

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
JUL 29 2019
SC Court of Appeals

Terry Capone, Appellant,

v.

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

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

- I. DOES THE DOCTRINE OF RES JUDICATA BAR FURTHER REVIEW OF APPELLANT'S ALLEGED WORK-RELATED INJURIES?

- II. ARE MOTIONS TO ALTER OR AMEND PURSUANT TO RULE 60 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE PROPER BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION, AND WAS APPELLANT'S RULE 60 MOTION TIMELY?

- III. DOES APPELLANT'S BRIEF RAISE ISSUES THAT WERE NOT PRESENTED BELOW AND ARE THEREFORE DEEMED WAIVED ON APPEAL?

STATEMENT OF THE CASE

Appellant Terry Capone (“Capone”) 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. (Forms 50, Employee’s Request for Hearing) 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. (December 2, 2015 Decision and Order) Capone did not file a Form 30, Request for Commission Review, to appeal the Commissioner McCaskill’s December 2, 2015 Decision and Order.

On October 17, 2017, and November 17, 2017, Capone filed successive Forms 50, Employee’s Request for Hearing, pertaining to the same claims denied by the unappealed December 2, 2015 Decision and Order. (Successive Forms 50 (WCC File Nos. 130203, 1322451, and 1420487)) Prior to a hearing before Commissioner Wilkerson, Capone also filed his Notice of Motion and Motion¹ for Relief to Alter, Amend, Set Aside Judgment, Order, or Proceeding under Rule 60(A) (B) [sic] and/or S.C. Code Ann. 1-23-380. (February 20, 2018 Notice of Motion and Motion) The Commissioner Wilkerson heard oral argument on February 21, 2018, and thereafter denied the successive Forms 50, Employee’s Request for Hearing, on the basis of *res judicata* via Decision and Order filed March 27, 2018. (March 27, 2018 Decision and Order)

As noted, Capone never filed a Form 30, Request for Commission Review, seeking relief from Commissioner McCaskill’s December 2, 2015 Decision and Order denying benefits.

¹ Capone’s motion was denied via Administrative Order dated March 26, 2018. (March 26, 2018 Motion Order)

Following the denial of his motion to alter or amend judgment, however, 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*. (Form 30, Request for Commission Review) Capone's Form 30, Request for Commission Review, was "Dismissed as Interlocutory" via Administrative Order dated June 18, 2018. (June 18, 2018 Order)

Capone filed his Notice of Appeal on or about July 23, 2018. This 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. Thereafter, Capone mailed two letters filed January 7 and 11, 2019, in which he requested this Court "IMMEDIATELY CANCEL NOTICE OF APPEAL" and "IMMEDIATE REFUND OF \$250 payment" based upon the assertion that he "cannot receive justice in this matter in this instance from this court. I do not wish to waste anymore [sic] time or money with this [C]ourt." (Jan. 7 and 11, 2019 letters) (Emphasis in the original)

Following issuance of the Remittitur, the Appellate Panel of the South Carolina Workers' Compensation Commission issued its March 1, 2019 Decision and Order. (March 1, 2019 Decision and Order) 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 finding he was not entitled to further benefits for the claims asserted in WCC File Nos. 1319203, 1322451, and 1420487 and that he 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. (Dec. 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, his admitted failure to seek timely review of that order, as well as his statements to this Court that he did not wish to pursue further appellate relief, Capone now seeks review by this Court of the unappealed denial of benefits dating back to December 2015.

FACTS

At all times relevant to this appeal, Capone was employed as a firefighter with the City of Columbia. (Dec. 2, 2015 Single Commissioner Decision and Order, p. 5) He retired in early 2014 with the rank of Battalion Chief. (*Id.*) He alleged compensable injuries to his toes and wrists, as well as post-traumatic stress disorder – with all alleged injuries occurring in 2013. (*Id.*, pp. 4-5)

ARGUMENT

Capone’s attempts to secure appellate review of the December 2, 2015 Decision and Order of the single commissioner are futile, and that order should be affirmed. First, by his own admission, Capone never filed a timely Form 30, Request for Commission Review. Accordingly, his claims are time barred, and the December 2, 2015 Decision and Order establishes the law of the case. Second, Capone’s appellate filings contain new issues and arguments that are conclusory and were never raised to or ruled upon by the single

commissioner. As such, those issues and arguments are waived on appeal. For all of these reasons, addressed in greater detail, below, this Court should affirm.

