated medical reports, the Commission's file was made a part of the record.

MEDICAL EVIDENCE/RATINGS- APA SUBMISSIONS

Pursuant to the South Carolina Administrative Procedures Act, South Carolina Code §1-23-320 et seq. and Regulation 67-612, the parties submitted the following items without objection as evidence in support of their cases;

¹ A hearing was originally scheduled on July 17, 2015, for purposes of deciding the issues raised in all three of claimant's Form 50s, but was continued for thirty days so that Claimant could seek representation.

CLAIMANT'S APA SUBMISSIONS

The Pro Se Claimant submitted two binders containing multiple documents that included medical records, photographs and internet research articles which were not numbered, put in date order or indexed. The binders indicated the WCC File Nos. 1319202, 1322451 and 1420487.

References to page numbers in Claimant's APAs refer to these binders.

DEFENDANTS' APA SUBMISSIONS

Toe claim/WCC File No. 1420487:

APA #1 Carolina Podiatry, Pages 1-4

Hands/Wrists/WCC File No. 1319203:

APA #1 Carolina Occupational Healthcare, Pages 1-7

APA #2 Ellis Physical Therapy, Pages 8-21

APA #3 Moore Orthopaedics, Pages 22-39

APA #4 Midlands Orthopaedics, Pages 40-46

APA #5 W. Randal Westerkam, MD, Pages 47-48

APA #6 Dr. James Bethea, Pages 49-56

Psyche', WCC File No. 1322451

APA #1 Doctor's Care, Pages 1-3

APA #2 Dr. Tiona Praylow, Pages 4-37

APA #3 Agape Counseling, Pages 38-134

APA #4 Sleepmed, Pages 135-151

STATEMENT OF THE CASE

These matters are properly before me to resolve issues raised in Claimant's Form 50s and in the Defendants' Form 51s. This case was heard by the undersigned Commissioner on August 21, 2015, at which time the parties and/or their representatives appeared and evidence was received. The parties have stipulated a compensation rate of \$682.37 as well as jurisdiction and venue.

Claimant alleges that he sustained compensable injuries by accident during the course and scope of his employment with the City of Columbia and is thus entitled to benefits under the Act for his three claims. The Defendants argue that the claims are not compensable as alleged.

Claimant alleges that on June 24, 2013, he was diagnosed with toe fungus that he attributes to his issued footwear and occupation as a firefighter and is in need of additional medical treatment for such condition. The Defendants argue that the claim for toe nail fungus occurring on June 24, 2013 (WCC File No. 1420487) is not compensable because there was no evidence that a compensable injury by accident during the course and scope of claimant's employment with the City occurred on that date. They further argue that there was no evidence of permanent partial impairment, time lost from work or need for medical treatment for this alleged injury.

Claimant next alleges that on October 12, 2013, he injured his wrists and needs additional medical treatment for that injury. He also lists injuries to his elbows, lower back and brain on his Form 50. The Defendants argue that the claim for hands, wrists, elbows, lower back and brain dated October 12, 2013 (WCC File No. 1319203) was not compensable as alleged because claimant had pre-existing carpal tunnel syndrome and there was no evidence of an aggravation occurring on October 12, 2013 and all medical treatment that may tend to lessen Claimant's period of disability had been provided. No additional medical treatment was deemed necessary by treating medical

provider. There was no medical evidence of injuries to the other body parts listed.

Claimant alleges a continuous injury by aggravation of Post-Traumatic Stress Disorder ("PTSD"), diagnosed on November 7, 2013. The Defendants argue that the claim for post-traumatic stress disorder and depression allegedly occurring on November 7, 2013 (WCC File No. 1322451) was not compensable because of a pre-existing diagnosis of post-traumatic stress disorder related to his service in the military and there was no evidence of an aggravation of this condition caused by his employment with the City. Also, Claimant did not meet the criteria of "unusual or extraordinary conditions of employment" for a compensable psychological injury under S.C. Ann. §42-1-160 (1962, as amended).

EVIDENCE-TESTIMONY

The Claimant seeks benefits under the South Carolina Workers' Compensation Act based upon accidental injuries occurring on June 24, 2013, wherein he allegedly injured his toe; on October 12, 2013, in which he claimed injuries to his bilateral hands/wrists and on November 7, 2013, where he alleges psychological aggravation while in the employment of the Defendant.

Claimant's Testimony:

Under oath, Claimant testified that at the time of the alleged injuries, he was employed by the City of Columbia Fire Department and had been for approximately 16 years. At the time of his retirement in early 2014, he had attained the rank of Battalion Chief. Claimant testified that on or about June 24, 2013, he sought treatment for toe fungus. He believes that his condition is caused by the type of work boots he was issued by the Fire Department. These boots do not allow moisture to wick away and as such, they promote fungal growth. Previously, Claimant sustained a crushing injury to his great toe in May, 2005 and has periodically sought treatment for toenail fungus since

that time. Claimant continues to treat his toenail condition.

On October 12, 2013, Claimant testified that while on duty, he came upon a motor vehicle accident where the driver was trapped inside a damaged vehicle. As he tried to pull the door open, he felt pain in his bilateral wrists and has been unable to work confidently since that time. He attributes the aggravation of his PTSD to this incident, among others, and feeling like he can no longer trust in his strength to do his job. He testified about sleep disturbances, obsessive behavior and depression. He has lost enjoyment in spending time with his family and friends and can no longer handle stressful environments. Claimant had been treated for PTSD prior to the October 12, 2013 incident.

Witnesses' Testimony:

Deputy Fire Chief Harry Tinsley testified regarding the usual circumstances of employment with the Department. Firefighters work a 24-hour shift with 48 hours off in between. He further testified that it is not unusual to be called to extricate passengers from vehicles involved in accidents, nor is it unusual to see the unfortunate aspects of fire damage and burns to victims. While fighting fires it is not unusual to find oneself in dangerous situations, and to be put in peril.

MEDICAL EVIDENCE

Toe Fungus – (WCC File No. 1420487):

On May 14, 2005, Claimant was seen at Moore Orthopaedics after a locker fell and hit him on his right big toe. The Claimant said he drilled his own nail to let the blood out and had been "buddy taping" it. X-rays revealed an avulsion fracture at the base of the distal phalanx. The nail later came off and it was noted he would probably have a deformed nail but he had pretty functional motion and little or no tenderness. (Claimant's APAs page 117, 133).

Claimant later developed toe nail fungus and he stated he was seen for this by Carolina Podiatry on 6/24/13. Per subpoena to Carolina Podiatry they indicate "Patient last seen in 2007, chart has been destroyed." (Defendant's APA pages 1-4).

Aggravation of Carpal Tunnel- (WCC File No. 1319203)

Claimant was initially seen by Dr. Motyka of Occupational Health Center for left and right hand/wrists numbness and pain on October 29, 2013. He stated that 17 days earlier he was helping to remove a trapped victim from a car and developed bilateral pain while pushing and pulling on the trapped door. He was given steroids and a physical therapy referral as well as light duty restrictions. (Defendant's APAs pages 3-4).

Claimant was seen again on November 12, 2013 with hand/wrist cramping and both elbows feeling "weird" also. Claimant resisted exam and would not answer questions. Dr. Motyka noted that the history and changing patterns given by the claimant made no sense and he suspected ulterior motives. He thought it best to send Claimant to a specialist for a final determination/diagnosis. (Defendant's APAs page 6).

Claimant began physical therapy at Ellis Physical Therapy for bilateral wrist and hand pain on November 6, 2013. (Defendant's APAs pages 10-12). Claimant indicated physical therapy was not of much benefit.

On December 6, 2013, Claimant was seen by Dr. David Fulton, of Moore Orthopaedics for hand pain, numbness and tingling. Dr. Fulton opined the symptoms were consistent with carpal tunnel syndrome and prescribed cock-up splints to sleep in. He initially released Claimant to return to work but Claimant stated he felt unsafe returning and that he could jeopardize himself or others due to weakness in his hands. Therefore, Dr. Fulton gave Claimant modified duty until results from

nerve conduction study were received. (Defendant's APA pages 25-26). A nerve conduction study was performed which concluded that Claimant had mild carpal tunnel bilaterally based on positive median/radial comparison studies. No significant evidence of ulnar neuropathy affecting either upper limb (Defendant's APA page 29). Dr. Clavert who performed the nerve study noted

"This is again an early mild carpal tunnel syndrome and given the degree of pronounced symptoms reported, there is a discordant nature between the degree of electro-diagnostic findings compared to the subjective symptom report. Typically, based on the very mild nature of our findings, this is something that would be treated non-operatively. We will defer to Dr. Fulton for further management." (Defendant's APA page 30).

Claimant was seen by Dr. Fulton again on January 21, 2014. He reported ongoing difficulties with numbness and pain. He reported frequent cramping in his hands as well as proximal migration of pain up into the forearms. Dr. Fulton's impression was very mild carpal tunnel syndrome. It was noted that his symptoms were certainly far greater than expected based on the objective numbers on his nerve study. Non-operative treatment was recommended and cortisone injections were given in both carpal tunnels. Work status was kept unchanged as the patient felt he could not perform his regular work activities. Claimant was encouraged to work light duty if available. (Defendant's APA page 34).

On February 18, 2014, Claimant came in wearing his splints, but said they were not helping. He stated the injections were not helpful. Claimant told Dr. Fulton that after the injections, he developed cramping and abdominal gas as well as low-back pain and also noticed some black marks on his cheeks. He attributed all of those symptoms to the injections. Dr. Fulton noted he had never heard of nor personally seen such in his medical practice. It was also noted Claimant did report sharp, frequent pain in his forearms which did not seem consistent with the extremely mild nerve

study. Also, the fact that he did not respond to bracing or cortisone injection of his mild carpal tunnel made it unlikely that he would respond favorably to any kind of operative intervention for his carpal tunnel. Based on his full range of motion of his fingers, elbows and wrists, and his excellent muscle strength and size, Dr. Fulton noted he appeared safe and able to work without restriction. Dr. Fulton concluded:

"I see no evidence of permanent partial impairment to either wrist. He may therefore return to work without restriction. I have nothing further to offer him at this point in time, and no scheduled follow up was made. He has a 0% permanent partial impairment to each wrist from my medical opinion." (Defendant's APA page 37).

In the past, Claimant had seen Dr. Michael Green of Midlands Orthopaedic for carpal tunnel syndrome and forearm pain on May 21, 2012. Claimant indicated his symptoms began on May 1, 2012 after he was involved in a non-worker's compensation covered automobile accident. On June 4, 2012, Dr. Green states:

"EMG nerve conduction studies performed on May 11, 2012 revealed a mild to moderate right carpal tunnel syndrome. There is mild left medial carpal tunnel syndrome as well." (Claimant's APAs page 265).

Dr. Green recommended cortisteroid injections and a splint. Opined Claimant could work with splint. (Defendants' APAs pages 40-42).

After Claimant's alleged injury on October 12, 2013, Claimant again saw Dr. Green on November 14, 2014, for a bilateral wrist problem after his release from Dr. Fulton. There was a note from Dr. Green that stated:

"It has recently come to our attention that this patient had been seen for this problem in the past and has been rated and released under workers' compensation. Apparently, the patient may be trying to reopen the case and relate the current symptoms to his previous workers' compensation claim. The patient was not forthright with that information and did not provide that information to us prior to his

initial office visit. The patient did not indicate that he had been treated for the same problem and treated previously. Thus the appointment was made under false pretenses and we did not have a chance to review his records prior to being seen to determine whether the appointment was made according to my practice guidelines. Therefore, it has been decided that we will not participate in the patient's medical care for this particular problem." (Defendant's APAs pages 40-46).

Claimant then saw Dr. Frank Pusey on July 7, 2015 and notes indicate his diagnosis was medial nerve entrapment and lesion of ulnar nerve. (Claimant's APAs page 200).

Aggravation of Post-Traumatic Stress Disorder -- (WCC File No. 1322451)

Claimant was initially seen by Tiona Praylow, MD with Envision Wellness on November 7, 2013. He presented for evaluation of worsening depression in context of stressors at work. He reported significant anxiety after he responded to a head on collision with an older and younger lady. He stated he had no tools to assist with the incident. He reported that he and EMS were trying to get the door open. He reported that his hands were fatigued, cramping and weak and he could not finish trying to pry open the door. Notes further indicate:

"On 10/14 and 10/15 he participated in a deposition related to a discrimination complaint he filed with the department. Over that time, he reviewed his entire career and was accused by opposing lawyer that his complaints were untrue and invalid. On 10/18 he went to work and did not return. He came home and laid in the bed. He felt hopeless and helpless. He was prescribed Fluoxetine for depression after seeing a therapist who referred him to his PCP. He has been having significant difficulty sleeping for over one year. He states he had an episode where he could not speak. He also had an episode during which he was swerving in his car due to anxiety. He reports he has been afraid at work, he is experiencing hyper arousal, he has panic attacks, he reports he has nightmares and is afraid of his shadow. He is having work-related stressors due to traumas experienced on the job. He has a previous history of serving in Marine Corps. He denies any current legal issues. Assessment: Pt. presents with history of traumas and increasing anxiety. His report of insomnia, panic attacks, hyper-vigilance and hyper arousal are concerning for PTSD. Socially, he notes discrimination in work place and relationship difficulty with this wife. It is unclear if his complaints are secondary to paranoia. Psychologically, he appears to have a presentation concerning PTSD but further evaluation is required to confirm diagnosis. Given sleep difficulties, will start Remeron 7.5 mg PO QHS."

(Defendant's APAs pages 4-5).

On November 11, 2013, Dr. Praylow's Assessment was:

"Patient meets criteria for PTSD based on several incidents where his life was threatened and subsequent symptoms of hyper vigilance, hyper arousal, and nightmares (re-experiencing). He is also exhibiting symptoms of depression." (Defendant's APAs pages 6-7).

On December 9, 2013, Claimant reports that he has continued to experience thoughts of harming someone. He stated that he envisioned himself shooting coworkers due to his frustration with discrimination in the workplace. He reported continued trouble sleeping due to nightmares. He noted that he was feeling very frustrated and concerned that his issues were not being appropriately addressed...his wife mentioned he had been exhibiting symptoms of paranoia for quite some time and she was concerned about his level of irritability and hyper arousal. Dr. Praylow's Assessment:

"Pt. continues to experience significant symptoms of PTSD. Given his HI with described plan, without intent, I have advised that he seek inpatient hospitalization. He contracts for safety and agrees to present to Three Rivers Behavioral Health tomorrow for intake evaluation. Therefore, I have agreed not to pursue involuntary commitment at this time." (Defendant's APAs pages 8-9).

On December 30, 2013, Claimant reported that he did not present for inpatient admission to Three Rivers because he did not feel it was warranted. He did go to Palmetto Health for evaluation was referred to their partial hospitalization program. However, given his difficulties with finances he did not feel that that was feasible at the time. He presented with ongoing depression and difficulty sleeping. He also noted ongoing irritability difficulty relating to his family members. Dr. Praylow's assessment:

"Patient meets criteria for PTSD based on several incidents and subsequent symptoms of hyper-vigilance, hyper-arousal, and nightmares. He is also exhibiting symptoms of depression." (Defendant's APAs page 11-12).

On January 6, 2014, Claimant reported he had been feeling like he "isn't going to make it." He stated he recently heard that a childhood friend fell off a ladder, broke his neck and died. This was disturbing to him and exacerbated his own issues due to a previous fall from ladder during course of his firefighting work. Claimant had not been working and reported ongoing somatic complaints in addition to anxiety and mood symptoms. He continued to have difficulty getting along with his wife and children and was living downstairs away from them at that time. He had decided not to move out of the home for fear that he may do something irrational or impulsive if he is completely alone and isolated. Patient continues to experience significant symptoms of PTSD. Ongoing sleep difficulty despite Remeron, Reserpin, Prozac, add Ambien and Ativan. Patient is advised to continue outpatient therapy at Agape Counseling. (Defendant's APAs pages 13-14).

In her note of February 10, 2014, Dr. Praylow notes that Claimant had a history of previous trauma dating back to his time in the Marine Corps during which he had post-concussive syndrome secondary to car accident and solitary confinement due to assault charges. He did not feel his anti-anxiety medication or Ambien were helping at all. He had not been able to sleep for a while. (Defendant's APAs pages 15-16).

On March 10, 2014, Claimant reported ongoing mood concerns. He was satisfied with department decision to grant him retirement disability. Things were still tense between he and his wife and that she stated she was going to be leaving him that summer. He had recently started Depakote for migraine headaches without significant improvement. Dr. Praylow's Risk assessment::

"Pt. exhibits risk factors for suicide and violence including static ones: age, male gender, and other factors such as history of depression and PTSD, history of suicidal and homicidal ideations, current relationship stressors with his wife and physical

ailments. However, patient continues to seek treatment from care providers and is compliant with treatment, he is happy about receiving retirement benefits from his employer, exhibits improved, intact reality testing and denies thoughts of harming self or others. These factors mitigate acute risk, therefore, he is not assessed to be dangerous to self or others at this time. This does not imply an ability to predict his future actions." (Defendant's APAs pages 17-18).

On May 5, 2014, Claimant stated he does have a history of assault in the past, and he states that when he gets into conflict with others, "it puts me on this whole other level." He also felt that it was a struggle to keep everything going and some days he doesn't feel like doing anything. (Defendant's APAs pages 19-20).

On May 12, 2014, Claimant indicated he was developing pain in his legs and that he had went to see a doctor. He was concerned excessive anxiety was a trigger for his symptoms. He had gained 35 pounds. Notes weight gain has caused him to have knee pain. He continued to "feel like I'm dying." He discussed ongoing relationship difficulties with his wife and daughters. He sometimes felt he was a burden to his family. Patient continued to experience significant symptoms of PTSD. (Defendant's APAs pages 21-22).

On June 23, 2014 Claimant stated he ran out of his medications and then stopped taking them abruptly. He felt sick, profusely swearing, shaking and nauseated. He was continuing to await a decision regarding his discrimination suit against the Fire Department. He felt someone was watching his home and he saw a person in a black truck on the side of his house and he felt they were watching him. He stated he was worried about things all the time. (Defendant's APAs pages 28-29).

A note dated July 21, 2014 indicates: He is continuing to submit paperwork to the VA to get his benefits addressed. He states that reviewing his military records caused him to re-experience his traumas again. He is also concerned about exposure to hazardous wastes at a base that he previously

worked on. (Defendant's APAs page 30).

On December 11, 2014, Claimant reported his wife called the police on him. She was concerned about his level of verbal aggression. When police arrived, she had left the house. No charges filed. Noted that Patient's wife had been invited to accompany him to appointments given her previous expressed concerns but she had not come in yet. Dr. Praylow noted:

"Patient meets criteria for PTSD and continues to exhibit irritability and hyper arousal. Continue outpatient therapy at Agape Counseling." (Defendant's APAs page 36).

While treating with Dr. Praylow, Claimant was also seen by Sheryl Williams, MS, MAR, LRC at Agape Counseling and Training Services. On his first visit dated October 24, 2013 it was noted he was being seen for symptoms of depression and anxiety as a result of having a discrimination claim against the fire department. (Defendant's APAs page 38). On November 12, 2013, counseling goals were for claimant to reduce depression and to reduce obsessing about work. (Defendant's APA page 45). On January 4, 2014:

"Client continue [sic] to focus and ruminate about work and what [sic] the wrong that has occurred." (Defendant's APAs page 60).

Dr. Williams' notes of January 30, 2014 indicate:

"Client reports being frustrated because he has some old medical records from when he was in the Marines that he forgot about. He feels that the symptoms he is currently experiencing is connected or the same." (Defendant's APAs page 69).

During counseling sessions for anxiety, depression and sleeplessness, Claimant makes multiple references to work and legal problems, alleged discrimination and worker's compensation cases. (Defendant's APAs pages 38, 40, 44-46, 49, 56, 58, 60, 62, 66, 71, 74, 77, 83, 86, 119 and 131. Some of these sessions also deal with family issues with his wife, children and mother.

(Defendant's APAs pages 53, 55, 80, 86, 105 and 113).

Claimant was also seen by Dr. Nicholas Lind of Post Trauma Resources. Dr. Lind writes

"Mr. Capone's current symptoms of anxiety and depression are in my opinion; these symptoms are as likely as not associated with stressors experienced while on active duty." (Claimant's APAs pages 39, 40).

FINDINGS OF FACT

1. The Claimant brought three separate claims cited above. A hearing was held on August 21, 2015 on all three claims.
2. The Claimant appeared without counsel and was advised of his right to counsel. He waived that right and proceeded Pro Se.
3. Worker's Compensation File #1319203 is an alleged Carpal Tunnel Syndrome claim aggravation which is denied by the Defendants. Initial medical treatment for this wrist injury was provided by the Defendants and no additional medical treatment has been recommended. Claimant was released with 0% impairment on February 18, 2014.
4. Workers' Compensation File #1322451 is an alleged aggravation of Post-Traumatic Stress Disorder claim which is denied by the Defendants.
5. Workers' Compensation File #1420487 is an alleged toe fungus claim which is denied by the Defendants.
6. Given that the claims are all denied, the burden of proof rests with the Claimant. The evidence standard in workers' compensation is a preponderance of the evidence. That means Claimant has to show his alleged injuries are more likely than not related to his employment.
7. The Claimant is a retired firefighter who worked for the City of Columbia for

approximately 16 years before retiring in early 2014.

8. As to the claim of Carpal Tunnel Syndrome, the Claimant asserts that he injured his hands/wrists in October 2013 while responding to a motor vehicle accident, and afterwards developed Post Traumatic Stress Disorder. However, Claimant also indicates in a medical record that he was experiencing numbness and tingling in his wrists and hands as early as May, 2012.

9. A medical note from Dr. Michael Green, dated **June 4, 2012**, reads in part, "EMG nerve conduction studies performed on May 11, 2012 revealed a mild to moderate right carpal tunnel syndrome. There is mild left medial carpal tunnel syndrome as well." (Claimant's APAs, page 265).

10. A nerve conduction study was performed by Dr. John Clavet on January 10, 2014. Dr. Clavet notes "very mild carpal tunnel syndrome" which is consistent with the findings of Dr. Green in 2012 (Defendant's APAs page 30).

11. Dr. David Fulton opines on February 18, 2014, "I see no evidence of permanent partial impairment to either wrist." "He has a 0% permanent partial impairment to each in my medical opinion" (Defendant's APAs page 37).

12. There is also a medical note from Dr. Frank Pusey dated July 7, 2015, in which he notes median nerve entrapment and lesion of ulnar nerve is listed under diagnoses. (Claimant's APAs page 200).

13. Given that the Carpal Tunnel Syndrome predates the date of accident pled and given that there is no evidence of this condition worsening in the record, (see 0% rating), the Claimant has failed to establish compensability of his aggravation of Carpal Tunnel Syndrome.

14. Additionally, there is no opinion in the record establishing the medical foundation necessary to promulgate a repetitive trauma claim as required by S.C. Code Ann. §42-1-172.

15. As to the claim of toe fungus, a locker fell onto the Claimant's foot and broke several bones in or around 2005. The toenail fungus seems to have originated with that injury and has been continuing. (Claimant's APAs, page 133).

16. Additionally, the Claimant is experiencing no pain and no disability from the toenail fungus, just "ugly nails". (Claimant's APAs, page 117).

17. As such, I cannot find that the alleged injury (toenail fungus) has its origin on the date pled nor has it been aggravated by an injury by accident on or about said date. Claimant fails to meet his burden with regard to this claim.

18. As to the Claimant's Post Traumatic Stress Disorder claim being causally related to his employment, there is nothing in the record, other than the subjective complaints of the Claimant, that establish the origin or an aggravation of the Claimant's Post Traumatic Stress Disorder.

19. That is not to say that the Claimant does not suffer from Post-Traumatic Stress Disorder. However, it appears from the notes of both Dr. Nicholas Lind and Sheryl Mims-Williams, both of whom have a professional specialization to the mind, that the Claimant does not suffer from Post-Traumatic Stress Disorder which is causally related to his employment with the City. It is more likely than not that the symptoms of Post Traumatic Stress Disorder experienced by the Claimant are rooted in events associated with his military service.

20. Dr. Lind writes, "Mr. Capone's current symptoms of anxiety and depression are consistent with the diagnoses of Post Traumatic Stress Disorder as well as Adjustment Disorder secondary to pain. In my opinion, these symptoms are as likely as not associated with stressors experienced while on active duty." (Claimant's APAs, pages 39-40).

21. Ms. Mims-Williams, who is a licensed professional counselor, writes, "According to

Mr. Capone, he was injured in a severe auto accident while riding as a passenger with another Marine. He was diagnosed with post-concussive syndrome, post-traumatic headaches, common migraines, and he continues to experience symptoms of post-traumatic stress.” (Claimant’s APAs, page 19).

22. There are no medical notes/reports in the record that link the aggravation of Claimant’s Post Traumatic Stress Disorder to his employment with the City of Columbia.

23. Additionally, as a matter of law, it is unlikely that a firefighter seeing a burned body or other injuries or events associated with that profession can be viewed as neither extraordinary nor unusual. That includes Claimant’s responding to an accident requiring extrication of a passenger.

24. When the record is viewed as a whole and juxtaposed to the injuries alleged, I cannot conclude that the Claimant has established a causal connection to the dates of injury pled and, thus, has not met the burden necessary as to compensability for his claims of injury or aggravation.

25. As such, the Claimant is not entitled to any benefits for these claims under the Act.

26. All three claims are dismissed with prejudice.

27. Both parties do have the right to appeal this decision pursuant to the procedure explained to them at the time of the hearing which is set forth in the Act.

CONCLUSIONS OF LAW

Accordingly, it is the determination and finding of this Commissioner that:

1. I find and conclude that this matter is governed by the South Carolina Workers' Compensation Act, Section 42-1-10 et. seq. of the South Carolina Code (1976, as amended).
2. I find and conclude that the Claimant's average weekly wage was \$1023.51 and the

compensation rate was \$682.68.

3. I find that the Claimant has not established a causal connection to the dates of injury pled and, thus, has not met the burden necessary for compensability using the standard of a preponderance of the evidence or more likely than not. S.C. Code Ann. §42-1-160 and §42-9-35.


4. There is no opinion in the record establishing the medical foundation necessary to promulgate a repetitive trauma claim as required pursuant to S.C. Code Ann. §42-1-172.

5. Additionally, as a matter of law, it is unlikely that a firefighter seeing a burned body or other injuries or events associated with that profession to include vehicle extrication, can be viewed as neither extraordinary nor unusual pursuant to S.C. Code Ann. §42-1-160 (37).

ORDER

IT IS THEREFORE ORDERED that the Claimant is not entitled to any additional benefits for these claims under the Act. All three claims are dismissed with prejudice. Both parties do have the right to appeal his decision pursuant to the procedure explained to them at the time of the hearing which is set forth in the Act.

AND SO IT IS ORDERED.


Commissioner Gene McCaskill
South Carolina Workers' Compensation

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Kellie Lindler on December 2, 2015

EXHIBIT C

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5723 www.wcc.sc.gov



WCC File #: 1420487
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: 57-6000229

Claimant's Name: TERRY H CAPONE SSN: _____ Employer's Name: CITY OF COLUMBIA
Address: _____ Address: PO BOX 667
City: _____ State: SC Zip: 29203 City: COLUMBIA State: SC Zip: 29217
Home Phone: _____ Work Phone: _____ Insurance Carrier: SELF/COMPANION TPA
Preparer's Name: TERRY H CAPONE Law Firm: N/A Preparer's Phone #: (803) 737-4242

A claim for workers' compensation benefits is made based on the following grounds: Date of Injury or Illness: 6/24/2013
 Injury Illness Repetitive Trauma Occupational Disease Physical Brain Injury Concurrent Jurisdiction

- The claimant sustained an injury to TOE/TOE NAIL/FOOT BILATERAL (Part(s) of Body Injured) on 6/24/2013 (Month/Day/Year) in RICHLAND county, state of SC. Body part(s) affected are: TOES/TOE NAILS/FOOT INTERNAL BILATERAL
- Briefly describe how the accident occurred. Dept never measured my feet/resulted wearing size 10.5/ 17 years actual 11.5-12 caused multi foot problems
- Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
- The relationship of employer and employee existed at the time of injury.
- At the time of the injury the claimant was performing services arising out of and in the course of employment.
- Notice of the accidental injury was given to the Employer on 1/5/2015 (Month/Day/Year) in the following manner: Via Email HSO OWUSU originally 6/24/2013, but changed to last day of work 10/21/2013 last of wearing steel toe shoes/boots.

*DATED Submitted
From Carrier wing*

7. Due to injury, the claimant is in need of (check one):
 (a) medical examination and treatment for: _____
 (b) additional medical examination and treatment for: Aggravation of Flat feet/Foot pain-Nail damage /Orthotics (BILATERAL Fallen Arches)

8. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: _____

9. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
 (1) General Disability: Total Partial (2) Specific Disability: Total Partial (3) Wage Loss

- 9a. A determination of permanent disability is premature at this time.

10. Due to the injury, the Claimant has a serious bodily disfigurement consisting of:
INTERNAL DAMAGE/DAMAGE TO TOE RECURRING AND PAIN THAT BECOMES CONSTANT LIMITING MOBILITY

- 10a. At the time of the injury, the Claimant was paid weekly wages of \$ 1,051.70 and demands accounting of days worked and wages earned as provided by law.

- 10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
City of Columbia/City of Columbia Fire Department 1800 Laurel Street Columbia SC 29202

11. Further grounds or unusual aspects of claim:
Originally thought to be just Toe Fungus, but through further treatment was found to be damage/due to steel toe shoes to small over 17 years

- 11a. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
Columbia Foot Clinic 1516 Calhoun St Columbia, SC 29201 (803) 2541814-FAX (803) 254 7674/ CPO 1901 Blanding St Columbia 803779-0550

- 11b. To the best of your knowledge, did you have any prior permanent disability?
If yes, describe: I had a 5% on my right elbow from being catapulted off 16 FT of a 24 FT Ladder in 2002

12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.

- 13a. I am filing a claim. I am not requesting a hearing at this time. 14. Estimated time needed for hearing: UNKNOWN

- 13b. I am requesting a hearing. A \$25 fee is required.

- Mediation
 a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
 b. Mediation is required pursuant to Reg. 67-1802.
 c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
 d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to SC WORKERS COMPENSATION COMMISSION
address 1333 Main ST COLUMBIA SC 29202 on the 17 day of November 2017 by first class postage certified mail personal service.

I verify the contents of this form are accurate and true to the best of my knowledge.
Preparer's Signature: [Signature] Fire Battalion Chief-Retired Title: tcapone@liberty.edu Email: November 17, 2017 Date: _____

Questions about the use of this form should be directed to the Claims Department at 803.737.5723. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615 as well as Reg. 67-1801.