I. THE DOCTRINE OF *RES JUDICATA* BARS FURTHER REVIEW OF APPELLANT’S ALLEGED WORK-RELATED INJURIES.

In its March 1, 2019 Decision and Order, the Appellate Panel of the Full Commission correctly determined that the doctrine of *res judicata* bars further appellate review of Capone’s claims in this case. This Court should affirm.

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). Therefore, our Supreme Court has held that where an appellant “failed to appeal the single commissioner’s finding to the full commission . . . it is the law of the case.” *Transportation Ins. Co. v. South Carolina Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691-692 (2010) (citations omitted); *Hudson ex rel. Hudson v. Lancaster Convalescent Center*, 407 S.C. 112, 120, 754 S.E.2d 486, 490 (2014) (“Under the law of the case doctrine, a party is precluded from re-litigating issues decided in a lower court order, when the party voluntarily abandons its appeal of that order.”) (citations omitted).

Recognizing Capone’s pro se status, Commissioner McCaskill went to great lengths to explain the appellate process during the very first hearing on these claims back in August of 2015. He even stressed the importance of filing a timely Form 30, stating “[w]hen you get the signed copy [of the single commissioner’s order], . . . from that time, that starts the clock running. There is a period of 14 days. If you don’t agree, you contact the Commission, say ‘I want to appeal Commissioner McCaskill’s decision.’” (Aug. 21, 2015 Hr’g Trans. p. 54, lines 9-16) Despite Commissioner McCaskill’s specific instructions, Capone never filed a Form 30, Request for Commission Review, challenging the December 2, 2015 Decision and Order until April 10, 2018. During the intervening two-year period, he never requested, and the Full Commission lacked authority to grant, any extension of the fourteen-day deadline. Instead, he filed successive, duplicative Forms 50 and an impermissible motion to alter or amend. These procedural missteps compel this Court to affirm the Full Commission Decision and Order.

Simply stated, Capone is barred from re-litigating a prior finding of non-compensability that was not appealed to the Appellate Panel of the Full Commission. *See Mead v. Jessex, Inc.*, 382 S.C. 525, 534, 676 S.E.2d 722, 727 (Ct. App. 2009); *Johnson v. Greenwood Mills, Inc.*, 317 S.C. 248, 251, 452 S.E.2d 832, 833 (1994) (applying *res judicata* to prevent re-litigation of matter where “the parties and subject matter are the same as in the prior litigation, and a court of competent jurisdiction issued an [o]rder which was not appealed.”); *Owenby v. Owens Corning Fiberglass*, 313 S.C. 181, 437 S.E.2d 130 (Ct. App. 1993) (*res judicata* applied where parties were the same and trial court order was not appealed). The Full Commission correctly determined that the December 2, 2015 Decision and Order was not timely appealed and, therefore, establishes the law of the case. This Court should affirm.

II. 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 efforts to seek reconsideration or re-open the three claims at issue here are likewise unavailing. Even if South Carolina Rule of Civil Procedure 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 after the single commissioner's order, 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), SCRPC (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, SCRPC, Capone's was not filed within one year of judgment and was not timely according to the plain text of the Rule.

Even if timely, however, a Rule 60 motion was an inappropriate method of seeking relief before the South Carolina Workers' Compensation Commission. As this Court has explained,

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.

the workers' compensation statutory scheme does not contemplate a motion to reconsider, or to later or amend judgment, before the Commission pursuant to Rule 59 or Rule 60, SCRPC. *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 an error in the single commissioner’s order] is a timely appeal to the full Commission and then to the courts.”)).

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. This Court should dismiss Capone’s appeal on this basis.