WCC Form # 50
Revised 7/13

50

Employee's Notice of Claim and/or Request for Hearing

*Weekly PAY E DATE OF ILLNESS
ADDENDUM 12/30/2017*


South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500 • Post Office Box 1715
Columbia, South Carolina 29202-1715
(803) 737-5675 www.wcc.sc.gov



WCC File #: 130203
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: 57-6000229

Claimant's Name: Terry H Capone SSN: _____ Employer's Name: City of Columbia130
Address: _____ Address: PO Box 147
City: _____ State: SC Zip: 29203 City: Columbia State: SC Zip: 29217
Home Phone: _____ Work Phone: _____ Insurance Carrier: Companion TPA Services, LLC (800)922 1282
Preparer's Name: SELF Law Firm: N/A Preparer's Phone #: (803) 6226578

A claim for workers' compensation benefits is made based on the following grounds: _____ Date of Injury or Illness: _____

- Injury Illness Repetitive Trauma Occupational Disease Physical Brain Injury Concurrent Jurisdiction
- The claimant sustained an injury to hands, arms, elbows, knees other (Part(s) of Body Injured) on _____ (Month/Day/Year) in RICHLAND county, state of SC. Body part(s) affected are: Hands, Arms, Elbows, Knees Bilateral, Feet, Head, Perineal and Lower Back
 - Briefly describe how the accident occurred. Aggravation and continuous trauma re-injuring work related trauma & injuries
 - Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
 - The relationship of employer and employee existed at the time of injury.
 - At the time of the injury the claimant was performing services arising out of and in the course of employment.
 - Notice of the accidental injury was given to the Employer on 11/11/2013 (Month/Day/Year) in the following manner: OSHA 301 Sent Via Email to HSO OWJUSU, Fire Chief and Admin- Additionally missing Military Medical records sent email and USPS (OA) 9/18/2017
 - Due to injury, the claimant is in need of (check one):
 (a) medical examination and treatment for: _____
 (b) additional medical examination and treatment for: Hands, Elbows, Arms, Feet, Knees Bilateral, head, Perineal and lower back
 - Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: 1/17/2014 - Present (City of Columbia W/C Companion TPA last paid 1/16/2014 Check No. 0000151611 amount \$682.37)
 - Due to the injury, the claimant has permanent disability of the following nature and extent (check one):
 (1) General Disability: Total Partial (2) Specific Disability: Total Partial (3) Wage Loss
 - 9a. A determination of permanent disability is premature at this time.
 10. Due to the injury, the claimant has a serious bodily disfigurement consisting of: 
 - 10a. At the time of the injury, the claimant was paid weekly wages of \$1,051.79 and demands accounting of days worked and wages earned as provided by law.
 - 10b. Give names and addresses of all employers for whom the claimant has worked since the date of the accident:
City of Columbia, City of Columbia Fire Department 1800 Laurel Street Columbia SC 29203
 11. Further grounds or unusual aspects of claim:
Military Medical records were missing, incomplete, poor quality until 2/26/2016-Symptoms/Disorders/Diseases worsened to disabling 10/21/2013.
 - 11a. List names and addresses of all physicians or other medical specialists who have seen or treated the claimant as a result of the accident:
See attached form
 - 11b. To the best of your knowledge, did you have any prior permanent disability?
If yes, describe: Yes, 5% Right Elbow (2003) Catapulted 16 ft to the ground on my back from a 24 ft Ladder fracturing right arm, missed being impelled
 12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
 - 13a. I am filing a claim. I am not requesting a hearing at this time. 14. Estimated time needed for hearing: UNKNOWN
 - 13b. I am requesting a hearing. A \$25 fee is required.
- Mediation
 a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
 b. Mediation is required pursuant to Reg. 67-1802.
 c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
 d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Fire Chief City of Columbia/Fire Department ADMIN Headquarters
address 1800 Laurel St Columbia SC 29202 on the 17 day of October 20 2017, by first class postage certified mail personal service.

I verify the contents of this form are accurate and true to the best of my knowledge.
Preparer's Signature: [Signature] Title: Fire Battalion Chief-Retired Email: tcapone@liberty.edu Date: October 17, 2017

Questions about the use of this form should be directed to the Claims Department at 803.737.5723. Refer to Regulations 67-204 through 67-211 and Regulations 67-601 through 67-615 as well as Reg. 67-1801.

South Carolina Workers' Compensation Commission
 1333 Main Street, Suite 500 • Post Office Box 1715
 Columbia, South Carolina 29202-1715
 (803) 737-5675 www.wcc.sc.gov



WCC File #: 1322451
 Carrier File #: _____
 Carrier Code #: _____
 Employer FEIN #: 57-6000229

Claimant's Name: Terry H Capone SSN: 133-58-7472 Employer's Name: City of Columbia130
 Address: 130 Summerlea Drive Address: PO Box 147
 City: Columbia State: SC Zip: 29203 City: Columbia State: SC Zip: 29217
 Home Phone: (803) 6226578 Work Phone: _____ Insurance Carrier: Companion TPA Services, LLC (800)922 1282
 Preparer's Name: SELF Law Firm: N/A Preparer's Phone #: (803) 6226578

A claim for workers' compensation benefits is made based on the following grounds: Date of Injury or Illness: 11/17/2013 / 10
 Injury Illness Repetitive Trauma Occupational Disease Physical Brain Injury Concurrent Jurisdiction

1. The claimant sustained an injury to Head(Brain,Mind)Body (Part(s) of Body Injured) on CONTINUOUS (Month/Day/Year) in RICHLAND county, state of SC. Body part(s) affected are: See above injuries
2. Briefly describe how the accident occurred. Aggravation of PTSD symptoms, Depression, Anxiety, Headaches from repeated work related trauma & injuries
3. Both the claimant and the employer were subject to the South Carolina Workers' Compensation Act at the time of injury.
4. The relationship of employer and employee existed at the time of injury.
5. At the time of the injury the claimant was performing services arising out of and in the course of employment.
6. Notice of the accidental injury was given to the Employer on 11/11/2013 (Month/Day/Year) in the following manner: OSHA 301 Sent Via Email to HSO OWUSU, Fire Chief and Admin- Additionally missing Military Medical records sent email and USPS (OA) 9/18/2017
7. Due to injury, the claimant is in need of (check one):
 (a) medical examination and treatment for: _____
 (b) additional medical examination and treatment for: PTSD, Depression, Anxiety, Headaches and secondary conditions associated; INSOMNIA
8. Due to injury, the claimant requests temporary total disability benefits because of lost compensable time from work and wages for the period of: IGS-D
1/17/2014 - Present (City of Columbia W/C Companion TPA last paid 1/16/2014 Check No. 0000151811 amount \$682.37)
9. Due to the injury, the Claimant has permanent disability of the following nature and extent (check one):
 (1) General Disability: Total Partial (2) Specific Disability: Total Partial (3) Wage Loss
- 9a. A determination of permanent disability is premature at this time.
10. Due to the injury, the Claimant has a serious bodily disfigurement consisting of: _____
- 10a. At the time of the injury, the Claimant was paid weekly wages of \$ 1,023.51, and demands accounting of days worked and wages earned as provided by law.
- 10b. Give names and addresses of all employers for whom the Claimant has worked since the date of the accident:
City of Columbia, City of Columbia Fire Department 1800 Laurel Street Columbia SC 29203
11. Further grounds or unusual aspects of claim:
Military Medical records were missing, incomplete, poor quality until 2/26/2016-Symptoms/Disorders/Diseases worsened to disabling 10/21/2013.
- 11a. List names and addresses of all physicians or other medical specialists who have seen or treated the Claimant as a result of the accident:
See attached form
- 11b. To the best of your knowledge, did you have any prior permanent disability?
 If yes, describe: Yes, 5% Right Elbow (2003) Catapulted 16 ft to the ground on my back from a 24 ft Ladder fracturing right arm, missed being impelled
12. Appropriate benefits as provided in the Act for the above grounds and other relief as the Workers' Compensation Commission may direct as just and proper.
- 13a. I am filing a claim. I am not requesting a hearing at this time.
- 13b. I am requesting a hearing. A \$25 fee is required. CHECK NO. 1400
14. Estimated time needed for hearing: UNKNOWN
- Mediation
 a. Mediation is requested to be ordered pursuant to Reg. 67-1801 B.
 b. Mediation is required pursuant to Reg. 67-1802.
 c. Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.
 d. Mediation has been conducted by a duly qualified mediator and resulted in an impasse.
 Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to Fire Chief City of Columbia/Fire Department ADMIN Headquarters address 1800 Laurel St Columbia SC 29202 on the 17 day of October 20 202017, by first class postage certified mail personal service.

I verify the contents of this form are accurate and true to the best of my knowledge.
 Preparer's Signature: [Signature] Title: Fire Battalion Chief-Retired Email: tcapone@liberty.edu Date: October 17, 2017

Names and Addresses of Physicians and Medical Specialist:

1. **Conigliaro Jones, MD, Primary Care Physician-** TLM Medical Services, LLC, 2701 Middleburg Drive Columbia, SC 29204 (803) 376-8875
2. **Sheryl M Williams, MS, MAR, LPC/S-** Licensed Professional Counselor- Agape Counseling and training Service Tele. 803 -779-2777 220 Stoneridge Drive Suite 302 Columbia SC 29210
3. **Tiona Praylow, M.D., Psychiatrist,** Envision Wellness Medical Group, 2601 Read Street, Suite I-7, Columbia, SC 29204, 803.256.0101 Fax:800.854.3497,
4. **Frank O. Pusey, MD, Neurologist,** Columbia Neurological Associates, 110 E Medical Ln #110, West Columbia, SC 29169 Tele: (803) 936-9888
5. **George A Jenkins, III MD, Gastroenterologist-** Carolina Digestive Disease, P.A., 1520 Taylor St, suite 200, Columbia, SC 29201 Tele.(803)509 5710 Fax (803) 5095711
6. **James F. Bethea, MD- Orthopedics-MUSC Specialty Care-West,** 2125 Charlie Hall Blvd, Charleston, SC 29414, Tele.(843) 876-0111 Fax. (843) 573-1577
7. **Melissa Hummel, MD Internist & Sleep Med Doctor and William C McLan MD,** BOGAN SLEEP CONSULTANTS, formerly SLEEPMED, 1333 Taylor Street 6-b, Columbia, SC 29201 P(803)251-3093
8. **Keyoka Smith, DPM and Ashley Finn, DPM, Podiatrist,** Columbia Foot Clinic, 1516 Calhoun St. Columbia, SC 29201
9. **CPO Certified Pedorthic Orthotics** 1901 Blanding Street, Columbia, SC (803)779-0550 Fax (803) 779-4606
10. **CVS Pharmacy North Main-** 4627 N Main St, Columbia SC 29203 803.7861106

EXHIBIT D

TERRY CAPONE,

Claimant

v.

CITY OF COLUMBIA,

Employer, and

CITY OF COLUMBIA
SELF-INSURED

Carrier, Defendants.

DECISION AND ORDER

WCC FILE NO.: 1322451, 1319203
& 1420487

Commissioner
South Carolina Workers' Compensation Commission

Hearing held in Richland County,
South Carolina, on February 21, 2018

Per notice timely and properly served upon all Parties of Interest.

Appearances: Pro Se Claimant
Dana M. Thye, Attorney for Defendants.

Filed: March 27, 2018

STIPULATIONS

At the call of the case, the parties stipulated that the South Carolina Workers' Compensation Commission had jurisdiction in this case and that venue was proper in Richland County. Claimant brought three separate claims and all have been adjudicated.

Claimant filed without counsel and was previously properly advised of his right to counsel. Claimant knowingly and voluntarily waived his right to counsel and proceeded Pro Se.

The Claimant seeks benefits under the South Carolina Workers' Compensation Act based upon alleged injuries occurring on June 24, 2014, wherein he injured his toe (WCC File No. 1420487), on October 12, 2013, in which he re-injured his bilateral hands/wrists (WCC File No. 1319203), and on November 7, 2013 (WCC File NO. 1322451), where he alleges an aggravation of a psychological injury, all while in the employ of the Employer/Defendants. Therefore, the South Carolina Workers' Compensation Commission has jurisdiction of these cases. Without Objection, and with the exception of any self-serving statements or unstipulated medical reports, the Commission's file was made a part of the record.

STATEMENT OF THE CASE

This matter was reviewed by the undersigned following the filing of three Forms 50 by the Claimant Pro se, one in WCC File No. 1322451, with a corresponding date of accident of November 7, 2013, one in WCC File No. 1319203, with a corresponding date of accident in October 12, 2013, and one in WCC File No. 1420487, with a corresponding date of accident in June 24, 2014.

Claimant's claims for Workers' Compensation benefits for an injuries arising out of and in the course of his employment on or about November 2013 to June 2014 to his hand, toe, and psychology were heard on August 21, 2015. These cases was fully and finally adjudicated by a Decision and Order by Commissioner McCaskill dated December 2, 2015. This Order was not timely appealed and there was no medical evidence to support a then existing mental condition that would have prohibited the Claimant from filing an appeal. Therefore this Order is the law of the case.

Claimant has now filed Forms 50 on the above-referenced claims, requesting a Hearing to determine issues that have already been decided by the Commission. Defendant

has argued that all three cases have been adjudicated in a full and final hearing on August 21, 2015 and since no timely appeal was filed, res judicata should apply.

FINDINGS OF FACT

1. After a review of the pleadings, the prior Decision and Order, and the complete record, I make the following Findings of Fact:
2. Claimant alleged injuries occurred on June 24, 2014, wherein he injured his toe (WCC File No. 1420487), on October 12, 2013, in which he re-injured his bilateral hands/wrists (WCC File No. 1319203), and on November 7, 2013 (WCC File NO. 1322451), where he alleges an aggravation of a psychological injury, all while in the employ of the Employer/Defendants.
3. On August 21, 2015, a full and final hearing was adjudicated on the merits of the case and a Decision and Order was filed December 2, 2015 by Commissioner Gene McCaskill finding that the Claimant is not entitled to any additional benefits for these claims under the Act.
4. Claimant acknowledges that he did not appeal the Decision and Order and I find no medical evidence to suggest that the Claimant had a then existing mental condition which prohibited him from filing a timely appeal.
5. As such, I find that res judicata applies and the Decision and Order filed on December 2, 2015 by Commissioner Gene McCaskill stands on the final adjudication on the merits of this case.

RULE OF LAW

1. This matter is governed by South Carolina Worker's Compensation Act and according to the Act, an application for review has to be made within fourteen days from the date when the notice of the award shall be given. S.C. Code Ann. § 42-17-50. According to *Wally v. C.Y. Thomason*, "If no application is made for review of the hearing commissioner's award, that award becomes effective as the award of the Commission". *Wally v. C.Y. Thomason Co. Et. Al.*, 232 S.C. 153, 101 S.E.2d 286 (1957).
2. Res Judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d, 414 (2011). Under the doctrine of res judicata, a litigant is barred from raising any

issues which were adjudicated in the former suit and any issues which might have been raised in the former suit. *ID*

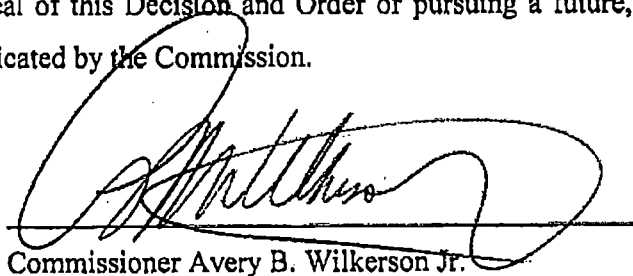
ORDER

IT IS ORDERED that Claimant's Forms 50 Requests for Hearings in the above referenced claims are DENIED and DISMISSED WITH PREJUDICE on the grounds of res judicata.

IT IS ORDERED that the further pleadings filed by the Claimant against Defendants subsequent to the date this Decision and Order becomes the law of the case shall be reviewed by the Jurisdictional Commissioner and shall be administratively dismissed if they relate to the subject matter already decided by the final decisions of the Commission cited above.

IT IS ORDERED that subsequent to the date this Decision and Order becomes the law of the case Defendants shall be relieved of any obligation to respond to further filings by Claimant related to WCC File No. 1322451, with a corresponding date of November 7, 2013, WCC File No. 1319203, with a corresponding date of October 12, 2013, and WCC File No. 1420487, with a corresponding date of June 24, 2014 unless specifically instructed to respond by the Commission. Nothing contained herein shall be construed to prevent the parties from pursuing a proper appeal of this Decision and Order or pursuing a future, unrelated claim not previously adjudicated by the Commission.

AND SO IT IS ORDERED



Commissioner Avery B. Wilkerson Jr.

3-26-2018
DATE

Served via U.S. Mail upon:
Terry Capone
Cynthia C. Dooley, Esquire
Dana M. Thye, Esquire

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Deborah Hutto on March 27, 2018

EXHIBIT E

DUE PROCESS OF LAW;

60(B) (5) IT IS BASED ON AN EARLIER JUDGMNET THAT APPLYING IT PROSPECTIVELY IS NO LONGER EQUITABLE; OR

60(B) (6) ANY OTHER REASON THAT JUSTIFIES RELIEF FROM OPERATION OF A JUDGMENT; TO INCLUDE BUT NOT LIMITED TO

(a) In The Interest of Justice

(b) Irregularities In Agency Actions

AND/OR

SC CODE §1-23-380 (2013) (A) in violation of constitutional or statutory provision

SC CODE §1-23-380 (2013) (B) in excess of the statutory authority of the agency;

SC CODE §1-23-380 (2013) (C) made upon unlawful procedures;

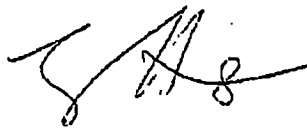
SC CODE §1-23-380 (2013) (D) affected by other error of law;

SC CODE §1-23-380 (2013) (E) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole records; or

SC CODE §1-23-380 (2013) (F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This Motion is based on the Memorandum of Points and Authorities and the Declaration of TERRY H CAPONE which follow, and all of the pleadings, records, and files in this action.

Dated: February 20, 2018



By: _____

In Pro Per Claimant

MEMORANDUM OF POINTS AND AUTHORITIES

RULE 60

RELIEF FROM JUDGMENT OR ORDER

(a) CORRECTIONS BASED ON CLERICAL MISTAKES; OVERSIGHTS AND OMISSIONS. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

Rule 60(a) of the Federal Rules of Civil Procedure provides that "[t]he court may correct a clerical mistake or a mistake arising from oversight whenever one is found in a judgment, order, or other part of the record." The word "record" in Rule 60(a) refers not only to process, pleadings, and verdict but also to evidentiary documents, testimony taken, instructions to the jury, and all matters pertaining to the case of which there is a written record.

Fed. R. Civ. P. 60(a). In *Sartin v. McNair Law Firm, P.A.*, 756 F.3d 259 (4th Cir. 2014), Finally, the court concluded that the fact that the district court's clarification order related to litigation that was dismissed over a year ago was of no consequence with respect to the district court's jurisdiction over the matter because as "Sartin properly concedes . . . 'Rule 60(a) . . . has no time limit.'" *Id.* at 268 (citing cases).

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)

When equitable principles warrant relief a party may obtain relief even though time for a Rule 60(b) motion has expired, through an independent action on the basis of accident, fraud, mistake, or newly discovered evidence. *West Virginia Oil & Gas Co. v. George E. Breece Lumber Co.*, 213 F.2d 702 (5th Cir.1954). See also the Federal Advisory Committee Note of 1946:

"If the right to make a motion is lost by the expiration of the time limits fixed in these rules, the only other procedural remedy is by a new or independent action to set aside a judgment upon those principles which have heretofore been applied in such an action. Where the independent action is resorted to, the limitation of time are those of laches or statutes of limitations.";

(3) fraud, misrepresentation, or other misconduct of an adverse party

The section does not limit power to the court:

(a) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(b) set aside a judgment for fraud on the court,

Fraud upon the court is "fraud which...subvert[s] the integrity of the Court itself, or is a fraud perpetuated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988) (emphasis added)(quoting Lightsey & Flanagan, supra, at 408). It has also been defined as "fraud that does, or at least attempts to, defile the court itself..."¹² Moore's Federal Practices §60.21 [4][a] (3d. ed.2000). The requisite fraud on the court occurs where "it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial systems ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party's claim or defense". Aoude v. Mobile Oil Corp., 892 F.2d 1115, 1118(1st Cir.1989). Includes any wrongful act by which a party obtains a judgment under circumstances which would make it inequitable to retain its benefit. Fraud covered must be of such a nature as to have prevented the moving party from presenting the merits of his case. Assamann v. Fleming, 159 F.2d 332 (8th Cir.1947). See also U.S. v. Rexach, 41 F.R.D. 180 (D.P.R.1966).

Fraudulent Concealment

The fraudulent concealment exception applies where an employer fraudulently conceals a worker's injury and its connection to employment whereby the concealment results in an aggravation of the injury. There are three necessary elements: (1) the employer conceals the existence of the injury; (2) the employer concealed the connection between the injury and employment; and (3) the injury was aggravated following the employer's concealment. (Lab. Code, § 3602, subd. (b); Jensen v. Angen (2003) 105 Cal. App. 4th 1322, 1325; see also, Palestini v. General Dynamics Corp. (2002) 99 Cal. App. 4th 80.) The fraudulent concealment exception more typically arises in situations involving exposure to asbestos, mold, or toxic chemical.(See, e.g. John-Manville Products v. Sup. Ct (1980) 27 Cal. 3d 465.) It is a very limited exception that requires actual knowledge by the employer and a lack of wareness by the worker of the injury and its relationship to employment.

South Carolina tribunals have the inherent power to reopen agreements and judgments procured by fraud. See Raby Const., L.L.P. v. Orr, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004) (citing Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951); see also Greenfield v. Greenfield, 245 S.C. 604, 141 S.E.2d 920 (1965) (holding "the inherent powers of a court, which are essential to its existence and protection and to the due administration of justice within the scope of the jurisdiction expressly conferred, do not depend upon express constitutional or legislative grant").

SCRCP.(emphasis in original) fraud, misrepresentation, or other misconduct of an adverse party (In South Carolina, extrinsic fraud is the only type of fraud for which relief may be granted) Raby const., L.L.P., 358 S.C. at 20, 594 S.E.2d at 483; Jamison v. Ford Motor Co., 373 S.C. 248, 273, 644 S.E.2d 755, 768 (Ct. App. 2007). Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." Hilton Head ctr. Of S.C. v. Public Serv. Comm., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and

trying his case, there has never been a real contest before the court on the subject matter of the action.” *Id.* The essential distinction between intrinsic and extrinsic fraud for purposes of relief from judgment is the ability to discover the fraud. *Ray v. Ray*, 374 S.C. 79, 84, 647 S.E.2d 237, 239 (2007)

(4) the judgment is void;

A judgment is either void or valid. Having resolved that question, the court must act accordingly. The judgment is void (stating a court may relieve a party from a final judgment if the judgment is void). “A void judgment is one that, from its inception, is a complete nullity and is without legal effect and must be distinguished from one which is merely ‘voidable.’” *Thomas & Howard Co.*, 318 S.C. at 291, 457 S.E.2d at 343 (1995) (citation omitted).

Although Rule 60(b)(4) is ostensibly subject to the “reasonable” time limit of Rule 60(b), at least one court has held that no time limit applies to a motion under the Rule 60(b)(4) because a void judgment can never acquire validity through laches. See *Crosby v. Bradstreet Co.*, 312 F.2d 483 (2nd Cir.) cert. denied, 373 U.S. 911 (1963) where the court vacated a judgment as void 30 years after entry. See also *Marquette Corp. v. Priester*, 234 F.Supp. 799 (E.D.S.C.1964) where the court expressly held that clause Rule 60(b)(4) carries no real time limit.

(5) the judgment is no longer equitable that the judgment should have prospective application.

This power to grant relief from the prospective features of a judgment has always been clearly recognized in equity. See *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 18 How. 421 (1855)

*This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court.

The phrase “independent action” has been interpreted to mean, not that a party could still utilize the older common law and equitable remedies for relief from judgment, but rather “that courts no longer are to be hemmed in by uncertain boundaries of these and other common law remedial tools.” *Klapprott v. United States*, 335 U.S. 601 (1949). The court now has power “to vacate judgments whenever such action is appropriate to accomplish justice.” *Id.*

Federal/ North Carolina

(6) Relief. Rule 60 (b)(6) allows relief “for[a]ny other reason justifying relief from the operation of the judgment.” N.C.R.Civ.P. 60(b)(6) has long been called “a grand reservoir of equitable power to do justice in a particular case.” *Norton v. Sawyer*, 30 N.C. App. 420, 426 (1976) (quotation omitted). Rule 60 (b)(6) provides relief only in “extraordinary circumstances” where the ends of justice require it. North Carolina courts have established that such justification only exist if the movant shows that (1) extraordinary circumstances exist; (2) justice demands it; and (3) the movant has a meritorious defense to the underlying claims. *Oxford Plastics v. Goodson*, 74 N.C. App. 256, 259-60 (1985). N.C. courts routinely discuss the first two requirements as a unified concept; so this section will therefore refer to them together as “extraordinary circumstances.”

A. Interest of justice

The concept of “interest of justice” is not limited to any particular litigant or a pro se litigant, but rather must encompass a sense of overall justice in the case. The application of this standard requires the Commission to consider not only the interest of all parties, but the goals and objectives of the Workers’ Compensation Act, and integrity of the adjudicatory

process before the Commission. Implicit in the requirement of justice is that no rule of the Industrial Commission may compel a result incompatible with the fundamental rights of any party. See *Handy v. PPG Indus.*, 154 N.C. App. 311, 571 S.E.2d 853 (2002) (emphasizing the importance of neutrality and impartiality of any tribunal in maintaining the integrity of our judicial and quasi-judicial processes).

B. Extraordinary Circumstances

1. Situations Constituting Potential "Extraordinary Circumstances"

a. "Irregular Judgments" Related to Court Practice. Unlike "erroneous" judgments- where the court's decision is based on an error of law- "irregular" judgments can form a basis for relief under Rule 60 (b) (6). An irregular judgment is one "rendered contrary to the cause and practice of the court, come within its purview." *Id.* at 717. *Taylor v. Triangle Posche-Audi, Inc.*, 27 N.C. App. 711, 717 (1975).

It has been my experience that the SC Workers' Compensation Commission Scheme, all stakeholders are not treated fairly and equitably in a timely manner and the system is not efficient or effective, as it bestowes privileges to white men while denying those to American African/black men and woman of color, in comparison to my own, (2) cases below noted the irregular judgment before us:

CASE #1. CLEO N. POWELL v. VULCAN MATERIALS Co. Believed to be Caucasian\ White Male MENTAL INJURY

POWELL, a Caucasian, a national guard veteran, As a result of an altercation with a supervisor, who pushed a finger into his chest, cursed him, called him a liar and accused POWELL of poor maintenance. The hearing commissioner found in its Scheme found that POWELL suffered an accidental mental injury arising out of an in the course of his employment. He ordered Vulcan to make weekly payments of \$268.99 for 500 weeks, to pay medical expenses retroactive to march 21, 1984, and to pay future lifetime medical care. It was determined a totally disabling and compensable "mental, emotional, and psychological injury" this was unusual, extraordinary condition. The circuit court's affirming the Commission is hereby Affirmed. GREGORY, C.J., and CHANDLER and FINNEY, JJ., concur.

CASE #2. TED FRAME v. RSI Caucasian\ White Male MENTAL INJURY

FRAME, a Caucasian, was often troubled by the dishonorable treatment of African-American employees under his charge from upper management, exacerbated by comments and admitted to never actually witnessing intimate sexual relations. The psychiatrist and psychologist agree (1) that Frame suffers from a bipolar type psychosis; (2) on the day in question he experienced what is known as a "decompensation" (a mental breakdown); (3) there is a certain genetic predisposition to this kind of psychosis; (4) this "decompensation" was the result of job-related stress; and (5) it was in no way certain that Frame would experience such a mental collapse regardless of exterior stimuli (i.e., his job). According to the psychiatrist and psychologist, Frame is not currently capable of full-time work.

In the SC Workers Compensation Commission Scheme, A hearing before a single commissioner resulted in an order granting Frame full benefits. The order of the single commissioner reads:

1. The Claimant was predisposed to mental illness, although it is unclear whether the predisposition was a result of genetics or something else. The basis of the predisposition is not relevant.
2. The Claimant's work stress was a contributing factor to the decompensation and was the major contributing factor.
3. Particular stressors in the workplace included: answering to "five bosses"; the constant anxiety resulting from escalating pressure associated with being on call. Other examples were trying to cut cost without cooperation, insufficient fire extinguishers to put out fires in the plant, conflict with DOT standards or regulations, lack of cooperation from mechanics and drivers, etc.

Note: In regards to above "FRAME", the record is absent that FRAME ever "DID ANYTHING" to help African-American people, only that it so troubled him along with other stress that he was made disabled.

Disabled by Bipolar Disorder that often runs in families (Hereditary) and inherent parts appear to be part of the mobile genetic elements; of those with this mood disorder (Genetics).

AND/OR

S.C. Code Ann. § 1-23-380 provides that any party aggrieved by the final decision in a contested case and is exhausted with all administrative remedies is entitled to judicial review. The court cannot substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court can affirm the decision of the agency or remand the case for further proceedings. The court can reverse or modify the decision if substantial rights of the appellant are prejudiced or the administrative findings, inferences, conclusions, or decisions:

- violates constitutional or statutory provisions; exceeds statutory authority of the agency;
- is made upon unlawful procedure;
- is affected by other error of law;
- is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A party aggrieved of the final decision of the circuit court or the court of appeals can obtain a review of the final judgment from the Supreme Court. The APA does not contain a specific statute of limitations, but courts have held that a six-year statute of limitation is applicable. *Turtle Island Restoration Network v. U.S. Department of Commerce*, 438 F.3d 937 (9th Cir. 2006) 28 U.S.C § 2401(a) states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

S.C.Code Ann. § 42-1-40 (Supp.2003) provides in relevant part:

"Average weekly wages" means the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of fifty-two weeks immediately preceding the date of injury, ... When for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

[3][4][5] The Worker's Compensation Act is remedial legislation enacted to protect the worker. Therefore, the statute is given a broad construction in order to accomplish that end. *238Booth v. Midland Trane Heating & Air Conditioning, 298 S.C. 251, 254, 379 S.E.2d 730, 731 (Ct.App.1989). "The statute provides an elasticity or flexibility with a view toward always achieving the ultimate objective of reflecting fairly a claimant's probable future earning loss." *Sellers v. Pinedale Residential Ctr.*, 350 S.C. 183, 191, 564 S.E.2d 694, 698 (Ct.App.2002). Moreover, it is well established that the objective of wage calculation is to arrive at a fair approximation of the claimant's probable future earning capacity. Disability reaches into the future, not the past; loss as a result of the injury must be thought of in terms of its impact on probable future earnings. *Bennett v. Gary Smith Builders* *Bennett v. Gary Smith Builders*, 271 S.C. 94, 98-99, 245 S.E.2d 129, 131 (1978).

N.C. Gen. Stat. §35A-1101(7), defines a mentally incompetent individual as: "[A]n Adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar causes of conditions."

A judgment may not be rendered in violation of constitutional protections. The validity of a judgment may be affected by a failure to give the constitutionality required due process notice and an opportunity to be heard. *Earle v. McVeigh*, 91 US 503, 23 L Ed 398. See also *Restatements, Judgments 4(b) Prather v Loyd*, 86 Idaho 45, 382 P2d 910.

The limitations inherent in the requirements of due process and equal protection of the law extend to judicial as well as political branches of government, so that a judgment may not be rendered in violation of those constitutional limitations and guarantees. *Hanson v Denckia*, 357 US 235, 2L Ed 1283, 78 S Ct 1228.