III. APPELLANT’S BRIEF RAISES ISSUES THAT WERE NOT PRESENTED BELOW AND ARE THEREFORE DEEMED WAIVED ON APPEAL.

In addition to the untimely filing of his Notice of Appeal, Capone never even addresses the actual merits of the orders issued by the single commissioner or the Full Commission. Instead, and for the first time on appeal, he asserts a litany of violations of his Constitutional rights that were never raised to or ruled upon by the single commissioner in the first (or any) instance. Capone’s constitutional rights arguments are to no avail as our appellate courts have held time and again that “[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (citing *Creech v. South Carolina Wildlife and Marine Resources Dept.*, 328 S.C. 24, 491 S.E.2d 571 (2007); *Martin v. Rapid Plumbing*, 369 S.C. 278, 291, 631 S.E.2d 547, 554 (Ct. App. 2006) (employer waived appellate review of issue that was not ruled upon below and failed to seek

timely review).

The same can be said with regard to arguments that are not sufficiently developed or detailed such that the appellate court can conduct an informed analysis. *See, e.g., MRI at Belfair, LLC v. South Carolina Dept. of Health and Environmental Control*, 394 S.C. 567, 576-577, 716 S.E.2d 111, 116 (Ct. App. 2011) (finding challenge to ALC review was not “sufficiently specific” to preserve its argument for appellate review.); *Bluffton Towne Center, LLC v. Gilleland-Prince*, 412 S.C. 554, 573, 772 S.E.2d 882, 893 (Ct. App. 2015) (finding issues not preserved for appellate review where appellant’s arguments were conclusory and not supported by legal authority); *Auto Owners Ins. Co. v. Benjamin*, 415 S.C. 137, 146, 781 S.E.2d 137, 142 (Ct. App. 2015) (citing rule that issues that are not supported by discussion of legal arguments and citations to authority are deemed waived and not preserved for appellate review) (citing Rule 208(b)(1)(D), SCACR; *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)).

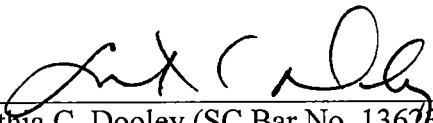
At the initial hearing before the single commissioner on August 21, 2015, Capone testified he “previously officially filed three charges with the EEOC alleging discrimination and have [sic] withdrawn or not pursued all except the last which had other charging parties.” (Aug. 21, 2015 Hr’g Trans. p. 6, line 24 – p. 7, line 2) Notwithstanding his concession that he never actually pursued his EEOC claims, and without ever raising these arguments to the single commissioner, Capone now contends in conclusory fashion that, among other things, the workers’ compensation ‘scheme’ is unconstitutional, this his Due Process and Equal Protection rights have been violated, and that the decisions against him have been obtained through trickery or fraud upon the tribunal. *See Appellant’s Amd. Initial Br.* pp. 31-37.

Capone's arguments on appeal must be rejected because they are conclusory and not substantiated or supported by fact, evidence, or the law and should be deemed abandoned on appeal.

CONCLUSION

For all of the reasons stated herein, Capone's conclusory arguments regarding violations of various Constitutional provisions should be deemed abandoned. Further, the unappealed December 2, 2015 Decision and Order of the single commissioner establishes the law of the case. The Decisions and Orders applying *res judicata* and affirming the denial of additional benefits should be affirmed.

July 29, 2019

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM THE SOUTH CAROLINA
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APPELLATE PANEL

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

Terry Capone,Appellant,

v.

City of Columbia, Employer, and
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PROOF OF SERVICE

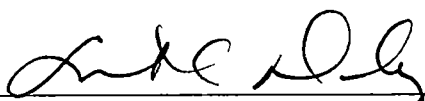
I certify this 29th day of July 2019 that I have served copies of the INITIAL BRIEF OF RESPONDENTS and RESPONDENTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL by mailing same, postage prepaid in the United States mail, addressed to the following:

Terry Capone
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APPELLANT, *PRO SE*

(Signature page to follow.)

July 29, 2019

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July 29, 2019

VIA HAND DELIVERY

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

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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 originals and one copy each of the Initial Brief of Respondents, Respondents' Designation of Matter to be Included in the Record on Appeal, and Proof of Service regarding the above-referenced matter. Please file the original documents 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.)