Violated my Constitutional Fifth Amendment Id. At 1295-96, which state:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty; or property, without due process of law; nor shall private property be taken for public use, without just compensation. *Cushman*, 576 F.3d at 1296.

"[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of of it. He must, instead, have a legitimate claim of entitlement to it." Id. At 1297 (alteration in original) (citing *Town of Castle Rock, Colo. V. Gonzales*, 545 U.S. 748, 756 (2005)(quoting *Bd. Of Regents of State Colls. V. Roth*, 408 U.S. 564, 577(1972))

Violated my constitutional 14 Amendment for Denial of Equal Protection, Civil Rights Act 1866 and 1981 Denial of Equal Justice Under law (RACE) African Decent See DNA results.

Civil Rights Act of 1866, Sess. I Ch. 31- An Act to protect all Persons in the United States in their Civil Rights, and Furnish the Means of their Vindication. It was mainly intended to protect the Civil Rights of persons of African Descent born in or brought to the U.S., in the wake of the American Civil war. 14 Stat. 27-30. *Jones v. Alfred H Mayer Co.*, 392 U.S.409 (1968), *Saint Francis College v. al-Khazraji*, 481 U.S. 604 (1987), *Domino's Pizza, Inc v. McDonald*, 546 U.S. 470 (2006)

42 U.S. Code §1981- Equal rights under the law-a Key Civil Rights provision in U.S. law that was originally enacted as part of the Civil Rights Act of 1866:

a) Statement of Equal Rights- All persons with the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to not other.

b) "Make and Enforce Contracts" defined-For purpose of this section the term "make and enforce contracts" included the making, performance, modification, and termination of contracts, and the employment of all benefits, privileges, terms, and conditions of the contractual relationship.

c) Protection Against Impairment- The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law. (R.S. § 1977. Pub. L. 102-106, title 1, § 101, Nov. 21, 1991, 105 Stat. 1071.) (11) The court clarified in a footnote that it purposefully avoided limiting §1981 Claims

to parties to contracts, to leave open the possibility that an intended third-party beneficiary of a contract may have rights under §1981. *Domino's Pizza, Inc v. Mcdonal*, 546 U.S.470 (2006)

Civil RICO (18 U.S.C § 1962 Prohibited Activities (c)) (C) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt. Conspiracy to Commit Civil RICO (18 U.S.C § 1962 Prohibited Activities (d))(D) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

As further grounds in support of this motion Claimant refer to the Affidavit attached hereto and incorporated by reference herein. Items believed to have been omitted from the record and other enclosed:

Exhibit #1. The Defendants omitted and continue to omit my correct Average Weekly Wage (AWW) to the Commission for my claims; they also previously paid me incorrectly and various. Emails and papers about pay

Exhibit #2. Deputy City Attorney Dana M Thye email, news article about mold and lab results. Dr. Fulton medical opinion CTS result of employment

Exhibit #3. TCAPONE WCC File 1420487 Disagreement with form 58. I submitted various evidence to the Commission 8/11/2015 and again in APA briefs 1 of 2 submitted to the court at a hearing held 8/21/2015

Exhibit #4. Set 1& 2 of 4: TCAPONE Addendum WCC File 1322451/1319203 Disagree with form 58. I submitted various evidence to the Commission 8/12/2015 File set 3 & 4 and again in APA briefs 1 of 2 submitted to the court at a hearing held 8/21/2015

Exhibit #5. Set 3& 4 of 4: TCAPONE Addendum WCC File 1322451/1319203 Disagree with form 58. I submitted various evidence to the Commission 8/12/2015 File set 1 & 2 and again in APA briefs 1 of 2 submitted to the court at a hearing held 8/21/2015

Exhibit #6. January 25, 2018 Freedom of Information Act answered by the City of Columbia, Information on Station MOLD and medical records released.

Exhibit #7 City of Columbia has denied all claims from the beginning, despite the "No Fault" system and contrary evidence in its possession and presented is fraud and to continue to deny claims is fraud that is

ongoing.

Exhibit #8 WCC NO 1319203, 1322451 & 1420487 Transcript of Proceedings August 21, 2015

Exhibit #9 Decision and Order of SCWCC WCC File NOS 1319203, 1322451, 1420487 FILED December 2, 2015.

Exhibit #10 Case information on TED FRAME v. Resort Services Incorporated And CLEO N.POWELL v. Vulcan Materials Co.

Exhibit #11 DNA Results Summary For Terry H Capone

CONCLUSION

Claimant in this matter, having shown sufficient grounds to have this Commission for these reasons briefly stated herein the verified complaints filed December 21, 2017, January 12, 2018, new form 58 filed and based upon the law of these cases, the undersigned respectfully request that this Motion For Relief to Alter, Amend, Set Aside Judgment, Order or Proceeding decided December 2, 2015, move this Commission to grant his motion.



Terry H Capone
Pro Per Claimant
130 Summerlea Drive
Columbia, SC 29203

February 20, 2018

DECLARATION TERRY H. CAPONE

Pursuant to 28 U.S.C. § 1746, I hereby declare as follows:

I am the Claimant in this action, I have personal knowledge of the matters discussed below and, if called as a witness, I could competently testify to them. I was unable to file a timely response to the complaint in this action for the reason(s):

1. I was mentally incompetent; I suffer from post traumatic stress disorder (PTSD) an occupational disease, major depression disorder, anxiety and irritable bowel syndrome with diarrhea (IBS-D), as a result of my occupation effectively back dated to * October 21, 2013, the day of reported disability and I was unable to work in the Fire Service, all have been determined by Social Security Disability, as a matter of law, to be "Severe" impairments (20 CFR 404.1520(c)).) and "The claimant also suffers from a variety of osteoarthritis, carpal tunnel syndrome, sleep related breathing disorder, and migraine headaches, decided September 12, 2016. I have suffered from Temporary Insanity. No limitations on time of notice or making claim apply as stated in "The Act".

* In error I previously reported October 21, 2013, as my last day of work. Here now corrected, and stated as the date of reported disability and unable to work any longer in the Fire Service

2. I have been and become Involuntarily Intoxicated by my prescription Medication regiment that is a result of my occupational disease/illnesses/Injuries, which include: Depakote ER 500 mg, Prozac 20 mg, Ambien 10 mg, Seroquel 300 mg, Ativan 1 mg, and others.

3. Due to my mental state caused in part by involuntary intoxication by use of a prescribed cocktail of antipsychotic, sedative, anticonvulsant, Selective Serotonin Reuptake Inhibitors (SSRI) and other medications for the treatment of my various conditions and my other psychiatric conditions, good grounds exist to allow me to reinstate my claim.

4. Due to the overwhelming stress brought on and endured in bringing this "No Fault" Claim I had to back away from it and focus on my health and staying alive. My disease carries with it an amnesia like state brought about by Neurocognitive disorders and Post Traumatic Stress Disorder newly diagnosed as an occupational disease and, and I was unable at the time to recall or discuss key traumatic and critical incidents/events.

5. Please refer to my motions, verified complaints and new for 58's submitted this Commission and defendants

6. I was not made aware until on or about December 2017, City was aware of Mold(Fungus) in Fire Stations because a published article dated: Thursday, May 21st 2015, Showed two types: ASpergillus/Penicillium and Chaetomium". The same mold determined in my lab results 6/2013.

Wherefore, the undersigned respectfully request for these reasons briefly stated herein and based upon the law of these cases, the undersigned respectfully requested the within Motion For Relief to Alter, Amend, Set Aside Judgment, Order or Proceeding decided December 2, 2015, motion be granted.

I declare under penalty to perjury under the laws of the State of South Carolina that the foregoing is true and correct to the best of my knowledge

Date: February 20, 2018



Terry H Capone
Pro Per Claimant
130 Summerlea Drive
Columbia, SC 29203

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
W.C.C. FILE NOS. 1322451, 1319203, 1420487

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

TERRY H CAPONE,

Employee
Pro Per Claimant,

CITY OF COLUMBIA,
et al.

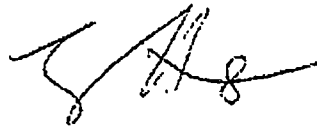
Employer (Self-Insured)
Defendants.

CERTIFICATE OF SERVICE

I certify that a copy of the Claimant's *Notice of Motion and Motion for Relief to Alter, Amend, Set Aside Final Judgment, Order, or Proceeding decided December 2, 2015 Under Rule 60 (A) (B) and/or SC Code 1-23-380 Issued to Defendants* in the Above-Referenced Matters was served upon the Attorney For City of Columbia, et al. by placing a copy of the same in the United States Mail, priority mail, certified return receipt requested, restricted to addressee, postage pre-paid to the address shown below on this 20th day of February, 2018:

Deputy Attorney Dana M. Thye
Office of the City Attorney
Post Office Box 667
Columbia, SC 29202

Cc: via email: dmthye@columbiasc.net



Terry H Capone
Pro Per Claimant
130 Summerlea Drive
Columbia, SC 29203

February 20, 2018
Columbia, South Carolina

EXHIBIT F

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
WCC FILE NO. 1319203, 1322451, 1420487

Terry H. Capone,

Claimant,
Vs.

City of Columbia,

Employer,

Companion Property & Casualty Group,

Carrier,
Defendants

MOTION ORDER

ON CLAIMANT'S MOTION FOR RELIEF TO ALTER,
AMEND, SET ASIDE JUDGMENT ORDER OR
PROCEEDING DECIDED DECEMBER 2, 2015 UNDER
RULE 60(a)(b) AND/OR SC CODE 1-23-380 ISSUED
TO DEFENDANTS IN THE ABOVE REFERENCED
MATTERS

Served via U.S. Mail upon:

Terry Capone

Cynthia C. Dooley, Esquire

Dana M. Thye, Esquire

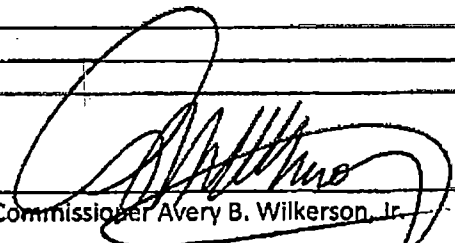
A Motion regarding the following issue(s) has been received.

- Discovery or Subpoena
- Appointment of guardian Ad Litem
- Attorney's appearance before the Commission
- Withdrawal of Representation
- Attorney's Fee
- Claim Pending Commission Review
- Postpone
- Adjourned the Scheduled Hearing
- Self Insurance Privileges
- Penalties and Interest
- Third Party Practice
- Other: Claimant's Motion For Relief to Alter Amend, Set Aside Judgment Order or Proceeding Decided December 2, 2015 Under Rule 60(A)(B) And/or SC Code 1-23-380 Issued to Defendants in the Above Referenced Matters.

The following disposition has been made: Granted Denied

- Set for Hearing
- Have Attorneys brief the Issue

Reasons: _____


Commissioner Avery B. Wilkerson, Jr.

Columbia, South Carolina

3-26-2018

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Deborah Hutto on March 27, 2018

EXHIBIT G

South Carolina Workers' Compensation Commission
1333 Main Street, Suite 500
P.O. BOX 1715
Columbia, SC 29202-1715
803-737-5675 www.wcc.sc.gov



WCC File #: 1322451-1319203-1420487
Carrier File #: _____
Carrier Code #: _____
Employer FEIN #: 57-6000229

Claimant's Name: Terry H Capone SSN: _____ Employer's Name: City of Columbia
Address: _____ Address: P.O. Box 147
City: Columbia State: SC Zip: 29203 City: Columbia State: SC Zip: 29217
Home Phone: _____ Work Phone: _____ Insurance Carrier: Companion TPA Services, LLC (800)922 1282
Preparer's Name: Terry H Capone Law Firm: N/A Preparer's Phone #: (803) 622-6578

REQUEST FOR COMMISSION REVIEW

Request for Commission Review by Claimant Employer (check one) Date of Injury or Illness: 8/24-10/12-11/1/2013 (m/d/yyyy)

The undersigned makes application for review of the findings of the Commissioner in the above-captioned case. The request for review is based on the following grounds: (State the grounds of your appeal in the form of questions presented. Each question presented must contain a concise statement of one proposition of law or fact. Refer to evidence by title and exhibit number. Use additional pages if necessary).

1. Did the commissioner error or abuse his discretion by denying my motion to Alter, Amend, Set Aside Final Judgment, Order or Proceeding Decided December 2, 2015 Under Rule 60 (A) Oversights and Omissions?

2. Did the commissioner error or abuse his discretion by denying my motion to Alter, Amend, Set Aside Final Judgment, Order or Proceeding Decided December 2, 2015 Under Rule 60 (B) (1) Newly Discovered Evidence which by Due Diligence Could Not have Been Discovered In Time To Move For A New Trial Under Rule 59 (B)?

3. Did the commissioner error or abuse his discretion by denying my motion to Alter, Amend, Set Aside Final Judgment, Order or Proceeding Decided December 2, 2015 Under Rule 60 (B) (3) Fraud on the Court and That is Still Ongoing and states: Can the commission(a) entertain an independent action or relieve a party from judgment, order, or proceeding; or (B) set aside a judgment for fraud on the court Continued on next page (2) Attached

(Check one) Oral argument is is not requested. Appellant's request for oral argument is waived if not indicated on this form.

Mediation
 Mediation is requested by consent of the Parties pursuant to Reg. 67-1803.

Questions regarding mediation may be submitted to mediation@wcc.sc.gov.

I certify I have served this document pursuant to Reg. 67-211 by delivering a copy to SC Workers' Compensation Commission
address PO BOX 1715 Columbia SC 29202-1715 on the 10th day of April 2018
by first class postage certified mail personal service.

Preparer's Signature: [Signature] Title: Fire Battalion Chief-Retired Email: tcapone@liberty.edu Date: 4/10/2018

Check this box if you are not represented by an attorney.

Questions about the use of this form should be directed to the Judicial Department at 803.737.5675 or appeals@wcc.sc.gov. If the claimant appeals and is not represented by counsel, the Judicial Department will properly serve this form pursuant to Reg. 67-607 C. Pursuant to Reg. 67-205 and Reg. 701, the appeal must be postmarked no later than 14 days from the date of service of the Decision and Order of the Hearing Commissioner along with the filing fee. Attach a Form 32, if you are unable to pay the filing fee. Refer to Reg. 67-211 and Reg. 67-701 through 711.

February 21, 2018
WCC FILE NO. #1322451-1319203-1420487-

April 10, 2018

4. Did the commissioner error or abuse his discretion by denying my motion to Alter, Amend, Set Aside Final Judgment, Order or Proceeding Decided December 2, 2015 Under Rule 60 (B) (4) The Judgment is Void or by where it acted in a manner inconsistent with Due Process of Law?
5. Did the commissioner error or abuse his discretion by denying my motion to Alter, Amend, Set Aside Final Judgment, Order or Proceeding Decided December 2, 2015 Under Rule 60 (B) (5) It is based on an earlier judgment that applying it prospectively is no longer equitable; Or
6. Did the commissioner error or abuse his discretion by denying my motion to Alter, Amend, Set Aside Final Judgment, Order or Proceeding Decided December 2, 2015 Under Rule 60 (B) (6) Any other reason that justifies relief from operation of A judgment?; To include But not limited to (a) In The Interest of Justice and or (b) Irregularities In agency Actions

AND/OR

7. Did the commissioner error or abuse his discretion by denying my motion to Alter, Amend, Set Aside Final Judgment, Order or Proceeding Decided December 2, 2015 Under SC Code §1-23-380 (2013) (A) in violation of constitutional or statutory provisions?
8. Did the commissioner error or abuse his discretion by denying my motion to Alter, Amend, Set Aside Final Judgment, Order or Proceeding Decided December 2, 2015 Under SC Code §1-23-380 (2013) (B) in excess of the statutory authority of the agency?
9. Did the commissioner error or abuse his discretion by denying my motion to Alter, Amend, Set Aside Final Judgment, Order or Proceeding Decided December 2, 2015 Under SC Code §1-23-380 (2013) (C) made upon unlawful procedures?
10. Did the commissioner error or abuse his discretion by denying my motion to Alter, Amend, Set Aside Final Judgment, Order or Proceeding Decided December 2, 2015 Under SC Code §1-23-380 (2013) (D) affected by other error of law?
11. Did the commissioner error or abuse his discretion by denying my motion to Alter, Amend, Set Aside Final Judgment, Order or Proceeding Decided December 2, 2015 Under SC Code §1-23-380 (2013) (E) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole records?

Or

12. Did the commissioner error or abuse his discretion by denying my motion to Alter, Amend, Set Aside Final Judgment, Order or Proceeding Decided December 2, 2015 Under SC Code §1-23-380 (2013) (F) arbitrarily or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion?

All have been expanded upon in said motion.

RULE OF LAW

S.C. Code Ann. § 42-9-30 (2015).

Although a claimant's degree of impairment is usually a question of fact for the Commission, if all the evidence points to one conclusion or the Commission's findings "are based on surmise, speculation or conjecture, then the issue becomes one of law for the court . . ." *Polk v. E.I. duPont de Nemours Co.*, 250 S.C. 468, 475, 158 S.E.2d 765, 768 (1968) (citing *Hines v. Pacific Mills*, 214 S.C. 125, 131, 51 S.E.2d 383, 385 (1949)); see also *Randolph v. Fiske-Carter Constr. Co.*, 240 S.C. 182, 189, 125 S.E.2d 267, 270 (1962) (holding where there is absolutely no evidence to support the Commission's findings, the question becomes a question of law).

To establish *res judicata*, the defendant must prove three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986); *Rogers*, 336 S.C. at 537, 520 S.E.2d at 817; *Owenby v. Owens Corning Fiberglas*, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993). Even when the defendant meets all of the required elements, *res judicata* will not be applied "where it will contravene other important public policies; the courts must weigh the competing public policies." *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992).

There are numerous exceptions to the application of *res judicata* and collateral estoppel. In *Pye*, this court adopted the Restatement (Second) of Judgments section 28, which states:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

- (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
- (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
- (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or
- (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
- (5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Pye, 325 S.C. at 437-38, 480 S.E.2d at 460-61.

In *Beall v. Doe*, this court adopted section 29 of the Restatement (Second) of Judgments:

A party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in § 28 and also whether:

- (1) Treating the issues as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;
- (2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;
- (3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;
- (4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;
- (5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
- (6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
- (7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;
- (8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Beall, 281 S.C. at 371, 315 S.E.2d at 190-91.

The doctrines of collateral estoppel and res judicata exist to “reduce litigation and conserve the resources of the court and litigants and it is based upon the notion that it is unfair to permit a party to relitigate an issue that has already been decided.” *State v. Bacote*, 331 S.C. 328, 331, 503 S.E.2d 161, 163 (1998). Even when the elements of res judicata and collateral estoppel have been met, they will not be rigidly or mechanically applied, and the application of the doctrines may be precluded where unfairness or injustice results, or public policy requires it. *Id.*; *Carrigg v. Cannon*, 347 S.C. 75, 552 S.E.2d 767 (Ct. App. 2001). “Thus application of res judicata will not be applied where it will contravene other important public policies; the courts must weigh the competing public policies.” *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992). We recognize that there have been instances when collateral estoppel or res judicata have not been invoked for countervailing public policy concerns. See *Bacote*, 331 S.C. at 331, 503 S.E.2d at 163 (declining to give collateral estoppel effect to proceedings which occur during an administrative hearing for a driver’s license revocation); *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 481 S.E.2d 706 (1997) (finding that giving administrative hearings held in front of the Employment Security Commission collateral estoppel effect would frustrate the purposes of the Employment Security Commission); *Johns*, 309 S.C. at 203, 420 S.E.2d at 859 (refusing to apply a consent order entered by the family court finding husband and wife married at common law because giving the order collateral estoppel effect would violate the State’s policy finding bigamous marriages void as mandated by statute).

An exception exists to the application of *res judicata* where the original judgment was obtained through the use of fraud. *Heiser v. Woodruff*, 327 U.S. 726, 66 S.Ct. 853, 90 L.Ed. 970 (1946); *see also Montalvo v. Banco Comercial de Mayaguez (In re Montalvo)*, 157 B.R. 510 (D.P.R.1993). However, if the fraud at issue was the subject of litigation in a previous suit, such a suit itself has preclusive or *res judicata* effect. *Heiser*, 327 U.S. at 736, 66 S.Ct. at 857-58

There is, however, an exception to the application of *res judicata* which is relevant to this case in which there is an alleged fraud underlying the original state court proceeding. It has long been recognized that a judgment attained with the aid of fraud does not deserve the deference normally given a case by other courts. In fact, a party may collaterally attack a previous judgment by proving that the previous decision arose from fraud. In a relatively recent bankruptcy case, the creditor contended "that the doctrine of *res judicata* bars the debtor from collaterally attacking the state court judgment[,] . . .," but the bankruptcy court concluded that "[t]he only restrictions on *res judicata* are [just] that[:] a party may collaterally attack a judgment to show it was obtained by fraud or collusion of the parties. . . ." *In re Bloomer*, 32 B.R. 25, 26 (Bankr.W.D.Mich. 1983). The Supreme Court explored this interesting *res judicata* question in a bankruptcy context and concluded that a state court decision obtained through fraud does not have a preclusive effect, and the bankruptcy court has the ability if not the duty to examine evidence of fraud brought to its attention:

Undoubtedly, since the Bankruptcy Act authorizes a proof of a claim based on a judgment, such a proof may be assailed in the bankruptcy court on the ground that the purported judgment is not a judgment because of want of jurisdiction of the court which rendered it over the persons of the parties or the subject matter of the suit, or because it was procured by *fraud* of a party.

Heiser v. Woodruff, 327 U.S. 726, 736, 66 S. Ct. 853, 858, 90 L. Ed. 970 (1946) (emphasis added).^[3] *Cf. United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 660 (1st Cir. 1990); *see also In re Giorgio*, 81 B.R. 766, 774 (D.R.I.1988); *In re KDI Corp.*, 14 B.R. 350, 353 (Bankr.S.D.Ohio 1981).

"Injury By Accident Arising Out of and in the Course of the Employment"

"In order to be entitled to workers' compensation benefits, the employee must show he or she sustained an 'injury by accident arising out of and in the course of the employment.'" *Owings v. Anderson County Sheriff's Dep't*, 315 S.C. 297, 299, 433 S.E.2d 869, 871 (1993); S.C.Code Ann. § 42-1-160 (Supp. 1996). *See also Doe v. South Carolina State Hosp.*, 285 S.C. 183, 328 S.E.2d 652 (Ct.App.1985) (three criteria for determining whether injury is compensable are (1) accident; (2) arising out of employment; and (3) arising in the course of employment).

"Injury By Accident"

The question of whether a claimant sustained an "injury by accident" within the South Carolina Workers' Compensation Act is a question of law. *Creech v. Ducane Co.*, 320 S.C. 559, 467 S.E.2d 114 (Ct.App.1995). The Court of Appeals *544 may review whether the Commission's determination is affected by an error of law. *Id.*; S.C.Code Ann. § 1-23-380(A)(6) (Supp.1996).

"Arising Out Of"

An accident "arises out of the employment when it arises because of it, as when the employment is a contributing proximate cause. *Fowler v. Abbott Motor Co.*, 236 S.C. 226, 113 S.E.2d 737 (1960). *See also Beam v. State Workmen's Compensation Fund*, 261 S.C. 327, 200 S.E.2d 83 (1973) (accident "arises out of employment when employment is contributing proximate cause). The phrase "arising out of in the Workers' Compensation Act refers to the origin of the cause of the accident. *Loges v. Mack Trucks, Inc.*, 308 S.C. 134, 417 S.E.2d 538 (1992).

In *Douglas v. Spartan Mills, Startex Div.*, 245 S.C. 265, 140 S.E.2d 173 (1965), our Supreme Court discussed the "arising out of" requirement:

*545 "It (the injury) arises "out of the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

Douglas, 245 S.C. at 269, 140 S.E.2d at 175 (citations omitted).

The question of whether an accident arises out of and is in the course and scope of employment is largely a question of fact for the Full Commission. *Wright v. Bi-Lo, Inc.*, 314 S.C. 152, 442 S.E.2d 186 (Ct.App.1994). However, where the facts are undisputed, the question of whether an accident is compensable is a question of law. *Jordan v. Dixie Chevrolet, Inc.*, 218 S.C. 73, 61 S.E.2d 654 (1950).

"In the Course of the Employment"

The phrase "in the course of the employment," as needed for a claimant to be entitled to Workers' Compensation benefits, refers to the time, place, and circumstances under which the accident occurred. *Owings v. Anderson County Sheriffs Dep't*, 315 S.C. 297, 433 S.E.2d 869 (1993); *Loges v. Mack Trucks, Inc.*, 308 S.C. 134, 417 S.E.2d 538 (1992). An injury arises "in the course of employment within the meaning of the Workers' Compensation Act when it occurs within the period of the employment at a place where the employee reasonably may be in the performance of his duties, and while *546 he is fulfilling those duties, or engaged in doing something incidental thereto. *Fowler v. Abbott Motor Co.*, 236 S.C. 226, 113 S.E.2d 737 (1960); *Schrader v. Monarch Mills*, 215 S.C. 357, 55 S.E.2d 285 (1949).

Question of Law

Under Workers' Compensation law, the decision of the Commission must be vacated if substantial rights of the claimant have been prejudiced because the administrative findings are clearly erroneous in view of the substantial evidence on the record as a whole. South Carolina Code Ann. § 1-23-380(A)(6) (Supp.1996) mandates a reversal if the decision of the administrative agency is clearly erroneous in view of the substantial evidence on the whole record.

548 In *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E.2d 76 (Ct.App.1995), Judge Connor penned an excellent analysis of Workers' Compensation law in regard to aggravation of a pre-existing condition. This Court explained:

Our courts have clearly held the natural consequences flowing from a compensable injury, absent an independent intervening cause, are compensable. *Whitfield v. Daniel Constr. Co.*, 226 S.C. 37, 83 S.E.2d 460 (1954). Moreover, the great weight of authority

holds the aggravation of the primary injury by medical or surgical treatment is compensable. *Id.* at 41, 83 S.E.2d at 462; Arthur Larson, *The Law of Workmen's Compensation* § 13.21(a) (1994). Additionally, new injuries resulting indirectly from treatment for the original injury are also compensable. *Id.* Likewise, a work-related accident which aggravates or accelerates a pre-existing condition, infirmity, or disease is also compensable. *Brown v. R.L. Jordan Oil Co.*, 291 S.C. 272, 353 S.E.2d 280 (1987); *Sturkie v. Ballenger Corp.*, 268 S.C. 536, 235 S.E.2d 120 (1977); *Glover v. Columbia Hospital of Richland County*, 236 S.C. 410, 114 S.E.2d 565 (1960) (a quiescent weakened, but not disabling condition accidentally aggravated, accelerated, or activated, with resulting disability, is compensable); Arthur B. Custy, *The Law of Workmen's Compensation in South Carolina* § 9.1 (1977). A condition is compensable unless it is due solely to the natural progression of a pre-existing condition. *Id.* It is no defense that the accident, standing alone, would not have caused the claimant's condition, because the employer takes the employee as it finds him or her. *Brown v. R.L. Jordan*, 291 S.C. at 275, 353 S.E.2d at 282. According to Professor Custy: [A]ggravation of a pre-existing condition is compensable where disability is continued for a longer time, even though no disability would normally have resulted from the injury alone, or even if the aggravation would have caused no injury to an employee who was not afflicted with the condition. Arthur B. Custy, *The Law of Workmen's Compensation in South Carolina* § 9.1 (1977); accord *Green v. Bennettsville*, 197 S.C. 313, 15 S.E.2d 334 (1941). *549 Finally, circumstantial evidence may be used to prove causation. *Glover v. Rhett Jackson Co.*, 274 S.C. 644, 267 S.E.2d 77 (1980). "The causal sequence ... may be more indirect or complex, but as long as the causal connection is in fact present the compensability of the subsequent condition is beyond question." Arthur Larson, *The Law of Workmen's Compensation* § 13.11(b) (1994). Where the evidence is susceptible of but one reasonable inference, the question is one of law for the court rather than one of fact for the Commission. *Glover v. Rhett Jackson Co.*

Mullinax, 318 S.C. at 436-37, 458 S.E.2d at 79-80.

Pre-existing disease or infirmity of the employee does not disqualify a claim under the "arising out of requirement if the employment aggravated, accelerated, or combined with the disease or infirmity to produce the disability for which compensation is sought. *Glover v. Columbia Hosp.*, 236 S.C. 410, 114 S.E.2d 565 (1960). When a pre-existing condition or disease is accelerated or aggravated by injury or accident "arising out of and in the course of the employment," the resulting disability is a compensable injury. *Brown v. R.L. Jordan Oil Co.*, 291 S.C. 272, 353 S.E.2d 280 (1987); *Arnold v. Benjamin Booth Co.*, 257 S.C. 337, 185 S.E.2d 830 (1971). See also *Sturkie v. Ballenger Corp.*, 268 S.C. 536, 235 S.E.2d 120 (1977) (exacerbation of pre-existing disease or injury arising out of or in course of employment is compensable); *Hiers v. Brunson Constr. Co.*, 221 S.C. 212, 70 S.E.2d 211 (1952) (if there is subsisting condition of illness or incapacity or physical disability which is caused, increased, or accelerated by some act or event coming by chance or happening fortuitously, then requisite quality or condition of injury will exist so as to make it accidental).

The right of a claimant to compensation for aggravation of a pre-existing condition arises only where there is a dormant condition which has produced no disability but which becomes disabling by reason of the aggravating injury. *Hines v. Pacific Mills*, 214 S.C. 125, 51 S.E.2d 383 (1949). A determination of whether a claimant's condition was accelerated or aggravated by an accidental injury is a factual matter for the Commission. *Brown*, supra. *550

Sections 15-3-40. Exceptions as to person under disability.- *If a person entitled to bring an action mentioned in Article 5 of this chapter or an action under Chapter 78 of this title, except for a penalty or forfeiture or against a sheriff or other officer for an escape, is at the time the cause of action accrued either:*

(1) within the age of eighteen years; or

(2) insane;

the time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended:

(a) more than five years by any such disability, except infancy; nor

(b) in any case longer than one year after the disability ceases.

SECTION 15-3-60. Effect of two or more disabilities.

When two or more disabilities shall coexist at the time the right of action accrues the limitation shall not attach until they all be removed.

Section 15-3-50 Disability must exist when right accrued.- "No person shall avail himself of a disability unless it existed when his right of action accrued.

SECTION 42-15-50. Limitation of time on notice or claim of mentally incompetent person or minor.

No limitation of time provided in this title for the giving of notice or making claim under this title shall run against any person who is mentally incompetent or a minor dependent as long as he has no guardian, trustee or committee.

HISTORY: 1962 Code Section 72-304; 1952 Code Section 72-304; 1942 Code Section 7035-52; 1936 (39) 1231.

N.C. Gen. Stat. §35A-1101(7), defines a mentally incompetent individual as: "[A]n Adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar causes of conditions."

A judgment may not be rendered in violation of constitutional protections. The validity of a judgment may be affected by a failure to give the constitutionality required due process notice and an opportunity to be heard. *Earle v. McVeigh*, 91 US 503, 23 L Ed 398. See also Restatements, Judgments 4(b) *Prather v Loyd*, 86 Idaho 45, 382 P2d 910.

The limitations inherent in the requirements of due process and equal protection of the law extend to judicial as well as political branches of government, so that a judgment may not be rendered in violation of those constitutional limitations and guarantees. *Hanson v Denckia*, 357 US 235, 2L Ed 1283, 78 S Ct 1228.

SCRCP.(emphasis in original) fraud, misrepresentation, or other misconduct of an adverse party (In South Carolina, extrinsic fraud is the only type of fraud for which relief may be granted) Raby const., L.L.P., 358 S.C at 20, 594 S.E.2d at 483; Jamison v. Ford Motor Co., 373 S.C. 248, 273, 644 S.E.2d 755, 768 (Ct. App. 2007). Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard." *Hilton Head ctr. Of S.C. v. Public Serv. Comm.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). "Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action." *Id.* The essential distinction between intrinsic and extrinsic fraud for purposes of relief from judgment is the ability to discover the fraud. Ray v. Ray, 374 S.C. 79, 84, 647 S.E.2d 237, 239 (2007); (4) **The judgment is void (stating a court may relieve a party from a final judgment if the judgment is void).** "A void judgment is one that, from its inception,

is a complete nullity and is without legal effect and must be distinguished from one which is merely "voidable." **Thomas & Howard Co., 318 S.C. at 291, 457 S.E.2d at 343 (1995) (citation omitted).**

Real Property- Area of Law Action based upon defective or unsafe condition of improvement to real property

Statutes: 15-3-640 15-3-670

(8) years (statue establishes an outside limitation of 8 years after substantial completion of the improvement during which normal statutes of limitation continue to run) (Limitation period may not be asserted by (1) defendant in personal injury or wrongful death action

Who was in possession of property and knew or should have known of defect; (2) defendant who engaged in fraud, gross negligence, or reckless misconduct in connection with the improvements or who concealed any cause of action; (3) defendants in personal injury or wrongful death action (a) if the injury, by its nature, was not discoverable in the exercise of reasonable diligence at the time of its occurrence, and (b) the injury was the result of exposure to a toxic or other harmful substance overtime, instead of the result of a sudden and fortuitous trauma

The concept of "interest of justice" is not limited to any particular litigant or a pro se litigant, but rather must encompass a sense of overall justice in the case. The application of this standard requires the Commission to consider not only the interest of all parties, but the goals and objectives of the Workers' Compensation Act, and integrity of the adjudicatory process before the Commission. Implicit in the requirement of justice is that no rule of the Industrial Commission may compel a result incompatible with the fundamental rights of any party. *See Handy v. PPG Indus.*, 154 N.C. App. 311, 571 S.E.2d 853 (2002) (emphasizing the importance of neutrality and impartiality of any tribunal in maintaining the integrity of our judicial and quasi-judicial processes).

ARTICLE 2 GENERAL 67-201. Application of Regulations. A. These regulations are entitled to a liberal construction in the furtherance of the purpose for which the South Carolina Workers' Compensation Law is intended. B. In doubtful cases, the application of these regulations shall be in favor of the injured employee

67-707. Additional and Newly Discovered Evidence. 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. (a) File the motion and affidavit with proof of service as soon as the new evidence is discovered. The motion and affidavit may be filed with the Form 30. (b) Serve the opposing party pursuant to R.67-215. (c) Oral argument will not be heard on the motion. The Commission will act upon the motion and issue an order before the review hearing is held. (d) If the Commission grants the motion, the review hearing is stayed. The case will be remanded to the original Hearing Commissioner who may, unless otherwise provided, reconvene the hearing or admit the deposition of a witness into the record. (e) The original Hearing Commissioner will issue his or her findings and

recommendations in the form of an order to the Commission and the parties. (f) Upon the receipt of the Commissioner's order, the Judicial Department will reset the case on the review hearing docket. (g) If the Commission denies the motion, the case may remain on the review hearing docket unless otherwise provided. HISTORY: Amended by State Register Volume 21, Issue No. 4, eff April 25, 1997.

PROVISIONS UNDER THE CONTRACT

The General Assembly enacted the Act in 1929 to both "provide swift and sure compensation to injured without the necessity of protracted litigation, and to insure[] a limited and determinate liability for employers." E.g., *Rorie v. Holly Farms*, 306 N.C. 706, 709, 295 S.E.2d 458, 460(1982)

The philosophy which supports the Work[ers'] Compensation Act is "that the wear and tear of human beings in modern industry should be charged to the industry, just as the wear and tear of machinery has always been charged. And while such compensation is presumably charged to industry, and consequently to the Employer or Owner of the industry, eventually it becomes a part of the fair money cost of the industrial product, to be paid for by the general public patronizing such products."

Vause v. Equipment Co., 233 N.C. 88, 92, 63 S.E. 2d 173, 176 (1951) (quoting *Cox v. Kansas City Refining Co.*, 108 Kan. 320, 195 P. 863 (1921)); see also *Barber v. Minges*, 223 N.C. 213, 216, 25 S.E. 2d 837, 839 (1943) ("The primary purpose of legislation of this kind is to compel industry to take care of its own wreckage.")

The basic operating principle of the Act is that an employee is automatically entitled to certain benefits whenever he suffers either person injury by accident occurring in the course of employment and arising out of it, or incurs an occupational disease. Those benefits include both wages based on disability and medical compensation. "Medical compensation" includes hospital services "as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will lessen the period of disability." N.C.G.S. § 97-2 (19)(1991). "Medical compensation shall be provided by the employer". N.C.G.S. § 97-25 (1991). Medical compensation may be ordered by the Commission if not provided by the employer. *Id.* The pecuniary liability of the employer therefore "shall limited to such charges as prevail in the same community for similar treatment of injured person of a like standard of living when such treatment is paid for by the injured person." N.C.G.S. §97-26 (1991). "[C]harges of hospitals for medical compensation...shall be subject to approval of the Commission." N.C.G.S. §97-90(a)(1991). The General Assembly created the Industrial Commission see N.C.G.S. §97-77, to administer the provisions of the Act, *Hanks v. Utilities Co.*, 210 N.C.312, 319, 186 S.E. 252, 257 (1936), and authorized the Commission to "make rules, not inconsistent with [the Act], for carrying out the provisions [thereof]. "N.C.G.S. § 97-80(a) (1991).

Concerns about the rising cost of medical compensation is valid, charges not paid by the employer (as self-insurer or by the insurance carrier) are spread to other patents, or in the case of state or federal careers, to the general taxpaying public. See Dellinger at 12.13. Such a result conflicts with the primary purpose of the Act, i.e., allocating the cost of work-related injuries first to the industry and ultimately to the consumer of the industry's products. See, e.g., *Vause v. Equipment Co.*, 233 N.C. at 92, 63 S.E.2d at 176; *Barber v Minges*, 223 N.C. at 216.S.E.2d at 839. Indeed, such allocation of cost to the employer is fundamental to the American compensation system, "largely private in structure, being a matter between employers, insurance carriers, and

employees,” and distinguishes it from the “typical [European] ‘socialistic’ schemes” in which “the government becomes the central figure.” 1 Arthur Larson, *The Law of Workmen's Compensation* § 3.10, at 1-15(1993).

Unlike pure social-insurance plans, the American compensation system does not place the cost on the “public” as such, but on a particular class of consumers, and thus retains a relation between the hazardousness of particular industries and the cost of the system to that industry and consumers of its product.

... [Thus,] [i]n the United States it is more precise to say that the consumer of a particular product ultimately pays the cost of compensation protection for the workers engaged in its manufacture. *Id.* § 3.20, at 1-16

The South Carolina Workers' Compensation Act requires that, to be compensable, an injury by accident must be one ‘arising out of and in the course of employment.’ Osteen V. Greenville Cnty. Sch. Dist., 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998); see also S.C. Code Ann. §42-1-160(A) (Supp.2010). “[A]ll occupational diseases are treated as ‘injuries by accident.’” State Workers' Comp. Fund v. S.C. Second Injury Fund, 310 S.C. 187, 189, 426 S.E.2d 112, 113 (Ct. App. 1992), rev'd on other grounds by State Workers' Comp. Fund v. S.C. Second Injury Fund, 313 S.C. 536, 443 S.E.2d 546 (1994).

Obituary

Mr. Joe Louis Smith Jr. (67) was born October 24, 1950 in Queens, New York, he was the son of the late Joe L. Smith Sr. and Barbara R. Smith. On Monday, March 26, 2018, at Warriors Walk, Wm. Jennings Bryan Donor VA Medical Center, Columbia, SC, he quietly passed away.

Mr. Smith grew up in the tight knit community of Southside Jamaica Queens, New York. He was affectionately called "Cottle" by his family and "Smitty" or "Joe Louis" by friends. At a young age he embarked upon Karate and over time became a ninth degree black belt. He taught Karate in the street as well as Dojo. He loved playing chess and enjoyed a good challenge. He was also a DJ who made a name for himself and was legendary for playing music in the park as well as in clubs. He had gifted hands and would often hand make his speakers from scratch. He loved playing handball, roller skating, and unique words like "supercalifragilisticexpialidocious."

During his life he attended John Adams High School, Ozone Park, NY and from there joined the United States Air Force and later on became a New York City Department of Corrections Officer (NYCD) on Rikers Island. It was during this time he acquired the love and began developing his passion for cameras and taking pictures of people. As years passed he relocated to South Carolina and worked for the State of South Carolina Department of Corrections, State Hospital, and during this time he became a professional photographer, continuing to develop his skill set for taking pictures and use of a camera. Also obtained his CDL license and started driving trucks and was employed with GAP Trucking Co., Inc., Columbia, SC at the time of his passing.

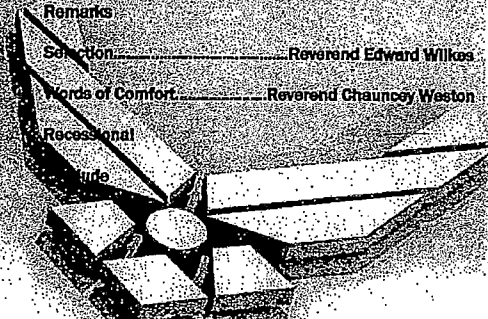
He was preceded in death by his parents, wife, Cheryl D. Smith, and a grandson, David R. Smith.

Mr. Joe Louis Smith Jr. leaves to mourn his passing: his children, Joe L. Smith III of Manchester, NJ; Terry (Tina) Capone of Columbia, SC and Barbara R. Smith of Far Rockaway, NY; one brother, James (Manetta) Smith of Lugoff, SC; one sister, Deborah Graham of Columbia, SC; eight grandchildren, Tanisa Capone, Ebony Capone, Rahem Batts, Aniya Harper, Olivia Harper, Madison Harper, Lincoln LaCalle, and Lucas LaCalle; one aunt, M. Joyce Eys of Lugoff, SC; his beloved dog, Caesar; a host of nieces, nephews, cousins, other loving relatives and special friends, all of whom cared for him deeply and will miss him dearly.

Memories



Order of Service

- Prelude
 - Processional
 - Selection..... Reverend Edward Wilkes
 - Scripture Reading..... Old and New Testaments
 - Prayer
 - Selection..... Reverend Edward Wilkes
 - Remarks
 - Selection..... Reverend Edward Wilkes
 - Words of Comfort..... Reverend Chauncey Weston
 - Recessional
- 
- Committal, Benediction, Interment
1:00 p.m.
Fort Jackson National Cemetery
4170 Percival Road
Columbia, South Carolina



THE AIRMAN'S CREED

I AM AN AMERICAN AIRMAN.
I AM A WARRIOR
I HAVE ANSWERED MY NATION'S CALL.

I AM AN AMERICAN AIRMAN.
MY MISSION IS TO FLY, FIGHT, AND WIN.
I AM FAITHFUL TO A PROUD HERITAGE,
A TRADITION OF HONOR,
AND A LEGACY OF VALOR.

I AM AN AMERICAN AIRMAN,
GUARDIAN OF FREEDOM AND JUSTICE,
MY NATION'S SWORD AND SHIELD,
ITS SENTRY AND AVENGER.
I DEFEND MY COUNTRY WITH MY LIFE.

I AM AN AMERICAN AIRMAN:
WINGMAN, LEADER, WARRIOR.
I WILL NEVER LEAVE AN AIRMAN BEHIND.
I WILL NEVER FALTER.

AND I WILL NOT FAIL.



U.S. AIR FORCE

Pallbearers
Family and Friends

Floral Bearers
Family and Friends

Weep Not For Me

By an Unknown Author

Weep not for me though I have gone
Into that gentle night
Grieve if you will, but not for long
Upon my soul's sweat fight

I am at peace, my soul's at rest
There is no need for tears
For with your love I was so blessed
For all those many years

There is no pain, I suffer not
The fear is now all gone
Put now these things out of your thoughts
In your memory I live on

Remember not my fight for breath
Remember not the strife
Please do not dwell upon my death
But celebrate my life

Columbia Location
8133 Gahana Ferry Road
Columbia, SC 29229
603-628-1668



St. Matthews Location
102 Church Street
St. Matthews, SC 29135
603-874-3517

PO Box 60423 | Columbia, SC 29262 | Fax 603-605-0168 | JP-Holley.com
Johnston P. Holley, President & Director
An Affirmation of Service
Celebrating 100 Years of Service



U.S. AIR FORCE



Passed
March 25, 2018

Mr. Joe Linn Smith, Jr.

Friday, April 6, 2018
11:00 a.m.

JP Holley Funeral Home Chapel
102 Church Street
St. Matthews, SC 29135

Columbia, South Carolina

Reverend Chauncey Webb, Officiating

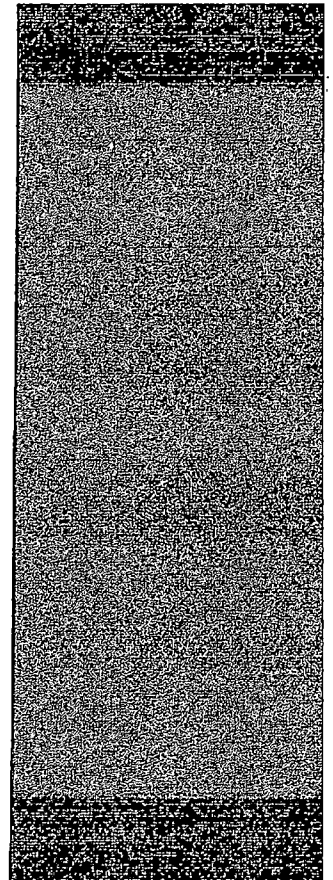


EXHIBIT H

**SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
JUDICIAL CONFERENCE DECISION AND ORDER**

Terry Capone v City of Columbia
SCWCC: 1322451, 1319203, 1420487
Commissioner: Wilkerson

This matter was heard before the South Carolina Workers' Compensation Full Commission in Judicial Conference. The Commissioners considered the matter and ordered the matter handled in the following manner:

IT IS, THEREFORE, ORDERED the pending appeal of the Administrative Order of the Commission dated March 27, 2018, is hereby;
 Dismissed as Interlocutory. Set for Oral Argument.

IT IS, THEREFORE, ORDERED the pending motion be, and hereby is;
 Granted. Denied. Dismissed Set for Hearing.

BEFORE THE;
 Hearing Comm. Jurisdictional Comm. Full Commission.

IT IS, THEREFORE, ORDERED this matter be, and hereby is; remanded to take such action and enter an Order consistent with the Court's directive.

Remand to Panel as indicated below.
 Barden James Taylor
 Beck Roche Wilkerson
 McCaskill

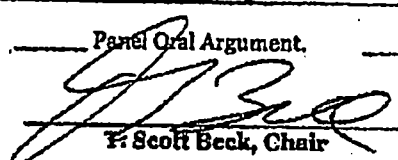
Remand for Order consistent with the Order of the Court.
 Remand to the Hearing Commissioner.
 Remand to the Jurisdictional Commissioner.
 Other: _____

Remand: Panel Oral Argument. En Banc Oral Argument.

AND IT IS SO ORDERED.

Columbia, South Carolina

6/13 2018


F. Scott Beck, Chair

CONCURRING:
Commissioner Susan S. Barden
Commissioner Melody James
Commissioner Aisha Taylor
Commissioner Avery Wilkerson
Commissioner Michael Campbell
Commissioner Gene McCaskill

NOT PARTICIPATING:

DISSENTING:

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THE UNDERSIGNED HAS THIS DATE SERVED THIS ORDER IN THE ABOVE ENTITLED ACTION UPON ALL PARTIES ELECTRONICALLY OR BY DEPOSITING A COPY THEREOF, POSTAGE PAID, IN THE UNITED STATES MAIL

This _____ day of _____, 2014.

By: _____
SCWCC Judicial Department

EXHIBIT I.

APPELLANT PANEL
DECISION AND ORDER
OF THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

S.C. W.C.C. FILE NOS. 1319203, 1322451, 1420487

Terry Capone, Employee,

Claimant / Appellant

v.

City of Columbia, Employer,

And

Companion Property & Casualty TPA

Defendants / Respondents.

Appellate Panel Review held in Columbia,
South Carolina on October 22, 2018 per
Notices timely and properly served on all
parties of interest.

Appellate Panel Decision and Order filed

March 1, 2019.

AGRUMENTS BRIEFED BY:

Terry Capone, *pro se* Claimant, of Columbia, South Carolina
for Claimant / Appellant

Cynthia C. Dooley, Esquire, Columbia, South Carolina,
for Defendants / Respondents.

STATEMENT OF THE CASE

The parties were heard by Commissioner Avery Wilkerson, Jr., Hearing Commissioner in Columbia, South Carolina on February 21, 2018.

On March 27, 2018, Commissioner Wilkerson, Jr. issued the following Stipulations, APA submissions, Statement of Case, Evidence of Case, Findings of Facts, Conclusions of Law, and Order.

STIPULATIONS

At the call of the case, the parties stipulated that the South Carolina Workers' Compensation Commission had jurisdiction in this case and that venue was proper in Richland County. Claimant brought three separate claims and all have been adjudicated.

Claimant filed without counsel and was previously properly advised of his right to counsel. Claimant knowingly and voluntarily waived his right to counsel and proceeded Pro Se.

The Claimant seeks benefits under the South Carolina Workers' Compensation Act based upon alleged injuries occurring on June 24, 2014, wherein he injured his toe (WCC File No. 1420487), on October 12, 2013, in which he re-injured his bilateral hands/wrists (WCC File No. 1319203), and on November 7, 2013 (WCC File No. 1322451), where he alleges an aggravation of a psychological injury, all while in the employ of the Employer/Defendants. Therefore, the South Carolina Workers' Compensation Commission has jurisdiction of these cases.

Without Objection, and with the exception of any self-serving statements or unstipulated medical reports, the Commission's file was made a part of the record.

STATEMENT OF THE CASE

This matter was reviewed by the undersigned following the filing of three Forms 50 by the Claimant Pro Se, one in WCC File No. 1322451, with a corresponding date of accident of November 7, 2013, one in WCC File No. 1319203, with a corresponding date of accident in October 12, 2013, and one in WCC File No. 1420487, with a corresponding date of accident in June 24, 2014.

Claimant's claims for Workers' Compensation benefits for injuries arising out of and in the course of his employment on or about November 2013 to June 2014 to his hand, toe, and psychology were heard on August 21, 2015. These cases were fully and finally adjudicated by a Decision and Order by Commissioner McCaskill dated December 2, 2015. This Order was not timely appealed and there was no medical evidence to support a then existing mental condition that would have prohibited the Claimant from filing an appeal. Therefore, this Order is the law of the case.

Claimant has now filed Forms 50 on the above-referenced claims, requesting a Hearing to determine issues that have already been decided by the Commission. Defendant has argued that all three cases have been adjudicated in a full and final hearing on August 21, 2015 and since no timely appeal was filed, res judicata should apply.

FINDINGS OF FACT

1. After a review of the pleadings, the prior Decision and Order, and the complete record, I make the following Findings of Fact:
2. Claimant alleged injuries occurred on June 24, 2014, wherein he injured his toe (WCC File No. 1420487), on October 12, 2013, in which he re-injured his bilateral hands/wrists (WCC File No. 1319203), and on November 7, 2013 (WCC File No. 1322451), where he alleges an aggravation of a psychological injury, all while in the employ of the Employer/Defendants.
3. On August 21, 2015, a full and final hearing was adjudicated on the merits of the case and a Decision and Order was filed December 2, 2015 by Commissioner Gene McCaskill finding that the Claimant is not entitled to any additional benefits for these claims under the Act.
4. Claimant acknowledges that he did not appeal the Decision and Order and I find no medical evidence to suggest that the Claimant had a then existing mental condition which prohibited him from filing a timely appeal.
5. As such, I find that res judicata applies and the Decision and Order filed on December 2, 2015 by Commissioner Gene McCaskill stands on the final adjudication on the merits of this case.

RULE OF LAW

1. This matter is governed by South Carolina Workers' Compensation Act and according to the Act, an application for review has to be made within fourteen days from the date when the notice of the award shall be given. S.C. Code Ann. §42-

17-50. According to *Wally v. C.Y. Thomason*, "If no application made for review of the hearing commissioner's award, that award becomes effective as the award of the Commission". *Wally v. C.Y. Thomason Co. Et. Al.*, 232 S.C. 153, 101 S.E.2d 286 (1957).

2. Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E. 2d, 414 (2011). Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the form suit. *ID*

ORDER

IT IS ORDERED that the Claimant's Forms 50 Requests for Hearings in the above referenced claims are DENIED and DISMISSED WITH PREJUDICE on the grounds of res judicata.

IT IS ORDERED that the further pleadings filed by the Claimant against Defendants subsequent to the date this Decision and Order becomes the law of the case shall be reviewed by the Jurisdictional Commissioner and shall be administratively dismissed if they relate to the subject matter already decided by the final decisions of the Commission cited above.

IT IS ORDERED that subsequent to the date this Decision and Order becomes the law of the case Defendants shall be relieved of any obligation to respond to further filings by Claimant related to WCC File No. 1322451, with a

corresponding date of November 7, 2013, WCC File No. 1319203, with a corresponding date of October 12, 2013, and WCC File No. 1420487, with a corresponding date of June 24, 2014 unless specifically instructed to respond by the Commission. Nothing contained herein shall be construed to prevent the parties from pursuing a proper appeal of this Decision and Order or pursuing a future, unrelated claim not previously adjudicated by the Commission.

AND IT IS SO ORDERED.

APPEAL

Within the statutory period, the Claimant filed an Application for Review in this case setting forth reasons for an appeal. A copy of this application was furnished to all interested parties prior to appellate review.

All proper testimony has been taken together with all documentary evidence and a transcript of the hearing; appellate briefs were delivered to the individual members of the South Carolina Workers' Compensation Appellate Panel.

By appeal Claimant/Appellant submits the following:

1. Did the Single Commissioner err in finding that the Appellant was not entitled to any benefits for all three claims under the Act?
2. Did the Single Commissioner err incorrectly decide the facts?
3. Did the Single Commissioner err in applying the wrong law?
4. Was the Single Commissioner's judgment wrong?

Based on a review of the whole record and briefs, the panel by unanimous vote Affirms the Decision and Order of the Single Commissioner. Accordingly, the

stipulations, APA submissions, statement of case, evidence of case, finding of fact, conclusions of law and order set forth below shall become and hereby are the law of the case:

STIPULATIONS

At the call of the case, the parties stipulated that the South Carolina Workers' Compensation Commission had jurisdiction in this case and that venue was proper in Richland County. Claimant brought three separate claims and all have been adjudicated.

Claimant filed without counsel and was previously properly advised of his right to counsel. Claimant knowingly and voluntarily waived his right to counsel and proceeded Pro Se.

The Claimant seeks benefits under the South Carolina Workers' Compensation Act based upon alleged injuries occurring on June 24, 2014, wherein he injured his toe (WCC File No. 1420487), on October 12, 2013, in which he re-injured his bilateral hands/wrists (WCC File No. 1319203), and on November 7, 2013 (WCC File No. 1322451), where he alleges an aggravation of a psychological injury, all while in the employ of the Employer/Defendants. Therefore, the South Carolina Workers' Compensation Commission has jurisdiction of these cases. Without Objection, and with the exception of any self-serving statements or unstipulated medical reports, the Commission's file was made a part of the record.

STATEMENT OF THE CASE

This matter was reviewed by the undersigned following the filing of three Forms 50 by the Claimant Pro Se, one in WCC File No. 1322451, with a corresponding date of accident of November 7, 2013, one in WCC File No. 1319203, with a corresponding date of accident in October 12, 2013, and one in WCC File No. 1420487, with a corresponding date of accident in June 24, 2014.

Claimant's claims for Workers' Compensation benefits for injuries arising out of and in the course of his employment on or about November 2013 to June 2014 to his hand, toe, and psychology were heard on August 21, 2015. These cases were fully and finally adjudicated by a Decision and Order by Commissioner McCaskill dated December 2, 2015. This Order was not timely appealed and there was no medical evidence to support a then existing mental condition that would have prohibited the Claimant from filing an appeal. Therefore, this Order is the law of the case.

Claimant has now filed Forms 50 on the above-referenced claims, requesting a Hearing to determine issues that have already been decided by the Commission. Defendant has argued that all three cases have been adjudicated in a full and final hearing on August 21, 2015 and since no timely appeal was filed, res judicata should apply.

FINDINGS OF FACT

1. After a review of the pleadings, the prior Decision and Order, and the complete record, we make the following Findings of Fact:

2. Claimant alleged injuries occurred on June 24, 2014, wherein he injured his toe (WCC File No. 1420487), on October 12, 2013, in which he re-injured his bilateral hands/wrists (WCC File No. 1319203), and on November 7, 2013 (WCC File No. 1322451), where he alleges an aggravation of a psychological injury, all while in the employ of the Employer/Defendants.

3. On August 21, 2015, a full and final hearing was adjudicated on the merits of the case and a Decision and Order was filed December 2, 2015 by Commissioner Gene McCaskill finding that the Claimant is not entitled to any additional benefits for these claims under the Act.

4. Claimant acknowledges that he did not appeal the Decision and Order and I find no medical evidence to suggest that the Claimant had a then existing mental condition which prohibited him from filing a timely appeal.

5. As such, I find that res judicata applies and the Decision and Order filed on December 2, 2015 by Commissioner Gene McCaskill stands on the final adjudication on the merits of this case.

RULE OF LAW

1. This matter is governed by South Carolina Workers' Compensation Act and according to the Act, an application for review has to be made within fourteen days from the date when the notice of the award shall be given. S.C. Code Ann. §42-17-50. According to *Wally v. C.Y. Thomason*, "If no application made for review of the hearing commissioner's award, that award becomes effective as the award of the

Commission". *Wally v. C.Y. Thomason Co. Et. Al.*, 232 S.C. 153, 101 S.E.2d 286 (1957).

2. Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties. *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E. 2d, 414 (2011). Under the doctrine of res judicata, a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the form suit. *ID*

ORDER

IT IS ORDERED that the Claimant's Forms 50 Requests for Hearings in the above referenced claims are DENIED and DISMISSED WITH PREJUDICE on the grounds of res judicata.

IT IS ORDERED that the further pleadings filed by the Claimant against Defendants subsequent to the date this Decision and Order becomes the law of the case shall be reviewed by the Jurisdictional Commissioner and shall be administratively dismissed if they relate to the subject matter already decided by the final decisions of the Commission cited above.

IT IS ORDERED that subsequent to the date this Decision and Order becomes the law of the case Defendants shall be relieved of any obligation to respond to further filings by Claimant related to WCC File No. 1322451, with a corresponding date of November 7, 2013, WCC File No. 1319203, with a corresponding date of October 12, 2013, and WCC File No. 1420487, with a

corresponding date of June 24, 2014 unless specifically instructed to respond by the Commission. Nothing contained herein shall be construed to prevent the parties from pursuing a proper appeal of this Decision and Order or pursuing a future, unrelated claim not previously adjudicated by the Commission.

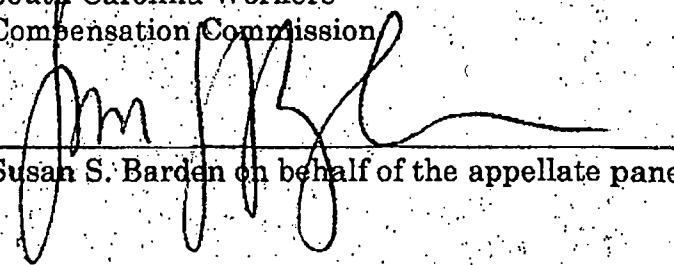
AND IT IS SO ORDERED.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law it is hereby ordered that the order of the hearing commissioner filed in the above captioned matters on March 27, 2018, is hereby affirmed. The Claimant's claim for a compensable injury by accident is denied in its entirety.

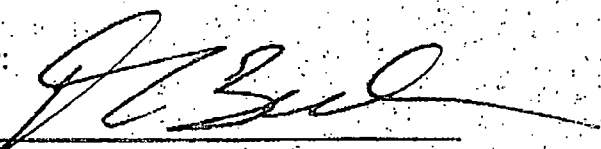
AND IT IS SO ORDERED.

South Carolina Workers'
Compensation Commission


Susan S. Barden on behalf of the appellate panel

FULL AFFIRMATION

Concur:


T. Scott Beck, Chair


Gene McCaskill, Commissioner

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Eugenia Hollmon on March 1, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No. 2019-000369
W.C.C. File Nos. 1322451, 1319203, 1420487

RECEIVED
MAY 08 2019
SC Court of Appeals

Terry Capone,Appellant,

v.

City of Columbia, Employer, and
Companion Third Party Administrator, LLC, Carrier, Respondents.

PROOF OF SERVICE

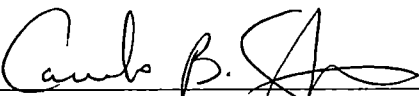
I certify this 8th day of May 2019 that I have served a copy of the MOTION TO DISMISS APPEAL by mailing same, postage prepaid in the United States mail, addressed to the following:

Terry Capone
130 Summerlea Drive
Columbia, SC 29203

APPELLANT, *PRO SE*

(Signature page to follow.)

May 8, 2019

By: 
Cynthia C. Dooley (SC Bar No. 13623)
Carmelo B. Sammataro (SC Bar No. 69746)
TURNER PADGET GRAHAM & LANEY P.A.
Post Office Box 1473
Columbia, SC 29202
CDooley@TurnerPadget.com
SSammataro@TurnerPadget.com
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR RESPONDENTS

Turner | Padget

Carmelo B. Sammataro

E-mail: SSammataro@TurnerPadget.com

Writer's Direct Dial: (803) 227-4253

Writer's Direct Fax: (803) 400-1532

May 8, 2019

VIA HAND DELIVERY

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

RECEIVED

MAY 08 2019

SC Court of Appeals

Re: Terry Capone v. City of Columbia and Companion Third Party Administrator, LLC
Appellate Case No.: 2019-000369
File No.: 15030.119

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Respondents' Motion To Dismiss Appeal regarding the above-referenced matter. Also enclosed are the original and one copy of the Proof of Service and our check for the filing fee. Please file the original filings and return clocked copies to me via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Carmelo B. Sammataro

CBS/tj

Enclosures

cc: Terry Capone, Appellant *pro se* (w/enc.)